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DEPARTMENT OF AGRICULTURE

Packers and Stockyards Administration

9 CFR Parts 201 and 203

Regulations and Policy Statements; Addition of OMB Control Numbers of Reporting and Recordkeeping Requirements

AGENCY: Packers and Stockyards Administration, USDA.

ACTION: Final rule; technical amendment.

SUMMARY: The Packers and Stockyards Administration, in accordance with the Paperwork Reduction Act of 1980, is adding to the regulations and a policy statement the control numbers previously assigned by the Director of the Office of Management and Budget upon approval of the reporting and recordkeeping requirements.

EFFECTIVE DATE: June 23, 1989.

FOR FURTHER INFORMATION CONTACT: Calvin W. Watkins, Deputy Administrator, Packers and Stockyards Administration, U.S. Department of Agriculture, Room 3039, South Building, Washington, DC 20250–2800, (202) 447–7063.

SUPPLEMENTARY INFORMATION: This action only adds Office of Management and Budget control numbers to regulations and a policy statement previously issued under the Packers and Stockyards Act, to comply with the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), and does not impose any requirements on the affected public, therefore:

(a) It is not a "major rule" under the requirements of E.O. 12291;

(b) It will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act;

(c) It does not have implications of federalism under the criteria of E.O. 12612;

(d) It does not impact on family formation under the criteria of E.O. 12606;

(e) Notice and public procedure on it are unnecessary as in 5 U.S.C. 553(b)(B) so notice of proposed rulemaking is not required by 5 U.S.C. 553(b); and

(f) Good cause is hereby found for making it effective in less than 30 days as in 5 U.S.C. 553(d)(3).

List of Subjects in 39 CFR Parts 201 and 203

Reporting and recordkeeping requirements, Packers, Stockyards, Dealers and market agencies.

Accordingly, Parts 201 and 203, Chapter II of Title 9 of the Code of Federal Regulations are amended as set forth below:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

1. The authority citation for Part 201 continues to read as follows:

Authority: 7 U.S.C. 222, 228(a), 7 CFR 2.17(e), 2.56.

2. Sections 201.34, 201.42, 201.44, 201.94, and 201.95 are amended by adding the OMB control number at the end.

§ 201.34 Termination of market agency, dealer and packer bonds.

* * * * *

(Approved by the Office of Management and Budget under control number 0590–0001)

§ 201.42 Custodial accounts for trust funds.

* * * * *

(Approved by the Office of Management and Budget under control number 0590–0001)

§ 201.44 Market agencies to render prompt accounting for purchases on order.

* * * * *

(Approved by the Office of Management and Budget under control number 0590–0001)

§ 201.94 Information as to business; furnishing of by packers, live poultry dealers, stockyard owners, market agencies, and dealers.

* * * * *

(Approved by the Office of Management and Budget under control number 0590–0001)

§ 201.95 Inspection of business records and facilities.

* * * * *

(Approved by the Office of Management and Budget under control number 0590–0001)

3. Section 201.45 is amended by changing the OMB control number to read as follows:

§ 201.45 Market agencies to make records available for inspection by owners, consignors and purchasers.

* * * * *

(Approved by the Office of Management and Budget under control number 0590–0001)

PART 203—STATEMENTS OF GENERAL POLICY UNDER THE PACKERS AND STOCKYARDS ACT

4. The authority citation for Part 203 continues to read as follows:

Authority: 7 CFR 2.17(e), 2.56.

5. Section 203.19 is amended by adding the OMB control number at the end.

§ 203.19 Statement with respect to packers engaging in the business of livestock dealers or buying agencies.

* * * * *

(Approved by the Office of Management and Budget under control number 0590–0001)

Done at Washington, DC, this 19th day of June 1989.

B.H. (Bill) Jones,

Administrator, Packers and Stockyards Administration.

[FR Doc. 89–14908 Filed 6–22–89; 8:45 am]
BILLING CODE 3410-KD-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Parts 509 and 512

[No. 89–1586]

RIN 3068–AA64

Rules of Practice and Procedure

Date: June 14, 1989.

AGENCY: Federal Home Loan Bank Board.

ACTION: Final rule.

SUMMARY: The Federal Home Loan Bank Board ("Board") is amending 12 CFR Parts 509 and 512, respectively, its regulations governing the rules of practice and procedure in adjudicatory proceedings and investigative and formal examination proceedings. The

revisions to Part 509 are designed to streamline prehearing procedures with a view toward expediting the proceedings, to clarify the authority of Administrative Law Judges appointed to conduct the proceedings, and to add several new provisions. The revisions to Part 512, which are of a clarifying and technical nature, update several provisions of the rules relating to the conduct of investigative and formal examination proceedings.

The Board expects that legislation pending before Congress will, if enacted, affect these rules directly by expanding the types of administrative proceedings available to the agency and making the Board's successor subject to new statutory enforcement provisions. However, these anticipated changes do not affect the need for the substantive amendments made by this final rule. Therefore, the Board has determined to adopt this rule and, if necessary, later to amend Parts 509 and/or 512 to reflect changes in names, statutory citations, and other procedural corrections that may be necessitated by the statutory amendments.

EFFECTIVE DATE: June 14, 1989. These rules will apply to all adjudicatory proceedings in which the notice initiating the proceeding is issued after June 23, 1989.

FOR FURTHER INFORMATION CONTACT: Gary A. Gegenheimer, Senior Attorney, Office of Enforcement (202) 906–7170; or Rosemary Stewart, Director, Office of Enforcement, (202) 906–7622.

SUPPLEMENTARY INFORMATION: On October 17, 1988, the Board published for comment in the **Federal Register** proposed revisions to its Rules of Practice and Procedures that govern adjudicatory proceedings authorized by the National Housing Act of 1934, 12 U.S.C. 1730 ("NHA"), the Home Owners' Loan Act of 1933, 12 U.S.C. 1464 ("HOLA"), the Change in Savings and Loan Control Act, 12 U.S.C. 1730(q) (the "Control Act"), and the Savings and Loan Holding Company Act, 12 U.S.C. 1730a (the "Holding Company Act"). 53 FR 40432 (October 17, 1988). These proposed revisions contained provisions revising prehearing procedures with a view toward streamlining adjudicatory proceedings and eliminating the need for unnecessary proof, clarifying the authority of Administrative Law Judges designated to conduct such proceedings, clarifying when depositions may be taken in connection with adjudicatory proceedings, and instituting a new procedure for summary disposition where no genuine issue of material fact exist. In addition, the Board proposed certain technical amendments to its Rules for Investigative Proceedings and Formal Examination Proceedings. *Id.*

After further consideration, including review of comments received on the proposal, the Board has decided to adopt the revisions substantially as proposed.

I. Revisions To Part 509

Part 509 was originally promulgated in 1967, following the enactment of the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89–695, 80 Stat. 1028 ("FISA"). 32 FR 6764 (May 3, 1967); 32 FR 8889 (June 22, 1967). The FISA granted the Board and its fellow financial institution regulatory agencies the authority to issue cease-and-desist orders against financial institutions and removal/prohibition orders against management officials who were found to have engaged in conduct that provided the grounds for such actions as set out in the FISA.

Subsequently, following the enactment of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95–630, 92 Stat. 3641, which amended the Board's enforcement authority in several significant ways, Part 509 was amended in 1979 with minor revisions. 44 FR 62479 (October 31, 1979). Thus, with minor changes, the rules have remained essentially unchanged since 1967.

In the 22 years that Part 509 has been in existence, the number and complexity of the adjudicatory proceedings initiated by the Board have increased significantly. Particularly since the enactment of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97–320, 96 Stat. 1469, enforcement actions involving complex loan and investment transactions involving tens of millions of dollars, have become the rule rather than the exception. At the same time, conversions from mutual to stock form of ownership, increasing activities of insured institutions in the securities area, and heightened interest in acquisitions of control of insured institutions have increased the possibilities for adjudicatory proceedings under the Control and the Holding Company Acts, as well as the provisions of the federal securities laws to which insured institutions and related persons are subject. While, as in the past, most adjudicatory proceedings are settled prior to the hearing stage, the number of litigated proceedings is steadily increasing. Because of the increasing complexity of most of these cases, the Board believes that it is appropriate to revise Part 509 to reflect the altered character of the cases and to streamline and clarify the procedures as much as possible. The Board notes that the Federal Deposit Insurance Corporation ("FDIC"), which has similar enforcement authority with respect to federally insured banks, recently adopted extensive revisions to its own rules of practice and procedure. See 53 FR 51656 (December 22, 1988). The Board's staff has been in contact with the FDIC staff about our common interests in revising and updating the hearing procedures for both agencies. Many of the revisions being adopted by the Board today closely resemble the rules adopted by the FDIC. The principal changes that are being adopted are summarized below.

A. Comment Summary

The Board received one comment letter on its October 1988 proposal. In addition, the Board staff obtained and reviewed the comment letters filed with the FDIC regarding its own proposal to revise its hearing rules. In general, the comments favored the undertakings of the Board and the FDIC in substantially revising the rules applicable to adjudicatory proceedings. The comments also raised certain questions and objections, some of which overlapped. The issues addressed by the comments, including the comments on the FDIC's proposal that also pertain to the Board's proposal, are incorporated into the discussion below.

B. Specific Items Raised and Suggested Changes

(1) Several of the commenters on the FDIC's proposal suggested that Rule 403 of the Federal Rules of Evidence ("FRE") should be incorporated into the agency's rules of procedure. FRE Rule 403 permits the exclusion of evidence where its probative value is outweighed by other factors, such as the undue consumption of time. The rationale for this suggestion was that rules of evidence utilized by the agency, which track the language of the Administrative Procedure Act governing admissibility, did not provide sufficient guidance to Administrative Law Judges on the admissibility of evidence.

(2) Objections were raised to permitting depositions solely in instances where witnesses would be unavailable to testify at the hearing.

(3) One commenter on the FDIC's proposal questioned the process of filing exceptions to recommended decisions as being archaic and cumbersome. This commenter suggested, as an alternative, that briefs be utilized setting out a statement of facts and reference to the record.

(4) Some commenters on the FDIC's proposal suggested that the decision of

the Administrative Law Judge should be treated as an initial decision of the agency, which would become final unless appealed to and reversed by the FDIC's Board of Directors, instead of being considered a recommended decision requiring a final decision by the agency.

(5) With respect to subpoenas, it was suggested by one commenter on the FDIC's proposal that subpoenas be standardized into a simple format and pre-printed. It was also suggested that subpoenas be pre-signed by an authorized official and issued by the Office of the Executive Secretary (the FDIC's equivalent to the Board's Secretariat). The rationale for the pre-signing suggestion was that the role of the Administrative Law Judge should be limited to ruling on disputes concerning subpoenas. The same commenter also recommended that when an issue was raised as to whether top agency officials could be subject to subpoena by respondents, the Administrative Law Judge should determine in the first instance whether the subpoena could be issued. The commenter opined that this procedure would prevent abuse of process by respondents who unnecessarily sought to subpoena senior agency officials.

(6) One commenter suggested that the FDIC's proposal to prohibit any material *ex parte* communications was overly broad and that a provision prohibiting only *ex parte* communications pertaining to the merits of the proceeding at issue would be sufficient. On the other hand, the commenter on the Board's proposal argued that the proposal did not go far enough, suggesting that all *ex parte* contacts should be prohibited and that the "housekeeping" matters such as scheduling of prehearing conferences be handled by a "hearing clerk" designated by the agency. The commenter on the proposed rule suggested that, while consultations between counsel for the parties and the administrative law judge on administrative matters may appear to be innocuous, clever counsel on either side may be able to utilize such opportunities to "sensitize" the Administrative Law Judge to certain factors favorable to their theory of the case. In order to avoid this possibility, the commenter recommended that all such administrative matters be handled by a clerk who would not be in a position to render a final disposition of the proceeding. In addition, the Board's comment letter took issue with the proposal's provision that counsel for the Office of Enforcement may advise the Board with regard to proposed rules or other legal proceedings involving analogous factual or legal issues. The commenter suggested that if the Board or Administrative Law Judge needs guidance with respect to case law or legal precedent in an attempt to resolve an issue under consideration, it would be more appropriate to have counsel for both sides submit briefs specifying what the proper legal treatment of that issue should be.

(7) A commenter on the FDIC's proposal opined that the provision for summary suspension of attorneys by the Administrative Law Judge for contemptuous conduct may be too harsh and recommended an interlocutory appeal process as a means of ameliorating this situation.

(8) Several of the FDIC's comment letters questioned whether respondents should be provided with a "Wells" type submission process, similar to that employed by the Securities and Exchange Commission. Two commenters recommended that the FDIC implement such a process, while one opposed it. The comment letter to the Board did not address this issue.

(9) The commenter on the Board's proposal suggested that the Board, along with the banking regulatory agencies, attempt to obtain a "pool" of administrative law judges that have had some exposure to or experience in Federal banking law. This suggestion was based on the experience of the Board and the banking agencies in obtaining the services of judges from other agencies with widely different backgrounds and experience, resulting in the possibility of inconsistent decisions on substantially similar facts and circumstances. The commenter therefore suggested that a provision be incorporated into the Board's rules to provide for more uniformity in the selection of administrative law judges.

(10) The Board's comment letter recommended that the provision regarding oral argument before the Board, which would require that parties requesting oral argument show good cause why their arguments were not, or could not be, presented adequately in writing, be eliminated. The commenter believed that this proposal would discourage oral argument, which in turn, the commenter believed, is inconsistent with fundamental fairness.

(11) Finally, the Board's comment letter suggested that a provision be added permitting the filing of *amicus curiae* briefs in enforcement proceedings. The commenter opined that such submissions can provide additional legal expertise and further elucidate issues that the Administrative Law Judge or the Board may fail to fully appreciate.

Analysis of Comments and Modifications

(1) The Board believes that the present version of § 509.24, which contains the standard for admissibility of evidence set forth in the Administrative Procedure Act, provides sufficient guidance to Administrative Law Judges on this issue. Therefore, the Board does not believe that it is necessary to adopt language from Rule 403 of the Federal Rules of Evidence on this matter.

(2) Regarding the suggestion that depositions be permitted in more circumstances than set forth under the proposal, the Board disagrees. First, there is no general right to pretrial discovery in administrative proceedings. See, e.g., *Silverman* v. *Commodity Futures Trading Commission*, 549 F.2d 28, 33 (7th Cir. 1977); *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970); 4 Stein, Mitchell, & Mezines, Administrative Law § 23.01[1] at 23–7 (1987) and cases cited therein. Second, one of the principal purposes of the revisions to Part 509 is to streamline and shorten the proceedings. This is consistent with both the language and legislative history of the NHA and the HOLA, which generally require that hearings be commenced 30 to 60 days following the issuance of a Notice. See S. Rep. No. 1482, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. and Admin. News 3532, 3537. The deposition process for general discovery purposes (as opposed to preserving testimony where the witness will be unavailable to testify at the hearing) would be inconsistent with this statutory mandate. Accordingly, the Board has elected to retain the provision allowing for depositions only upon satisfaction of the prerequisites set forth in the rule. The FDIC reached the same conclusion on this issue. See 53 FR 51658. The Board is, however, adopting a provision permitting limited document discovery in certain circumstances.

(3) Section 557(c) of the Administrative Procedure Act, 5 U.S.C. 557(c), specifically authorizes parties to adjudicatory proceedings to have a reasonable opportunity to file exceptions with administrative law judges. This procedure has been utilized for many years at many administrative agencies. While the commenter opined that the exception process was archaic, burdensome, and time consuming, the Board believes that this procedure assures the parties that a fair, just, and detailed review of the record and of the

recommended decision will be undertaken. Under the rules, exceptions generally are to be filed within 30 days of service of the recommended decision, so that lengthy delays should not occur. Accordingly, the Board believes that it is appropriate to continue to utilize the exception process set forth in the Administrative Procedure Act. The FDIC reached the same conclusion on this issue. See 53 FR at 51658.

(4) The Administrative Procedure Act provides that the individual who presides at a hearing may issue an initial decision or a recommended decision. The difference between the two types of decisions is that an initial decision becomes the final agency decision unless one of the parties appeals the decision to the agency or unless the agency undertakes to review the initial decision on its own. A recommended decision, on the other hand, does not become a final agency action unless the agency specifically adopts the recommended decision, requiring some formal action by the agency in every adjudicated case.

The Board has determined to maintain the present two-tier approach to its administrative enforcement proceedings of a recommended decision of the Administrative Law Judge followed by a review and final decision and order by the Board. The Board believes that this approach provides the parties to such proceedings with due process protections by providing a review of the findings, conclusions, admissions of evidence, and any other rulings made by the Administrative Law Judge. Additionally, the Board believes that it is unlikely that many parties who had been willing to proceed through the hearing process would fail to appeal an adverse initial decision to the Board. Thus, the change suggested by the commenter does not appear likely to expedite the entry of final agency decisions in most proceedings. The FDIC reached the same conclusion. See 53 FR at 51659.

(5) Regarding subpoenas, the Board notes that it already utilizes a standard preprinted subpoena form in connection with its adjudicatory proceedings. The suggestion that an authorized official of the Secretariat execute and issue subpoenas, however, would not be practical under the present system, in which Administrative Law Judges must be "borrowed" from other agencies. Accordingly, the Board has determined to maintain the existing practice of having subpoenas issued by the Administrative Law Judge upon application by any party.

(6) Although the Board is sensitive to the concerns of the commenter in the area of *ex parte* communications and believes that the suggestion regarding designation of an administrative clerk has some appeal, it also does not believe that such a suggestion is practical given the present structure of the adjudicatory apparatus. The problem stems principally from the fact that all administrative law judges utilized in the Board's adjudicatory proceedings are employed by other agencies, and the level of support staffs available at those agencies differs considerably. Unlike Federal district court judges, many administrative law judges do not have law clerks to handle routine matters. Furthermore, because the administrative law judges handling the Board's proceedings are disbursed in agency offices throughout the country, it would not be practical to designate clerks at the Board to handle such matters. Accordingly, the Board has decided to adopt the rule as proposed. The Board does encourage parties to adjudicatory proceedings to utilize the services of administrative law judge's clerks or support staff to handle routine matters whenever possible.

Regarding the proposal's language that counsel for the Office of Enforcement is permitted to advise the Board on settlement proposals and on other unrelated legal proceedings, the Board believes that the commenter apparently misunderstood both the language and intent of the proposal in this area. The Board does not intend—and does not believe that the language of the rule contemplates—that counsel for the Office of Enforcement should advise the Board on matters regarding an adjudicatory proceeding under consideration by the Board except on notice to all other parties to the proceeding and opportunity for other parties to be heard. Rather, it is the Board's view that OE counsel should have the freedom to advise the Board on other matters, such as the adoption of proposed regulations or other enforcement proceedings (such as injunctive actions in Federal district court to which the Board may be a party) that may arguably involve similar factual or legal issues without running afoul of the *ex parte* rule. Obviously, if the administrative law judge or the Board needs legal guidance in a particular adjudicatory proceeding, the proper procedure is for the parties to make their views known to the Board in accordance with the rules. The Board does not believe that the limited provision allowing OE counsel to advise the Board on other arguably analagous matters in any way compromises the general rule.

(7) Regarding suspension of attorneys from particular proceedings, the Board notes that the relevant case law has consistently upheld the authority of administrative agencies to set standards for admission to practice before them as well as to establish criteria for suspension, debarment or other sanctions for misconduct. The provisions of Part 509 on this issue, as well as the provisions of Part 513, include sufficient due process protections including notice, an opportunity for a hearing and a right of review. The Board believes that these provisions will contribute to a fair, expeditious, and just resolution of enforcement proceedings and, accordingly, has decided to adopt them as proposed. The FDIC reached the same conclusion on this issue. See 53 FR at 51659.

(8) There has been much discussion recently concerning whether a formal or informal procedure, such as the SEC's "Wells" procedure should be implemented to permit potential respondents in enforcement actions to have an opportunity to persuade the agency that official enforcement action against them is not warranted before any action is actually taken. One study, a report commissioned by the Administrative Conference of the United States, while making no formal recommendation regarding the adoption of any such procedure for the banking agencies, did note that such a procedure would be of limited utility in the process of bank supervision and enforcement. The rationale for this position is that the supervisory apparatus already provides numerous informal opportunities for the exchanges of views in the normal course of the examination and supervisory process before a formal enforcement action is commenced. *See* Malloy, *Report to the Administrative Conference of the United States on Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies* (1987) at 53, n. 197. The Board is in agreement with this position. The informal mechanisms already in place for resolving regulatory problems (*i.e.*, the opportunity to consent voluntarily to a resolution of supervisory concerns by entering into consent orders or otherwise) normally provide potential respondents with an opportunity for presenting their positions, while at the same time allowing the agency to move swiftly and efficiently to correct problems discovered during examinations of insured institutions. Accordingly, the Board has determined that it will not adopt a formal or informal Wells-type submission

procedure. The FDIC reached an identical conclusion. See 53 FR 51659.

(9) The Board believes that while it would be desirable, through the use of a "pooling" arrangement with the other banking agencies or otherwise, to endeavor to ensure more uniformity in the selection of administrative law judges, that goal cannot adequately be addressed in this document. The Board must necessarily rely on the availability of administrative law judges at any given time and, unfortunately, has no control over whether the available judges will have significant expertise in banking matters. In order to remedy the possible problem of inconsistent decisions on similar factual and legal issues, the Board has sought, through the publication of these rules, to provide as much guidance as possible to administrative law judges (while allowing them sufficient flexibility to deal with unique or unusual circumstances that may arise). The Board does look forward to working with the other banking regulatory agencies to address the perceived concern raised by the commenter.

(10) After careful consideration, the Board has decided to retain the provision regarding oral argument as proposed. The Board believes that there is ample opportunity for the parties to make their views known through the submission of written materials, briefs, live testimony of witnesses, and, in many cases, oral argument before the Administrative Law Judge. In those cases in which one party's views could not have been adequately presented in writing prior to the final decision stage, the rules provide a means for scheduling oral argument. The Board believes that this provides sufficient protection for all parties and that a presumption in favor of granting oral argument would therefore be cumbersome and unnecessary.

(11) The Board has decided not to adopt the commenter's suggestion regarding limited participation and the submission of *amicus* briefs. In the Board's view, if a significant number of limited participants were to raise collateral issues in administrative enforcement proceedings, the proceedings may become unmanageable and too time-consuming. The Board also notes that the presumption in enforcement proceedings is, and for many years has been, that they will remain private and confidential unless the Board determines otherwise in the public interest; permitting participation by other parties, even on a limited basis short of full intervention, could seriously undermine this presumption. Accordingly, the Board has decided not to include a provision allowing limited participation.

Section-by-Section Summary and Discussion

A. Subpart A: General

1. Appointment of Administrative Law Judges

Unlike the majority of federal departments and agencies that conduct adjudicatory proceedings, the federal banking regulatory agencies (including the Board) do not have their own administrative law judges on their staffs. As a result, the Board must request that the Office of Personnel Management ("OPM") arrange for other agencies or departments to "loan" the services of their administrative law judges to conduct adjudicatory proceedings on a case-by-case basis. OPM selects administrative law judges for these proceedings on a case-by-case basis from a "pool" of available candidates. Section 509.3 codifies the existing procedure. In this regard, the former definition of "presiding officer," which meant alternatively the Board or any person actually conducting a proceeding, is being eliminated. Under the revisions adopted today, the term "Administrative Law Judge" is specifically defined to mean an administrative law judge appointed or detailed as specified in Title 5 of the United States Code to conduct an adjudicatory proceeding. The term also refers to the Board where an administrative law judge has not yet been appointed, where his services have ended, or where he is otherwise unavailable.

2. Appearance and Practice in Adjudicatory Proceedings

Section 509.5, concerning appearance and practice in adjudicatory proceedings, makes several changes to the prior § 509.3. First, any appearance by an attorney or duly authorized official of a corporation, partnership, or government unit is subject to the provisions governing conflicts of interest, as well as those concerning suspension and debarment (Part 513). Second, § 509.5(a)(2) provides that any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia and who has not been suspended or debarred from practice before the Board in accordance with the provisions of Part 513 and has not been excluded or suspended from a particular proceeding pursuant to § 509.5(c) may represent parties in that proceeding. The attorney is required to file a notice of appearance at the outset of the proceeding, stating that he is qualified to represent others in accordance with § 509.5(a)(2) and disclosing whether he has ever been suspended or debarred from practice by the bar of any State, territory, Commonwealth or the District of Columbia, and, if so, the dates of such suspensions or disbarments and a description of the surrounding facts and circumstances.

The new disclosure requirement represents a change from the proposed rule in this area in that under the proposal, an attorney who had been suspended or debarred in any State or other political entity listed in the rule would have been automatically precluded from representing parties in an adjudicatory proceeding before the Board, irrespective of the possibility that he may have been a member in good standing of some other bar. Upon reconsideration of this issue, the Board has decided to retain the language of the existing rule while adding a disclosure requirement regarding any suspensions or disbarments to which an attorney is subject. Such suspensions or disbarments may, in appropriate cases, be grounds for commencement of separate proceedings under Part 513.

Section 509.5(d) also provides for representation of non-parties appearing to give testimony at depositions by their own attorneys.

3. Good Faith Certification

Rule 11 of the Federal Rules of Civil Procedure provides the basis for § 509.6, the "good faith certification." This is a new provision. Like Rule 11, the proposed rule requires that every written presentation made by a party after the issuance of the notice must be signed by that party or the attorney for the party. A signature on a post-notice written presentation constitutes a certification that the attorney or party has read the written presentation, that the presentation is well grounded in fact and warranted by existing law or a good faith argument for extending or modifying existing law, and that it is not interposed for any improper purpose to the best of that party's or attorney's knowledge, information, and belief formed after reasonable inquiry. Failure to sign a written presentation will result in its being stricken from the record unless it is signed promptly after the signature omission is brought to the attention of the attorney or party. The making of an oral motion or argument constitutes the same certification as the signing of a written presentation. The Administrative Law Judge or the Board

has the authority to impose sanctions under Part 509 or under Part 513 upon the attorney, the party, or both, for violations of the good faith certification requirements.

4. *Ex parte* Communications

Section 509.7 is new, but it embodies existing law in the area of *ex parte* communications. It defines, generally prohibits, and provides for sanctions in the event of improper *ex parte* communications. Paragraph (a) of the rule defines an "ex parte communication" as any material oral or written communication concerning the merits of a proceeding, which takes place between a party, his counsel, or any other person interested in the proceeding and the Administrative Law Judge, the Board, any member of the Board, or any person assisting or advising the Board concerning the preparation of a decision with respect to the proceeding and which was neither on the record nor on reasonable notice to all parties. It prohibits *ex parte* communications from the time the notice is served (or, if a party learns that the notice has been approved by the Board, from the time that information is acquired) until the Board serves its final decision. Paragraph (d) prohibits the Administrative Law Judge from consulting with anyone within the Board on the merits of an adjudicatory proceeding except on reasonable notice and opportunity for all parties to participate, and provides that the Administrative Law Judge shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Board engaged in the performance of investigatory or adjudicatory functions in connection with an adjudicatory proceeding.

Paragraph (c) of the rule sets forth a procedure to be followed in the event that an *ex parte* communication is received by the Administrative Law Judge, a Board Member, or other person described in paragraph (a). If the communication is in writing, the person receiving the communication will be required to cause a copy of the communication to be served on every party to the proceeding. If the communication is oral, a memorandum setting forth the substance of the communication must be served on each party. All parties will then have 10 days to file with the Administrative Law Judge or the Board a response to the *ex parte* communication, including any recommendation for sanctions they believed to be appropriate under the circumstances. Sanctions may be imposed for knowing violations of the rule. Such knowing violations may be grounds for a decision adverse to the party violating the rule or suspension or debarment of the person engaging in such conduct under the procedures set forth in Part 513.

Communications between the Administrative Law Judge and parties or their counsel involving routine non-substantive matters such as scheduling of conferences or meetings, requests for copies of documents, or brief extensions of time are not considered to be communications concerning the merits of the proceeding and are not considered to be within the scope of the rule. In addition, the rule does not preclude counsel for the Office of Enforcement from advising the Board on settlement proposals submitted pursuant to § 509.22, or on matters (such as proposed regulations or other legal proceedings) that involve analogous factual or legal issues but are not related to the proceeding at issue.

5. Maintenance of the Record, Service, Filing of Papers, and Copies

"Housekeeping" matters concerning maintenance of the record, service, and filing of papers are covered in §§ 509.8, 509.9, 509.10, and 509.11. Section 509.8 provides that the Board's Office of the Secretary ("Secretariat") shall maintain the official record in each proceeding. Section 509.9 amends the prior provision governing service by the parties to clarify that service is deemed to have been accomplished at the time of personal service, upon deposit in the United States mail of the document or paper required to be served or by delivery of the document or paper to an express mail delivery service. The revised rule thus adopts the provision of Rule 5(b) of the Federal Rules of Civil Procedure that service by mail is complete upon mailing. The rule also reduces the number of copies of papers that must be filed in adjudicatory proceedings and clarifies the requirements as to filing of papers with the Secretariat. Under § 509.10, the original and one copy of all papers required to be served on other parties to the proceeding will be filed with the Secretariat at the time of service or within a reasonable time thereafter, but no event later than 3 business days following service on the other parties. A copy must also be served on the Administrative Law Judge at the time of service on the other parties.

The prior rule provided that materials required to be filed with the Secretariat be received by the office in Washington, DC on or before the applicable filing deadline. This could lead to a situation in which a party would be required to send materials to the Secretariat prior to the time he was required to serve the opposing parties in order to ensure that the Secretariat would receive the materials by the appointed date. In order to rectify this situation, the Board has adopted a system similar to that employed under Rule 5(d) of the Federal Rules of Civil Procedure, pursuant to which materials may be filed before service or within a reasonable time thereafter. The prior rules also were potentially confusing in that the rule governing motions, former § 509.10, provided that once a presiding officer was appointed, all motions were "filed" with the presiding officer. Moreover, while § 509.19 required that seven copies accompany the original of any document required to be filed with the Secretariat, this requirement was not applicable after a presiding officer was appointed and prior to the filing of exceptions to the recommended decision, because all motions and other papers were filed with the presiding officer. The former rules did not specify any number of copies that must accompany originals filed with presiding officers, and the practice of Administrative Law Judges on this point may vary considerably. The Board believes that, while the Administrative Law Judge must necessarily receive copies of all motions and other significant papers filed in connection with a proceeding, the proper custodian of the official record in an adjudicatory proceeding should be the Board's Secretariat, not the Administrative Law Judge. The Board believes that the rules adopted today will eliminate any uncertainty by providing that the Secretariat will maintain the official record and will receive the original and one copy of all filings (functioning, in essence, in a manner analogous to a "clerk of the court") and that a copy of all such filings will be furnished to the Administrative Law Judge. This is consistent with the procedure recently adopted by the FDIC governing filing of papers and maintenance of the official record. The rule does not apply to the transcript of testimony or exhibits adduced at the hearing or to proposed exhibits submitted to the Administrative Law Judge prior to a hearing in accordance with a prehearing order issued pursuant to § 509.21.

6. Amending Pleadings

The Board is adopting a procedure, similar to that utilized by other administrative agencies, that permits the notice and answer to be amended by leave of the Administrative Law Judge or by the express or implied consent of the parties without formal amendment.

Previously, a notice could be amended only by the Board, and there were no formal procedures for amending an answer. The Board is making this change in order to reduce further the number of routine matters upon which it is required to rule prior to a final disposition of a proceeding. The change is not intended to constitute a substantive departure from the former § 509.4, under which matters of fact and law alleged in a notice could be amended at any stage of the proceedings. Accordingly, the Board is including language similar to that employed under Rule 15 of the Federal Rules of Civil Procedure, which mandates that leave to amend pleadings shall be freely given where justice so requires. This amendment is virtually identical to the rule governing amendments of pleadings recently adopted by the FDIC. 12 CFR 308.22, 53 FR at 51674.

7. Consolidation and Severance

Section 509.16, concerning consolidation and severance of proceedings, is entirely new and closely resembles the FDIC's amendments on these issues. 12 CFR 308.24, 53 FR 51674. Section 509.16(a) addresses circumstances that may arise when more than one action is taken that arise out of the same transaction or occurrence and involve common questions of law or fact and when a proceeding is instituted seeking the same remedy against two or more respondents based on the same transaction or occurrence. In these circumstances, proceedings generally should be consolidated unless it would cause undue delay or manifest injustice.

Section 509.16(b) provides that a proceeding involving two or more respondents may be severed on the motion of any party or upon the initiative of the Administrative Law Judge or by resolution of the Board. Severance may be appropriate if the proceeding against one or more of the respondents is being settled or stayed, if severance may promote prompt resolution of the proceedings, or if severance would be required to prevent manifest injustice.

8. Interlocutory Review

Section 509.18 is a new provision that permits parties to a proceeding to appeal rulings on motions by the Administrative Law Judge only in very limited circumstances. Interlocutory appeals are permitted only in extraordinary circumstances that warrant the Board's prompt review. Any party desiring to appeal a ruling of the Administrative Law Judge on an interlocutory basis will be required to submit a motion to the Administrative Law Judge requesting certification to the Board for interlocutory review. Exceptions will be available in cases of rulings by the Administrative Law Judge suspending an attorney from further participation in a particular proceeding or denying a motion for summary disposition. Upon certification by the Administrative Law Judge, notice of a denial of a request for certification that a party believes was clearly erroneous, or notice of a ruling that may be appealed without certification, a party may file with the Secretariat a petition for interlocutory review of the contested ruling. The petition must include a copy of the order from which interlocutory appeal was being sought and a statement of the factual and legal bases for interlocutory review. Any party will be permitted to serve a response to a petition for review within 10 days of service of the petition. The Board will determine whether to grant the petition and will decide the issue without oral argument or further written submissions unless it otherwise orders. Unless otherwise ordered by the Administrative Law Judge or the Board, no motion for certification, petition for review, or granting thereof will operate as a stay of the proceedings. Any stay of longer than 30 days requires specific Board approval.

The Administrative Law Judge may certify a ruling to the Board only upon the motion of a party and a determination by him that the ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate conclusion of the proceeding. These criteria are modeled upon Rule 5 of the Federal Rules of Appellate Procedure, which concerns interlocutory appeals by permission pursuant to 28 U.S.C. 1292(b). The Board has the authority to dismiss an interlocutory appeal if it determines that the Administrative Law Judge's certification was erroneously granted or that prompt consideration of the appeal was not warranted under the above criteria.

9. Prehearing Procedures

A number of new provisions are being added with the aim of simplifying proceedings by narrowing factual and legal issues to be determined, resolving as many factual issues as possible prior to commencement of the hearing, and providing for the exchange of information by the parties in advance of the hearing so that only disputes regarding genuine, material, factual, or legal issues need to be resolved through the hearing process. In this regard, the new rules contain provisions for the exchange of lists of witnesses expected to testify at the hearing together with a summary of each witness' expected testimony prior to the proceeding, copies of all exhibits that each party intends to introduce as evidence at the hearing, and stipulations as to factual matters. In addition, any party may serve (and the Administrative Law Judge may require all parties to serve) a prehearing brief outlining the applicable legal principles and what the party believes the evidence will demonstrate. The new procedures closely resemble those recently adopted by the FDIC, 12 CFR 308.33, 53 FR 51678, and codify existing practice in most Board adjudications today.

The Board believes that these new provisions will streamline its proceedings considerably. Resolving as many evidentiary, factual, and legal issues as possible in advance of the hearing will narrow the focus and shorten the time required for the hearing by ensuring that only those matters that are genuinely contested need to be established before the Administrative Law Judge. Prehearing identification of exhibits will give each party the opportunity to know in advance what materials the opposing party plans to introduce. This will give each party the chance to formulate any applicable objections to the introduction of such materials and submit those objections to the Administrative Law Judge prior to the actual hearing, thereby eliminating the need for time-consuming arguments regarding the admissibility of documents at the hearing. It is contemplated by the proposed rule that objections to the introduction of exhibits and rulings thereon will be handled in this fashion during the prehearing stage, so that all exhibits to which objection has not been taken, or that the Administrative Law Judge determines should be admitted into evidence, may simply be considered part of the hearing record and utilized by the parties at the hearing without the need for document-by-document introduction by counsel or an individual ruling by the Administrative Law Judge on each exhibit. In this regard, the Board notes that authenticity of documents should seldom be an issue in administrative proceedings. This is especially true because many of the documents to be introduced in the Board's proceedings will consist of records of the insured institution to which the particular proceeding pertains, reports or other materials filed by the institution with the Board

pursuant to its regulations, other records of which the Board may take official notice, or public records. Furthermore, even where a document does not fall into one of the above categories, the Board believes that authenticity should become an issue only if there is a good faith reason to doubt the genuineness of a document. The Board is of the opinion that the prehearing procedures adopted today will permit the parties to eliminate as many problems and needless time delays as possible in this area.

10. Discovery

New § 509.21 provides for limited discovery. Paragraph (a) states the general rule that discovery may be obtained only through the production of documents and in accordance with the procedures set forth in § 509.21 and through no other means. Privileged documents are not discoverable.

A party seeking to obtain discovery must serve a motion for discovery setting forth the reasons that discovery is necessary. The request must set forth facts and arguments sufficient to demonstrate that the documents sought are relevant and material to the party's case or defense, that the party has substantial need for the materials, and that the location and production of the materials will not result in any undue burden to any other party or in any undue delay in the proceeding. Upon a clear showing that these criteria have been satisfied, the Administrative Law Judge may grant all or such part of the party's request as he deems appropriate under the circumstances. The party from whom the documents are sought has 20 days to furnish the documents to the requesting party unless the parties agree on a different time or the Administrative Law Judge sets a different time for good cause shown. Failure to comply with an order of the Administrative Law Judge granting a discovery request within the prescribed time period is a ground for a motion to compel production of the documents and may result in the imposition of sanctions by the Administrative Law Judge pursuant to his authority under § 509.5(c). Upon a showing that discovery is being conducted in bad faith or in such a manner as unreasonably to annoy, oppress, or embarrass any party, the Administrative Law Judge may order that discovery be terminated or may limit the scope and/or manner of discovery. All discovery, including all responses to discovery requests, must be completed not less than 30 days prior to the date scheduled for the commencement of the hearing unless the Administrative Law Judge finds on the record that good cause clearly exists for an exception to this requirement.

As noted above, the Board has long taken the position that there is no general right to prehearing discovery for respondents in administrative enforcement proceedings, and the case law supports this view. The Board is, however, adopting this amendment in response to commentary, principally from the private bar, that some form of discovery should be available to respondents as a matter of fairness. *See, e.g.,* Shockey, *Discovery in Bank Regulatory Agency Enforcement Actions*, 42 Bus. Law. 91 (1986). While the Board is sensitive to this concern, it also believes that it is imperative that discovery be limited to only those materials that are truly necessary for a party adequately to prepare its case or defense. In particular, the Board is concerned that discovery provisions not become vehicles for "fishing expeditions" whose principal purpose is to delay the proceedings, delve into matters that would yield materials of little or no legal relevance in the preparation of a party's case or defense, or probe the mental processes of the agency's decision makers. Accordingly, the Board believes that it is appropriate to require that parties seeking discovery be required to demonstrate a clear need for the materials sought and that opposing parties have the opportunity to respond to these contentions.

The Board notes that the prehearing procedures being adopted today, such as the prehearing exchange of exhibits, witness lists, testimony summaries, and prehearing memoranda should give each party a sufficient opportunity well in advance of the hearing to know the basis of each claim or defense to be asserted by the opposing party. These procedures contain significant provisions for the prehearing exchange of information by the parties, so that in normal circumstances, additional formal discovery should seldom be necessary. An example of an appropriate discovery request might be a request for copies of pertinent portions of transcripts of testimony of witnesses taken during a formal examination or investigative proceeding prior to the commencement of the adjudicatory proceeding and who are expected to testify at the hearing, together with the exhibits to those transcripts.

11. Subpoenas

Section 509.22 contains technical and clarifying amendments to the Board's procedural rule governing subpoenas requiring the attendance of witnesses and the production of physical evidence. It makes clear that subpoenas are to be issued only to require witnesses to testify and produce documents at the hearing, rather than as discovery devices to require prehearing depositions and the production of documents in advance of the hearing. A separate provision, § 509.23, addresses the taking of depositions for purposes of preserving the testimony of witnesses who will be unavailable to testify at the hearing. Moreover, because of the requirements of § 509.19 that proposed exhibits be provided to the opposing party and submitted to the Administrative Law Judge in advance of the hearing, and of § 509.21 providing for orders to compel the production of documents in the discovery process, there should seldom, if ever, be a need for subpoenas for the production of documents in advance of the hearing. The portion of the rule governing document production is primarily intended to cover instances in which, for example, a party knows of the existence of a material document in the possession of a prospective nonparty witness but has been unable to obtain a copy of the document voluntarily. In that event, the Board believes that the party should have the ability to require the witness to appear at the hearing and produce that document despite the general requirement that all exhibits or a list thereof be submitted in advance. The rule is not, however, intended to require a witness to produce at or prior to a hearing a voluminous amount of material that has not been identified in advance of the hearing and may be of little or no relevance.

The rule also lengthens from 5 days to 10 days the time within which a person to whom a subpoena is directed may move to quash the subpoena and clarifies that the party at whose request the subpoena is issued is responsible for serving the subpoena once it is executed by the Administrative Law Judge.

12. Depositions

Section 509.23 sets forth the procedures for the taking of depositions in adjudicatory proceedings. The rule requires that a party desiring to take the deposition of a witness first apply to the Administrative Law Judge setting forth the reasons that the deposition is necessary. Any party may serve a response to such an application within 10 days of receipt of a copy of the application. The Administrative Law Judge may permit the deposition to be taken only upon a showing that the prospective deponent will be or is likely to be unavailable to testify at the hearing, the testimony will be relevant and material to the proceeding, *and* the

taking of the deposition will not result in any undue burden to any other party or in undue delay in the proceeding.

The requirement of prior application to the Administrative Law Judge has existed in the Board's procedural rules for many years. Previously, § 509.8 set forth a procedure for depositions only in connection with hearings provided for in Part 509a (which are not conducted under the Administrative Procedure Act), Part 565, or § 583.26, but did not apply to other hearings conducted pursuant to Part 509. See former 12 CFR 509.8(a) and (b). New § 509.23 will apply to any hearing conducted under part 509. The new provision will not apply to hearings conducted under Part 509a, as these hearings are not conducted under the Administrative Procedure Act. Furthermore, the references to Part 565 and § 583.26(d) are being eliminated as unnecessary, as hearings conducted pursuant to these provisions are already expressly covered by Part 509. See § 509.1(d) (termination of insurance) and § 509.1(e) (hearings under the Savings and Loan Holding Company Act). This procedure maintains the Board's existing position regarding general discovery in administrative enforcement proceedings, while permitting depositions for the limited purpose of preserving testimony where a material witness will be unavailable.

13. Official Notice

A new provision, § 509.24(b), permits the Administrative Law Judge or the Board to take official notice of any material fact that might be judicially noticed by a district court of the United States and of any material information in the official public records of the Board. The Board believes that this revision will likewise expedite proceedings by eliminating the need to "prove" obvious facts. If any party requests that official notice be taken of any fact, other parties to the proceeding will be afforded the opportunity to establish the contrary.

14. Public and Private Hearings

Section 509.25 combines the provisions of former § 509.6(c) and § 509.21 and adds a new provision. It provides that, unless a public hearing is ordered by the Board in the public interest, all hearings shall be private and attended only by the parties, their representatives or counsel, witnesses while testifying, and other persons having an official interest in the proceeding. The entire record in the proceeding is to remain confidential unless otherwise ordered by the Board or required by law. The new provision permits the Administrative Law Judge to take appropriate steps in public hearings to protect the reputations and integrity of nonparties to the proceeding, including closing portions of such hearings to the public and admitting materials into the record under seal.

15. Summary Disposition

The Board is adopting a procedure, similar to those utilized by a number of other administrative agencies, for summary disposition of proceedings in which the material facts are undisputed.[1] Under new § 509.26, any party who believes that there is no genuine dispute as to the material facts of an adjudicatory proceeding and that he is entitled to judgment as a matter of law may move for summary disposition of all or any part of the proceeding. That party will then be required to submit a statement of the material facts he contends are not in dispute, accompanied by a brief in support of his contention that he is entitled to judgment as a matter of law. Any other party may then submit an opposition to the motion for summary disposition and/or may countermove for summary disposition. Upon receipt of the parties' papers, the Administrative Law Judge may require additional briefing or schedule oral argument on the motion or motions. Thereafter, if the Administrative Law Judge determines that there is no dispute as to the material facts in the proceeding, that a hearing to adduce further facts is unnecessary, and that any party is entitled to a decision in his favor as a matter of law, he will submit a recommended decision to the Board pursuant to § 509.27(c). The case then proceeds as set out in new §§ 509.29 to 509.32. No such recommendation to the Board is required if the Administrative Law Judge determines that no party is entitled to summary disposition. In addition, if the Administrative Law Judge determines that a party is entitled to judgment only on certain claims but not on all claims on which he has moved for summary disposition, the Administrative Law Judge is not required to submit a recommended decision to the Board until after the hearing had been concluded. Instead, he may issue a prehearing order stating that the identified matters upon which the party is entitled to judgment will not need to be addressed at the hearing. Following the hearing, the Administrative Law Judge will simply incorporate his findings of fact and conclusions of law on the claims summarily disposed of into his recommended decision to the Board. Alternatively, the Administrative Law Judge may find that an order should be entered based on the presence of all of the necessary statutory elements regarding certain transactions or occurrences only, while not necessarily making a similar finding with respect to other transactions or occurrences alleged in a notice. Thus, for example, in a removal/prohibition proceeding, the Office of Enforcement may move for summary disposition based on allegations concerning two loan transactions. If the Administrative Law Judge found that one, but not both, of the transactions contained no dispute as to the material facts and that all of the elements required under the NHA or the HOLA to support a removal/prohibition order were present, he could recommend to the Board that a removal/prohibition order be issued based on that transaction, thereby obviating the need for a fact finding hearing on either transaction.

In moving for or opposing summary disposition, a party may not rely on mere allegations, but must submit documentary evidence, stipulations, admissions in pleadings, and/or deposition testimony in support of his contention.

The Board is adopting this procedure in order to provide a mechanism for futher shortening and streamlining of proceedings, thereby saving the parties, the Board, and its staff considerable time and expense. The Board wishes to emphasize that the proposed summary disposition procedure is not intended to deprive any respondent of the opportunity to appear before the Administrative Law Judge to present its case. Rather, the board is providing an alternative mechanism whereby a "fact trial" may be dispensed with, and written submissions and/or an oral argument on the law substituted, where there are no disputed material facts. The Board does not believe that such a procedure will deprive a respondent of any "hearing" to which he is entitled under the HOLA, the NHA, or any of the Board's other enabling statutes. Instead, it merely provides that the hearing could take a different form; instead of a lengthy "trial" to determine the facts, the hearing may consist of oral argument and/or legal briefing as to the proper application of relevant legal principles to the uncontested facts. The board therefore believes that the new procedure is fully in accordance with the requirements of the Administrative Procedure Act and due process of law.

[1] *See e.g.*, 7 CFR 10.91 (Commodity Futures Trading Commission); 16 CFR 3.24 (Federal Trade Commission).

16. Review by the Board on its Own Initiative

Section 509.29, dealing with exceptions to the recommended decision of the Administrative Law Judge, is unchanged from the prior provision in this area with one exception. New § 509.29(c) permits the Board, on its own initiative, to review all or any part of a recommended decision of an Administrative Law Judge within 30 days after the recommended decision has been served on all parties. Notice of any order of the Board directing review on its own initiative will be served on all parties by the Secretariat. This provision is intended to permit the Board to review any aspect of a recommended decision that it may deem appropriate, irrespective of whether the parties have filed exceptions to that portion of the recommended decision.

17. Oral Argument Before the Board

Section 509.30 revises former § 509.14 concerning oral argument before the Board on the recommended decision of the Administrative Law Judge and the findings of fact and conclusions of law upon which the recommended decision was based. The principal change from the prior provision is that any party requesting oral argument before the Board must show good cause as to why oral argument is necessary, including the reasons that any argument proposed to be presented orally was not, or could not be, adequately presented in writing.

18. Decison of the Board

Section 509.32 adds a provision to the former § 509.16, regarding the decision of the Board, providing that employees of the Board who have not engaged in any way in the performance of investigatory or adjudicatory functions in connection with a proceeding may, pursuant to delegated authority, advise and assist the Board in its consideration of that proceeding. This provision is intended to apply to those situations in which matters must be decided by the Board itself, rather than the Administrative Law Judge hearing the case. Included in this category would be motions submitted to the board prior to the appointment of the Administrative Law Judge, motions to dismiss a proceeding (which only the Board may decide), and the final decision of the board following the Administrative Law Judge's recommended decision.

B. Subpart B: Assessment of Civil Money Penalties

A new Subpart B sets forth specific procedures for proceedings to determine whether and to what extent civil money penalties should be assessed against insured institutions, their affiliates, service corporations, savings and loan holding companies, subsidiaries thereof, and/or related officials against whom the board has the authority to impose civil money penalties. These provisions, as well as the provisions of Subpart A, apply to these proceedings.

Proceedings to assess civil money penalties will commence with the issuance of a notice of assessment of civil money penalty. The notice is to contain a statement of the facts constituting the grounds for the assessment of the penalty, the amount of the penalty, the date by which the penalty is to be paid, and a statement informing the party being assessed the penalty of its right to request a hearing to contest the assessment of the penalty within 10 days after service of the notice. A party requesting a hearing is additionally required to file an answer as prescribed in proposed § 509.14 within 20 days of service of the notice of assessment. Upon receipt of a request for a hearing, the Board will serve the party afforded the hearing with notice of the time and place for the hearing. The hearing will be scheduled at least 30 days, but not more than 60 days, following the service of the notice of hearing, and will be conducted in accordance with the procedural provisions of Subpart A. A party requesting a hearing need not pay the penalty until after the hearing has been conducted.

Upon service of the Board's final decision and order, if adverse to the respondent, (or in the event that the respondent consents to the assessment of the penalty), payment of the penalty will be made as provided in § 509.38. In determining the amount of the penalty to be assessed, the Board will consider the financial strength and good faith of the person or entity being assessed, the seriousness of the violation, any previous violations, and any other matters that the interests of justice may require.

II. Revisions To Part 512

The Board is also adopting several technical changes to Part 512, its Rules for Investigative Proceedings and Formal Examination Proceedings. The revisions are summarized below.

The definition of "formal examination proceeding" contained in § 512.2(c) is being revised to reflect the clarification of the Board's authority provided by the Competitive Equality Banking Act of 1987, Pub. L. No. 100–86, 101 Stat. 552 ("CEBA"). The CEBA clarifies that the Board may conduct investigations of persons seeking to acquire control of insured institutions pursuant to the Control Act and may utilize its formal examination authority in doing so, as well as in investigating other possible violations of the Control Act.

Section 512.3 is being amended to state simply that all materials gathered during the course of any formal examination proceeding or investigative proceeding are confidential. This is simply a grammatical change, and the Board does not intend any substantive departure form its current practice in this area.

Section 512.4 is being revised to provide that the Director or any Deputy Director of the Office of Enforcement may approve the release of transcripts of a witness' own testimony to that witness or his counsel. Previously, the regulation provided that this authorization could be given only by the Board; in practice, however, the director of the Office of Enforcement performed this function pursuant to a delegation of authority from the Board. The amendment therefore simply codifies the agency's present practice and reduces the number of routine, nonsubstantive matters with which the Board must deal.

Section 512.5 is being amended in three respects. Paragraph (b)(1) provides that an attorney who has been suspended or debarred from practice by the highest court of any state, commonwealth, territory, possession or the District of Columbia, or by the Board in accordance with Part 513 is precluded from representing other persons before the Board in investigative and formal examination proceedings. Previously, the only basis for such preclusion under § 512.5 was suspension or debarment by the Board pursuant to Part 513. Additionally, paragraph (b)(2) is being amended to make it clear that only the attorney actually personally representing a witness (as distinguished from attorneys for the institutions that are the subjects of investigative or formal examination proceedings or for other witnesses or interested persons) may accompany that witness during the taking of that witness' testimony. Again, this is the practice that has been followed by the Board for many years in this area, and the amendment is of a clarifying nature only.

Former § 512.5(c) is being deleted. That paragraph provided that in a public investigative proceeding conducted under the Holding Company Act, if the record contained allegations of wrongdoing by any individual, the person had the right to appear on the record and to cross-examine witnesses and produce rebuttal testimony and documentary evidence. The Board is

deleting this provision for a number of reasons. First, in the nearly 20 years that the rule had been in existence, the Board and its staff had no record of the Board's ever having conducted a "public investigative proceeding." Second, the whole notion of cross-examination and the presentation of "rebuttal" testimony and documentary evidence is inconsistent with the function of an investigation: the purpose of an investigative proceeding is to develop facts in order to determine whether violations of laws, rules, or regulations have occurred and whether an insured institution and individuals therein have engaged in unsafe or unsound practices with respect to the institution, its subsidiaries, or its affiliates, thereby providing a basis for future enforcement action. It does not, however, determine rights or results in the issuance of orders. Permitting individuals to present "rebuttal" evidence during the course of an investigation fundamentally alters the nature of the proceeding by converting the investigation into a trial. This, in turn, can result in substantial delays with little or no benefit to the decision making process. In fact, the FDIC, having experienced precisely these sorts of pointless delays and arguments in connection with its own investigations, recently deleted its own analogous provision, former 12 CFR 308.51(d). See 53 FR 51168. In the preamble to its amendments, the FDIC observed that rather than producing useful rebuttal information, § 308.51(d) had proven confusing and unworkable. *Id.* Of course, the deletion of § 512.5(c) does not preclude designated representatives conducting investigations and formal examinations from using their discretion to seek out evidence or testimony rebutting or otherwise relating to any apparent wrongdoing. Likewise, no individual is ever precluded from providing information relevant to an investigation or an explanation of his actions to the Board staff if he believes that circumstances so require.

Section 512.7, relating to the service of subpoenas, is being amended to add a provision that would permit service by an express delivery service and remove any language implying that a subpoena could be issued at the instance of anyone other than the Board official(s) conducting the investigative or formal examination proceeding. [2] In this regard, new paragraph (a) removes the reference to the tender of fees and mileage at the time a subpoena is served, and a new separate paragraph (d) provides simply that witnesses summoned to appear in any investigative or formal examination proceeding will be paid the same fees and mileage paid to witnesses in United States district courts. Paragraph (b) is being revised to provide that all motions to quash subpoenas issue in any investigative or formal examination proceeding must be addressed to and decided by the Director or any Deputy Director of the Office of Enforcement. Finally, paragraph (c) is being amended to provide that foreign nationals are subject to service of subpoenas if service is made upon a duly authorized agent of that person located in the United States. Again, this revision comports with the Board's current interpretation and practice on this issued and does not represent a substantive change.

[2] The former version of § 512.7 implied that a subpoena could be issued by and served at the instance of a person calling "rebuttal" witnesses pursuant to § 512.5(c). However, in view of the deletion of § 512.5(c) announced today, any such implication would be unnecessary and inappropriate.

Final Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Board is providing the following regulatory flexibility analysis:

1. *Need for and objectives of the rules.* These elements are incorporated above in SUPPLEMENTARY INFORMATION.

2. *Issues raised by comments and agency assessment and response.* These elements are incorporated above in the SUPPLEMENTARY INFORMATION.

3. *Significant alternatives minimizing small-entity impact and agency response.* The Rules of Practice and Procedure and Rules for Investigative Proceedings and Formal Examination Proceedings apply equally to all insured institutions. The rules impose no new recordkeeping requirements or other additional administrative burden on any insured institution.

List of Subjects in 12 CFR Parts 509 and 512

Administrative practice and procedure, Investigations.

Accordingly, the Board hereby proposes to amend Parts 509 and 512, Subchapter A, Chapter V, Title 12, *Code of Federal Regulations*, as set forth below.

1. Part 509 is revised to read as follows:

SUBCHAPTER A—GENERAL

PART 509—RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS

Subpart A—General

Sec.

Subpart B—Assessment of Civil Money Penalties

Authority: Sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402, 403, 407, 48 Stat. 1256, 1257, 1260, as amended (12 U.S.C. 1725, 1726, 1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); sec. 12, 48 Stat. 892, as amended (15 U.S.C. 78*l*); Reorg. Plan No. 3 of 1947, 3 CFR, 1943–1948 Comp.

Subpart A—General

§ 509.1 Scope of regulations.

This part prescribes rules of practice and procedure applicable to

adjudicatory proceedings as to which hearings are provided by the following statutory provisions:

(a) Hearings under section 6(i) of the Federal Home Loan Bank Act, as amended, 12 U.S.C. 1426(i), to determine whether cause exists for the removal of any member of a Federal Home Loan Bank from membership or for depriving any non-member borrower of the privilege of obtaining advances from a Federal Home Loan Bank;

(b) Hearings in cease and desist proceedings under section 5(d)(2) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(2) ("HOLA") and section 407(e) of the National Housing Act, as amended, 12 U.S.C. 1730(e) ("NHA");

(c) Hearings under section 5(d)(4) of the HOLA, 12 U.S.C. 1464(d)(4), and section 407(g) of the NHA, 12 U.S.C. 1730(g), to determine whether a director, officer, or other person should be removed from office and/or prohibited from further participation in the conduct of the affairs of an insured institution;

(d) Hearings under section 407(b) of the NHA, 12 U.S.C. 1730(b), to determine whether cause exists for the termination of the insured status of any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;

(e) Hearings under section 408(a)(2)(D) of the NHA, 12 U.S.C. 1730a(a)(2)(D), to determine whether any person directly or indirectly exercises a controlling influence over the management or policies of an insured institution or any other company;

(f) Hearings under section 407(k)(3) of the NHA, 12 U.S.C. 1730(k)(3), section 408(j)(4)C) of the NHA, 12 U.S.C. 1730a(j)(4)(C), and section 5(d)(8)(B) of the HOLA, 12 U.S.C. 1464(d)(8)(B), to determine whether and/or to what extent civil penalties should be assessed against institutions, affiliates, service corporations, savings and loan holding companies, subsidiaries thereof and/or related officials in violation of any order issued under the Board's cease-and-desist authority or any provision of section 408 of the NHA, 12 U.S.C. 1730a, or any regulation (see Parts 583 and 584 of Subchapter F of this chapter) or order issued pursuant thereto;

(g) Hearings under section 408(h)(5)(A) of the NHA, 12 U.S.C. 1730a(h)(5)(A), to determine whether to terminate certain activities by savings and loan holding companies or to terminate ownership or control of a non-insured savings and loan holding company subsidiary;

(h) Hearings under section 407(q)(4) of the NHA, 12 U.S.C. 1730(q)(4), to determine whether the Federal Savings and Loan Insurance Corporation should issue an order to approve or disapprove a person's proposed acquisition of an insured institution and/or savings and loan holding company; and

(i) Hearings under section 15(c)(4) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c)(4) (the "Exchange Act"), to determine whether any institution or person subject to the jurisdiction of the Board pursuant to section 12(i) of the Exchange Act, 15 U.S.C. 78/(i), has failed to comply with the provisions of sections 12, 13, 14(a), 14(c), 14(d), or 14(f) of the Exchange Act.

§ 509.2 Definitions.

As used in this part:

(a) The term "adjudicatory proceeding" means a proceeding conducted pursuant to this part and leading to the formulation of a final order other than a regulation.

(b) The term "institution" means a Federally-chartered association within the meaning of section 5(d) of the HOLA, 12 U.S.C. 1464(d), an institution whose accounts are insured by the Federal Savings and Loan Insurance Corporation ("insured institution") within the meaning of section 401(a) of the NHA, 12 U.S.C. 1730(a), a subsidiary of an insured institution, a savings and loan holding company within the meaning of section 408(a)(1)(D) of the NHA, 12 U.S.C. 1730a(a)(1)(D), and a subsidiary of a savings and loan holding company within the meaning of section 408(a)(1)(H) of the NHA, 12 U.S.C. 1730a(a)(1)(H).

(c) The term "Board" means the Federal Home Loan Bank Board or, where appropriate, the Federal Savings and Loan Insurance Corporation.

(d) The term "Secretariat" means the Office of the Secretary to the Federal Home Loan Bank Board, including any Acting or Assistant Secretary to the Board, as defined at § 500.11 of this subchapter.

(e) The term "Administrative Law Judge" means an administrative law judge appointed pursuant to section 3105 or detailed to the Board pursuant to section 3344 of Title 5 of the United States Code to preside at a hearing conducted in accordance with this part. As used in this part, the term also shall refer to the Board or any person to whom the Board has delegated authority to act when an Administrative Law Judge has not been appointed or is unavailable.

(f) The term "party means an institution or person named as a respondent in any adjudicatory proceeding. The Office of Enforcement of the Board also is deemed to be a party to all proceedings under this part.

(g) The term "Respondent" means any institution or person against whom the Board seeks relief in the notice commencing the adjudicatory proceeding.

(h) The term "notice" means the notice that commences the adjudicatory proceeding, is served upon the Respondent by the Board, and designates a date, time, and place for the hearing to be conducted in connection with the allegations in the notice.

(i) Any use of a masculine, feminine, or neuter gender shall be deemed to encompass whichever usage would be appropriate under the circumstances, in accordance with § 500.6 of this subchapter.

§ 509.3 Appointment of Administrative Law Judge.

(a) *Appointment.* Unless otherwise directed by the Board, all hearings under this part shall be conducted by an Administrative Law Judge appointed by the United States Office of Personnel Management.

(b) *Procedures.* (1) Following the issuance and service of a notice, the Board or any person designated by the Board shall promptly request the appointment of an Administrative Law Judge to conduct the proceeding.

(2) Upon notification that an Administrative Law Judge has been appointed, the Board or any person designated by the Board shall advise the parties in writing of such appointment.

(3) If for any reason the designated Administrative Law Judge is unable to conduct or complete the proceeding for which he was appointed, a successor Administrative Law Judge shall be requested and appointed.

§ 509.4 Authority of the Administrative Law Judge.

All hearings governed by this part shall be conducted in accordance with the provisions of Chapter 5 of Title 5 of the United States Code. The Administrative Law Judge designated pursuant to this part to preside at any such hearing shall be in charge of the hearing and shall have the duty to conduct it in a fair and impartial manner and to take all action to avoid unnecessary delay in the disposition of the proceeding. Such Administrative Law Judge shall have all powers necessary to that end, including the following powers:

(a) To administer oaths and affirmations;

(b) To issue subpoenas and subpoenas duces tecum, as authorized by this part,

and to revoke, quash, or modify any such subpoenas;

(c) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(d) To take or cause depositions to be taken as authorized by this part;

(e) To regulate the course of the hearing and the conduct of the parties and their counsel;

(f) To hold conferences for the settlement or simplification of issues or for any other proper purpose;

(g) As justice may require, to consider and rule upon all procedural and other motions appropriate in an adversarial proceeding, except that only the Board shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in final determination of the merits of the proceeding; and

(h) To prepare and present to the Board a recommended decision as provided herein.

Without limitation on the foregoing, the Administrative Law Judge shall, subject to the provisions of this part, have all the authority of section 556(c) of Title 5 of the United States Code.

§ 509.5 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the Board*—(1) *By non-attorneys.* An individual may appear on his own behalf; an authorized member of a partnership may represent the partnership; a bona fide and duly authorized officer of a corporation, trust, or association may represent the corporation, trust, or association; and an official or employee of any governmental unit, agency, or authority may represent that unit, agency, or authority before the Board (including representation before the Administrative Law Judge appointed to conduct the proceeding), unless such individual, partner, officer, or employee has been suspended or debarred from practice in accordance with the provisions of Part 513 of this subchapter or excluded or suspended from the proceeding pursuant to paragraph (c) of this section.

(2) *By attorneys.* Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia and who has not been suspended or debarred from practice before the Board in accordance with the provisions of Part 513 of this subchapter or excluded or suspended from a particular proceeding in accordance with paragraph (c) of this section may represent parties or other persons in such adjudicatory proceeding. An attorney representing a party in an adjudicatory proceeding shall file a notice of appearance with the Secretariat, containing a written declaration that he is currently qualified to practice before the Board as provided by this paragraph (a)(2) and is authorized to represent the particular party on whose behalf he acts. Included in the notice of appearance shall be a written disclosure as to whether the attorney has ever been suspended or debarred from practice by the bar of any State, territory, Commonwealth, or the District of Columbia and, if so, the date(s) of any such suspension or debarment and a description of the facts and circumstances surrounding the same.

(b) *Conflict of interest in representation.* An individual shall not represent another person in an adjudicatory proceeding if it reasonably appears that such representation may be affected by that individual's responsibilities to a third person or by the individual's own interests. The Administrative Law Judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(c) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous, or contumacious conduct at any phase of any adjudicatory proceeding under this part, as determined in the sole discretion of the Administrative Law Judge, may be grounds for exclusion therefrom and suspension for the duration of the proceeding and may be grounds for suspension or debarment pursuant to Part 513 of this subchapter.

(d) *Representatives of nonparties.* A nonparty who is required or requested to testify at a prehearing deposition pursuant to § 509.23 may be represented by any person qualified to represent a party before the Board. Anyone representing a nonparty in such a situation need not file a notice of appearance unless expressly ordered to do so by the Administrative Law Judge, but may be required by the Administrative Law Judge or any party to state on the record or in writing the information required in a notice of appearance. No attorney or other representative who refuses to provide such information shall be permitted to represent any person in the proceeding.

§ 509.6 Good faith certification.

(a) *General requirement.* After the issuance of the notice, every subsequent written presentation by a party represented by an attorney shall be signed by at least one attorney of record in that attorney's individual name and shall state the attorney's business address and telephone number. A party who is not represented by an attorney shall sign his presentations and shall include his address and telephone number.

(b) *Effect of signature.* (1) The signature of an attorney or party constitutes a certification by the signer that the attorney or party has read the presentation; that, to the best of his knowledge, information, and belief formed after reasonable inquiry, the presentation is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a presentation is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(d) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any attorney or party constitutes a certification by the attorney or party that, to the best of his knowledge, information, and belief formed after reasonable inquiry, his statements are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and are not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(d) *Sanctions for violation.* If a presentation is made in violation of this section, the Administrative Law Judge may, on motion of any party or on his own motion, impose upon the attorney, represented party, or both any appropriate sanction authorized by this part.

§ 509.7 Ex parte communications.

(a) *Definition.* "Ex parte communication" means any material oral or written communication concerning the merits of an adjudicatory proceeding that takes place between a party, his counsel, or another person interested in the proceeding and the Administrative Law Judge handling that proceeding, the Board, any member of the Board, or any person who may reasonably be expected to be involved in assisting or advising the Board with respect to the preparation of a decision with respect to that proceeding and that was neither on the record nor on reasonable prior notice to all parties

(d) *Prohibition of ex parte communications.* From the time the notice is served, or from the date that a party learns that a notice has been approved by the Board, whichever is applicable, until the date that the Board serves its final decision pursuant to § 509.32, no person, including any person involved in the decisional process concerning the proceeding, shall knowingly make or cause to be made an ex parte communication concerning the merits of the proceeding.

(c) *Communications involving the Administrative Law Judge.* (1) The Administrative Law Judge shall not consult anyone within the Board on the merits of an adjudicatory proceeding, except upon notice and opportunity for all parties to participate in such consultation. This section shall not be construed as prohibiting the Administrative Law Judge from consulting with employees or agents of the Board on procedural matters.

(2) The Administrative Law Judge shall not be responsible to, nor subject to the supervision or direction of, any officer, employee, or agent of the Board engaged in the performance of investigatory or adjudicatory functions.

(d) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the Administrative Law Judge, the Board, any member of the Board, or other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within 10 days of receipt of service of the ex parte communication to file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The Administrative Law Judge shall then determine whether any action should be taken concerning the ex parte communication and, if so, what that action should be.

(e) *Sanctions.* To the extent consistent with the interests of justice and the policy of the NHA, the HOLA, and/or the Federal Home Loan Bank Act, knowing violation of this section may be a ground for a decision adverse to a party who violates this section or may be a ground for suspension or debarment of any person engaging in such conduct under the procedures set forth in § 509.5(c) herein or in Part 513 of this subchapter.

§ 509.8 Maintenance of the record.

The transcript of testimony and exhibits, together with all papers and requests (including motions, stipulations, exceptions, rulings, pleadings, briefs, and other materials filed in connection with the proceeding) shall constitute the exclusive record for decision in accordance with this part. The Secretariat shall maintain the official record of all papers filed in each proceeding under this part. Upon appointment of the Administrative Law Judge, the Secretariat shall forward to the Administrative Law Judge a copy of the existing record of the proceeding.

§ 509.9 Service.

(a) *By the Board.* All documents or papers required to be served by the Board upon any party afforded a hearing shall be served by the Secretariat unless some other person shall be designated for such purpose by the Board. Such service, except for service on counsel for the Office of Enforcement, shall be made by personal service or by registered or certified mail, addressed to the last known address of such party, or on the attorney or representative of record of such party, provided that if there is no attorney or representative of record, such service shall be made upon such party at the last known address of such party. Such service may also be made in such other manner reasonably calculated to give actual notice as the Board may by regulation or otherwise provide.

(b) *By the parties.* Except as otherwise expressly provided in this part, all documents or papers filed in a proceeding under this part shall be served by the party filing the same upon the attorneys or representatives of record of all other parties to the proceeding or, if any party is not so represented, then upon such party. Such service may be made by personal service, by registered, certified, or regular first-class mail, or by an express delivery service addressed to the last known address of such parties or to their attorneys or representatives of record. Service shall be deemed to have been made at the time of personal service, upon deposit in the United States mails of a properly addressed and postage-paid document, or upon delivery of such document to an express delivery service. All such documents or papers shall include a certificate, signed by the person making service and stating that such service on other parties has been made and indicating the date and method of such service.

(c) *By the Administrative Law Judge.* Copies of all orders and rulings on motions by the Administrative Law Judge shall be served on all parties to the proceeding in the same manner as described in paragraph (b) of this section. The Administrative Law Judge shall file the original of all rulings and orders by him with the Secretariat.

§ 509.10 Filing of papers.

(a) Unless otherwise specifically provided in the notice or by the Administrative Law Judge, an original and one copy of all documents and papers required to be served under this part shall be filed with the Secretariat, with a copy to the Administrative Law Judge after he is designated. This rule shall not apply to the transcript of testimony and exhibits adduced at the hearing or to proposed exhibits submitted in advance of the hearing pursuant to an order of the Administrative Law Judge pursuant to § 509.19.

(b) All material required to be filed with the Board or the Secretariat shall be filed with the Secretariat, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552. Any such filing with the Secretariat shall be made at the time of service or within a reasonable time thereafter, but must be received by the Secretariat in Washington, DC, within three business days of service on the other parties.

§ 509.11 Formal requirements as to papers filed.

(a) *Form.* All papers filed under this part shall be double spaced and printed or typewritten on 8½ by 11 inch paper. All copies shall be clear and legible.

(b) *Signature.* The original of all papers filed by a party shall be signed by such party of by the duly authorized agent or attorney of such party and must show the address of the signer. Counsel for the Office of Enforcement shall sign the original of all papers filed by that Office.

(c) *Caption.* All papers filed must include at the head thereof, or on the title page, the name of the Board or FSLIC, the name of the party afforded the hearing, the number of the resolution giving notice of the hearing, and the subject matter of the particular paper.

§ 509.12 Computing time.

(a) *General rule.* In computing any period of time prescribed or allowed by this part, the date of the act, event, or default from which the designated period of time begins to run is not to be included. The last day so computed shall be included, unless it is a Saturday, Sunday, or federal holiday, in which event the period shall run until the end of the next day that is neither a

Saturday, Sunday, nor such federal holiday. When the period of time prescribed or allowed is 10 days or less, intermediate Saturdays, Sundays, and such federal holidays shall be excluded in the computation.

(b) *Service by mail.* Whenever any party has the right or is required to do some act within a period of time prescribed in this part after the service upon him of any document or other paper of any kind, and such service is made by mail, three days shall be added to the prescribed period; *Provided, however,* That if an overnight mail service is used, only one day shall be added to the prescribed period.

(c) *Change of time limits.* Except as otherwise provided by law, the Administrative Law Judge may, at the request of the parties or *sua sponte,* extent the time limits prescribed by these rules or by any notice or order issued in the proceedings for good cause shown. Prior to the appointment of an Administrative Law Judge and after the filing of a recommended decision pursuant to § 509.27(d), the Board or any person designated by the Board may grant such extensions for good cause shown.

§ 509.13 Notice.

Whenever a hearing is ordered by the Board in any proceeding provided for in this part, a notice shall be served by the Secretariat, or other person designated for such purpose by the Board, upon the party or parties afforded the hearing. Such notice shall state the time, place, and nature of the hearing, the legal authority and jurisdiction under which the hearing is to be held, and, if an Administrative Law Judge has been designated to preside at the hearing, the name and address of such Administrative Law Judge. Such notice shall also contain a statement of the matters of fact and law constituting the grounds for the hearing.

§ 509.14 Answer.

(a) *When required.* In any notice commencing an adjudicatory proceeding, the Board shall direct the party or parties afforded the hearing to file an answer to the allegations contained in the notice. Except where a different period of not less than 10 days after service of a notice is specified by the Board, a party shall file an answer with the Secretariat within 20 days after service upon him of the notice.

(b) *Requirements of answer; effect of failure to deny.* An answer filed under this section shall concisely state any defenses and specifically admit or deny each allegation in the notice, unless the party is without knowledge or information, in which case his answer shall so state and such statement shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When a party contends in good faith that part of an allegation is false, he shall specify so much of it as is true and shall deny only the remainder.

(c) *Admitted allegations.* If a party filing an answer under this section elects not to contest any of the allegations of fact set forth in the notice, his answer shall consist of a statement that he admits all of the allegations to be true. Such answer shall constitute a waiver of hearing as to the facts alleged in the notice. All parties will then have an opportunity to serve proposed findings of fact, conclusions of law, and a discussion of the appropriate remedy under the circumstances, together with supporting briefs, with copies to the Administrative Law Judge. These filings, together with the notice, shall provide a record basis on which the Administrative Law Judge shall file with the Secretariat his recommended decision in accordance with section 557 of Title 5 of the United States Code.

(d) *Effect of failure to answer.* Failure of a party to file an answer required by this section within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations in the notice. If no answer is filed, the Administrative Law Judge, without further notice to the party, may receive proposed findings of fact, conclusions of law, and a recommended order from the Office of Enforcement and, based thereon, may find the facts to be as alleged in the notice and file with the Secretariat a recommended decision containing such findings and appropriate conclusions. The Administrative Law Judge may, for good cause shown, permit the filing of a delayed answer after the time for filing the answer has expired, provided that a request to file such a delayed answer is made to the Administrative Law Judge within the time prescribed for the filing of the answer. No request to file a delayed answer will be considered after the time for filing the answer has expired.

§ 509.15 Amending pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding by leave of the Administrative Law Judge. Such leave shall be freely given. The respondent shall answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Administrative Law Judge orders otherwise for good cause shown.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they shall be treated in all respects as if they have been raised in the notice or answer and no formal amendments shall be required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the Administrative Law Judge may allow the notice or answer to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the Administrative Law Judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The Administrative Law Judge may grant a continuance to enable the objecting party to meet such evidence.

§ 509.16 Consolidation and severance of proceedings.

(a) *Consolidation.* On motion of any party, or upon the initiative of the Administrative Law Judge, or by resolution of the Board:

(1) Any two or more proceedings may be consolidated for some or all purposes if each proceeding involves or arises out of the same transaction or occurrence, or series of transactions or occurrences, and material common questions of law or fact will arise in each of the proceedings, unless such consolidation would cause unreasonable delay or injustice.

(2) Any two or more proceedings against the same or at least one common respondent that involve or arise out of the same transaction or occurrence, or series of transactions or occurrences, and involve common questions of law or fact may be consolidated for some or all purposes, unless such consolidation would cause unreasonable delay or manifest injustice.

(b) *Severance.* On the motion of any party or upon the initiative of the Administrative Law Judge, or by resolution of the Board, a proceeding involving two or more respondents may be severed for some or all purposes if:

(1) Severance is appropriate because the proceeding against one or more respondents is settled, stayed, or cannot proceed; or

(2) Severance will promote prompt resolution of the proceeding as to one respondent, or as to some or all respondents; or

(3) Severance is otherwise required to prevent manifest injustice.

§ 509.27 Motions.

(a) *In writing.* An application or request for an order or ruling not otherwise specifically provided for in this part shall be made by motion. After an Administrative Law Judge has been designated to preside at a hearing and before the filing with the Secretariat of his recommended decision, all such motions shall be filed with the Secretariat, with a copy to the Administrative Law Judge, as provided in § 509.10. At all other times motions shall be addressed to the Board and filed with the Secretariat. In either case, a copy shall also be served on every other party to the proceeding. Motions shall be in writing, except that a motion made at a session of a hearing may be made orally on the record unless the Administrative Law Judge directs that it be reduced to writing. All written motions shall state with particularity the order or relief sought and the grounds therefor.

(b) *Responses.* Within 15 days after service of any written motion, or within such other period of time as may be fixed by this part or by order of the Administrative Law Judge, any party may file a written response to such motion. The moving party shall have no right to reply to such response except as expressly permitted by this part or by order of the Administrative Law Judge. The Administrative Law Judge may waive the requirements of this section as to motions for brief extensions of time and may rule upon such motions after receiving an oral response from the opposing party.

(c) *Dilatory motions not permitted.* Repetitive or numerous motions that raise the same issues or arguments or deal with the same subject matter as previously-decided motions shall not be permitted. Such dilatory motions may form the basis for sanctions under § 509.5(c) of this part or Part 513 of this subchapter. The Administrative Law Judge may assess costs attendant to responding to or ruling on such motions against parties who file such dilatory motions.

(d) *Supporting papers.* Written memoranda or briefs may be filed with motions or responses thereto, stating the points and authorities relied upon in support of the position taken.

(e) *Oral argument.* No oral argument will be heard on motions except as directed by the Administrative Law Judge.

(f) *Rulings on motions.* Except as otherwise provided in this part, the Administrative Law Judge shall rule promptly upon all motions properly served upon him and upon such other motions as the Board may direct, except that if the Administrative Law Judge finds that a prompt decision by the Board on a motion is essential to the proper conduct of the proceeding, he may refer such motion to the Board for decision. The original of all rulings and orders on motions by the Administrative Law Judge shall be filed by him with the Secretariat, and copies served by the Administrative Law Judge on all parties to the proceeding.

(g) *Continuation of proceeding.* Unless otherwise ordered by the Administrative Law Judge or the Board, the proceeding, including the hearing, shall continue pending the determination of any motion that must be decided by the Board.

§ 509.18 Interlocutory review.

(a) *General rule.* The Board will review a ruling of the Administrative Law Judge prior to the submission of the Administrative Law Judge's recommended decision only in extraordinary circumstances that warrant the Board's prompt review and in accordance with the procedures set forth in this section.

(b) *Scope of review.* An interlocutory appeal may be permitted, in the discretion of the Board, under the following circumstances:

(1) Appeal from a ruling pursuant to § 509.5 suspending an attorney or other representative from participation in a particular proceeding;

(2) Appeal from an order denying a motion for summary disposition;

(3) On certification by the Administrative Law Judge in accordance with paragraph (c) of this section;

(4) Upon any other interlocutory ruling where certification has been denied by the Administrative Law Judge. Interlocutory review shall not be granted under this paragraph (b)(4) unless the Board determines that the Administrative Law Judge's failure to certify the matter was clearly erroneous.

(c) *Certification by Administrative Law Judge.* (1) Any party may move that the Administrative Law Judge certify and permit an appeal of a contested ruling to the Board. Such a motion shall be served within 10 days of the Administrative Law Judge's notification to the parties of the contested ruling; *Provided, however,* That if such a motion is made during the hearing, the Administrative Law Judge may permit the motion and responses thereto to be made orally. The motion for certification must state the grounds relied upon, including the reasons for permitting the interlocutory review, in accordance with the criteria set forth in paragraph (c)(2) of this section. Any party may serve a response to a motion for certification within 10 days after service of the motion.

(2) The Administrative Law Judge shall certify a ruling for interlocutory review to the Board only upon a motion by a party and a determination by the Administrative Law Judge that (i) the ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion and (ii) an immediate appeal from the ruling may materially advance the ultimate conclusion of the proceeding. Any certification to the Board shall be in writing and shall set forth the relevant issues, an explanation of the ruling on the issues, and specific reasons for the granting of the moving party's request for review by the Board.

(d) *Procedure.* Where certification is not required under paragraph (b) of this section of where the Administrative Law Judge certifies a ruling for interlocutory review by the Board, or where a party believes that a denial of certification by the Administrative Law Judge was clearly erroneous, a petition for interlocutory review may be filed within 10 days after notice of the Administrative Law Judge's ruling or certification. The petition shall include or have attached thereto a copy of the ruling or portion thereof from which appeal is being sought and present the points of fact and law relied upon in support of the position taken. Any party may serve a response to a petition for interlocutory review within 10 days of service of the petition. The Board shall determine whether to grant interlocutory review based upon the petition for review and any responses thereto without oral argument or further written submissions unless the Board shall otherwise direct.

(e) *Dismissal of interlocutory appeal by the Board.* The Board may dismiss an interlocutory appeal if it finds that the Administrative Law Judge's certification was erroneously granted or if it finds that prompt consideration of the appeal is not warranted under the standards set forth above in paragraph (c)(2) of this section.

(f) *Notification by the Secretariat.* Neither a motion to the Administrative Law Judge for interlocutory review, nor a petition to the Board for interlocutory review, nor the granting of such a motion or petition under this section shall suspend or stay the proceeding unless otherwise ordered by the Administrative Law Judge or the Board. Any stay of longer than 30 days must be specifically approved by the Board.

§ 509.19 Prehearing conference and exchange of information.

(a) *Prehearing conference.* The Administrative Law Judge may, on his own initiative or at the request of any party, direct counsel for all parties to meet with him at a specified time and place prior to the hearing (in person or by telephone) and/or submit prehearing memoranda to him in writing, to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice will be taken;

(4) Limiting the number of witnesses; and

(5) Such other matters as may aid in the orderly disposition of the proceeding.

(b) *Witnesses.* Within a period of time established by the Administrative Law Judge and prior to the date scheduled for the hearing, each party shall serve a written list of witnesses to be called to testify at the hearing. The list shall contain the name and address of each witness and a brief summary of the testimony expected of each witness. The Administrative Law Judge shall not allow any witness to testify at the hearing who is not included on any party's witness list except for good cause shown.

(c) *Exhibits.* Within a period of time established by the Administrative Law Judge and prior to the date scheduled for hearing, each party shall serve a written list of exhibits to be offered into evidence at hearing together with a copy of each proposed exhibit. The Administrative Law Judge shall not allow any exhibit to be accepted into evidence at the hearing that is not listed and copied in accordance with the provisions of this paragraph except for good cause shown.

(d) *Stipulations.* Within a period of time established by the Administrative Law Judge and prior to the date scheduled for the hearing, the parties shall by written stipulation agree upon as many pertinent facts as practicable. The parties may also stipulate to any other pertinent facts orally at the hearing. When stipulations are accepted by the Administrative Law Judge, they shall be binding on the parties.

(e) *Prehearing brief.* Any party may serve, and the Administrative Law Judge may require all parties to serve, a prehearing brief or legal memorandum in advance of the hearing date.

(f) *Prehearing order.* At or within a reasonable time following the conclusion of a prehearing conference, the Administrative Law Judge shall file with the Secretariat and serve upon each party a prehearing order setting forth agreements reached and any procedural determinations made. Any agreements reached among the parties at the prehearing conference or otherwise shall become part of the record and shall be binding on the parties unless the Administrative Law Judge permits otherwise for good cause shown.

§ 509.20 Opportunity for informal settlement.

(a) Any respondent may at any time unilaterally submit to the Secretariat, for consideration by the Board of its designee, with copies to all other parties, written offers or proposals for settlement of a proceeding, without prejudice to the rights of the parties. Other parties to the proceeding may respond to the settlement offer within 20 days of service of such settlement offer. Unless the Office of Enforcement recommends to the Board or its designee that it accept the submitted settlement offer, submission of a settlement offer shall not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this subpart. No such settlement offer or proposal shall be admissible in evidence over the objection of any party in any hearing in connection with such proceeding.

(b) Upon receipt of a settlement offer, the Board, its designee, or any person selected by the Board or its designee may consult with the parties about the settlement offer by convening a settlement conference with the parties or by requiring the submission of such additional information as the Board or such other person may deem, appropriate for consideration of the settlement offer.

(c) The Board shall notify the parties of is decision whether to accept the settlement offer within 60 days of its receipt of such settlement offer, unless extended in writing for good cause.

§ 509.21 Discovery.

(a) *General rule.* Parties to proceedings under this part may obtain discovery only through the production of documents and only by order of the Administrative Law Judge in accordance with the procedures set forth in this paragraph. Except as otherwise expressly authorized by this part, no other form of discovery shall be allowed.

(b) *Criteria.* Discovery shall be permitted only upon a clear showing that:

(1) The documents being sought are relevant and material to the requesting party's case or defense;

(2) The party seeking discovery has substantial need for the materials for the preparation of its case or defense; and

(3) The location and production of the documents will not result in any undue burden to any other party or in any undue delay in the proceeding.

(c) *Procedure.* Any party seeking to obtain discovery shall serve a motion for discovery containing facts and arguments sufficient to demonstrate that the criteria set forth in paragraphs (b) (1), (2), and (3) of this section have been satisfied. The motion shall identify with reasonable particularity the documents requested, either by individual item or by category. Any party may serve a response to the motion within 10 days of service thereof. Upon a clear showing that the criteria set forth in paragraphs (b) (1), (2), and (3) of this section have ben satisfied, the Administrative Law Judge may grant all or such part of such discovery request as he may deem appropriate under the circumstances.

(d) *Response.* In the event that the Administrative Law Judge grants all or part of a discovery request, the party from whom the documents were requested shall furnish the documents within 20 days of service of the decision of the Administrative Law Judge, unless the parties agree on a different time or the Administrative Law Judge orders a different time for good cause shown. If any documents are withheld on the basis of privilege of any kind as provided by paragraph (e) of this section, the responding party shall provide a written list of the documents withheld, the privilege claimed with respect to each document, and the basis for the claim of privilege.

(e) *Privileged documents.* Privileged documents are not discoverable. Applicable privileges include the attorney-client privilege, the attorney work product privilege, the governmental deliberative process privilege, and other such privileges as the United States Constitution, applicable acts of Congress, or principles of the common law may provide.

(f) *Motions to compel production.* If any party fails to comply with an order of the Administrative Law Judge granting a discovery request within the prescribed time for response, or withholds documents without a valid privilege claim, the requesting party may move for an order of the Administrative Law Judge compelling production of the documents. The Administrative Law Judge may impose sanctions under

§ 509.5(c) for failure to comply with a discovery order.

(g) *Protective orders.* Upon a showing that discovery is being conducted in bad faith or in such a manner as unreasonably to annoy, oppress, or embarrass any party, the Administrative Law Judge may order discovery terminated or may limit the scope or manner of discovery. Grounds for terminating or limiting discovery include persistent requests for privileged documents, repeated inquiries into areas that are neither relevant nor likely to lead to the discovery of relevant information, and unwarranted attempts to pry into a party's preparation for trial.

(h) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 30 days prior to the date scheduled for the commencement of the hearing. No exceptions to this rule shall be permitted unless the Administrative Law Judge finds on the record that good cause clearly exists for waiving the requirements of this subsection.

§ 509.22 Subpoenas for documentary or physical evidence or for witness attendance.

(a) *Issuance.* The Administrative Law Judge shall issue subpoenas, as authorized by law, at the request of any party, requiring the attendance of witnesses at the hearing to be held in connection with an adjudicatory proceeding and/or the production of documentary or physical evidence at such hearing. Where it appears to the Administrative Law Judge that the subpoena may be unreasonable, oppressive, excessive in scope, or unduly burdensome, the party seeking the subpoena may be required, as a condition precedent to the issuance of the subpoena, to show the general relevance and reasonable scope of the testimony or other evidence sought. In the event the Administrative Law Judge, after consideration of all the circumstances, determines that the subpoena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it in modified form upon such conditions as justice requires.

(b) *Motion to quash.* Any person to whom a subpoena is directed may, prior to the time specified therein for compliance but in no event more than 10 days after the date of service of such subpoena, serve a motion, in accordance with the provisions of § 509.17 of this part, to revoke, quash, or modify such subpoena, accompanying such application with a statement of the reasons therefor.

(c) *Service of subpoena.* The party seeking the subpoena is responsible for effecting service thereof. Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena by personal service, certified or registered mail, or an express delivery service to such person and by tendering the fees for one day's attendance and the mileage as specified in paragraph (d) of this section, except that when a subpoena is issued at the instance of the Office of Enforcement, fees and mileage need not be tendered at the time of service of the subpoena. If service is made by a United States Marshall, his deputy, or an employee of the Board, such service shall be evidenced by his return thereon. If made by any other person, such person shall make affidavit thereto, describing the manner in which service is made, and return such affidavit on or with the original subpoena.

(d) *Attendance of witnesses.* The attendance of witnesses and the production of documents pursuant to a subpoena issued in connection with a hearing provided for in this part may be required from any place in any State, Commonwealth, possession, territory, or the District of Columbia at any designated place where the hearing is being conducted. Witnesses subpoenaed in any proceeding under this part shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States.

§ 509.23 Depositions.

(a) *Prerequisites.* Oral depositions shall be permitted in adjudicatory proceedings under this part only upon a showing that:

(1) The proposed deponent is or is likely to be unavailable to attend the hearing because of age, illness, infirmity or other cause beyond the control of the deponent;

(2) The testimony of the proposed deponent will be relevant and material to the proceeding; and

(3) The taking of the deposition will not result in any undue burden to any other party or in undue delay in the proceeding.

(b) *Procedure.* Any party desiring to take the oral deposition of a witness shall serve a written motion setting forth facts sufficient to demonstrate that the prerequisites set forth in paragraph (a) of this section have been satisfied. The motion shall include the name and address of the proposed deponent and a statement setting forth the matters upon which the proposed deponent will be questioned, the materiality and relevance of the deponent's testimony, the need for the deposition, and the proposed time and place for the deposition. Any party may serve a response to the motion within 10 days after service thereof. Failure of a party to respond to such a motion within 10 days will be deemed to constitute a waiver of objection to the deposition.

(c) *Decision.* Upon a showing that the prerequisites set forth in paragraph (a) of this section have been satisfied, the Administrative Law Judge may, by subpoena or subpoena duces tecum, order that such oral deposition be taken. If, after consideration of all circumstances, the Administrative Law Judge determines that the deposition or its location, in whole or in part, is unnecessary, unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to grant the motion or may grant it only upon such conditions as justice requires. The Administrative Law Judge shall serve a notice of the action taken on the motion upon each of the parties. Service shall be accomplished under the procedures of § 509.9 of this part. Service shall be completed at least 10 days in advance of the date and time fixed for the taking of the deposition.

(d) *Motion to quash.* A person named in a subpoena or subpoena duces tecum to take evidence by oral deposition who is not a party to the proceeding may move to revoke, quash, or modify the subpoena. Such motion shall be accompanied by a statement of the reasons therefor and a copy of the motion shall be served upon the party requesting the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than 10 days after the date of service of the subpoena, except for good cause shown.

(e) *Procedure on deposition; objections.* Each witness testifying upon oral deposition shall be duly sworn, and all other parties shall have the right to cross-examine. Objections to questions or evidence shall be in short form, stating the grounds of objection, unless a valid privilege is asserted. If the deponent refuses to answer a question posed at a deposition, the deposition may be adjourned or completed at the option of the party who requested the deposition, except as to the unanswered question, and an oral or written request may be made to the Administrative Law Judge to compel an answer.

(f) *Protective orders.* At any time during the taking of a deposition, on motion of the deponent or of any party, and upon a showing that the deposition is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or

party, the Administrative Law Judge may order the termination of the deposition or may limit the scope and manner of the taking of the deposition. Grounds for terminating or limiting a deposition include persistent questioning on privileged matters, repeated inquiries into areas that are neither relevant nor likely to lead to the discovery of relevant information, or unwarranted attempts to pry into a party's preparation for trial. The physical condition of the witness and the adequacy of the examination that has already taken place also may be considered.

(g) *Introduction as evidence.* If the deposition or any portion of the deposition is offered at the hearing, the Administrative Law judge shall then consider any objections raised, provided that those objections were made during the deposition and, at that time, may refuse to allow reading of the answer to any question found to be objectionable. Subject to appropriate rulings on such objections to questions or evidence as were noted at the time the deposition was taken or as would be valid were the witness personally present and testifying, the deposition or any part thereof may be submitted into evidence by any party to the proceeding. Only that part of a deposition that is received in evidence at a hearing shall constitute a part of the record in such proceeding upon which a decision may be based.

(h) *Payment of fees.* The fees of the witness and of there porter shall be paid by the person upon whose application the deposition was taken.

§ 509.24 Conduct of hearings.

(a) *Hearing rules.* Every party shall have the right to present its case or defense by oral and documentary evidence and to conduct such cross-examination as may be required for full disclosure of the facts. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. Objections to the admission or exclusion of evidence shall be concise and, together with rulings thereon, become part of the record. Argument on objections may, at the discretion of the Administrative Law Judge, take place off the record. Failure to object to admission or exclusion of evidence or to any ruling shall constitute a waiver of the objection. The privileges of witnesses or parties shall be governed by the principles of the common law as such principles may be interpreted by the courts of the United States in light of reason and experience.

(b) *Official notice.* Official notice may be taken of any material fact that might be judicially noticed by a district court of the United States and of any material information in the official public records of the Board. All matters officially noticed by the Administrative Law Judge shall appear on the record. If official notice is requested or taken of any fact, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

(c) *Transcript of testimony.* Hearings shall be recorded and transcripts will be made available to any party upon payment of the cost thereof. A copy of the transcript of the testimony taken at the hearing, duly certified by the reporter, together with all exhibits, shall be filed with Administrative Law Judge, who shall file such materials with the Secretariat at the time he submits his recommended decision. The Administrative Law Judge shall have the authority to rule upon motions to correct the record.

(d) *Continuances and changes or extensions of time and changes of place of hearing.* Prior to the appointment of an Administrative Law Judge and after the filing of a recommended decision pursuant to § 509.27 of this part, except as otherwise expressly provided by law, the Board may in the notice or any subsequent order provide time limits different from those specified in this part and may, on its own initiative or for good cause shown, change or extend any time limit prescribed by these rules or the notice, or change the time and place for any hearing hereunder. The Administrative Law Judge may, as permitted by law, change the time for beginning any hearing, continue or adjourn a hearing from time to time, and change the location of the hearing.

(e) *Call for further evidence, oral arguments, briefs, or reopening of hearing.* The Administrative Law Judge may call for the production of further evidence upon any issue, may permit oral argument and submission of briefs at or following the hearing, and, upon appropriate notice, may reopen the hearing at any time prior to the filing of his recommended decision with the Secretariat.

§ 509.25 Private and public hearings.

(a) All hearings shall be private and shall be attended only by the parties, their representatives or counsel, witnesses while testifying, and other persons having an official interest in the proceeding unless the Board determines that a public hearing should be held pursuant to this section. Unless an exception is granted by the Administrative Law Judge in response to a motion by a party, all witnesses shall be sequestered.

(b) Unless otherwise ordered by the Board as provided in paragraph (c) of this section or required by law, the entire record in any proceeding under this part, including, but not limited to, the notice, answer, the transcript, exhibits, proposed findings of fact and conclusions of law, briefs, recommended decision of the Administrative Law Judge, exceptions thereto, the decision and order of the Board, and any other papers and documents that are filed in connection with the proceeding shall not be made public, and shall be for the confidential use only of the Board and its staff, the Administrative Law Judge, the parties, and appropriate supervisory authorities.

(c) Where the Board, in its discretion, after fully considering the views of the party afforded the hearing, determines that a public hearing is necessary to protect the public interest, the Board may order that the hearing be public. In any public hearing, the Administrative Law Judge shall have the authority to take all appropriate steps, including closing portions of the hearing to the public and admitting materials into the record under seal, to protect the reputation and integrity of any nonparties to the proceeding.

§ 509.26 Summary disposition.

(a) *Filing of motions and responses.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for summary disposition in his favor of all or any part of the proceeding. Such motion may be filed at any time. Any party, within 20 days after service of such a motion, or within such further time period as the Administrative Law Judge may allow, may serve an opposition to such motion and/or may countermove for summary disposition. Following receipt of a motion for summary disposition and all responses thereto and any further written submission and/or oral argument he deems appropriate, the Administrative Law Judge shall submit a recommended decision to the Board in accordance with the provisions of § 509.27(c) and of paragraph (d) of this section if he finds that summary disposition is warranted. No such recommended decision need be filed with the Board if the Administrative Law Judge finds that no party is entitled to summary disposition. If the Administrative Law Judge determines that a party is entitled to summary disposition as to certain claims only, he may defer submitting a recommended decision as to those claims until he files his recommended decision at the conclusion of the hearing. If the Administrative Law Judge

determines that a party is entitled to an order based on the presence in one or more transaction(s) or occurrence(s) of all statutory elements necessary to support such an order, he may recommend that the Board issue such an order based on such transaction or occurrence even though he may make no such finding with respect to other transactions or occurrences contained in the notice.

(b) *Supporting papers.* A motion for summary disposition shall be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue, supported by documentary evidence, admissions in pleadings, stipulations, depositions, and any other evidentiary materials that the moving party contends support his position. The motion shall also be accompanied by a brief containing the points and authorities in support of the contention of the party making the motion. Any party opposing a motion for summary disposition shall file a statement setting forth those material facts as to which he contends a genuine dispute exists, supported by evidence of the same type required to be submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate. A party opposing a motion for summary disposition may argue that, although there is no dispute as to the material facts, the law is unclear or contrary to the position urged by the moving party or that the circumstances are such that a different remedy or result is appropriate. In this event, the party's submission shall clearly set forth such legal differences or circumstances and a discussion of the appropriate result or remedy.

(c) *Hearing on motion.* At the request of any party or *sua sponte*, the Administrative Law Judge may convene a hearing on any motion for summary disposition for the purpose of receiving oral argument on the motion.

(d) *Recommended decision on motion.* The Administrative Law Judge shall recommend that the Board issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, stipulations, documentary evidence, deposition transcripts, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with the motion show that: (1) There is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed on the record; and (3) the moving party is entitled to a decision in his favor as a matter of law.

§ 509.27 Proposed findings of fact and conclusions of law and recommeded decision.

(a) *Proposed findings of fact and conclusions of law.* Each party shall have a period of 30 days after the submission of the hearing transcript to the Administrative Law Judge following the close of the hearing, or such further time as the Administrative Law Judge for good cause may allow, to serve proposed findings of fact and conclusions of law, which may be accompanied by a brief in support thereof. Such proposals shall be supported by citation of such statutes, decisions and other authorities, and page references to such portions of the record as may be relevant. Each party may serve a reply brief within 20 days of service of the other parties' proposed findings of fact and conclusions of law and accompanying briefs. All such proposals and briefs shall become a part of the record.

(b) *Recommended decision and filing of record.* The Administrative Law Judge shall, within 30 days after the expiration of the time allowed under paragraph (a) of this section, or within such further time as the Board for good cause may allow, file with the Secretariat and certify to the Board for decision the entire record of the hearing, which shall include his recommended decision in accordance with section 557 of Title 5 of the United States Code, the transcript, and the exhibits (including, on request of any of the parties, any exhibits excluded from evidence or tenders of proof), exceptions, rulings, and all pleadings, briefs, and other materials filed in connection with the hearing. Promptly upon such filing, the Secretariat shall serve upon each party to the proceeding a copy of the recommended decision. The provisions of this paragraph (b) shall not apply in any case where the hearing was held before the Board.

§ 509.28 Briefs.

(a) *Contents.* All briefs shall be confined to the particular matters in issue. Each proposed finding of fact, conclusion of law, or exception that is briefed shall be supported by a concise argument and by citation of such statutes, decisions, and other authorities and by page references to such portions of the record as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief with appropriate references to the transcript.

(b) *Reply briefs.* Reply briefs may be served within 20 days after service of original briefs of opposing parties, or such further time as the Administrative Law Judge may permit, and shall be confined to matters in opening briefs. Further briefs may be filed only with the express permission of the Administrative Law Judge.

(c) *Delayed filing.* Briefs not served on or before the time fixed in this part will be received only upon special permission of the Administrative Law Judge.

§ 509.29 Exceptions.

(a) *Filing.* Within 30 days after service of the recommended decision of the Administrative Law Judge or such further time as the Board for good cause shall allow, any party (other than a party who has not filed an answer in accordance with § 509.14(a)), may serve and file with the Secretariat exceptions thereto or to any portion thereof, or the failure of the Administrative Law Judge to make any recommendation, finding, or conclusion, or to the admission or exclusion of evidence, or to any other ruling of the Administrative Law Judge supported by such brief as may appear advisable.

(b) *Waiver.* Failure of a party to serve and file exceptions to the recommended decision of the Administrative Law Judge or any portion thereof, or to his failure to adopt a proposed finding or conclusion, or to the admission or exclusion of evidence, or to any other ruling of the Administrative Law Judge within the time allowed under paragraph (a) of this section, shall be deemed to be a waiver of objection thereto.

(c) *Review by the Board on its own initiative.* The Board may, on its own initiative, undertake review of a recommended decision of an Administrative Law Judge within 30 days after the recommeded decision has been served on all parties. Notice of any order of the Board directing review on its own initiative shall be served on all parties by the Secretariat.

§ 509.30 Oral argument before the Board.

Upon the Board's own initiative or upon the written request of any party made within the time for filing exceptions to the recommeded decision (or any part thereof) of the Administrative Law Judge, the Board or its designee(s) may order and hear oral argument on all or any part of the recommended decision and the findings and conclusions on which the recommended decision or such part thereof is based. Such written request

must show good cause for oral argument, including reasons why arguments have not been or cannot be, presented adequately in writing. Oral argument before the Board shall be recorded by the Secretariat.

§ 509.31 Notice of submission to the Board.

Upon the filing of the record with the Secretariat, and upon the expiration of the time for the filing of exceptions and all briefs, including reply briefs or any further briefs permitted by the Board, and upon the hearing of any oral argument ordered by the Board, the Secretariat shall notify the parties in writing that the case has been sumbitted to the Board for final decision.

§ 509.32 Decision of the Board.

(a) Employees of the Board who have not engaged in any way in the performance of investigatory or adjudicatory functions in connection with a proceeding may advise and assist the Board in the consideration of the proceeding. The Board shall consider the recommeded decision and the whole record on review and shall base its determination thereon.

(b) The Board shall render its final decision within 90 days after the Secretariat has notified the parties, pursuant to § 509.31 of this part, that the case has been submitted to the Board for final decision, unless within such 90-day period the Board shall order that such notice be set aside and the case reopened for further proceedings. Copies of the decision and order of the Board shall be served by the Secretariat upon each party to the proceeding and, if directed by the Board or required by statute, upon any appropriate State supervisory authority.

Subpart B—Assessment of Civil Money Penalties

§ 509.33 Scope.

The rules and procedures in this Subpart and in subpart A shall apply to proceedings under section 407(k)(3) of the NHA, 12 U.S.C. 1730(k)(3), section 408(j)(4)(C) of the NHA, 12 U.S.C. 1730a(j)(4)(C), and section 5(d)(8)(B) of the HOLA, 12 U.S.C. 1464(d)(8)(B), to determine whether and/or to what extent civil penalties should be assessed against insured institutions, their affiliates, service corporations, savings and loan holding companies, subsidiaries thereof, and/or related officials in violation of any order issued under the Board's cease-and-desist authority or any provision of section 408 of the NHA, 12 U.S.C. 1730a *et seq.* or any regulation (see Parts 583 and 584 of this Subchapter F of this chapter) or order issued pursuant thereto.

§ 509.34 Notice of assessment; request for hearing; answer.

Proceedings to assess civil money penalties shall be commenced by service of a notice of assessment of civil money penalty. The notice shall contain a statement of the facts constituting the grounds for the assessment of the penalty, the amount of the civil money penalty being assessed, and the date by which the penalty must be paid and shall inform the party being assessed of its right to request a hearing to challenge the assessment of the penalty within 10 days of service of the notice. If a hearing is not requested within the prescribed 10 day period, the assessment shall constitute a final and unappealable order of the Board. A party requesting a hearing shall file an answer as prescribed in § 509.14.

§ 509.35 Notice of hearing.

A party requesting a hearing shall be informed by notice of the time and place set for the hearing. The notice of hearing shall be served at least 30 days in advance of the date set for the hearing and shall order the hearing to commence within 60 days after receipt of the request for a hearing. Any party afforded a hearing who does not appear at the hearing personally or through a duly authorized representative shall be deemed to have consented to the issuance of an assessment order.

§ 509.36 Assessment orders.

In the event of consent, or if upon the record developed at the hearing, the Board finds that any of the grounds specified in the notice of assessment has been established, the Board may serve an order of assessment of civil money penalty upon the party concerned. An assessment order shall be effective immediately upon service or upon such other date as may be specified therein and shall remain effective and enforceable until it is stayed, modified, terminated, or set aside by the Board or by a reviewing court.

§ 509.37 Payment of civil penalty.

(a) Civil penalties assessed pursuant to this Subpart B are payable and to be collected within 60 days after the issuance of the notice of assessment, unless the Board fixes a different time for payment where it determines that the purpose of the penalty would be better served thereby: *Provided, however,* That if a party has made a timely request for a hearing to challenge the assessment of the penalty, the party shall not be required to pay such penalty until the Board has issued a final order of assessment following the hearing. In such cases, the penalty shall be paid within 60 days of service of such order unless the Board fixes a different time for payment.

(b) Checks in payment of civil penalties shall be made payable to the Treasurer of the United States and sent to the Controller's Division of the Board. Upon receipt, the Board shall forward the check to the Treasury of the United States.

§ 509.38 Relevant considerations.

In determining the amount of the penalty to be assessed in any proceeding under this part, the Board shall consider the financial strength and good faith of the party against whom the penalty is to be assessed, the gravity of the violation, any previous violations, and such other matter as justice may require.

PART 512—RULES FOR INVESTIGATIVE PROCEEDINGS AND FORMAL EXAMINATION PROCEEDINGS

2. The authority citation for Part 512 is revised to read as follows:

Authority: Sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402, 407, 48 Stat. 1256, 1260, as amended (12 U.S.C. 1725, 1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); sec. 12, 48 Stat. 892, as amended (15 U.S.C. 78*l*); Reorg. Plan. No. 3 of 1947; 3 CFR 1943–1948 Comp.

3. Section 512.1 is revised to read as follows:

§ 512.1 Scope of part.

This part prescribes rules of practice and procedure applicable to the conduct of investigative proceedings under section 408(h)(2) of the National Housing Act, as amended, 12 U.S.C. 1730a(h)(2) ("Act") and to the conduct of formal examination proceedings with respect to insured institutions and their affiliates under section 407 (m)(2) or (q)(16) of the Act, as amended, 12 U.S.C. 1730 (m)(2) or (q)(16). This part does not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in Part 509 of this subchapter.

4. Section 512.2(c) is revised to read as follows:

§ 512.2 Definitions.

* * * * *

(c) "Formal examination proceeding" means the administration of oaths and affirmations, taking and preserving of testimony, requiring the production of books, papers, correspondence,

memoranda, and all other records, the issuance of subpoenas, and all related activities in connection with examination of insured institutions and their affiliates conducted pursuant to section 407 (m)(2) or (q)(16) of the Act; and

* * * * *

5. Section 512.3 is revised to read as follows:

§ 512.3 Confidentiality of proceedings.

All formal examination proceedings shall be private and, unless otherwise ordered by the Board, all investigative proceedings shall also be private. Unless otherwise ordered or permitted by the Board, or required by law, and except as provided in §§ 512.4 and 512.5, the entire record of any investigative proceeding or formal examination proceeding, including the resolution of the Board or its delegate(s) authorizing the proceeding, the transcript of such proceeding, and all documents and information obtained by the designated representative(s) during the course of said proceedings shall be confidential.

6. Section 512.4 is revised to read as follows:

§ 512.4 Transcripts.

Transcripts or other recordings, if any, of investigative proceedings or formal examination proceedings shall be prepared solely by an official reporter or by any other person or means authorized by the designated representative. A person who has submitted documentary evidence or given testimony in an investigative proceeding or formal examination proceeding may procure a copy of his own documentary evidence or transcript of his own testimony upon payment of the cost thereof; *Provided,* That a person seeking a transcript of his own testimony must file a written request with the Director or any Deputy Director of the Office of Enforcement stating the reason he desires to procure such transcript, and said persons may for good cause deny such request. In any event, any witness (or his counsel) shall have the right to inspect the transcript of the witness' own testimony.

7. Sections 512.5(b)(1) and (b)(2) are revised to read as follows:

§ 512.5 Rights of witnesses.

* * * * *

(b) * * *

(1) Such attorney shall be a member in good standing of the bar of the highest court of any State, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice by the bar of any such political entity or before the Board in accordance with the provisions of Part 513 of this subchapter and has not been excluded from the particular investigative proceeding or formal examination proceeding in accordance with paragraph (b)(3) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of his testimony and may briefly question the witness, on the record, at the conclusion of his testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes solely for his use in representing his client. All witnesses shall be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be permitted to be present during the taking of testimony of any other witness called in such proceeding. Neither attorney(s) for the institution(s) that are the subjects of the investigative proceedings or formal examination proceedings, nor attorneys for any other interested persons, shall have any right to be present during the testimony of any witness not personally being represented by such attorney.

* * * * *

§ 512.5 [Amended]

8. Section 512.5 is amended by removing paragraph (c).

9. Section 512.7 is revised to read as follows:

§ 512.7 Subpoenas.

(a) *Service.* Service of a subpoena in connection with any investigative proceeding or formal examination proceeding shall be effected in the following manner:

(1) *Service upon a natural person.* Service of a subpoena upon a natural person may be affected by handing it to such person; by leaving it at his office with the person in charge thereof, or, if there is no one in charge, by leaving it in a conspicuous place therein; by leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; by mailing it to him by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to him.

(2) *Service upon other persons.* When the person to be served is not a natural person, service of the subpoena may be effected by handing the subpoena to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; by mailing it to any such representative by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to such person.

(b) *Motions to quash.* Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the Director or any Deputy Director of the Office of Enforcement to quash or modify such subpoena, accompanying such application with a statement of the reasons therefor. The Director or the Deputy Director, as appropriate, may: (1) Deny the application; (2) quash or revoke the subpoena; (3) modify the subpoena; or (4) condition the granting of the application on such terms as the Director or Deputy Director determines to be just, reasonable, and proper.

(c) *Attendance of witnesses.* Subpoenas issued in connection with an investigative proceeding or formal examination proceeding may require the attendance and/or testimony of witnesses from any State or territory of the United States and the production by such witnesses of documentary or other tangible evidence at any designated place where the proceeding is being (or is to be) conducted. Foreign nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States.

(d) *Witness fees and mileage.* Witnesses summoned in any proceeding under this part shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 89-14821 Filed 6-22-89; 8:45 am]

BILLING CODE 6720-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88-NM-176-AD; Amdt. 39-6243]

Airworthiness Directives; Lockheed Model L-188A and L-188C Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Lockheed Model L-188A

and L–188C series airplanes, which requires inspection and rework or replacement, if necessary, of the flap asymmetry shutoff valve; inspection and rework or replacement, if necessary of the flap asymmetry universal joints; and modification of the annunciator light wiring. This amendment is prompted by reports of flap asymmetry. This condition, if not corrected, could lead to control difficulties at low altitude on takeoff or landing.

EFFECTIVE DATE: July 24, 1989.

ADDRESSES: The applicable service information may be obtained from Lockheed Aeronautical Systems Company, P.O. Box 551, Burbank, California 91520, Attention: Commercial Order Administration, Dept. 65–33, U–33, B–1. This information may be examined at the FAA, Transport Airplane Directorate, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Los Angeles Aircraft Certification Office, 3229 East Spring Street Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. William Roberts, Aerospace Engineer, Airframe Branch, ANM–121L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806–2425; telephone (213) 988–5228.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include a AD, applicable to Lockheed L–188A and L–188C series airplanes, which requires inspection of flap asymmetry system components, and rework or replacement, if necessary, was published in the **Federal Register** on December 8, 1988 (53 FR 49558).

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

The manufacturer stated that, because there have been very few service problems over the years related to the unsafe condition addressed, the proposed AD is not justified. The manufacturer indicated that the incident which occurred in May 1988 was the only recent problem reported in a number of years, and the only one of its type. The FAA does not agree. The May 1988 incident is the third report of flap asymmetry problems. During this incident, the pilot-in-command on a training flight experienced flap asymmetry and, because the annunciator light did not function, could not locate the source of the problem in time to prevent loss of roll control at low altitude. The FAA has determined this to be an unsafe condition and, therefore, considers this AD action justified.

The manufacturer requested the paragraph A.2. be revised with an objective to provide positive engagement to the splined ends of the torque tubes. The change would modify the valve by adding pins through each side (two per joint); modified joints may then be returned to service. The manufacturer requested that this procedure, which has the advantage of salvaging existing parts, be considered as an acceptable alternative method to that proposed in the Notice. The FAA concurs with the commenter and has determined that this alternate procedure has the same objective as the proposed requirements of paragraph A.2. The final rule has been revised to include a new paragraph A.3. which contains the alternate procedure.

The manufacturer also requested that the portions of proposed paragraph B.1. concerning inspections of *torque tubes and bearings* be deleted, since there is no evidence to show that current maintenance plans are inadequate so as to require a special system check. The FAA concurs with the commenter. After further evaluation, the FAA finds that there is no service history to indicate a need for inspection of torque tubes and bearings. Accordingly, this proposed requirement has been deleted from the final rule. (The portions of proposed paragraph B.1. concerning inspections to determine *spline engagement* are retained in a separate paragraph).

The manufacturer suggested that the proposed compliance time of 90 days was restrictive and should be extended, since it did not match the time when valves would be available from the supplier. The manufacturer's informal quotations from the valve supplier indicate that it would require a minimum of 150 to 180 days after receipt of an order to obtain valve modification parts kits (not including valve body modification), or 210 to 330 days to obtain new valves. The manufacturer stated that in either case, an operator with a discrepant valve could face a potential aircraft grounding action. In light of this time involved for replacement of a valve, the manufacturer also requested that paragraph B.2. be clarified to define an acceptable repair procedure. The FAA does not concur with the suggestion to extend the compliance time. Operators have several options to choose from in complying with the AD; specifically, compliance can be achieved by replacement with a new valve, refurbishment with a parts kit, or disassembly, repair, and reassembly. The repair can consist of rebuilding or replacing unserviceable parts. In developing and appropriate compliance time for this AD action, the FAA considered not only the degree of urgency associated with correcting the unsafe condition, but the practical aspect of obtaining and installing required parts, and scheduling required repairs. Based on the data available to the FAA, concern by the commenter that airplanes could be grounded is not the burden it is represented to be, since the option is present to repair the valve independently of parts obtained from the valve supplier. The FAA has determined that 90 days after the effective date of this final rule is sufficient time to perform the valve teardown, repair, and reassembly. Further, under the provisions of paragraph E., operators are also offered the opportunity to propose an alternate means of compliance.

Another commenter, an operator, proposed that the wording in paragraph B. regarding the requirement for verifying spline engagement be revised to indicate that engagement must be ".375-inch, as specified in the maintenance manual." This operator also noted that the distance between torque tube shoulders (5.50 to 5.87 inches, for example), which is a second method of controlling spline engagement, was only an approximation. The FAA concurs and has revised the final rule to include both methods for determining acceptable spline engagement.

The operator also noted that the phrase, "approved by the Manager, Los Angeles Aircraft Certification Office [ACO]," references gaining approval for something not already approved in any source document, such as a service bulletin, and requested that the rule specify exactly what constitutes such an approval. The operator questioned the means by which the Manager approves repairs and modifications, and the appropriateness of this procedure. The operator suggested that problems will arise if each operator must have its own method of complying with each portion of the proposed AD approved personally by the Manager of the ACO. The FAA does not concur with the commenter's concerns as to the appropriateness of this requirement. It is the obligation of the FAA to address identified unsafe conditions, and notify affected operators by way of AD rulemaking. At the time this rulemaking was initiated, the FAA alerted the manufacturer that appropriate service information would be required. In cases where a manufacturer's service information has

not been released by the time an AD is issued, the FAA has determined that, in the interim, it is necessary to require necessary action or modification "in a manner approved by the FAA." Although the relevant rework drawings or service bulletins for this final rule are not available from the manufacturer at this time, operators should find that, on the first occurrence of their need for the data, the manufacturer will have completed its preparation of the service information. Operators are also offered the opportunity to propose alternate means of compliance, as provided by paragraph E.

The operator also requested clarification of which inspections may be terminated when replacement of the wing flap asymmetry shutoff valve is accomplished. The final rule has been clarified accordingly to show that replacement with shutoff valve, P/N 668225–1 (the same part number as the current valve) is not terminating action, and continued repetitive inspections would be required. Replacement with a modified or new valve, P/N 668225–101, constitutes terminating action for the repetitive inspections of the valves required by paragraph C of the final rule.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the following rule with the changes previously described. These changes will neither increase the economic burden on any operator nor increase the scope of the rule.

It is estimated that there are approximately 97 Model L–188 series airplanes of the affected design in the worldwide fleet. It is estimated that 45 airplanes of U.S. registry will be affected by this AD, that it will take approximately 140 manhours per airplane to accomplish the required actions, and that the average 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 $252,000.

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 would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (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) will not have a significant economic impact, positive or negative, on a substantial number of small entities, under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

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:

PART 39—[AMENDED]

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

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

2. Section 39.13 is amended by adding the following new airworthiness directive:

§ 39.13 [Amended]

Lockheed Aeronautical Systems Company: Applies to Lockheed Model L–188A and L–188C series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent airplane control difficulties due to flap asymmetry, accomplish the following:

A. Within 90 days after the effective date of this AD, inspect the flap universal joints to determine if they are splined without a stop.

Note: Flap universal joints that are splined without a stop are easily detected by the lack of a screw and washer that holds the pins in place.

If they do not have a stop, accomplish one of the following:

1. Remove from service any flap universal joints that are splined without a stop and install universal joints that are splined with a stop; or

2. Cut a circumferential groove into the splines of the torque tube shafts on each side of the universal joints (1 inch from the end of the shaft) and install a snap ring, in a manner approved by the Manager, Los Angeles Aircraft Certification Office, Northwest Mountain Region. The snap ring is to eliminate the possibility of spline disengagement. The snap ring should completely encircle the shaft; or

3. Modify each universal joint by drilling a hole and installing a ⅛-inch diameter steel pin through each side (two per joint). Locate the pin from .7- to .8-inch from each end, and locate so as to intersect the spline centerline. Peen both pin ends. This modification must be accomplished in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office, Northwest Mountain Region.

Note: Local spotfacing may be necessary on pins located at maximum dimension.

B. Within 90 days after the effective date of this AD and thereafter at intervals not to exceed one year, verify proper torque tube-to-universal joint engagement of .375-inch, as specified in Detail E of the L–188 Maintenance Manual, Section 27–6–8, Figure 201; and verify that the distance between the edges of the torque tube shoulders at BL55 is 5.5 to 5.87 inches (universal joints with internal stop), or 6.0 to 6.6 inches for universal joints reworked with added stop pins.

C. Within 90 days after the effective date of this AD and thereafter at intervals not to exceed one year, inspect the wing flap asymmetry shutoff valves, P/N 668225–1, to ascertain whether the valves hang up or respond slowly (greater than 1 second).

1. If the valves hang up or respond slowly, prior to further flight, install a functioning serviceable valve of the same part number (P/N 668225–1) and repeat the inspections at intervals not to exceed one year.

2. Installation of modified valve, P/N 668225–101, or a new valve, P/N 668225–101, in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office, Northwest Mountain Region, constitutes terminating action for the repetitive inspections of the wing flap asymmetry shutoff valves required by paragraphs C. and C.1., above.

D. Within 90 days after the effective date of this AD, rewire the flap asymmetry annunciator light in the cockpit to trigger the annunciator, in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office, Northwest Mountain Region, so that the light in the cockpit will illuminate when the asymmetry detector is tripped and not be dependent on the shutoff valve.

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

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Los Angeles Aircraft Certification Office.

F. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a base to accomplish the actions 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 Lockheed Aeronautical Systems Company, P.O. Box 551, Burbank, California 91520, Attn: L–188 Commercial Support Contracts, Dept. 63–11, Unit 33. These documents may be examined at the FAA, Northwest

Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or 3229 East Spring Street, Long Beach, Califonria.

This amendment becomes effective July 24, 1989.

Issued in Seattle, Washington, on June 8, 1989.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-14904 Filed 6-22-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 89-AGL-3]

Establishment of Transition Area; Chetek, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The nature of this action is to establish the Chetek, WI, transition area to accommodate a new VOR/DME Runway 17 Standard Instrument Approach Procedure (SIAP) to Chetek Municipal-Southworth Airport, Chetek, WI. The intended effect of this action is to ensure segregation of the aircraft using approach procedures in instrument conditions from other aircraft operating under visual weather conditions in controlled airspace.

EFFECTIVE DATE: 0901 u.t.c., September 21, 1989.

FOR FURTHER INFORMATION CONTACT: Harold G. Hale, Air Traffic Division, Airspace Branch, AGL-520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7360.

SUPPLEMENTARY INFORMATION:

History

On Friday, February 24, 1989, the Federal Aviation Administration (FAA) proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish a transition area airspace near Cheteck, WI (54 FR 7952), as corrected on Friday, April 7, 1989, (54 FR 14098). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

Except for editorial changes, this amendment is the same as that proposed in the notice as corrected. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6E dated January 3, 1989.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations establishes a transition area airspace near Chetek, WI. The development of a new VOR/DME Runway 17 SIAP requires that the FAA designate airspace to insure that the procedure will be contained within controlled airspace. The minimum descent altitude for this procedure may be established below the floor of the 700-foot controlled airspace.

Aeronautical maps and charts will reflect the defined areas which will enable other aircraft to circumnavigate the area in order to comply with applicable visual flight rule requirements.

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

List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

Adoption of the Amendment

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

Chetek, WI [New]

That airspace extending upward from 700 feet above the surface within a 5-mile radius of the Chetek Municipal-Southworth Airport (lat. 45° 18' 24" N., long. 91° 38' 18" W.); within 4.75 miles each side of the Rice Lake VOR/DME (lat. 45° 28' 33" N., long. 91° 43' 30" W.) 159 radial extending from the 5-mile radius to 12.5 miles northwest of the Chetek Municipal-Southworth Airport, excluding that portion which overlies the Rice Lake, WI, transition area.

Issued in Des Plaines, Illinois on June 12, 1989.

Teddy W. Burcham,

Manager, Air Traffic Division.

[FR Doc. 89-14900 Filed 6-22-89; 8:45 am]

BILLING CODE 4910-13-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3606-1]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision; Fresno County Air Pollution Control District and South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of final rules.

SUMMARY: The purpose of this action is to withdraw approval of revisions to the California State Implementation (SIP) for the Fresno County Air Pollution Control District (APCD) and the South Coast Air Quality Management District (AQMD). These revisions consist of rules which were approved on April 10, 1989 (54 FR 14224). The intent of this action is to provide a public comment period for the revisions. EPA is publishing a notice of proposed rulemaking elsewhere in today's **Federal Register** on these rules. EPA is taking this action in accordance with the procedures described in the April 10, 1989, final rulemaking notice.

DATE: This action is effective June 23, 1989.

ADDRESSES: Copies of the Fresno County APCD and South Coast AQMD submittal are available for public inspection during normal business hours at the EPA Region 9 office and the following locations:

California Air Resources Board, Stationary Source Division, Criteria Pollutants Branch, Industrial Section, 1025 "P" Street, Room 210, Sacramento, CA 95814.

Fresno County Air Pollution Control District, 1221 Fulton Mall, Fresno, CA 93775.

South Coast Air Quality Management District, 9150 Flair Drive, El Monte, CA 91731.

FOR FURTHER INFORMATION CONTACT: Cynthia G. Allen, A–2–3, State Implementation Plan Section, Air Programs Branch, Air and Toxics Division, Environmental Protection Agency, Region 9, 215 Fremont Street, San Francisco, CA 94105, (415) 974–7635.

SUPPLEMENTARY INFORMATION:

Background

On June 4, 1986, the California Air Resources Board officially submitted to EPA a set of revisions to the California SIP. These revisions included Fresno County Rules 102, 111, 609, 613, 613.1, 613.2, 613.3, 613.4, and 614 and South Coast Rule 209.

On April 10, 1989, EPA approved these submittals as a revision to the California SIP. (For further information about these revisions, see 54 FR 14224.)

In the approval notice EPA advised the public that the effective date of approval would be deferred for 60 days to provide an opportunity to submit comments on the revisions. EPA announced that, if, within 30 days of the publication of the approval notice, EPA received notice that someone wished to submit an adverse or critical comment, it would withdraw its approval and begin a new rulemaking by proposing the action and establishing a 30-day comment period.

Comments were received by EPA concerning the rule revisions listed above. Therefore, in accordance with the procedures described above, EPA is today withdrawing its April 10, 1989 approval of these revisions and is proposing to approve the Fresno Rules and the South Coast Rule elsewhere in today's Federal Register.

EPA is withdrawing the original approval without providing prior notice and opportunity to comment because it finds there is good cause within the meaning of 5 U.S.C. 553(b) to do so. Notice and comment would be impractical because EPA needs to withdraw its approval quickly in order to consider the comments which members of the public want to submit. In addition, further notice is not necessary because EPA has already informed the public that it would follow this procedure if notice were received that adverse or critical comments will be submitted. For the same reasons, EPA finds it has good cause under 5 U.S.C. (b) to make this withdrawal immediately effective.

The Office of Management and Budget has exempted this action from the requirements of Section 3 of Executive Order 12291.

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen oxide, Ozone, Particulate matter, and Reporting and recordkeeping requirements.

Dated: June 14, 1989.

Daniel W. McGovern,

Regional Administrator.

Subpart F of Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

Subpart F—California

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. Section 52.220 is amended by removing and reserving paragraph (c)(169) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(169) [Reserved]

[FR Doc. 89–14870 Filed 6–22–89; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 81

[FRL–3606–7]

Designation of Areas for Air Quality Planning Purposes; Attainment Status Designations: Wisconsin

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Notice of final rulemaking.

SUMMARY: In a November 7, 1988 (53 FR 44912), notice, USEPA proposed to disapprove a request from the State of Wisconsin to revise the attainment status designation, at 40 *Code of Federal Regulations* (CFR) 81.350, for a sub-city area of Racine, Racine County, Wisconsin, from secondary nonattainment to attainment relative to the former total suspended particulates (TSP) National Ambient Air Quality Standards (NAAQS). Under the Clean Air Act (CAA) and USEPA's transitional particulate matter policy (July 1, 1987, 52 FR 24682), TSP designations can continue to be changed if sufficient data are available to warrant such a change. USEPA continues to process TSP redesignation requests, because various regulatory provisions remain tied to the TSP attainment status.

USEPA is disapproving Wisconsin's redesignation request because the Wisconsin Department of Natural Resources (WDNR) failed to provide sufficient evidence that (1) the monitoring data were representative of worst-case ambient concentrations, (2) emission reductions were federally approved, permanent, and resulted in the decrease in ambient concentrations, and (3) dispersion techniques were not responsible for the improvement in air quality. These redesignation criteria are contained in an April 21, 1983, memorandum entitled "Section 107 Designation Policy Summary" from Sheldon Meyers, then Director, Office of Air Quality Planning and Standards (OAQPS), and a September 30, 1985, memorandum entitled "Total Suspended Particulate (TSP) Redesignations" from Gerald A. Emison, Director, OAQPS.

DATE: This final rulemaking becomes effective July 24, 1989.

ADDRESSES: Copies of the redesignation request, technical support documents and the supporting air quality data are available at the following addresses:

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch (5AR–26), 230 South Dearborn Street, Chicago, Illinois 60604.

Wisconsin Department of Natural Resources, Bureau of Air Management, 101 South Webster, Madison, Wisconsin 53707.

FOR FURTHER INFORMATION CONTACT: Uylaine E. McMahan, (312) 886–6031.

SUPPLEMENTARY INFORMATION: Under section 107(d) of the CAA, the Administrator of USEPA has promulgated the NAAQS attainment status designations for all areas within each State. For Wisconsin, see 43 FR 8962 (March 3, 1978), 43 FR 45993 (October 5, 1978), and 40 CFR 81.350. These area designations are subject to revision whenever sufficient data become available to warrant a redesignation. A sub-city area of Racine, Wisconsin, was designated as not attaining the secondary TSP standard. On July 23, 1987, pursuant to section 107(d)(5) of the CAA, the WDNR requested that the sub-city nonattainment area of Racine [1] be

[1] The Racine sub-city nonattainment area is defined as follows: North—Douglas Avenue north from Marquette Street to Rapids Drive, northwest on Rapids Drive to intersection with Forest Street west to intersection with west boundary. West—North from corner of Grange Avenue and Washington Avenue north to Freres Avenue north to intersection with north boundary. South—Washington Avenue west from Grange Avenue to Marquette Street. East—Marquette Street north from Washington Avenue to Douglas Avenue.

redesignated to attainment of the TSP NAAQS.

For areas designated nonattainment for TSP, a TSP State Implementation Plan (SIP) was required which satisfied the requirements of section 110(a) and Part D of the CAA, including assuring the attainment and maintenance of the TSP NAAQS. USEPA revised the particulate matter standard on July 1, 1987 (52 FR 24634), and eliminated the TSP ambient air quality standard. The revised standard is expressed in terms of particulate matter with nominal diameter of 10 micrometers or less (PM_{10}). USEPA will continue to process redesignations of areas from nonattainment to attainment for TSP in keeping with past policy, because various regulatory provisions such as new source review and prevention of significant deterioration are keyed to the attainment status of areas. The July 1, 1987, notice (page 24682, column 1) described USEPA's transition policy regarding TSP redesignations. According to USEPA's transition policy, TSP redesignation requests are to be reviewed for compliance with USEPA's redesignation policies issued in memoranda on April 21, 1983, and September 30, 1985. These are: (1) Eight consecutive quarters of the most recent air quality data must reveal no violation of the TSP NAAQS and the monitoring data must be representative of worst-case ambient concentrations, (2) improvement in monitored readings for TSP must be attributable to implementation of a USEPA approved control strategy, (3) emission reductions and improvements must be permanent, and (4) dispersion techniques must not be responsible for the improvement in air quality.

USEPA proposed to disapprove Wisconsin's redesignation request on November 7, 1987. No comments on this notice of proposed rulemaking were received.

Conclusion

USEPA is disapproving the redesignation request for a sub-city nonattainment area of Racine, Wisconsin, because the WDNR did not (1) submit sufficient documentation as to the reasons for air quality improvement in Racine, (2) make a finding as to whether current air quality will be maintained, or (3) address dispersion techniques.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 22, 1989. This action may not be challenged later in the proceedings to enforce its requirements. (See 307(b)(2).)

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

List of Subjects in 40 CFR Part 81

Air pollution control, Environmental protection, National parks, Wildnerness areas.

Authority: 42 U.S.C. 7401–7642.

Date: June 7, 1989.

Valdas V. Adamkus,

Regional Administrator.

[FR Doc. 89–14915 Filed 6–22–89; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 81

[FRL–3606–6]

Designation of Areas for Air Quality Planning Purposes; Attainment Status Designations; Wisconsin

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Notice of final rulemaking.

SUMMARY: In a June 29, 1988 (53 FR 24459), notice, USEPA proposed to disapprove a request from the State of Wisconsin to revise the attainment status designation, at 40 *Code of Federal Regulations* (CFR) 81.350, for a sub-city area in the City of Beloit, Rock County, Wisconsin, from secondary nonattainment to attainment relative to the former total suspended particulates (TSP) National Ambient Air Quality Standards (NAAQS). Under the Clean Air Act (CAA) and USEPA's transitional paticulate matter policy (July 1, 1987, 52 FR 24682), TSP designations can continue to be changed if sufficient data are available to warrant such a change. USEPA continues to process TSP redesignation requests, because various regulatory provisions remain tied to the TSP attainment status.

In today's final notice USEPA is instead approving Wisconsin's redesignation request because the Wisconsin Department of Natural Resources (WDNR) provided during the public comment period sufficient evidence that (1) eight consecutive quarters of the most recent air quality data revealed no TSP NAAQS violations and the monitoring data were representative of worst-case ambient concentrations, (2) the decrease in ambient TSP concentrations is as attributed to an implemented SIP and permanent emission reductions, and (3) dispersion techniques were not responsible for the improvement in air quality. These redesignation criteria are contained in an April 21, 1983, memorandum entitled "Section 107 Designation Policy Summary" from Sheldon Meyers, then Director, Office of Air Quality Planning and Standards (OAQPS), and a September 30, 1985, memorandum entitled "Total Suspended Particulate (TSP) Redesignations" from Gerald A. Emison, Director, OAQPS.

Although USEPA has previously proposed rulemaking on this package, it is treating it today as a "direct final" rulemaking, because its earlier proposal was a proposal to disapprove Wisconsin's redesignation request. Thus, this action will be effective August 22, 1989, unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

DATE: Any adverse comments must be submitted by July 24, 1989. This final rulemaking becomes effective August 22, 1989. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Copies of the redesignation request, technical support documents and the supporting air quality data are available at the following addresses.

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch (5AR–26), 230 South Dearborn Street, Chicago, Illinois 60604

Wisconsin Department of Natural Resources, Bureau of Air Management, 101 South Webster, Madison, Wisconsin 53707.

Adverse comments on this proposed rule, if any, should be addressed to: (Please submit an original and three copies, if possible)

Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR–26), U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Uylaine E. McMahan, (312) 886–6031.

SUPPLEMENTARY INFORMATION: Under section 107(d) of the CAA, the Administrator of USEPA has promulgated the NAAQS attainment status for all areas within each State. For Wisconsin, see 43 FR 8962 (March 3, 1978), 43 FR 45993 (October 5, 1978), and 40 CFR 81.350. These area designations are subject to revision whenever sufficient data become available to warrant a redesignation. A sub-city area of Beloit, Wisconsin, was designated as not attaining the secondary TSP standard. On July 23, 1987, pursuant to section 107(d)(5) of the CAA, the WDNR

requested that the sub-city nonattainment area of Beloit [1] be redesignated to attainment of the TSP NAAQS.

For areas designated nonattainment for TSP, a TSP State Implementation Plan (SIP) was required which satisfied the requirements of Section 110(a) and Part D of the CAA, including assuring the attainment and maintenance of the TSP NAAQS. USEPA revised the particulate matter standard on July 1, 1987, (52 FR 24634) and eliminated the TSP ambient air quality standard. The revised standard is expressed in terms of particulate matter with a nominal diameter of 10 micrometers or less (PM_{10}). USEPA wll continue to process redesignations of areas from nonattainment to attainment for TSP in keeping with past policy, because various regulatory provisions such as new source review and prevention of significant deterioration are keyed to the attainment status of areas. The July 1, 1987, notice (page 24682, column 1) described USEPA's transition policy regarding TSP redesignations. According to USEPA's transition policy, TSP redesignation requests are to be reviewed for compliance with USEPA's redesignation policies issued in memoranda on April 21, 1983, and September 30, 1985. They are: (1) Eight consecutive quarters of the most recent air quality data reveal no violation of the TSP NAAQS; (2) improvement in monitored readings for TSP must be attributable to the implementation of a USEPA approved control strategy; (3) emission reductions and improvements in air quality must be permanent and not merely the result of economic down turn or temporary; and (4) dispersion techniques must not be responsible for the improvement in air quality.

USEPA proposed to disapprove Wisconsin's redesignation request on June 29, 1988. Comments on this notice of proposed rulemaking were received from WDNR. These comments and USEPA's responses are provided below:

Criterion 1

Violation-free monitoring data—Eight consecutive quarters of the most recent air quality data must reveal no violation of the TSP NAAQS. Monitors must be placed at the points of expected maximum TSP impact.

WDNR's Submittal

On June 27, 1988, WDNR submitted the 1987 monitoring data for three sites in Beloit. These data all indicated attainment as they are below the NAAQS. The 1987 data combined with the 1986 violation-free data submitted by the WDNR on July 1, 1987, provided eight quarters of violation-free data. The most recent violations of the secondary NAAQS were monitored in 1985. USEPA notes that one of the two 1985 exceeedances occurred on May 31, 1985, on which day high TSP levels were measured across Wisconsin, Michigan, northern Ohio and Illinois. Because WDNR already has collected 2 years of violation-free data since 1985, it is not relying on excluding the possible exceptional event in 1985.

WDNR justified the location of the monitors in their July 27, 1988, submittal. The three monitors in Beloit have operated continuously since 1978, although not all at the same locations. The Beloit College and Beloit City Hall monitors were located in the nonattainment area as a result of a WDNR modeling analysis of potential annual TSP exceedances (*Total Suspended Particulate, Air Quality Analysis for the Beloit Nonattainment Area*, WDNR, April 1979). The Beloit College monitor has remained at the same location in the nonattainment area. The City Hall monitor was relocated several times since 1984 due to building demolitions and an effort to monitor near additional sources. The third monitor was located to the east of the current nonattainment area. USEPA agrees that WDNR has sited two of their three Beloit monitors in areas of expected maximum concentrations. The current Beloit College monitor is sufficient to indicate attainment in the current ½ mile by ½ mile secondary nonattainment area.

Criterion 2

Implementation of USEPA-approved control strategy—The USEPA approved control strategy (i.e., SIP) must have been implemented. The improvement in monitored readings for TSP (since the base year used for nonattainment designation) must be attributable to enforceable or permanent emission reductions implemented since that year.

WDNR's Submittal

In 1979, Wisconsin approved NR 154.11 (now NR 415.05 and NR 415.06) which limited particulate emissions from sources located inside, and those sources which are not located inside but whose emissions nonetheless significantly affected, primary and secondary nonattainment areas. Four facilities in Beloit were identified and had to control their TSP emissions further than statewide particulate limits through the application of reasonably available control technology (RACT). USEPA approved Wisconsin's RACT TSP rules for ROCK County on March 9, 1983 (48 FR 9761). That is, Rock County has an approved Part D SIP. As of December 1988, there were no "violators" present on USEPA's significant violators list, and WDNR commented that all sources are in compliance. Thus, Beloit has fulfilled the requirement for an implemented SIP.

The four facilities which were required to be controlled to RACT TSP emission limits were:

1. Beloit Corporation-St. Lawrence Plant,
2. Beloit Corporation-Eddy Street Plant,
3. Colt Industries, and
4. Wisconsin Power and Light-Blackhawk.

The total emissions from these four facilities have decreased from approximately 900 tons per year in 1976 to approximately 40 tons per year in 1987. These emission reductions were the result of RACT emission limits and the permanent source closings discussed in the next section. USEPA agrees that WDNR has submitted justification for the air quality improvement in Beloit.

Criterion 3

Permanent emission reductions—Emission reductions and improvement in air quality must not be merely the result of economic downturn or temporary.

WDNR's Submittal

The RACT requirements for Beloit sources have been federally approved and as such, are permanent. In addition to RACT, two permanent shutdowns have occurred. In 1987, the Beloit Corporation (St. Lawrence Plant) removed the majority of its air sources. These sources have been deleted from the Wisconsin emission inventory such that the removal is considered permanent for new source review purposes. The removal of the St. Lawrence Plant is significant to this redesignation because the WDNR 1979 report noted that, even with RACT, emissions from the Plant could result in secondary nonattainment. The permanent shutdowns at the St. Lawrence Plant support the redesignation. Also, Colt Industries discontinued their foundry operation in

[1] The Beloit sub-city nonattainment area is defined as follows:

North: Portland Avenue east from Fourth Street to the intersection with Woodward Avenue. Woodward Avenue east to Park Avenue.

West: Fourth Street north from Board Street to Portland Avenue.

South: Broad Street west from Park Avenue to Fourth Street.

East: Park Avenue south from Woodward Avenue to Board Street.

1984. The emissions from the foundry have also been deleted from the Wisconsin emission inventory, and the removal is considered permanent for new source review purposes. USEPA agrees that the reduction in emissions in Beloit are permanent and not temporary.

Criterion 4

Dispersion techniques—Dispersion techniques, which are not creditable according to the revised section 123 regulations (50 FR 278992), cannot be responsible for the improvement in air quality.

WDNR's Submittal

In their July 27, 1988, submittal, WDNR stated that the modeling conducted for the 1979 WDNR report did not contain any combined stacks for any source studied. Additionally, the WDNR verified that no source has increased its stack height.

Conclusion

WDNR has satisified the requirements for the TSP redesignation. Therefore, USEPA is approving as a direct final [2] rulemaking the redesignation of a subcity area in the City of Beloit, Rock County, Wisconsin, from secondary nonattainment to attainment relative to the former TSP NAAQS.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 22, 1989. This action may not be challenged later in the proceedings to enforce its requirements. (See section 307(b)(2).)

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Under 5 U.S.C. 605(b), I certify that approving this redesignation request will not have a significant economic impact on a number of small entities because it imposes no new requirements on anyone. (See 46 FR 8709).

[2] January 19, 1989, (54 FR 2214) Federal Register notice.

List of Subjects in 40 CFR Part 81

Air pollution control, Environmental Protection, National parks. Wilderness areas.

Authority: 42 U.S.C. 7401–7642.

Date: June 6, 1989.

Valdas V. Adamkus,

Regional Administrator.

For the reasons set forth in the preamble, Part 52 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. In § 81.350, the TSP table is amended by revising the entry for "Rock County" under AQCR 73 to read as follows:

§ 81.350 Wisconsin.

* * * * *

WISCONSIN–TSP

Designation /Area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
* * * *	*	*	*	
AQCR 73				
Rock County				X
* * * *	*	*	*	

[FR Doc. 89–14914 Filed 6–22–89; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 16

[CGD 86–067]

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel; Suspension of Implementation Date

AGENCY: Coast Guard, DOT.

ACTION: Final rule, suspension of implementation date.

SUMMARY: This final rule suspends the implementation date for pre-employment drug testing by marine employers have 50 or more employees. The U.S. District Court for the District of Columbia has requested a delay to allow for consideration of the pending cases in light of recent Supreme Court decisions and anticipated decisions of the Circuit Court of Appeals for the District of Columbia Circuit.

EFFECTIVE DATE: This rule is effective on June 21, 1989.

FOR FURTHER INFORMATION CONTACT: Commander John Koski, Project Manager, Marine Investigation Division (G–MMI), Office of Marine Safety Security and Environmental Protection, U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001, (202) 267–2215.

SUPPLEMENTARY INFORMATION: On June 21, 1989, a hearing was held in the U.S. District Court for the District of Columbia in the case of *Transportation Institute, et al.*, v. *United States Coast Guard and Samuel K. Skinner, Secretary of Transportation.* At the conclusion of the hearing the court requested a voluntary suspension of that portion of the Coast Guard's drug testing rules which require marine employers to implement pre-employment drug testing commencing June 21, 1989. Section 16.205 of Title 46, Code of Federal Regulations, promulgated on November 21, 1988, 53 FR 47064, requires each employer who employs more than 50 employees required to be tested under Part 16 to implement pre-employment drug testing under § 16.210 not later than June 21, 1989. All other testing required under Part 16 has implementation dates of December 21, 1989 or later.

This final rule amends § 16.205(a) to delay implementation of pre-employment drug testing by those employers having more than 50 employees until July 21, 1989.

This amendment to the drug testing rules is needed immediately to delay the compliance date specified in the final rule. Under the implementation schedule published in the **Federal Register** on November 21, 1988, certain marine

employers would have been required to begin testing on June 21, 1989. The U.S. District Court for the District of Columbia has requested a delay to allow for consideration of the pending cases in light of recent Supreme Court decisions and anticipated decisions of the Circuit Court of Appeals for the District of Columbia Circuit. For these reasons the Coast Guard has determined that good cause exists for promulgating this final rule without notice and opportunity for comment and for making this rule effective in less than thirty days after publication.

Regulatory Assessment

This final rule merely extends for a limited period one of the compliance dates in the final rule published on November 21, 1988, and does not change the basic regulatory structure in that rule. The economic impact of this extension is so minimal that further evaluation is not necessary.

Regulatory Flexibility Determination

The amendments in this final rule extend the compliance date only for employers who have 50 or more employees. The compliance dates for smaller entities are not affected. Therefore the Coast Guard certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This final rule does not amend the recordkeeping and reporting requirements of the final rule published on November 21, 1988.

Environmental Assessment

The Coast Guard has considered the environmental impact of this amendment to the rules promulgated on November 21, 1988, and concluded that, under section 2.B.2.1 of Commandant Instruction M16475.1B, they will have no significant environmental impact and are categorically excluded from further environmental documentation.

Federalism Implications

In accordance with Executive Order 12612, the Coast Guard has determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 46 CFR Part 16

Seamen, Marine safety, Navigation (Water), Alcohol and alcoholic beverages, Drugs.

Final Rule

For the reasons set forth in the preamble, Title 46, Chapter I, of the Code of Federal Regulations is amended as follows:

PART 16—[AMENDED]

1. The authority citation for Part 16 continues to read as follows:

Authority: 46 U.S.C. 2103, 3306, 7101, 7301 and 7701; 49 CFR 1.46.

2. Section 16.205 is amended by revising paragraph (a) to read as follows:

§ 16.205 Implementation of chemical testing programs.

(a) Each employer who employs more than 50 employees required to be tested under this part shall implement the pre-employment testing program required in § 16.210 not later than July 21, 1989. All other employer testing programs required by this part shall be implemented not later than December 21, 1989.

* * * * *

Dated: June 21, 1989.

J.D. Sipes,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 89-15074 Filed 6-21-89; 2:45 pm]

BILLING CODE 4910-14-M

Office of the Secretary

49 CFR Part 1

[OST Docket No. 1; Amdt. 1-229]

Organization and Delegation of Powers and Duties; Delegation of Authority to the Commandant of the United States Coast Guard

AGENCY: Office of the Secretary, Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The Secretary of Transportation has delegated authority to the Commandant, United States Coast Guard, to provide assistance to film producers and to accept reimbursement for costs connected with such assistance. The Code of Federal Regulations does not reflect this delegation, and therefore a change is necessary.

EFFECTIVE DATE: June 7, 1989.

FOR FURTHER INFORMATION CONTACT: Samuel E. Whitehorn, Office of the General Counsel, C-50, (202) 366-9307, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION: Secretary Skinner has delegated to the Commandant, United States Coast Guard, authority under 14 U.S.C. 659 to conduct operations with Coast Guard Vessels, aircraft, facilities and personnel to provide assistance to film producers; to accept reimbursement for costs, other than those that would be incurred in Coast Guard Operations or training; to reimburse the money collected to Coast Guard appropriations; and to waive costs not exceeding $200 for one production and other costs related to noncommercial productions which are determined to be in the public interest.

The *Code of Federal Regulations* does not reflect this delegation, and therefore a change is necessary.

Since this amendment relates to departmental management, procedures, and practice, notice and comment on it are unnecessary and it may be made effective in fewer than thirty days after publication in the **Federal Register.** The Delegation is effective immediately.

In accordance with the Secretary's authority, the following change is made.

List of Subjects in 49 CFR Part 1

Authority delegations (Government agencies), Organization and functions (Government agencies).

In consideration of the foregoing, Part 1 of Title 49, Code of Federal Regulations, is amended to read as follows:

PART 1—[AMENDED]

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

Authority: 49 U.S.C. 322.

2. Section 1.46 is amended by adding a new paragraph (qq) to read as follows:

§ 1.46 Delegations to Commandant of the Coast Guard.

* * * * *

(qq) Carry out the functions and exercise the authority vested in the Secretary by 14 U.S.C. 659 relating to providing assistance to film producers and obtaining reimbusement for assistance provided.

Issued on: June 7, 1989.

Samuel K. Skinner,

Secretary of Transportation.

[FR Doc. 89-14840 Filed 6-22-89; 8:45 am]

BILLING CODE 4910-62-M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1016

[Ex Parte No. 55 (Sub-No. 52)]

Special Procedures Governing the Recovery of Expenses by Parties to Commission Adjudicatory Proceedings

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: In 1981, the Commission adopted rules at 49 CFR Part 1916 implementing the Equal Access to Justice Act. By its own terms, the Act was repealed on October 1, 1984. In 1985, the Act was recodified with certain amendments (Pub. L. No. 99–80, 99 Stat. 183) and made effective for cases begun on or after October 1, 1984. The Commission adopts a final rule implementing the recodified and amended Equal Access to Justice Act.

EFFECTIVE DATE: July 23, 1989.

FOR FURTHER INFORMATION CONTACT: Richard R. Hartley, 202–275–7786; or, Richard B. Felder, 202–275–7691. (TDD for hearing impaired: 202–275–1721.)

SUPPLEMENTARY INFORMATION: On February 21, 1989, the Commission proposed to amend its rules to reflect the recodified and amended Equal Access to Justice Act (EAJA). 54 FR 7454. Only one comment was received. It requests a grandfather provision to exclude a pending EAJA proceeding from any narrowing effect of the changes in the regulations, but to apply any benefits that might result from those changes to that proceeding.

The proposed addition to 49 CFR 1016.102 reflects the fact that prior law applies to cases pending on October 1, 1981. That is, the amended EAJA specifically provides that its pre-recodification provisions apply through final disposition of any adversary adjudication initiated before the date of repeal (October 1, 1984). Therefore, to the extent our new rules are inconsistent with the prior law, they may not be applied to proceedings begun in the 1981–1984 period. Conversely, where the new rules reflect interpretations that were available under prior law, they may and will be applied in future decisions affecting 1981–1984 cases. With this clarification, the proposed rules are adopted as final rules.

These rules will not significantly affect either the quality of the human environment or the conservation of energy resources. It is hereby certified that these rules will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 49 CFR Part 1016

Claims, Equal access to justice, Lawyers.

Decided: June 15, 1989.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

Noreta R. McGee,

Secretary.

For the reasons set forth in the preamble, Title 49, Chapter X, Part 1016 of the Code of Federal Regulations is amended as follows:

PART 1016—SPECIAL PROCEDURES GOVERNING THE RECOVERY OF EXPENSES BY PARTIES TO COMMISSION ADJUDICATORY PROCEEDINGS

1. The authority citation for Part 1016 is revised to read as follows:

Authority: 49 U.S.C. 10321, 5 U.S.C. 504(c)(1), and 5 U.S.C. 553.

2. Section 1016.102 is revised to read as follows:

§ 1016.102 When the Act applies.

The Act applies to any adversary adjudication pending before the Commission after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date, regardless of when they were initiated or when final Commission action occurs. These rules incorporate the changes made in Pub. L. No. 99–80, 99 Stat. 183, which applies generally to cases instituted after October 1, 1984. If awards are sought for cases pending on October 1, 1981 or filed between that date and September 30, 1984, the prior statutory provisions (to the extent they differ from the existing ones, and our implementing rules) apply.

§ 1016.104 [Amended]

3. Section 1016.104 is amended by removing the words "an initial" and "initial" before "decision", respectively, in the two places the phrase appears.

§ 1016.105 [Amended]

4. Section 1016.105, paragraph (a) is amended by changing the United States Code citation to 5 U.S.C. 504(b)(1)(B).

5. Section 1016.105, paragraph (b) is revised to read as follows:

§ 1016.105 Eligibility of applicants.

* * * * *

(b) The types of eligible applicants are as follows:

(1) An individual whose net worth did not exceed $2 million at the time the adversary adjudication was initiated;

(2) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization whose net worth does not exceed $7 million and which had no more than 500 employees at the time the adversary adjudication was initiated;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association.

* * * * *

§ 1016.105 [Amended]

6. Section 1016.105, paragraph (d), is removed and paragraphs (e) through (g) are redesignated paragraphs (d) through (f).

7. Section 1016.106, paragraph (a), is revised to read as follows:

§ 1016.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record made in the adversary adjudication for which fees and other expenses are sought. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, which may avoid an award by showing that its position was reasonable in law and fact.

* * * * *

8. Section 1016.107, paragraph (b) is revised to read as follows:

§ 1016.107 Allowable fees and expenses.

* * * * *

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour, unless a higher fee is justified. 5 U.S.C. 504(b)(1)(A). However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily

charges clients separately for such expenses.

* * * * *

§ 1016.108 [Removed]

9. Section 1016.108 is removed.

10. Section 1016.201, paragraph (b), is revised to read as follows:

§ 1016.201 Contents of application.

* * * * *

(b) The application shall also include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

* * * * *

§ 1016.202 [Amended]

11. Section 1016.202, paragraph (a) is amended by deleting the words "except a qualified tax-exempt organization or cooperative association" in the first sentence.

12. Section 1016.202, paragraph (b) is revised to read as follows:

§ 1016.202 Net worth exhibit.

* * * * *

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes that there are legal grounds for withholding it from disclosure may file a motion to withhold the information from public disclosure. The burden is on the moving party to justify the confidentiality of the information.

§ 1016.301 [Amended]

13. Section 1016.301, paragraph (c) is amended by removing the reference "§ 1100.98" and adding the references "§§ 1115.2 and 1115.3", in its place.

§ 1016.303 [Amended]

14. Section 1016.303, paragraph (b) is amended by removing the last 3 lines and adding "be granted as justified."

§ 1016.305 [Amended]

15. Section 1016.305 is amended by removing the last sentence and adding the sentence "A commenting party may not broaden the issues."

16. Section 1016.307, paragraph (a) is revised to read as follows:

§ 1016.307 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel or on his or her own initiative, the adjudicative officer may order further proceedings when necessary.

* * * * *

§ 1016.308 [Amended]

17. Section 1016.308 is amended by substituting the phrase "a decision" for "an initial decision."

18. Section 1016.309 is revised to read as follows:

§ 1016.309 Agency review.

In the event the adjudicative officer is not the entire Commission, the applicant or agency counsel may seek review of the initial decision on the fee application, or the Commission may review the decision on its own initiative, in accordance with § 1115.2. If no appeal is taken, the initial decision becomes the action of the Commission 20 days after it is issued. If the adjudicative officer is the entire Commission, § 1115.3 applies.

[FR Doc. 89-14855 Filed 6-22-89; 8:45 am]
BILLING CODE 7035-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 672

[Docket No. 81132-9033]

Groundfish of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of closure.

SUMMARY: The Director, Alaska Region, NMFS (Regional Director), has determined that the total allowable catch (TAC) of "other rockfish" in the Eastern Regulatory Area of the Gulf of Alaska has been reached. The Secretary of Commerce (Secretary) is prohibiting directed fishing for and further retention of "other rockfish" by vessels fishing in this area from 12:00 noon, Alaska Daylight Time (A.d.t.), on June 19, 1989, through December 31, 1989.

DATES: Effective from 12:00 noon, A.d.t., on June 19, until midnight, Alaska Standard Time, December 31, 1989. Comments must be submitted on or before July 5, 1989.

ADDRESSES: Comments should be addressed to Steven Pennoyer, Director, Alaska Region (Regional Director), National Marine Fisheries Service, P.O. Box 21668, Juneau, Alaska 99802-1668.

FOR FURTHER INFORMATION CONTACT: Janet E. Smoker, Fishery Management Biologist, 907-586-7230.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) governs the groundfish fishery in the exclusive economic zone in the Gulf of Alaska under the Magnuson Fishery Conservation and Management Act. Regulations implementing the FMP are at 50 CFR Part 672. Section 672.20(a) of the regulations establishes an optimum yield (OY) range of 116,000-800,000 metric tons (mt) for all groundfish species in the Gulf of Alaska. Total allowable catches (TACs) for target species and species groups are specified annually within the OY range and apportioned among the regulatory areas and districts.

The 1989 TAC specified for "other rockfish" in the Eastern Regulatory area is 5,774 mt (54 FR 6524, February 13, 1989). The Regional Director reports that vessels have landed 4,844 mt of "other rockfish" through June 3 in the Eastern Regulatory Area. At recent catch and effort rates, the entire TAC will be harvested by June 19.

Therefore, pursuant to § 672.20(c)(2)(i), the Secretary is prohibiting further fishing for and retention of "other rockfish" effective 12:00 noon, A.d.t., June 19, 1989. Any "other rockfish" caught in the Eastern Regulatory area after that must be treated as prohibited species and discarded at sea. The category "other rockfish" is defined for the West Yakutat and East Yakutat District of the Eastern Regulatory area as all fish of the genus *Sebastes* except pelagic shelf rockfish, and for the Southeast Outside District as all fish of the genus *Sebastes* except pelagic shelf and demersal shelf rockfish. See 54 FR 6524 (February 13, 1989) for further information concerning the species included in the "other rockfish" category.

Overharvesting of "other rockfish" will result unless this notice takes effect promptly. Therefore, NOAA finds for good cause that prior opportunity for public comment on this notice is contrary to the public interest and its effective date should not be delayed.

Public comments on the necessity for this action are invited for a period of 15 days after the effective date of this notice and may be submitted to the Regional Director at the address above until July 5, 1989. If written comments are received which oppose or protest

this action, the Secretary will reconsider the necessity of this action, and, as soon as practicable after that reconsideration, will publish in the **Federal Register** a notice either of continued effectiveness of the adjustment, responding to comments received, or modifying or rescinding the adjustment.

Classification

This action is taken under §§ 672.22 and 672.24, and is in compliance with Executive Order 12291.

List of Subjects in 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

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

Dated: June 19, 1989.

Joe P. Clem,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-14856 Filed 6-20-89; 8:45 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 54, No. 120
Friday, June 23, 1989

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. FV-89-063]

Proposed Expenses and Assessment Rate for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would authorize expenditures and establish assessment rates under Marketing Order Nos. 916 and 917 (California nectarines, plums and peaches) for the 1989–90 fiscal year which began March 1, 1989. The proposal is needed for the Nectarine Administrative Committee, and the Plum and Peach Commodity Committees established under these orders to incur operating expenses during the 1989–90 fiscal year and to collect funds during that year to pay those expenses. This would facilitate program operations. Funds to administer these program are derived from assessments on handlers.

DATES: Comments must be received by July 3, 1989.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, USDA, AMS, Fruit and Vegetable Division, P.O. Box 96456, Room 2525–S, Washington, DC, 20090–6456. Comments should reference the docket number, date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: George J. Kelhart, Marketing Order Administration Branch, F&V, AMS, USDA, P.O. box 96456, Room 2525–S, Washington, DC 20090–6456, telephone: (202) 475–3919.

SUPPLEMENTARY INFORMATION:

This rule is proposed under Marketing Order Nos. 916 (7 CFR Part 916) regulating the handling of nectarines grown in California and 917 (7 CFR Part 917) regulating the handling of fresh pears, plums, and peaches grown in California. These orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

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

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities.

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

There are approximately 650 handlers of California plums, peaches and nectarines subject to regulations under these marketing orders (7 CFR Parts 916 and 917), and there are approximately 2,030 producers of these commodities in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having averge gross annual revenues for the last three years of less than $500,000. Small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of these handlers and producers may be classified as small entities.

Each marketing order requires that the assessment rate for a particular fiscal year shall apply to all assessale commodities handled from the begining of such year. An annual budget of expenses is prepared by each administrative committee and submitted to the U.S. Department of Agriculture for approval. The members of the Committees are primarily handlers and producers of the regulated commodities. They are familiar with the committees' needs and with the costs for goods, services and personnel in their local areas, and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by each committee is derived by dividing anticipated expenses by expected shipments of the commodity. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committees' expected expenses. Recommened budget and rates of assessment are usually acted upon by the committees shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited so that the committees will have funds to pay their expenses.

The Nectarine Administrative Committee met May 3, 1989, and unanimously recommended 1989–90 marketing order expenditures of $3,515,037 and an assessment rate of $0.185 per 25-pound package or equivalent. For comparison, 1988–89 fiscal year actual expenditures were $2,787,093 and the assessment rate was $0.18 cents per package or equivalent. Major expenditure categories projected for 1989–90 with actual 1988–89 expenditures in parenthesis are: Salaries and employee benefits, $193,191 ($177,712); consultant fees, $45,000 ($53,179); production research, $86,587 ($87,403); market development and promotion, $2,076,100 ($1,494,762); and inspection, $907,500 ($871,209). With the execption of $65,000 budgeted for uncollected assessment accounts, the remaining expenses are for program administration.

Estimated total income for 1989–90 of $3,824,490 includes projected assessment income of approximately $3,101,155 based on anticipated shipments of 16,763,000 packages of fresh nectarines, carryover income from 1987–88 of $620,085, anticipated income from export development and research subsidies from state and federal agencies of $70,250 and interest income totalling $33,000. This income will cover anticipated expenditures for 1989–90 and provide an adequate carryover to meet authorized committee expenses

until 1990–91 assessment funds are collected. Committee operating reserves are within the limits authorized under the program.

The Plum Commodity Committee met May 3, 1989, and unanimously recommended 1989–90 marketing order expenditures of $3,154,353 and an assessment rate of $0.21 per 28-pound package or equivalent. For comparison, 1988–89 fiscal year expenditures were $3,090,693 and the assessment rate was $0.19 per 28-pound package or equivalent. Major expenditure categories projected for 1989–90 with actual 1988–89 expenditures in parenthesis are: Salaries and employee benefits, $193,190 ($168,713); consultant fees, $5,000 (nothing budgeted); production research, $67,091 ($77,302); market development and promotion, $1,749,663 ($1,679,526); and inspection, $1,078,000 ($1,038,355). With the exception of $85,000 budgeted for uncollected assessment accounts, the remaining expenses are for program administration.

Total income for 1989–90 would amount to $3,402,340, including projected assessment income of $2,969,190 based on shipments of 14,139,000 packages of fresh plums at $0.21 per 28-pound package or equivalent. Assessment income would be supplemented with unexpended 1988-89 funds ($311,650), interest income ($20,000) and export subsidies ($101,500) from state and federal agencies. This income will cover the anticipated expenditures for 1989–90 and provide an adequate carryover to meet authorized committee expenses until 1990–91 assessment funds are collected. Committee reserves are within limits authorized under the program.

The Peach Commodity Committee met May 4, 1989, and unanimously recommended 1989–90 marketing order expenditures of $2,849,419 and an assessment rate of $0.185 cents per 25-pound package or equivalent. For comparison, 1988-89 fiscal year expenditures were $2,269,778 and the assessment rate was $0.18 per 25-pound package or equivalent. Major expenditure categories projected for 1989–90 with actual 1988–89 expenditures in parenthesis are: Salaries and employee benefits, $182,282 ($159,261); consultant fees, $5,000 (nothing budgeted); production research, $61,087 ($61,902); market development and promotion, $1,546,700 ($1,073,846); and inspection, $864,000 ($863,223). With the exception of $50,000 budget for uncollected assessment accounts, the remaining expenses are for program administration.

Total income for 1989–90 would amount to $3,218,650, including projected assessment income of approximately $2,572,240, based on shipments of 13,904,000 packages of fresh peaches at $0.185 per 25-pound package or equivalent. Assessment income would be supplemented with unexpended 1988–89 funds ($564,660), interest income ($24,000) and export subsidies ($57,750) from state and federal agencies. This income will cover the anticipated expenditures for 1989–90 and provide an adequate carryover to meet authorized committee expenses until 1990–91 assessment funds are collected. Committee reserves are within limits authorized under the program.

While this proposed action would impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be significantly offset by the benefits derived from the operation of the marketing orders. Therefore, the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

Based on the foregoing, it is found and determined that a comment period of less than 30 days is appropriate because the levels of expenses and assessment rates for these programs should be expedited. The committees need to have sufficient funds to pay their expenses, which are incurred on a continuous basis.

List of Subjects in 7 CFR Parts 916 and 917

Marketing agreements and orders, Nectarines, Plums, Peaches and Pears, California.

For the reasons set forth in the preamble, it is proposed that 7 CFR Parts 916 and 917 be amended as follows:

1. The authority citation for 7 CFR Parts 916 and 917 continues to read as follows:

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

PART 916—NECTARINES GROWN IN CALIFORNIA

2. A new § 916.227 is added to read as follows:

§ 916.227 Expenses and assessment rate.

Expenses of $3,515,037 by the Nectarine Administrative Committee are authorized, and an assessment of $0.185 per 25-pound package or equivalent of assessable nectarines is established for the fiscal period ending February 28, 1990. Unexpended funds may be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

3. A new § 917.250 is added to read as follows:

§ 917.250 Expenses and assessment rate.

Expenses of $3,154,353 by the Plum Commodity Committee are authorized, and an assessment of $0.21 per 28-pound package or equivalent of assessable plums is established for the fiscal period ending February 28, 1990. Unexpended funds may be carried over as a reserve.

4. A new § 917.251 is added to read as follows:

§ 917.251 Expenses and assessment rate.

Expenses of $2,849,419 by the Peach Commodity Committee are authorized, and an assessment of $0.185 per 25-pound package or equivalent of assessable peaches is established for the fiscal period ending February 28, 1990. Unexpended funds may be carried over as a reserve.

Dated: June 19, 1989.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division.

[FR Doc. 89–14850 Filed 6–22–89; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 1250

[Docket No. PY–89–003]

Egg Research and Promotion

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the American Egg Board's (the Board) rules and regulations governing the collection of egg research and promotion assessments. The proposal would increase the rate of assessment for the activities of the Board from 2.5 cents per 30-dozen case of eggs marketed to 5 cents. This action is proposed to enable the Board to strengthen the research and promotion activities authorized by the Egg Research and Consumer Information Act. An additional change would establish procedures for obtaining a one-time refund or pro rata share of assessments collected and held in an interest-bearing escrow account in accordance with the Egg Research and Consumer Information Act Amendments

of 1988. Refunds would be dispersed only if elimination of the refund provision from the Egg Research and Promotion Order would not be approved by producers voting in a referendum. This change is proposed to implement amendments to the Order which became effective January 1.

DATES: Comments must be submitted on or before August 7, 1989.

ADDRESSES: Written comments are to be mailed to Janice L. Lockard, Chief, Standardization Branch, Poultry Division, AMS, USDA, Room 3944–South, P.O. Box 96456, Washington, DC 20090–6456. Written comments received may be reviewed in the Washington, DC, Standardization Branch office during regular business hours.

FOR FURTHER INFORMATION CONTACT: Janice L. Lockard, 202–447–3506.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

This action was reviewed in accordance with Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be non-major because it does not meet the criteria contained therein. It will not result in an annual effect on the economy of $100 million or more or in a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. It also will not have a significant impact on competition, employment, investment, productivity, innovation, or in the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Effect on Small Entities

The Administrator of the Agricultural Marketing Service has determined that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The purpose of the RFA is to fit regulatory action to the scale of businesses subject to such action in order that small businesses will not be unduly or disproportionately burdened.

The majority of egg handlers and producers under the Egg Research and Consumer Information Act may be characterized as small entities. Many egg producers are also handlers of eggs. Pursuant to regulation, handlers are responsible for collecting assessments from producers. There are an estimated 723 handlers and 1,869 producers under the program. Currently, egg producers must pay a mandatory assessment of 2.5 cents per 30-dozen case of eggs marketed to fund the research and promotion activities authorized by the Act. The present assessment of 2.5 cents per 30-dozen case is equivalent to approximately 0.128 percent of the wholesale price of a 1-dozen carton of Large eggs. A 5-cent assessment rate would be equivalent to approximately 0.25 percent of the wholesale price of a 1-dozen carton of Large eggs. This is based on the Economic Research Service's 3-year average wholesale price for New York City Grade A Large cartoned eggs (1986–88) of 65 cents per dozen. The Board collects approximately $3.7 million annually from the 2.5-cent assessment and it is estimated that it would collect $7.4 million for a 5-cent assessment. It is estimated that any additional costs would be offset by the benefits to be derived from strengthened research and promotion programs.

Background and Proposed Changes

1. Increase in the Rate of Assessment

The Egg Research and Promotion Order in § 1250.347 (7 CFR 1250.347) authorizes the American Egg Board to collect assessments at the rate of 5 cents per 30-dozen case of eggs, or the equivalent thereof, or such lower amount to cover expenses and expenditures as approved by the Secretary of Agriculture. The Order also authorizes the Board to make rules and regulations to effectuate the terms and provisions of the Order. Following the recommendation of the Board, an amendment to the rules and regulations became effective on September 1, 1987 (52 FR 36907), lowering the assessment rate from 5 cents per 30-dozen case of eggs marketed to 2.5 cents. This action was taken at a time when egg producers were experiencing unfavorable net returns due to low prices which, in part, caused an erosion of financial support for Board activities. The decrease in the assessment was successful in lowering the refund rate, thus, gaining a broader base of producer support for national-level programs such as egg nutrition and education, foodservice promotion, consumer education, and new product development.

The 2.5-cent assessment was refundable until January 1, 1989. At that time, amendments to the Order eliminating the refund provision became effective and were published in the **Federal Register** (54 FR 98). Such amendments would not be subject to a producer referendum until the end of an 18-month period from the effective date of the amendments, January 1, 1989. This amendatory action to eliminate the refund provision was required by the Egg Research and Consumer Information Act Amendments of 1988 (Pub. L. 100–575), effective October 31, 1988. At the same time, individual producers and producer groups petitioned the Board to consider raising the assessment rate to 5 cents. The Board collects approximately $3.7 million annually from a 2.5-cent assessment. It is estimated that with the 5-cent assessment, the Board would collect $7.4 million annually. With the proposed increase, ongoing activities could be funded at current levels and paid advertising, including television, could be resumed at a level as approved by the Board and the Secretary. The Board subsequently polled all eligible producers to determine whether such an increase for this purpose would be supported. The results showed that 57 percent of those voting, representing 72 percent of egg production voting, would support such an increase. Based on this response and a review of current and prospective market conditions, the Board voted unanimously to recommend a proposal to increase the assessment rate from 2.5 cents to 5 cents.

2. Procedure for Obtaining One-Time Refund

The 1988 amendments to the Act require the Board to place into an interest-bearing escrow account 10 percent of the assessments received from egg producers beginning January 1, 1989, until approval by producer referendum of the amendment to the Order eliminating producer refunds. If the amendment to the Order is not approved in the referendum, the escrow account will be used to pay refunds to eligible egg producers who requested a refund pursuant to regulation changes proposed herein. If the escrow account does not contain sufficient amounts to refund all eligible producers demanding a refund, the Board will prorate the amount of refunds demanded by eligible producers. If the amendment to the Order is approved, the amount in the escrow account will be used by the Board in accord with the purposes set forth in the Act.

The amended Act specifies that refunds "shall be made in accordance with regulations, on a form, and within a time period prescribed by the Egg Board." Accordingly, an amendment to § 1250.523 is proposed to provide a procedure for obtaining a one-time refund. The procedure would require egg producers to file an application to obtain a refund of assessments paid or a pro rata share from the escrow account maintained by the Board. It is estimated that this application form will take 10

minutes to complete. Refund application forms for this purpose would be filed within 90 days following the effective date of the amended rules and regulations proposed herein. The number of the approximately 1,869 producers who would file refund requests pursuant to the proposed regulation is not known.

Paperwork Reduction

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the new information collection requirements that are included in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB). The requirements are not effective until OMB approval has been obtained.

Existing information collection requirements and recordkeeping provisions contained in 7 CFR Part 1250 have been approved by OMB and have been assigned No. 0581–0098.

List of Subjects in 7 CFR Part 1250

Egg research and promotion.

For the reasons set forth in the preamble, Title 7, CFR Part 1250 is proposed to be amended as follows:

PART 1250—EGG RESEARCH AND PROMOTION

1. The authority citation of Part 1250 continues to read as follows:

Authority: Pub. L. 93–428, 88 Stat. 1171, as amended; 7 U.S.C. 2701–2718.

2. Section 1250.514 is revised to read as follows:

§ 1250.514 Levy of assessments.

An assessment of 5 cents per case of commercial eggs is levied on each case of commerical eggs handled for the account of each producer. Each case of commercial eggs shall be subject to assessment only once. The following shall be exempt from the provisions of this section:

(a) Any egg producer whose aggregate number of laying hens at any time during the 3-consecutive-month period immediately prior to the month in which assessments are due and payable has not exceeded 3,000 laying hens, and

(b) Any flock of breeding hens whose production of eggs is primarily utilized for the hatching of baby chicks.

3. In § 1250.523, the introductory text is revised and paragraph (d) is added to read as follows:

§ 1250.523 Procedure for obtaining refunds.

Except as provided in paragraph (d) of this section, each egg producer against whose eggs an assessment was levied and collected may obtain a refund of the assessment amount for any calendar month in the following manner:

* * * * *

(d) Effective January 1, 1989, producer refunds as provided in paragraphs (a), (b), and (c) of this section are eliminated. If elimination of the refund provision is not approved pursuant to a referendum, as required by the Egg Research and Consumer Information Act Amendments of 1988, any egg producer who is responsible for paying assessments to the Board under this subpart and who is not in favor of supporting the program established under the Order (§§ 1250.301 through 1250.363) shall have the right to demand and receive from the Board a one-time refund of such assessments or to pro rata share thereof collected from such producer and deposited into an interest-bearing escrow account pursuant to § 1250.336(g) of the Order in the following manner:

(1) *Application forms.* Refund application forms shall be provided by the Egg Board.

(2) *Submission of refund application to Egg Board.* Any producer requesting a one-time refund or pro rata share from the interest-bearing escrow account shall mail an application on the prescribed form to the Egg Board. The refund application shall contain the following information:

(i) Producer's name and full mailing address;

(ii) Farm or firm name;

(iii) Assigned identification number;

(iv) Date of application; and

(v) Signature of producer or authorized representative of producer.

(3) *Time limit for submission of refund application to Board.* All refund applications must be mailed to the Board within 90 days following the effective date of this amended subpart. Validation of filing will be the envelope bearing the postmark date in which the application is mailed. No refund applications will be validated after the 90-day dead-line, except that any producer entering the business after that date must submit a refund application within 90 days after first collection or sale of assessable eggs, but in no case after the date of the producer referendum.

(4) *Payment of refund.* If producers voting in a referendum do not favor elimination of the refund provision, the Egg Board shall pay refund requests or a pro rate share thereof within 60 days of the date the referendum results are released by the Secretary.

Done at Washington, DC, on June 19, 1989.

Kenneth C. Clayton,

Acting Administrator.

[FR Doc. 89–14810 Filed 6–22–89; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21 and 25

[Docket No. NM–38; Notice No. SC–89–3–NM]

Special Conditions; Aerospatiale/Aeritalia ATR–72, Lightning and Radio Frequency (RF) Energy Protection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This notice proposes special conditions for the Aerospatiale/Aeritalia ATR–72 airplane. This airplane will have a novel or unusual design feature associated with a multipurpose computer system which performs critical and essential functions. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of the multipurpose computer system from the effects of lightning and susceptibility to external radio frequency (RF) energy sources. This notice contains the safety standards which the Administrator finds necessary to ensure that the critical and essential functions this system performs in the ATR–72 are maintained.

DATE: Comments must be received on or before August 7, 1989.

ADDRESS: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, Attn: Rules Docket (ANM–7), Docket No. NM–38, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168; or delivered in duplicate to the Office of the Assistant Chief Counsel at the above address. Comments must be marked: Docket No. NM–38. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4:00 p.m.

FOR FURTHER INFORMATION CONTACT: Gene Vandermolen, Flight Test and Systems Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, FAA, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168, telephone (206) 431–2157.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of these proposed special conditions by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator before taking action on this proposal. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. NM-38." The postcard will be date/time stamped, and returned to the commenter.

Background

On January 24, 1986, Aerospatiale applied for an amendment to their Type Certificate No. A53EU to include the Aerospatiale/Aeritalia ATR-72 airplane. The Aerospatiale/Aeritalia ATR-72 is a derivative of the Aerospatiale/Aeritalia ATR-42 airplane, and will incorporate a multipurpose computer system comprising two computers which provide critical and essential functions.

Lightning Protection

The Aerospatiale/Aeritalia ATR-72 airplane is designed with multipurpose computers which perform critical and essential functions, such as control of stick pusher, pitch trim, flaps, propeller feathering, crew altering, deice and antiice, electrical power, door monitoring, landing gear monitoring, propeller brake, air conditioning, and pressurization, etc. These computers, which are designed to perform critical or essential functions, are susceptible to disruption to both the command/response signals and the operational mode logic as a result of electrical and magnetic interference. This disruption of signals could result in functions failing to be properly provided when needed. To ensure that a level of safety is achieved equivalent to that of existing operating airplanes, special conditions are needed which require that the computers, associated relays, and wiring will be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of lightning. To provide a means of compliance with the proposed special conditions, a clarification on the threat definition for lightning is needed.

The following "threat definition," based on Society of Automotive Engineers (SEA) Report No. AE4L-87-3, is proposed as a basis to use in demonstrating compliance with the proposed lightning protection special condition.

The lightning current waveforms (Components A, D, and H) defined below, along with the voltage waveforms in Advisory Circular (AC) 20-53A, will provide a consistent and reasonable standard which is acceptable for use in evaluating the effects of lightning on the airplane. These waveforms depict threats that are external to the airplane. How these threats affect the airplane and its systems depend upon the system's installation configuration, materials, shielding, airplane geometry, etc.; therefore, tests (including tests on the completed airplane or an adequate simulation) and/or a verified analysis need to be conducted in order to obtain the resultant internal threat to the installed systems. The multipurpose computer system may then be evaluated with this internal threat in order to determine its susceptibility to upset and/or malfunction.

To evaluate the induced effects to these systems, three considerations are required:

1. *First Return Stroke:* (Severe Strike—Component A, or Restrike—Component D). This external threat needs to be evaluated to obtain the resultant internal threat and to verify that the level of the induced currents and voltages is sufficiently below the equipment "hardness" level;

2. *Multiple Stroke Flash.* (½ Component D). A lightning strike is often composed of a number of successive strokes, referred to as a multiple stroke. Although multiple strokes are not necessarily a salient factor in a damage assessment, they can be the primary factor in a system upset analysis. Multiple strokes can induce a sequence of transients over an extended period of time. While a single event upset of input/output signals may not affect system performance, multiple signal upsets over an extended period of time (2 seconds) may affect the systems under consideration. Repetitive pulse testing and/or analysis need to be carried out in response to the multiple stroke environment to demonstrate that the system response meets the safety objective. This external multiple stroke environment consists of 24 pulses and is described as a single Component A followed by 23 randomly spaced restrikes of ½ magnitude of Component D (peak amplitude of 50,000 amps), all within 2 seconds. An analysis or test needs to be accomplished in order to obtain the resultant internal threat environment for the system under evaluation;

3. *Multiple Burst.* (Component H). In-flight data-gathering projects have shown bursts of multiple, low amplitude, fast rates of rise, short duration pulses accompanying the airplane lightning strike process. While insufficient energy exists in these pulses to cause direct (physical damage) effects, it is possible that indirect effects resulting from this environment may cause upset to some digital processing systems.

The representation of this interference environment is a repetition of low amplitude, high peak rate of rise, double exponential pulses which represent the multiple bursts of current pulses observed in these flight data gathering projects. This component is intended for an analytical (or test) assessment of functional upset of the system. Again, it is required that this component be translated into an internal environmental threat in order to be used. This "Multiple Burst" consists of 24 random sets of 20 strokes within a period of 2 seconds. Each set of 20 strokes is made up of 20 "Multiple Burst" waveforms randomly distributed within a period of one millisecond. The individual "Multiple Burst" waveform is defined below.

The following current waveforms constitute the "Severe Strike" (Component A), "Restrike" (Component D), "Multiple Stroke" (½ Component D), and the "Multiple Burst" (Component H). These components are defined by the following double exponential equation:

$$i(t) = I_o (e^{-at} - e^{-bt})$$

where;

t = time in seconds,

i = current in amperes, and

		Severe strike (component A)	Restrike (component D)	Multiple stroke (½ component D)	Multiple burst (component H)
I^{A}amp	=	218,810	109,405	54,703	10,572
a, sec^{-1}	=	11,354	22,708	22,708	187,191
b, sec^{-1}	=	647,265	1,294,530	1,294,530	19,105,100

This equation produces the following characteristics:

ipeak	=	200 KA	100 KA	50 KA	10 KA
and,					
(di/dt)max(amp/sec)	=	1.4×10^{11} @t=0+sec	1.4×10^{11} @t=0+sec	0.7×10^{11} @t=0+sec	2.0×10^{11} @t=0+sec
di/dt, (amp/sec)	=	1.0×10^{11} @t=.5 us	1.0×10^{11} @T=.25 us	$0.5 \times 0.5 \times 10^{11}$ @t=.25 us	
di/dt, (amp/sec)	=	1.0×10^{11}	1.0×10^{11}	0.5×10^{11}	
Action Integral (amp^2 sec)	=	2.0×10^{6}	0.25×10^{6}	$.0625 \times 10^{6}$	

Protection from Unwanted Effects of Radio Frequency (RF) Energy

Airplane designs which utilize metal skins and mechanical command and control means have traditionally been shown to be immune from the effects of FR energy from ground-based transmitters. With the trend toward increased power levels from these sources, plus the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of the airplane to RF energy must be established. No universally accepted guidance to define the maximum energy level in which civilian airplane system installations must be capable of operating safely has been established.

It is not possible to precisely define the RF energy to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for RF energy. Furthermore, coupling to cockpit installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing RF emitters, an adequate level of protection exists when compliance with the RF special condition is shown with paragraphs 1 or 2 below:

1. A minimum RF threat of 100 volts per meter average electric field strength from 10 KHz to 20 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. An RF threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Average (V/m)	Peak (V/m)
10 KHz—3 MHz	100	100
3 MHz—30 MHz	1,000	1,000
30 MHz—100 MHz	100	100
100 MHz—200 MHz	200	3,000
200 MHz—1 GHz	2,000	6,000
1 GHz—2 GHz	2,000	14,000
2 GHz—8 GHz	600	14,000
8 GHz—10 GHz	2,000	14,000
10 GHz—40 GHz	1,000	8,000

To establish the values in paragraph 2 above, an analysis was performed using a model of U.S. airspace and the Electromagnetic Compatibility Analysis Center (ECAC) data base, which contains the characteristics of all U.S. emitters. This analysis assumed a minimum separation distance between the airplane and emitters as follows: In the airport environment, 250 ft. for fixed emitters and 50 ft. for mobile emitters; for the air-to-air environment, 50 ft. from interceptor aircraft and 500 ft. from non-interceptor aircraft; for the ground-to-air environment, 500 ft.; and for the ship-to-air environment, 1,000 ft. The results of this analysis were then combined with the results of a study of emitters in European countries. The above values are therefore believed to represent the worst case external threat levels to which an airplane would be exposed in the operating environment.

Type Certification Basis

Under the provisions of § 21.101 of the Federal Aviation Regulations (FAR), Aerospatiale/Aeritalia must show that the Model ATR-72 meets the applicable provisions of the regulations incorporated by reference in Type Certificate No. A53EU, or the applicable regulations in effect on the date of application for the Model ATR-72. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis."

The type certification basis for the Aerospatiale/Aeritalia ATR-72 airplanes includes certain European airworthiness requirements and specific sections of Part 25 of the FAR. Collectively, these requirements, which are listed in Type Certificate Data Sheet No. A53EU, have been found equivalent to Part 25 of the FAR, as amended by Amendments 25-1 through 25-54. In addition the type certification basis includes § 25.904, as amended by Amendments 25-1 through 25-62; Special Federal Aviation Regulation (SFAR) 27, including all amendments effective on or before the ATR-72 TC date; Part 36 of the FAR, including all amendments effective on or before the ATR-72 TC date; FAA Exemption 4385 (NM-104) regarding § 25.571(e)(2), granted April 19, 1984; a finding of regulatory adequacy pursuant to the "Noise Control Act of 1972"; an FAA finding of equivalent safety for § 25.773(b)(2) of the FAR; ice protection provisions of JAR 25.1419; appropriate FAA Advisory Circulars on precision approach and landing; and the special conditions proposed herein.

If the Administrator finds that the applicable airworthiness regulations (i.e., Part 25 as amended) do not contain adequate or appropriate safety standards for the Model ATR-72 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations. Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.101.

Conclusion: This action affects only certain unusual or novel design features on one model series of airplanes. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Parts 21 and 25

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Aerospatiale/Aeritalia ATR-72 airplane.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2); 42 U.S.C. 1857f-10, 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

1. *Lightning Protection.*

a. Each electronic system which performs critical functions must be designed and installed to ensure that the operation and operational capabilities of these systems to perform critical functions are not affected when the airplane is exposed to lightning.

b. Each essential function of new or modified electronic systems or installations must be protected to ensure that the function can be recovered in a timely manner after the airplane has been exposed to lightning.

2. *Protection from Unwanted Effects of Radio Frequency (RF) Energy.* The Multipurpose Computer System must be designed and installed to ensure that the operation and operational capabilities of this system to perform critical functions are not adversely affected when the airplane is exposed to high energy RF fields.

3. For the purpose of these special conditions, the following definitions apply:

Critical Functions. Functions whose failure would contribute to or cause a failure condition which would prevent the continued safe flight and landing of the airplane.

Essential Functions. Functions whose failure would contribute to or cause a failure condition which would significantly impact the safety of the airplane or the ability of the flightcrew to cope with adverse operating conditions.

Issued in Seattle, WA, on June 2, 1989.

Darrell M. Pederson,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-14903 Filed 6-22-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 89-NM-89-AD]

Airworthiness Directives; Empresa Brasileira de Aeronautica, S.A. (EMBRAER) Model EMB-120 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This Notice proposes to adopt a new airworthiness directive (AD), applicable to EMBRAER Model EMB-120 series airplanes, which would require the modification of the landing gear aural warning system in order to alert the crew on approach that the landing gear is not down. This proposal is prompted by two recent inadvertent gear-up landings wherein the aural warning device did not sound. This condition, if not corrected, could result in an inadvertent gear-up landing.

DATE: Comments must be received on or before August 14, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 89-NM-89-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from EMBRAER, 276 SW. 34th Street, Fort Lauderdale, Florida 33315. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the FAA Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia.

FOR FURTHER INFORMATION CONTACT: Mr. William H. Trammell, Aerospace Engineer, ACE-130A, FAA, Central Region, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia 30349; telephone (404) 991-3020.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments sumbitted will be available, both before and after the closing date for comments in the Regional Rules Docket for examination by interested persons. A report summarizing each FAA public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to Notice must submit a self-addressed, stamped post card on which the following statement is made: Comments to Docket Number 89-NM-89-AD. The post card will be date/time stamped and returned to the commenter.

Discussion

There have been two reports of accident involving Model EMB-120 series airplanes wherein the crew failed to place the landing gear in the down position prior to landing. Both accidents occurred during crew training sessions while simulating various emergencies during approach to include loss of flaps at low aircraft gross weights. The resulting minimal approach power adjustment was such that the landing gear warning system was never re-armed after the initial power reduction and muting of the gear warning horn by the crew. The cause was determined to be the lack of switches representing the Electronic Engine Control (EEC) "ON" operating condition. This condition, if not corrected, could lead to an inadvertent gear-up landing.

EMBRAER has issued Service Bulletin No. 120-032-0055, dated March 16, 1989, for airplanes without a radio altimeter, which describes procedures to modify the landing gear up aural warning system, to alert the crew on approach when the land gear is not down.

EMBRAER has also issued Service Bulletin No. 120-032-0052, dated March 15, 1989, for airplanes with radio altimeters, which describes procedures to similarly modify the landing gear warning system.

This airplane is manufactured in Brazil and type certificated in the United

States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since this condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would require modification of the landing gear warning system, in accordance with the service bulletins previously described.

It is estimated that 60 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 24 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. The estimated cost for parts is $490 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $87,000 (or $1,450 per airplane).

The regulations 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 12612, it is determined that this proposal would not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (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) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the Regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendent

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Empresa Brasileira De Aeronautica, SA (EMBRAER): Applies to Model EMB–120 series airplanes; Serial numbers 120004, 120006 through 120070, 120072 through 120080, and 120082 through 120099; certificated in any category. Compliance is required within 50 days after the effective date of this AD, unless previously accomplished.

To prevent a gear-up landing due to malfunction of the landing gear aural warning system, accomplish the following:

A. For airplanes not equipped with radio altimeters, modify the landing gear aural warning system and calibrate new switches, in accordance with EMBRAER Service Bulletin No. 120–032–0055 dated March 16, 1989.

B. For airplanes equipped with radio altimeters, modify the landing gear warning system, in accordance with EMBRAER Service Bulletin 120–032–0052, dated March 15, 1989.

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

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Atlanta Aircraft Certification Office.

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to EMBRAER, 276 SW. 34th Street, Fort Lauderdale, Florida 33315. These documents may be examined at the FAA Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle Washington, or the FAA, Central Region, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia.

Issued in Seattle, Washington, on June 14, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–14899 Filed 6–22–89; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 39

[Docket No. 89–NM–86–AD]

Airworthiness Directives; Empresa Brasileira de Aeronautica, S.A. (EMBRAER) Model EMB–120 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD), applicable to certain Empresa Brasileira de Aeronautica, S.A. (EMBRAER) Model EMB-120 series airplanes, which would require replacement of certain glide slope antennae. This proposal is prompted by numerous reports of erratic glide slope data during instrument flight rules (IFR) approaches. This condition, if not corrected, could result in airplaines receiving inaccurate glide slope data when landing in instrument weather conditions.

DATES: Comments must be received no later than August 7, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–103, Attention: Airworthiness Rules Docket No. 89–NM–86–AD, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168. The applicable service information may be obtained from EMBRAER, 276 SW. 34th Street, Fort Lauderdale, Florida 33315. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia.

FOR FURTHER INFORMATION CONTACT: Mr. A. E. Clark, Systems and Equipment Branch, ACE-130A; telephone (404) 991–3020. Mailing Address: FAA, Atlanta Aircraft Certification Office, Small Airplane Directorate, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia 30349.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing data for comments specified above will be considered by the

Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of thie proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 89–NM–86–AD." The post card will be date/time stamped and returned to the commenter.

Discussion

There have been several reports of erratic glide slope data on EMBRAER Model EMB–120 series airplanes equipped with a Chelton antenna, P/N 17–21F6P3. Further investigation revealed that glide slope oscillation has occurred due to the accumulation of moisture in the Chelton antenna. Attempts to seal the radome and antenna to prevent moisture accumulation have been unsuccessful. This condition, if not corrected, could result in airplanes receiving inaccurate glide slope data when landing in instrument weather conditions.

EMBRAER has issued Service Bulletin 120–034–0072, dated April 14, 1989, which describes procedures to replace the Chelton glide slope antenna with a Collins glide slope antenna type 37P5, P/N 522–0700–023, and to install a pedestal type support P/N 120–47294–001. The Collins antenna has had no reported glide slope problems.

This airplane model is manufactured in Brazil and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since this condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would require replacing the Chelton glide slope antenna with a Collins glide slope antenna and installing a pesdestal type support, in accordance with the service bulletin previously described.

It is estimated that 80 airplaines of U.S. registry would be affected by this AD, that it would take approximately 3 manhours per airplaine to accomplish the required actions, and that the average labor cost would be $40 per manhour. The estimated cost for parts is $510. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $50,400.

The regulations 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 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (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) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Empresa Brasileira De Aeronautica, S.A. (Embraer): Applies to Model EMB–120 series airplanes, as listed in EMBRAER Service Bulletin 120–034–0072, dated April 14, 1989, certificated in any category. Compliance is required within 30 days after the effective date of this AD, unless previously accomplished.

To prevent erratic glide slope information during IFR approaches, accomplish the following:

A. Replace the Chelton glide slope antenna, P/N 17–21F6P3, with a Collins glide slope antenna type 37P5, P/N 522–0700–023, and install a pedestal-type support, P/N 120–47294–001, in accordance with EMBRAER Service Bulletin 120–034–0072, dated April 14, 1989.

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, Standardization Branch, ANM–113, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Standardization Branch, ANM–113.

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to EMBRAER, 276 SW. 34th Street, Fort Lauderdale, Florida 33315. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Atlanta Aircraft Certification Office, Small Airplane Directorate, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia.

Issued in Seattle, Washington, on June 8, 1989.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–14895 Filed 6–22–89; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 39

[Docket No. 89–NM–95–AD]

Airworthiness Directives: Fokker Model F–27 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD), applicable to certain Fokker Model F–27 series airplanes, which would require a one-time inspection for cracks of the fuselage external skin riveted connections between fuselage Station 1400 and the partial pressure bulkhead, and repair, if necessary. This proposal is prompted by reports of cracks found in several parts of the external skin due to fatigue cracking of the dimpled rivet holes. This condition, if not corrected,

could lead to reduced structural capability of the fuselage and subsequent decompression of the airplane.

DATES: Comments must be received no later than August 14, 1989.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 89-NM-95-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicble service information may be obtained from Fokker Aircraft USA, Inc., 1199 N. Fairfax Street, Alexandria, Virginia 22314. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Quam, Standardization Branch, ANM-113; telephone (206) 431-1978. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 89-NM-95-AD." The post card will be date/time stamped and returned to the commenter.

Discussion

The Rijksluchtvaartdienst (RLD), which is the airworthiness authority of the Netherlands, in accordance with existing provisions of a bilateral airworthiness agreement, has notified the FAA of an unsafe condition which may exist on certain Fokker Model F-27 series airplanes. There have been two reports of the fuselage skin rupturing between Station 3820 and Station 4240 along the rivet row of stringers 34 and 35. This condition, if not corrected, could lead to reduced structural capability of the fuselage and subsequent decompression of the airplane.

Fokker has issued Service Bulletin F27/53-108, dated February 3, 1989, which prescribes procedures for a one-time visual inspection for cracks in the fuselage external skin riveted connections between fuselage Station 1400 and the partial pressure bulkhead, and repair, if necessary. The RLD has classified the service bulletin as mandatory, and has issued the Netherlands Airworthiness Directive BLA No. 89-20 to address this subject.

This airplane model is manufactured in the Netherlands and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since this condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would require an inspection for cracks in the fuselage external skin riveted connections between fuselage Station 1400 and the partial pressure bulkhead, and repair, if necessary, in accordance with the service bulletin previously described.

This is considered to be interim action. The manufacturer is currently attempting to determine the extent and nature of the addressed damage, and is developing an appropriate repetitive inspection schedule and/or modification that will preclude the need for repetitive inspections. Once these are developed, the FAA may consider further rulemaking to revise this AD to require additional necessary action.

It is estimated that 33 airplanes of U.S. registry would be affected by this AD, that it would take approximately 4 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $5,280.

The regulations 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 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (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) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Fokker: Applies to Model F-27 series airplanes, Serial Number 10202, 10105 through 10684, 10686, 10687, and 10689 through 10692, certificated in any category. Compliance is required as indicated, unless previously accomplished.

To prevent reduced structural capability of the fuselage and subsequent decompression of the airplane, accomplish the following:

A. For airplanes in post-Service Bulletin F27/21-30 configuration, within 30 days after the effective date of this AD or upon the accumulation of 30,000 landings, whichever occurs later, inspect the external skin at the riveted connections between fuselage Station 1400 and the partial pressure bulkhead, in accordance with Fokker Service Bulletin F27/53-108, dated February 3, 1989. If cracks are found, repair prior to further flight, in accordance with the service bulletin.

B. For airplanes in pre-Service Bulletin F27/21–30 configuration, within 30 days after the effective date of this AD or upon the accumulation of 50,000 landings, whichever occurs later, inspect the external skin at the riveted connections between Fuselage Station 1400 and the partial pressure bulkhead in accordance with Fokker Service Bulletin F27/53–108, dated February 3, 1989. If cracks are found, repair prior to further flight, in accordance with the service bulletin.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM–113, FAA, Northwest Mountain Region.

Note: The request should be forwarded through a FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Standardization Branch, ANM–113.

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Fokker Aircraft USA, Inc., 1199 N. Fairfax Street, Alexandria, Virginia. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle Washington 98168

Issued in Seattle, Washington, on June 14, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–14896 Filed 6–22–89; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 39

[Docket No. 89–ANE–12]

Airworthiness Directives; Garrett Engine Division (Hereinafter Called "Garrett"), Allied-Signal Incorporated, Models TFE731–3, –3A, –3AR and –3R Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt an airworthiness directive (AD) that would require the removal of suspect high pressure turbine rotor (HPTR) discs within 150 operating cycles, after the effective date of the AD, on certain Garrett turbofan engine models. The proposed AD is needed to prevent additional uncontained turbine rotor failures due to low cycle fatigue from an inclusion of foreign material within the disc.

DATES: Comments must be received on or before August 25, 1989.

ADDRESSES: Comments on the proposal may be mailed in duplicate to Federal Aviation Administration, New England Region, Office of the Assistant Chief Counsel, Attn: Rules Docket No. 89–ANE–12, 12 New England Executive Park, Burlington, Massachusetts 01803, or delivered in duplicate to Room 311, at the above address.

Comments delivered must be marked: Docket No. 89–ANE–12.

Comments may be inspected at the New England Region, Office of the Assistant Chief Counsel, Room 311, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays.

The applicable engine manufacturer's service bulletin may be obtained from Garrett General Aviation Service Division, Distribution Center, 2340 East University, Phoenix, Arizona 85034; telephone (602) 225–2548, or may be examined in the Regional Rules Docket.

FOR FURTHER INFORMATION CONTACT: Joseph Costa, Aerospace Engineer, Propulsion Branch, ANM–140L, Los Angeles Aircraft Certification Office, Transport Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 3229 East Spring Street, Long Beach, California 90806–2425; telephone (213) 988–5246.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the FAA before any final action is taken on the proposed rule. The proposal contained in this notice may be changed in light of comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket at the address given above, for examination by interested persons. A report summarizing each FAA-public contact, concerned with the substance of the proposed AD, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: Comments to Docket No. 89–ANE–12. The postcard will be date/time stamped and returned to the commenter.

The FAA has determined that a Garrett TFE731–3 engine incurred an uncontained HPTR disc failure after 2,764 cycles due to low cycle fatigue from an inclusion of stainless steel in the disc bore area. This foreign material contamination occurred during the pre-forging remelt process. It has been determined that during subsequent forging operations additonal discs could contain the foreign material. A non-destructive inspection technique conducted by Garrett will confirm the discs acceptability for conitinued service. This proposed AD requires removal of the 49 suspect discs. Since this condition is likely to exist in other engines of the same type design, the proposed AD would require the removal of suspect discs in accordance with Garrett Alert Service Bulletin (SB) TFE731–A72–3388, dated February 28, 1989, to correct the unsafe condition.

The regulations 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 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this proposed regulation involves only 49 engines at a negligible cost due to Garrett's incentive program. Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12921; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal; and (4) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Engines, Air transportation, Aircraft, Aviation safety, and Incorporation by reference.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the FAA proposes to amend Part 39 of the Federal Aviation Regulations (FAR) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983); and 14 CFR 11.85.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive (AD):

Garrett Engine Division (hereinafter called "Garrett"), **Allied-Signal Incorporated:** Applies to models TFE731–3, –3A, –3AR, and –3R turbofan engines equipped with high pressure turbine rotor (HPTR) discs, part numbers 3072316–2, –3, and 3073110–1, –2.

Compliance is required as indicated, unless already accomplished.

To prevent an uncontained engine failure, accomplish the following:

(a) Remove and replace with a serviceable part, specific serial number HPTR discs in accordance with the accomplishment instructions in Garrett Alert Service Bulletin (SB) TFE731–A72–3388, dated February 28, 1989, at next access to the turbine rotor assembly or within 150 operating cycles after the effective date of this AD or prior to June 1, 1990, whichever occurs first.

Note: For the purpose of the AD, access to the turbine rotor assembly is defined as whenever the N_1 turbine module is separated from the engine.

(b) Aircraft may be ferried in accordance with the provisions of FAR 21.197 and 21.199 to a base where the AD can be accomplished.

(c) Upon submission of substantiating data by an owner or operator through an FAA Airworthiness Inspector, the Manager, Los Angeles Aircraft Certification Office, Federal Aviation Administration, Transport Airplane Directorate, Aircraft Certification Service, 3229 East Spring Street, Long Beach, California 90806–2425, may approve an equivalent means of compliance or an adjustment of the compliance schedule which provides an equivalent level of safety.

Issued in Burlington, Massachusetts, on June 14, 1989.

Arthur J. Pidgeon,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 89–14897 Filed 6–22–89; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 39

[Docket No. 89–ANE–11]

Airworthiness Directives; Teledyne Continental Motors (TCM) Engines, Models TSIO–520B, BB, D, DB, E, EB, J, JB, K, KB, N, NB, UB, and VB

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt an Airworthiness Directive (AD) that would require a one time inspection and, if necessary, replacement of the scavenge oil pump gears on certain TCM engines, models TSIO–520B, BB, D, DB, E, EB, J, JB, K, KB, N, NB, UB, and VB. This proposed AD is needed to prevent possible loss of the scavenge pump which could result in total loss of engine power.

DATES: Comments must be received on or before August 25, 1989.

ADDRESSES: Comments on the proposal may be mailed in duplicate to Federal Aviation Administration, New England Region, Office of the Assistant Chief Counsel, Attn: Rules Docket No. 89–ANE–11, 12 New England Executive Park, Burlington, Massachusetts 01803, or delivered in duplicate to Room 311, at the above address.

Comments delivered must be marked: Docket No. 89–ANE–11.

Comments may be inspected at the New England Region, Office of the Assistant Chief Counsel, Room 311, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The applicable service bulletin (SB) No. M89–4, dated February 9, 1989, may be obtained from Teledyne Continental Motors, P.O. Box 90, Mobile, Alabama 36601, or may be examined in the Regional Rules Docket.

FOR FURTHER INFORMATION CONTACT: Jerry Robinette, Aerospace Engineer, Propulsion Branch, ACE–140A, Atlanta Aircraft Certification Office, Federal Aviation Administration, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia 30349; telephone (404) 991–3810.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the agency before any final action is taken on the proposed rule. The proposal contained in this notice may be changed in light of comments.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket at the address given above, for examination by interested persons. A report summarizing each FAA-public contact, concerned with the substance of the proposed AD, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self addressed, stamped postcard on which the following statement is made: Comments to Docket No. 89–ANE–11. The postcard will be date/time stamped and returned to the commenter.

The FAA has determined that there have been 39 service difficulty reports (since 1983) of scavenge pump gear failures on certain TCM engines, models TSIO–520B, BB, D, DB, E, EB, J, JB, K, KB, N, NB, UB, and VB. Failure of the scavenge pump gears results in total loss of engine power due to lack of lubrication. This problem is addressed in TCM SB M89–4 which recommends a one time inspection of marked gears and replacement of any unmarked gears or any gear which fails the inspection. The gears, part numbers (P/N's) 635334 and 639388, have a shallow hardness depth, and wear or pressure abrasive cleaning procedures can destroy the hardened layer. TCM introduced carburized gears which have much greater resistance to wear. However, they did not mark the early production gears P/N's 649157 and 649159; therefore, there are unidentifiable carburized gears in use. Later carburized gears have a drill point for identification. These carburized gear (P/N's 649157 and 649159) are to replace P/N's 635334 and 639388, and unmarked gears P/N's 649157 and 649159. Since this condition is likely to exist or develop on other engines of the same type design, the proposed AD would require a one time inspection of the gears and, if necessary, replacement of certain scavenge oil pump gears.

The regulations 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 12612, it is determined that this proposal

would not have sufficient federalism implications to warrant the preparation of a Federal Assessment.

The FAA has determined that this proposed regulation involves 8481 engines and the approximate cost would be $310 per engine. Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (Z44 FR 11034; February 26, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal; and (4) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Engines, Air transportation, Aircraft, Aviation safety, and Incorporation by reference.

The Proposed Amendment

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

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983); and 14 CFR 11.85.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive (AD):

Teledyne Continental Motors (TCM): Applies to TCM engines, models TSIO–520B, BB, D, DB, E, EB, J, JB, K, KB, N, NB, UB, and VB, equipped with scavenge oil pump gears Part Numbers (P/N's) 635334, 639388, 648157, and 649159.

Compliance is required within 500 flight hours of the effective date of this AD, or at any maintenance event during which the scavenge oil pump gears are removed from the engine, whichever occurs first, unless already accomplished.

To prevent possible failure of scavenge oil pump gears which could result in total loss of engine power, accomplish the following:

(a) Remove the scavenge oil pump gears (P/N's 635334, 639388, 649157 or 649159) from the scavenge oil pump housing, inspect the gear teeth for a drill point as shown in Figure 1 of TCM Service Bulletin (SB) No. M89–4, dated February 9, 1989.

(1) If the drill point is present, inspect the gears in accordance with the inspection procedures outlined in SB M89–4.

(2) If the drill point is not present or the gears fail the inspection specified in SB M89–4, replace the gears with P/N 649157 and/or 649159 gears having the drill point marking.

(b) Make appropriate log book entry showing compliance with this AD.

(c) Aircraft may be ferried in accordance with the provisions of FAR 21.197 and 21.199 to a base where the AD can be accomplished.

(d) Upon submission of substantiating data by an owner or operator through an FAA Airworthiness Inspector, the Manager, Atlanta Aircraft Certification Office, Federal Aviation Administration, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia 30349, may approve an equivalent means of compliance or an adjustment of the compliance schedule specified in this AD, which provides an equivalent level of safety.

Issued in Burlington, Massachusetts, on June 14, 1989.

Arthur J. Pidgeon,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 89–14898 Filed 6–22–89; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 211

[Docket No. 88N–0320]

Current Good Manufacturing Practice in Manufacture, Processing, Packing, or Holding; Proposed Revision of Certain Labeling Controls

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the current good manufacturing practice (CGMP) regulations for human and veterinary drug products to revise certain labeling control provisions. The changes are intended to reduce the frequency of drug product mislabeling. The proposal specifies conditions for the use of gang-printed or cut labeling, exempts from CGMP labeling reconciliation requirements manufacturers that employ 100-percent drug product label inspection systems, and requires manufacturers to identify filled drug product containers that are not immediately labeled. These actions are based upon findings of a recent agency study of drug product recalls.

DATE: Comments by August 22, 1989.

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: Robert J. Meyer, Center for Drug Evaluation and Research (HFD–362), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–295–8046.

SUPPLEMENTARY INFORMATION:

I. Introduction

Because of the persistent problem of drug product mislabeling and of class I recalls in fiscal year 1987 due to drug product mislabeling, FDA undertook an extensive review of labeling procedures under the CGMP regulations with a view toward modifying labeling control requirements to reduce the frequency of drug product mislabeling. The proposed rule, which would modify specific sections of the packaging and labeling control subpart of the CGMP regulations, is intended to encourage desirable labeling operations and to contribute measurably to preventing drug product mislabeling.

The agency action is based on a recent study conducted by FDA that examined all recalls due to drug product mislabeling that have occurred over the last 5 fiscal years (fiscal year 1983 through fiscal year 1987). A copy of this study is on file with the Dockets Management Branch (address above) under the docket number found in brackets in the heading of this document, and may be seen there between 9:00 a.m. and 4:00 p.m., Monday through Friday.

The agency's study demonstrated that approximately one-quarter of all drug product recalls over the past 5 fiscal years were due to drug product mislabeling. The study identified four primary causes of these mislabeling-related recalls: Label mixups, product mixups, label printing errors, and product label versus container label errors. Of these causes, the study identified label mixups as the leading cause of recall incidents involving mislabeled products. Such a mixup occurs when an incorrect label is applied to a correctly identified drug product.

FDA analyzed recall incidents attributed to label mixups. The analysis showed that the use of cut labels, labels of similar size, shape or color, and deviations from existing CGMP labeling requirements were the leading causes of such mixups. The following three label control practices were not involved in any of the recalls attributed to label mixups: The use of labels differentiated by size, shape, or color; the use of dedicated packaging lines; and the use of electronic label verification systems that validate the labeling of each product during finishing operations (100-percent label inspection).

II. Proposed Revisions to the Regulations

Based on the review of this study, the agency is proposing to revise the labeling control requirements of the CGMP regulations—

1. To prohibit gang printing of labeling to be used for different drug products or different strengths or net contents (see proposed § 211.122(f)) of the same drug product, unless the labeling from gang-printed sheets is adequately differentiated by size, shape, or color;

2. To allow manufacturers to use cut labels if labeling and packing lines are dedicated to each different drug product or different strengths of the same drug products, or if a 100-percent examination for correct labeling is conducted by the use of appropriate electronic or electromechanical equipment during or after completion of finishing operations;

3. To exempt manufacturers from the requirement for label reconciliation if a 100-percent drug product label inspection system is employed during or after completion of finishing operations; and

4. To require manufacturers to incorporate into their written labeling procedures a provision for identification and handling of filled drug product containers that are not immediately labeled, in order to preclude mislabeling of individual containers, lots, or portions of lots. Such identification is to be sufficient to determine name, strength, quantity of contents, lot or control number, and expiration date of the drug product.

III. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(10) that this proposed 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.

IV. Economic Impact

The agency has considered the economic impact of this proposed rule and has determined that it requires neither a regulatory impact anlaysis as specified in Executive Order 12291 nor a regulatory flexibility analysis as defined in the Regulatory Flexibility Act (Pub. L. 96–354). Specifically, the proposal would establish additional conditions for the use of certain types of labeling and for the control of packaged drug products that will be labeled at a later date. In addition, the proposal would provide an exemption from an existing label control requirement when certain conditions are met. The agency believes that the overall cost impact of these proposed changes would be minimal. For example, a significant number of firms already use some type of electronic or electromechanical equipment to inspect all labeling. Therefore, under this proposed rule, there would be a cost savings for certain operations for manufacturers who use a 100-percent drug product label inspection system because the proposal would exempt these manufacturers from the current label reconciliation requirements and the new control procedures for cut labels. Although there may be additional costs to some manufacturers, many firms already meet some or all of these proposed requirements, or would meet the conditions for exemption from certain requirements.

In summary, the agency concludes that the proposed rule is not a major rule inasmuch as the proposed labeling control revisions would not result in a significant overall cost to manufacturers. Moreover, the proposed rule is intended to reduce the frequency of mislabeling-related recalls and thus be more cost efficient, since its cost impact is minimal relative to the cost associated with a drug product recall. For these reasons, therefore, the agency has determined that this proposed rule is not a major rule as defined in Executive Order 12291. Further, the agency certifies that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act.

V. Request for Comments

Interested persons may, on or before August 22, 1989, submit to the Dockets Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 211

Drugs, Labeling, Laboratories, Packaging and containers, Prescription drugs, Reporting and recordkeeping requirements, Warehouses.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that Part 211 be amended as follows:

PART 211—CURRENT GOOD MANUFACTURING PRACTICE FOR FINISHED PHARMACEUTICALS

1. The authority citation for 21 CFR Part 211 continues to read as follows:

Authority: Secs. 201(n), 501, 502, 505, 506, 507, 701 (21 U.S.C. 321(n), 351, 352, 355, 356, 357, 371); 21 CFR 5.10, 5.11.

2. Section 211.122 is amended by revising paragraph (f), by redesignating paragraph (g) as paragraph (h), and by adding new paragraph (g) to read as follows:

§ 211.122 Materials examination and usage criteria.

* * * * *

(f) Use of gang-printed labeling for different drug products, or different strengths or net contents of the same drug product, is prohibited unless the labeling from gang-printed sheets is adequately differentiated by size, shape, or color.

(g) If cut labels are used, packaging and labeling operations shall include one of the following special control procedures:

(1) Dedication of labeling and packaging lines to each different drug product or different strength of the same drug product; or

(2) Use of appropriate electronic or electromechanical equipment to conduct a 100-percent examination for correct labeling during or after completion of finishing operations.

* * * * *

3. Section 211.125 is amended by revising paragraph (c) to read as follows:

§ 211.125 Labeling issuance.

* * * * *

(c) Procedures shall be utilized to reconcile the quantities of labeling issued, used, and returned, and shall require evaluation of discrepancies found between the quantity of drug product finished and the quantity of labeling issued when such discrepancies are outside narrow preset limits based on historical operating data. Such discrepancies shall be investigated in accordance with § 211.192. Label reconciliation is waived if a 100-percent examination for correct labeling is performed in accordance with § 211.122(g)(2).

* * * * *

4. Section 211.130 is amended by redesignating paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e), respectively, and by adding new paragraph (b) to read as follows:

§ 211.130 Packaging and labeling operations.

* * * * *

(b) Identification and handling of filled drug product containers that are not immediately labeled, to preclude mislabeling of individual containers, lots, or portions of lots. Identification shall be sufficient to determine name, strength, quantity of contents, lot or control number, and expiration date of the drug product.

* * * * *

Dated: April 24, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-14871 Filed 6-22-89; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[EE-120-86]

RIN 1545-AK41

Minimum Coverage Requirements; Correction

AGENCY: Internal Revenue Service, Treasury.

ACTION: Corrections to notice of proposed rulemaking.

SUMMARY: This document contains corrections to the Federal Register publication for Thursday, May 18, 1989, at 54 FR 21437 of the notice of proposed rulemaking. The proposed rules relate to the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986.

FOR FURTHER INFORMATION CONTACT: Nancy J. Marks, 202-343-6954 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking that is the subject of these corrections provides the public with guidance needed to comply with the law and would affect sponsors of the participants in pension, profit-sharing and stock bonus plans and certain other employee benefit plans.

Need for Correction

As published, the May 18, 1989, notice contains errors that, if not corrected, might cause confusion to taxpayers and practitioners.

Correction of Publication

Accordingly, the publication of the proposed rule (FR. Doc. 89-11613) is corrected as follows:

Paragraph 1. On page 21440, column 1, in the preamble, under the subheading "4. Definition of Plan and Rules and Plan Aggregation and Disaggregation", the reference to "section 41D(b)" should read "section 410(b)".

1.401(b)-3 [Corrected]

Par. 2. On page 21444, column 2, under 1.401(b)-3(d), Example 2., line 12 of the colunn, the word "but" should be removed.

1.410(b)-6 [Corrected]

Par. 3. On page 21447, column 3, under 1.410(b)-6(f), Example 2, line 15 of (iii), the language "employees (100 out of 100 of nonhighly" should read "employees (100 out of 100 nonhighly".

1.410(b)-7

Par. 4. On page 21449, column 2, fourth line under 1.410(b)-7(e)(2), the language "paragraph (c) (1), (2), (3), (5) or (6) of this" should read "paragraph (c) (1), (2), (5) or (6) of this".

Dale D. Goode,

Chief, Regulations Unit Assistant Chief Counsel (Corporate).

[FR Doc. 89-14842 Filed 6-22-89; 8:45 am]

BILLING CODE 4830-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

Montana Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule; reopening and extension of public comment period on proposed amendment.

SUMMARY: OSMRE is announcing receipt of additional explanatory information and revisions pertaining to a previously proposed amendment to the Montana permanent regulatory program (hereinafter, the "Montana program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The additional explanatory information and revisions pertain to repair of rills and gullies, and protection of archeological resources. The amendment is intended to revise the State program to be consistent with the corresponding Federal standards, incorporate the additional flexibility afforded by the revised Federal regulations, provide additional safeguards, clarify ambiguities, improve operational efficiency, and achieve use of the best technology currently available.

This notice sets forth the times and locations that the Montana program and proposed amendment to that program are available for public inspection and the reopened comment period during which interested persons may submit written comments on the proposed amendment.

DATES: Written comments must be received by 4:00 p.m., m.d.t. July 10, 1989.

ADDRESSES: Written comments should be mailed or hand delivered to Mr. Jerry R. Ennis at the address listed below.

Copies of the Montana program, the proposed amendment, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive one free copy of the proposed amendment by contacting OSMRE's Casper Field Office.

Mr. Jerry R. Ennis, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 100 East B Street, Room 2128, Casper, WY 82601-1918, Telephone: (307) 261-5776

Office of Surface Mining Reclamation and Enforcement, Administrative Record Office, Room 5131, 1100 L Street NW., Washington, DC 20240, Telephone: (202) 343-5492

Gary Amestoy, Administrator, Montana Department of State Lands Reclamation Division, Capitol Station, 1625 Eleventh Avenue, Helena, Montana 59620, Telephone: (406) 444-2074

FOR FURTHER INFORMATION CONTACT: Mr. Jerry R. Ennis, Director, Casper Field Office, (307) 261-5776.

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program

On April 1, 1980 the Secretary of the Interior conditionally approved the Montana program. General background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program can be found in the April 1, 1980 Federal Register (45 FR 21560). Subsequent actions concerning Montana's program and program amendments can be found at 30 CFR 926.15 and 926.16.

II. Proposed Amendment

By letter dated December 21, 1988 (administrative record No. MT-5-1),

Montana submitted a proposed amendment to its program pursuant to SMCRA. Montana submitted the proposed amendment in response to a July 2, 1985 letter that OSMRE sent in accordance with 30 CFR 732.17(c). The regulations that Montana proposes to amend are: Definitions and strip mine permit application requirements, Administrative Rules of Montana (ARM) 26.4 sub-chapter 3; mine permit and test pit prospecting permit procedures, ARM 26.4 sub-chapter 4; backfilling and grading requirements, ARM 26.4 sub-chapter 5; transportation facilities, use of explosives, and hydrology, ARM 26.4 sub-chapter 6; topsoiling, revegetation, and protection of wildlife and air resources, ARM 26.4 sub-chapter 7; alluvial valley floors, prime farmlands, alternate reclamation, and auger mining ARM 26.4 sub-chapter 8; underground coal and uranium mining, ARM 26.4 sub-chapter 9; prospecting, ARM 26.4 sub-chapter 10; bonding, insurance, reporting, and special areas, ARM 26.4 sub-chapter 11; special departmental procedures, ARM 26.4 sub-chapter 12, and miscellaneous provisions, ARM 26.4 sub-chapter 13.

OSMRE published a notice in the January 9, 1989 **Federal Register** (54 FR 632) announcing receipt of the amendment and inviting public comment on the adequacy of the proposed amendment (administrative record No. MT–5–16). The public comment period ended February 8, 1989.

On March 20, 1985 OSMRE notified the State by letter, of its concerns with the proposed amendment to the Montana program (administrative record No. MT–5–15). Montana responded to these concerns on April 27, 1989 with additional explanatory information and revisions (administrative record No. MT–5–20). OSMRE published a notice in the May 17, 1989 **Federal Register** (54 FR 21228) announcing receipt of the additional explanatory information and revisions and reopening the public comment period (administrative record No. MT–5–25). The public comment period ended June 1, 1989.

During its review of the explanatory information and revisions, OSMRE identified two additional concerns relating to protection of archeological resources, ARM 26.4.404(5)(d), and repair of rills and gullies, ARM 26.4.721(2). OSMRE notified Montana of these concerns by letter dated May 17, 1989 (administrative record No. MT–5–24). Montana responded in a letter dated June 1, 1989 by submitting additional explanatory information and a revised amendment package (administrative record No. MT–5–30).

III. Public Comment Procedures

OSMRE is reopening the comment period on the proposed Montana program amendment to provide the public an opportunity to reconsider the adequacy of the amendment in light of the additional materials submitted. In accordance with the provisions of 30 CFR 732.17(h), OSMRE is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Montana program.

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under **"DATES"** or at locations other than the Casper Field Office will not necessarily be considered in the final rulemaking or included in the administrative record.

List of Subjects in 30 CFR Part 926

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Raymond L. Lowrie,

Assistant Director, Western Field Operations.

Date: June 14, 1989.

[FR Doc. 89–14887 Filed 6–22–89; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 36

RIN 2900–AE01 and 2900–AD30

Duty Periods; Loan Guaranty: Processing Assumptions of VA Guaranteed Home Loans

AGENCY: Department of Veterans Affairs.

ACTION: Correction; Proposed Regulations.

SUMMARY: On June 6, 1989, commencing on page 24212 (54 FR 24212); the Department of Veterans Affairs published a proposed rule to amend its regulation for classification of training performed by members of the Senior Reserve Officers' Training Corps. In the amendatory language, it stated that § 3.6(d)(2) was being revised. In fact, § 3.6(d)(2) is not being revised and is correct as it appears in the current (revised as of July 1, 1988) of Title 38, Code of Federal Regulations. However, in the copy printed June 6, 1989, four words in paragraph (d)(2) were inadvertently left out. To avoid any confusion, VA is printing the correct paragarph (d)(2). It is the same as the current paragraph in 38 CFR and there is no revision planned at this time.

On June 15, 1989, commencing on page 25469 (54 FR 25469), the Department published a proposed rule to amend its regulations for processing assumptions of VA guaranteed home loans. Under the proposed rule, VA loan holders will now be permitted to charge either the purchaser or the seller of property purchased subject to assumption of the loan a fee, not to exceed the lesser of $300 and the actual cost of required credit reports or a maximum charge prescribed by State law, for processing an assumption approval.

The $300 figure was correct in the preamble to the document, but another figure was inadvertently printed in the text of the proposed regulation.

VA regrets the errors, this notice hereby corrects the errors and the corrections are published below.

FOR FURTHER INFORMATION CONTACT: Part 3: Mr. Bill Leonard, 202–233–3005; Part 36: Mr. Leonard Levy, 202–233–6376.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

38 CFR Part 36

Condominiums, Handicapped, Housing loan programs-housing and community development, Manufactured homes, Veterans.

Dated: June 19, 1989.

Charles A. Fountaine III,

Chief, Directives Management Division.

1. In 38 CFR Part 3, § 3.6, paragraph (d)(2) is republished as it appears in the 1988 edition of the Code of Federal Regulations read as follows:

§ 3.6 Duty periods.

* * * * *

(d) * * *

(2) Special additional duties authorized for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned; and

* * * * *

§§ 36.4275, 36.4312, 36.4508 [Corrected]

2. In §§ 36.4275(a)(3)(iii), 36.4312(d)(8), and 36.4508(a)(2)(iii), remove the words "$500" wherever they appears and add, in their place, the words "$300".

[FR Doc. 89-14831 Filed 6-22-89; 8:45 am]

BILLING CODE 8320-01-M

Notices

Federal Register
Vol. 54, No. 120
Friday, June 23, 1989

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.

ADVISORY COMMITTEE ON FEDERAL PAY

Meetings

The Advisory Committee on Federal Pay announces that public discussions of the adjustment in Federal white-collar employee pay for Fiscal Year 1990 have been scheduled for Tuesday, July 25, in Suite 600, 1730 K Street NW., Washington, DC. They will start at 1:30 p.m.

These discussions are intended to give organizations representing Federal employees or any interested government employees an opportunity to express their views regarding the Pay Agent's proposals. Those wishing to discuss the Agent's proposals with the Committee should notify the Committee by July 21. The telephone number is 653–6193. Written comments should also reach the Committee by July 21—Suite 205, 1730 K Street NW., Washington, DC 20006. Both written submissions and requests for an opportunity to discuss the issues should include a telephone number where the organization or official can be reached.

The Advisory Committee on Federal Pay, established as an independent agency by Section 5306 of Title 5, United States Code (Pub. L. 91–656, the Federal Pay Comparability Act), is charged with assisting the President in carrying out the policies of Section 5301 of Title 5, United States Code. The Committee's fundamental obligation is to present the President with an independent recommendation on Federal pay for the 1.4 million white-collar workers and other employees whose pay is linked to the General Schedule. Section 5306 of Title 5 requires the Committee to make findings and recommendations to the President on the annual adjustment in Federal pay after considering the written views of employee organizations, the President's Agent, other officials of the Government of the United States, and such experts as the Committee may consult.

Lucretia Dewey Tanner,
Executive Director.

[FR Doc. 89–14933 Filed 6–22–89; 8:45 am]
BILLING CODE 6820–43–M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. 90642–9142]

Memorandum of Understanding Between the Patent and Trademark Office and the Animal and Plant Health Inspection Service

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The Patent and Trademark Office (PTO) is providing notice of a memorandum of understanding (MOU) between the PTO and the Animal and Plant Health Inspection Service (APHIS). The MOU establishes procedures whereby APHIS assists PTO in determining a product's eligibility for patent term extension under 35 U.S.C. 156, as amended by the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670, 102 Stat. 3971 (1988)). Procedures are also described for exchanging information between APHIS and PTO regarding regulatory review period determinations and the processing of due diligence petitions.

DATE: The memorandum of understanding became effective June 15, 1989.

I. Purpose

This agreement establishes the procedures whereby the Animal and Plant Health Inspection Service (APHIS) assists the Patent and Trademark Office (PTO) in determining a product's eligibility for patent term restoration under 35 U.S.C. 156. It also establishes procedures for exchanging information between APHIS and PTO regarding regulatory review period determinations, due diligence petitions and informal APHIS hearings under the law.

II. Background

The patent term restoration portion of the "Generic Animal Drug and Patent Term Restoration Act" of 1988 (the Act) (Pub. L. 100–670) was designed to create new incentives for research and development of certain products which are subject to premarket government approval. These provisions enable the owners of patents on certain animal drugs and veterinary biological products, and the owners of patents on methods of using or manufacturing such drug products, (as "drug product" is defined in the Act), to attempt to restore to the terms of those patents some of the patent time lost while awaiting premarket government approval.

Under the patent term restoration sections of the Act, a patent which claims a veterinary biological product that is subject to the Virus-Serum-Toxic Act (21 U.S.C. 151–159) and has been approved for marketing, or a method of using or manufacturing such a product, which has been approved for use, may qualify for patent term extension. Regardless of whether the patent claims a product, or a method of using or manufacturing a product, the applicant for a patent term extension must establish that:

(1) The patent has not expired (35 U.S.C. 156(a)(1));

(2) The patent has never been extended (35 U.S.C. 156(a)(2));

(3) The application for extension is submitted by the owner of record of the patent or the owner's agent and includes details relating to the patent and regulatory review time spent in securing APHIS approval (35 U.S.C. 156(a)(3));

(4) The product has been subject to a regulatory review period within the meaning of 35 U.S.C. 156(g) before its commercial marketing or use (35 U.S.C. 156(a)(4));

(5) The permission for commercial marketing or use;

(A) Is the first permitted commercial marketing or use of the product (35 U.S.C. 156(a)(5)(A)); or

(B) In the case of a veterinary biological product which has received permission for commercial marketing or use in both non-food-producing animals and food-producing animals, and has not yet been subject to a regulatory review period which is the basis for an extension in non-food-producing animals, the permission for commercial

marketing or use of the product after the regulatory review period for use in food-producing animals is the first permitted commercial marketing or use of the product for administration to food-producing animals (35 U.S.C. 156(a)(5)(C); and

(6) The application for extension of the term of the patent was submitted to PTO within 60 days of APHIS approval of the commercial marketing or use application (35 U.S.C. 156(d)(1)).

While it is the responsibility of the Commissioner of Patents and Trademarks (Commissioner) to decide whether an applicant has satisfied these six conditions, APHIS has certain direct responsibilties under 35 U.S.C. 156 for determining the length of the regulatory review period. Consequently, to facilitate eligibility decisions and permit APHIS and PTO to carry out their responsibilities under 35 U.S.C. 156, APHIS and PTO have entered into this agreement.

Under this agrement, APHIS, upon receipt of a written request from PTO, will inform PTO whether, with regard to eligibility for extension, a veterinary biological product has undergone a regulatory review period within the meaning of 35 U.S.C. 156(g) prior to commercialization. Under this agreement, APHIS will also, upon request by PTO and receipt of a copy of the application for patent term extension, determine the length of the regulatory review period for the approved veterinary biological product.

The procedures covered by this agreement extend from the date of PTO's request for information on eligibility to the resolution of due diligence petitions and informal hearings. The regulatory review period determination is not final until due diligence petitions and informal hearings, if any, have been resolved. A certificate for extension of the term of a patent may not issue from PTO until the regulatory review period determination if final, unless an interim extension appears warranted under 35 U.S.C. 156(e)(2).

III. Substance for the Agreement: Patent Term Extension Applications Under 35 U.S.C. 156

A. Eligibility Determination Assistance

1. Upon deciding that a patent term extension application is complete and meets basic formal requirements, PTO will send a written request to APHIS requesting the APHIS:

a. Verify whether the veterinary biological product was subject to a regulatory review period within the meaning of 35 U.S.C. 156(g) prior to its commercial marketing or use; and if so, whether it was the first permitted commercial marketing or use of the veterinary biological product for administration to a food producing animal; and

b. Inform PTO whether the patent term restoration application was submitted within 60 days after the product was approved.

2. Additionally, PTO, in its written request, shall clearly state that it is not requesting determination at this time of the regulatory review period applicable to the product.

3. APHIS will consult its records and experts and, through Biotechnology, Biologics, and Environmental Protection (BBEP) will issue a written response to the Deputy Solicitor of the PTO on each of these questions.

4. APHIS, upon written request, will also provide assistance to PTO in petitions before the Commissioner regarding eligibility determinations.

B. Regulatory Review Period Determinations

1. Should PTO decide that the veterinary biological product or method of using or manufacturing a product is eligible for patent term restoration, it will send APHIS a copy of the application for patent term restoration and a written request to determine the length of the applicable regulatory review period. The copy and request will be sent to APHIS within 60 days of the application's receipt by PTO.

2. APHIS will consult its records, determine the length of the applicable regulatory review period, and, through BBEP, issue a written statement of that determination to the Commissioner. Within 30 days after receipt of the application and written request from PTO, the determination will be made and APHIS will publish it in the **Federal Register.**

C. Due Diligence Petitions and Hearing Requests

1. Due diligence petitions must be filed at APHIS within 180 days after publication of the regulatory review period in the **Federal Register.**

a. If no due diligence petition is received by APHIS within the 180 day filing period, APHIS will promptly notify PTO in writing that the regulatory review period determination is final.

b. If a due diligence petition which satisfies statutory and regulatory requirements is received by APHIS:

(1) APHIS will promptly notify PTO in writing of the receipt of the petition;

(2) PTO will refrain from issuing a certificate of extension pending a final determination of the regulatory review period, unless an interim extension appears warranted under 35 U.S.C. 156(e)(2);

(3) APHIS will determine within 90 days after receipt of such a petition and will send written notification to the Commissioner as to any modification in the length of the regulatory review period; and

(4) APHIS will also publish its due diligence determination, together with the full factual and legal bases for its decision, in the **Federal Register.**

2. Requests for an informal hearing on APHIS's due diligence determination must be received by APHIS within 60 days of the publication of the due diligence determination in the **Federal Register.**

a. If APHIS does not receive any request for an informal hearing within the 60 day filing period, APHIS will notify PTO in writing that the regulatory review period determination, as modified, if at all, by the due diligence determination, is final.

b. If APHIS receives a request for an informal hearing within the 60 day filing period:

(1) APHIS will notify PTO in writing of the hearing request;

(2) APHIS will hold a hearing as prescribed under 35 U.S.C. 156(d)(2)(B)(ii);

(3) PTO will refrain from issuing a certificate of extension pending final determination of the regulatory review period unless an interim extension appears warranted under 35 U.S.C. 156(e)(2); and

(4) Within 30 days after completion of the hearing, APHIS will affirm or revise the determination that was the subject of the hearing, will notify the Commissioner in writing of any revision and whether the determination of the regulatory review period is now final, and will publish any revision in the **Federal Register.**

D. Supplemental Information

Should either agency receive information which is relevant to the patent term restoration of a patent during any stage of these eligibility or regulatory review period determinations, that agency will promptly notify the other and provide documentation as available.

E. Availability of Information

Copies of all letters required by this agreement and exchanged between PTO and APHIS will be placed in the file for each product subject to patent term restoration. These files are available for review at APHIS, Biotechnology, Biologics, and Environmental Protection,

Rm. 850, 6505 Belcrest Road, Federal Building, Hyattsville, MD 20782, and at the Patent and Trademark Office, Crystal Plaza Building 2–5C15, 2011 Jefferson Davis Highway, Arlington, VA 22202.

IV. Names and Addresses of Participating Parties

A. Patent and Trademark Office, Washington, DC 20231.

B. Animal and Plant Health Inspection Service, 6505 Belcrest Road, Hyattsville, MD 20782

V. Liaison Officers

A. Liaison Officer for the Patent and Trademark Office:

Deputy Solicitor (currently Charles E. Van Horn, Esq.,), Patent and Trademark Office, Washington, DC 20231, (703) 557–3637.

B. Liaison Officer for the Animal and Plant Health Inspection Service

Deputy Director, Biotechnology Coordination and Technical Assistance (currently Michael A. Lidsky, Esq., Acting Deputy Director), Animal and Plant Health Inspection Service, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–5862.

VI. Period of Agreement

This agreement, when accepted by both parties, will be effective indefinitely. It may be modified by mutual written consent or terminated by either party upon a thirty day advance written notice to the other party.

Approved and Accepted for the Patent and Trademark Office

Donald J. Quigg,

Assistant Secretary and Commissioner of Patents and Trademarks.

Date: June 15, 1989.

Approved and Accepted for the Animal and Plant Health Inspection Service

Samuel V. Ladd,

Acting Administrator, Animal and Plant Health Inspection Service.

Date: May 25, 1989.

[FR Doc. 89–14848 Filed 6–22–89; 8:45 am]

BILLING CODE 3510–16–M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Loan and Purchase Programs

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice of final determination.

SUMMARY: This notice affirms the final determinations concerning the price support levels for pulled wool and mohair for the 1989 marketing year. These determinations are required to be made pursuant to the National Wool Act of 1954, as amended.

EFFECTIVE DATE: April 3, 1989.

ADDRESS: Bruce R. Weber, Director, Commodity Analysis Division, USDA-ASCS, Room 3741, South Building, P.O. Box 2415, Washington, DC 20013.

FOR FURTHER INFORMATION CONTACT: Janise A. Zygmont, Agricultural Economist, Commodity Analysis Division, USDA-ASCS, Room 3760, South Building, P.O. Box 2415, Washington, DC 20013 or call (202) 447–6734. A Final Regulatory Impact Analysis has been prepared and is available on request from the above-named individual.

SUPPLEMENTARY INFORMATION: This notice has been reviewed under USDA procedures implementing Executive Order 12291 and Departmental Regulation No. 1512–1 and has been designated as "major." It has been determined that these proposed determinations will result in an annual effect on the economy of $100 million or more.

It has been determined that the Regulatory Flexibility Act is not applicable to this notice since there is no requirement that the Commodity Credit Corporation (CCC) publish a notice of proposed rulemaking in accordance with 5 U.S.C. 553 or any other provision of law with respect to the subject matter of this notice.

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

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

The title and number of the Federal assistance program to which this notice applies are: National Wool Act Payments, 10.059, as found in the Catalog of Federal Domestic Assistance.

Section 703(a) of the National Wool Act of 1954, as amended ("Wool Act"), provides that the Secretary of Agriculture shall support the prices of wool and mohair to producers by means of loans, purchases, payments, or other operations. The Secretary of Agriculture has determined that the prices of wool and mohair will be supported for the 1986 and 1990 marketing years by means of payments to producers (51 FR 28852, August 12, 1986).

Section 703(b) of the Wool Act provides that the level of support for shorn wool for each of the marketing years 1982 through 1987 and marketing year 1990 shall be 77.5 percent and, for marketing years 1988 and 1989, 76.4 percent of an amount which is determined by multiplying 62 cents (the support price in 1965) by the ratio of: (1) The average parity index (the index of prices paid by farmers, including commodities and services, interest, taxes, and farm wage rates) for the three calendar years immediately preceding the calendar year in which such support price is being determined and announced to (2) the average parity index for the three calendar years 1958, 1959, and 1960, rounding the result to the nearest full cent.

Section 703(c) of the Wool Act provides that the support prices for pulled wool and for mohair shall be established at such levels, in relationship to the support price for shorn wool, as the Secretary of Agriculture determines will maintain normal marketing practices for pulled wool, and as the Secretary determines is necessary to maintain approximately the same percentage of parity for mohair as for shorn wool. Section 703(c) further provides that the support price for mohair must be within a range of 15 per centum above or below the comparable percentage of parity at which shorn wool is supported.

On November 28, 1988, a notice of proposed determinations was published at 53 FR 47838, requesting comments concerning the method of calculating the price support levels for pulled wool and for mohair for the 1989 marketing year. The notice also indicated that the 1989 shorn wool support price (grease basis) would be $1.77 per pound.

Discussion of Comments

A total of 241 comments were submitted. Three comments did not contain specific recommendations. All of the remaining comments addressed the mohair support price. None made reference to the pulled wool (unshorn lamb) formula.

Eighty-nine percent of respondents recommended that mohair be supported at 100 percent of the percentage of parity at which shorn wool is supported. Another 9 percent of respondents recommended that mohair be supported at 115 percent (maximum) of the wool parity percentage. These comments on the proposed determinations were not adopted.

The remaining 2 percent favored supporting mohair at 85 percent (minimum) of the wool parity percentage and it has been determined that mohair will be supported at a level of 85 percent of the percentage of parity at which shorn wool is supported. Current estimates indicate that at this minimum level of support, producers would receive nearly 45 percent of their income from mohair in the form of Government payments. To support mohair at a higher level would be inconsistent with recent Government efforts to increase reliance by all agricultural sectors on the free market.

After taking the foregoing comments into consideration, and in order to implement the statutory requirement that the Secretary shall support the prices of wool and mohair for the 1986 through 1990 marketing years, the following determinations have been made with respect to the wool and mohair price support programs for the 1989 marketing year. The determinations affirm 1989 support prices of $1.77 per pound for shorn wool and $4.588 per pound for mohair as announced by the Secretary of Agriculture in a press release issued on April 3, 1989. The pulled wool support rate will continue to be calculated as it has been in previous years.

Final Determinations

A. Support Price—Shorn Wool

The average parity index for the 3-year period 1985–87 is 1110.3 The average parity index for the 3-year base period of 1958–60 is 297.3. The ratio of these indices is 3.7346. The result of multiplying 3.7346 by the 1965 support price of $0.62 per pound is $2.3155. Applying the formula indicated in section 703(b) of the Wool Act, 76.4 percent of $2.3155 is $1.77, when rounded to the nearest full cent.

B. Support Price—Pulled Wool

The support price for pulled wool for the 1989 marketing year cannot be determined until the 1989 national average market price for shorn wool is calculated, which would occur by April 1990. The method for calculating the support price for pulled wool shall be as follows:

Once the 1989 national average market price for shorn wool is determined, the support price for pulled wool will be determined by taking 80 percent of the difference between the 1989 support price for shorn wool and the 1989 average market price for shorn wool, multiplied by 5 pounds (the amount of wool pulled from the pelt of an average 100-pound unshorn lamb).

C. Support Price—Mohair

The support price for mohair for the 1989 marketing year shall be 85 percent of the percentage of parity at which shorn wool is supported, or $4.588 per pound. The calculation is as follows:

The October 1988 parity prices for shorn wool and for mohair are $2.89 and $8.82 per pound, respectively. The support price for shorn wool for the 1989 marketing year as calculated in accordance with the formula set forth in section 703(b) of the Wool Act is $1.77 per pound or 61.2 percent of the October 1988 parity price for shorn wool. The price support level for mohair for the 1989 marketing year is equal to 85 percent of 61.2 percent (the percentage of parity at which shorn wool is supported), which is equal to 52.02 percent. Accordingly, 52.02 percent of the October 1988 parity price for mohair results in a support price for mohair for the 1989 marketing year of $4.588 per pound.

The support programs conducted pursuant to the Wool Act are subject to the provisions of the Balanced Budget and Deficit Reduction Act of 1985, as amended. As a result, the program support levels announced in this notice may be recalculated to comply with this Act.

Authority: Secs. 4 and 5, 62 Stat. 1070, as amended (15 U.S.C. 714b and c); secs. 702–708, 68 Stat. 910–912, as amended (7 U.S.C. 1781–1787).

Signed at Washington, DC on June 19, 1989.

Keith D. Bjerke,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 89–14907 Filed 6–22–89; 8:45 am]

BILLING CODE 3410-05-M

DEPARTMENT OF DEFENSE

Department of Army

Intent (NOI); Environmental Impact Statement (EIS); Proposed Construction of a New Headquarters for the Army Materiel Command (AMC); Fort Belvoir, VA

AGENCY: DOD, U.S. Army Materiel Command, Alexandria, Virginia.

SUMMARY: Currently, AMC is located in leased space within the city of Alexandria, VA. The facility currently leased for AMC is no longer economically, spatially or functionally adequate. Locating the AMC at Ft. Belvoir in Fairfax County would consolidate AMC staff and related activities as well as enhancing planning, coordination, and operational control by providing contiguous facility space. AMC proposes to construct a new administrative facility for approximately 2500 personnel. Parking areas, roadways, utilities, and security berms will also be provided. The proposed location for this construction will be within Ft. Belvoir.

Alternatives

Alternatives to be considered in the EIS will include:

a. No Action; remain in existing facility
b. Relocate to larger, existing facility; leasing existing office space
c. Construction of a new AMC Headquarters elsewhere

The EIS process will be conducted in accordance with the National Environmental Policy Act (NEPA), the implementing Army Regulation 200–2, and the provisions of the Council on Environmental Quality, 40 CFR Part 1500. An EIS for relocation of other Army activities to the Ft. Belvoir area under the Base Realignment and Closure Act is currently in progress. Although it is a separate EIS, scoping meetings will be held for both EISs during similar or the same time frames.

Scoping: The Army will conduct public meetings to aid in determining the critical issues and possible alternatives which need to be addressed in the EIS. The public, as well as federal, state, and local agencies are encouraged to participate in the scoping process by submitting comments and identifying relevant issues to be addressed in the EIS. The Army anticipates initiation of the scoping meetings during August 89. Advance public notice of the scoping meetings will be announced in the local media in the near future. Questions and comments reqarding the scope of the environmental analysis, as well as requests to be placed on the mailing list, should be forwarded to: Director of Engineering and Housing, ATTN: Mr. Pat McLaughlin, Ft. Belvoir, Virginia 22060.

Comments and suggestions should be received not later than 15 days following the public scoping meeting to be considered for incorporation in the Draft Environmental Impact Statement.

Lewis D. Walker,

Deputy for Environment, Safety and Occupational Health OASA (I&L).

June 20, 1989.

[FR Doc. 89–14936 Filed 6–22–89; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF EDUCATION

Open Meetings on Recompetition of Regional Educational Laboratories

SUMMARY: This notice provides the schedule and background information for five open meetings being conducted in preparation for the recompetition of regional educational laboratories funded by the Office of Educational Research and Improvement (OERI).

DATES, ADDRESSES AND TIMES:

June 26, 1989, OERI, 555 New Jersey Avenue NW., Room 326, Washington, DC, 9:00 a.m. to 11:45 a.m.

June 27, 1989, OERI, 555 New Jersey Avenue NW., Room 326, Washington, DC, 9:00 a.m. to 11:45 a.m.

July 19, 1989, Kansas City Airport Marriott Hotel, 775 Brasilia Avenue, Kansas City, Missouri, 9:00 a.m. to 12:00 Noon; 1:00 p.m. to 4:00 p.m.

July 19, 1989, OERI, 555 New Jersey Avenue NW., Room 326, Washington, DC, 9:00 a.m. to 12:00 Noon; 1:00 p.m. to 4:00 p.m.

July 21, 1989, San Francisco Airport Hilton Hotel, San Francisco (California) International Airport, 9:00 a.m. to 12:00 Noon; 1:00 p.m. to 4:00 p.m.

FOR FURTHER INFORMATION CONTACT: Ms. Adria White, Office of Educational Research and Improvement, U.S. Department of Education, 555 New Jersey Avenue NW., Room 502, Washington, DC 20208–5644, Telephone (202) 357–6181.

SUPPLEMENTARY INFORMATION: The Office of Educational Research and Improvement (OERI) is preparing for a recompetition of regional educational laboratories in 1990. In preparation for this competition, OERI is seeking views and advice from the field about educational needs and problems in the United States and how laboratories can help respond to them.

OERI will hold five open meetings to help plan for the recompetition. Representatives of major educational associations and other organizations have been invited to present their individual views about the future of the regional laboratory program at the meetings to be held at OERI on June 26 and June 27. These two meetings will be identical in purpose and format, but the invited participants will be different.

The next three meetings, two on July 19 and one on July 21, will be non-invitational, at which members of the public, including State and local officials, educators, and private citizens, may present statements to OERI officials about the regional laboratory program. Written statements from the public forwarded directly to OERI by July 21, 1989, in response to this announcement also will be considered in planning for the recompetition.

Format of the Meetings

At the two invitational meetings on June 26 and June 27, OERI officials will make brief introductory statements. Invited representatives of the educational associations and organizations will make statements about the laboratories, reflecting the views of their various constituencies. (Further details about issues which may be discussed are provided below.) The public may attend and listen to the presentations made in these two meetings.

At the three non-invitational meetings on July 19 and July 21, following introductory statements by OERI officials, members of the public will make statements about the laboratories. All public statements will be limited to 10 minutes each. Persons speaking will be asked to submit written copies of their statements at the meetings. (Written statements from persons not attending the meetings may also be submitted directly to OERI, as indicated above.)

How To Participate

Persons wishing to attend any of these meetings, or participate in the non-invitational meetings, should contact the OERI meeting coordinator. Ms. Adria White, at (202) 357–6181, or write to her at the address above. Anyone appearing at a non-invitational meeting to speak without previously scheduling a time in advance with Ms. White will be assigned a 10 minute time interval that day, if time is available.

Major Issues

OERI is seeking views and advice from the public, especially on the following questions:

1. What activities conducted by regional educational laboratories have been most valuable in the past 2–3 years?

2. How can regional laboratories contribute to improving performance of our educational system—what are the key issues and problems they should focus on in the future?

3. What kinds of laboratory activities and strategies (e.g., syntheses and other research and development (R&D) products, direct technical assistance, training and capacity building, etc.) would be most beneficial in the future?

4. What form of relationship(s) between laboratories and organizations or other persons seeking improvement in schools would be most effective?

OERI will also accept advice on other issues related to the future of the laboratory progam.

Additional Information That Will Be Available

The U.S. Department of Education plans to issue a solicitation late in 1989 for proposals to operate regional laboratories in the funding period beginning December 1, 1990. Proposals will be due in the early Spring, 1990. The exact dates for these events will be announced later this Summer. This and other information related to OERI's planning for the regional laboratory recompetition may be obtained as it becomes available by contacting Ms. Adria White at the address or telephone number provided above. Among the items to be made available are:

1. Commissioned papers and reports about the regional laboratory program (some are currently available);

2. A written synthesis and verbatim transcripts of the two invitational meetings, plus verbatim transcripts and statements submitted to OERI in connection with the non-invitational meetings;

3. Final announcement of the solicitation and award schedule and a copy of the solicitation itself.

Information About the Laboratory Program

The regional laboratory program was established in 1965 to help get the best available knowledge about improved practices and methods into the nation's classrooms. Laboratories were to develop and disseminate this knowledge and provide training and technical assistance in its application. Twenty laboratories were originally established, although there was no systematic delineation of the regional boundaries for their services. At present, nine regional laboratories serve all 50 States, the District of Columbia, Puerto Rico, the Virgin Islands and Pacific Island entities.

The program is now authorized by section 405(d)(4) of the General Education Provisions Act (GEPA), as amended (20 U.S.C. 1221e). Section 405(d)(4)(A)(i) of GEPA provides that regional laboratories must be "established by public agencies or private nonprofit organizations to serve the needs of a specific region of the nation under the governance of a regionally representative governing board * * *." The regulations for the program are contained in 34 CFR Parts 706 and 707 (53 FR 30790 (August 15, 1988)).

After extensive consultation during 1984–85 in preparation for a recompetition of then-existing awards, the Department established six "premises", or principles on which laboratories should operate. As stated in OERI's 1985 solicitation of proposals, these premises were that the laboratories would: (1) Focus on school and classroom improvement; (2) emphasize dissemination and technical assistance; (3) engage in applied research and development to the extent that these strengthen laboratory efforts at school improvement; (4) serve designated regions; (5) have independent governing boards; and (6) be part of a nationwide system.

These premises and related policies adopted in 1985 brought two particularly significant changes in the laboratory program. The first was that the large scale product development and applied R&D that the laboratories had participated in were deemphasized. Rather, dissemination and technical assistance were emphasized. Second, a substantial portion of laboratories' work towards school improvement was directed to be delivered in accordance with an indirect service strategy.

Laboratory services delivered pursuant to this strategy since 1985 have been directed "with and through" a variety of service improvement and intermediary organizations (e.g. State education agencies, education service agencies and professional associations), rather than directly to schools and classrooms. The reasoning underlying this strategy has been that there are too many school districts, schools and classrooms in the country for laboratories to work with even a significant portion of them directly. Working with intermediaries through the indirect strategy has thus been designed to leverage and extend the benefits of laboratory funding. However, not all laboratory work is delivered through the indirect strategy. Laboratories may work with local districts and schools under specified conditions; they also serve State decisionmaker needs directly with a portion of their funds. The various strategies for delivery of lab services will be reconsidered as part of planning for the recompetition.

Fiscal Year 1989 funding for the program is $22.1 million. This amount includes $5.1 million in special appropriations for a laboratory rural initiative. The present laboratory contracts expire on November 30, 1990. The forthcoming recompetition wil determine what organizations will operate laboratories in the funding period beginning December 1, 1990.

The laboratory regions and the present contractors are listed below.

Regions	Present Contractors
Northeastern (CT, MA, ME, NH, NY, RI, VT, Puerto Rico, and Virgin Islands).	Regional Laboratory for Educational Improvement of the Northeast and Islands, Andover, Massachusetts.
Mid-Atlantic (DE, DC, MD, NJ, and PA).	Research for Better Schools, Inc., Philadelphia, Pennsylvania.
Appalachian (KY, TN, VA, and WV).	Appalachia Educational Laboratory, Inc., Charleston, West Virginia.
Southeastern (AL, FL, GA, MS, NC, and SC).	Southeastern Educational Improvement Laboratory, Research Triangle Park, N.C.
Central (CO, KS, MO, NE, ND, SD, and WY).	Mid-continent Regional Educational Laboratory, Aurora, Colorado.
Southwestern (AR, LA, NM, OK, and TX).	Southwest Educational Development Laboratory, Austin, Texas.
Midwestern (IL, IN, IA, MI, MN, OH, WI).	North Central Regional Educational Laboratory, Elmhurst, Illinois.
Western (AZ, CA, NV, and UT).	Far West Laboratory for Educational Research and Development, San Francisco, California.
Northwestern (AK, ID, MT, OR, and WA).	Northwest Regional Educational Laboratory, Portland, Oregon.
Pacific Basin* (HA and Pacific Insular Areas).	Northwest Regional Educational Laboratory, Portland, Oregon.

*A tenth region to serve the State of Hawaii and other Pacific jurisdictions was established in 1985; however, the Northwest Laboratory was designated to serve this region during 1985–90 and support preparations there for a new laboratory. It is expected that a separate award to serve this region will be made in the 1990 recompetition.

Authority: 20 U.S.C. 1221e.

Dated: June 21, 1989.

Bruno V. Manno,

Acting Assistant Secretary for Educational Research and Improvement.

[FR Doc. 89–15109 Filed 6–22–89; 8:45 am]

BILLING CODE 400–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER89–1–001, et al.]

Wisconsin Power & Light Co., et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. Wisconsin Power & Light Company

[Docket No. ER89–1–001]

June 16, 1989.

Take notice that on May 24, 1989, Wisconsin Power & Light Company tendered for filing its compliance refund report. WPL states that prior to the Commission's approval of the Settlement Agreement there was no collection of rates for transactions subject to the tariff in excess of the rates provided for in the Settlement Agreement.

Comment date: June 30, 1989, in accordance with Standard Paragraph E at the end of this notice.

2. Arkansas Power & Light Company

[Docket No. ER89–417–000]

June 16, 1989.

Take notice that on May 25, 1989 Arkansas Power & Light Company (AP&L) tendered for filing documents to reflect the correction of an error in the calculation of variable D in the cost of capital included in AP&L's May 8, 1989 filing in this docket.

Comment date: June 30, 1989, in accordance with Standard Paragraph E at the end of this notice.

3. Louisville Gas & Electric Company

[Docket Nos. EC89–13–000 and ER89–482–000]

June 19, 1989.

Take notice that Louisville Gas and Electric Company (Louisville) on June 5, 1989, tendered for filing a Seventh Supplemental Agreement dated March 14, 1989, to the Interconnection Agreement between Louisville and East Kentucky Power Cooperative (East Ky.).

The purpose of the supplement is to provide the parties with a coordinated, interconnected operation that provides for the sale, purchase and interchange of electric power and energy.

Copies of the filing were served on east Ky. and the Public Service Commission of Kentucky.

The supplement to the Interconnection Agreement provides for service schedules that are designated:

I. Service Schedule A—Emergency Energy
II. Service Schedule B—Interchange Energy
III. Service Schedule C—Short Term Power
IV. Service Schedule D—Seasonal Power
V. Service Schedule E—Limited Term Power
VI. Service Schedule F—Diversity Power

Comment date: July 3, 1989, in accordance with Standard Paragraph E at the end of this notice.

4. Texas Utilities Electric Company

[Docket No. ER82–545–002]

June 19, 1989.

Take notice that on May 31, 1989, Texas Utilities Electric Company ("Texas Utilities") tendered for filing unexecuted Transmission Service

Agreements ("TSAs") between itself and various operating companies of the Central and Southwest holding company system ("the CSW Operating Companies"). Texas Utilities states that the TSAs are required by the Commission in a previous order in this docket. Texas Utilities further states that the TSAs implement the transmission arrangements offered by Texas Utilities pursuant to its FERC Electric Tariff governing service to, from and over certain HVDC Interconnections.

Comment date: July 3, 1989, in accordance with Standard Paragraph E at the end of this notice.

5. Southern California Edison Company

[Docket No. ER89-225-000]

June 19, 1989.

Take notice that on June 14, 1989, Southern California Edison Company (Edison) tendered for filing a supplement to its initial rate schedule filing regarding the following Power Sale Agreement, executed on August 10, 1988, by the respective parties:

Edison-SMUD Power Sale Agreement Between Southern California Edison Company (Edison) and Sacramento Municipal Utility District (SMUD)

Edison and SMUD executed an Agreement under which Edison will sell 300 megawatts of capacity and associated energy to SMUD from January 1, 1990, through December 31, 1999. AT SMUD's option, 250 megawatts of this capacity may be taken from May 15 through September 15 (summer capacity). SMUD also has an option to purchase, on a year-round basis, up to 400 megawatts of additional capacity and associated energy. The supplemental filing provides traditional information requested by the FERC staff.

Copies of this filing were served upon the Public Utilities Commission of the State of California and all intervenors.

Comment date: July 3, 1989, in accordance with Standard Paragraph E at the end of this notice.

6. Commonwealth Electric Company v. Boston Edison Company

[Docket No. EL88-3-002 and EL88-56-002]

June 19, 1989.

Take notice that on June 13, 1989, the Boston Edison Company of Boston, Massachusetts 02199 (Edison) filed with the Commission a refund report in accordance with the requirements of the Commission's orders of June 24, 1988, February 27, 1989, and April 27, 1989, in the above-referenced proceeding. Edison states that copies of the filing have been served on all persons listed on the Commission's official service list.

Comment date: July 3, 1989, in accordance with Standard Paragraph E at the end of this notice.

7. Montana Power Company

[Docket No. ER89-343-000]

June 19, 1989.

Take notice that on May 22, 1989, the Montana Power Company (Montana) tendered an Amendment to its filing in Docket No. ER89-343-000. Montana submitted an amended Index of Purchasers, identified as Twelfth Revised Sheet No. 10 under FERC Electric Tariff, 2nd Revised Volume No. 1, which has been amended to show an effective date of January 1, 1988 for the service agreement with Seattle City Lights.

Montana requests waiver of the Commission's notice requirements to allow the agreement to be effective on such date.

Comment date: July 3, 1989, in accordance with Standard Paragraph end of this notice.

8. Tucson Electric Power Company

[Docket No. ER89-471-000]

June 19, 1989.

Take notice that on May 31, 1989, Tucson Electric Power Company (Tucson) tendered for filing a short term power sale agreement between Tucson and Arizona Public Service Company.

Comment date: July 3, 1989, in accordance with Standard Paragraph E at the end of this notice.

9. Idaho Power Company

[Docket No. ER89-484-000]

June 19, 1989.

Take notice that on June 5, 1989, Idaho Power Company (Idaho Power) tendered for filing, notice of approval of Idaho Power's application for membership in the WSPP. Rates, Terms and Conditions of participation in the WSPP are contained in the WSPP Agreement dated November 1, 1986, and approved by Federal Energy Regulatory Commission Order dated March 12, 1987, in Docket No. ER87-97-001.

Idaho Power requests that the requirements of prior notice be waived and an effective date of June 1, 1989 be given to this proposed rate schedule.

Comment date: July 3, 1989, in accordance with Standard Paragraph E at the end of this notice.

10. Hennepin Energy Resource Co., Limited Partnership

[Docket No. ER89-462-000]

June 19, 1989.

Take notice that on June 13, 1989 Hennepin Energy Resource Co., Limited Partnership tendered for filing a letter submitting the initial rate schedule that was inadvertently omitted from the May 26, 1989 filing in this docket.

Comment date: July 3, 1989, in accordance with Standard Paragraph end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426 in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-14843 Filed 6-22-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP89-634-000, CP89-815-000, CP89-629-000]

Iroquois Gas Transmission System; Tennessee Gas Pipeline Co.; Information Notice Regarding Intent to Study Alternative Routes in the Draft Environmental Impact Statement for the Proposed Iroquois/Tennessee Pipeline Project

June 19, 1989.

Introduction

On February 17, 1989, the Federal Energy Regulatory Commission (FERC or Commission) issued a *Notice of Intent to Prepare a Draft Environmental Impact Statement for the Iroquois/Tennessee Pipeline Project and Request for Comments on Its Scope* (NOI). This supplemental notice identifies two major alternative routes through New York and Massachusetts that will be addressed in the environmental impact statement (EIS).

Background

On January 17, 1989, Iroquois Gas Transmission System (Iroquois) and Tennessee Gas Pipeline Company (Tennessee) filed applications before the FERC in the above-referenced dockets, under section 7 of the Natural Gas Act, for authorization to construct facilities and transport up to 533,900 Mcfd (thousands of cubic feet per day) of Canadian natural gas received from TransCanada Pipelines Limited. The gas would be delivered to local distribution companies (LDCs) and cogeneration customers in New York, New Jersey, and Connecticut. Iroquois would also deliver gas to Tennessee near Wright, New York and Stratford, Connecticut, and to Algonquin Gas Transmission Company (Algonquin) near Brookfield, Connecticut for redelivery to certain LDCs, cogeneration, and power generation customers in Connecticut, Massachusetts, New Hampshire, and Rhode Island.

Description of Alternative Routes

The staff is presently analyzing an alternative route to the proposed Iroquois route called the Greater Northeast route.[1] This alternative route would deviate from the proposed Iroquois route near Canajoharie, New York (milepost 156) and head in an easterly direction to the vicinity of Greenfield, Massachusetts. See figure 1. From Greenfield the Greater Northeast route would turn east-southeasterly to Mendon, Massachusetts. All deliveries of natural gas would be made to Tennessee at Mendon.

Figure 1 shows all the facilities needed for this alternative route that are not already being analyzed as part of the Iroquois proposal. These facilities would include approximately 199 miles of new 36-inch-diameter pipeline in New York and Massachusetts. Other facilities not shown for this routing of the Iroquois pipeline include delivery mainlines to Long Island Lighting Company and to Central Hudson Gas & Electric Corporation. These delivery mainlines would be constructed along the same identical routes as the Iroquois proposal, which was discussed in the February 17, 1989 NOI. The complete alternative will be discussed in the EIS.

The staff's plan to study this routing was announced at the scoping meetings which were held in Albany, New York and Danbury, Connecticut on March 15 and 16, 1989, in conjunction with the Iroquois/Tennessee Pipeline Project. It was also announced in Keene, New Hampshire, Rutland, Vermont, and Fitchburg, Massachusetts on March 21, 22, and 23, 1989, in conjunction with the scoping meetings on the Champlain Pipeline Company Project.

Another alternative which the staff will review is similar to the Greater Northeast route except that the 199 miles of new route in New York and Massachusetts would be replaced by a route adjacent to Tennessee's existing pipeline from Wright, New York east across Massachusetts.

Comment Procedure

This notice is to provide greater public awareness of the staff's intention to examine these routings as part of its EIS. Anyone wishing to file comments with the Commission regarding the environmental issues on these alternative routes should do so as soon as possible, but within 30 days from the date this notice is published in the Federal Register.

A copy of this notice has been distributed to Federal, state, and local agencies, public interest groups, libraries, newspapers, parties in this proceeding, and other interested individuals. A general map of the Greater Northeast route has been mailed to everyone on the environmental document mailing list. Detailed maps of the Greater Northeast route have been provided to the Board of Selectmen and Planning Commission of each affected town identified in table 1.

Written comments concerning significant issues or concerns related to the alternative routes should contain supporting documentation and rationale. Written comments must be filed by July 24, 1989. The comments should reference Docket No. CP89-634-000, and be addressed to the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington DC 20426. A copy of the comments should also be sent to the FERC project manager identified below.

Additional information about the alternatives is available from Mr. Mark Jensen, Project Manager, Environmental Policy and Project Analysis Branch, Office of Pipeline and Producer Regulation, Room 7312, 825 North Capitol Street, NE., Washington, DC 20426, telephone (202) 357-9021 or FTS 357-9021.

Lois D. Cashell,

Secretary.

[1] This route was originally proposed by the Greater Northeast Pipeline Corporation and Algonquin Gas Transmission Corporation in Docket Nos. CP88-191-000 and CP88-192-000 in the Commission's Northeast open season proceeding. These dockets were dismissed by the Commission's *Order Denying Rehearing and Terminating Dockets* on May 2, 1989.

TABLE 1.—GREATER NORTHEAST PIPELINE ALTERNATIVE FACILITY LOCATIONS

Proposed facilities	Map lengths (miles)	State	County	Towns or cities
Mainline	18.8	NY	Montgomery	Canajoharie, Charleston, Florida Glen, Root.
Mainline	14.1	NY	Schenectady	Duanesburg, Princetown, Rotterdam.
Mainline	24.5	NY	Rensselaer	East Greenbush, Nassau, North Greenbush, Sand Lake, Stephentown.
Mainline	22.0	NY	Albany	Albany, Bethlehem, Guilderland, New Scotland.
Mainline	21.4	MA	Berkshire	Cheshire, Dalton, Hancock, Hinsdale, Lanesborough, Peru, Windsor.
Mainline	27.0	MA	Franklin	Ashfield, Conway, Deerfield, Leverett, Shutesburg, Sunderland.
Mainline	24.0	MA	Hampshire	Plainfield, Belchertown, Pelham, Ware.
Mainline	47.2	MA	Worcester	Auburn, Blackstone, East Brookfield, Leicester, Mendon, Millbury, Millville, Northbridge, North Brookfield, Spencer, Sutton, Uxbridge, West Brookfield.

[FR Doc. 89-14845 Filed 6-22-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP87-34-008]

Northwest Alaskan Pipeline Co.; Extension of Tariff Provisions

June 16, 1989.

Take notice that on June 16, 1989, Northwest Alaskan Pipeline Company ("Northwest Alaskan") tendered for filing in Docket No. RP87-34-008 the following tariff sheets:

Rate Schedule

X-3

Tariff Sheets Number

Original Sheet No. 308BBB.1
Original Sheet No. 308FFF.1
Original Sheet No. 358VV.1
Original Sheet No. 358AAA.1

Northwest Alaskan proposed that these tariff sheets be effective on July 1, 1989.

Northwest Alaskan states that these tariff sheets would continue in effect certain aspects of the current interim settlement agreement among Northwest Alaskan, United Gas Pipe Line Company ("United") and Pan-Alberta Gas Ltd. ("Pan-Alberta"), which would otherwise expire on June 30, 1989, from July 1, 1989 through the earlier of (a) October 31, 1989 or (b) the date on which a long-term settlement becomes effective (the "Extended Interim Period"). The current interim settlement agreement (the "Interim Settlement") consists of the Tenth Amendment to the Gas Purchase Agreement between United and Northwest Alaskan, the Twentieth Amending Contract to the Gas Sales Contract between Northwest Alaskan and Pan-Alberta, and the marketing and Transportation Agreement between United and Pan-Alberta, which are contained in Northwest Alaskan's FERC Gas Tariff Original Volume No. 2, Rate Schedule X-3 at tariff sheets numbered 30800 through 308FFF and 358HH through 358AAA.

Northwest Alaskan states that the provisions of the Interim Settlement to be extended for the Extended Interim Period are paragraphs 5(b), 7, 7(a), 8(b), 7(c), 7(d), 7(e), 7(f), 7(h), 7(i), 8, 9, 9(b), 11, 12, 13, 14, 17 and 18 of the Tenth Amendment and the Twentieth Amending Contract and paragraphs 3(a), 3(b), 5(a), 5(b), 6, 7, and 8 of the Marketing and Transportation Agreement.

United and Pan-Alberta have entered into an agreement that sets forth, among other things, the basic principles upon which definitive agreements shall be reached to settle and permanently resolve their ongoing disputes with respect to the purchase, sale and transportation of Canadian gas. The purpose of the requested extension is to preserve the status quo and to grant the parties an opportunity to finalize and obtain necessary approvals of the longterm settlement.

Northwest Alaskan has requested that the Commission approve the requested extension of the Interim Settlement provisions of Northwest Alaskan's tariff to be effective on July 1, 1989 and find that the extension is just and reasonable, prudent and in the public interest.

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 (18 CFR 385.211 or 385.214). All such motions or protests should be filed on or before June 23, 1989. 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. 89-14844 Filed 6-22-89; 8:45 am]

BILLING CODE 6717-01-M

Office of Hearings and Appeals

Cases Filed the Week of March 10 Through March 17, 1989

During the Week of March 10 through March 17, 1989, the applications for other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy. Submissions inadvertently omitted from an earlier list have also been included.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

June 13, 1989.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of March 10 Through March 17, 1989]

Date	Name and Location of applicant	Case No.	Type of submission
Aug. 23, 1988	Getty/Smallwood Oil Co., St. Louis, Missouri	RR265-2	Request for Modification/Rescission. If granted: The August 19, 1988 Decision and Order (Case No. RF265-2727) issued to Smallwood Oil Company would be modified regarding the firm's Application for Refund in the Getty refund proceeding.
Nov. 23, 1988	Economic Regulatory Admin., Washington, DC	KRZ-0526	Interlocutory. If granted: Russell B. Newton would be dismissed as a party in the Proposed Remedial Order proceeding involving Kern Oil & Refining Company (Case No. KRO-0520).
Feb. 27, 1989	Murphy Oil Corp., Washington, DC	KFX-0063	Supplemental. If granted: Murphy Oil Corporation would receive refund monies issued to certain applicants in the Murphy Oil refund proceeding (KEF-0095) in satisfaction of judgments which Murphy has obtained against these customers.
Mar. 15, 1989	Marathon/Township Oil Co., Washington, DC	RF250-8	Request for Modification/Rescission. If granted: The November 22, 1988 Decision and Order (Case No. RR250-4) issued to Township Oil Company would be modified regarding the firm's application for refund submitted in the Marathon refund proceeding.

REFUND APPLICATIONS RECEIVED

Date received	Name of refund proceeding/name of refund application	Case No.
03/10/89 thru 03/17/89	Gulf Oil Refund, Applications Received	RF300-10732 thru RF300-10737
03/10/89 thru 03/17/89	Crude Oil Refund, Applications Received	RF272-75379 thru RF272-75400
03/10/89 thru 03/17/89	Murphy Refund, Applications Received	RF309-965 thru RF309-1013
03/10/89 thru 03/17/89	Atlantic Richfield Refund, Applications Received	RF304-8072 thru RF304-8154
03/10/89 thru 03/17/89	Exxon Refund, Applications Received	RF307-9648 thru RF307-9684
03/10/89 thru 03/17/89	Shell Refund, Applications Received	RF315-4419 thru RF315-4684

Name of firm	Case No.	Received
Iowa Power & Light	RA272-5	03/15/89
Liberty Crown	RF313-93	03/15/89
T.E. Enterprises, Inc.	RF313-94	03/15/89
Tutcher Magic Gas Company, Inc.	RF317-5	03/15/89
K & J	RF316-5	03/16/89
Service Distributing Company, Inc.	RF313-95	03/16/89
Donald Kraft	RA272-7	03/16/89
Pine Beach Crown	RF313-96	03/16/89
Brick Crown	RF313-97	03/16/89
David S. Horner	RF313-98	03/17/89
Payne Service Station	RF313-99	03/17/89
Belair Road Crown	RF313-100	03/17/89

[FR Doc. 89-14926 Filed 6-22-89; 8:45 am]
BILLNG CODE 6450-01-M

Office of Hearings and Appeals

Cases Filed the Week of March 24 Through March 31, 1989

During the Week of March 24 through March 31, 1989, the submissions listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy. Submissions inadvertently omitted from earlier lists have also been included.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

June 13, 1989.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of March 24 through March 31, 1989]

Date	Name and location of applicant	Case No.	Type of submission
Jan. 23, 1989	Oasis Petroleum Corporation, Culver City, California	KEZ-0094	Interlocutory. If granted: The Office of Hearings and Appeals would reconsider those portions of the August 22, 1986 Decision and Order which are not the subject of Oasis Petroleum Corporation's motion to strike (KEZ-0095).
Jan. 23, 1989	Oasis Petroleum Corporation, Culver City, California	KEZ-0095	Interlocutory. If granted: The Office of Hearings and Appeals would strike certain portions of the August 22, 1986 Decision and Order (Case Nos. HEG-0031, KEX-0071 and KEX-0018) issued to Lucky Stores, Inc. and Research Fuels, Inc.
Mar. 28, 1989	Aminoil/Plymouth LP Gas Corporation, St. Louis, Missouri.	RR139-70	Request for Modification/Rescission. If granted: The January 31, 1989 Decision and Order (Case No. RF139-126) issued to Plymouth LF Gas Corporation would be modified regarding the firm's application for refund submitted in the Aminoil refund proceeding.

REFUND APPLICATIONS RECEIVED

Date received	Name of refund proceeding/Name of refund application	Case No.
03/24/89 thru 03/31/89	Crude Oil Refund, Applications Received	272-75412 thru RF272-75423
03/24/89 thru 03/31/89	Murphy Oil Refund, Applications Received	RF309-1065 thru RF309-1158
03/24/89 thru 03/31/89	Atlantic Richfield, Applications Received	RF304-8210 thru RF304-8280
03/24/89 thru 03/31/89	Shell Refund, Applications Received	RF315-4868 thru RF315-5017

Name of firm	Case No.	Received
Gate Petroleum Company	RF313-107	03/27/89
Crown Service, Inc.	RF313-108	03/27/89
William C. Walton	RF313-109	03/27/89

Name of firm	Case No.	Received
6th Street Crown	RF313-110	03/28/89
Dearybury Oil Company, Inc	RF313-111	03/28/89
H. Brauns, Inc	RF313-112	03/28/89
S.W. Duke Oil Distributor	RF313-113	03/28/89
Tri-Valley Growers, Inc	RC272-35	03/29/89
Harold W. Marks	RA272-8	03/29/89
T.J. Huskey	RF313-114	03/30/89
Southern California Edison Company	RC272-36	03/30/89
Consolidated Edison Company of NY	RC272-37	03/30/89
Long Island Lighting Company	RC272-38	03/30/89
San Diego Gas & Electric Company	RC272-39	03/30/89
Orange & Rockland Utilities Co	RFRC272-40	03/30/89
Pacific Gas & Electric Company	RFRC272-41	03/30/89
Biltmore Oil Company, Inc	RF313-115	03/31/89

-FR Doc. 89-14927 Filed 6-22-89; 8:45 am]
BILLING CODE 6450-01-M

Office of Hearings and Appeals

Issuance of Proposed Decision and Order Issued the Period of March 27 Through May 12, 1989

During the period of March 27 through May 12, 1989, the proposed decision and order summarized below was issued by the Office of Hearings and Appeals of the Department of Energy with regard to an application for exception.

Under the procedural regulations that apply to exception proceedings (10 CFR Part 205, Subpart D), any person who will be aggrieved by the issuance of a proposed decision and order in final form may file a written notice of objection within ten days of service. For purposes of the procedural regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date an aggrieved person receives actual notice, whichever occurs first.

The procedural regulations provide that an aggrieved party who fails to file a Notice of Objection within the time period specified in the regulations will be deemed to consent to the issuance of the proposed decision and order in final form. An aggrieved party who wishes to contest a determination made in a proposed decision and order must also file a detailed statement of objections within 30 days of the date of service of the proposed decision and order. In the statement of objections, the aggrieved party must specify each issue of fact or law that it intends to contest in any further proceeding involving the exception matter.

Copies of the full text of this proposed decision and order are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E-234, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays.

June 13, 1989.

George B. Breznay,

Director, Office of Hearings and Appeals.

North Georgia Petroleum Company Gainesville, GA; KEE-0172

The North Georgia Petroleum Company (NGPC) filed an Application for Exception from the provisions of Energy Information Administration (EIA) reporting requirements. The exception request, if granted, would relieve NGPC of the requirement to file Form EIA-782B, entitled "Reseller/Retailers' Monthly Petroleum Product Sales Report." On May 9, 1989, the Department of Energy issued a Proposed Decision and Order which tentatively denied the exception request.

[FR Doc. 89-14928 Filed 6-22-89; 8:45 am]
BILLING CODE 6450-01-M

Notice of Issuance of Decisions and Order for Week of March 27 through March 31, 1989

During the week of March 27 through March 31, 1989, the decisions and orders summarized below were issued with respect to applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeals

Salomon, Inc., 3/27/89, KFA-0271

The OHA considered a Freedom of Information Act Appeal filed by Salomon, Inc. Salomon claimed that the Economic Regulatory Administration (ERA) had failed to conduct an aequate search of over 300 files. In addition, Salomon claimed that the DOE had improperly withheld documents under Exemptions 5 and 7. In its Decision, the DOE considered many issues. Among the more important issues considered were (1) the scope and application of the Deliberative Process Privilege, (2) the scope and application of the Attorney Client Privilege, (3) the scope and application of the Attorney Work-Product Privilege, and (4) the application of Exemption 7A to ERA enforcement and audit files. The DOE found that the ERA's search had been adequate. However, the DOE conducted a de novo review of the withheld documents and granted the appeal in part.

The Augusta Chronicle Augusta Herald, 3/31/89, KFA-0264

The Augusta Chronicle/Augusta Herald (the Chronicle) filed an Appeal from a denial by the Denying Official of the Savannah River Operations Office (Savannah River) of the Department of Energy (DOE) of a Request for Information which it had submitted under the Freedom of Information Act (FOIA). In considering the Appeal, the DOE found that the requested commercial material was not confidential and therefore releasable under the FOIA. Additionally, the DOE found that identifying personnel information must be deleted and withheld from the documents released to the Chronicle.

Refund Applications

Atlantic Richfield Company/Palm Desert ARCO, 3/27/89, RF304-1503

The DOE issued a Decision and Order concerning an Application for Refund filed in the Atlantic Richfield Company (ARCO) special refund proceeding. The applicant documented the volume of his ARCO purchases and submitted documentation that he did not transfer the right to refund when he sold his business. As a retailer requesting a refund of less than $5,000, the applicant was presumed injured. The refund granted in this Decision totaled $4,300 ($3,350 in principal and $950 in interest).

Crown Central Petroleum Corporation/General Oil Distributors, Inc., et al., 3/28/89, RF313-79, et al.

The DOE issued a Decision and Order granting applications filed by six purchasers of Crown refined petroleum products in the Crown Central Petroleum Corporation special refund proceeding. According to the procedures set forth in *Crown Central Petroleum Corp.*, 18 DOE 85,326 (1988), each applicant was found to be eligible for a refund based on the volume of products it purchased from Crown. The total amount of refunds approved in this Decision was $27,443, representing $23,637 in principal plus $3,806 in accrued interest.

Crown Central Petroleum Corporation/ Southeastern Energy Corp., et al., 3/27/89, RF313–73, et al.

The DOE issued a Decision and Order granting applications filed by seven purchasers of Crown refined petroleum products in the Crown Central Petroleum Corporation special refund proceeding. According to the procedures set forth in *Crown Central Petroleum Corp.*, 18 DOE ¶ 85,326 (1988), each applicant was found to be eligible for a refund based on the volume of products it purchased from Crown. The total amount of refunds approved in this Decision was $32,072, representing $27,625 in principal plus $4,447 in accrued interest.

Crown Central Petroleum Corporation/ T.C. Enterprises, Inc., et al., 3/30/89 RF313–64, et al.

The DOE issued a Decision and Order granting applications filed by five purchasers of Crown refined petroleum products in the Crown Central Petroleum Corporation special refund proceeding. According to the procedures set forth in *Crown Central Petroleum Corp.*, 18 DOE ¶ 85,326 (1988), each applicant was found to be eligible for a refund based on the volume of products it purchased from Crown. The total amount of refunds approved in this Decision was $41,940, representing $36,123 in principal plus $5,817 in accrued interest.

Crown Central Petroleum Corporation/ Virginia Electric and Power Company, 3/27/89, RF313–78

The DOE issued a Decision and Order granting an application filed by Virginia Electric and Power Company, a purchaser of Crown refined petroleum products, in the Crown Central Petroleum Corporation special refund proceeding. According to the procedures set forth in *Crown Central Petroleum Corp.*, 18 DOE ¶ 85,326 (1988), the applicant was found to be eligible for a refund based on the volume of products it purchased from Crown. The total amount of the refund approved in this Decision was $20,488, representing $17,647 in principal plus $2,841 in accrued interest.

Dorchester E–Z Mart Stores, Inc., 3/27/89, RF253–31

The DOE issued a Decision granting an Application for refund in the Dorchester Gas Corporation refund proceeding. E–Z Mart is a retailer of Dorchester petroleum products. E–Z Mart adequately established that it purchased 1,157,704 gallons of Dorchester product. Although E–Z Mart's allocable share exceeds $5,000, it has elected to limit its claim to the $5,000 threshold amount. Therefore, E–Z Mart is not required to provide a detailed demonstration of injury and is eligible for its full allocable share. The total refunds approved in this Decision is $7,286, including both interest and principal.

Exxon Corporation/Dick's Enterprises, et al., 3/29/89, RF307–5257, et al.

The Office of Hearings and Appeals of the Department of Energy issued a Decision and Order granting 42 Applications for Refund from consent order funds obtained from Exxon Corporation. Each Applicant sought a refund of less than $5,000, and was therefore presumed to have suffered injury as a result of Exxon's alleged overcharges. The sum of the refunds granted is $27,032.

Exxon Corporation/Hilltop Exxon, et al., 3/28/89, RF307–2026, et al.

The DOE issued a Decision and Order concerning 34 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the Applicants purchased directly from Exxon and was either a reseller whose allocable share is less than $5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $20,749 ($17,686 principal plus $3,063 interest).

Exxon Corporation/Koloup Service Center, Inc., 3/29/89, RF307–1848, RF307–7066

The DOE issued a Decision and Order considering Applications for Refund filed in the Exxon Corporation special refund proceeding by both a former owner (Case No. RF307–7066) and the current owner (Case No. RF307–1848) of Koloup Service Center, Inc. (Koloup). The former owner operated Koloup as a retail service station during the period August 19, 1973, through January 27, 1981. The DOE found that the former owner did not transfer the right to any refunds in the 1984 sale of the station. Accordingly, the application filed by the current owner was denied, and that filed by the former owner was granted. Since the former owner purchased directly from Exxon, and its allocable share is less than $5,000, it is eligible to receive a refund equal to its full allocable share. The refund amount granted in this Decision is $1,137 ($969 principal plus $168 interest).

Exxon Corporation/Pickens Propane Gas Co., et al., 3/30/89, RF307–2672, et al.

The DOE issued a Decision and Order concerning 30 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the Applicants purchased directly from Exxon and was either a reseller whose allocable share is less than $5,000 or an end-user of Exxon products. The DOE found that each applicant is eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $21,410 ($18,250 principal plus $3,160 interest).

Exxon Corporation/Tolberts Exxon Station, et al., 3/28/89, RF307–1788, et al.

The Office of Hearings and Appeals of the Department of Energy issued a Decision and Order granting 45 Applications for Refund from consent order funds obtained from Exxon Corporation. Each Applicant sought a refund of less than $5,000, and was therefore presumed to have suffered injury as a result of Exxon's alleged overcharges. The sum of the refunds granted is $24,994.

Exxon Corporation/W. L. Graben, et al., 3/28/89, RF307–5415, et al.

The Office of Hearings and Appeals of the Department of Energy issued a Decision and Order granting 50 Applications for Refund from consent order funds obtained from Exxon Corporation. Each Applicant sought a refund of less than $5,000, and was therefore presumed to have suffered injury as a result of Exxon's alleged overcharges. The sum of the refunds granted is $43,538.

Exxon Corporation/William L. Goodwin Exxon, et al., 3/27/89, RF307–276, et al.

The DOE issued a Decision and Order concerning six Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the Applicants purchased directly from Exxon and was either an end-user or a reseller whose allocable share is less than $5,000. The DOE determined that

each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $2,385 (2,033 principal plus $352 interest).

Gulf Oil Corporation/Beatties FD. Gulf, et al., 3/30/89, RF300–322, et al.

The DOE issued a Decision and Order concerning eight Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury. The sum of the refunds granted in this Decision is $12,856.

Gulf Oil Corporation/Farmers Union Central Exchange, Inc., 3/27/89, RF300–7879

The DOE issued a Decision and Order concerning an Application for Refund submitted by Farmers Union Central Exchange, Inc. (Cenex) in the Gulf Oil Corporation special refund proceeding. As an end-user of Gulf products, Cenex was granted a refund based on its full allocable share. Under the procedures established in *Gulf Oil Corporation*, 16 DOE ¶ 85,381 for agricultural cooperatives, Cenex also certified that it would pass through any refund received to its members. The refund granted in this Decision is $17,922.

Gulf Oil Corporation/H.S. Bunting Estate, 3/30/89, RF300–710

The DOE issued a Decision and Order concerning an Application for Refund submitted in the Gulf Oil Corporation special refund proceeding by H.S. Bunting Estate (Bunting). Bunting applied as both a consumer and a retailer of Gulf refined products. Since Bunting did not submit information indicating that a refund under the end-user presumption was appropriate, the OHA utilized the reseller presumption in considering the Bunting Application. Bunting did not attempt to demonstrate injury and was awarded a refund under the 40 percent presumption. The total refund granted in this Decision is $9,638.

Gulf Oil Corporation/Jerry Huck, 3/27/89, RF300–6862, RF300–6863

The DOE issued a Decision and Order concerning two Applications for Refund submitted by Jerry Huck in the Gulf Oil Corporation refund proceeding. The sum of the principal refunds of Mr. Huck's applications was greater than $5,000. The DOE ruled that, because the applications were related, they would be considered as one, and that the applicant would need to show injury in order to receive a refund of his full allocable share. The applicant had elected the small claims presumption and thus was approved a refund of $5,000 principal plus $1,484 interest. The sum of the refunds granted in this Decision is $6,484.

Gulf Oil Corporation/Jimmy's Gulf Service, et al., 3/28/89, RF300–219, et al.

The DOE issued a Decision and Order concerning 15 Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. The applications were approved using a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $27,976.

Gulf Oil Corporation/Lowry Gulf Station, et al., 3/30/89, RF300–237, et al.

The DOE issued a Decision and Order concerning six Applications for Refund submitted by indirect purchasers in the Gulf Oil Corporation special refund proceeding. Because the DOE had not received Refund Applications from any of the indirect purchasers' suppliers, the direct purchasers from Gulf, the indirect purchasers' Applications were approved under the same procedures used to evaluate direct purchasers claiming under a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $14,595.

Gulf Oil Corporation/Luis R. Santini, et al., 3/28/89, RF300–7855, et al.

The DOE issued a Decision and Order concerning 17 Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $55,574.

Gulf Oil Corporation/Pride Petroleum, Inc., et al., 3/27/89, RF300–6412, et al.

The DOE issued a Decision and Order concerning 14 Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $146,433.

Gulf Oil Corporation/Ralph D. Weaver, Inc., et al., 3/27/89, RF300–5740, et al.

The DOE issued a Decision and Order concerning 12 Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $126,765.

Gulf Oil Corporation/S. W. Rawls, Inc., et al., 3/27/89, RF300–5652, et al.

The DOE issued a Decision and Order concerning eight Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $101,591.

Gulf Oil Corporation/Timbercreek Oil Co., et al., 3/28/89, RF300–5012, et al.

The DOE issued a Decision and Order concerning six Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $13,480.

Gulf Oil Corporation/Warner Oil Company, 3/29/89, RF300–5703

The DOE issued a Decision and Order concerning an Application for Refund submitted in the Gulf Oil Corporation special refund proceeding by Warner Oil Company (Warner). Warner purchased 18,803,657 gallons of Gulf refined product as a reseller and distributed 758,000 gallons of Gulf refined product as a consignee. Warner did not demonstrate injury and was awarded a refund under the 40 percent presumption of injury for its reseller gallons. Warner received a refund of $6,484 ($5,000 principal plus $1,484 interest).

Standard Oil Co. (Indiana/New Mexico Standard Oil Co. (Indiana) /New Mexico Coline Gasoline Corp./New Mexico National Helium Corp./ New Mexico Belridge Oil Co./New Mexico Perry Gas Processors, Inc., New Mexico, 3/28/89, RM 21–147, et al.

The DOE issued a Decision and Order approving a Motion for Modification filed by the State of New Mexico in the Amoco I, Amoco II, Coline, National Helium, Belridge, and Perry Gas special refund proceedings. New Mexico wished to use $202,429 (plus any accrued interest) in previously-approved second-stage refund monies for the promotion of four ridesharing programs within the state. In *Standard Oil Co. (Indiana)/ New Mexico*, 18 DOE ¶ 85,073 (1988), the DOE had approved the use of these funds for only two ridesharing programs. The DOE found that the proposed modification of the State's original plan would provide restitution to injured consumers of petroleum products. Accordingly, the DOE approved New Mexico's request.

State Escrow Distribution, 3/30/89, RF302–6

The Office of Hearings and Appeals ordered the DOE's Office of the Controller to distribute $81,000,000.00 to the State Governments. Those funds had been set aside for distribution to the States in *Getty Oil Co.*, 18 DOE ¶ _____, No. KEF-0124 (March 21, 1989). The use of the funds by States is governed by the Stripper Well Settlement Agreement.

Suburban Propane Gas Corporation/ Luci Petroleum, Inc., 3/28/89, RF299-42

The DOE issued a Decision and Order denying an Application for Refund filed by Luci Petroleum, Inc., a reseller of petroleum products, in the Suburban Propane Gas Corporation special refund proceeding. Luci was found to have been a spot purchaser of Suburban products. Because it could not successfully demonstrate that it was not a spot purchaser, and because it made no attempt to rebut the spot purchaser presumption of non-injury, Luci was found not to have been injured by Suburban's alleged overcharges, and was therefore ineligible for a refund.

Suburban Propane Gas Corp./Musolino & Sons, Inc., 3/31/89, RF299-87

The DOE issued a Decision and Order granting an Application for Refund filed by Musolino & Sons, Inc. in the Suburban Propane special refund proceeding. Musolino estimated its purchase volumes for the consent order period by prorating its actual purchase volumes for three months in 1978 over the entire period. We asked for further evidence indicating that these three months were indicative of Musolino's general purchase patterns. Musolino supplied additional records indicating that this was the case. Therefore, according to the procedures set forth in *Suburban Propane Gas Corporation*, 16 DOE ¶ 85,382 (1987), Musolino's original submission was approved. The total refund granted in this Decision was $248, consisting of $200 in principal plus $48 in accrued interest.

Total Petroleum, Inc./Herb's Oil Company, et al., 3/28/89, RF321-194, et al.

The DOE issued a Decision and Order concerning 15 Applications for Refund filed by purchasers of motor gasoline and/or No. 2 oils from Total Petroleum, Inc. The applicants sought a portion of the settlement fund obtained by the DOE through a consent order entered into with Total. Each of the applicants was a reseller whose allocable share is less than, or equal to $5,000. Under the standards established in *Total Petroleum, Inc.*, 17 DOE ¶ 85,542 (1988), the DOE granted refunds in this proceeding which total $32,923 ($28,193 principal plus $4,730 interest).

DISMISSALS

The following submissions were dismissed.

Name	Case no.
Andrews Oil Co.	RF309-902 RR309-1
Bayshore Service Station	RF304-6399
Beall Oil Company	RF313-29
Beswick ARCO	RF304-3716
Cat Creek Party Store	RF3310-71
City of Bridgeport	RF272-66097
Crowders Gulf	RF300-7306
Echols Oil Company, Inc.	RF313-38
Edgecomb Metals Company	RF307-4793
Ellis Exxon Service Station	RF307-273
Elmer Kant	RF309-784
F. O. Earle Jr. Oil Co.	RF307-7150
Gary Pearson Amoco Service #2	RF272-62422
J. B. Black, Jr. Trucks	RF272-72451
J&B Oil Co.	RF310-2
Jack's Party Store	RF310-54
Jewish Home & Hospital for Aged	RF272-71715
Jim's Total Service	RF3310-61
Joe E. Brown ARCO	RF304-3658
Kivett Oil Company	RF313-12
Landry's Exxon	RF307-7242
Maholtz ARCO *et al.* (See Attached List).	RF304-3479
Mini-Serve	RF300-2669
Oliver Gulf/J.L. Oliver	RF300-10633
PotwinService	RF310-64
Richland Apco	RF310-22
Skelton Bros. Oil Co.	RF307-1798
Total Car Care, Inc.	RF310-41
Vera Johnson Service Grocery	RF300-2873
W. C. Rice Oil Co., Inc.	RF313-45
Ward Transport, Inc.	RF272-75366

Appendix

March 27, 1989.

Case No.	Applicant name
FR304-3479	Maholtz ARCO
FR304-3503	Spusta's ARCO Service
FR304-3512	Poulton's Service Station
FR304-3522	Koclka ARCO Service
FR304-3526	Newsome Town and Country Market
FR304-3528	Watson, Inc.
FR304-3531	Taylor ARCO
FR304-3549	Charles Service Center
FR304-3635	Joe's ARCO
FR304-3640	Mahan Fuel Co., Inc.
FR304-3642	Key ARCO, Inc.
FR304-3646	Lin's ARCO
FR304-3656	Jerry's ARCO Station
FR304-3669	Maurles Service Station
FR304-3672	A M P Mini Market
FR304-3687	Key ARCO, Inc.
FR304-3688	Key ARCO, Inc.
FR304-3691	Joe's ARCO
FR304-3714	Mayton Brothers Service Station
FR304-3725	Mike's ARCO
FR304-3746	K & B Service Station
FR304-3747	Maines ARCO
FR304-3949	Kalil Mikallas ARCO
FR304-3954	MCO ARCO
FR304-4131	Lee's ARCO Service
FR304-4132	Van Sickle ARCO Service
FR304-4136	Migas ARCO Service
FR304-4343	Carl's ARCO Service
FR304-6387	Teo's ARCO
FR304-6391	Meyer's Town Pump
FR304-6395	Temple ARCO
FR304-6402	Mel's ARCO AM-PM

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E-234, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines*, a commercially published loose leaf reporter system.

June 13, 1989.

George B. Breznay

Director, Office of Hearings and Appeals.

[FR Doc. 89-14929 Filed 6-22-89; 8:45 am]

BILLING CODE 6450-01-M

Notice of Issuance of Decisions and Orders for Week of April 3 Through April 7, 1989

During the week of April 3 through April 7, 1989, the decisions and orders summarized below were issued with respect to applications for refund filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Refund Applications

Atlantic Richfield Company/Abendroth Water Conditioning, Inc., et al., 4/5/88, RF304-156, et al.

The DOE issued a Decision and Order concerning 62 Applications for Refund filed in the Atlantic Richfield Company (ARCO) special refund proceeding. As reseller/retailers claiming refunds of less than $5,000 in principal or end users, each applicant is presumed to have been injured by ARCO's alleged overcharges. After examining the applications and supporting documentation, the DOE determined that the firms should receive refunds totaling $94,445, representing $73,398 in principal and $21,047 in interest.

Atlantic Richfield Company/Larry's ARCO Service, et al., 4/5/89, RF304-2478, et al.

The DOE issued a Decision and Order concerning forty-five Applications for Refund filed in the Atlantic Richfield Company special refund proceeding. All of the applicants were either end-users or reseller/retailers that applied for small claims. In addition, each applicant documented the volume of its purchases from ARCO and, therefore, was presumed to have been injured and entitled to a refund. The DOE concluded that the applicants should receive refunds totalling $64,712, representing $50,289 in principal and $14,423 in accrued interest.

Atlantic Richfield Company/Lyon's ARCO, et al., 4/3/89, RF304–1519, et al.

The DOE issued a Decision and Order concerning forty-two Applications for Refund filed in the Atlantic Richfield Company (ARCO) special refund proceeding. All of the applicants documented the volume of their ARCO purchases and were end-users or reseller/retailers requesting refunds of $5,000 or less. Therefore, each applicant was presumed injured. The refunds granted to this Decision totaled $54,719 ($42,529 in principal and $12,190 in interest).

Emmett Elliott, 4/7/89, RC272–44.

On August 22, 1988, the DOE issued a Decision and Order granting a refund to Emmett Elliott (Elliott), Case No. RF272–36184). *Lake Villa School District, et al.*, (Case Nos. RF272–36001, *et al.*) (August 22, 1988). The DOE determined that this refund was a duplicate of the refund granted to Elliott, Case No. RF272–30375), on July 28, 1988. *Michael D. Lyons, et al.*, (Case Nos. RF272–30200, *et al.*) (July 28, 1988). Accordingly, the DOE issued a Supplemental Order rescinding the refund granted to Elliott in *Lake Villa School District, et al.*

Exxon Corporation/Car Rentals, Inc., et al., 4/3/89, RF307–2238, et al.

The DOE issued a Decision and Order concerning 43 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share was less than $5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is $33,135 ($28,237 in principal and $4,898 in interest).

Exxon Corporation/Freeman Oil Co., et al., 4/3/89, RF307–4707, et al.

The DOE issued a Decision and Order granting a refund to eight resellers of refined petroleum products in the Exxon Corporation Special refund proceedings. Because each firm chose to limit its refund claim to the greater of $5,000 or 40 percent of its volumetric refund amount, each firm was presumed to have been injured by Exxon's alleged overcharges. The refunds granted in this Decision totaled $47,296, including $6,989 in accrued interest.

Exxon Corporation/John Holton Oil Co., et al., 4/4/89, RF307–5511, et al.

The Office of Hearings and Appeals of the Department of Energy issued a Decision and Order granting 49 Applications for Refund in the Exxon Corporation special refund proceeding. Each Applicant sought a refund of less than $5,000 and was therefore presumed to have been injured. The sum of the refunds granted is $39,587.

Gerald Zimmerman, 4/7/89, RC272–43

On March 20, 1989, the DOE issued a Decision and Order granting a crude oil refund to Gerald Zimmerman (Zimmerman), Case No. RF272–49731. *Thomas L. Miller, et al.*, (Case Nos. RF272–49601, *et al.*) (March 20, 1989). The DOE determined that this refund was a duplicate of one granted to Zimmerman on January 13, 1989 (Case No. RF272–46870). *Charlie Alexander, et al.*, (Case Nos. RF272–46800, *et al.*) Accordingly, the DOE rescinded the second refund granted in *Thomas L. Miller, et al.*

Gulf Oil Corporation/Bonds Oil Company Tom M. Bonds, 4/7/89, RF300–302, RF300–3182, RF300–3188.

The DOE issued a Decision and Order concerning three Applications for refund submitted in the Gulf Oil Corporation special refund proceeding by Tom M. Bonds, a reseller and consignee of Gulf products. Because Mr. Bonds' allocable share was less than $5,000, no demonstration of injury was required. Accordingly, on the basis of documentation of Mr. Bonds' volume of Gulf purchasers, the applications were approved under the 10 percent and small claims presumptions of injury. The amount of the refund granted in this Decision is $3,906.

Gulf Oil Corporation/Certified Gulf Car Care, Memorial Gulf Car Care, 4/3/89, RF300–62, RF300–180

The DOE issued a Decision and Order concerning two Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding by Acadiana Energy for its subsidiaries Certified Gulf Car Care and Memorial Gulf Car Care. Both Certified and Memorial are gas stations which operated independently as sole proprietorships during the refund period and had been purchased by Acadiana after the refund period in 1986. The OHA determined that when Acadiana purchased the stations, the assets so transferred did not include potential refunds. Therefore, the Applications were denied.

Gulf Oil Corporation/Jenkins Gulf Station, et al., 4/5/89, RF300–200, et al.

The DOE issued a Decision and Order Concerning twenty-four Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. The Applications were approved using a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $39,314.

Gulf Oil Corporation/Lawrence Stuardi, 4/7/89, RF300–4637, RF300–4682, RF300–5705, RF300–10757

The DOE issued a Decision and Order concerning four Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding by Lawrence Stuardi. Because each applicant firm was owned by Mr. Stuardi during the consent order period, the applicants were considered to be a single firm for purposes of the Gulf proceeding. Because their collective total maximum refund exceeded $5,000, and no demonstration of injury was made the Applications were approved under the 40 percent presumption of injury. The refund granted in this Decision, including accrued interest, is $6,484.

Gulf Oil Corporation/Metropolitan Edison Company, 4/3/89, RF300–7943

The DOE issued a Decision and Order concerning an Application for Refund submitted in the Metropolitan Edison Company (Met-Ed) in the Gulf Oil Corporation special refund proceeding. As an end-user of Gulf products, Met-Ed was granted a refund based on its full allocable share. Under the procedures established in *Gulf Oil Corporation*, 16 DOE ¶ 85,381 (1987) for regulated utilities, Met-Ed also certified that it would notify the appropriate regulatory body of any refund received and pass through any refund received to its customers. The refund granted in this Decision is $20,928.

Gulf Oil Corporation/Penn Central Transportation Company, Southern Pacific Transportation Company, 4/5/89, RF300–7771, RF300–8083

The DOE issued a Decision and Order concerning two Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each

application was approved using a presumption of injury. The sum of the refunds granted in this Decision is $95,367.

Gulf Oil Corporation/Peoples Petroleum Co., Inc., et al., 4/3/89, RF300–7611, et al.

The DOE issued a Decision and Order concerning 10 Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury. The sum of the refunds granted in this Decision is $64,840.

Gulf Oil Corporation/Peterson Petroleum, Inc., 4/3/89, RF300–4296

The DOE issued a Decision and Order concerning an Application for Refund submitted in the Gulf Oil Corporation special refund proceeding. The Application was approved using a presumption of injury. The total refund granted in this Decision, including accrued interest, is $37,357.

Gulf Oil Corporation/Terry's Service Station, Inc., et al., 4/5/89, RF300–291, et al.

The DOE issued a Decision and Order concerning nine Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. The Applications were approved using a presumption of injury. The sum of the refunds granted in this Decision, including accrued interest, is $18,846.

Gulf Oil Corporation/Thermagas, Inc., 4/7/89, RF300–357

The DOE issued a Decision and Order concerning an Application for Refund submitted by Thermagas, Inc. in the Gulf Oil Corporation special refund proceeding. Thermagas requested a refund which exceeded $5,000, and supported its claim with a demonstration that during the refund period it accumulated banks of unrecouped increased product costs which exceeded its potential refund, and that it did not pass through those costs to its customers. Accordingly, Thermagas was granted a refund amount of $8,203.

James W. Tate, 4/4/89, RC272–42

On August 12, 1988, the DOE issued a Decision and Order granting a crude oil proceeding refund to James W. Tate (Tate), Case No. RF272–34808. *Dennis Hart, et. al.*, (Case Nos. RF272–34800, *et al.*) (August 12, 1988). The DOE determined that this refund was a duplicate of one previously granted to Tate (Case No. RF 272–14179). *E.Y. Trucking, et al.*, (Case Nos. RF272–14001, *et al.*) (June 24, 2988). Accordingly, the DOE issued a Supplemental Order rescinding the second refund.

MCO Holdings, MGPC, Inc./Petrolane Gas Services, Ltd., 4/6/89, RF312–8

The DOE issued a Decision and Order granting an Application for Refund in the MCO Holdings, MGPC special refund proceeding. Petrolane was a reseller of MGPC propane and butane and submitted a cost bank which indicated that it had banked costs well in excess of its volumetric allocation. Additionally, Petrolane provided market price data from the Energy Information Administration (EIA) to indicate that it was competitively disadvantaged by its purchases from MGPC. The DOE rejected the firm's use of EIA pricing information in determining if it was competitively disadvantaged and determined that the use of pricing information in *Platt's Oil Handbook and Oilmanac* was a more appropriate source of market information for comparison. Because neither *Platt's* nor EIA had price information regarding butane during the period Petrolane purchased this product from MGPC (May 1974 through June 1975), the DOE presumed that purchases of butane followed a similar pricing pattern as purchases of propane from MGPC. Using this information, the DOE determined that Petrolane was competitively disadvantaged in its purchases from MGPC and was injured to the full extent of its allocable share of the consent order fund. After examining the firm's Application and supporting documentation, the DOE determined that the firm should receive a refund totaling $35,726 ($30,457 principal and 5,269 interest).

Murphy Oil Corporation/Board of Light & Power, City of Marquette, 4/5/89, RF309–271

The DOE issued a Decision and Order granting an Application for Refund filed by the Board of Light & Power, City of Marquette, Michigan (Marquette) in the Murphy Oil Corporation special refund proceeding. The applicant, a public utility, purchased directly from Murphy and is considered an end-user of Murphy products. Marquette filed a statement certifying that it would pass through any refund received to its customers and that it would notify the appropriate regulatory agency. Accordingly, Marquette was granted its full allocable share of $736 ($639 in principal plus $97 in interest).

Southern California Edison Co., et al., 4/5/89, RC272–36, et al.

The DOE issued a Supplemental Order modifying the terms of each Decision and Order in which any of the six utility claimants under consideration were granted refunds in the Crude Oil Subpart V refund proceeding. Originally, the Decisions and Orders specified that each of the claimants would be paid by check made payable to and sent to their attorney. These Decisions and Orders were modified to provide that the refund checks be made payable to the applicants and forwarded by electronic wire transfer in accordance with instructions submitted by each applicant to the DOE.

Transit Authority, City of Omaha, 4/7/89, RC272–45

On August 30, 1988, the DOE issued a Decision and Order granting a refund of $2,205 to the Transit Authority, City of Omaha (Omaha), Case No. RF272–13447. *G.T. Hamilton, Jr., et al.*, (Case Nos. RF272–13423, *et al.*) (August 30, 1988). The DOE determined that this refund was a duplicate of one granted to Omaha, Case No. RF272–5693, on August 16, 1988. *Eugene D. Gott, et al.*, (Case Nos. RF272–4261, *et al.*) (August 16, 1988). Accordingly, the DOE issued a Supplemental Order rescinding the refund granted to Omaha in *Eugene D. Gott, et al.*

Tri Valley Growers, Inc., 4/5/89, RC 272–35

The DOE issued a Supplemental Order concerning a Subpart V crude oil refund previously granted to Tri/Valley Growers, Inc. (Tri/Valley). *See Durand Area Schools*, 17 DOE ¶ 85,737 (1988). After the refund was paid, the DOE learned that Tri-Valley had filed a validly executed Refiners Escrow Release of Claims and had received a refund from the Refiners Escrow Account pursuant to the Stripper Well Settlement Agreement. In view of this fact, the DOE determined that Tri/Valley was ineligible to receive any refund in the Subpart V proceedings. Accordingly, the DOE rescinded the refund previously granted to the firm, and ordered Tri/Valley to remit to the DOE the amount of the refund, $1,920.

Dismissals

The following submissions were dismissed.

Name	Case No.
AM–PM Mini-Mart	RF304–3785
Ashdale Plaza Road Co	RF304–4221
Atlantic Aviation Corporation	RF300–9850

Name	Case No.
Balducci Service Station	RF300-8578
Bluewell Auto Center	RF300-2313
Brantley Gulf	RF300-6626
Campbell Oil Co., Inc	RF300-7672
Clifford Baker	RF307-2054
Cooks Getwell Gulf	RF300-7715
Crawford Oil Co	RF300-9948
D&J Oil Co	RF309-284
Deaton, Inc	RF309-214
Dick Kelly's ARCO	RF304-4214
E.G. Bradford & Sons, Inc	RF309-226
Eddie Truck Stop	RF300-9963
Farmland Industries, Inc	RF195-9
Flaughs Service	RF300-8603
Frank's Exxon	RF307-2072
George Hornbuckle	RF309-765
Jarrell Oil Co., Inc	RF313-3
Joe's ARCO	RF304-4226
Joseph Erpenbeck	RF304-1745
Ken Jones	RF307-2066
Knox Fuel Stop MN #77B	RF272-74323
Knox Fuel Stop MN #487	RF272-74324
Knox Fuel Stop MN #723	RF272-74325
Knox Fuel Stop MN #364A	RF272-74326
Knox Fuel Stop MN #410	RF272-74327
Knox Fuel Stop MN #258	RF272-74329
Knox Fuel Stop MN #487	RF300-10393
Knox Fuel Stop MN #77B	RF300-10394
Knox Fuel Stop MN #364A	RF300-10395
Knox Fuel Stop MN #723	RF300-10396
Knox Fuel Stop MN #258	RF300-10397
Knox Fuel Stop MN #410	RF300-10398
Knox Fuel Stop MN #487	RF300-10401
Knox Fuel Stop MN #410	RF300-10405
Knox Fuel Stop MN #77B	RF300-10407
Knox Oil of Texas	RF272-74328
Knox Oil of Texas	RF300-10399
Knox Truck Wash	RF272-74322
Knox Truck Wash	RF300-10392
Levy Gulf	RF300-7735
Lindsey Oil Co	RF300-7660
M and M Gulf Service	RF300-8488
M and M Oil, Inc	RF300-8500
Mobil Oil Corporation	RF195-11
Mount Home Exxon	RF307-5844
O'Neill Tire & Supply Co	RF304-4227
Parker Energy & Petroleum Co., Inc.	RF309-243
Pre Fab Transit	RF300-8446
Public Oil Co	RF309-228
Reds Oil Co	RF300-9959
Ron's ARCO Service 66	RF304-185
Saddle River Exxon	RF307-1793
Sysco Food System	RF300-7030
Vincente Bros. Service	RF304-3787
Webb's Oil Corporation	RF309-216

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E-234, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines*, a commercially published loose leaf reporter system.

June 13, 1989.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 89-14930 Filed 6-22-89; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-3607-2]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382-5073 or (202) 382-5075. Availability of Environmental Impact Statements Filed June 12, 1989 Through June 16, 1989 Pursuant to 40 CFR 1506.9.

EIS No. 890156, Final, FHW, VA, VA-265/Danville Expressway Completion, US-58 to US-29, Funding and 404 Permit, City of Danville, Pittsylvania County, VA, Due: July 24, 1989, Contact: James Tumlin (804) 771-2371.

EIS No. 890157, Draft, COE, GU, Agana Bayfront Area Typhoon and Storm Surge Protection Facilities (Guam Comprehensive Study), Construction, Anigua to Dungca's Beach, GU, Due: August 7, 1989, Contact: James Maragos (808) 438-2263.

EIS No. 890158, Draft, FHW, HI, Kahekili Highway/US-83 Widening, Likelike Highway/US-63 to Kamehameha Highway and Interchange Construction at Likelike Highway/US-63, Funding, Island of Oahu, City and County of Honolulu, HI, Due: August 21, 1989, Contact: William Lake (808) 541-2700.

EIS No. 890159, Draft, FHW, VA, VA-31/James River Crossing Improvement, VA-10 to VA-5, Funding, Section 10 and 404 Permits, Coast Guard Permits, Surry, James City and Charles City Counties, VA, Due: August 7, 1989, Contact: James Tumlin (804) 771-2371.

EIS No. 890160, Draft, SCS, MS, Long Beach Watershed Plan, Flood Damage Reduction, Funding, Harrision County, MS, Due: August 7, 1989, Contact: Pete Heard (601) 965-5202.

EIS No. 890161, Draft, USA, TT, Kwajalein Atoll Ongoing and Strategic Defense Initiative Activities, Test Range Facility Construction and Support Services, Republic of the Marshall Islands, Due: August 7, 1989, Contact: LTC Keglovits (205) 895-3616.

EIS No. 890162, Draft, AFS, PA, Allegheny Reservoir Motel-Restaurant Complex, Site Selection and Construction, Allegheny National Forest, Warren County, PA. Due: August 14, 1989, Contact: David Wright (814) 723-5150.

EIS No. 890163, Draft, COE, MA, Saugus River and Tributaries Flood Damage Reduction Plan, Implementation, Lynn, Malden, Revere and Saugus Communities, Essex, Middlesex and Suffolk Counties, MA, Due: August 7, 1989, Contact: Joseph Horowitz (617) 647-8518.

EIS No. 890164, Draft, FHW, NC, Northern Wake Expressway, Construction, NC-55 Near Morrisville to US 64 Near Knightdale, Funding and 404 Permit Wake and Durham Counties, NC, Due: August 14, 1989, Contact: Kenneth Bellamy (919) 790-2859.

EIS No. 890165, Final, COE, IA, Mississippi River Flood Damage Reduction Facilities, Construction, Coon Rapids Dam to Ohio River, Muscatine and Louisa Counties, IA, Due: July 24, 1989, Contact: Robert Vanderjack (309) 788-6361.

EIS No. 890166, Final, BLM, CA, PLES I Geothermal Project, Geothermal Wellfield Development and 10 MWe Powerplant Construction/Operation, Plan of Operation, Utilization and Injection, Approval, Inyo National Forest, Mono County, CA, Due: July 24, 1989, Contact: Mike Ferguson (619) 872-4881.

Amended Notices

EIS No. 890149, Final, SFW, MA, RI, CT, NH, VT, ME, New England Atlantic Salmon Restoration Activities 1989-2021, Implementation, Connecticut, Pawcatuck, Merrimack, Saco, Union, Androscoggin, Kennebec, Penobscot, St. Croix, Meduxnekeag and Aroostook Rivers, CT, RI, MA, NH, VT and ME, Due: August 15, 1989, Contact: Dan Kimball (617) 965-5100. Inadvertently omitted from the 6-16-89 **Federal Register.**

Dated: June 20, 1989.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 89-14934 Filed 6-22-89; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3607-3]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared June 5, 1989 through June 9, 1989 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) 382-5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 7, 1989 (54 FR 15006).

Draft EISs

ERP No. D–AFS–J61074–MT, Rating EC2, White Stallion Timber Sale Management, Implementation, Darby Range District, Bitterroot National Forest, Ravalli County, MT.

Summary: EPA believes that the draft EIS does not support selection of Alternative B as the preferred alternative and requests that the final EIS provide the rationale for selecting Alternative B. EPA has concerns regarding the limited monitoring proposed for the timber sale and requests that the final EIS provides specific information on planned monitoring and feedback mechanisms.

ERP No. D–AFS–L82010–00, Rating LO, Pacific Northwest Region National Forests, Nursery Pest Management Control Plan, Implementation, Skamania County, WA and Lane, Douglas, Deschutes and Jackson Counties, OR.

Summary: EPA has no objections to the preferred alternatives as described in the draft EIS.

ERP No. D–NPS–L67023–AK, Rating E01, Wrangell-St. Elias National Park and Preserve, Mining Operations Management Plan, Implementation, AK.

Summary: EPA determined that the proposed action entails significant cumulative environmental impacts to wetlands and wildlife habitat that must be avoided through appropriate controls. The draft EIS adequately addresses potentially significant environmental impacts. However, further explanation of the relative impacts and controls for each alternative should be provided.

ERP No. D–NPS–L67024–AK, Rating E01, Denali National Park and Preserve, Mining Operations Management Plan, Implementation, AK.

Summary: EPA determined that the proposed action entails significant cumulative environmental impacts to wetlands and wildlife habitat that must be avoided through appropriate controls. The draft EIS adequately addresses potentially significant environmental impacts. However, further explanation of the relative impacts and controls for each alternative should be provided.

Final EISs

ERP No. F–FHW–K40162–CA, Ventura County Routes 23 and 118 Freeway Gap Closure, Rt–23 Freeway at New Los Angeles Avenue to Rt–118 Freeway at College View Avenue, Funding, 404 Permit, Moorpark City, Ventura County CA.

Summary: EPA requested that two features be added to the wetlands mitigation proposal to ensure that wetlands mitigation areas are protected for the life of the project and that the mitigation plan contains specific criteria for evaluating the success of mitigation habitats.

Dated: June 20, 1989.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 89–14935 Filed 6–22–89; 8:45 am]

BILLING CODE 6560–50–M

[FRL–3606–9]

Small Business Competitiveness Demonstration Program; Plan for Expansion in Targeted Industry Categories

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: This notice invites public comment on EPA's proposed plan to expand small business participation in 10 industry categories pursuant to Title VII of the "Business Opportunity Development Reform Act of 1988", Pub. L. 100–565.

DATE: Comments are due in writing on or before July 24, 1989.

ADDRESS: Comments should be addressed to: Environmental Program Agency, Office of Small and Disadvantaged Business Utilization (A–149C), 401 M Street, SW., Washington, DC 20460. ATTN: Margie A. Wilson.

FOR FURTHER INFORMATION CONTACT: Margie A. Wilson, at (703) 557–7305 (FTS 557–7305).

SUPPLEMENTARY INFORMATION: Title VII of the "Business Opportunity Development Reform Act of 1988" seeks to demonstrate whether targeted goaling and management techniques can expand Federal contract opportunities for small business in industry categories where such opportunities historically have been low despite adequate numbers of small business contractors in the economy. EPA has been identified as a participant in the demonstration program. For purposes of expansion of the demonstration program EPA has targeted the following industries:

Description	Product/Service Code
(1) ADP Facilities Management Services	R301
(2) Other ADP Services	R399
(3) Other Environmental Services, Studies & Analytical Support	F999
(4) Other Research & Development	A211
(5) Water Pollution Research & Development	AH31
(6) Water Quality Support Services	F103
(7) Other Natural Resources Management Services	F099
(8) Air Quality Support Services	F101
(9) Other Management Support Services	R799
(10) Other Business Consultant Services	R421

EPA's Plan to Expand Small Business Participation in 10 Industry Categories

EPA has three major buying facilities located in Washington, DC; Cincinnati, Ohio; and Research Triangle Park, North Carolina. A small business representative is assigned to each buying facility to assist and promote small business, including small disadvantaged, and women-owned businesses in obtaining acquisition opportunities with EPA. EPA plans to increase small business participation in the 10 selected categories through its outreach efforts which include the following:

—Selecting the ten (10) industry categories amenable to increase small business participation.

—Developing an instructional program to train the Agency's procurement personnel in their roles and responsibilities in implementing the provisions under the law.

—De-emphasizing, within the technical evaluation criteria, the corporate history requirement, and substituting technical and professional qualifications whenever possible.

—Breaking out requirements to allow more participation by small businesses in areas where their participation has been historically low or nonexistent.

—Making sure that copies of solicitations are mailed directly to small businesses.

—Developing outreach programs to help small businesses become more competitively involved in the Agency acquisition activities.

Date: June 19, 1989.

John M. Ropes,

Director, Office of Small and Disadvantaged Business Utilization.

[FR Doc. 89–14916 Filed 6–22–89; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Information Collection Submitted to OMB for Review

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of information collection submitted to OMB for review and approval under the Paperwork Reduction Act.

SUMMARY: The submission is summarized as follows:

Type of Review: Extension of expiration date without any change in substance or method of collection
Title: Reports of Indebtedness of Executive Officers and Principal Shareholders to Correspondent Banks and to Own Bank
Form Number: FFIEC 004
OMB Number: 3064–0023
Expiration Date of Current OMB Clearance: September 30, 1989
Frequency of Response: Annually
Respondents: Insured State nonmember banks and their executive officers and principal shareholders
Number of Respondents: 33,516
Number of Responses Per Respondent: 1
Total Annual Responses: 33,516
Average Number of Hours Per Response: 2
Total Annual Burden Hours: 67,032
OMB Reviewer: Gary Waxman (202) 395–7340, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office building, Washington, DC 20503
FDIC Contact: John Keiper, (202) 898–3810, Assistant Executive Secretary, Room 6069, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429
Comments: Comments on this collection of information are welcome and should be submitted on or before August 21, 1989.

ADDRESSES: A copy of the submission may be obtained by calling or writing the FDIC contact listed. Comments regarding the submission should be addressed to the OMB reviewer listed. The FDIC would be interested in receiving a copy of the comments.

SUPPLEMENTARY INFORMATION: The FDIC is requesting OMB approval to extend the use of form FFIEC 004 which is designed to assist executive officers and principal shareholders of FDIC-supervised banks in meeting statutory reporting requirements as implemented by FDIC regulation 12 CFR Part 349. According to 12 CFR Part 349, if during any calendar year an executive officer or principal shareholder of an insured State nonmember bank or a related interest of such a person has outstanding an extension of credit from a correspondent bank, the executive officer or principal shareholder must make a written report to the board of directors of the insured State nonmember bank on or before January 31 of the following year. Also, upon receipt of a written request, the bank is required to disclose to the requester the identity of bank insiders whose indebtedness to the bank exceeds certain amounts.

Dated: June 16, 1989.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 89–14883 Filed 6–22–89; 8:45 am]

BILLING CODE 6714–01–M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224–200237–001
Title: City of Long Beach Terminal Agreement.
Parties: City of Long Beach (City), Lucky Cement Corporation (LCC).
Synopsis: The Agreement amends the basic agreement (Agreement No. 224–200237) which provides for LCC's use of certain premises on Pier A, Berth 209, harbor of the City of Long Beach for use as a ground slag-cement facility. It provides for LCC to pay, subject to a reimbursement from the City, for demolishing, removing and disposing of all structures and improvements on the premises except for the asbestos roof on the structures and the Rapistan conveyor sortation system.

Agreement No.: 224–003930–002.
Title: Port Authority of New York & New Jersey Terminal Agreement.
Parties: Port Authority of New York & New Jersey Universal Maritime Service Corp.
Synopsis: The Agreement provides that the unit rate for handling copper in breakbulk at the Red Hook Terminal shall be an amount equal to the wharfage charge for "all cargo" as published in Port Authority's Marine Terminal Tariff PA–9. The Agreement revises the method of calculating the usage rental and container rental and revises Agreement provisions involving the minimum limits of liability insurance.

By Order of the Federal Maritime Commission.

Ronald D. Murphy,

Assistant Secretary.

Dated: June 20, 1989.

[FR Doc. 89–14886 Filed 6–22–89; 8:45 am]

BILLING CODE 6730–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency For Toxic Substances and Disease Registry

[ATSDR–10]

Availability of Final Versions of First 25 Toxicological Profiles

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Public Health Services (PHS), Department of Health and Human Services (DHHS).

ACTION: Notice.

SUMMARY: This notice announces the availability of five of the final versions of the first 25 toxicological profiles prepared by ATSDR.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), as amended by the Superfund Amendments and Reauthorization Act (SARA) (Pub. L. 99–499) requires that ATSDR compile a priority list of at least 100 hazardous substances most commonly found at facilities on the CERCLA National Priorities List (NPL), and which are determined to pose the most significant potential threat to human health. The list identifying the first 100 hazardous substances was published in the **Federal Register** on April 17, 1987 (52 FR 12866), as required by CERCLA section 104(i)(2)(A). Section 104(i)(3) of CERCLA further requires that the Administrator of ATSDR prepare toxicological profiles for the hazardous substances included on the priority list.

Notice of the availability of the first 25 draft toxicological profiles for public review and comment was published in the **Federal Register** on October 15, 1987 (52 FR 38340), with notice that a 90-day public comment period would be provided for each profile, starting from the actual release date. Following the close of each comment period, chemical

specific comments were addressed, and where appropriate, changes were incorporated into each profile. The public comments, the classification of and response to those comments, and other data submitted in response to the **Federal Register** notice bear the docket control number ATSDR–2. This material is available for public inspection at ATSDR, Trailer 11, 4770 Buford Highway, Chamblee, GA 30341 between 8:00 a.m. and 4:30 p.m. Monday through Friday except legal holidays.

Availability

This notice is to announce the availability of five of ATSDR's final toxicological profiles for the first 25 substances as mandated by CERCLA. Additional final profiles will be announced in the **Federal Register** as they become available. The following toxicological profiles are now available through the U.S. Department of Commerce, National Technical Information Service, Springfield, VA 22161:

Toxicological profile	Document number	CAS #
Arsenic	ATSDR/TP–88/02	7440–38–2
Cadmium	ATSDR/TP–88/08	7440–43–9
Heptachlor/Heptachlor Epoxide	ATSDR/TP–88/16	76–44–8/1024–57–3
Methylene Chloride	ATSDR/TP–88/18	75–09–2
Di(2-ethylhexyl)phthalate	ATSDR/TP–88/15	117–81–7

Dated: June 16, 1989.

Walter R. Dowdle,

Acting Administrator, Agency for Toxic Substances and Disease Registry.

[FR Doc. 89–14857 Filed 6–22–89; 8:45 am]

BILLING CODE 4160–70–M

Family Support Administration

Forms Submitted to the Office of Management and Budget for Clearance

The Family Support Administration (FSA) will publish on Fridays information collection packages submitted to the Office of Management and Budget (OMB) for clearance, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Since the last scheduled publication for June 9, 1989, the following package was submitted to OMB: For a copy of package, call the FSA, Reports Clearance Officer on 202–252–5598.

FSA Grantee Survey of the Low Income Home Energy Assistance Program (Forms FSA–283 and FSA–284) are used to obtain preliminary and updated estimates of sources and uses of federal and nonfederal LIHEAP funds, and households to be assisted during the fiscal year.

Form FSA–283, Winter Telephone Survey (0970–0063)—Respondents: State or local governments; Number of Respondents: 51; Frequency of Response: 1; Average Burden per Response: 3.25 hours; Estimated Burden: 166 hours.

Form FSA–284, Summer Telephone Survey (0970–0076)—Respondents: State or local governments; Number of Respondents: 51; Frequency of Response: 1; Average Burden per Response: 3.00 hours; Estimated Burden: 153 hours.

OMB Desk Clearance Officer: Justin Kopca.

Written comments and recommendations for the proposed information collections should be sent directly to the OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3201, 725 17th Street, NW., Washington, DC 20503.

Date: June 15, 1989.

Sylvia E. Vella,

Deputy Associate Administrator, Office of Management and Information Systems, FSA.

[FR Doc. 89–14822 Filed 6–22–89; 8:45 am]

BILLING CODE 4150–04–M

Forms Submitted to the Office of Management and Budget for Clearance

The Family Support Administration (FSA) will publish on Fridays, information collection packages submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Following is the **Federal Register** submission by FSA:

(For a copy of package, call the FSA, Reports Clearance Officer on 202–252–5598).

Title IV–F Jobs Expenditure Report, FSA–331—This form is used to issue quarterly State grant awards under the JOBS program effective July 1, 1989. It also tracks matching rate provisions of section 403(k) and 403(l) of the Social Security Act as amended.

Respondents: State Agencies.

Number of Respondents: 55.

Frequency of Response: Quarterly.

Average Burden per Response: 1.75 hours.

Estimated Annual Burden: 385 hours.

OMB Desk Officer: Justin Kopca.

Written comments and recommendations for the proposed information collection should be sent directly to the OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3201, 1725 17th Street, NW., Washington, DC 20503.

Date: June 14, 1989.

Naomi B. Marr,

Associate Administrator, Office of Management and Information Systems.

[FR Doc. 89–14668 Filed 6–22–89; 8:45 am]

BILLING CODE 4150–04–M

Food and Drug Administration

Advisory Committees; Meetings

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: This notice announces forthcoming meetings of public advisory committees of the Food and Drug Administration (FDA). This notice also summarizes the procedures for the meetings and methods by which interested persons may participate in open public hearings before FDA's advisory committees.

Meetings: The following advisory committee meetings are announced:

Radiologic Devices Panel

Date, time and place. July 10 and 11, 1989, 9 a.m., Rm T–416, Twinbrook Bldg. No. 4, 12720 Twinbrook Parkway, Rockville, MD.

Type of meeting and contact person. Open public hearing, July 10, 1989, 9 a.m. to 10 a.m., unless public participation does not last that long; open committee discussion, 10 a.m. to 4 p.m.; closed presentation of data, 4 p.m. to 5 p.m.; open public hearing, July 11, 1989, 9 a.m. to 10 a.m.; open committee discussion, 10 a.m. to 4 p.m.; closed presentation of data, 4 p.m. to 5 p.m.; Adrianne Galdi,

Center for Devices and Radiological Health (HFZ–430), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7514.

General function of the committee. The committee reviews and evaluates available data on the safety and effectiveness of devices and makes recommendations for their regulation.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before June 26, 1989, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. The committee will discuss premarket approval applications (PMA's) for hyperthermia devices. The committee may also discuss clinical study requirements.

Closed presentation of data. The committee may review and/or discuss trade secret and/or confidential commercial information relevant to PMA's. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Neurological Devices Panel

Date, time, and place. July 14, 1989, 9 a.m., Rm. T–416, Twinbrook Bldg. No. 4, 12720 Twinbrook Parkway, Rockville, MD.

Type of meeting and contact person. Open committee discussion, 9 a.m. to 10 a.m.; closed presentation of data, 10 a.m. to 11 a.m.; open public hearing, 11 a.m. to 12 m., unless public participation does not last that long; open committee discussion, 1 p.m. to 3 p.m.; Robert Munzner, Center for Devices and Radiological Health (HFZ–430), Food and Drug Administration 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7226.

General function of the committee. The committee reviews and evaluates available data on the safety and effectiveness of devices and makes recommendations for their regulation.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before July 7, 1989, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. The committee will discuss processed human dura mater that is used for cranial surgery and make recommendations regarding classification. The committee will also discuss a premarket approval application (PMA) for a cerebrospinal fluid (CSF) shunt valve.

Closed presentation of data. The committee will discuss trade secret and/or confidential commercial information regarding the PMA for the CSF shunt valve. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Vaccines and Related Biological Products Advisory Committees

Date, time, and place. July 20 and 21, 1989, 8:30 a.m., Lister Hill Auditorium, National Institutes of Health, Bldg. 38A, 8600 Rockville Pike, Bethesda, MD.

Type of meeting and contact person. Open public hearing, July 20, 1989, 8:30 a.m. to 9:30 a.m., unless public participation does not last that long; open committee discussion, 9:30 a.m. to 3:30 p.m.; closed committee deliberations, 3:30 p.m. to 5:30 p.m.; closed committee deliberations, July 21, 1989, 8:30 a.m. to 2:30 p.m.; Jack Gertzog, Center for Drug Evaluation and Research (HFD–9), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–5455.

General function of the committee. The committee reviews and evaluates available data on the safety and effectiveness of marketed and investigational human drugs for use in the diagnosis, prevention, or treatment of human diseases. The committee also reviews and evaluates the quality and relevance of FDA's research program which provides scientific support for the regulation of these products.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before July 6, 1989, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. On July 20, 1989, the committee will discuss *Hemophilus influenzae* Type B Conjugate Vaccines.

Closed committee deliberations. On July 20, 1989, and on July 21, 1989, the committee will review trade secret or confidential commercial information relevant to pending license applications and investigational new drugs in the Center for Biologics Evaluation and Research. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Anesthesiology and Respiratory Therapy Devices Panel

Date, time, and place. July 27, 1989, 9 a.m., Rm. 416, Twinbrook Bldg. No. 4, 12720 Twinbrook Parkway, Rockville, MD.

Type of meeting and contact person. Open committee discussion, 9 a.m. to 9:15 a.m.; open public hearing, 9:15 a.m. to 10:15 a.m., unless public participation does not last that long; open committee discussion, 10:15 a.m. to 11 a.m.; closed presentation of data, 11 a.m. to 11:30 a.m.; closed committee deliberations, 11:30 a.m. to 12 m.; Diane Minear, Center for Devices and Radiological Health (HFZ–430), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–8014.

General function of the committee. The committee reviews and evaluates available data on the safety and effectiveness of devices and makes recommendations for their regulation.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before July 14, 1989, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. The committee will discuss a premarket approval application (PMA) for an infant high frequency ventilator.

Closed presentation of data. The committee may discuss trade secret and/or confidential commercial information regarding the above PMA. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Closed committee deliberations. The committee will discuss trade secret or confidential commercial information regarding the PMA listed above. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee

deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (Subpart C of 21 CFR Part 10) concerning the policy and procedure for electronic media coverage of FDA's public administrative proceedings, including hearing before public advisory committees under 21 CFR Part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this **Federal Register** notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

Persons interested in specific agenda items to be discussed in open session may ascertain from the contact person the approximate time of discussion.

Details on the agenda, questions to be addressed by the committee, and a current list of committee members are available from the contact person before and after the meeting. Transcripts of the open portion of the meeting will be available from the Freedom of Information Office (HFI–35), Food and Drug Administration, Rm. 12A–16, 5600 Fisher Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fisher Lane, Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m., Monday through Friday. Summary minutes of the open portion of the meeting will be available from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

The Commissioner, with the concurrence of the Chief Counsel, has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. The Federal Advisory Committee Act (FACA), as amended by the Government in the Sunshine Act (Pub. L. 94–409), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in certain other instances not generally relevant to FDA matters.

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosure is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, notably deliberative sessions to formulate advice and recommendations to the agency on matters that do not independently justify closing.

This notice is issued under section 10(a) (1) and (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770–776 (5 U.S.C. App. I)), and FDA's regulations (21 CFR Part 14) on advisory committees.

Dated: June 14, 1989.

James S. Benson,

Acting Commissioner of Food and Drugs.

[FR Doc. 89–14872 Filed 6–22–89; 8:45 am]

BILLING CODE 4160–01–M

Public Health Service

Office of the Assistant Secretary for Health, Native Hawaiian Health Care Act of 1988; Delegation of Authority

Notice is hereby given that in furtherance of the delegation of authority of May 26, 1989 from the Secretary of Health and Human Services to the Assistant Secretary for Health, the Assistant Secretary for Health has redelegated all of the authorities delegated to him under the Native Hawaiian Health Care Act of 1988, as amended hereafter, to the Administrator, Health Resources and Services Administration. Excluded was the authority to issue regulations and to submit reports to the Congress.

Redelegation

These authorities may be redelegated.

Effective Date

This delegation became effective on June 14, 1989.

James O. Mason,

Assistant Secretary of Health.

Date: June 14, 1989.

[FR Doc. 89–14839 Filed 6–22–89; 8:45 am]

BILLING CODE 4160–15–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing-Federal Housing Commissioner

[Docket No. N-89-1917; FR-2606]

Unutilized and Underutilized Federal Buildings and Real Property Determined by HUD to Be Suitable for Use for Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized and underutilized Federal property determined by HUD to be suitable for possible use for facilities to assist the homeless.

DATE: June 23, 1989.

ADDRESS: For further information, contact Morris Bourne, Director, Transitional Housing Development Staff, Room 9140, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 755-9075; TDD number for the hearing- and speech-impaired (202) 426-0015. (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: In accordance with the December 1, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88-2503-OG (D.D.C.), HUD is publishing this Notice to identify Federal buildings and real property that HUD has determined are suitable for use for facilities to assist the homeless. The Notice also clarifies the process to be used by homeless assistance providers in applying for use of the properties determined suitable by HUD. The properties described in this Notice were identified from information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies.

The Order requires HUD to take certain steps to implement section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), which sets out a process by which unutilized or underutilized Federal properties may be made available to the homeless. Under section 501(a), HUD is to collect information from Federal landholding agencies about such properties and then to determine, under criteria developed in consultation with the Department of Health and Human Services (HHS) and the Administration of General Services (GSA), which of those properties are suitable for facilities to assist the homeless. The Order requires HUD to publish, on a weekly basis, a **Federal Register** Notice identifying property determined suitable. HUD published the first Notice on January 9, 1989 (54 FR 667).

The properties identified in this Notice may ultimately be available for use by the homeless, but they are first subject to review by the landholding agencies pursuant to the court's Memorandum of December 14, 1988 and section 501(b) of the McKinney Act. Section 501(b) requires HUD to notify each Federal agency with respect to any property of such agency that has been identified as suitable. Within 30 days from receipt of such notice from HUD, the agency must transmit to HUD: (1) Its intention to declare the property excess to the agency's need or to make the property available on an interim basis for use as facilities to assist the homeless; or (2) a statement of the reasons that the property cannot be declared excess or made available on an interim basis for use as facilities to assist the homeless.

First, if the landholding agency decides that the property cannot be declared excess or made available to the homeless for use on an interim basis, the property will no longer be available.

Second, if the landholding agency declares the property excess to the agency's need, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law and the December 12, 1988 Order and December 14, 1988 Memorandum, subject to screening by other Federal agencies that may wish to make use of the property.

Finally, in lieu of declaring any particular property as excess, the landholding agency may decide to make the property available to the homeless for use on an interim basis.

Prior to May 20, 1989, in weekly **Federal Register** Notices, HUD stated that: (1) For properties determined as suitable for facilities to assist the homeless, and about which either the landholding agencies had stated an intent to declare them excess or which GSA had subsequently accepted as excess, applications by homeless providers to utilize the properties must be submitted to HHS; but (2) for properties that landholding agencies had stated an intent to make available on an interim basis, the applications must be submitted directly to the agencies, rather than to HHS. A Court Order issued on May 22, 1989 in *National Coalition for the Homeless* v. *Veterans Administration* now requires HUD to accept and process applications for all properties determined suitable by HUD.

As of the date of this Notice, any homeless assistance provider interested in any property identified in the **Federal Register** as suitable should send a written expression of interest to HHS, addressed to Judy Breitman, Division of Health Facilities Planning, U.S. Public Health Service, HUS, Room 17A-10, 5600 Fishers Lane, Rockville, MD 20857; (301) 443-2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. If an applicant is interested in specific details regarding a particular property (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), the applicant should consult with the contact person at the landholding agency whose name is listed in the **Federal Register** Notice.

In order to maximize the opportunity to utilize a suitable property, homeless assistance providers should submit expressions of interest within 30 days from the date of publication in the **Federal Register** that the property has been determined suitable. For this 30-day period, during which the landholding agencies, pursuant to section 501(b), state their intentions with regard to the properties determined as suitable, the landholding agencies are prohibited by the December 12, 1988 Order from transferring or disposing of these properties. Furthermore, if HHS receives an expression of interest on a property, and the landholding agency has stated an intent to declare it excess or make it available on an interim basis, the Order prohibits the landholding agencies from transferring or disposing of the property until after HHS has completed procedssing the application. Conversely, after the 30-day period, if HHS has not received any expression of interest in the property from a homeless assistanced provider, the landholding agency is free to retain, transfer, or dispose of the property in accordance with applicable law, even if it has stated an intent to declare a property excess or make it available for use on an interim basis.

If an applicant submits an expression of interest within the 30 days after the determination of suitability and before the landholding agency's statement of intention about the property, HHS will notify the applicant of the option chosen by the landholding agency as soon as HHS receives the information. If the landholding agency states an intent to declare the property excess or make it

available on an interim basis, HHS will process an application. If the landholding agency states that it will not declare the property excess or make it available on an interim basis, HHS will provide that information to the applicant and will not process any application.

Applicants wishing to submit applications after the 30-day period should contact HHS to determine if the landholding agency stated an intent to declare the property excess or make it available on an interim basis; if so, applicants should consult with the contact person at the landholding agency whose name is listed in the **Federal Register** to confirm that the agency has not retained, transferred, or disposed of the property.

In accordance with the December 12, 1988 Order, HHS will evaluate, within 15 days of receipt, a complete application and issue a recommendation on whether the application is approvable. If, upon completion of its review, HHS determines that an application is approvable, it will notify the landholding agency (in the case of a property declared available for interim use) or GSA (in the case of a property accepted as excess), which will decide whether to lease, license, or permit the property to the applicant. If the landholding agency agrees to make the property available: (1) In the case of "interim use" properties, the agency will take final action regarding the lease, license, or permit document, in consultation with the applicant; (2) in the case of "excess" properties, HHS will enter into a lease agreement with the applicant, once assignment is received from GSA.

If HHS receives a complete competing application for a suitable property within a reasonable time after receipt of the first complete application (approximately five days) HHS will evaluate and rank each approvable application. HHS will forward its recommendation to the landholding agency, listing the approvable applications that have been received and their relative ranks. The landholding agency will be responsible for making a final decision regarding whether to lease, license, or permit the property. If HHS receives approvable applications for a property subsequent to submission to the landholding agency of other approvable applications, HHS will review, process, and forward the new applications to the landholding agency for its action, but will not attempt to rate the application against the previously submitted application(s).

If HHS does not approve an application, HHS will so notify the applicant and the landholding agency. If HHS disapproves all applications, it will notify the landholding agency, which may then retain, transfer, or dispose of the property in accordance with applicable law.

Homeless assistance provides may also submit to HHS applications for suitable properties listed in **Federal Register** Notices published between February 7, 1989 and May 20, 1989, for which landholding agencies had stated an intent to make them available on an interim basis. Landholding agencies are encouraged to hold these properties available for expressions of interest from homeless assistance providers for 30 days from the date of this Notice. (Providers should, in advance of submission of any expression of interest, consult with the contact person at the landholding agencies listed in the **Federal Register** Notices to confirm that a property has not been retained, transferred, or disposed of by the agency.)

Public bodies and private nonprofit organizations wishing more information about a particular property identified in today's Notices should contact the appropriate landholding agency at the following addresses: U.S. Air Force: Bill Kimball, HQ–USAF/LEER, Washington, DC 20332–0500 (202) 767–4384; GSA: James Folliard, Federal Property Resources Services, GSA, 18th and F Streets NW., Washington, DC 20405 (202) 535–7067; Dept. of Veterans Affairs: Linda Tribby, 084A, Real Property Program Management, 810 Vermont Ave. NW., Washington, DC 20420 (202) 233–5026; U.S. Navy: Andrea Wohfeld, Code 20 YAW, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332 (202) 325–7342; U.S. Army: (Military Facilities) HQ–DA, Attn: DAEN–ZCI–P–Robert Conte; Room 1E671 Pentagon, Washington, DC 20360–2600 (202) 693–4583; (Corps of Engineers civil works projects) Bob Swieconek, HQ–US Army Corps of Engineers, Attn: CERE–MN, 20 Massachusetts Avenue NW, Washington, DC 20415–1000 (202) 272–1750. (These are not toll-free numbers).

Date: June 16, 1989.

James E. Schoenberger,

General Deputy, Assistant Secretary for Housing—Federal Housing Commissioner.

Suitable Land (By State)

(Number of properties ( ))

Arkansas

Lock & Dam 5 (1)
Wrightsville Park
Arkansas River, AR
Landholding Agency: ARMY COE
Location: Jefferson and Pulaski Cos.
Comment: 144 acres, Boat Ramp

Beaver Lake (1)
Pine Tap
Rogers, AR
Landholding Agency: ARMY COE
Comment: 17 acres

Slate Gap (1)
Beaver Lake
Rogers, AR
Landholding Agency: ARMY COE
Comment: 288 acres

Alpine
Beaver Lake
Rogers, AR
Landholding Agency: ARMY COE
Comment: 49 acres

Ventris
Beaver Lake
Rogers, AR
Landholding Agency: ARMY COE
Comment: 73 acres and Boat Ramp

Blue Springs (1)
Beaver Lake
Rogers, AR
Landholding Agency: ARMY COE
Comment: 66 acres and Boat Ramp

Indian Point (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Location: White River—Arkansas Mountain
Comment: 400 acres

Eagle Nest (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Location: White River—Arkansas and Mo.
Comment: 50 acres

Fairview (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Comment: 70 acres

Gulley Spring (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Comment: 35 acres

Horse Shoe Band (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Comment: 615 acres

Sister Creek (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Comment: 480 acres

Yocum Creek (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Comment: 90 acres

Sugar Loaf (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Comment: 50 acres

Group Use (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Comment: 165 acres

Damsite East (1)
David D. Terry Lock & Dam
Pulaski County, AR
Landholding Agency: ARMY COE
Comment: 45 acres, pav, boat ramp, sealed toilet

Brush Lake (1)
Nimrod Lake
Perry & Yell Counties, AR
Landholding Agency: ARMY COE
Comment: 128 acres

Hogan Creek (1)
Nimrod Lake
Perry & Yell Counties, AR
Landholding Agency: ARMY COE
Comment: 129 acres

Rover (1)
Nimrod Lake
Perry & Yell Counties, AR
Landholding Agency: ARMY COE
Comment: 232 acres

Nimrod Lake (1)
Highway 27
Perry & Yell Counties, AR
Landholding Agency: ARMY COE
Comment: 48 acres

Salt Creek Park (1)
Greers Ferry Lake
Heber Springs, AR
Landholding Agency: ARMY COE
Comment: 107 acres

French Creek (1)
Gillham Lake
Gillham, AR
Landholding Agency: ARMY COE
Comment: 430 acres—Rd. owned by Weyerhauser

Mail Ford Panther Creek (1)
Dierks Lake
Deirks, AR
Landholding Agency: ARMY COE
Comment: 210 acres

Quarry Bluff (1)
Blue Mountain Lake
Logan & Yell Counties, AR
Landholding Agency: ARMY COE
Comment: 252 acres

Baird Mountain (1)
Table Rock Lake
Branson, AR
Landholding Agency: ARMY COE
Comment: 90 acres

California

Norton AFB Communication (1)
6 & Central Highland
San Bernardino, CA
Landholding Agency: AIR FORCE
Location: Lease expires 12/31/89 30.3 AC 5–6 acres used by little league baseball
Comment: Lease expires 12/89—30 days notice

Colorado

Bennett Army National Guard Site (1)
Arapaho, CO
Landholding Agency: ARMY
Location: 30 miles S.E. of Denver—Silos and underground rooms 242 acres
Comment: Scheduled for disposal under base closure and realignment out

Georgia

U.S. Honor Faim £1 (1)
McDonald Blvd
Atlanta, GA
Landholding Agency: GSA
Location: 24.25 Fee Acres

Indiana

Cecil M. Harden Lake—Walker Ramp (1)
Route 1, Box 129
Rockville, IN 47872–
Landholding Agency: ARMY COE
Comment: 20% in floodway 30 acres

Cecil Harden Lake—Hollandburg Site (1)
RR1, Box 129
Rockville, IN 47872–
Landholding Agency: ARMY COE
Comment: 43 acres

Brookville Lake—Battlepoint Site (1)
P.O. Box 230
Brookville, IN
Landholding Agency: ARMY COE
Comment: 10% in floodway—680 acres

Kentucky

Buckhorn Lake (1)
Trace Branch Road
Hyden, KY
Landholding Agency: ARMY COE
Comment: 12 plus vacant acres

Massuchusetts

Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Location: Land 119.5 acres. Parcel "I" 5700 Block

Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Location: Land 130.2 acres

Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Location: 15.7 acres w/barracks building 425
Comment: Land suitable

Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Location: Property 2408 Building 154 acres. Friable asbestos present
Comment: Land is suitable

Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Location: 27.9 acres

Minnesota

Land (1)
Fort Snelling
St. Paul, MN
Landholding Agency: DOVA
Number of Properties: 1
Comment: 5.76 acres surrounds bldgs £227–229, 240–249, and 253 one building occupied

Dept. of Veterans Affairs (1)
5629 Minnehaha Avenue
Minneapolis, MN
Landholding Agency: DOVA
Comment: 12.1 used for parking until 1990

Missouri

Clearwater Lake (1)
Riverside
Piedmont, MO
Landholding Agency: ARMY COE
Comment: 244 acres

Clearwater Lake (1)
Funk Branch
Piedmont, MO
Landholding Agency: ARMY COE
Comment: 30 acres

Clearwater Lake (1)
Thurman Pt.
Piedmont, MO
Landholding Agency: ARMY COE
Comment: 64 acres with boat ramp

Coombs Ferry (1)
Table Rock Lake
Branson, MO
Landholding Agency: ARMY COE
Location: Also in Arkansas. Paved boat ramp, sealed toilet, picnic tables
Comment: 66 acres

Washington

Reston Way National Guard Site (1)
3001 Starr Street
Tacoma, WA
Landholding Agency: ARMY
Comment: 5.5 acres

West Virginia

Morgantown L/D Monongahela Rivers (2)
Box 3, R.D £2
Morgantown, WV
Landholding Agency: ARMY COE
Location: 2 Parcels
Comment: 15 & acres, 10% in Floodway

Suitable Buildings (by State)

(Number of Properties ( ))

Alabama

Coffeeville Lock & Dam (1)
Star Route, Box 11
Blandon Springs, AL 36919–
Landholding Agency: ARMY COE
Location: Property TV–15
Comment: Adjacent to lock dam where 1,000 ton vessels transport hazardous flammable mat.

Selden Lock & Dam (3)
Route 21
Sawyerville, AL 36776–
Landholding Agency: ARMY COE
Location: Property TV–21, TV–22, TV–24

Claiborne Lock & Dam (1)
Route 1, Box 50
Franklin, AL
Landholding Agency: ARMY COE
Location: Property 39

Millers Ferry Lock & Dam (1)
Route 1, Box 102
Camden, AL
Landholding Agency: ARMY COE
Location: Property TU–43

Henry Lock & Dam (1)
Route 1, Box 474
Lowndesboro, AL 36752–
Landholding Agency: ARMY COE
Location: Property TV–49

Arkansas

Hot Springs National Park (1)
116 Sleepy Valley Road
Hot Springs, AR
Landholding Agency: GSA
Location: Property 7–I–AR–415–S Detached Home—for off-site removal only.
Comment: Building must be removed from present site.

Hot Springs National Park (1)
213 Congress
Hot Springs, AR
Landholding Agency: GSA
Location: Property 7–I–AR–415–S Detached Home—for off-site removal only.
Comment: Building must be removed from present site.

Hot Springs National Park (1)
120 Clinton
Hot Springs, AR
Landholding Agency: GSA
Location: Property 7–I–AR–415–S Detached Home—for off-site removal only.
Comment: Building must be removed from present site.

Hot Springs National Park (1)
113 Clinton
Hot Springs, AR
Landholding Agency: GSA
Location: Property 7–I–AR–415–S Detached Home—for off-site removal only.
Comment: Building must be removed from present site.

Hot Springs National Park (1)
203 Congress
Hot Springs, AR
Landholding Agency: GSA
Location: Property 7–I–AR–415–S Detached Home—for off-site removal only.
Comment: Building must be removed from present site.

Hot Springs National Park (1)
840 Music Mtn. Road
Hot Springs, AR
Landholding Agency: GSA
Location: Property 7–I–AR–415–S
Comment: Building must be removed from present site.

California

Pasadena Detachment Off. Naval Research (1)
1030 E. Green Street
Pasadena, CA
Landholding Agency: NAVY
Comment: Asbestos present vacant building 41,000 square feet

Edwards AFB (1)
Edwards AFB, CA
Landholding Agency: AIR FORCE
Location: Property 513 water supply building
Comment: small building—unknown contaminates

Georgia

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4903

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4904

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Number of Properties: 1
Location: Property 4905

Fort Benning (1)
Det. Day Room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4906

Fort Benning (10)
Enlisted personnel dining room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4907

Fort Benning (1)
Enlisted personnel dining room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4908

Fort Benning (1)
Det Day Room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4909

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4910

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4911

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4912

Fort Benning (1)
Arms Building
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4914

Fort Benning (1)
Company Headquarters Building
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4915

Fort Benning (1)
General Storehouse
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4916

Fort Benning (1)
Arms Building
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4917

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4918

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4919

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4920

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4921

Fort Benning (1)
Det. Day Room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4922

Fort Benning (1)
Enlisted Personnel Dining Room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4924

Fort Benning (1)
Det. Day Room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4925

Fort Benning (1)
Battalion Classroom
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4926

Fort Benning (1)
Battalion Classroom
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4927

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4928

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4929

Fort Benning (1)
Trainee Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4931

Fort Benning (1)
General Storehouse
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4932

Fort Benning (1)
Enlisted Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4933

Fort Benning (1)
Arms Building
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4930

Fort Benning (1)
Det. Day Room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4934

Fort Benning (1)
Enlisted Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4935

Fort Benning (1)
Enlisted Barracks
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4936

Fort Benning (1)
Enlisted Personnel Dining Room
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4937

Fort Benning (1)
Administration and Supply Building
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4938

Fort Benning (1)
Battalion
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4939

Fort Benning (1)
General Storehouse
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4951

Fort Benning (1)
General Storehouse
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4953

Fort Benning (1)
Recreation Building
Muscogee, GA
Landholding Agency: ARMY
Location: Property 5363

Fort Benning (1)
Service Club
Muscogee, GA
Landholding Agency: ARMY
Location: Property 5362
Comment: 5500 square feet

Fort Benning (12)
Ft. Benning Mil. Reserv.
Muscogee, GA
Landholding Agency: ARMY
Location: Property 5279, 5278, 5276, 5274, 5273, 5272, 5271, 5270, 5269, 5268, 5267, 5266, 5277, 5275
Comment: 4248 square feet

Fort Benning (1)
Ft. Benning Mil. Reserv.
Muscogee, GA
Landholding Agency: ARMY
Location: Property 4954
Comment: 3776 square feet

Massachusetts

Camp Edwards (6)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 1508, 1511, 1514, 1517, 1520, 1523
Comment: 6 vacant buildings 8496 square feet each

Otis Air National Guard Case (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Location: Property 921 Friable asbestos
Comment: Asbestos; 4720 square feet; 90% vacant

Otis Air National Guard (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Location: 38.9 acres 3100 Block

Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Location: Property 111FH building and 130.2 ACS
Comment: building impacted by asbestos; not usable

Minnesota

Land (1)
5629 Minnehaha
Minneapolis, MN
Landholding Agency: DOVA
Comment: 12.1 acres used for parking until 1990

Laundry Plant (1)
5629 Minnehaha Avenue
Minneapolis, MN
Landholding Agency: DOVA
Location: Property 15
Comment: Friable asbestos present vacant bldg 6050 square feet

Boiler House (1)
5629 Minnehaha Avenue
Minneapolis, MN
Landholding Agency: DOVA
Location: Property 16
Comment: Friable asbestos present; vacant bldg 6,000 square feet.

Storage Building (1)
5629 Minnehaha Avenue
Minneapolis, MN
Landholding Agency: DOVA
Location: Property 21
Comment: Quonset (prefab) vacant building; 3,100 square feet

Incinerator (1)
5629 Minnehaha Avenue
Minneapolis, MN
Landholding Agency: DOVA
Location: Property 48
Comment: Asbestos present. Vacant building 2000 square feet

Storage Building (1)
5629 Minnehaha Avenue
Minneapolis, MN
Landholding Agency: DOVA
Location: Property 64
Comment: Small vacant storage building 350 square feet

Storage Building (1)
5269 Minnehaha Avenue
Minneapolis, MN
Landholding Agency: DOVA
Location: Property T–10
Comment: Prefab building 1800 square feet

Missouri

St. Joseph Material Yard (1)
4th & Duncan Street
St. Joseph, MO
Landholding Agency: ARMY COE

Location: 1 off Trailer (poor condition) 1 Pump House (poor condition)
1 Gas & Oil House (poor condition)—on leased land
Comment: All buildings must be moved from site.
Building (1)
607 Hardesty Street
Kansas City, MO
Landholding Agency: GSA
Location: Property 9 Space is committed to H.H.S., no longer available
Comment: Space not available; committed to H.H.S.

North Carolina

VA Medical Center (1)
508 Fulton Street
Durham, NC
Landholding Agency: DOVA
Comment: Building needs repairs will be vacant summer '89 2,490 square feet

New Mexico

Kirtland AFB (1)
Wyoming Avenue
Albuquerque, NM
Landholding Agency: AIR FORCE
Location: Property 00029 portable building
Comment: vacant 520 square feet
Kirtland AFB (1)
Wyoming Avenue
Albuquerque, NM
Landholding Agency: AIR FORCE
Location: Property 00023 portable building
Comment: Vacant 596 feet
Kirtland AFB (1)
Wyoming Avenue
Albuquerque, NM
Landholding Agency: AIR FORCE
Location: Property 00018 portable building—latrine
Comment: Must be relocated vacant latrine facility 707 square feet

Texas

Veterans Center (1)
1901 S. First Street
Temple, TX
Landholding Agency: DOVA
Location: Property 24
Comment: Asbestos present; will be vacant Summer '89; 10,000 square feet
Veterans Center (1)
1901 S. First Street
Temple, TX
Landholding Agency: DOVA
Location: Property 25
Comment: Asbestos present; will be vacant Summer '89; 10,000 square feet
Veterans Center (1)
1901 S. First Street
Temple, TX
Landholding Agency: DOVA
Location: Property 26
Comment: Asbestos present; will be vacant Summer '89; 10,000 square feet

Virginia

Fort Lee (1)
SHOP Road
Fort Lee, VA
Landholding Agency: ARMY
Location: Property 6001 Building must be moved
Comment: Damaged floor; 9460 square feet building must be removed from site
Fort Lee (1)
SHOP Road
Fort Lee, VA
Landholding Agency: ARMY
Location: Property 6002; Building must be moved, 7660 square feet
Comment: Deteriorated roof and floor; Asbestos in mech. room
Fort Lee (1)
SHOP Road
Fort Lee, VA
Landholding Agency: ARMY
Location: Property 6005, 6011
Comment: Structurally deteriorated; 2550 feet; each building must be removed from site
Fort Lee (2)
SHOP Road
Fort Lee, VA
Landholding Agency: ARMY
Location: Property 6012, 6013, 6006
Comment: Structurally deteriorated building must be removed from site
Fort Lee (24)
SHOP Road
Fort Lee, VA
Landholding Agency: ARMY
Location: Property 6003
Comment: Building must be removed from site

Unsuitable Land (by State)

(Number of Properties ( ))

Arkansas

Lake Dardanelle (1)
Illinois Bayou
Arkansas River, AR
Landholding Agency: ARMY COE
Reason: Not accessible by road
Comment: 70 acres—1 mile to RD.
Lake Dardanelle (1)
Dike View
Arkansas River, AR
Landholding Agency: ARMY COE
Reason: Not accessible by road
Location: Dardanelle County
Comment: 85 acres—1 mile from RD.
Lick & Dam £5 (1)
Brodie Pike
Arkansas River, AR
Landholding Agency: ARMY COE
Reason: Not accessible by road
Location: Jefferson & Pulaski Counties
Comment: 347 acres—1 mile from Rd.
Bear Creek Island (1)
Beaver Lake
Rogers, AR
Landholding Agency: ARMY COE
Reason: Not accessible by road
Comment: 301 Acre—1 mile form Rd.
Jimmie Creek Island (1)
Bull Shoals Lake
Mountain Home, ARMY COE
Landholding Agency: ARMY COE
Reason: Not accessible by road
Location: White River—Arkansas & Mo.
Comment: 270 acres—1 miles to Rd.
Marineers Island (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Reason: Not accessible by road
Comment: 25 acres
Music Creek (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Reason: Not accessible by road
Comment: 325 acres—1 mile from road
Noe Creek (1)
Bull Shoals Lake
Landholding Agency: ARMY COE
Reason: Not accessible by road
Comment: 80 acres
Red Wolfe (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Reason: Not accessible by road
Comment: 50 acres
Risley Hollow (1)
Bull Shoals Lake
Mountain Home, AR
Landholding Agency: ARMY COE
Reason: Not accessible by road
Comment: 60 acres

California

Mather AFB (1)
Sacramento, CA
Landholding Agency: AIR FORCE
Reason: Within 2000 ft. from flammable or explosive material
Comment: Firing range explosive demolition area

Georgia

Ft. McPherson (1)
Atlanta, GA
Landholding Agency: ARMY
Location: Land occupied by non-government owned structures
Comment: Totally occupied by Marta Station, Rd 5, etc.

Indiana

Cecil Harden Lake-Mansfield Ramp (1)
Route 1, Box 129
Rockville, IN 47872–
Landholding Agency: ARMY COE

Reason: Floodway
Comment: 100% in floodway

Massachusetts

Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Reason: Not accessible by road
Location: 18.69 acres w/base roads and sidewalks no utilities 600

Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Reason: Not accessible by road
Reason: Within airport runway clear zone
Location: Land 33.8 acres block 500

Missouri

Rosecans ANG Base (1)
Rosecrans Memorial Airport
St. Joseph, MO
Landholding Agency: AIR FORCE
Reason: Floodway
Location: Ballfield 5.1 acres located in floodway

Utah

Hill, AFB (1)
Utah, UT
Landholding Agency: AIR FORCE
Reason: Not accessible by road
Reason: Other
Location: Property Hill AFB
Comment: Playground under menor of understanding

West Virginia

Hildebrand L/D Monogahela River (1)
Box 870 Route 2
Morgantown, WV
Landholding Agency: ARMY COE
Reason: Not accessible by road
Comment: 1.6 acres

Unsuitable Buildings (By State)

(Number of Properties ( ))

Alaska

Kotzebue AFB (1)
Elmendorf, AK
Landholding Agency: AIR FORCE
Reason: Isolated area
Reason: Contamination
Location: Property 204 Radome towers
Comment: Secured area

Kotzebue AFB (1)
Elmendorf, AK
Landholding Agency: AIR FORCE
Reason: Isolated area
Reason: Contamination
Reason: Other
Location: Property 205 Gym
Comment: Secured area

Sparrevohn AFB (1)
Elmendorf, AK
Landholding Agency: AIR FORCE
Reason: Isolated area
Reason: Contamination
Location: Property 130 Warehouse
Comment: Severe arctic weather conditions possible asbestos

Sparrevohn A.F. Station (1)
Covered Storage
Elmendorf, AK
Landholding Agency: AIR FORCE
Reason: Isolated area
Reason: Contamination
Location: Property 150
Comment: Severe arctic weather conditions possible asbestos

Sparrevohn A.F. Station (1)
Elmendorf, AK
Landholding Agency: AIR FORCE
Reason: Isolated area
Reason: Contamination
Reason: Other
Location: Property 165 weather building
Comment: Secured area

Tin City, A.F. Station (1)
Elmendorf, AK
Landholding Agency: AIR FORCE
Reason: Isolated area
Reason: Contamination
Reason: Other
Location: Property 113 Water supply building
Comment: Secured area

Tin City A.F. Station (1)
Elmendorf, AK
Landholding Agency: AIR FORCE
Reason: Isolated area
Location: Property 203 Dormitory
Comment: Severe arctic weather conditions possible asbestos PCB's

Arizona

Davis—Monthan AFB (1)
Tucson, AZ
Landholding Agency: DOD DMAFB
Reason: Contamination
Reason: Other
Location: Property 5142
Comment: Secured area possible friable asbestos facility used to store insecticide

Camp Roberts (1)
47 Mess Halls—2543 square ft. per bldg
San Luis Opispo, CA
Landholding Agency: ARMY
Comment: 2543 square feet per building

Camp Roberts (1)
San Luis Opisbo, CA
Landholding Agency: ARMY
Location: 178 Barracks Buildings 3984 square feet each
Comment: 3984 square feet per building

Oakland Army Base (1)
Oakland, CA
Landholding Agency: Army
Reason: Other
Location: Property 780,640,780
Comment: Secured area

Travis AFB (1)
Perimeter Rd.
Solano Co., CA
Landholding Agency: AIR FORCE
Reason: Within airport runway clear zone
Reason: Other
Location: Property 1182 Sewage Treatment Facility
Comment: Secured area

Travis AFB (1)
Dixon Ragasdale Sts.
Solano Co., CA
Landholding Agency: AIR FORCE
Reason: Within 2000 ft. from flammable or explosive material
Reason: Other
Location: Property 915 Concrete block building—Explosive ordinance within 500'
Comment: Secured area

Travis AFB (1)
Broadway Street
Solano City, CA
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 152
Comment: Noise level is excess of 80 Decibles

Travis AFB (1)
Broadway Street
Solano City, CA
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 159
Comment: Noise level in excess of 80 decibles

Edwards AFB (1)
Edwards, CA
Landholding Agency: AIR FORCE
Reason: Within 2000 ft. from flammable or explosive material
Location: Property 8102
Comment: Water supply building close to rocket propulsion research area

Edward AFB (1)
Traffic Checkhouse—Within 2000 feet
Edwards, CA
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Other
Location: Property 8476
Comment: Secured area leaking underground tank adjacent to building 8476

McClellan AFB (1)
Sacramento, CA
Landholding Agency: AIR FORCE
Reason: Within airport runway clear zone; Asbestos-present no clean up planned
Location: Property 494
Comment: Environmental analysis is pending

Norton AFB (1)
San Bernardino, CA
Landholding Agency: AIR FORCE
Reason: Contamination; Base hazardous storage facility

Location: Property 23
Comment: Secured area

Norton AFB (1)
San Bernardino, CA
Landholding Agency: AIR FORCE
Reason: Contamination; Base harzardous storage facility
Location: Property 502
Comment: Secured area

Norton AFB (1)
San Bernardino, CA
Landholding Agency: AIR FORCE
Reason: Contamination; Base harzardous storage facility
Location: Property 575
Comment: Secured area

Travis AFB (1)
Broadway
Solano Co., CA
Landholding Agency: AIR FORCE
Reason: Within 2000 ft. from flammable or explosive material
Location: Property 123 Trailer—located near hazardous storage site close to noise of aircraft
Comment: Secured Area

Travis AFB (1)
Hospital Drive
Solano Co., CA
Landholding Agency: AIR FORCE
Reason: Within 2000 ft. from flammable or explosive material
Location: Property 371 Trailer—within 1440 feet of 10,000 barrel above ground fuel storage tank
Comment: Secured area

Travis AFB (1)
Hospital Drive
Solano, CA
Landholding Agency: AIR FORCE
Reason: Within 2000 ft. from flammable or explosive material
Location: Property 375 Trailer—with 1,000 of 10,000 barrel above-ground fuel tank
Comment: Secured area

Edwards AFB (1)
Research Equipment Storage
Edwards AFB, CA
Landholding Agency: AIR FORCE
Location: Property 4310
Comment: Secured area

Colorado

Buckley Air National Guard Base (1)
Aurora, CO
Landholding Agency: AIR FORCE
Location: Property 24
Comment: Secured area friable asbestos 18 miles from Denver

Buckley Air National Guard Base (1)
Aurora, CO
Landholding Agency: AIR FORCE
Location: Property 738
Comment: Secured area

Florida

Jacksonville Comm. Facility Annex (GATR) (2)
Fleming Island, Hwy 17 S.
Clay Co., FL
Landholding Agency: AIR FORCE
Location: 2 buildings—Generator, Equipment building U.S. Fish & Wildlife restrictions apply RE: Eagles's Nest site will be cleaned up by 1/1/90
Comment: Secured area

Maine

Loring AFB (1)
Dormitory
Limestone, ME
Landholding Agency: AIR FORCE
Location: Property 6100
Comment: Secured area

Loring AFB (1)
Former dispensary
Landholding Agency: AIR FORCE
Location: Property 5200
Comment: Secured area friable asbestos

Loring AFB (1)
Former Commissary
Limestone, ME
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Other
Location: Property 5301
Comment: Secured area

Maryland

Brandywine Defense Reutilization Mar Off (2)
Rte 381, Brandywine Road
Brandywine, MD
Landholding Agency: AIR FORCE
Location: 2 Building in P.G. County (warehouse) 8 acres, Estimated cost of clean-up 7 million—plans for funding
Comment: PBC's and Asbestos

Camp Edwards (7)
Barnstable, MA
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 4609, 4608, 46907, 4606, 4605, 4604, 4603
Comment: Secured area

Camp Edwards (13)
Barnstable, MA
Landholding Agency: AIR FORCE
Reson: Other
Location: Property 3668, 3666, 3663, 3661, 3645, 3643, 3633, 3632, 3631, 3602 3599
Comment: Asbestos present in boiler room

Camp Edward (5)
Barnstable, MA
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 3556, 3554, 3534, 3533
Comment: Secured area; asbestos present boiler room

Camp Edwards (51)
Barnstable, MA
Landholding Agency: AIR FORCE
Number of Properties: 51
Reason: Other
Location: Property 3462, 1710, 1519, 1640, 1235, 1258 3441, 3442, 3443, 3651, 3658, 3662, 3664, 3665, 3667, 3634, 3635, 3603, 3604, 3612, 3447, 3549, 3551, 3553, 3555, 3521, 3522, 3524, 3512, 3513, 1508 1511, 1514, 1517, 1520, 1523, 1131, 1163, 1305, 1306, 1307, 3631, 3632, 3643, 3645, 3663, 3661, 3666, 3668, 4603
Comment: Secured area.

Camp Edwards (7)
Army National Trng. Site
Barstable, MA
Landholding Agency: ARMY COE
Reason: Other
Location: Property 3543, 3545, 3547, 3549, 8551, 3553, 3557
Comment: Secured Area

Camp Edwards (2)
Army National Guard Trng. Site
BArnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3651, 3658
Comment: Friable asbestos in furn. room 2 vacant bldgs 2780 square feet each

Camp Edwards (2)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3634, 3635
Comment: Friable asbestos in furn room. f3634 2 vacant buildings 589 square ft. each

Camp Edwards (3)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3603, 3604, 3612
Comment: Friable asbestos in furn. room 3 vacant buildings 15,340 square feet each

Camp Edwards (2)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 1131, 1163
Comment: 2 vacant buildings 1080 square feet each

Camp Edwards (2)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3512, 3513
Comment: 2 vacant buildings 15,340 square feet each

Camp Edwards (4)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3521, 3522, 3523, 3524,
Comment: 4 vacant buildings 1976 square feet each

Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 4610

Comment: vacant building 80 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 4609
Comment: Vacant building 1460 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 4608
Comment: 1 vacant building 816 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3633
Comment: Friable asbestos in furn. room 1 vacant building 840 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3613
Comment: Friable asbestos in furn. room 1 vacant building 5410 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3602
Comment: Friable asbestos in furn. room 1 vacant building 16,526 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3599
Comment: Friable asbestos in furn. room 1 vacant building 5,520 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3953
Comment: Friable asbestos in furn. room 1 vacant building 3,108 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3556
Comment: Friable asbestos in furn. room 1 vacant building 2208 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3554
Comment: Friable asbestos in furn. room 1 vacant building 2208 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3534
Comment: 2331 friable asbestos in furn. room 1 vacant building 2331 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3533
Comment: Friable asbestos in furn. room 1 vacant building 3663 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3493
Comment: 1 vacant building 800 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 3462
Comment: 1 vacant building 575 square feet
Camp Edwards (1)
Army National Guard Trng. Site
Barnstable Co., MA
Landholding Agency: ARMY COE
Location: Property 1519
Comment: 1505 square feet 1 vacant building
Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: U.S. AIR FORCE
Reason: Within airport runway clear zone
Reason: Other
Location: Property 3012 Building—Friable asbestos
Otis Air National Guard Base (1)
Cape Cod
Barnstable, MA
Landholding Agency: AIR FORCE
Reason: Within airport runway clear zone
Reason: Other environmental
Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Other
Location: Property 3187 Comment: Secured area
Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Within airport runway clear zone
Reason: Other
Location: Property 125 runway clear zone
Comment: Secured area
Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Reason: Within airport runway clear zone
Reason: Other
Location: Property 3146 located near taxi way
Comment: Secured area
Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Within airport runway clear zone
Location: Property 3107 Friable asbestos
Comment: Located on flight line
Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Reason: Within airport runway clear zone
Reason: Other
Location: Property 3117 Friable asbestos
Comment: Secured area
Otis Air National Guard Base (1)
Cape Cod, MA
Landholding Agency: AIR FORCE
Reason: Within airport runway clear zone
Location: Property 425 Barracks supply storage
Comment: Too close to airfield for occupancy.

Michigan

Selfridge ANG Base (1)
Macomb, MI
Landholding Agency: AIR FORCE
Reason: Floodway
Reason: Other
Location: Property 5658, 5670 Radar Towers Bases
Comment: Secured area
Selfridge ANG Base (1)
Macomb, MI
Landholding Agency: MACOMB
Reason: Within 2000 ft. from flammable or explosive material
Reason: Floodway
Reason: Other environmental
Reason: Other
Location: Property 560, 580 Observation Towers
Comment: Secured area
Selfridge ANG Base (1)
Macomb, MI
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Within 2000 ft. from flammable or explosive material
Reason: Other
Location: Property 1005 Heating Plant
Comment: Secured area
Selfridge ANG Base (2)
Macomb, MI
Landholding Agency: AIR FORCE
Reason: Floodway
Reason: Other

Location: Property 1688, 1689
Comment: Secured area
Selfridge ANG Base (2)
Macomb, MI
Landholding Agency: AIR FORCE
Reason: Within 2000 ft. from flammable or explosive material
Reason: Other
Location: Property Property 1412, 1434 Hydrant Fuel Facilities close to explosives
Comment: Secured area
Selfridge ANG Base (1)
Macomb, MI
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Within 2000 ft. from flammable or explosive material
Reason: Other
Location: Property 1041 Rada Tower
Comment: Secured area
Selfridge ANG Base (1)
Macomb, MI
Landholding Agency: AIR FORCE
Reason: Within 2000 ft. from flammable or explosive material
Reason: Other
Location: Property Property 1012 Dormitory—no planned clean-up
Comment: Secured area friable asbestos—1350 from Munitions
Selfridge ANG Base (1)
Macomb, MI
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Within 2000 ft. from flammable or explosive material
Reason: Other
Location: Property 856 Engine Test Cell—1280 to munitions
Comment: Secured area

Minnesota

Smoke Stock (1)
5629 Minnehaha Avenue
Minneapolis, MN
Landholding Agency: DOVA
Reason: Other
Location: Property 36
Comment: Building is a smoke stock

Missouri

Malmstron AFB (1)
Malmstron, MO
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 230 CE water shop and transcient alert far.
Comment: Secured area

Nebraska

Offutt AFB (1)
Omaha, NE
Landholding Agency: AIR FORCE
Reason: Other
Location: Trailer 10x944

Comment: Secured area

New Hampshire

Pease AFB (1)
Newington, NH
Landholding Agency: AIR FORCE
Reason: Other
Location: Traffic check house
Comment: Building is top small 38 square feet. Secured area
Pease AFB (1)
Newington, NH
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Within 2000 ft. from flammable or explosive mataerial
Reason: Other
Location: Vehicle Fuel Station
Comment: Secured area
Pease AFB (1)
Newington, NH
Landholding Agency: AIR FORCE
Reason: Other
Location: Pass and ID check
Comment: Secured area

New Mexico

Kirtland AFB (1)
Wyoming Avenue
Albuquerque, NM
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 00013 Portable structure
Comment: Noise level 75 to 80 DB
Kirtland AFB (1)
Wyoming Avenue
Albuquerque, NM
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 0004
Comment: Noise level 75 to 80 DB
Kirtland AFB (1)
Wyoming Avenue
Albuquerque, NM
Landholding Agency: AIR FORCE
Reason: Isolated area
Reason: Within 2000 ft. from flammable or explosive material
Location: Property 30145 building
Comment: High voltage security fence 10'
Kirtland AFB (1)
Wyoming Avenue
Albquerque, NM
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Other
Location: Property 00607 unsafe for occupancy
Comment: Building is in hazardous condition

Ohio

Wright-Patterson AFB (1)
Greene City, OH
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 30092 temporary pumping station

Comment: Secured area
Wright-Patterson (1)
Greene City, OH
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 30205 Flight surgeon clinic—semi permanent
Comment: Secured area
Newark AFB (1)
Irvington Dr.
Heath, OH
Landholding Agency: AIR FORCE
Reason: Other
Trailer—located in petroleum storage area.
Comment: Secured area

Oklahoma

Vance AFB (4)
Office Building
Enid, OK
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 286,512,290,604
Comment: Secured area
Vance AFB (1)
Enid, OK
Landholding Agency: AIR FORCE
Reason: Contamination
Reason: Other
Location: Property 110 liquid Fuel pumping station
Comment: Secured area
Vance AFB (1)
Enid, OK
Landholding Agency: AIR FORCE
Reason: Within 2,000 ft. from flammable or explosive material
Reason: Other
Location: property 262 warehouse
Comment: Secured area

Puerto Rico

Punta Salinas Radar Site (1)
Toa Baja, PR
Land holding Agency: AIR FORCE
Reason: Other
Location: Property Building 10 Recreational area
comments: Secured area

South Dakota

Renel Heights Housing (56)
Ellworths AFB—9118A, 9121, 9123
Ellworth, SD
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 8533BC, 8534CD, 8536C, 8540CD, 8542B, 8546A, 8552, 8554A, 8566B, 8574C, 8583D, 8594B, 8604A, 8607A, 8609, 8610, 8612, 8615A, 8617, 8623ABC, 8703A, 8705, 8706B, 8711, 8713, 8714B, 8716, 8721B, 8722A, 8727D, 8730C, 8802B, 8803A, 8806B, 8807A, 8809B, 8811B, 8813, 8815BCD, 8817BC, 8901, 8903, 8905, 8910, 8911,

8916, 8918, 8923, 8926, 9103, 9107, 9108A, 9111A,
Comment: Unsafe condition due to shift in foundations.

Skyway Housing (9)
Ellsworth AFB
Ellsworth, SD
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 8473, 8440, 8438, 8433, 8425, 8421, 8406, 8412
Comment: Unsafe—danger of fire 9 buildings ground shifting has undermined foundations

Utah

Hill Air Force Base (25)
Munition Storage Site
Hill AFB, UT
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 204, 2008, 2122, 2126, 2144, 2216, 2224, 882, 2225, 2226, 2243, 2244, 2245, 2249, 2310, 2313, 2315, 2316, 2317, 2331, 2334, 2336, 2337, 2338, 2007
Comment: Secured area

Virginia

Fort Lee (3)
Byrd Avenue
Fort Lee, VA
Landholding Agency: ARMY
Reason: Other
Location: Property 4100, 4101, 4103, Building must be moved half already demolished removing asbestos
Comment: Severly determined/partially demolished

Washington

62nd Military Airlift Wing (1)
McCord AFB
Pierce, WA
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 128 Scheduled for demolition with six months 2—Just outside run away clear zone property can be moved.
Comment: Secured area

Fairchild AFB (1)
Pump House—asbestos present
Spokane, WA
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 151
Comment: Secured area

62 Military Airlift Wing (1)
McCord AFB
Pierce, WA
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 508 Abestos present no clean-up planned
Comment: Secured area

62 Military Airlift Wing (1)
McCord AFB
Pierce, WA
Landholding Agency: ARMY
Reason: Other
Location: Property 554 Property scheduled for demolition but can be moved
Comment: Secured area

62 Military Airlift Wing (1)
McCord AFB
Pierce, WA
Landholding Agency: AIR FORCE
Reason: Other
Location: Property 850 wood and cinder block
Comment: Secured area

[FR Doc. 89-14830 Filed 6-22-89; 8:45 am]
BILLING CODE 4210-27-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-040-09-4351-08-SPCA; FES 89-14]

Availability of Final Environmental Impact Statement for the San Pedro River Riparian Management Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, the Bureau of Land Management (BLM) has prepared a final environmental impact statement (FEIS) for a proposed management plan for the San Pedro River Riparian EIS Area in southeastern Arizona. The proposal involves kinds and levels of use permitted to maintain or improve the riparian ecosystem presently found in the EIS area. The proposal prohibits the use of vehicles off designated roads, and provides for the development of a limited number of recreational facilities, as well as research and administrative facilities. A portion of the EIS area will be closed to the discharge of firearms.

SUPPLEMENTARY INFORMATION: A limited number of copies of the management plan/FEIS are available upon request from the Safford District Office, Bureau of Land Management, 425 East 4th Street, Safford, Arizona 85546, telephone (602) 428-4040; or the San Pedro Project Office, Bureau of Land Management, Box 9853, RR 1, Huachuca City, Arizona 85616, telephone (602) 457-2265; or the Arizona State Office, Bureau of Land Management, 3707 North 7th Street, Phoenix, Arizona 85011, telephone (602) 241-5552. Public reading copies will be available at these locations.

DATE: The public comment period will end 30 days following notification of availability of this document by the Environmental Protection Agency (EPA) in the **Federal Register** EPA published their notice on June 16, 1989.

ADDRESS: Comments should be sent to the Safford District Manager at the address below.

FOR FURTHER INFORMATION CONTACT: Vernon L. Saline, San Simon Area Manager, 425 East 4th Street, Safford, Arizona 85546, Telephone (602) 428-4040.

Phillip D. Moreland,
Chief, Branch of Planning, Environment, Lands and Recreation.

[FR Doc. 89-14861 Filed 6-22-89; 8:45 am]
BILLING CODE 4310-32-M

Alaska State Office; Proposed Reinstatement of a Terminated Oil and Gas Lease

June 14, 1989.

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 AA-48203-BC has been received covering the following lands:

Seward Meridian, Alaska

T. 31 N., R. 11 E.,
Section 21, NWNE.
40 acres

The proposed reinstatement of the lease would be under the same terms and conditions of the original lease, except the rental will be increased to $5 per acre per year, and royalty increased to 16⅔ percent. The $500 administrative fee and the cost of publishing this Notice have been paid. The required rentals and royalties accruing from January 1, 1989, the date of termination, have been paid.

Having met all the requirements for reinstatement of lease AA-48203-BC 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 January 1, 1989, subject to the terms and conditions cited above.

Ruth Stockie,
Chief, Branch of Mineral Adjudication.

[FR Doc. 89-14862 Filed 6-22-89; 8:45 am]
BILLING CODE 4310-JA-M

[NV-943-09-3111-15; N-46706]

Proposed Reinstatement of a Terminated Oil and Gas Lease

June 13, 1989.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice proposes Class II reinstatement of oil and gas lease N–46706.

EFFECTIVE DATE: February 1, 1989.

FOR FURTHER INFORMATION CONTACT: Jack Lewis, Bureau of Land Management, (BLM), Nevada State Office, 850 Harvard Way, P.O. Box 12000, Reno, Nevada 89520, 702–328–6338.

SUPPLEMENTARY INFORMATION: Under provisions of Pub. L. 97–451, petition for reinstatement of oil and gas lease N–46706 for lands in Clark County, Nevada, was timely filed and was accompanied by all required rentals and royalties accruing from February 1, 1989, the date of termination.

No valid lease has been issued affecting the lands. The Lessee has agreed to new lease terms for rentals and royalties at rates of $5.00 per acre and 16⅔ percent respectively. Payment of a $500.00 administrative fee has been made.

Having met all the requirements for reinstatement of the lease 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 February 1, 1989, subject to the increased rental and royalty rates cited above and the original terms and conditions of the lease and the reimbursement for cost of publication of this notice.

Marla B. Bohl,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 89–14853 Filed 6–22–89; 8:45 am]

BILLING CODE 4310–HC–M

[AZ–020–09–4212–12; A 20346–Q]

Realty Action; Exchange of Public Lands, Pima County, Arizona

BLM proposes to exchange public land in order to achieve more efficient management of the public land through consolidation of ownership.

The following public land is being considered for disposal by exchange pursuant to the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. 1716.

Gila and Salt River Meridian, Arizona

T. 17 S., R. 10 E.,
sec 23, lots 1, 2, NW¼NE¼, W½;
sec. 27, S½;
sec. 34, N½.
T. 18 S., R. 12 E.,
sec. 11, lots 1, 2, S½NE¼, E½NW¼, NE¼ SW¼, N½SE¼;
sec. 13, all unpatented land.

Containing approximately 1600 acres.

Final determination on disposal will await completion of an environmental analysis.

In accordance with the regulations of 43 CFR 2201.1(b), publication of this Notice will segregate the affected public lands from appropriation under the public land laws, including the mining laws, but not the mineral leasing laws or Geothermal Steam Act.

The segregation of the above-described lands shall terminate upon issuance of a document conveying such lands or upon publication in the **Federal Register** of a notice of termination of the segregation; or the expiration of two years from the date of publication, whichever occurs first.

For a period of forty-five (45) days, interested parties may submit comments to the District Manager, Phoenix District Office, 2015 West Deer Valley Road, Phoenix, Arizona 85027.

Charles R. Frost,

Associate District Manager.

Date: June 16, 1989.

[FR Doc. 89–14863 Filed 6–22–89; 8:45 am]

BILLING CODE 4310–32–M

[MT–070–09–4050–91–M74131]

Realty Action; Montana

AGENCY: Bureau of Land Management, Butte District Office.

ACTION: Amendment of Notice of Realty Action for M74131, exchange of public lands and private lands in Missoula, Granite, Powell, and Lewis and Clark counties.

SUMMARY: This notice amends the original Notice of Realty Action for M74131 published on July 2, 1987 (Vol. 52 No. 127 page 25085). In exchange for the public lands listed in the notice, the United States will acquire certain private lands from Champion International. Publication of the notice in the **Federal Register** segregated the public lands from settlement, sale, location and entry under the public land laws, including the mining laws but not from exchange pursuant to section 206 of the Federal Land Policy and Management Act of 1976. This segregative effect is extended and will expire two years from the date of publication of this notice or when patent issues whichever occurs first.

June 15, 1989.

J.A. Moorhouse,

District Manager.

[FR Doc. 89–14864 Filed 6–22–89; 8:45 am]

BILLING CODE 4310–DN–M

[NV–930–09–4212–14; N–50987]

Realty Action; Nevada

DATE: Effective July 24, 1989.

ACTION: Realty action; Non-competitive sale of public land in Humboldt County, Nevada.

SUMMARY: This notice supercedes **Federal Register** Document 89–11192 published in the **Federal Register** on Wednesday, May 10, 1989 (54 FR 20211). Notice is hereby given that pursuant to the Act of October 21, 1976 (43 U.S.C. 1713, section 203), the Bureau of Land Management will sell at fair market value the following described parcel of public land by non-competitive land sale procedures.

Mount Diablo Meridian, Nevada

T. 44 N., R. 31 E.,
Section 20, E½NE¼SE¼NE¼SE¼,NE¼ SE¼SE¼NE¼SE¼,E½E½NE¼NE¼ SE¼.SE¼SE¼SE¼NE¼SE¼.

Containing 5 acres.

For a period of 45 days from the date of this notice, interested parties may submit comments to the District Manager, Bureau of Land Management, 705 E. 4th St., Winnemucca, NV 89445.

FOR FURTHER INFORMATION CONTACT: Hal Green, District Realty Specialist, Bureau of Land Management, Winnemucca District Office, 705 E. 4th St., Winnemucca, NV 89445 (702) 623–3676.

SUPPLEMENTARY INFORMATION: This non-competitive sale will resolve the unauthorized use and occupancy of public lands located in northern Humboldt County, Nevada. Competitive interest could not be determined at the time of sale preparation. In order to eliminate conflicts of interest in land ownership, non-competitive land sale procedures have been used.

Publication of this notice in the **Federal Register** shall segregate the public lands to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. Any subsequent application shall not be considered as filed and shall be returned to the applicant. This segregative effect of the Notice of Realty Action shall terminate upon issuance of the patent or other document of conveyance to such land, upon publication in the **Federal Register** of a termination of the segregation, or 270 days from the date of publication, whichever occurs first.

Payment of the property shall be by cash, certified check, postal money order, bank draft, or cashier's check

made payable to the Dept. of the Interior-BLM.

The Authorized Officer may withdraw the parcel from sale if it is determined that consummation of the sale would be inconsistent with the provisions of existing law or policy.

The land sale is consistent with federal regulations contained in Title 43 CFR, specifically:

43 CFR 2710.0–6(3)(iii) Direct sale as provided for in 2711.3–3 of this title may be used when the lands offered for sale are completely surrounded by lands in one ownership with no public access, or where the lands are needed by State or local governments or nonprofit corporations, or where necessary to protect existing equities in the lands or resolve inadvertent unauthorized use or occupancy of said lands.

Reservations to the Federal Government

1. Rights-of-way for ditches and canals constructed under the authority of the United States, Act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945.

2. *All mineral deposits together with the right to prospect for, mine, and remove the same.

3. Patent, when issued, will be subject to the following right-of-way of record: N–1461, 24.9 kv powerline Harney Electric Cooperative, Inc.

Ronald B. Wenker,

District Manager, Winnemucca.

Dated: June 14, 1989.

[FR Doc. 89–14865 Filed 6–22–89; 8:45 am]

BILLING CODE 4310–HC–M

[WY–060–09–4212–14, WYW–101839]

Realty Action; Direct Sale of Public Land in Johnson County, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Direct sale of land parcel (WYW–101839) in Johnson County, Wyoming.

SUMMARY: The Bureau of Land Management has determined that the lands described below are suitable for public sale. Section 203 of the Federal Land Policy and Management Act (FLPMA) of 1976 (90 Stat. 2750; 43 U.S.C. 1713) requires the BLM to receive fair market value for the land sold and any bid for less than fair market value will be rejected. The BLM may accept or reject any and all offers, or withdraw any land or interest on the land for sale if the sale would not be consistent with FLPMA or other applicable law. This disposal action is consistent with the Buffalo Resource Area's Resource Management Plan.

The planning document, environment assessment/land report, and memorandums and letters of Federal, state, and local contacts concerning the sale are available for review at the Bureau of Land Management, Buffalo Resource Area Office. All bids and requests for information should be sent to BLM, Buffalo Resource Area, 189 North Cedar Street, Buffalo, Wyoming 82834 (phone (307) 684–5586).

Parcel

Serial No.	Legal description	Acre-age	Appraised value
WYW–101839	T. 41 N., R. 79 W., 6th P.M. Section 5: SE¼SE¼	40.00	$1,400,000

The publication of this Notice of Realty Action in the **Federal Register** shall segregate the above public lands from appropriation under the public land laws, including the mining laws. Any subsequent application shall not be accepted, shall not be considered as filed and shall be returned to the applicant if the Notice segregates the land from the use applies for in the application. The segregation effect of this Notice will terminate upon issuance of a conveyance document, 270 days, or when a cancellation Notice is published, which ever occurs first.

Sale Procedures

The land described above will be offered for sale directly to the adjoining landowner. The adjoining landowner submitting a bid must provide evidence of adjoining landownership before the bid will be accepted. A bid will also constitute an application for conveyance of those mineral interests offered for conveyance in the sale. The mineral interests being offered have no known mineral values. At the time of the sale, the purchaser will be required to pay a $50.00 nonreturnable filing fee (in addition to their bid) for all unreserved mineral interests.

The "total" purchase amount must be received in the Buffalo Resource Area Office on Wednesday, August 23, 1989 by 4:30 p.m. Full payment must be by certified check, money order, bank draft, or cashier's check made payable to the Department of the Interior, BLM. The envelope containing the payment must be marked in the front lower left-hand corner with the words "Public Land Sale, (identify parcel serial number), Sale Held *(date)*."

To successfully purchase land, the purchaser must be a U.S. citizen 18 years of age or older, a corporation authorized to own real estate in the State of Wyoming, a State, State instrumentality or political subdidivsion authorized to hold property, or an entity legally capable of conveying and holding land or interests in Wyoming.

Patent Terms and Conditions:

Any patents issued will be subject to all valid existing rights. Specific patent reservations include:

1. A reservation for ditches or canals by authority of the United States, Act of August 30, 1989 (26 Stat. 391; 43 U.S.C. 945).

2. Minerals Reservation:

The United States reserves the oil and gas in the lands subject to this conveyance together with the rights to prospect for, mine, and remove the minerals. All other mineral estates will be sold together with the surface estate for an additional $50 fee. A more detailed description of this reservation, which will be incorporated in the patent document, is available for review at the Buffalo Resource Area Office.

3. The following oil and gas leases will remain in effect on the applicable parcel until terminated by the operation of the existing laws.

Oil and Gas Lease Number: W–75040

For a period of 45 days from the date of this Notice published in the **Federal Register**, interested parties may submit commens to the District Manager, Casper District Office, 17091 East "E" Street, Casper, Wyoming 82601. Any adverse comments will be evaluated by the State Director, who may vacate or modify this realty action and issue a final determination. In the absence of

*The mineral deposits or interests having no known mineral value will be conveyed simultaneously with the surface estate at the time of sale. The purchaser will be required to remit a $50.00 nonrefundable fee. Failure to do so will result in the cancellation of the sale.

any action by the State Director, this realty action will become final.

James W. Monroe,

Casper District Manager.

Date: May 24, 1989.

[FR Doc. 89-14937 Filed 6-22-89; 8:45 am]

BILLING CODE 4310-22-M

[ID-942-09-4703-12]

Idaho; Filing of Plats of Survey

The plat of survey of the following described land was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 10:00 a.m., June 13, 1989.

The plat representing the dependent resurvey of portions of the north boundary and subdivisional lines; the subdivision of sections 4 and 9, and the survey of certain lots in sections 4 and 9, T. 9 N., R. 27 E., Boise Meridian, Idaho, Group No. 773 was accepted June 12, 1989.

This survey was executed to meet certain administrative needs of this Bureau.

Inquiries about this land should be sent to the Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

June 13, 1989.

[FR Doc. 89-14866 Filed 6-22-89; 8:45 am]

BILLING CODE 4310-GG-M

Fish and Wildlife Service

Availability of the Draft Environmental Assessment; Proposed St. Catherine's Creek National Wildlife Refuge, Adams County, MS

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of the draft environmental assessment for the proposed establishment of St. Catherine's Creek National Wildlife Refuge.

SUMMARY: This notice advises the public that the U.S. Fish and Wildlife Service, Southeast Region, proposes to establish a national wildlife refuge in the vicinity of St. Catherine's Creek in Adams County, Mississippi. The purpose of the proposal is to provide protection and management for wintering waterfowl and other wildlife on approximately 15,000 acres of wetland and associated habitats in the area. A Draft Environmental Assessment has been developed by Service biologists in coordination with the State of Mississippi, other Federal agencies, and private groups to consider the biological, environmental, and socioeconomic effects of acquiring 15,000 acres of waterfowl habitat in the area and establishing a national wildlife refuge. Written comments or recommendations concerning the proposal are welcomed, and should be sent to the address below.

DATES: Land acquisition planning for the project is currently underway. The draft assessment will be available to the public as of June 16, 1989. Written comments must be received no later than July 24, 1989, to be considered.

ADDRESSES: Comments and requests for copies of the assessment and further information should be addressed to: Mr. Charles Danner, Chief, Project Development Branch, Office of Refuges and Wildlife, U.S. Fish and Wildlife Service, 75 Spring Street, SW., Room 1240, Atlanta, Georgia 30303.

SUPPLEMENTARY INFORMATION: The primary objectives of the proposal are to preserve wintering habitat for mallard, pintail, blue-winged teal, and wood duck; and preserve production habitat for wood duck to help meet the habitat goals presented in the North American Waterfowl Management Plan. Establishment of a refuge and proper management would provide excellent wintering waterfowl habitat and a needed waterfowl refuge in the Lower Mississippi River Valley. Secondary compatible uses would possibly include public outdoor activities such as hunting, fishing, research, and environmental education.

The St. Catherine's Creek area is significant to wintering waterfowl due to: (1) Geographic location in the Mississippi Flyway, (2) habitat diversity, and (3) seasonal flooding. The bottomland hardwood forests, the converted wetlands, and associated habitats also provide habitat for a great diversity of other wildlife. Big game species including deer and turkey are abundant. Small game and furbearers prevalent on the area are rabbit, coyote, beaver, otter, mink, nutria, raccoon, gray fox, red fox, bobcat, and opossum. Doves, quail, raptors, and wading birds are also common on the area. Endangered species likely to occur on the area are wintering bald eagles and occasionally migrating peregrine falcons.

The proposed area is located adjacent to the Mississippi River in western Adams County, Mississippi, approximately 7 miles south of Natchez and three miles west of U.S. Highway 61. Catahoula National Wildlife Refuge lies 35 miles to the west, and Tensas River National Wildlife Refuge lies 50 miles north of the proposed refuge. The two major landowners within the proposed refuge are willing sellers and support establishment of a refuge in the area.

Service biologists have developed a draft environmental assessment in coordination with the State of Mississippi, other Federal agencies and private groups to consider the biological, environmental, and socioeconomic effects of acquiring 15,000 acres of waterfowl habitat in the area and establishing a national wildlife refuge. Three alternatives and their potential impacts on the environment are presented and evaluated. The Service believes the preferred alternative, Acquisition and Management by the Fish and Wildlife Service, is a positive step in preventing the loss of additional acres needed to support populations in the Lower Mississippi River Valley.

June 9, 1989.

James W. Pulliam, Jr.,

Regional Director.

[FR Doc. 89-14860 Filed 6-22-89; 8:45 am]

BILLING CODE 4310-55-M

Minerals Management Service

Development Operations Coordination Document

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the receipt of a proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that ARCO Oil and Gas Company has submitted a DOCD describing the activities it proposes to conduct on Lease OCS-G 7682, Block 105, Vermilion Area, offshore Louisiana. Proposed plans for the above area provide for the development and production of hydrocarbons with support activities to be conducted from an existing onshore base located at Sabine Pass, Texas.

DATE: The subject DOCD was deemed submitted on June 16, 1989. Comments must be received on or before July 10, 1989 or 15 days after the Coastal Management Section receives a copy of the plan from the Minerals Management Service.

ADDRESSES: A copy of the subject DOCD is available for public review at the Public Information Office, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). A copy of the DOCD and the

accompanying Consistency Certification are also available for public review at the Coastal Management Section Office located on the 10th Floor of the State Lands and Natural Resources Building, 625 North 4th Street, Baton Rouge, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). The public may submit comments to the Coastal Management Section, Attention OCS Plans, Post Office Box 44487, Baton Rouge, Louisiana 70805.

FOR FURTHER INFORMATION CONTACT: Michael J. Tolbert; Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section, Exploration/Development Plans Unit; Telephone (504) 736–2867.

SUPPLEMENTARY INFORMATION: The purpose of this Notice is to inform the public, pursuant to section 25 of the OCS Lands Act Amendments of 1978, that the Minerals Management Service is considering approval of the DOCD and that it is available for public review. Additionally, this Notice is to inform the public, pursuant to § 930.61 of Title 15 of the CFR, that the Coastal Management Section/Louisiana Department of Natural Resources is reviewing the DOCD for consistency with the Louisiana Coastal Resources Program.

Revised rules governing practices and procedures under which the Minerals Management Service makes information contained in DOCDs available to affected States, executives of affected local governments, and other interested parties became effective May 31, 1988 (53 FR 10595).

Those practices and procedures are set out in revised § 250.34 of Title 30 of the CFR.

Date: June 16, 1989.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 89–14867 Filed 6–22–89; 8:45 am]

BILLING CODE 4310-MR-M

Development Operations Coordination Document

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the receipt of a proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that ODECO Oil and Gas Company has submitted a DOCD describing the activities it proposes to conduct on Lease OCS–G 6813, Block 159, Lease OCS–G 5245, Block 160, Lease OCS–G 5703, Block 161, Lease OCS–G 7809, Block 163, Main Pass Area, and Lease OCS–G 5746, Block 41, Chandeleur Area, offshore Louisiana and Mississippi. Proposed plans for the above area provide for the development and production of hydrocarbons with support activities to be conducted from an existing onshore base located at Venice, Louisiana.

DATE: The subject DOCD was deemed submitted on June 9, 1989. Comments must be received on or before July 10, 1989, or 15 days after the Coastal Management Section receives a copy of the plan from the Minerals Management Service.

ADDRESSES: A copy of the subject DOCD is available for public review at the Public Information Office, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). A copy of the DOCD and the accompanying Consistency Certification are also available for public review at the Coastal Management Section Office located on the 10th Floor of the State Lands and Natural Resources Building, 625 North 4th Street, Baton Rouge, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). The public may submit comments to the Coastal Management Section, Attention OCS Plans, Post Office Box 44487, Baton Rouge, Louisiana 70805.

FOR FURTHER INFORMATION CONTACT: Michael J. Tolbert, Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section, Exploration/Development Plans Unit, Telephone (504) 736–2867.

SUPPLEMENTARY INFORMATION: The purpose of this Notice is to inform the public, pursuant to section 25 of the OCS Lands Act Amendments of 1978, that the Minerals Management Service is considering approval of the DOCD and that it is available for public review. Additionally, this Notice is to inform the public, pursuant to § 930.61 of Title 15 of the CFR, that the Coastal Management Section/Louisiana Department of Natural Resources is reviewing the DOCD for consistency with the Louisiana Coastal Resources Program.

Revised rules governing practices and procedures under which the Minerals Management Service makes information contained in DOCDs available to affected States, executives of affected local governments, and other interested parties became effective May 31, 1988 (53 FR 10595). Those practices and procedures are set out in revised § 250.34 of Title 30 of the CFR.

Date: June 15, 1989.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 89–14868 Filed 6–22–89; 8:45 am]

BILLING CODE 4310-MR-M

Bureau of Mines

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

A request extending the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made directly to the Bureau clearance officer and to the Office of Managment and Budget, Paperwork Reduction Project (1032–0090), Washington, DC 20503, telephone 202–395–7340.

Title: Production Estimate.

OMB Approval Number: 1032–0090.

Abstract: The collection is needed to provide data on mineral production for the Secretary's Annual Report. It is used as an annual production estimate. The data are published by commodity for use by Government agencies, industry, education programs and the general public. The respondents are producers of Ferrous Metals, Industrial Minerals and Nonferrous Metals.

Bureau Form Number: 6–1209–A and 6–1209–AA.

Frequency: Quarterly and annually.

Estimated Completion Time: 15 minutes.

Annual Responses: 7,150.

Annual Burden Hours: 1,788.

Bureau clearance officer: James T. Hereford 202–634–1125.

April 7, 1989.

Robert F. Fagin,

Acting Director, Bureau of Mines.

[FR Doc. 89–14869 Filed 6–22–89; 8:45 am]

BILLING CODE 4310-53-M

INTERSTATE COMMERCE COMMISSION

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).

1. Parent corporation and address of principal office: Weis Markets, Inc., 1000 South Second Street, Sunbury, PA 17801–0471.

2. Wholly owned subsidiary which will participate in the operations: Weis Food Service, Incorporated in the State of Pennsylvania, P.O. Box 151, Rt. 11, Northcumberland, PA 17857.

Noreta R. McGee,

Secretary.

[FR Doc. 89–14931 Filed 6–22–89; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 31466]

The Atchison, Topeka and Santa Fe Railway Co.—Trackage Rights Exemption—Burlington Northern Railroad Co.; Exemption

Burlington Northern Railroad Company (BN) has agreed to grant overhead trackage rights to The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) between BN milepost Z601.8, at Avard, OK, and BN milepost G423.3, at Tulsa, OK, a distance of 178.5 miles in Woods, Alfalfa, Garfield, Noble, Pawnee, Creek, and Tulsa Counties. Santa Fe will have the right to operate trains between Avard and Perry, OK, and between Perry and Tulsa, but not through Perry except under certain terms and conditions. The trackage rights became effective on or after June 12, 1989.

This notice is filed under 49 CFR 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Michael W. Blaszak, The Atchison, Topeka and Santa Fe Railway Company, 80 East Jackson Boulevard, Chicago, IL 60604.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Dated: June 20, 1989.

By the Commission, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89–15053 Filed 6–22–89; 8:45 am]

BILLING CODE 7035–01–M

[Docket No. AB–55 (Sub-No. 288X)]

CSX Transportation, Inc.—Abandonment Exemption—at South Parkersburg in Wood County, WV

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Commission exempts from the prior approval requirements of 49 U.S.C. 10903–10904 the abandonment by CSX Transportation, Inc., of 2.8 miles of rail line in Wood County, WV, subject to standard labor protective conditions and under the condition that CSXT continue operations until the line is sold to another entity for continued rail service.

DATES: Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on July 24, 1989. Formal expressions of intent to file an offer [1] of financial assistance under 49 CFR 1152.27(c)(2) must be filed by July 3, 1989, petitions to stay must be filed by July 10, 1989, and petitions for reconsideration must be filed by July 18, 1989.

ADDRESSES: Send pleadings referring to Docket No. AB–55 (Sub-No. 288X) to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

(2) Petitioner's representative: Lawrence H. Richmond, CSX Transportation, 100 North Charles Street, Baltimore, MD 21201.

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: June 16, 1989.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

Noreta R. McGee,

Secretary.

[FR Doc. 89–14932 Filed 6–22–89; 8:45 am]

BILLING CODE 7035–01–M

[1] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987), and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440–48446).

[Finance Docket No. 31427 (Sub-No. 1)]

Merchants Management Corp.—Continuance in Control Exemption—Railroad Switching Service of Missouri, Inc.; Exemption

Merchants Management Corp. (MMC), a noncarrier, has filed a notice of exemption under 49 CFR 1180.4(g) regarding its continuance in control of Railroad Switching Service of Missouri, Inc. (Switching), upon the commencement of rail operations by Switching. Switching, a noncarrier, has filed concurrently a notice of exemption in Finance Docket No. 31426 *Railroad Switching Service of Missouri, Inc.—Lease and Operation Exemption—Norfolk and Western Railway Company*, in which it seeks an exemption to acquire by lease from the City of St. Louis, MO and to operate a line of railroad, extending between milepost 0.00 (Valuation Station 0+0) and milepost 1.89 (Valuation Station 100+0), in St. Louis, MO. MMC presently controls the Poseyville and Owensville Railroad Company (P&O). Thus, as a result of the involved transaction, MMC will control two rail carriers, P&O and Switching.

MMC indicates that: (1) P&O and Switching will not connect with each other; (2) the continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other; and (3) the transaction does not involve a Class I carrier. Therefore, this transaction involves the continuance in control of a nonconnecting carrier, and is exempt from the prior review requirements of 49 U.S.C. 11343. *See* 49 CFR 1180.2(d)(2).

As a condition to the use of this exemption, any employees affected by the transaction will be protected by the conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Any comments must be filed with the Commission and served on: John T. Sullivan, Peper, Martin, Jensen, Maichel and Hetlage, 1875 Eye Street, NW., Suite 1200, Washington, DC 20006–5475.

Decided: June 20, 1989.

By the Commission, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89–15054 Filed 6–22–89; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 31476]

Adelaide McHugh, et al.; Exemption; Continuance in Control

On May 25, 1989, Adelaide McHugh, Edward L. McHugh, Gerard J. McHugh, and William B. McNulty (applicants) filed a notice of exemption under 49 CFR 1180.2(d)(2) to continue in control of Tyburn Railroad Company (Tyburn) (a noncarrier) upon the commencement of rail operations by Tyburn. A comment was submitted by the Railway Labor Executives' Association. The Railway Labor Executives' Association filed comments.

Applicants and James C. McHugh now jointly control McHugh Brothers Heavy Hauling, Inc., a carrier operating as New Hope and Ivyland Railroad Company (NHIR). Applicants propose to form and control a new corporation, Tyburn. It will become a carrier upon commencement of its operation of a rail line leased from Consolidated Rail Corporation (Conrail) at Morrisville, Pennsylvania. Tyburn has filed concurrently a notice of exemption in Finance Docket No. 31457, *Tyburn Railroad Company—Acquisition and Operation—Line of Consolidated Rail Corporation.* There, Tyburn seeks an exemption under 49 CFR 1150.31 to operate about 3,040 feet of railroad of Conrail, between Conrail's track, line code 1121 (milepost 45.4) and facilities currently leased from Conrail by Tyburn.[1] This line is presently operated by NHIR.

Applicants indicate that: (1) NHIR and Tyburn will not connect with each other or any railroad in their corporate family; (2) the continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family; and (3) the transaction does not involve a Class I carrier. Therefore, this transaction involves the continuance in control of a nonconnecting carrier, and exempt from the prior review requirements of 49 U.S.C. 11343. *See* 49 CFR 1180.2(d)(2).

As a condition to the use of this exemption, any employees affected by the transaction will be protected by the conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

Any comments must be filed with the Commission and served on applicant's representative, William P. Quinn, Esquire, Rubin Quinn Moss & Heaney, 1800 Penn Mutual Tower, 510 Walnut Street, Philadelphia, Pennsylvania 19106–3619, (215) 925–8300.

If the notice contains false or misleading information, the exemption is void *ab initio.* A petition to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: June 7, 1989.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89–14660 Filed 6–22–89; 8:45 am]

BILLING CODE 7035–01–M

[Docket No. AB–14 (Sub-No. 6X)]

Northwestern Pacific Railroad Company—Discontinuance Exemption—Operations in Marin County, CA; Corrected Notice of Exemption [1]

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments and Discontinuances* to discontinue service over its 9.95-mile line of railroad between milepost 25.821 at or near Ignacio, CA and milepost 15.71 at or near San Rafael, CA, in Marin County, CA.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on July 9, 1989 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),[3] must be filed by June 19, 1989. Petitions for reconsideration and requests for public use conditions under 49 CFR 1152.28 must be filed by June 29, 1989 with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: John MacDonald Smith, Gary A. Laakso, Southern Pacific Building, One Market Plaza, San Francisco, CA 94105.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by June 14, 1989. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Acting Chief, SEE at (202) 275–7684. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, public use, or trail use/rail banking conditions will be

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[1] Tyburn has filed a petition to revoke the exemption and has raised arguments concerning this agency's jurisdiction over this line. That issue will be addressed in Finance Docket No. 31475.

[1] The notice of exemption served and published in the **Federal Register** on June 9, 1989 (54 FR 24766) contained an error in the pertinent dates for petitions to stay and for petitions for reconsideration. The correct dates are June 19, 1989, for petitions to stay and June 29, 1989, for petitions for reconsideration.

[2] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See Exemption of Out-of-Service Rail Lines*, 4 I.C.C.2d 400 (1988). Any entity seeking a stay involving environmental concerns is encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

[3] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987), and final rules published in the **Federal Register** on December 22, 1987 (52 FR 48440–48446).

imposed, where appropriate, in a subsequent decision.

Decided: June 16, 1989.

By the Commission, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89-14811 Filed 6-22-89; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket 31426 Sub-No. 1]

Railroad Switching Service of Missouri, Inc.—Lease and Operation Exemption—Norfolk and Western Railway Co; Exemption

Railroad Switching Service of Missouri, Inc. (Switching), a non-carrier, has filed a notice of exemption to acquire by lease and to operate 1.89 miles of railroad, extending between milepost 0.00 (Valuation Station 0+0) and milepost 1.89 (Valuation Station 100+0), in St. Louis, MO. In accordance with an agreement enetered into with Norfolk and Western Railway Company, (N&W), the City of St. Louis, MO will acquire the line and immediatley lease it to Switching. The agreement is expected to be consummated on or after June 15, 1989. A transaction relating to the continuance in control of Switching by Merchants Management Corp. is the subject of a notice of exemption filed concurrently in Finance Docket No. 31427 (Sub-No. 1), *Merchants Management Corp.—Continuance in Control Exemption—Railroad Switching Service of Missouri, Inc.*

Any comments must be filed with the Commission and served on John T. Sullivan, Peper, Martin, Jensen, Maichel and Hetlage, 1875 Eye Street, NW., Suite 1200, Washington, DC 20006-5475

Switching must preserve intact all sites and structures more than 50 years old until compliance with the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. 470, is achieved. *See Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901,* 4 I.C.C.2d 305 (1988).[1]

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

[1] Switching has certified to the Missouri State Historic Preservation Officer that no sites or structures listed or qualifying for inclusion in the *National Register of Historic Places* will be transferred as a result of this transaction.

Decided: June 20, 1989.

By the Commission, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89-15055 Filed 6-22-89; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 31475]

Tyburn Railroad Co.; Exemption; Operation and Acquisition

Decided: June 7, 1989.

Tyburn Railroad Company (Tyburn), a noncarrier, has filed a notice of exemption under 49 CFR 1150.31 to operate a line of railroad between Consolidated Rail Corporation's (Conrail) track, line code 1121 (milepost 45.4) and facilities currently leased from Conrail by Tyburn, a total of 3,040 feet of rail line. Tyburn also filed a petition to revoke the exemption, requesting the Commission to resolve whether it has jurisdiction over this line. The transaction will be consummated on or about the seventh day following filing of the Notice of Exemption. The Railway Labor Executives' Association filed comments seeking imposition of labor protective conditions.

The line is currently operated by New Hope and Ivyland Railroad Company (NHIR), which has some of the same owners as Tyburn. A transaction relating to the continuance in control of Tyburn is the subject of a notice of exemption filed in Finance Docket No. 31476, *Adelaide McHugh, et al.—Continuance in Control Exemption—Tyburn Railroad Company.*[1]

Tyburn is the current lessee of these rail facilities. NHIR provides services under rail contracts (49 U.S.C. 10713) and for a single shipper. NHIR will cease operations when Tyburn begins its operations. While Tyburn initially plans to serve only the present shipper, it intends to market its rail services to other shippers.[2]

[1] Tyburn will be formed by Adelaide McHugh, Edward McHugh, Gerard McHugh, and William McNulty (applicants in Finance Docket No. 31476, *infra*). Applicants and James McHugh now jointly control McHugh Brothers Heavy Hauling, Inc., which operates NHIR.

[2] Tyburn has filed a petition to revoke this exemption, asking the Commission to resolve the issue of whether, when it markets its service to other shippers, this line would become a line of railroad subject to agency jurisdiction or whether it would remain an industrial spur. This notice does not resolve that question, but is issued because Tyburn has otherwise met the requirements of 49 CFR 1150.31. The Commission will address the petition to revoke in a separate decision.

Comments must be filed with the Commission and served on applicant's representative, William P. Quinn, Esquire, Rubin Quinn Moss & Heaney, 1800 Penn Mutual Tower, 510 Walnut Street, Philadelphia, Pennsylvania 19106-3619, (215) 925-8300.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio.* A petition to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

The involved property does not contain any sites or structures: (a) Listed in the National Register of Historical Places; or (b) 50 years old or older.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89-14661 Filed 6-22-89; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Information Collection(s) Under Review

June 19, 1989.

The Office of Management and Budget (OMB) has been sent the following proposals for the collection of information for review under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) and the Paperwork Reduction Reauthorization Act. Entries are grouped into submission categories. Each entry contains the following information:

(1) The title of the form or collection;

(2) The agency form number, if any, and the applicable component of the Department sponsoring the collection;

(3) How often the form must be filled out or the information is collected;

(4) Who will be asked or required to respond, as well as a brief abstract;

(5) An estimate of the total number of respondents and the amount of estimated time it takes each respondent to respond;

(6) An estimate of the total public burden hours associated with the collection; and,

(7) An indication as to whether section 3504(h) of Pub. L. 96-511 applies.

Comments and/or questions regarding the item(s) contained in this notice, especially regarding the estimated response time, should be directed to the OMB reviewer, Mr. Edward Clarke, on (202) 395-7340 AND to the Department of Justice's Clearance Officer. If you anticipate commenting on a form/

collection, but find that time to prepare such comments will prevent you from prompt submission, you should so notify the OMB reviewer AND the Department of Justice's Clearance Officer of your intent as soon as possible. The Department of Justice's Clearance Officer is Mr. Larry E. Miesse who can be reached on (202) 633–4312.

All entries in this notice are for extensions of the expiration dates of currently approved collections without any change in the substance or in the method of collection.

(1) Application for Certificate of Citizenship.
(2) N–600. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Information is required to determine eligibility for issuance of a Certificate of Citizenship to a person who claims to have derived such citizenship under the authority of Section 341 of the Immigration and Nationality Act.
(5) 32,000 estimated annual respondents at one hour each.
(6) 32,000 estimated annual burden hours.
(7) Not applicable under 3504(h)

(1) Document Verification Request.
(2) G–845. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. This form is an integral part of the Systematic Alien Verification for Entitlement (SAVE) Program and provides direct access to the INS Alien Status Verification Index.
(5) 200,000 annual respondents at .083 hours each.
(6) 16,600 estimated annual burden hours.
(7) Not applicable under 3504(h)

(1) Application for Permanent Residence.
(2) I–485. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Data is required from applicants to adjust status to that of a lawful permanent resident of the United States under Sections 245 and 249 of the Immigration and Nationality Act.
(5) 180,000 estimated annual respondents at .5 hours each.
(6) 90,000 estimated annual burden hours.
(7) Not applicable under 3504(h)

(1) Application for Suspension of Deportation.
(2) I–256A. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Form is used by aliens in deportation proceedings who seek to have their deportation suspended by the Attorney General and to acquire lawful permanent resident status.
(5) 574 estimated annual respondents at one hour each.
(6) 574 estimated annual burden hours.
(7) Not applicable under 3504(h)

(1) Application for Change of Nonimmigrant Status.
(2) I–506. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Data is needed to comply with Section 248 of the Immigration and Nationality Act by collecting adequate information to determine eligibility for nonimmigrant status and change of nonimmigrant status.
(5) 55,000 estimated annual respondents at .5 hours each.
(6) 27,500 estimated annual burden hours.
(7) Not applicable under 3504(h)

(1) Application by Nonimmigrant Alien for Replacement of Arrival Document.
(2) I–102. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Used by an alien to request replacement of nonimmigrant arrival document that has been lost, stolen, mutilated or destroyed. The information provided is used to verify status and to determine eligibility.
(5) 20,000 estimated annual respondents at .25 hours each.
(6) 5,000 estimated annual burden hours.
(7) Not applicable under 3504(h)

(1) Application for Issuance of Permit to Reenter the United States.
(2) I–131. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Section 223 of the Immigration and Nationality Act provides for issuance of a permit to aliens lawfully admitted, who intend to temporarily depart. The information given on the form will enable an officer of the service to render a decision as to whether the alien is eligible to receive such a document.
(5) 150,000 estimated annual respondents at .5 hours each.
(6) 75,000 estimated annual burden hours.
(7) Not applicable under 3504(h)

(1) Application for Issuance of a Refugee Travel Document (Article 28, United Nations Convention of July 28, 1951, and Protocol of 1967 Relating to Status of Refugees, 8 CFR 223a).
(2) I–570. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Form is used to obtain necessary data for determination of applicant's eligibility for issuance of a refugee travel document. Form is filed by alien physically present in the United states, whose presence is lawful and who is a refugee under Section 101(a)(42)(A) of the Immigration and Nationality Act.
(5) 6,000 estimated annual respondents at one hour each.
(6) 6,000 estimated annual burden hours.
(7) Not applicable under 3504(h).

(1) Canadian Border Boat Landing Card.
(2) I–68. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. This information allows certain persons who enter the United States from Canada by small craft to be inspected only once during the navigational season.
(5) 7,500 estimated annual respondents at .166 hours each
(6) 1,245 estimated annual burden hours.
(7) Not applicable under 3504(h).

(1) Questionnaire submitted by Petitioner at Final Naturalization Hearing.
(2) N–445. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Data is required to determine petitioner's eligibility for naturalization in order to make appropriate recommendation by INS to the naturalization court.
(5) 240,000 estimated annual respondents at .083 hours each.
(6) 20,000 estimated annual burden hours.
(7) Not applicable under 3504(h).

(1) Request that an Applicant Appear for an Interview.
(2) N–430. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. The data collected on this form is needed to prepare a Certificate of Naturalization for an eligible petitioner for naturalization as proscribed in Section 338 of the Immigration and Nationality Act.
(5) 350,000 estimated annual respondents at .083 hours each.
(6) 29,050 estimated annual burden hours.
(7) Not applicable under 3504(h).

(1) Alien Change of Address Card.

(2) AR–11. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Section 265 of the Immigration and Nationality Act requires aliens in the United States to inform the INS of any change of address.
(5) 250,000 estimated annual respondents at .083 hours each.
(6) 20,750 estimated annual burden hours.
(7) Not applicable under 3504(h).

(1) Arrival Information.
(2) N–14A. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Used by INS to identify arrival records of aliens applying for benefits. Data is needed primarily to identify arrival information for arrivals prior to 1924.
(5) 1,000 estimated annual respondents at .25 hours each
(6) 250 estimated annual burden hours.
(7) Not applicable under 3504(h).

(1) Biographic Information.
(2) G–325. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. Used when it is necessary to check other Federal records on applications or petitions submitted by applicants for benefits under the Immigration and Nationality Act. Form is also required of applicants for adjustment to permanent resident status and applicants for naturalization.
(5) 500,000 estimated annual respondents at .25 hours each.
(6) 125,000 estimated annual burden hours.
(7) Not applicable under 3504(h).

(1) Alien Registration Fingerprint Chart.
(2) AR–4. Immigration and Naturalization Service.
(3) On occasion.
(4) Individuals or households. 8 CFR 264.1(e), 264.4, 261, 262, 263 and 264 of the Immigration and Nationality Act provide for the fingerprinting of nonimmigrants who have failed to maintain status.
(5) 200,000 estimated annual respondents at .25 hours each.
(6) 50,000 estimated annual burden hours.
(7) Not applicable under 3504(h).

Larry E. Miesse,

Departmental Clearance Officer, Department of Justice.

[FR Doc. 89–14847 Filed 6–22–89; 8:45 am]

BILLING CODE 4410–10–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 character 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 supersede as 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.

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:

New York
NY89–18 (Jan. 6, 1989) ..... pp. 827–836b
8989–19 (Jan. 6, 1989) ..... pp. 836c–836h
Pennsylvania
PA89–1 (Jan. 6, 1989) ..... pp. 838, 840
PA89–2 (Jan. 6, 1989) ..... pp. 950–951
PA89–8 (Jan. 6, 1989) ..... pp. 916–918
pp. 920–921
PA89–9 (Jan. 6, 1989) ..... p. 926
PA89–11 (Jan. 6, 1989) ..... p. 938
PA89–13 (Jan. 6, 1989) ..... p. 946
PA89–16 (Jan. 6, 1989) ..... p. 962
PA89–19 (Jan. 6, 1989) ..... p. 978
8989–20 (Jan. 6, 1989) ..... pp. 984–985

Volume II:

Iowa
IA89–1 (Jan. 6, 1989) ..... pp. 22–25
8989–7 (Jan. 6, 1989) ..... p. 56
Illinois
8989–14 (Jan. 6, 1989) ..... pp. 192, 194
8989–15 (Jan. 6, 1989) ..... pp. 202–204
Minnesota
MN89–12 (Jan. 6, 1989) ..... p. 611

Volume III:

California
CA89-4 (Jan. 6, 1989)..... pp. 72, 91

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 6 Day of June 1989.

Robert V. Setera,

Acting Director, Division of Wage Determinations.

[FR Doc. 89-14765 Filed 6-22-89; 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 request shown below, not later than July 3, 1989.

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 July 3, 1989.

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 5th day of June 1989.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

Appendix

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Amoco Production Co. (company)	Denver, CO	6/5/89	5/19/89	22,983	Oil and gas.
Amoco Production Co. (company)	Chicago, IL	6/5/89	5/19/89	22,984	Oil and gas.
Amoco Production Co. (company)	Tulsa, OK	6/5/89	5/19/89	22,985	Oil and gas.
Amoco Production Co. (workers)	Houston, TX	6/5/89	5/19/89	22,986	Oil and gas.
Amoco Production Co. (company)	New Orleans, LA	6/5/89	5/19/89	22,987	Oil and gas.
AT&T Dallas Works (CWA)	Mesquite, TX	6/5/89	5/8/89	22,988	Comm. equipment.
Baldwin & Miller, In. (company)	Newark, NJ	6/5/89	5/20/89	22,989	Holloware and Flatware.
Bancroft & Martin (company)	S. Portland, ME	6/5/89	5/9/89	22,990	Steel.
Bayonne Fashions (ILGWU)	Bayonne, NJ	6/5/89	5/15/89	22,991	Women's lingerie.
Bendix Safety Restraint Systems (ACTWU).	Knoxville, TN	6/5/89	4/21/89	22,992	Seat belts.
Continental Laboratories, Inc.	Billings, MT	6/5/89	5/15/89	22,993	Mudlogging.
Control Data (workers)	Arden Hills, MN	6/5/89	5/15/89	22,994	Computers.
Control Data (workers)	Minneapolis, MN	6/5/89	5/15/89	22,995	Computers.
Crescent Foods, Inc. (company)	Seattle, WA	6/5/89	5/9/89	22,996	Spices.
DL Mud, Inc. (workers)	New Orleans, LA	6/5/89	5/19/89	22,997	Oil and gas.
Du Pont Co. (company)	Pompton Lakes, NJ	6/5/89	5/16/89	22,998	Electric blasting caps.
Everseal Mfg. (IBPAT)	Ridgefield, NJ	6/5/89	5/22/89	22,999	Paints.
GTE Halls Station (workers)	Muncy, PA	6/5/89	5/11/89	23,000	Printed circuit boards.
Getter Trucking, Inc. (workers)	Gillette, WY	6/5/89	5/12/89	23,001	Oil and Gas.
Gruss Petroleum Management, Inc. (company).	Midland, TX	6/5/89	5/18/89	23,002	Oil and Gas.
Gruss Petroleum Management, Inc. (company).	New York, NY	6/5/89	5/18/89	23,003	Oil and Gas.
H&H Atlas, Inc. (ILGWU)	Bronx, NY	6/5/89	5/15/89	23,004	Ladies' bathingsuits.
Haake Buchler Instruments, Inc. (company).	Fort Lee, NJ	6/5/89	5/12/89	23,005	Scientific instruments.
High Mountain Inspection Service, Inc. (workers).	Mills,WY	6/5/89	5/17/89	23,006	Oil and gas.
Hunt Energy Corp. (company)	Dallas, TX	6/5/89	5/2/89	23,007	Oil and gas.
J.G. Carmel, Inc. (company)	Midland, TX	6/5/89	5/18/89	23,008	Oil and gas.
Jerry Scott Drilling Co. (workers)	Seminole, OK	6/5/89	5/16/89	23,009	Oil and gas.
Jorgruss Oil Corp. (company)	Midland, TX	6/5/89	5/18/89	23,010	Oil and gas.
L & S Sales, Inc. (workers)	Caribou, ME	6/5/89	5/10/89	23,011	Frozen foods.
Mamary Brothers, Inc. (company)	New York, NY	6/5/89	5/9/89	23,012	Ladies' sleepwear.
Mareve Oil Corp. (company)	Midland, TX	6/5/89	5/18/89	23,013	Oil and gas.
Maxim Drilling & Exploration	Gillette, WY	6/5/89	4/18/89	23,014	Oil and gas.
Pegasus Holding Corp. (company)	Midland, TX	6/5/89	5/18/89	23,015	Oil and gas.

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Stackpole Carbon Co. (IUE)	St. Marys, PA	6/5/89	5/18/89	23,016	Molded Graphite and Brushes.
Stryker Machine Products (IUE)	Trenton, NJ	6/5/89	5/18/89	23,017	Component parts.
Tiara, Mfg. (workers)	Potosi, MO	6/5/89	5/19/89	23,018	Medical uniforms and supplies.
U.S. Enerteck, Bolts Unlimited (workers).	Farmington, NM	6/5/89	5/7/89	23,019	Oil and gas.
Vicrtex (company)	Wharton, NJ	6/5/89	5/22/89	23,020	Wallpaper.
Wells Lamont Corp. (workers)	Oak Grove, LA	6/5/89	5/17/89	23,021	Gloves.
Witco Corp.-Richardson Battery Parts Div. (workers).	Clark, NJ	6/5/89	5/16/89	23,022	Battery containers.

Investigations Regarding Certifications of Eligibility to Apply for Worker Adjustment Assistance

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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 July 3, 1989.

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 July 3, 1989.

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 12th day of June 1989.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition number	Articles produced
BHP Petroleum (Americas, Inc.) (company)	Midland, TX	6/12/89	3/27/89	23,023	Oil and gas.
Bison Drilling, Inc. (workers)	Wakeeney, KS	6/12/89	5/22/89	23,024	Oil and gas.
CDI Corporation (workers)	Secaucus, NJ	6/12/89	5/23/89	23,025	Computers.
C&H Transportation Co., Inc.	Dallas, TX	6/12/89	5/22/89	23,026	Oil and gas.
Challenger Circle F (company)	Trenton, NJ	6/12/89	5/23/89	23,027	Wire devices.
Champion Spark Plug Co. (UAW)	Toledo, OH	6/12/89	5/10/89	23,028	Spark plugs.
Champion Spark Plug Co. (UAW)	Detroit MI	6/12/89	5/10/89	23,029	Spark plugs.
Champion Spark Plug Co. (UAW)	Cambridge, OH	6/12/89	5/10/89	23,030	Spark plugs.
Champion Spark Plug Co. (UAW)	Burlington, IA	6/12/89	5/10/89	23,031	Spark plugs.
Chrysler Corp. (UAW)	Kenosha, WI	6/12/89	5/24/89	23,032	Cars.
Copperweld Steel Co., Inc. (USWA)	Warren, OH	6/12/89	5/27/89	23,033	Steel bars.
Cravat Coal Co. (company)	Cadiz, OH	6/12/89	5/16/89	23,034	Bituminous coal.
Delsea Parker Corp (Iron Wkrs)	Millville, NJ	6/12/89	5/17/89	23,035	Steel.
Ellithorpe Well Control, Inc.	Odessa, TX	6/12/89	5/22/89	23,036	Oil and gas.
GNB, Inc. (IBEW)	Leavenworth, KS	6/12/89	5/18/89	23,037	Batteries.
Henkel Corp. (workers)	Harrison, NJ	6/12/89	5/19/89	23,038	Paper.
L&M Oil Co. (workers)	Dallas, TX	6/12/89	5/17/89	23,039	Oil and gas.
L.S. Thorsen Corp. (IUE)	Ellsworth, ME	6/12/89	5/23/89	23,040	Sheet Metal.
Meriden-Stinehour Press (workers)	Meriden, CT	6/12/89	5/23/89	23,041	Books,
Metalurgical Exo-Products Corp. (Metscrap Div.) (IUMSB).	McKees Rock, PA	6/12/89	5/22/89	23,042	Aluminum.
Mueller Power Tongs, Inc. (workers)	Stanford, TX	6/12/89	5/21/89	23,043	Oil and gas.
Parkway Fabricators (workers)	South Amboy, NJ	6/12/89	5/25/89	23,044	Suits.
Scab Rock Feeders (workers)	Othello, WA	6/12/89	5/19/89	23,045	Beef Products.
Signetics Corp (workers)	Orem, UT	6/12/89	5/20/89	23,046	Computers chips.
Tapley Rutter (workers)	Moonachie, NJ	6/12/89	5/25/89	23,047	Bibles.
Unisys Corp (workers)	Secaucus, NJ	6/12/89	5/23/89	23,048	Computers.
WCI Major Appliance Group (workers)	Newark, OH	6/12/89	5/18/89	23,049	Appliance parts.

[FR Doc. 89-14919 Filed 6-22-89; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-22,163]

Micro Energy International, Inc.; Roswell, NM; Termination of Investigation

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) as amended by the Omnibus Trade and Competitiveness Act of 1988 (Pub.L. 100-418), the Department of Labor herein presents the results of an investigation regarding certification of eligibility to apply for worker adjustment assistance.

The investigation was initiated in response to a petition received on November 18, 1988 and filed on behalf of

workers employed at Micro Energy International in Roswell, New Mexico to develop an energy source product.

Micro Energy International, Incorporated, Roswell, New Mexico was a start-up company which was formed to produce and market an energy source product. The company was incorporated in August 1985 and was dissolved in November 1985. The product was not marketed during the short term of Micro Energy's operation.

The retroactive provisions of section 1421 (a)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988 do not apply to workers who are engaged in the production of an article if such workers were eligible to be certified for benefits under the Trade Act prior to the implementation of the retroactive provisions.

All workers were separated from the subject firm more than one year prior to the date of the petition. Section 223 of the Act specifies that no certification may apply to any worker whose last separation occurred more than one year before the date of the petition. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 16th day of February 1989.

Marvin M. Fooks,

Trade Adjustment Assistance.

[FR Doc. 89-14920 Filed 6-22-89; 8:45 am]

BILLING CODE 4510-30-M

Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued during the period of May 1989.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivion thereof, have become totally or partially separated,

(2) That sales or produciton, or both, of the firm or subdivision have decreased absolutely, and

(2) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Negative Determinations

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-22,507; Texas Meridian Production Co., Houston, TX

TA-W-22,666; Fashion Craft Industries, Henryetta, OK

TA-W-22,461; R.E. Smith Interests, Inc., Snyder, TX

TA-W-22,656; Wellington Leather Goods, Inc., New York, NY

TA-W-22,674; Lucky Star, Brooklyn, NY

TA-W-22,667; Fisher Scientific Co., Indiana, PA

TA-W-22,693; E.P. Manufacturing, Inc., Rochester, NY

TA-W-22,714; Sanyo E & E Corp., Richmond, IN

TA-W-22,718; Shelley Manufacturing Co., Miami, FL

TA-W-22,487; Jersild Knitting Corp., Neenah, WI

TA-W-22,639; Nat Kaplan, New York, NY

TA-W-22,468; Andrew Harris, Inc., Philadelphia, PA

TA-W-22,561; Bates Fabrics, Inc., Lewiston, ME

TA-W-22,589; Mary D. Knitting Mills, Inc., Glendale, NY

TA-W-22,611; United Steel & Wire Co., Inc., Pennsauken, NJ

TA-W-22,768; Eaton Corp., Specialty Castings Div., Marshall, MI

TA-W-22,605; SMS Automotive Product, Inc., Philadelphia, PA

TA-W-22,657; Willow & Reed, Inc., Elmhurst, NY

TA-W-22,595; National Semiconductor, South Portland, ME

TA-W-22,582; AKZO Salt, Inc., (Formerly International Salt Co) Williston, ND

TA-W-22,523; E & L Fashions, Paterson, NJ

TA-W-22,583; Jay Garment Co., Clarksville, TN

In the following cases, the investigation revealed that criterion (3) has not been met for the reasons specified.

TA-W-22,689; Big Apple Knits Limited, Brooklyn, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-22,620; Decor Fur, Inc., New York, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-22,712; Regal Ware, Inc., Virginia Beach, VA

Increased import did not contribute importantly to workers separations at the firm.

TA-W-22,675; M. Goldstein, Brooklyn, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-22,708; Peerless Winsmith, Inc., Springville, NY

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-22,741; Speed Rack, Inc., Quncy, IL

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-22,598; Pan American Tanning Corp., Gloversville, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-22,719; Standard Microsystems Corp., Hauppauge, NY

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-22,791; Spain Construction Service, Inc., St Elmo, IL

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA-W-22,663; Damon Creations, Inc., North Bergen, NJ

The workers' firm does not produce an article as required for certification under Section 222 of theTrade Act of 1974.

TA-W-22,700; Hudson Shipping Co., Inc., New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA-W-22,702; Mac Originals, New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA-W-22,778; ICO Positive Seal, Odessa, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,779; ICO Spincoat, Odessa, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,750; Bill Miller, Inc., Henryetta, OK

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,571; Continental Trend Resources, Enid, OK

The investigation revealed that criterion (1) and (2) has not been met. Employment did not decline during the relevant period as required for certification. Sales or production did not decline during the relevant period as required for certification.

TA–W–22,705; Oneok Exploration, Great Bend KS

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22,577; Etienee Aigner, New York, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22,630; Imprimis Technology, Inc., Bloomington, MN

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22,687; Andrea Products, New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,690; Calvin Klein Collections, New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,735; Iberia Petroleum Co., Houston, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,420; Walden Service, Inc., Odessa, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,692; Combustion Engineering, Inc., Lyndhurst, NJ

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,724; C.D.R. Footwear, Inc., Keene, NH

Aggregate U.S. imports of work footwear did not increase in 1988 compared to 1987 or in January 1989 compared to January 1988.

TA–W–22,668; H & E Pipe Service, Inc., Williston, ND

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,658; A.V. Well Service, Olney, IL

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,684; International Longshoremen, Local 854, Employed Through New Orleans Association, New Orleans, LA

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,740; Siemens Transmissions Systems, El Paso, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,671; Lillian Vernon, Portchester, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,672; Lillian Vernon, New Rochelle, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,614; A.B.F., Long Island City NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,553A; Louisiana Intrastate Gas Corp., Alexandria, VA

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22,682; Sola Barnes-Hind, Phoenix, AZ

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22,730; Gold Circle Stores, Buffalo, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22,600; Phillips Petroleum Co., Headquarters, Bartlesville, OK

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 694; Exide Corp., Hays, KS

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 684; Teledyne Merla, Snyder, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 626; Fort Hill Lumber Co., Grande Rhonde, OR

U.S. imports of Softwood lumber declined absolutely and relative to U.S. production 1988 compared to 1987.

TA–W–22, 645; Pico Products, Inc., OH

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 664; Delicia Sportswear, New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 828; Petromar Corp., Rockport, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 646; Quality Plant Service, Inc., Yonkers, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 634; Leviton Manufacturing Co., Inc., Little Neck, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 570; The Computer Consulting Center, New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 594; Murphree Tool Co., Midland, TX

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 592; Max Murphy Tank Truck Service, Geff, IL

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 564; Briggs and Stratton Corp. Headquarters-Engine Div., Milwaukee, WI

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 564A; Briggs and Stratton Corp. Key & Lock Div., Good Hope Rd Plant, Glendale, WI

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 564B; Briggs and Stratton Corp., Parts Div., Menomonee Falls, WI

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 564C; Briggs and Stratton Corp., West Allis Foundry, West Allis, WI

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 715; Shell Western E&P, Inc., Crew 120, Salt Lake City, UT

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 716; Shell Western E & P, Inc., Crew 266, Glendive, MT

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 717; Shell Western E & P, Inc., Crew 174, Bay City, MI

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 568; Cimarron Resources, Inc., Aurora, Co

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 652; Simco Awards, Inc., New York, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 665; Edmond Stern, Inc., New York, NY

U.S. imports of knit fabric were negligible.

TA–W–22, 862; Lone Star Industries, Inc., New Orleans, LA

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 670; Kuehne & Nagel, Inc., New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 793; Technical Engineering Consulting, Inc., Ypsilante, MI

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 618; Bushue Well Service, Effingham, IL

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 622; Elmer Little & Sons, Johnstown, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 419; Union Pacific Resources, Houston, TX

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 419A; Union Pacific Resources, At Various Locations in The State of Texas

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 419B; Union Pacific Resoucres, At Various Locations in The State of Oklahoma

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 660; Arbeit Brothers, Inc., New York, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 698; G & G Drill Collar Service Co., Inc., Abilene, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 700; Hudson Shipping Co., Inc., New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 680; Schwerman Trucking Co., Maryneal, TX

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 781; LTV Energy Products, Bradford, PA

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 702; Mac Originals, New York, NY

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–22, 642; O'Donnell Coal Co., O'Donnell Mine #3, Indiana, PA

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 695; Fairchild Republic Co., Melville, NY

Increased imports did not contribute importantly to workers separations at the firm.

TA–W–22, 747; Teledyne Wisconsin Motor, West Allis, WI

The investigation revealed that criterion (1) has not been met. Employment did not decline during the relevant period as required for certification.

Affirmative Determination

TA–W–22, 703; Mitchell Corp., Cadillac, MI

A certification was issued covering all workers separated on or after March 15, 1988.

TA–W–22, 696; FEDCO Automotive Components Co., Buffalo, NY

A certification was issued covering all workers separated on or after March 8, 1988.

TA–W–22, 758; Bethlehem Steel Corp., Williamsport Wire Rope Div. Williamsport, PA

A certification was issued covering all workers separated on or after October 1, 1988.

TA–W–22, 777; Hummelstown Mfg., Elizabethtown, PA

A certification was issued covering all workers separated on or after March 29, 1988 and before May 7, 1989.

TA–W–22, 734; Hunt Oil Co., Western Div., Denver, CO

A certification was issued covering all workers separated on or after March 21, 1988.

TA–W–22, 723; Wes-Mor Drilling, Inc., Graham, TX

A certification was issued covering all workers separated on or after February 22, 1988 and before January 31, 1989.

TA-W-22, 644; Pan Canadian Petroleum Co., Denver, CO and Houston, TX

A certification was issued covering all workers separated on or after February 28, 1988.

TA-W-22, 720; Sunrise Undergarment Co., New York, NY

A certification was issued covering all workers separated on or after March 9, 1988.

TA-W-22, 683; Taylor's Casing Crews, Odessa, TX

A certification was issued covering all workers separated on or after February 14, 1988.

TA-W-22, 826; Operators, Inc., Located Throughout The State of North Dakota

A certification was issued covering all workers separated on or after October 1, 1988.

TA-W-22, 722; Weldon Miller Contractors, Inc., Morgan City, LA

A certification was issued covering all workers separated on or after March 16, 1988.

TA-W-22, 662; D & R Tong Service, Odessa TX

A certification was issued covering all workers separated on or after February 14, 1988.

TA-W-22,673; Longhorn Casing Crews, Odessa, TX

A certification was issued covering all workers separated on or after February 14, 1988.

TA-W-22,732; Houston Fluid & Leasing, Dallas, TX

A certification was issued covering all workers separated on or after February 22, 1988.

TA-W-22,732A; Houston Fluid & Leasing, Ranger, TX

A certification was issued covering all workers separated on or after February 22, 1988.

TA-W-22,669; Halliburton Services, Henderson, KY

A certification was issued covering all workers separated on or after March 9, 1988.

TA-W-22,647; R & C Drilling Co., Inc., Hays, KS

A certification was issued covering all workers separated on or after November 1, 1988.

TA-W-22,502; Post Manufacturing Co., Inc., New York, NY

A certification was issued covering all workers separated on or after February 3, 1988 and before February 28, 1989.

TA-W-22,654; Thomas Drilling Co., Duncan, OK

A certification was issued covering all workers separated on or after February 24, 1988.

TA-W-22,788; Pyramid Drilling Co., Abilene, TX

A certification was issued covering all workers separated on or after January 1, 1989.

TA-W-22,678; PEP Drilling Co., Mt. Vernon, IL

A certification was issued covering all workers separated on or after March 7, 1988.

TA-W-22,678A; PEP Drilling Co., Carrollton, OH

A certification was issued covering all workers separated on or after March 7, 1988.

TA-W-22,615; AT and T Technologies, Inc., General Markets Group, Westminster, CO

A certification was issued covering all workers separated on or after March 3, 1988.

TA-W-21,619; Chalmers Exploration Co., Abilene, TX

A certification was issued covering all workers separated on or after February 24, 1988.

TA-W-21,631; John Kiss & Sons, North Bergen, NJ

A certification was issued covering all workers separated on or after February 25, 1988.

TA-W-22,635; McAdams, Roux & Associates, Inc., Denver, CO

A certification was issued covering all workers separated on or after January 1, 1989.

TA-W-22,635A; McAdams, Roux & Associates, Inc., Gillete, WY

A certification was issued covering all workers separated on or after January 1, 1989.

TA-W-22,775; Harrell Exploration Co., Denver, CO

A certification was issued covering all workers separated on or after January 1, 1989.

TA-W-22,588; Mark Manufacturing Co., Fort Worth, TX

A certification was issued covering all workers separated on or after February 14, 1988 and before August 31, 1988.

TA-W-22,633; Kinney Shoe Corp., Romney Shoe Div., Romney, WV

A certification was issued covering all workers separated on or after January 1, 1989.

TA-W-22,569; Circle M Mud, Inc., Oklahoma, OK

A certification was issued covering all workers separated on or after February 22, 1988 and before May 30, 1989.

TA-W-22,616; Almond Jewelry, Inc., Westbury, NY

A certification was issued covering all workers separated on or after February 27, 1988.

TA-W-22,560; Animal Fair, Inc., Eden Valley, MN

A certification was issued covering all workers separated on or after February 10, 1988.

TA-W-22,580; Harry Levine, Long Island City, NY

A certification was issued covering all workers separated on or after February 14, 1988.

TA-W-22,567; Champion Garment Co., Rome, GA

A certification was issued covering all workers separated on or after August 1, 1988 and before December 31, 1988.

TA-W-22,628; Gearhart Industries, Inc., Abilene, TX

A certification was issued covering all workers separated on or after February 28, 1988 and before January 1, 1989.

TA-W-22,721; Waco Lehigh Portland Cement Co., Waco, TX

A certification was issued covering all workers separated on or after September 1, 1988.

TA-W-22,759; Blum & Fink, Inc., New York, NY

A certification was issued covering all workers separated on or after March 29, 1988.

TA-W-22,706; P and N Industries, Inc. New York, NY

A certification was issued covering all workers separated on or after March 1, 1988.

TA-W-22,676; New Venture Knitting Mills, Brooklyn, NY

A certification was issued covering all workers separated on or after February 28, 1988 and before April 30, 1989.

TA-W-22,799; Western Atlas International, Atlas Wireline Div., Indiana, PA

A certification was issued covering all workers separated on or after March 13, 1988 and before September 1, 1988.

TA-W-22,699; Howden Sirocco, Inc., Hyde Park, MA

A certification was issued covering all workers separated on or after March 16, 1988.

TA-W-22,679; Phentex USA, Inc., Plattsburgh, NY

A certification was issued covering all workers separated on or after March 18, 1988.

TA-W-22,948; Sherwood Medical Co., Sherburne, NY

A certification was issued covering all workers separated on or after January 1, 1989.

TA-W-22,681; Shar-Alan Oil Co., Denver, CO

A certification was issued covering all workers separated on or after February 22, 1988.

TA-W-22,681A; Shar-Alan Oil Co., At Various Locations in The State of CO

A certification was issued covering all workers separated on or after February 22, 1988.

TA-W-22,681B; Shar-Alan Oil Co., At Various Locations in The State of Oklahoma

A certification was issued covering all workers separated on or after February 22, 1988.

TA-W-22,681C; Shar-Alan Oil Co., At Various Locations in the State of Texas

A certification was issued covering all workers separated on or after February 22, 1988.

TA-W-22,596; Neil Scott Originals, New York, NY

A certification was issued covering all workers separated on or after June 1, 1988 and before July 31, 1988.

TA-W-22,637; Miller We; Service, Fairfield, IL

A certification was issued covering all workers separated on or after March 2, 1988.

TA-W-22,513; Wearwear Proctor Silex, Altoona, PA

A certification was issued covering all workers separated on or after January 26, 1988 and before February 1, 1989.

TA-W-22,492; Mark D. Knitting Mills, Philadelphia, PA

A certification was issued covering all workers separated on or after January 30, 1988.

TA-W-22,514; Wes-Tex Drilling Co., Abilene, TX

A certification was issued covering all workers separated on or after January 23, 1988.

TA-W-22,562; Benstock Co., Buffalo, NY

A certification was issued covering all workers separated on or after February 17, 1988.

TA-W-22,572; Cricketeer Manufacturing Co., Lawrenceburg, KY

A certification was issued covering all workers separated on or after March 16, 1988.

TA-W-22,648; Reliable Acid, Inc., Fairfield, IL

A certification was issued covering all workers separated on or after March 3, 1988 and before March 31, 1989.

TA-W-22,661; Apollo Drilling, Inc., Gillette, WY

A certification was issued covering all workers separated on or after March 5, 1988.

TA-W-22,661A; Apoll Drilling, Inc., Denver, CO

A certification was issued covering all workers separated on or after March 5, 1988.

TA-W-22,459; Phillips Petroleum, Western Div., Oklahoma City, OK

A certification was issued covering all workers separated on or after January 23, 1988.

TA-W-22,653; Sonat Offshore Drilling, Inc., New Orleans, LA

A certification was issued covering all workers separated on or after Janaury 1, 1989.

TA-W-22,370; See Land Drilling Co., Houma, LA

A certification was issued covering all workers separated on or after December 27, 1987 and before December 31, 1988.

TA-W-22,370A; See Land Drilling Co., Laurel, MS

A certification was issued covering all workers separated on or after December 27, 1987 and before December 31, 1988.

I hereby certify that the aforementioned determinations were issued during the month of May 1989. Copies of these determinations are available for inspection in Room 6434, U.S. Department of Labor, 601 D Street, NW., Washsington, DC 20213 during normal business hours or will be mailed to persons to write to the above address.

Dated: June 13, 1989.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 89-14921 Filed 6-22-89; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-22,609]

TGX Corp.; Westfield, NY; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18 an application for administrative reconsideration was filed with the Director of the Office of Trade Adjustment Assistance for workers at TGX Corporation, Westfield, New York. The review indicated that the application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA-W-22,609; TGX Corporation Westfield, New York (June 9, 1989)

Signed at Washington, DC, this 14th day of June 1989.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 89-14922 Filed 6-22-89; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-21,999 et al.]

Western Oceanic, Inc., et al; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance

In the matter of Western Oceanic, Inc., TA-21,999, Houston, Texas, TA-W-21,999A, Lafayette, Louisiana; Western Oceanic, Services, Inc., TA-W-21,999B, Houston, Texas, TA-W-21,999C, Lafayette, Louisiana; North Star Drilling Company, TA-W-21,999D, Houston, Texas, TA-W-21,999E, Lafayette, Louisiana.

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on January 25, 1989 applicable to all workers of Western Oceanic, Inc., Houston, Texas. The certification was amended on March 24, 1989 to include the Lafayette, Louisiana location.

The certification is being amended to properly reflect the correct worker group. New information from the company shows that Western Oceanic Services and North Star Drilling are domestic subsidiaries of Western Oceanic, Inc. Workers are transferred among Western Oceanic's subsidiaries to work on drilling rigs in the Gulf as needed. The employment and revenue data requested by the Department from Western Oceanic inlcudes the data from Western Oceanic Services and North Star Drilling.

The notice, therefore is amended by including Western Oceanic Services and North Star Drilling in Houston, Texas and Lafayette, Louisiana. It was the Department's intent to include all workers of Western Oceanic, Inc., Western Oceanic Services and North Star Drilling under TA-W-21,999.

The amended notice applicable to TA-W-21,999 is hereby issued as follows:

All workers of Western Oceanic, Inc.; Western Oceanic Services; and North Star Drilling, Houston, Texas and Lafayette,

Louisiana who became totally or partially separated on or after October 1, 1985 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 12th day of June 1989.

Stephen A Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 89-14923 Filed 6-22-89; 8:45 am]

BILLING CODE 4510-30-M

Disaster Unemployment Assistance; Change 1 to Unemployment Insurance Program Letter 16-89 for Implementing Statutory Amendments Affecting the Disaster Unemployment Assistance Program

On November 23, 1988, the President signed into law H.R. 2707, which in Title I contains the "Disaster Relief and Emergency Assistance Amendments of 1988" (the DREA) affecting the Disaster Unemployment Assistance (DUA) Program. On March 24, 1989, the Department published Unemployment Insurance Program Letter (UIPL) No. 16-89, dated February 10, 1989, and the preamble thereto in the **Federal Register** (54 FR 12295). The operating instructions contained in the UIPL superseded the prior provisions for the DUA Program and certain provisions of the regulations at 20 CFR Part 625 implementing the DUA Program, to the extent that the provisions of DREA were inconsistent with the Disaster Relief Act of 1974 (renamed the "Robert T. Stafford Disaster Relief and Emergency Assistance Act" by the DREA) and the regulations.

In this Change 1 to UIPL No. 16-89, the Department is providing further guidance and clarification to certain operating instructions contained in the UIPL where questions were raised by the States and the cooperating State agencies in implementing and administering the provisions of the DREA amendments.

Unemployment Insurance Program Letter No. 16-89, Change 1 is published below.

Signed at Washington, DC, on June 13, 1989.

Roberts T. Jones,

Assistant Secretary of Labor.

BILLING CODE 4510-30-M

U.S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION UI/DUA
	CORRESPONDENCE SYMBOL TEUMI
	DATE June 15, 1989

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 16-89 CHANGE 1

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : DONALD J. KULICK
Administrator
for Regional Management

SUBJECT : Disaster Unemployment Assistance--Operating Instructions for Implementing the Statutory Amendments Affecting the Program

1. Purpose. To provide clarification of Section 4.A.1., "ADMINISTRATION", of UIPL 16-89, which sets forth the operating instructions implementing the statutory amendments affecting the Disaster Unemployment Assistance (DUA) Program.

2. References. UIPL No. 16-89; Section 410(a) of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act); and Section 106(f)(1) of the Disaster Relief and Emergency Assistance Amendments of 1988 (the DREA).

3. Background. Several State Employment Security Agencies (SESAs) have raised questions concerning Section 4.A.1. of UIPL 16-89. This section addresses Section 410(a) of the Stafford Act, which, as amended by Section 106(f)(1) of the DREA, provides that DUA is payable for a week of unemployment only if "the individual is not entitled to any other unemployment compensation ... or waiting period credit."

This directive provides clarification of, and answers to questions raised about, Section 4.A.1. of the Department of Labor's operating instructions.

4. Operating Instructions Clarification.

In Section 4.A.1., under the heading "ADMINISTRATION", the operating instructions state that under Section 410(a) of

RESCISSIONS	EXPIRATION DATE June 30, 1990

DISTRIBUTION

the Stafford Act, DUA is not payable if the individual is not entitled to a payment of unemployment compensation because the individual: 1) is under a disqualification, 2) has excessive disqualifying income, 3) is employed or is not able to work or available for work, or 4) for any other reason is ineligible for unemployment compensation or waiting period credit the individual otherwise would be entitled to but for such ineligible reason.

Section 410(a) of the Act provides "The President is authorized to provide to any individual unemployed as a result of a major disaster such benefit assistance as he deems appropriate while such individual is unemployed for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation ... or waiting period credit."

Section 625.5 of 20 CFR sets forth the conditions that must be met for an individual's unemployment to be determined to be caused by a major disaster and 20 CFR 625.4 sets forth the eligibility conditions for receipt of DUA benefits. The qualifying requirements set forth in these regulations did not change as a result of the recent amendments by the DREA. Rather, Section 106(f)(1) of the DREA added one additional qualifying requirement in order to be eligible for the payment of DUA, i.e., that "the individual is not entitled to any other unemployment compensation ... or waiting period credit."

It was not the intent of Section 4.A.1. of the operating instructions to deny DUA benefits to any individual unemployed as a result of a major disaster, as determined under the regulations, as long as such individual is not entitled to unemployment compensation.

The following questions and answers provide guidance and clarification of the phrase "not entitled to any other unemployment compensation" as used in the statute.

Question 1. Is an individual under an unsatisfied voluntary quit disqualification for unemployment compensation eligible for DUA if he/she becomes unemployed due to the major disaster?

Answer. Yes. For example, if an individual quit a job prior to the disaster and was disqualified for unemployment compensation but subsequently obtained a job and was separated due to the disaster and if such wages, employment, length of employment or time period from the

beginning date of the denial did not satisfy the disqualification, the individual would nevertheless be entitled to DUA because the most recent separation was due to the disaster.

Question 2. May an individual who is unemployed and injured as a result of the disaster still be paid DUA if such individual is denied unemployment benefits because the individual does not meet the State law able and available requirements?

Answer. Yes. If an individual becomes unemployed due to being injured as a result of the disaster (20 CFR 625.5(a)(5) and (b)(4)), the individual would meet the exception for being considered able and available for work under 20 CFR 625.4(g). If the individual were denied unemployment compensation as not being able or available for work under State law, such individual, if otherwise eligible, must be paid DUA benefits.

Another circumstance, related to availability, arises where an individual is unemployed because the individual cannot reach his/her place of employment as a direct result of the disaster (20 CFR 625.5(a)(2) and (b)(2)). If the individual is denied unemployment compensation under State law as not being available for work since the job is available, such individual may be paid DUA if the individual is otherwise eligible.

Question 3. May an individual be paid DUA where he/she starts receiving unemployment compensation after becoming unemployed due to the disaster and then becomes ineligible for such benefits for some reason?

Answer. No. For example, an individual who becomes unemployed due to a major disaster is entitled to unemployment compensation and subsequently, during the disaster assistance period, the individual obtains a suitable temporary job or partial employment and then quits. If the individual is disqualified for unemployment compensation because of the quit, such individual may not be paid DUA because the individual's most recent unemployment is not attributable to the disaster but due to a separation not caused by the disaster.

Another example is, an individual was entitled to unemployment compensation and became injured for any reason not related to the disaster and, under State law,

the individual was denied benefits as not being able or available for work. Such individual could not receive DUA because the individual does not meet the eligibility exception provision since the injury was not caused by the disaster.

While a question was not specifically asked, from a standpoint of clarification and understanding, an individual determined ineligible for unemployment compensation because of the receipt of disqualifying income may not be paid DUA. Such individual is considered eligible for unemployment compensation or waiting period credit.

5. Action Required. This information should be provided to appropriate staff members.

6. Inquiries. States should direct inquiries to the appropriate Regional Office.

[FR Doc. 89-14925 Filed 6-22-89; 8:45 am]
BILLING CODE 4510-30-C

Occupational Safety and Health Administration

Wyoming State Standards; Approval

1. Background

Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called the Regional Administrator) under delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary), (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State Plan which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On May 3, 1974, notice was published in the **Federal Register** (39 FR 15394) of the approval of the Wyoming Plan and adoption of Subpart BB to Part 1952 containing the decision.

The Plan provides for the adoption of Federal Standards as State Standards by:

1. Advisory Committee coordination.
2. Publication in newspapers of general/major circulation with a 45-day waiting period for public comment and hearings.
3. Adoption by the Wyoming Health and Safety Commission.
4. Review and approval by the Governor.
5. Filing with Secretary of State and designation of an effective date.

OSHA regulations (29 CFR 1953.22 and 1953.23) require that States respond to the adoption of new or revised permanent Federal standards by State promulgation of comparable standards within six months of OSHA publication in the **Federal Register**, and within 30 days for emergency temporary standards. Although adopted State standards or revisions to standards must be submitted for OSHA review and approval under procedures set forth in Part 1953, they are enforceable by the state prior to federal review and approval. By letter dated October 21, 1988 from John T. Chambers, Former Assistant Administrator, Wyoming Occupational Health and Safety Division, to Byron R. Chadwick, OSHA Regional Administrator, the State submitted rules and regulations in response to the following Federal OSHA General Industry Standards (29 CFR 1910.1200: Hazard Communication 52 FR 31852, 8/24/87; 29 CFR 1910.1928: Benzene, 52 FR 34462, 9/11/87; 29 CFR 1910.268: Telecommunications, 52 FR 36384, 9/28/87). By letter dated January 11, 1989, from Stephan R. Foster, Assistant Administrator, Wyoming Occupational Health and Safety Division, to Byron R. Chadwick, OSHA Regional Administrator, the State submitted rules and regulations in response to the following Federal OSHA General Industry Standards (29 CFR 1910.1048: Formaldehyde, 52 FR 46168, 12/4/87; 29 CFR 1910.217, Mechanical Power Presses—Presence Sensing Device Initiation, 53 FR 8322, 3/14/88).

The above adoptions of Federal standards have been incorporated in the State Plan and are contained in the Wyoming Occupational Health and Safety Rules and Regulations for General Industry, as required by Wyoming Statute 1977, section 27–11–105(a)(viii).

State standards for 29 CFR 1910.1200: Hazard Communication were adopted by the Health and Safety Commission of Wyoming on February 5, 1988 (effective March 8, 1988); State standards for 29 CFR 1910.1028: Benzene were adopted by the Health and Safety Commission of Wyoming on February 5, 1988 (effective March 9, 1988); State standards for 29 CFR 1910.268: Telecommunications were adopted by the Health and Safety Commission of Wyoming on February 5, 1988 (effective February 19, 1988); State standards for 29 CFR 1910.1048: Formaldehyde and for 29 CFR 1910.217: Mechanical Power Presses—Presence Sensing Device Initiation were both adopted by the Health and Safety Commission of Wyoming on June 14, 1988 (effective August 4, 1988). Adoption of all these standards was pursuant to Wyoming Statute 1977, section 27–11–105. The State standards on Hazardous Communications, Benzene, Telecommunications, Formaldehyde, and Mechanical Power Presses—Presence Sensing Device Initiation are all substantially identical to the Federal Standards actions, with the only exceptions being paragraph numbering and minor wordage appropriate only to the Wyoming statutes.

According to Wyoming's Letter of May 19, 1989, to Byron R. Chadwick, Regional Administrator, the State will not have its own requirements for recognition of third-party validation organizations for the standard on presence sensing device initiation for mechanical power presses. Wyoming is instead relying on Federal OSHA's third-party recognition program as outlined in Appendix C. Applications will be filed with Federal OSHA in Washington, DC.

2. Decision

The above State Standards have been reviewed and compared with the relevant Federal Standards, and OSHA has determined that the State Standards are at least as effective as the comparable Federal Standards, as required by section 18(c)(2) of the Act. OSHA has also determined that the differences between the State and Federal Standards are minimal and that the Standards are thus substantially identical. OSHA therefore approves these standards; however, the right to reconsider this approval is reserved should substantial objections be submitted to the Assistant Secretary.

3. Location of Supplement for Inspection and Copying

A copy of the standards supplements, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, Room 1576, Federal Office Building, 1961 Stout Street, Denver, Colorado 80294; the Occupational Health and Safety Department, 604 East 25th Street, Cheyenne, Wyoming 82002; and the Office of State Programs, Room N–3700, 200 Constitution Avenue, NW., Washington, DC. 20210.

4. Public Participation

Under 29 CFR 1953.2(c), the Assistant Secretary may prescribe alternative procedures to expedite the review process or for any other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplements to the Wyoming State Plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reason(s):

The standards were adopted in accordance with the procedural requirements of State law which included public comment, and further public participation would be repetitious. This decision is effective June 23, 1989.

Authority: Sec. 18, Pub. L. 91–596, 84 Stat. 1608 (29 U.S.C. 667).

Signed at Denver, Colorado this 8th day of February, 1989.

Byron R. Chadwick,

Regional Administrator.

[FR Doc. 89–14924 Filed 6–22–89; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL COMMISSION FOR EMPLOYMENT POLICY

Meeting

ACTION: Notice of meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) notice is hereby given of a public meeting of the National Commission for Employment Policy at the Aristocrat Hotel, Dallas, Texas 75201.

DATE: Tuesday, July 11, 1989, 1:30 p.m. til 4:30 p.m.

Status: This meeting is to be open to the public

Matters to be discussed: The purpose of this public meeting is to enable the Commission members to discuss progress on the proposed research agenda, and to discuss findings received from the prior hearings.

FOR FURTHER INFORMATION CONTACT: Barbara C. McQuown, Director, National Commission for Employment Policy, 1522 K Street, NW., Suite 300, Washington, DC. 20005, Tel. (202) 724–1545.

SUPPLEMENTARY INFORMATION: The National Commission for Employment Policy was established pursuant to Title IV–F of the Job Training Partnership Act (Pub. L. 97–300). The Act charges the Commission with the broad responsibility of advising the President, and the Congress on national employment issues. Handicapped individuals wishing to attend should contact the Commission so that appropriate accommodations can be made. Minutes of the meeting and working papers will be available for public inspection at the Commission's headquarters, 1522 K Street, NW., Suite 300, Washington, DC 20005.

Signed at Washington, DC, this 19th day of June.

Barbara C. McQuown,

Director, National Commission for Employment Policy.

[FR Doc. 89–14909 Filed 6–22–89; 8:45 am]

BILLING CODE 4510–30–M

Meeting

ACTION: Notice of hearing.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) notice is hereby given of a public hearing at the Dirksen Building, Ceremonial Courtroom, Rm. 2525, 219 South Dearborn, Chicago, Illinois, 60604.

DATE: Monday, July 10, 1989, 9:00–4:30.

Status: The hearing is to be open to the public.

Matters To Be Discussed: The purpose of this public hearing is to enable the Commission members to learn from various segments of the Job Training Partnership Act (JTPA) system their reactions to a draft Commission paper which examines possible explanations for the under-representation of Hispanics in JTPA. Persons invited to testify represent State and local government agencies that administer JTPA programs and organizations that provide training under JTPA.

Interested parties may submit written comments either prior to or after the official hearing date, but no later than August 15, 1989 to the Commission headquarters. Additional hearings will be conducted across the U.S. over the next few months. It is anticipated that the results of the hearings will be used to develop formal Commission recommendations.

FOR FURTHER INFORMATION CONTACT: Barbara C. McQuown, Director, National Commission for Employment Policy, 1522 K Street, NW., Suite 300, Washington, DC 20005, (202) 724–1545.

SUPPLEMENTARY INFORMATION: The National Commission for Employment Policy was established pursuant to Title IV–F of the Job Training Partnership Act (Pub. L. 97–300). The Act charges the Commission with the broad responsibility of advising the President, and the Congress on national employment issues. Handicapped individuals wishing to attend should contact the Commission so that appropriate accommodations can be made. Minutes of the hearing and written testimony submitted by witnesses will be available for public inspection at the Commission's headquarters, 1522 K Street, NW., Suite 300, Washington, DC 20005.

Signed at Washington, DC, this 19th day of June.

Barbara C. McQuown,

Director, National Commission for Employment Policy.

[FR Doc. 89–14910 Filed 6–22–89; 8:45 am]

BILLING CODE 4510–30–M

Meeting

ACTION: Notice of hearing.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) notice is hereby given of a public hearing at Earl Campell Building, Room 7C 58, 7th Floor, 1100 Commerce, Dallas, Texas, 75242.

DATE: Wednesday, July 12, 1989, 9:00–4:30.

Status: The hearing is to be open to the public.

Matters To Be Discussed: The purpose of this public hearing is to enable the Commission members to learn from various segments of the Job Training Partnership Act (JTPA) system their reactions to a draft Commission paper which examines possible explanations for the under-representation of Hispanics in JTPA. Persons invited to testify represent State and local government agencies that administer JTPA programs and organizations that provide training under JTPA.

Interested parties may submit written comments either prior to or after the official hearing date, but no later than August 15, 1989 to the Commission headquarters. Additional hearings will be conducted across the U.S. over the next few months. It is anticipated that the results of the hearings will be used to develop formal Commission recommendations.

FOR FURTHER INFORMATION CONTACT: Barbara C. McQuown, Director, National Commission for Employment Policy, 1522 K Street, NW., Suite 300, Washington, DC 20005, (202) 724–1545.

SUPPLEMENTARY INFORMATION: The National Commission for Employment Policy was established pursuant to Title IV–F of the Job Training Partnership Act (Pub. L. 97–300). The Act charges the Commission with the broad responsibility of advising the President, and the Congress on national employment issues. Handicapped individuals wishing to attend should contact the Commission so that appropriate accommodations can be made. Minutes of the hearing and written testimony submitted by witness will be available for public inspection at the Commission's headquarters, 1522 K Street, NW., Suite 300, Washington, DC 20005.

Signed at Washington, DC, this 19th day of June

Barbara C. McQuown,

Director, National Commission for Employment Policy.

[FR Doc. 89–14911 Filed 6–22–89; 8:45 am]

BILLING CODE 4510–30–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 40-8684]

Malapai Resources Co.; Final Finding of No Significant Impact Regarding the Termination of the Source and Byproduct Material License for Operation of Malapai Resources Co.; Willow Creek Research and Development Site in Campbell County, Wyo.

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of final finding of no significant impact.

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1. Proposed Action

The proposed administrative action is to terminate the source and byproduct material license authorizing Malapai Resources Company to operate Willow Creek Research and Development Project facility located in Campbell County, Wyoming.

2. Reasons for Final Finding of No Significant Impact

An environmental assessment of the well-field restoration was prepared by the staff at the U.S. Nuclear Regulatory Commission (NRC) and issued by the Commission's Uranium Recovery Field Office, Region IV. The environmental assessment performed by the Commission's staff indicated that the ground water had been successfully restored. Soil sampling at the site has shown that no radiological release took place during the operation. The following documents were used in assessing the environmental impacts at the site:

- Environmental and operational information submitted by the licensee to the NRC during the operation of the research and development facility;
- Discussions and written correspondence with the Wyoming Department of Environmental Quality; and
- Information derived from professional papers, journals and textbooks; U.S. NRC regulations and regulatory guides; Federal, State and local agencies; and independent consultants.

Based on the review of these documents, the Commission has determined that no significant impact will result from the proposed action.

The following statements support the final finding of no significant impact and summarize the conclusions resulting from the environmental studies.

A. Site reclamation and decontamination will be incorporated as a requirement in Malapai Resources Company's commercial solution mining license, which has been amended to cover the site.

B. The ground-water quality at the site has been restored to required concentrations. However, future mining plans associated with the commercial operation of the Christensen Ranch Satellite facility will mine through the restored well fields. Therefore, Malapai Resources will be required to seek regulatory approval of the proposed activities.

In accordance with 10 CFR Part 51.33(a), the Director, Uranium Recovery Field Office, made the determination to issue a final finding of no significant impact in the Federal Register. Concurrent with this finding and in accordance with NRC regulations, Source Material License SUA-1337 will be terminated.

This finding, together with the environmental assessment of ground-water restoration, is available for public inspection and copying at the Commission's Uranium Recovery Field Office at 730 Simms Street, Golden, Clorado, and at the Commission's Public Document Room at 2120 L Street, NW., Washington, DC.

Dated at Denver, Colorado, this 13th day of June 1989.

For the Nuclear Regulatory Commission.

Edward F. Hawkins,

Branch Chief, Uranium Recovery Field Office, Region IV.

[FR Doc. 89-14893 Filed 6-22-89; 8:45 am]

BILLING CODE 7590-01-M

Special Committee to Review the Severe Accident Risks Report; Meeting

The NRC Special Committee to Review the Severe Accident Risks Report (NUREG-1150) will hold its initial meeting on July 10, 11 and 12, 1989, at the Crowne Plaza Holiday Inn, 1750 Rockville Pike, Rockville, Maryland. Notice of establishment of this committee was published in the **Federal Register** on June 22, 1989.

The purpose of the Special Committee is to provide the NRC with a technical peer review of the adequacy of the methods, insights, analyses and conclusions set forth in the April 1989 draft of NUREG-1150 including answers to particular questions posed by the Commission. It is anticipated that the revised draft NUREG-1150 report will be available to the public in late-June 1989.

The entire meeting will be open to the public. Any member of the public wishing to file a written statement with the Committee may send the statement to Mr. Charles B. Bartlett, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

The agenda for the meeting will be essentially as follows, all times being approximate:

Monday, July 10, 1989

- 9:00 a.m. Committee discussion of internal practices and protocols.
- 10:00 a.m. Introductory remarks and report overview by NRC staff (report background, objectives, structure)
- 12:30 p.m. Lunch
- 1:30 p.m. Discussion of Risk Analysis Methods and Key Findings:
- (1) Accident Frequency Analysis
- 3:00 p.m. Break
- 3:15 p.m. Accident Frequency Analysis (contd)
- 4:00 p.m. (2) Discussion of Accident Progression Analysis, including source term, consequence analysis and expert elicitation methods
- 5:30 p.m. Adjournment

Tuesday, July 11, 1989

- 9:00 a.m. Continuation of discussions on Accident Progression Analysis
- 10:00 a.m. Break
- 10:15 a.m. Accident Progression Analysis (contd)
- 12:00 a.m. Lunch
- 1:00 p.m. Continuation of discussions on Accident Progression Analysis
- 2:00 p.m. Uncertainty Analysis
- 3:00 p.m. Break
- 3:15 p.m. Uncertainty Analysis (contd)
- 4:00 p.m. Perspectives on Key Findings
- 4:30 p.m. General Discussion
- 5:30 p.m. Adjournment

Wednesday, July 13, 1989

- 9:00 a.m. Until the conclusion of business, the Committee will discuss and exchange preliminary views regarding the information presented.

Further information regarding the intital meeting can be obtained by calling Mr. Charles B. Bartlett (telephone 301/492-3604).

Dated: June 19, 1989.

John C. Hoyle,

Advisory Committee Management Officer.

[FR Doc. 89-14838 Filed 6-22-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-387 and 50-388]

Pennsylvania Power and Light Co.; Denial of Amendment to Facility Operating License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) has denied a request by Pennsylvania Power and Light Company, (licensee) for an amendment to Facility Operating License Nos. NPF-14 and NPF-22 issued to the licensee for operation of the Susquehanna Steam Electric Station, Unit Nos. 1 and 2, located in Luzerne County, Pennsylvania. Notice of Consideration of Issuance of this amendment was published in the **Federal Register** on August 4, 1988 (53 FR 29404).

The purpose of the licensee's amendment request was to revise Technical Specification (TS) 3/4.3.7.1, changing the requirements of Action 70.

The NRC staff has advised the licensee that the proposed amendment is generic in nature and cannot be processed on a plant-by-plant basis.

The licensee was notified of the Commission's denial of the proposed change by letter dated May 16, 1989.

By July 24, 1989, the licensee may demand a hearing with respect to the denial described above. Any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for hearing or petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date.

A copy of any petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, and to Jay Silberg, Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, Washington, DC 20037, attorney for the licensee.

For further details with respect to this action, see (1) the application for amendment dated April 6, 1988, and (2) the Commission's letter to the licensee dated May 16, 1989.

These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC, and at the Ousterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, Pennsylvania 18701. A copy of item (2) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Document Control Desk.

Dated at Rockville, Maryland, this 16th day of June 1989.

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. 89-14892 Filed 6-22-89; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Services Policy Advisory Committee; Advisory Committee for Trade Policy and Negotiations Intergovernmental Policy Advisory Committee Investment Policy Advisory Committee; Meetings and Determination of Closing of Meetings

The meetings of the Services Policy Advisory Committee to be held July 12, 1989 from 9:30 a.m. to 12:00 Noon, in Washington, DC, the Advisory Committee for Trade Policy and Negotiations to be held July 18, 1989 from 2:00 p.m. to 4:30 p.m., in Washington, DC, the Intergovernmental Policy Advisory Committee to be held July 25, 1989 from 9:30 a.m. to 12:00 Noon, in Washington, DC, the Investment Policy Advisory Committee to be held July 26, 1989 from 9:30 a.m. to 12:00 Noon, in Washington, DC, will include the development, review and discussion of current issues which influence the trade policy of the United States. Pursuant to section 2155(f)(2) of Title 19 of the United States Code, I have determined that these meetings will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining positions.

Additional information can be obtained by contacting Yvonne Beeler, Office of Private Sector Liaison, Office of the United States Trade Representative, Executive Office of the President, Washington, DC 20506.

Carla A. Hills,

United States Trade Representative.

[FR Doc. 89-14888 Filed 6-22-89; 8:45 am]

BILLING CODE 3190-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-26942; File No. SR-Amex-89-14]

Self-Regulatory Organizations; American Stock Exchange, Inc.; Notice of Filing and Order Granting Temporary Accelerated Approval to Proposed Rule Change Relating to Listing of Taxable Municipal Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1) ("Act"), notice is hereby given that on June 14, 1989, the American Stock Exchange, Inc. ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Amex. 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 proposed rule change amends Section 104 (Bonds and Debentures) and 1003 (Application of Policies) of the Amex *Company Guide* to provide listing and delisting guidelines applicable to taxable municipal securities. New Rule 703 would provide that, notwithstanding Part IV of Amex rules, Exchange transactions in taxable municipal securities shall be cleared, compared and settled in accordance with applicable rules of the Municipal Securities Rulemaking Board ("MSRB").

The text of the proposed rule change is available at the Office of the Secretary, Amex, and at the Commission.

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 Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex 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

(1) Purpose

The Exchange is proposing to amend Section 104 of the *Company Guide* to provide that municipal securities, as defined by the Act,[1] are eligible for listing and registration. At this time, the Exchange will consider listing only those securities which are subject to federal taxation.

To be eligible for listing, a municipal security must be rated as investment grade by at least one nationally recognized rating service, and satisfy the Exchange's distribution criteria for bonds of issuers whose corporate securities are not listed on the Exchange, *i.e.*, the size of the issue must be at least $20 million principal amount/aggregate market value, with at least 100 holders. In addition, the Exchange may consider such other information as it deems necessary to evaluate the appropriateness of the issue for exchange trading, including the financing structure and/or arrangement of the issuer.

Municipal securities will be assigned to a specialist unit and traded in accordance with all Amex regulations otherwise applicable to the trading of corporate bonds. As with corporate bonds, trade reports and quotation information will be disseminated over Network B. However, to assure uniformity of practice within the securities industry, proposed Rule 703 provides that all aspects of the trade reconciliation process, including comparison, settlement, and clearing, will be governed by the applicable requirements of the MSRB.[2]

Further, the proposed rule changes are not intended to otherwise alter the existing regulatory framework and oversight applicable to municipal securities trading.[3]

Municipal securities will be subject to the same original and annual listing fees as apply to corporate debt securities.

Finally, the Exchange is proposing to amend its delisting guidelines to provide that a municipal security would be subject to delisting in the event it were no longer rated as investment grade by a nationally recognized rating service.

(2) Basis

The proposed rule change is consistent with section 6(b) of the Act in general and furthers the objectives of section 6(b)(5) in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in, securities, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a securities exchange, and, in particular, the requirements of section 6 and the rules and regulations thereunder. Only taxable municipal bond issuers that qualify under the Amex's existing non-listed corporate issuer distribution criteria will be considered for listing on the Exchange. These criteria, along with any other relevant information in determining whether the issue is appropriate for exchange trading, should ensure that only municipal bond issues that can support a liquid trading market will be listed on the Exchange. Moreover, the regulatory scheme in place for municipal securities now would continue to apply to Amex-listed municipal securities, except that the Amex surveillance program would cover the trading of the listed securities.

The Amex has requested that the proposed rule change be given accelerated effectiveness pursuant to section 19(b)(2) of the Act for a period of 120 days. During this period, Amex would be able to list qualifying municipal securities. Also during this period, Amex will file an identical proposed rule change requesting permanent approval of the listing of municipal securities that would be subject to the full notice and comment period.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of the proposal in the **Federal Register**. While the Commission is sensitive to concerns raised by granting approval to a proposal to list a new product before the expiration of the comment period, the Commission believes that accelerated approval is appropriate in this instance because, during the period of this temporary authorization, Amex trading will be subject to the traditional regulatory structure applicable to municipal securities. Moreover, the securities to be listed by the Amex are not a new product and indeed are comparable in all material respects to other municipal securities that are currently traded in other established and regulated markets. In addition, Amex-listed municipal securities will be traded like other Amex-listed bonds and will be subject to applicable MSRB rules.

Finally, because certain municipal securities for which a listing application is currently pending are likely to be issued prior to the thirtieth day following publication of notice of the proposed rule change, it is necessary to inform prospective issuers that their securities are eligible for listing and that the Exchange has in place guidelines and procedures applicable to such securities.

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 Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the

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[1] *See* Section 3(a)(29) of the Act, 15 U.S.C. 78c(a)(29) (1982).

[2] MSRB Rule G–3 provides specific qualification requirements for municipal securities principals and representatives. In light of the Amex's qualification requirements for specialists, the Commission believes it is appropriate solely for purposes of this temporary 120-day approval period for the Amex to rely on these requirements for its specialists in lieu of the Rule G–3 standards. It is important, however, that any specialist selected by the Amex for the listed municipal securities be familiar with the characteristics of municipal securities.

[3] The National Association of Securities Dealers ("NASD") has the authority to enforce the MSRB rules. The Commission notes that the Amex also will be responsible for enforcing MSRB rules for the listed municipal securities. The Amex enforcement in this regard will not preempt or limit in any manner the NASD's authority to act in this area.

Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing also will be available for inspection and copying at the principal office of the above-referenced self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by July 14, 1989.

It therefore is ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change is approved for a 120-day period ending on October 14, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Dated June 16, 1989.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 89-14912 Filed 6-22-89; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-17011; 812-7298]

The Lincoln National Life Insurance Co., et al.

June 15, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("1940 Act").

Applicants: The Lincoln National Life Insurance Company ("LNL"); Lincoln National Variable Annuity Account H ("Variable Account"); and American Funds Distributors, Inc. ("AFD").

Relevant 1940 Act Sections: Exemption requested under section 6(c) from sections 26(a)(2) and 27(c)(2).

Summary of Application: Applicants seek an order to the extent necessasry to permit LNL to deduct mortality and expense risk charges from the assets of the Variable Account.

Filing Date: The application was filed on April 17, 1989 and an amendment was filed on May 31, 1989.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m. on July 10, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, in the case of an attorney-at-law, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Lincoln National Life Insurance Company, 1300 South Clinton Street, Fort Wayne, Indiana 48801; American Funds Distributors, Inc., 333 South Hope Street, Los Angeles, CA 90071.

FOR FURTHER INFORMATION CONTACT: Heidi Stam, Staff Attorney (202) 272-3017, or Clifford E. Kirsch, Special Counsel (202) 272-2061 (Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 253-4300).

Applicants' Representation

1. The Variable Account was established in connection with the proposed issuance of flexible premium variable annuity contracts ("Contracts").

2. The Variable Account will invest in shares of the American Variable Insurance Series ("Series Fund"). The Series Fund is an open-end, diversified management investment company with a number of series, or portfolios. The Variable Account has a number of subaccounts, each of which invests solely in a specific corresponding portfolio of the Series Fund.

3. LNL will deduct a contract maintenance charge of $35 per year to compensate LNL for administrative services provided to contract owners. LNL also deducts an administrative expense charge at an effective annual rate of .10% of the net assets of the Variable Account. LNL does not anticipate any profits from these charges.

4. A contingent deferred sales charge of up to 6% of purchase payments is imposed on certain full surrenders or partial withdrawals under the Contracts.

5. The administrative and contingent deferred sales charges under the Contracts may be waived or reduced under certain circumstances which are described more fully in the application.

6. LNL imposes a charge to compensate it for bearing certain mortality and expense risks under the Contracts. This charge is equal to an effective annual rate of 1.25% of the value of the net assets of the Variable Account. Of that amount, approximately .80% is attributable to mortality risks, and approximately .45% is attributable to expense risks.

7. The mortality risk borne by LNL arises from its obligation to make annuity payments regardless of how long all annuitants may live and from its obligation to pay a death benefit that may be higher than the Contract value. LNL's expense risk is that the deductions for administration costs under the Contracts may be insufficient to cover the actual future costs incurred by LNL.

8. If the mortality and expense risk charge is insufficient to cover actual costs and assumed risks, the loss will fall on LNL. Conversely, if the charge is more than sufficient to cover costs, any excess will be profit to LNL. LNL currently anticipates a profit from this charge.

9. LNL does not anticipate that the contingent deferred sales charge will generate sufficient funds to pay the cost of distributing the Contracts. If the distribution charges are insufficient to cover the expenses, the deficiency will be met from LNL's general account which may include amounts derived from the mortality and expense risk charge.

10. LNL states that the mortality and expense risk charge is a reasonable charge to compensate LNL for the risks assumed under the Contracts.

11. LNL represents that the charge of 1.25% for mortality and expense risks is within the range of industry practice with respect to comparable annuity products. This representation is based upon LNL's analysis of publicly available information about similar industry products, taking into consideration such factors as current charge levels, the existence of charge level guarantees, and guaranteed annuity rates. LNL will maintain at its administrative offices, available to the Commission, a memorandum setting forth in detail the products analyzed in the course of, and the methodology and results of, its comparative survey.

12. Applicants acknowledge that any profit realized from the mortality and expense risk charge may be viewed by the Commission as being offset by distribution expenses not reimbursed by the contingent deferred sales charge. LNL has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements will benefit the Variable Account and Contract owners. The basis for such conclusion is set forth in a memorandum which will be maintained by LNL at its administrative offices and will be available to the Commission.

[4] 17 CFR 200.30-3(a)(12) (1988).

13. LNL also represents that the Variable Account will only invest in management investment companies which undertake, in the event such company adopts a plan under Rule 12b–1 to finance distribution expenses, to have a board of directors (or trustees), a majority of whom are not interested persons of the company, formulate and approve any such plan under Rule 12b–1.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89–14849 Filed 6–22–89; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #2358]

Alaska; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on June 10, 1989, I find that all political jurisdictions and Alaska native villages along the Yukon and Kuskokwim Rivers and associated tributaries, in the State of Alaska, constitute a disaster loan area due to damages from flooding beginning on May 1, 1989. Eligible persons, firms, and organizations may file applications for physical damage until the close of business on August 11, 1989, and for economic injury until the close of business on March 12, 1990, at the address listed below: Disaster Area 4 Office, Small Business Administration, P.O. Box 13795, Sacramento, CA 95853–4795, or other locally announced locations. In addition, applications for economic injury from small businesses located in all organized boroughs in the State of Alaska, with the exception of Kodiak Island Borough, may be filed until the specified date at the above location.

The interest rates are:

Homeowners with Credit Available Elsewhere	8.000%
Homeowners with Credit Available Elsewhere	4.000%
Businesses with Credit Available Elsewhere	8.000%
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000%
Businesses and Non-Profit Organizations (EIDL) Without Credit Available Elsewhere	4.000%
Others (Including Non-Profit Organizations) with Credit Available Elsewhere	9.125%

The number assigned to this disaster for physical damage is 235806, and for economic injury the number is 677400.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Date: June 14, 1989.

Bernard Kulik,

Deputy Associate Administrator, for Disaster Assistance.

[FR Doc. 89–14877 Filed 6–22–89; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Areas #2355 & #2356]

Michigan And Contiguous Counties in the State of Indiana; Declaration of Disaster Loan Area

St. Joseph County, and the contiguous counties of Branch, Calhoun, Cass, Kalamazoo, and Van Buren, in the State of Michigan, and Elkhart and Lagrange Counties, in the State of Indiana, constitute a disaster loan area as a result of damages from severe flooding which occurred May 30 through June 4, 1989. Applications for loans for physical damage may be filed until the close of business on August 14, 1989, and for economic injury until the close of business on March 15, 1990, at the address listed below: Disaster Area 2 Office, Small Business Administration, 120 Ralph McGill Blvd., 14th Floor, Atlanta, Georgia 30308, or other locally announced locations.

The interest rates are:

Homeowners With Credit Available Elsewhere	8.000%
Homeowners Without Credit Available Elsewhere	4.000%
Businesses With Credit Available Elsewhere	8.000%
Businesses and Non-Profit Organization Without Credit Available Elsewhere	4.000%
Businesses and Non-Profit Organization (EIDL) Without Credit Available Elsewhere	4.000%
Others (Including Non-Profit Organizations) With Credit Available Elsewhere	9.125%

The numbers assigned to this disaster for the State of Michigan are 235506 for physical damage and 677000 for economic injury. For Indiana the numbers are 235606 for physical damage and 677100 for economic injury.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Date: June 15, 1989.

Susan Engeleiter,

Administrator.

[FR Doc. 89–14878 Filed 6–22–89; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Area #2357]

Ohio (And Contiguous Counties in the State of Indiana); Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on June 10, 1989, I find that the Counties of Butler, Cuyahoga, Geauga, Greene, Lake Lorain, Mercer, Montgomery, Preble, and Warren, in the State of Ohio, constitute a disaster loan area due to severe storms and flooding beginnng on May 23, 1989. Eligible persons, firms, and organizations may file applications for physical damage until the close of business on August 11, 1989, and for economic injury until the close of business on March 12, 1990, at the address listed below: Disaster Area 2 Office, Small Business Administration, 120 Ralph McGill Blvd., 14th Floor, Atlanta, Georgia 30308, or other locally announced locations. In addition, applications for economic injury from small businesses located in the contiguous counties of Ashland, Astabula, Auglaize, Clark, Clermont, Clinton, Darke, Erie, Fayette, Hamilton, Huron, Madison, Medina, Miami, Portage, Shelby, Summit, Trumbull, and Van Wert, in the State of Ohio, and the counties of Adams, Dearborn, Franklin, Jay, Union, and Wayne, in the State of Indiana, may be filed until the specified date at the above location.

The interest rates are:

Homeowners With Credit Available Elsewhere	8.000%
Homeowners Without Credit Available Elsewhere	4.000%
Businesses With Credit Available Elsewhere	8.000%
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000%
Businesses and Non-Profit Organizations (EIDL) Without Credit Available Elsewhere	4.000%
Others (Including Non-Profit Organizations) With Credit Available Elsewhere	9.125%

The number assigned to this disaster for physical damage is 235706 for the State of Ohio. For economic injury the numbers are 677200 for the State of Ohio, and 67730 for the State of Indiana.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Date: June 14, 1989.

Bernard Kulik,

Deputy Associate Administrator for Disaster Assistance.

[FR Doc. 89–14880 Filed 6–22–89; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Area No. 2351; Amendment No. 1]

North Carolina (And Contiguous Counties in the States of South Carolina & Virginia); Declaration of Disaster Loan Area

The above-numbered Declaration (54 FR 24068) is hereby amended in accordance with the Notice of Amendment to the President's declaration, dated May 21, 1989, to include Anson and Rutherford Counties, and the contiguous counties of Buncombe, Henderson, McDowell, and Richmond, in the State of North Carolina, and Marlboro County, in the State of South Carolina, as a result of damages from tornadoes which occurred on May 5, 1989.

All other information remains the same; i.e., the termination date for filing applications for physical damage is the close of business on July 17, 1989, and for economic injury until the close of business on February 20, 1990.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Date: May 25, 1989.

Bernard Kulik,

Deputy Associate Administrator for Disaster Assistance.

[FR Doc. 89-14879 Filed 6-22-89; 8:45 am]

BILLING CODE 8025-01-M

[Delegation of Authority No. 1-A (Revision 16)]

Delegation of Authority; General Counsel, et al.

Delegation of Authority No. 1-A (Revision 15) is hereby revised to read as follows:

(a) Pursuant to authority vested in me by the Small Business Act, of 1958, 72 Stat. 384, as amended, authority is hereby delegated to the following officials in the following order:

(1) General Counsel.

(2) Associate Deputy Administrator for Management and Administration.

(3) Associate Deputy Administrator for Special Programs to perform, in the event of the absence or incapacity of the Administrator and the Deputy Administrator any and all acts which the Administrator is authorized to perform, including but not limited to authority to issue, modify, or revoke delegations of authority and regulations, except exercising authority under sections 9(d) and 11 of the Small Business Act, as amended.

(b) An individual acting in any of the positions in paragraph (a) remains in the line of succession only if he or she has been designated acting by the Administrator or Acting Administrator due to a vacancy in the position.

(c) This delegation is not in derogation of any authority residing in the above listing officials relating to the operations of their respective programs nor does it affect the validity of any delegations currently in force and affect and not revoked or revised herein.

EFFECTIVE DATE: June 23, 1989.

Dated: June 16, 1989.

Susan Engeleiter,

Administrator.

[FR Doc. 89-14881 Filed 6-22-89; 8:45 am]

BILLING CODE 8025-01-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 June 16, 1989

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. 46342

Date Filed: June 11, 1989.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: July 10, 1989.

Description: Application of American Airlines, Inc. pursuant to Section 401 of the Act and Subpart Q of the Rules of Practice applies for amendment of its certificate of public convenience and necessity for Route 137 so as to authorize all-cargo service between the United States and the Federal Republic of Germany.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 89-14841 Filed 6-22-89; 8:45 am]

BILLING CODE 4910-62-M

Coast Guard

[CGD 89-049]

Lower Mississippi River Waterway Safety Advisory Committee Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App I) notice is hereby given of a meeting of the Lower Mississippi River Waterway Safety Advisory Committee. The meeting will be held on Tuesday, July 11, 1989, in the 29th Floor Boardroom of the World Trade Center, 2 Canal Street, New Orleans, LA at 9:00 a.m. The agenda for the meeting consists of the following items:

1. Call to Order.

2. Minutes of the 18 April 1989, meeting.

3. Report by the Coast Guard on items discussed from 18 April 1989, meeting.

a. Report and comments from the Coast Guard concerning the grounding of the M/V Marshall Konyev.

b. Proposal for definition of Channel 67 radio boundaries.

c. Update on Anchorage/Revetment Study.

d. Formation of Navigational Subcommittee to partiicpate in Waterways Anaylsis Management Study.

4. New Business

5. Adjournment

The purpose of this Advisory Committee is to provide consultation and advice to the Commander, Eight Coast Guard District on all areas of maritime safety affecting this waterway.

The meeting is open to the public. Members of the public may present written or oral statements at the meeting.

Additional information may be obtained from Commander G. A. Bird, USCG, Executive Secretary, Lower Mississippi River Waterway Safety Advisory Committee, c/o Commander Coast Guard District (oan) Room 1141, Hale Boggs Federal Building, 500 Camp Street, New Orleans, LA 70130-3396, telephone number (504) 589-6234.

Dated: June 1, 1989.

W.F. Merlin,

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

[FR Doc. 89-14873 Filed 6-22-89; 8:45 am]

BILLING CODE 4910-14-M

Federal Aviation Administration

Noise Exposure Map; Waukegan Regional Airport; Waukegan, IL

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by the Waukegan Port District for Waukegan Regional Airport under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 CFR Part 150 are in compliance with applicable requirements.

EFFECTIVE DATE: The effective date of the FAA's determination on the noise exposure maps is June 5, 1989.

FOR FURTHER INFORMATION CONTACT: Prescott C. Snyder, Federal Aviation Administration, Great Lakes Region, Airports Divison, AGL–611.1, 2300 East Devon Avenue, Des Plaines, Illinois 60018, (312) 694–7538.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Waukegan Regional Airport are in compliance with applicable requirements of Part 150, effective June 5, 1989.

Under section 103 of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict noncompatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) Part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses.

The FAA has completed its review of the noise exposure maps and related description submitted by the Waukegan Port District. The specific maps under consideration are the noise exposure maps: 1986 Noise Exposure Map (Figure A), page v and 1991 Noise Exposure Map (Figure B), page vi (both showing unabated contours), in the submission. The FAA has determined that these maps for Waukegan Regional Airport are in compliance with applicable requirements. This determination is effective on June 5, 1989. FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in Appendix A of FAR Part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under Part 150 or through FAA's review of noise exposure maps.

Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator which submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR Part 150, that the statutorily required consultation has been accomplished.

Copies of the noise exposure maps and of the FAA's evaluation of the maps are available for examination at the following locations:

Federal Aviation Administration, 800 Independence Avenue SW., Room 617, Washington, DC 20591

Federal Aviation Administration, Great Lakes Region, Airports Divison Office, 2300 East Devon Avenue, Room 269, Des Plaines, Illinois 60018

Federal Aviation Administration, Chicago Airports District Office, 2300 East Devon Avenue, Room 268, Des Plaines, Illinois 60018

Waukegan Port District, Administrative Offices, 55 South Harbor Place, P.O. Box 620, Waukegan, Illinois 60079.

Questions may be directed to the individual named above under the heading **FOR FURTHER INFORMATION CONTACT.**

Issued in Des Plaines, Illinois on June 5, 1989.

Larry H. Ladendorf,

Manager, Planning/Programming Branch, Airports Division, Great Lakes Region.

[FR Doc. 89–14902 Filed 6–22–89; 8:45 am]

BILLING CODE 4910–13–M

Maritime Administration

[Docket S–850]

Ocean Chemical Carriers, Inc., et al.; Application for Permission To Operate Five T–5 Tankers in the Domestic Intercoastal and Coastwise Trades

By letter dated June 15, 1989, Ocean Chemical Carriers, Inc. and Ocean Transport, Inc. (Applicants) requested written permission pursuant to section 805(a) of the Merchant Marine Act 1936, as amended (Act) for affiliated companies to operate five T–5 petroleum product tankers under long-term charter to the Military Sealift Command (MSC) in the domestic intercoastal and coastwise trades. In 1984, Ocean Carriers, Inc. received a similar permission and the Applicants desire approval for additional affiliations.

The JULIUS HAMMER and the FRANCES HAMMER (Vessels) are receiving subsidy pursuant to Operating-Differential Subsidy Agreement (ODSA), Contract MA/MSB–440 and MA/MSB–442, respectively. Seabulk Transmarine I, Inc. is currently operating the JULIUS HAMMER under a Sub-Bareboat Charter Agreement with Suwannee River Lines, Inc. Seabulk Transmarine III, Inc. is operating the FRANCES HAMMER under a Sub-Bareboat Charter Agreement with Suwannee River Phosphate Lines, Inc. The Vessels are in turn each time chartered by the Seabulk companies to Suwannee River Chartering, Inc. The Time Charter Agreements provide Suwannee River Chartering, with the consent of Suwannee River Lines and Suwannee River Phosphate Lines, with the contractual right to appoint a successor operator for the Vessels. Suwannee River Chartering has made a decision to seek a new operator for the Vessels, and has formally requested all necessary

approvals of the Act from the Maritime Administration. The Applicants have reached an agreement with Suwannee River Chartering to assume the operation of the Vessels from the Seabulk companies.

The Applicants aver that they are not affiliated in any manner with Suwannee River Chartering. The Applicants note that they are, however, wholly owned by Joe Vaughan. Mr. Vaughan in turn holds the majority interest in the five tanker companies each currently operating T–5 petroleum product tankers for the MSC (T–5 Operators). The five companies operating the T–5 tankers are (1) Ocean Freedom Shipping, Inc., M/V PAUL BUCK; (2) Ocean Triumph Shipping, Inc. M/V SAMUEL COBB; (3) Ocean Champion Shipping, Inc., M/V GUS W. DARNELL; (4) Ocean Star Shipping, Inc., M/V GIANELLA; and (5) Ocean Spirit Shipping, Inc., M/V MATTHIESEN. An affiliation would therefore exist between the Applicants as new subsidized operators and the T–5 Operators.

The Maritime Administrator has already granted section 805(a) permission for affiliated companies owned by Mr. Vaughan to operate both subsidized vessels and the T–5 tankers (Docket S–729). In 1984, Ocean Carriers received permission from the Maritime Administrator under section 805(a) and section II–13(a) of ODSA Contract MA/MSB–167 to enable the affiliated T–5 Operators to operate the T–5 tankers under long-term charter to the MSC in the domestic intercoastal and coastwise trade. The Maritime Administrator granted 805(a) permission after determining that such approval would not result in unfair competition to coastwise or intercoastal operators, or cause prejudice to the objects and policies of the Act. Additionally, according to the Applicants, the corporate structures of the companies were modified to eliminate the possibility of subsidy diversion.

The Applicants state that there has been no change of circumstances since the Maritime Administrator granted section 805(a) permission to Ocean Carriers, Inc. The operation of the Vessels, according to the Applicants, would not create any new issues relating to affiliation since the coastwise vessels in question remain the T–5 tankers. The domestic operations of the T–5 Operators would continue to be totally separate from the Applicants' proposed subsidized operations.

The T–5 tankers are under long-term charter to the MSC. The T–5 Operators do not have the right to carry private commercial cargo in either the domestic or foreign commerce. The Applicants emphasize that this eliminates any possibility of competition with coastwise tanker operators, rendering moot all section 805(a) issues relating to the objects and policies of the Act.

The Applicants contend that the facts underlying the instant section 805(a) request are essentially identical in form to those involving Ocean Carriers, Inc.'s existing section 805(a) permission. The Applicants therefore request section 805(a) approval with respect to the T–5 tankers on an expedited basis.

Any person, firm, or corporation having any interest in the application for section 805(a) permission and desiring to submit comments concerning the application must file written comments in triplicate, to the Secretary, Maritime Administration, Room 7300, Nassif Building, 400 Seventh Street SW., Washington, DC 20590, by the close of business 5:00 p.m. on June 30, 1989. If such comments deal with section 805(a) issues, they should be accompanied by a petition for leave to intervene. The petition should state clearly and concisely the grounds of interest and the alleged facts relied on for relief.

If no petitions for leave to intervene on section 805(a) issues are received within the specified time, or if it is determined that petitions filed do not demonstrate sufficient interest to warrant a hearing, the Maritime Administration will take such action as may be deemed appropriate. In the event petitions regarding the relevant section 805(a) issues are received from parties with standing to be heard, a hearing will be held, the purpose of which will be to receive evidence under section 805(a) relative to whether the proposed operations (a) could result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or international service, or (b) would be prejudicial to the objects and policy of the Act relative to domestic operations.

(Catalog of Federal Domestic Assistance Program Nos. 20.804 Operating-Differential Subsidies (ODS))

By Order of the Maritime Administrator.

Date: June 20, 1989.

James E. Saari,

Secretary.

[FR Doc. 89–14968 Filed 6–21–89; 8:45 am]

BILLING CODE 4910–81–M

DEPARTMENT OF THE TREASURY

Fiscal Service

[Dept. Circ. 570, 1988—Rev., Supp. No. 18]

Surety Companies Acceptable on Federal Bonds; Termination of Authority; Industrial Indemnity Co., et al.

In the matter of Industrial Indemnity Co., Industrial Indemnity Co. of the Northwest, International Insurance Co., North River Insurance Co., United States Fire Insurance Co.

Notice is hereby given that the Certificates of Authority issued by the Treasury to the companies names below, under the United States Code, Title 31, Section 9304–9308, to qualify as an acceptable surety on Federal bonds, are terminated effective today.

Company name	Last listed as an acceptable surety 7/1/88 at
Industrial Indemnity Co	53 FR 25066
Industrial Indemnity Co. of the Northwest.	53 FR 25066
International Insurance Co	53 FR 25066
North Rivere Insurance Co	53 FR 25070
United States Fire Insurance Co	53 FR 25078

With respect to any bonds currently in force, bond-approving officers for the Government may let such bonds run to expiration and need not secure new bonds. However, no new bonds should be accepted from the Company. In addition, bonds that are continuous in nature should not be renewed.

Questions concerning this notice may be directed to the Department of the Treasury, Financial Management Service, Finance Division, Surety Bond Branch, Washington, DC 20227, telephone (202) 287–3916.

Dated: June 16, 1989.

Mitchell A. Levine,

Assistant Commissioner, Comptroller Financial Management Service.

[FR Doc. 89–14882 Filed 6–22–89; 8:45 am]

BILLING CODE 4810–35–M

UNITED STATES INFORMATION AGENCY

Receipt of Cultural Property Request From the Government of Peru and Amendment to Agenda of Meeting of the Cultural Property Advisory Committee

Pursuant to section 303(f)(1) of the Convention on Cultural Property Implementation Act (19 U.S.C.

2602(f)(1)), notice is hereby given that the United States Government is in receipt of a request under section 303(a)(3) from the Government of Peru, a State Party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The request from Peru is for U.S. import restrictions on certain archaeological material to assist Peru in protecting its cultural patrimony.

Peru's request will be transferred to the Cultural Property Advisory Committee for review at its meeting on June 22. Portions of the Cultural Property Advisory Committee meeting to be held in Room 840, 301 Fourth Street SW., was previously announced as open to the public; portions of the meeting were announced as closed to the public for reasons specified in **Federal Register** announcement of June 12, 1989, Vol. 54, No. 111, page 24977.

Also, public notice is given that due the receipt of an emergency request from the Government of Peru, the agenda of the Committee's meeting on June 23 will be altered so that the Committee may review the request.

9:00 am–9:30 am—Referral of request to the Cultural Property Advisory Committee by USIA Deputy Director Stone—closed to the public

9:30 am–10:30 am—Reports by the Legal and Communications Subcommittees—open to the public

10:30 am–11:00 am—Report of the Drafting Subcommittee—closed to the public

11 am–until adjournment—Review of Peru's request by the Committee—closed to the public

Those portions of the Committee's meeting involved with reviewing Peru's request will be closed to the public in accordance with the provisions of section 10(d) of the Federal Advisory Committee Act and 5 U.S.C. 552b(c)(9)(B). The session will be closed because the discussion will involve investigative techniques and information the premature disclosure of which would be likely to frustrate significantly implementation of proposed actions and policies. Disclosure of information at this time identifying specific cultural property is likely to frustrate the possible imposition of import restrictions on such cultural property. The Committee will discuss recommendations to the President as to appropriate U.S. action regarding Peru's request under the terms of the Convention on Cultural Property Act. For the foregoing reasons the closing of the meeting is authorized under section 10(d) of the FACA and 5 U.S.C. 552b(c)(9)(B).

Dated: June 21, 1989.

Marvin L. Stone,

Deputy Director, United States Information Agency.

Appendix—Determination To Close Portions of Meeting of the Cultural Property Advisory Committee

June 23, 1989.

Based on information provided to me by the Cultural Property Advisory Committee, I hereby determine that certain portions of the meeting of the Cultural Property Advisory Committee scheduled on June 23 may be closed to the public.

Due to the receipt of an emergency request from the Government of Peru, the Committee has requested that those portions of its meeting on June 23 be closed to the public that will involve discussion of investigative techniques and procedures for the handling of a State Party request submitted by the Government of Peru. There will be discussion of information, the premature disclosure of which, would be likely to frustrate significantly implementaiton of proposed actions and policies (5 U.S.C. 552b(c)(9)(B)).

Dated: June 21, 1989.

Marvin L. Stone,

Deputy Director, United States Information Agency.

[FR Doc. 89–15115 Filed 6–21–89; 4:41 pm]

BILLING CODE 8230–01–M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 120
Friday, June 23, 1989

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 54 FR 24464.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 11:00 a.m., June 27, 1989.

CHANGES IN THE AGENDA: The Commodity Futures Trading Commission has cancelled the rule enforcement review previously scheduled for the closed meeting at 11:00 a.m., June 27, 1989. This review will be rescheduled for a July meeting.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, Secretary of the Commission

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 89-15036 Filed 6-21-89; 1:01 pm]

BILLING CODE 6351-01-M

UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES

Meeting Notice

TIME AND DATE: 8:00 a.m., July 10, 1989.

PLACE: Uniformed Services University of Health Sciences, Room D3-001, 4301 Jones Bridge Road, Bethesda, Maryland 20814-4799.

STATUS: Open—under "Government in the Sunshine Act" (5 U.S.C. 552b(e)(3)).

MATTERS TO BE CONSIDERED:

8:00 a.m. MEETING—BOARD OF REGENTS

(1) Approval of Minutes—April 17, 1989; (2) Faculty Matters; (3) Report—Admissions; (4) Report—Associate Dean for Operations; (5) Report—Dean, Military Medical Education Institute; (6) Report—President, USUHS; (7) Comments—Members, Board of Regents; (8) Comments—Chairman, Board of Regents

New Business

SCHEDULED MEETINGS: October 16, 1989.

CONTACT PERSON FOR MORE INFORMATION: Charles R. Mannix, Executive Secretary of the Board of Regents, 202/295-3028.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

June 21, 1989.

[FR Doc. 89-15050 Filed 6-21-89; 1:02 pm]

BILLING CODE 3810-01-M

FEDERAL MARITIME COMMISSION

TIME AND DATE: 10:00, June 28, 1989.

PLACE: Hearing Room One—1100 L Street, NW., Washington, DC 20573-0001.

STATUS: Closed.

MATTERS TO BE CONSIDERED: 1. Service Contract Docket No. 89-05—U.S. Atlantic & Gulf/Australia-New Zealand Conference Correction of a Clerical Error in Confidential Service Contract S.C. No. 61.

CONTACT PERSON FOR MORE INFORMATION: Ronald D. Murphy, Assistant Secretary, (202) 523-5725.

Ronald D. Murphy,

Assistant Secretary.

[FR Doc. 89-14996 Filed 6-21-89; 10:55 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, June 28, 1989.

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: June 20, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-14991 Filed 6-21-89; 10:01 am]

BILLING CODE 6210-01-M

SECURITIES AND EXCHANGE COMMISSION

Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of June 26, 1989.

An open meeting will be held on Wednesday, June 28, 1989, at 1:00 p.m., in Room 1C30. Closed meetings will be held on Friday, June 30, 1989 at 10:00 a.m. and 2:00 p.m.

The Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meetings. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at closed meetings.

Chairman Ruder, as duty officer, voted to consider the items listed for the closed meetings in closed session.

The subject matter of the open meeting scheduled for Wednesday, June 28, 1989, at 1:00 p.m., will be:

1. Consideration of whether to adopt Rules 61-68 under the Rules of Practice regarding the payment of bounties in connection with insider trading litigation as authorized by Section 21A(e) of the Securities Exchange Act of 1934. For further information, please contact Kenneth Hall at (202) 272-2533.

2. Consideration of whether to adopt Rule 15c2-12, which would require underwriters of municipal securities to obtain review, and disseminate an official statement concerning the municipal securities they underwrite, and to modify the list of factors included in the Commission's interpretation of the responsibilities of underwriters of municipal securities that was published in Securities Exchange Act Release No. 26100 (Sept. 22, 1988), 53FR 37778 (1988). The commission will also consider whether to issue a release delegating authority to the Division of Market Regulation to grant exemptions from the rule. For further information, please contact Edward L. Pittman at (202) 272-2848.

3. Consideration of whether to adopt rule 15a-6, which would provide exemptions from broker-dealer registration for foreign broker-dealers engaged in specified activities involving the U.S. securities markets and certain institutional investors. In addition, the Commission will consider issuing a concept release that solicits comment on a conceptual approach to regulation of foreign broker-dealers that would recognize foreign regulation of broker-dealers. The Commission will also consider recommending to the U.S. Department of Treasury that consideration be given to similar regulation of foreign government securities broker-dealers. For further information, please contact John

Polanin, Jr. or Dan Gray at (202) 272–2848 regarding Rule 15a–6 or the proposed concept release, respectively.

4. Consideration of whether to publish for comment (1) proposed amendments to Form N–2, the registration form for closed-end management investment companies under the Securities Act of 1933 and the Investment Company Act of 1940, that would establish a two-part format for disclosure to prospective investors and update current disclosure requirements; (2) related rule amendments; and (3) guidelines to amend Form N–2. For further information, please contact Kenneth J. Berman at (202) 272–2107.

5. Consideration of whether to adopt Rule 11a–3 under the Investment Company Act of 1940. Rule 11a–3 would allow registered open-end investment companies ("funds") and their principal underwriters to make certain exchange offers to fund shareholders and to shareholders of other funds in the same group of funds. For further information, please contact Wendy B. Finck at (202) 272–3045.

The subject matter of the closed meeting scheduled for Friday, June 30, 1989, at 10:00 a.m., will be:

Settlement of injunctive actions.
Settlement of administrative proceedings of an enforcement nature.
Institution of injunctive actions.
Institution of administrative proceedings of an endorcement nature.
Discussion of investigation.

The subject matter of the closed meeting scheduled for Friday, June 30, 1989, at 2:00 p.m., will be:

Administrative proceeeings of an enforcement nature.
Litigation matters.
Opinion.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Anthony Ain at (202) 272–2400.

Jonathan G. Katz,

Secretary.

June 21, 1989.

[FR Doc. 89–15110 Filed 6–21–89; 3:58 pm]

BILLING CODE 8010–01–M

Corrections

Federal Register
Vol. 54, No. 120
Friday, June 23, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 51

Shelled Pistachio Nuts; Grade Standards

Correction

In proposed rule document 89-14137 beginning on page 25281 in the issue of Wednesday, June 14, 1989, make the following correction:

On page 25282, in the second column, in § 51.2559(a), in the fifth line, "paragraph" should read "subparagraph".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 94

[Docket No. 89-013]

Importation of Eggs Other than Hatching Eggs

Correction

In rule document 89-8775 beginning on page 14792 in the issue of Thursday, April 13, 1989, make the following correction:

In the second column, under **DATES** in the first line, "April 12, 1989" should read, "April 13, 1989."

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP89-1536-000, et al.]

Trunkline Gas Co. et al.; Natural Gas Certificate Filings

Correction

In notice document 89-14065 beginning on page 25328 in the issue of Wednesday, June, 14, 1989, make the following correction:

On page 25332 in the first column, under number 13. "[Docket No. CP89-156-000]" should read, "[Docket No. CP89-1546-000]".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[FRL-3527-7; KY-050]

Designation of Areas for Air Quality Planning Purposes; Kentucky: Redefinition of Attainment Area From Rest of State to County-by-County

Correction

In the issue of Monday, May 22, 1989, on page 22054-22060, beginning in the second column, in the correction to rule document 89-4297, a portion of the text that appeared is inaccurate. In the third column, item 4 is corrected to read as follows:

4. On the same page, in the table, in the same column, remove the "X" that appears in the eleventh line from the bottom (corresponding with McCreary County).

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPP-30000/40A; FRL-3575-4]

Preliminary Determination To Cancel Certain Daminozide Product Registrations; Availability of Technical Support Document and Draft Notice of Intent To Cancel

Correction

In notice document 89-12560 beginning on page 22558 in the issue of Wednesday, May 24, 1989, make the following corrections:

1. On page 22564, in the third column, the second paragraph should be designated "(i)".

2. On the same page, in the same column, in the same paragraph, in the sixth line, insert "milk," after "meat,".

3. On page 22567, in the second table, in the third column, the first entry should read "1.8×10^{-9}".

4. On the same page, in the same table, in the same column, the next to the last entry should read "0.84×10^{-9}".

5. On the same page, in the second column, in the fourth line from the bottom, "very" should read "vary".

6. On page 22568, in the first table, in the heading, "Subjects" should read "Subsets".

7. On the same page, in the same table, in the third column, the last entry should read "5.9×10^{-7}".

8. On the same page, in the second column, in the equation, the second line should read "$70\times Q^{*}_{1}$".

9. On page 22571, in the 3rd column, in the 10th line "1988" should read "1989".

10. On page 22573, in the first column, under **VI. References**, in item (7), in the fourth line "Research" was misspelled.

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-51732; FRL-3577-7]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

Correction

In notice document 89-12788 beginning on page 22944 in the issue of Tuesday, May 30, 1989, make the following corrections:

1. On page 22946, in the first column under P 89-608, in the fourth line, "treatment" was misspelled.

2. On page 22947, in the second column, under P 89-641, in the second line "(G)" should read "(S)".

3. On the same page and same column, under P 89-642, the eighth line should read, "LD50>10G/KG species(Rat). Eye".

4. On the same page, in the third column, under P 89-651, the second line should read "*Chemical*(S) Phenol, 4, 4''-(oxybis(".

5. Also under P 89-651, the eighth line should read "LD50>5.0 G/KG species(Rat). Static".

6. On the same page, in the third column, under P 89-652, in the third line "Basse" should read "Based".

7. On page 22948, in the first column under P 89-655, the sixth line, should read "LD>5,000 MG/KG species(Rat). Eye".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 89F-0157]

Ciba-Geigy Corp.; Filing of Food Additive Petition

Correction

In notice document 89-12979 appearing on page 23540 in the issue of Thursday, June 1, 1989, make the following correction:

In the second column, in the second line, the zip code should read "10532-2188".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Consumer Participation; Open Meetings

Correction

In notice document 89-13350 appearing on page 24265 in the issue of Tuesday, June 6, 1989, make the following correction:

On page 24265, in the second column, under **FOR FURTHER INFORMATION CONTACT**, at the end of the last line insert the following: "(617) 279-1479."

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 89F-0167]

Michelman, Inc.; Filing of Food Additive Petition

Correction

In notice document 89-12980 appearing on page 23540 in the issue of Thursday, June 1, 1989, make the following corrections:

1. In the second column, under **SUMMARY**, in the seventh line, "ethylene" was misspelled.

2. In the same column, under **SUPPLEMENTARY INFORMATION**, in the fifth line, the parenthetical should read "(FAP 9B4146)".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 412

[BERC-630-P]

RIN 0938-AE02

Medicare Program; Changes to the Inpatient Hospital Prospective Payment System and Fiscal Year 1990 Rates

Correction

In proposed rule document 89-10781 beginning on page 19636 in the issue of Monday, May 8, 1989, make the following corrections:

1. On page 19691, in the last column, in the space above the second entry from the bottom (corresponding with the dotted lines), under "Wage index", insert "1.0521.

2. On page 19692, in the first column, in the second entry from the bottom, remove the asterisk.

3. On the same page, in the last column, the sixth entry, should read "0.9738".

4. On page 19693, in the first page column, under "Wage index",the seventh entry should read "1.0138".

5. On page 19694, in the third page column, under "County", in the fourth entry from the bottom, "VA" should read "WI".

6. On page 19709, in the second page column, under "Description", in the eighth entry, in the last line, "or" should read "and".

7. On the same page, in the same page column, under "Description", in the 12th entry, in the last line, "or" should read "and".

8. On page 19711, in the second page column, under "Description", in the eighth entry, beginning in the first line "hemorrhage" was misspelled.

9. On the same page, in the same page column, under "Description" in the 11th entry, in the first line, "Percutaneous" was misspelled.

10. On the same page, in the same page column, between the 19th and 20th entries insert the following:

"51.85 Endoscopic sphincterotomy and papillotomy Non-OR, 412".

11. On the same page, in the third page column, under "Procedure code", the 13th entry from the bottom, should read "89.10".

12. On the same page, in the same page column, under "Description", in the third entry from the bottom, in the second and third lines, "detoxification" was misspelled.

13. On page 19712, in the 2nd page column, under "Description", in the 11th entry from the bottom, in the 2nd line, "disease" should read "diseases".

14. On the same page, in the same page column, under "Description", in the eighth entry from the bottom, in the last line, "or" should read "of".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 6696

[CO-930-09-4214-10; C-48465]

Withdrawal of Public Lands and Reserved Minerals for Protection of Scenic and Recreational Values in the Ruby Canyon of the Colorado River; Colorado

Correction

In the issue of Thursday, February 2, 1989, on page 5302 in the third column, a correction to FR Doc. 89-14 appeared. The third item, in the quotation should have read, "Sec. 19, lots 1,3,4, NW¼NE¼, N½SW¼NE¼".

BILLING CODE 1505-01-D

federal register

Friday
June 23, 1989

Part II

General Services Administration

48 CFR Chapter 5

General Services Administration Acquisition Regulation; Reissuance and Revision; Final Rule

GENERAL SERVICES ADMINISTRATION

48 CFR Chapter 5

General Services Administration Acquisition Regulation; Reissuance and Revision

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Final rule.

SUMMARY: The General Services Administration Acquisition Regulation (GSAR), Chapter 5 (APD 2800.12A), is revised to reflect the results of a general review of the entire regulation conducted to assure the regulation is essential to implement Government-wide policies and procedures within GSA, needed to satisfy unique needs of the agency, and to ensure the regulation meets other statutory requirements. The current regulation (APD 2800.12) and Acquisition Circulars AC–88–2, AC–88–3 and AC–89–1 are canceled. The intended effect is to update and improve the regulatory coverage and provide guidance to GSA contracting personnel.

EFFECTIVE DATE: July 1, 1989.

FOR FURTHER INFORMATION CONTACT: Ida Ustad, Director of the Office of GSA Acquisition Policy and Regulations (VP), (202) 566–1224.

SUPPLEMENTARY INFORMATION:

A. Background

In March 1988, the Administrator of the Office of Federal Procurement Policy (OFPP) requested the heads of departments and agencies to review procurement related regulations of their agencies that purportedly implement or supplement the Federal Acquisition Regulation (FAR). The purpose of the review was to assure that agency issued procurement regulations are essential to implement Government-wide policies and procedures within the agency, needed to satisfy the unique needs of the agency, and meet other statutory requirements or limitations. In addition to reviewing the regulation for the purposes outlined by the OFPP, the GSA's review included a general review to update the regulation to reflect current organization titles, to update references to other directives and to ensure that the material was current and still needed. The issuance of the revised regulation represents the culmination of the review project.

B. Public Comments

The revisions to the regulation having a significant cost or administrative impact on contractors or offerors, or having a significant effect beyond the internal operating procedures of GSA were published in the **Federal Register** for public comment. Notices of proposed rulemaking were published in the **Federal Register** on December 24, 1987 (GSAR Notice No. 5–65 regarding utility contracts (52 FR 48729)); January 17, 1989 (GSAR Notice No. 5–230 regarding specifications, standards, purchase descriptions and the acquisition of commercial products (54 FR 1739)); January 17, 1989 (GSAR Notice No. 5–115 regarding the contractor's report of orders received clause for GSA schedule contracts (54 FR 1740)); January 25, 1989 (GSAR Notice No. 5–221 regarding improper business practices and personal conflicts of interest (54 FR 3627)); January 30, 1989 (GSAR Notice No. 5–236 regarding multiyear contracting and options (54 FR 4319)); February 3, 1989 (GSAR Notice No. 5–223 regarding publicizing and response times (54 FR 5516)); February 9, 1989 (GSAR Notice No. 5–227 regarding contractor qualifications and related solicitation provisions and clauses (54 FR 6308)); February 28, 1989 (GSAR Notice Nos. 5–233 and 5–234 regarding bid samples (54 FR 8362)); March 3, 1989 (GSAR Notice Nos. 5–242 and 5–356 regarding foreign acquisition and quality assurance (54 FR 9067)); and March 27, 1989 (GSAR Notice No. 5–228 regarding debarment, suspension and ineligibility (54 FR 12462)). Public comments and comments from various GSA offices have been considered and where appropriate incorporated in the final rule.

C. Executive Order 12291

The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. The exemption applies to this rule.

D. Regulatory Flexibility Act

The GSA indicated in publishing GSAR Notice No. 5–115, regarding the Contractor's Report of Orders Received clause for GSA schedule contracts, that the proposed rule may have an economic effect on a substantial number of small entities and invited comments from the public. No comments were received on the impact of the proposed rule. The final regulatory flexibility analysis has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. Copies of the final regulatory flexibility analysis are available from the office identified above. GSA certifies that the other revisions to the regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

E. Paperwork Reduction Act

All of the information collection requirements contained in the regulation have been submitted to and approved by the Office of Management and Budget under the Paperwork Reduction Act. Section 501.105 of the regulation lists the regulatory citation for each information collection requirement and the related OMB control number.

List of Subjects in 48 CFR Chapter 5

Government procurement.

Dated: June 2, 1989.

Richard H. Hopf, III,

Associate Director for Acquisition Policy.

The General Services Administration, Chapter 5, is revised to read as follows:

CHAPTER 5—GENERAL SERVICES ADMINISTRATION

Subchapter A—General

Subchapter B—Competition and Acquisition Planning

Subchapter C—Contracting Methods and Contract Types

Subchapter D Socioeconomic Programs

SUBCHAPTER A—GENERAL

PART 501—GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION SYSTEM

Authority: 40 U.S.C. 486(c).

Subpart 501.1—Purpose, Authority, Issuance

501.102 Authority.

The General Services Administration Acquisition Regulation (GSAR) is issued and maintained by the Associate Administrator for Acquisition Policy under the authority of the Federal Property and Administrative Services Act of 1949, as amended.

501.103 Applicability.

(a) This regulation applies to contracts for supplies or services (including construction).

(b) Parts 501, 502, 503, 505, 506, 517, 533, 552, 553, 570 and Subparts 504.70, 507.1, 509.4, 515.1, 519.6, 519.7, 532.8, 532.9 and 543.1 apply to leases of real property. Other provisions do not apply to leases of real property unless a specific cross-reference is made in Part 570.

(c) This regulation applies to the disposal of real and personal property only to the extent explicitly stated. The portions of Subpart 501.6 regarding the Contracting Officer Warrant Program and legal review and assistance, and Subpart 504.70 on the uniform procurement instrument identification system apply to the disposal of real or personal property. Subpart 509.4 regarding suspension and debarment of contractors is applicable to contracts for the disposal of personal property (see FPMR Subpart 101–45.6).

(d) This regulation may deviate from the Federal Acquisition Regulation (FAR) when authorized. (See FAR Subpart 1.4 and Subpart 501.4.) When the GSAR does not implement the FAR, the FAR alone governs.

501.104 Issuance.

501.104–1 Publication and code arrangement.

The GSAR is published in the daily issue of the **Federal Register**, a cumulated form in the Code of Federal Regulations (CFR), and a separate loose-leaf edition.

501.104–2 Arrangement of regulations.

(a) The numbering system used in GSAR conforms to the FAR System. A particular policy or procedure is identified by the same number in both the FAR and GSAR.

(b) When the GSAR implements the FAR, the GSAR is numbered (and captioned) to correspond to the FAR part, subpart, section, or subsection being implemented.

(c) When the GSAR supplements the FAR by dealing with subject matter not in the FAR, numbers beginning with 70 are assigned to the supplementing part, subpart, section, or subsection.

(d) When the FAR requires no implementation, the GSAR will not contain corresponding citations. This will result in some gaps in the GSAR. In such cases, see the FAR for policies and procedures.

501.104–3 Copies.

Copies of the GSAR in CFR form may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402.

501.105 OMB Approval under the Paperwork Reduction Act.

The following OMB control numbers apply:

GSAR reference	OMB Control Number
507.305	3090–0104
509.105–1(a)	3090–0007
510.004–70	3090–0203
512.104(a)(2)	3090–0204
512.104(a)(4)	3090–0204
514.201(7)(a)	3090–0200
515.406–2	3090–0199
516.203–4(b)	3090–0243
522.406–6	1215–0140
523.370	3090–0205
525.105–70(d)	3090–0198
525.205	3090–0240
528.202–71(a)	3090–0189
532.502–3	3090–0229
532.905–70	9000–0102
532.905–71	3090–0080
537.110(a)	3090–0197
537.110(b)	3090–0006

GSAR reference	OMB Control Number
538.203-71	3090-0121
542.1107	3090-0027
546.302-70	3090-0027
546.302-71	3090-0027
546.570	3090-0227
552.207-70	3090-0104
553.210-74	3090-0203
552.212-1	3090-0204
552.212-71	3090-0204
552.214-75	3090-0200
552.215-75	3090-0199
552.216-71	3090-0243
552.223-71	3090-0205
552.225-70	3090-0198
552.225-75	3090-0240
552.228-74	3090-0189
552.232-74	3090-0229
552.232-79	3090-0080
552.237-70	3090-0197
552.237-71	3090-0006
552.238-72	3090-0121
552.242-70	3090-0027
552.246-70	3090-0027
552.246-71	3090-0027
552.249-71	3090-0227
GSA-72	3090-0121
GSA-72-A	3090-0121
GSA-527	3090-0007
GSA-618-D	1215-0149
GSA-1142	3090-0080
GSA-1364	3090-0086
GSA-1678	3090-0027
GSA-2419	9000-0102
570.802(c)	3090-0086

501.170 Other GSA publications.

501.170-1 GSA orders and handbooks.

Internal agency guidance, as described in FAR 1.301(a)(2), must be issued by heads of contracting activities in the form of a GSA order or handbook. GSA orders and handbooks must not unnecessarily repeat, paraphrase, or otherwise restate the FAR and GSAR. Policies and procedures for issuing GSA orders and handbooks are in the HB, Writing GSA Internal Directives (OAD P 1832.3).

501.170-2 Acquisition letters.

(a) Acquisition letters may be issued to provide coverage on an interim basis, pending incorporation of material in GSA orders or handbooks. Acquisition letters will be considered canceled after one year and therefore must be incorporated into the applicable order or handbook within that time period.

(b) The heads of contracting activities (HCA's) or their designees may issue acquisition letters. Normally no more than two officials within a contracting activity, as appropriate, may be designated to issue acquisition letters.

(c) Acquisition letters must be coordinated with appropriate offices including Acquisition Policy, Counsel, and the Inspector General. Proposed procedures affecting the operation of the small business program must be coordinated with the Office of Small and Disadvantaged Business Utilization (AU).

(d) Acquisition letters must be identified by a number assigned by the issuing activity. The number should begin with the correspondence symbol of the issuing office, followed by the last two digits of the calendar year in which it is issued and be numbered consecutively beginning with 1. For example, the number of the first letter issued by the Commissioner, Public Buildings Service, in calendar year 1989 will be P-89-1.

(e) The body of the acquisition letter should contain the following paragraphs, as appropriate:

(1) Purpose.
(2) Background.
(3) Effective date.
(4) Termination date.
(5) Cancellation.
(6) Applicability (offices to which acquisition letter is applicable).
(7) Reference to regulations (FAR or GSAR), handbooks, or orders.
(8) Instructions/procedures.

(f) The issuing office is responsible for distributing its acquisition letters to affected contracting activities, regional Acquisition Management Staffs (RAMS), the Office of Acquisition Policy, appropriate Central Office contracting activities, Associate General Counsels, Regional Counsels, Directives and Correspondence Management Branch in Central Office, and Information Management Branches in the regions. In Region 3, it is the Administrative Operations Branch.

(g) Each issuing office must report on acquisition letters issued and canceled on a quarterly basis so that the Office of Acquisition Policy can issue a consolidated index of all acquisition letters issued or canceled. The index will be distributed to GSA contracting activities.

Subpart 501.4—Deviations From the FAR and GSAR

501.402 Policy.

(a) In order to maintain maximum uniformity, deviations from the FAR and the GSAR must be kept to a minimum.

(b) A contracting activity may deviate from a regulatory provision which implements a statutory requirement provided the nature of the deviation does not violate the underlying statute.

(c) Deviations must not be used to defeat the FAR and GSAR approval requirements.

501.403 Individual deviations.

Individual deviations from the GSAR or the FAR must be approved by the head of the contracting activity. A copy of the deviation justification and approval must be furnished to the Office of Acquisition Policy (VP).

501.404 Class deviations.

(a) Class deviations from the FAR and GSAR must be approved by the Associate Administrator for Acquisition Policy (V).

(b) Class deviations from the GSAR will expire in 12 months if not extended. They may be rescinded earlier without prejudice to any action previously taken.

(c) Requests for class deviations must be supported by statements that fully disclose the need for and the nature of the deviation.

Subpart 501.6—Contracting Authority and Responsibilities

501.601 General.

Heads of contracting activities (see 502.1) are contracting officers by virtue of their position. Other contracting officers are appointed under FAR 1.603 and 501.603.

501.602 Contracting officers.

501.602-1 Authority.

Contracting authority is not required for:

(a) Using the imprest fund;
(b) Signing training authorizations for public course offerings;
(c) Signing travel documents;
(d) Ordering printing and duplicating services;
(e) Ordering supplies on Standard Form 344 or other FEDSTRIP forms;
(f) Signing Government Bills of Lading;
(g) Signing machine-loaded orders against established contracts for supplies to replenish warehouse stock;
(h) Signing machine-generated delivery orders against definite quantity contracts for motor vehicles;
(i) Signing memorandums of Agreement with other Federal agencies; and
(j) Authorizing interagency transfers of funds.

501.602-2 Responsibilities.

(a) *GSA revolving funds.* Unless otherwise notified, contracting officers may assume that sufficient funds are available for purchases payable from GSA revolving funds upon the receipt of a requisition signed by an authorized individual citing funds. Requisitions for requirement contracts, which provide for a guaranteed minimum, must cite funds adequate to cover the guaranteed minimum quantities.

(b) *GSA funds, other than revolving funds.* (1) A requisition signed by an

authorized individual may be considered as evidence that funds cited are available for purchases payable from GSA funds other than revolving funds. Citation of additional funds must be obtained from the requisitioning activity before awarding a contract or purchase order when the purchase exceeds (by 10 percent or $50, whichever is greater) the amount cited on the purchase requisition.

(2) When a requisition is not used, e.g., lease of real property, the contracting officer must ensure funds are available before awarding the contract.

(c) *Other Federal agencies' funds.* On purchases for direct delivery to Federal agencies other than GSA, the receipt of a properly signed/approved purchase request is sufficient evidence that funds are available. Where, however, the agency's purchase request indicates that a specific dollar amount has been set aside for the acquisition, as in the case of a Project Implementation Order/Commodities (PIO/C) from the Agency for International Development, the buying activity must not exceed the fund limitation except to the extent authorized in supply support agreements. When the funds stated on the purchase request appear to be or are insufficient to cover costs for the acquisition, transportation, export surcharge, and any other expense involved in the delivery of material to designated consignees, additional funds must be obtained from the requiring agency before the acquisition is completed as indicated below:

(1) When requirements are submitted by agencies directly to a contracting division in the Central Office (regardless of where the procurement is actually made), the request for additional funds should be made by the Central Office contracting division.

(2) When requirements are submitted to a regional contracting division (regardless of where the acquisition is made), the request for additional funds will be made by the order processing and control activity in the region initially receiving the requirement.

501.602-3 Ratification of unauthorized commitments.

(a) *Authority.* Under FAR 1.602-3, contracting officers may ratify unauthorized contractual commitments if the HCA approves the ratification action. The HCA may not redelegate this authority.

(b) *Procedures.* (1) Generally, the Government is not bound by commitments made by persons who do not have contracting authority. Such unauthorized acts may violate laws or regulations. Therefore, unauthorized commitments should be considered as serious employee misconduct and consideration given to initiating disciplinary action. If suspected irregularities may involve fraud against the Government, or any type of misconduct that might be punishable as a criminal offense, either the employee's supervisor or the contracting officer must immediately report the matter to the Office of the Inspector General with a request for a complete investigation.

(2) The individual who made the unauthorized commitment shall furnish the appropriate contracting director all records and documents concerning the commitment and a complete written statement of facts, including, but not limited to, a statement as to why normal acquisition procedures were not followed, why the contractor was selected and a list of other sources considered, description of work or products, estimated or agreed-upon contract price, citation of appropriation available, and a statement regarding the status of the performance. Under exceptional circumstances, such as when the person who made the unauthorized commitment is no longer available to attest to the circumstances of the unauthorized commitment, the contracting director may waive the requirement that the responsible employee initiate and document the request for ratification, provided that a written determination is made stating that a commitment was in fact made by an employee, who must be identified in the determination.

(3) The contracting director will assign the request to a contracting officer for processing. The contracting officer shall prepare a summary statement of facts addressing the limitations in FAR 1.602-3(c) recommending whether or not the transaction should be ratified. Advice against express ratification should include a recommendation for other appropriate disposition. When ratification is not permissible due to legal improprieties in the procurement, the contracting officer may recommend that payment be made for services rendered on a quantum meruit basis (the reasonable value of work or labor) or for goods furnished on a quantum valebant basis (the reasonable value of goods sold and delivered) provided there is a showing that the Government has received a benefit. (See FAR 1.602-3(d).)

(4) The request for ratification, the information required by paragraph (b)(3) of this section and a recommendation for corrective action to preclude recurrence, must be forwarded, through appropriate channels to the HCA for consideration.

(5) The HCA shall approve the ratification in writing, or direct other disposition as appropriate. Acquisitions approved for ratification are returned to the contracting officer for issuance of the necessary contractual documents. If the request for ratification is not justified, the HCA will return the request without approval and provide a written explanation for the decision not to approve ratification.

(6) HCAs shall maintain a separate file containing a copy of each request for approval to ratify an unauthorized contractual commitment and a copy of the response. This file must be made available for review by the Office of Acquisition Policy and the Inspector General.

501.603 Selection, appointment, and termination of appointment.

501.603-1 General.

The contracting officer warrant program (COWP) is the system established for the selection, appointment, and termination of appointment of contracting officers.

501.603-3 Appointment.

(a) Heads of contracting activities (HCAs) may delegate authority to make purchases not to exceed $500 by memorandum to the employee. Requests for delegation of contracting authority at the $500 level may be made by memorandum and must include the candidate's name, title, and organizational location; a brief explanation of the need for authority; a brief description of the individual's qualifications; and a certification that the candidate has received the training required by 501.603-70(h)(1)(i).

(b) HCAs or Chairman of the COWP Board, if authorized by the HCA, may nominate contracting officer candidates for basic, intermediate, or unlimited warrants to the Associate Administrator for Acquisition Policy (see 501.603-70(c)). To nominate a candidate, the HCA or Chairman must submit a GSA Form 3410, Request for Appointment. The Request for Appointment must be accompanied by a GSA Form 3409, Personal Qualifications Statement for Appointment as a Contracting Officer, prepared and signed by the candidate.

(c) Candidates for basic, intermediate, or unlimited warrants who do not meet the minimum experience, certification and/or training requirements outlined in 501.603-70, may be appointed on an interim basis. Candidates for interim appointment at the intermediate warrant level must complete all the basic level courses and three intermediate level courses before the appointing official

will consider a request for appointment. Candidates for interim appointment at the unlimited warrant level must complete all the basic level courses and complete five intermediate level courses before the appointing official will consider a request for appointment. These restrictions do not apply to realty leasing or sales warrants. All minimum training requirements must be scheduled and met within a reasonable period of time. At least two of the required courses or equivalency tests must be completed each year after the date of appointment to avoid losing the warrant.

(d) The Associate Administrator for Acquisition Policy appoints contracting officers at the basic, intermediate or unlimited level using the Standard Form 1402, Certificate of Appointment. The original Certificate of Appointment (SF-1402) will be provided to the appointed contracting officer and should be displayed at the contracting officer's duty station. A copy of the Certificate of Appointment will be forwarded to the appropriate HCA or Chairman of the COWP Board and to the Office of Finance.

501.603-4 Termination.

(a) HCAs shall notify the Associate Administrator for Acquisition Policy by letter when a contracting officer—

(1) Resigns;

(2) Transfers to another agency or is reassigned to another office within GSA;

(3) Is terminated, or otherwise disciplined for malfeasance or incompetence; or

(4) No longer has a need for the appointment.

(b) HCAs may suspend a contracting officer's appointment for a temporary period not to exceed 30 days for failing to exercise sound business judgment or for other improprieties in carrying out the responsibilities incident to serving as a contracting officer. During the 30-day suspension period, the HCA shall either lift the suspension or recommend that the Associate Administrator for Acquisition Policy terminate the appointment.

501.603-70 Contracting officer warrant program (COWP).

(a) *General.* The objective of the COWP is to appoint as contracting officers individuals who are qualified and have valid organizational need for contracting authority. Factors to be considered in assessing the need for a contracting officer include volume of actions, complexity of work, and organizational structures.

(b) *Applicability.* The program applies to all contracting officers except those appointed under the Inspector General Act (Pub. L. 95-452).

(c) *Definitions.*

"Appointing official" means the Associate Administrator for Acquisition Policy or the head of the contracting activity (HCA).

"Contracting Officer Representative" (COR) means a Government employee designated in writing by the contracting officer (CO), by name and position title, who is authorized to take action for the contracting officer with specified limitations. A contracting officer may not authorize a COR to issue change orders or otherwise modify a contract unless the COR is a warranted contracting officer.

"Delivery order" means an order for supplies and/or services placed against an already established contract under the terms and conditions of the contract.

"Established source contract" means a contract established by GSA or another Federal agency that authorizes or requires GSA to place orders against the contract. (See Part 8 of the FAR.)

"Warrant Limitations" means limitations which, in addition to the FAR, GSAR, laws, Executive Orders, GSA Orders, and other applicable regulations, are imposed on the authority of contracting officers, and set forth in the Certificate of Appointment (Standard Form 1402). Warrant limitations may include but are not limited to requirements for prior reviews, approvals, and other controls.

(d) *Responsibilities*—(1) *Associate Administrator for Acquisition Policy.* As the Procurement Executive for GSA, the Associate Administrator for Acquisition Policy is responsible for providing management direction of the procurement system, maintaining a procurement career management program to ensure a professional workforce, and appointing contracting officers in accordance with FAR 1.603 and 501.603.

(2) *Heads of contracting activities.* The heads of contracting activities (HCAs) (see 502.1) are responsible for delegating authority to make purchases that do not exceed $500 and for conducting effective and efficient acquisition programs. HCAs must establish training plans for contracting personnel and budget for funds to implement such plans; monitor the performance of contracting officers; and establish controls to ensure compliance with applicable laws, regulations, procedures and the dictates of management practice. Central Office HCAs shall designate an official to serve as Chairman of the COWP board.

(3) *Contracting Officer Warrants Boards.* The HCA appoints the Chairman of the COWP Board. The Chairman appoints the board members and receives, evaluates, and processes requests for appointment of contracting officers under the COWP. The warrant board consists of supervisory personnel at the SES or GM/GS 14/15 levels representing contracting offices within the contracting activity and, in an advisory capacity, representatives of the Office of Personnel and the Office of General Counsel.

(4) *Regional Acquisition Management Staff (RAMS).* The RAMS shall assist the HCA in the administration of the COWP, issue procedures for the operation of the program at the regional level, recommend program changes when necessary, analyze proposed regional courses and training material and recommend them for fulfilling the requirements of the COWP, maintain detailed training records for each contracting officer, and ensure that appropriate forms required by the Office of Finance are provided to the Office of Finance and to the Office of Acquisition Policy (Attn: VF).

(e) *Types of appointments*—(1) *Interim.* An interim appointment is made to a candidate who does not meet the minimum requirements for a permanent appointment. Such appointments are for a specified time and provide for the scheduling and completion of required training within a reasonable period of time. At least two of the required courses or equivalency tests must be successfully completed each year after the date of appointment to avoid termination of the appointment. The Office of Acquisition Policy and the RAMS periodically review training records of individuals with interim appointments to determine whether they are making adequate progress towards completion of required training.

(2) *Permanent.* A permanent appointment is made to a candidate who meets all requirements for experience and training at the time the appointment is made. For those contract specialists mandated to be in the GSA Occupational Certification Program (OAD 9410.1), the candidate must be certified as a full-performance level contract specialist. Permanent appointments may be made for a specified period if the need for contracting authority is limited to a specific period of time.

(f) *Warrant levels.* The following warrant levels are equated with dollar value of individual transactions (e.g., contract, modification, supplemental agreement, etc.) and not the aggregate contract value:

$500—Up to and including $500 per open market purchase or per order placed against established source contract.
Basic—Up to and including $25,000 per open market purchase or the maximum order limitation for orders placed against established source contracts.
Intermediate—Up to and including $100,000 per contract or the maximum order limitation for orders placed against established source contracts.
Senior—Unlimited.

(g) *Experience requirements.* The following experience requirements apply to contracting officer candidates for the various warrant levels.

(1) *Basic.* Candidates must have at least 1 year of current (within last 5 years) contracting experience with progressive assignments leading to broader technical ability.

(2) *Intermediate.* Candidates must have at least 2 years of current (within last 5 years) contracting experience with progressive assignments leading to broader technical ability.

(3) *Senior.* Candidates must have at least 3 years of current (within last 5 years) contracting experience with progressive assignments and broader technical ability.

(h) *Training requirements*–(1) *Mandatory training to qualify for appointment.* A contracting officer candidate must complete the minimum core training requirements described below. To qualify for an intermediate level warrant, a candidate must complete the basic and intermediate level training. A candidate must complete the basic, intermediate, and senior level training in order to qualify for a senior level warrant. Supervisors are responsible for providing their employees with advice and assistance necessary to complete this required training. Mandatory training for a permanent warrant designation includes the following general topics as a minimum:

(i) *$500 Level.* Candidates for appointment must receive a minimum of 4 hours on-the-job orientation or formal training on small purchase procedures. Individuals that have taken formal training courses on small purchases or basic procurement meet the requirement for 4 hours of training. The training may be provided by contracting officers, senior procurement personnel, or a member of the RAMS staff on the basic principles of small purchasing, the requirements for use of established sources, and the responsibilities and obligations of contracting officers.

(ii) *Basic Level* (Does not apply to realty leasing & sales personnel).

(A) Small Purchases/Schedule Contracts—40 hours.

(B) Basic Procurement—40 hours.

(C) Contract Administration for Program Personnel—40 hours (Applicable to Buildings Managers Only).

(D) Basic Fleet Management Procurement—40 hours (*Only course* required for Fleet Managers).

(iii) *Non-1102 COs.* COs not classified as 1102 employees and who do not make open market purchases greater than small purchases will not be required to take the Basic Procurement course.

(iv) *Intermediate level* (Does not apply to realty leasing & sales personnel).

(A) Government Contract Law—80 hours.

(B) Contracting by Sealed Bidding—40 hours.

(C) Government Contract Negotiations—40 hours.

(D) Government Contract Negotiation Techniques—40 hours.

(E) Cost and Price Analysis—40 hours.

(F) GSA Price Analysis—40 hours.

(G) Government Contract Administration—40 hours.

(H) Government Contract Termination—40 hours.

(I) ADP Contracting—40 hours (applicable to ADP acquisition personnel only).

(J) Contracting for Services—40 hours.

(K) Public Utility Contracts—40 hours (applicable to personnel handling public utility procurements).

(L) Contracting for Architect/Engineer services—40 hours (applicable to personnel handling Architect/Engineer service procurements).

(M) Construction Contracting—40 hours (applicable to personnel handling procurement of construction).

(v) *Senior level (over $100,000).* (Does not apply to leasing and sales.)

(A) Executive Seminar in Acquisition—24–40 hours.

(B) Advanced Procurement Management—40 hours.

(C) Advanced Contract Administration—40 hours.

(vi) *Realty leasing personnel.* (A) Federal Real Property Leasing or Basic Lease Contracting—40 hours.

(B) Real Estate Law or Federal Real Property Lease Law—40 hours.

(C) Negotiation Techniques—40 hours.

(D) Cost and Price Analysis or Pricing of Lease Proposals—40 hours.

(E) Real Estate Appraisal Capitalization Theory and Techniques, Part A (AIREA or equivalent course)—40 hours.

(vii) *Sales Contracting personnel.* (A) Basic Procurement—40 hours (real property sales personnel only).

(B) Sales and Disposal of Government Property—40 hours (personal property sales personnel only).

(C) Government Contract Law—80 hours.

(D) Government Contract Negotiations—40 hours.

(E) Sales and Disposal of Real Property—40 hours or Personal Property Sales—80 hours. (Course selection dependent on type of property being disposed of.)

(viii) *Construction contracting officer representatives (CORs).* Individuals nominated for warrants limited to the issuance of change orders up to $25,000 are required to complete the Basic Procurement course and the Construction Contracting course. Special COR warrants above the basic level will require the completion of all courses required for construction contracting at the higher level.

(ix) *Motor Pool Disposal personnel.* Individuals nominated to dispose of Motor Pool Vehicles are required to complete the Basic Fleet Management Procurement course and the Personal Property Utilization and Disposal course.

(2) *Substitution of experience for training.* Individuals currently serving and classified in 1102 positions for an uninterrupted period of 3 years will not be required to take the basic level courses if they are proposed for intermediate or senior level warrants.

(3) *Substitute courses.* Training courses of equivalent content may be substituted with the written approval of the Office of Acquisition Policy. Courses from the following sources are considered to be equivalent provided the training meets the minimum hours required:

(i) Training from a Government-sponsored source, such as U.S. Army Logistics Management Center (ALMC).

(ii) Training from a source listed in the Defense Management Education and Training (DMET) Catalog or the Federal Acquisition Institute (FAI) Catalog.

(iii) Training provided by colleges or universities deemed equivalent by the Federal Acquisition Institute.

(4) *Refresher training.* Contracting officers in the Federal Supply Service are encouraged to attend the Contract Quality Assurance course (40 hours) in fulfilling the continuing education requirements.

(5) *Tests.* Tests administered either by the GSA Office of Personnel, DOD training facilities or other professional organizations may be taken as an alternative to training with the written approval of the Office of Acquisition Policy. The GSA training office may be

contacted for referral to DOD testing facilities such as Fort Lee, VA.

(6) *Mandatory training to retain contracting officer designation.* As a condition of continuing designation, all contracting officers, except those with a $500 level warrant or those on interim appointments, must complete 16 hours (for basic level warrants) or 40 hours (for intermediate or unlimited level warrants) of formal acquisition training every 3 years in order to maintain competency.

501.670 Legal review and assistance.

501.670-1 Policy.

The Office of General Counsel is responsible for ensuring compliance with the laws and regulations applicable to, and policies of, the agency. This section sets forth the responsibilities of legal counsel and agency personnel involved in any aspect of the contracting process (from policy and planning through contract completion or termination and closeout) in obtaining and providing legal review and assistance. It is agency policy that Office of General Counsel attorneys will be major participants in the contracting process. Subject to the provisions of this section 501.670, authority to make contracting decisions is vested in the contracting officer. Legal counsel is responsible for legal advice furnished by them and for the legal sufficiency of such contracting decisions. Contracting officers and other contracting personnel are entitled to rely upon legal counsel and technical and audit advice received from other appropriate agency experts but are solely responsible for all other aspects of their contracting decisions. Contracting officers and other contracting personnel shall not, absent prior legal review or assistance, as required, proceed with proposed actions requiring legal review or assistance pursuant to this section 501.670. Contracting officers and other contracting personnel may request, through the appropriate level official within their service or staff office, and are entitled to, review of legal advice at higher levels within the Office of General Counsel. Supervisory personnel are responsible for assuring that their subordinates comply with the provisions of this section.

501.670-2 Definitions.

"Contract" has the meaning ascribed to it in FAR 2.101, and includes real property leases.

"Contracting," as used in this section, means the acquisition or disposal by contract (includes small purchases and leases) of any services or interest in real or personal property. To the extent that specific language reflects terminology used in procurement, the counterpart terminology is intended for matters involving disposals.

"Legal assistance" means a process whereby legal counsel provides legal advice and guidance on questions or problems that arise during any phase of the acquisition process.

"Legal counsel" means the attorney employed by the Office of General Counsel (including offices of Regional Counsel) assigned to provide legal review or assistance.

"Legal review" means a formal process whereby legal counsel analyzes a matter to ensure legal sufficiency, i.e., that the proposed action is in compliance with applicable laws, regulations and policy and is prudent in light of related legal considerations, e.g., other contracts with the same or other contractor, or claims, disputes or litigation concerning the same or other contracts.

"Modification" means any deletion from, or alteration or change of, or addition or supplement to, a contract or solicitation.

"Offer" has the meaning ascribed to it in FAR 2.101.

"Solicitation," as used in this section, means solicitations for offers, invitations for bids, requests for proposals, and any other kind of document inviting, soliciting, or requesting the submission of a bid, offer, or proposal in connection with a procurement or disposal.

501.670-3 Responsibilities.

(a) Subject to the provisions of this section, contracting officers have the authority and responsibility for making contracting decisions. Agency personnel involved in any aspect of the contracting process (from policy and planning through contract completion or termination and closeout) shall:

(1) Obtain approval for legal sufficiency before taking actions that require legal review under this section.

(2) Obtain legal assistance before taking actions that require legal assistance under this section, provided this section shall not be construed as either (i) prohibiting contracting officers or other contracting personnel from proceeding, in contravention of advice of legal counsel, with an action requiring legal assistance or, (ii) as absolving contracting officers or other agency personnel from responsibility for so proceeding.

(3) Provide assigned legal counsel with all pertinent information including facts, points at issue and rationale for proposed action.

(4) Request legal review or assistance in a timely fashion so that legal counsel has time to respond.

(5) Document files to reflect legal counsel's concurrence and comment, if any.

(b) The Office of General Counsel is responsible for ensuring compliance with the laws and regulations applicable to, and policies of, the agency. Assigned legal counsel is responsible for—

(1) The legal review and assistance furnished and for the legal sufficiency of contracting decisions which result from same.

(2) Providing timely legal review and assistance on a broad range of legal and policy problems arising during the contracting process.

(3) Ensuring that proposed contractual actions and issuances comply with applicable laws, regulations and policy.

(c) Supervisory personnel are responsible for ensuring that their subordinates comply with this section.

501.670-4 Legal review.

(a) Absent legal counsel's prior written approval for legal sufficiency, or waiver of the requirement therefor, action must not be taken on the following matters (except as provided in 501.670-4(c) and 501.670-5(c)):

(1) With respect to the outleasing of real property that is not surplus, and the acquisition of areawide or single delivery point utility services in excess of $150,000, the (i) issuance of solicitations (including modifications thereof), and (ii) the award of contracts (and modifications thereof).

(2) With respect to the disposal (by sale, outlease or otherwise) of surplus real property, the (i) issuance of solicitations (and modifications thereof), (ii) the award of contracts (and modifications thereof), and (iii) the transmittal of explanatory statements.

(3) Award of any contract which requires pre-award or post-award clearance by the Office of Acquisition Policy or by a service or regional clearance office under GSA Order, Contract Clearance (APD 2800.1B), and modifications thereof.

(4) Determinations and findings required by the FAR, GSAR, or other appropriate authority (see FAR Subpart 1.7 and GSAR Subpart 501.7) and justifications to use other than full and open competition (see FAR Subpart 6.3).

(5) Solicitations which deviate from provisions or clauses prescribed by regulation or other appropriate authority, or which add additional provisions or clauses to those prescribed in the FAR or GSAR.

(6) Solicitations involving repurchase action against a defaulted contract.

(7) Decisions involving the nonapplication of, or any exemption to be taken from, the subcontracting plan requirements of Pub. L. 95–507.

(8) Late offers and modifications.

(9) Offers indicating that a contingent fee has been, or may be, paid.

(10) Alleged mistakes in offers.

(11) Protests, including small business size protests, filed with the agency, the General Accounting Office (GAO), General Services Administration Board of Contract Appeals (GSBCA), or the Small Business Administration.

(12) Matters involving the disclosure of offers before opening in sealed bidding or before award in negotiation.

(13) Proposed letter contracts.

(14) Ratification of unauthorized contractual commitments.

(15) Proposed determinations to reject all offers and cancel a solicitation for reasons other than unreasonable prices.

(16) Assignments of amounts due or to become due under contracts and change of name or novation agreements.

(17) Contract disputes, claims and final decisions of any nature, regardless of the contracting officer's proposed position.

(18) Memoranda of position and appeal files in cases appealed to the GSBCA or Claims Court.

(19) Matters relating to litigation before the courts or the GSBCA.

(20) Termination actions of any nature, including pretermination (i.e., "cure") letters.

(21) Assessments of costs, including administrative and excess reprocurement cost.

(22) Recommendations and other actions relative to suspending or debarring a concern or individual.

(23) Freedom of Information Act, Privacy Act, and standards of conduct matters.

(24) Proposed responses to Congressional inquiries, and to General Accounting Office (GAO) and Inspector General audit reports which pertain to the legality of proposed or past actions.

(25) Deviations from FAR, GSAR, or other directives.

(26) Regulations, orders, directives or other issuances affecting the acquisition process.

(27) Contracts for advisory and assistance services subject to GSA Order, Procurement of Advisory and Assistance Services (ADM 2800.12D).

(b) Agency officials, in conjunction with legal counsel, are encouraged to establish more stringent supplemental criteria for legal review when resources are available. Copies of supplemental criteria should be forwarded to the Associate Administrator for Acquisition Policy and to the General Counsel.

(c) Absent the consent of the submitting official or good cause shown by legal counsel, legal review of matters submitted therefor to legal counsel shall be deemed waived unless written approval or disapproval thereof is furnished to the submitting official by close of official business on the second full business day following legal counsel's receipt thereof.

(d) Nothing in 501.670–4(a) (1) through (3) requires post-award legal review of the following types of contract modifications:

(1) Administrative modifications (i.e., modifications that do not affect the contract term, price, quality or quantity or work, contract requirements, or the completion date/time of delivery).

(2) As to all contracts, modifications (i) to exercise options that were priced and evaluated, or (ii) to increase the estimated contract cost under the Limitation of Cost clause in cost-reimbursable contracts.

(3) As to real property leases, modifications (i) establishing occupancy dates, (ii) settling debits and credits under unit price allowances and ratios, (iii) for lease alterations not subject to clearance pursuant to APD 2800.1B if to be paid on a lump sum basis and not impacting operating cost or maintenance requirements, (iv) effecting tax or CPI operating cost escalations/de-escalations, or (v) changing the percentage of Government occupancy.

(4) As to FSS contracts, routine modifications (i) to Federal supply schedule contracts, (ii) to stock program contracts, or (iii) to special order program contracts.

(5) As to IRMS contracts, routine modifications to multiple award schedule contracts.

(e) As to FPRS real property disposal by competitive sale, no pre-award contract review is required where the solicitation and any modification thereof have been approved pursuant to 501.670–4(a)(2) and the proposed awardee's offer conforms in all respects to the terms of such solicitation.

501.670–5 Legal assistance.

(a) Agency personnel shall pay special attention to the following areas, present problems or questions to legal counsel and, when such problems or questions are presented, defer relevant action until legal assistance has been received and fully considered or waived:

(1) Preliminary questions or problems relating to matters requiring legal review.

(2) Questions concerning the proper use of appropriations or other funds and sensitive or confidential issues.

(3) Matters involving: (i) Application of the Buy American Act or related provisions of law, (ii) application of the labor statutes (e.g. Walsh-Healey Act, Service Contract Act, etc.), (iii) small business or labor surplus area concerns, (iv) consideration of subcontracting plans as required by Pub. L. 96–507, (v) withholding of payments to contractors for Department of Labor labor standards violations, (vi) the adequacy of bid guarantees and payment or performance bonds, (vii) competitive range determinations, or (viii) evaluation of offers.

(4) Matters relating to: (i) Nonresponsiveness of bids and nonresponsibility of contractors; (ii) contractor indebtedness, bankruptcy, or financing; (iii) use of special and directed sources of supply, e.g. procurement of supplies from Federal Prison Industries or of supplies or services from workshops for the blind and other severely handicapped; and (iv) eligibility to use GSA supply sources.

(5) When unusual or novel procurements are contemplated.

(6) Contract administration matters that involve legal issues or concerns.

(7) Questions raised during debriefing of offerors.

(8) When there is doubt or controversy as to the legal sufficiency of an action, or the interpretation or application of existing statutes, regulations and policies.

(9) Real property disposal plans.

(b) Agency personnel are urged to notify legal counsel in advance of meetings scheduled with legal representatives of outside parties, meetings where legal issues are likely to be discussed, and negotiations of complex contracts, and modifications thereto. Legal counsel shall, whenever feasible, attend such meetings and negotiations and furnish legal advice to the attending agency personnel.

(c) Legal assistance shall be furnished not later than the time specified in 501.670–4(c) or the requirements therefor shall be deemed waived.

501.670–6 Waivers.

The General Counsel or Deputy General Counsel may waive, in writing, legal review requirements on a case-by-case basis or class basis. An Associate General Counsel or Regional Counsel may waive, in writing, legal review requirements on a case-by-case basis. These authorities are not delegable.

Subpart 501.7—Determinations and Findings

501.700 Scope of subpart.

This subpart provides general information on the content and format of determinations and findings (D&Fs). Specific information on the various D&Fs can be found in the FAR or GSAR part that requires the D&F. This subpart is not an all-inclusive listing of D&F requirements.

501.704 Content.

501.704-70 Sample formats.

(a) *Type of contract*—(1) *Cost reimbursement contracts.* The following is prescibed for determinations required by FAR 16.301-3, 16.302, 16.303, 16.304, 16-305, 16.306, 16.403, and 16.404.

General Services Administration
Determinations and Findings

Authority to Use Cost Reimbursement Type Contract

Findings

I hereby find that:

(1) The (Service/Office title) proposes to contract for (describe work, service, or product) (identify program or project). The estimated cost is ($_____) (if contract is CPFF type, insert "plus a fixed fee of ($_____) which is ($_____) percent of the estimated cost exclusive of fee").

(2) (Explain why it is impracticable to secure property or services of the kind or quantity required without using the proposed type of contract or why the proposed method of contracting is likely to be less costly than other methods.)

(3) These findings are made pursuant to (cite appropriate statute and/or regulation).

Determinations

I hereby determine that:

On the basis of the above findings, it is impracticable to secure the property or services of the kind or quality required without using a (cost, cost-sharing, or cost-plus-a-fixed-fee*) type of contract, or the (cost, cost sharing, or cost-plus-a-fixed-fee**) method of contracting is likely to be less costly than other methods.*

Date: _____

(Signature)

* Use applicable word or statement.

** Use applicable words.

(2) *Time and material or labor-hour contracts.* The format prescribed by subparagraph (a)(1) of this section must be followed except that the final paragraph must read substantially as follows:

I hereby determine that:

On the basis of the above findings, no other type of contract is suitable for this procurement.

(3) *Letter contracts.* The following format is prescribed for determinations required by FAR 16.603-3:

General Services Administration
Determinations and Findings

Authority to Use a Letter Contract

Findings

I hereby find that:

(1) The (Service/Office title) proposes to contract for (describe the work, service, or product) (identify program or project). The estimated cost is $_____ (complete if possible).

(2) (Explain why no other contract is suitable. Explain why the Government's interests demand that the contractor be given a binding commitment so that work can start immediately, and why it is not possible to negotiate a definitive contract in time to meet the requirements.)

(3) These findings are made pursuant to (cite appropriate statute and/or regulations).

Determinations

I hereby determine that:

On the basis of the above findings, it is impracticable to secure the property or services of the kind or quality required within the timeframe required without the use of a letter contract.

Date: _____

(Signature)

(b) *Use of procedures that are less than full and open competition.* (1) *Exclusion of source(s).* The following format is prescribed for determinations and findings made under section 303(b)(1) of the Federal Property and Administrative Services Act (41 U.S.C. 253(b)(1)) and FAR 6.202.

General Services Administration
Determinations and Findings

Authority to Exclude Source(s) From Competition On An Individual Contract Under 41 U.S.C. 253(b)(1)

Findings

I hereby find that:

(1) The (Service/Office title) proposes to procure (describe work to be performed or product to be delivered) (identify program or project and state estimated contract price).

(2) (Explain why it is necessary to exclude a particular source(s) in order to establish or maintain an alternative source or sources for the supplies or services being acquired. Explain how this action will (a) increase or maintain competition and likely result in reduced overall costs, (b) be in the interest of national defense by having a facility available for furnishing the supplies or services in case of a national emergency or industrial mobilization, or (c) be in the interest of national defense by establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.)

Determinations

I hereby determine that:

On the basis of the above findings, it is necessary to exclude (identify source(s)) from (identify the contract action) in order to establish or maintain an alternative source or sources for the supplies or services being acquired because to do so will (describe benefits as required by FAR 6.202).

Date: _____

(Signature)

(2) *Not in public interest.* The following format is prescribed for determinations and findings made under section 303(c)(7) of the Federal Property and Administrative Services Act (41 U.S.C. 253(c)(7)) and FAR 6.302-7:

General Services Administration
Determinations and Findings

Authority Not To Provide For Full and Open Competition On an Individual Contract Under 41 U.S.C. 253(c)(7)

Findings

I hereby find that:

(1) The (Services/Office title) proposes to produce (describe work to be performed or product to be delivered) (identify program or project and state estimated contract price).

(2) (The contents of the justification prepared by the contracting officer, in accordance with FAR 6.302-7 and 6.303-2, shall be included as a part of the findings to support the determination.)

Determinations

I hereby determine that:

On the basis of the above findings, it is not in the public interest to provide for full and open competition in the procurement of (describe work to be performed or product to be delivered) (identify program or project).

Date: _____

(Signature)

(c) *Advance payments.* The format for advance payment determinations and findings is set forth in FAR 32.410.

(d) *Buy American.* The prescribed format for nonavailability determinations and findings required by FAR 25.102(a)(4) and 25.202(a)(3) is set forth in 525.108-70.

(e) *Determinations pending decision on protest to GAO*—(1) *Protest filed before award.* The following format is prescribed for determinations and findings required by FAR 33.104(b):

General Services Administration
Determinations and Findings

Authority To Proceed With Award Pending a Decision by GAO on Protest Before Award

Findings

I hereby find that:

(1) The (Services/Office title) proposes to procure (describe work to be performed or product to be delivered). The estimated cost is _____.

(2) Solicitation (identify solicitation) was issued on _____ and bids/ proposals were received on _____.

(3) On _____ (insert date GAO received protest) (identify protestor by name) submitted a protest to GAO concerning the solicitation (identify solicitation).

(4) (Set forth urgent and compelling circumstances that significantly affect the interests of the United States and will not permit waiting for the decision of GAO on the protest).

(5) Award is anticipated within 30 calendar days from the date this determination and findings is signed.

(6) These findings are made pursuant to 31 U.S.C. 3553(c)(2) and FAR 33.104(b)(1).

Determinations

I hereby determine that:

On the basis of the above findings, urgent and compelling circumstances will not permit waiting for the decision of the GAO on the protest filed by (identify protestor and solicitation).

Date: _____

_____

(Signature)

(2) *Protest filed after award.* The following format is prescribed for determinations and findings required by FAR 33.104(c):

General Services Administration
Determinations and Findings

Authority To Continue Contract Performance Pending a GAO Decision on Protest Filed After Award

Findings

I hereby find that:

(1) The (Services/Office title) awarded a contract to (name contractor) on _____ for furnishing of (identify product, service or work to be performed). The contract is valued at _____ and resulted from solicitation _____.

(2) On _____ (insert date GAO received protest) (identify protestor by name) submitted a protest to GAO concerning contract number _____.

(3) (Explain that: (a) continued contract performance will be in the best interest of the United States; or (b) urgent and compelling circumstances exist that significantly affect the interests of the United States and will not permit waiting for the GAO's decision).

(4) These findings are made pursuant to 31 U.S.C. 3553(d)(2) and FAR 33.104(c)(2).

Determinations

I hereby determine that:

On the basis of the above findings, (either (a) continued contract performance will be in the best interest of the United States, or (b) urgent and compelling circumstances exist that will not permit waiting for the GAO's decision) and that, accordingly, contract performance under contract _____ may continue pending GAO's decision on the protest.

Date: _____

_____

(Signature)

501.707 Signatory authority.

A D&F must be signed by the appropriate official in accordance with Table 501–1. The FAR frequently refers to determinations being made by the agency head. Section 309 of the Federal Property and Administrative Services Act defines agency head and provides that at the option of the Administrator, the term may include the chief official of any principal organizational unit of the GSA. The Administrator has authorized the heads of contracting activities to act as agency head to facilitate the procurement of property and services under Title III of the Federal Property and Administrative Services Act. (See GSA Delegation of Authority Manual, ADM P 5450.39C.) When the applicable statute precludes redelegation of the authority, the table provides for the Administrator to sign such D&Fs.

TABLE 501–1.—SIGNATORY AUTHORITY

D&F Requirement	Signatory authority
a. Determinations as to price or fee under a cost-plus-fixed-fee contract. (See FAR 15.903(d) and 16.306(c)(2).).	Individual D&Fs may be signed by the head of the contracting activity (HCA), as defined in 502.1, or a designee. Class D&Fs must be signed by the HCA.
b. Determinations that the use of a cost, cost-plus-fixed-fee contract or an incentive contract is likely to cost less than other methods, or that it is impractical to secure property or services of the kind and quality required without using one of these types of contracts. (See Far 16.301–3, 16.302, 16.303, 16.304, 16.305. 16.306(c)(1), 16.403, and 16.404).	Individual D&Fs may be signed by the HCA or a designee. Class D&Fs must be signed by the HCA.
c. Determinations to use a time-and-material or labor-hour contract. (See FAR 16.601 and 16.602).	Individual D&Fs must be signed by the contracting officer. Class D&Fs must be signed by the HCA.
d. Determinations to use a letter contract. (See FAR 16,603–3.).	Individual D&Fs must be signed by the HCA or a designee.
e. Determinations to exclude a particular source from a contract action in order to establish or maintain an alternative source or sources for supplies or services. (See 41 U.S.C. 253(b)(1) and FAR 6.202.).	Individual D&Fs must be signed by the HCA. Class D&Fs are not permitted.
f. Determinations that it is not in the public interest to use full and open competition. (See FAR 6.302–7.).	Individual D&Fs must be signed by the Administrator. This authority may not be redelegated. Class D&Fs are not permitted.
g. Determinations that the making of advance payments would be in the public interest. (See FAR 32.410.).	D&Fs must be signed by the HCA. Class D&Fs are not permitted.
h. Determinations with respect to waiving either the requirement for submission of certified cost or pricing data or for the inclusion of the clauses required by FAR 25.215–22 through 52.215–25 in contracts with foreign governments or agencies thereof. (See FAR 15.804–3(i).)	Individual D&Fs must be signed by the HCA. Class D&Fs are not permitted.
i. Determinations to omit the clause specified at FAR 52.215–1, Examination of Records by Comptroller General, from contracts with foreign contractors or subcontractors. (See 41 U.S.C 254(c) and FAR 15.106–1(b).)	Individual D&Fs must be signed by the Administrator with the concurrence of the Comptroller General or a designee.
k. Determinations regarding the exceptions to the restrictions of the Buy American Act. (See FAR Subpart 25.102(a)(4), 25.202(a)(3) and GSAR 525.108–70.	Individual D&Fs may be signed by the HCA or a designee.
l. Determinations under the Balance of Payments program. (See FAR 25.3.)	Individual D&Fs may be signed by the HCA or a designee.
m. Determinations under Section 302(b)(2) of the Trade Agreements Act. (See FAR Subpart 25.4 and GSAR Subpart 525.4.)	Individual D&Fs must be signed by the HCA in accordance with 525.402–71.
n. Determinations to proceed with an award or to continue contract performance pending a GAO decision on a protest. (See FAR 33.104 (b) and (c).)	Individual D&Fs must be signed by the HCA. Class D&Fs are not permitted.

PART 502—DEFINITIONS OF WORDS AND TERMS

Authority: 40 U.S.C. 486(c).

Subpart 502.1—Definitions

502.101 Definitions.

"Agency competition advocate" means the Director of the Office of Acquisition Management and Contract Clearance.

"Contracting activity competition advocate" means the (a) Director of Acquisition Management and Contract Clearance, (b) FSS Competition Advocate, Office of Commodity Management, (c) Director, Agency Liaison Officer Program Division, IRMS, (d) Special Assistant to the Director, Program Support Office, FPRS, and (e) Regional Director, Regional Acquisition

Management Staff for Regions 2, 3, 4, 5, 6, 7, 9, and the National Capital Region. The Director of Acquisition Management and Contract Clearance serves as the contracting activity competition advocate for Central Office contracting activities outside of FSS, IRMS, and FPRS.

"Contracting director" means directors of Central Office or regional office divisions that are responsible for performing contracting and/or contract administration functions except for FSS. "Contracting director" means directors of Commodity Centers and Federal Supply Service Bureaus in the FSS.

"Head of the contracting activity" (HCA) means the Associate Administrator for Acquisition Policy, Commissioner of the Federal Supply Service (FSS), Information Resources Management Service (IRMS), Public Buildings Service (PBS), Federal Property Resources Service (FPRS), or Regional Administrators (Regions 2, 3, 4, 5, 6, 7, 9, and the National Capital Region). The Associate Administrator for Acquisition Policy serves as the HCA for Central Office contracting activities outside of FSS, IRMS, PBS, and FPRS.

"Senior procurement executive" means the Associate Administrator for Acquisition Policy.

Part 503—Improper Business Practices and Personal Conflicts of Interest

Subpart 503.1—Safeguards

Sec.

Subpart 503.2—Contractor Gratuities to Government Personnel

Subpart 503.3—Reports of Suspected Antitrust Violations

Subpart 503.4—Contingent Fees

Subpart 503.5—Other Improper Business Practices

Subpart 503.6—Contracts with Government Employees or Organizations Owned or Controlled by Them

Subpart 503.7—Voiding and Rescinding Contracts

Authority: 40 U.S.C. 486(c).

Subpart 503.1—Safeguards

503.101 Standards of conduct.

503.101–3 Agency regulations.

(a) GSA Standards of Conduct are in Part 105–735 of the General Services Administration Property Management Regulations (GSPMR) (ADM 7900.9). Authorized exceptions to FAR 3.101–2 are in GSPMR 105–735.202(e). Enforcement procedures are in GSPMR 105–735.101.

(b) The requirement for employee financial disclosure and restrictions on private employment for former Government employees are in GSPMR 105–735.4 and 105–735.6.

Subpart 503.2—Contractor Gratuities to Government Personnel

503.203 Reporting suspected violations of the Gratuities clause.

Employees shall immediately report any suspected violation of the Gratuities clause to the contracting officer, the Assistant Inspector General for Investigations or the Regional Inspector General for Investigations and to the Deputy Standards of Conduct Counselor in accordance with GSPMR 105–735.202(e)(4). The report must outline circumstances which indicate the Gratuities clause has been violated and include all pertinent documents. The Office of Inspector General will investigate and, if appropriate, forward a report and recommendation to the Department of Justice and/or the Office of Acquisition Policy, and/or the Office of Ethics and Civil Rights.

503.204 Treatment of violations.

(a) The Associate Administrator for Acquisition Policy or a designee shall make determinations under FAR 3.204.

(b) The Associate Administrator or designee, after coordinating the matter with legal counsel, may initiate proceedings under FAR 3.204(a) by notifying the contractor that action against the contractor for a violation of the Gratuities clause is being considered. Notice must be provided by means of a letter sent by certified mail to the last known address of a party, its counsel, or agent for service of process. In the case of a business, notice may be sent to any partner, principal officer, director, owner or co-owner, or joint venture. If no return receipt is received within 10 calendar days of mailing, receipt will be presumed.

(c) The contractor shall have 30 calendar days to exercise its rights under FAR 3.204(b), unless an extension is granted.

(d) The Associate Administrator or designee may refer a matter to an agency fact-finding official designated by the Chairman of the GSA Board of Contract Appeals, if a determination is made that there are disputes of fact material to making a determination under FAR 3.204(a). Referrals for fact-finding will not be made in cases arising from a conviction or indictment as defined in FAR 9.403. If a referral is made, the fact-finding official shall:

(1) Afford the contractor the opportunity to dispute material facts relating to the determinations under FAR 3.204(a) (1) and (2).

(2) Conduct the proceedings under rules that are consistent with FAR 3.204(b).

(3) Schedule a hearing within 20 calendar days of receipt of the referral. Extensions may be granted for good cause upon the request of the contractor or the agency.

(4) Deliver written findings of fact to the Associate Administrator or designee (together with a transcription of the proceedings, if made), within 20 calendar days after the hearing record closes. The findings must resolve any material disputes of fact by a preponderance of the evidence.

(e) The Associate Administrator or designee may reject the findings of the fact-finding official only if they are determined to be clearly erroneous or arbitrary and capricious.

(f) In cases arising from conviction or indictment, or in which there are no disputes of material fact, the Associate Administrator or designee shall conduct the hearing required by FAR 3.204(b).

(g) If it is determined that the Gratuities clause has been violated, the contractor may present evidence of mitigating factors to the Associate Administrator or designee, either orally or in writing, in accordance with a schedule established by the Associate Administrator or designee. The Associate Administrator or designee shall exercise the Government's rights under FAR 3.204(c) only after considering mitigating factors.

Subpart 503.3—Reports of Suspected Antitrust Violations

503.303 Reporting suspected antitrust violations.

Contracting officers shall report evidence of suspected antitrust

violations in acquisitions to the Assistant Inspector General for Investigations or the Regional Inspector General for Investigations. The Office of Inspector General will investigate and prepare a report and recommendation to the Attorney General and to the Office of Acquisition Policy for suspension or debarment consideration.

Subpart 503.4—Contingent Fees

503.404 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 552.203–4, Contingent Fee Representation and Agreement, in solicitations and contracts for the acquisition of leasehold interests in real property.

(b) The contracting officer shall insert the provision at 552.203–5, Covenant Against Contingent Fees, in solicitations and contracts for the acquisition of leasehold interests in real property.

503.408 Evaluation of the SF 119.

503.408–1 Responsibilities.

The contracting officer's documentation of the evaluation, conclusion and any proposed action must be reviewed by assigned legal counsel and the contracting director.

503.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

Employees who suspect or have evidence of violations of the Covenant Against Contingent Fees clause shall report the matter to the contracting officer as well as the Office of Inspector General. If appropriate, the Office of Inspector General will forward a report and recommendation to the Department of Justice.

Subpart 503.5—Other Improper Business Practices

503.570 Advertising.

503.570–1 Policy.

Contractors shall not refer to contracts awarded by GSA in commercial advertising in a manner which states or implies that the product or service provided is approved or endorsed by the Government or is considered by the Government to be superior to other products or services. This policy is intended to avoid the appearance of preference by the Government toward any product or service.

503.570–2 Contract clause.

The contracting officer shall insert the clause at 552.203–70, Restriction on Advertising, in solicitations and contracts for supplies or services when the contract amount is expected to exceed the small purchase limitation.

Subpart 503.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

503.602 Exceptions.

(a) The heads of contracting activities may authorize exceptions to the policy in FAR 3.601.

(b) Offers submitted by Government employees on solicitations issued under the Office of Management and Budget (OMB) Circular A–76 may be considered if the contracting officer complies with 503.603. When Government employees submit offers, they do so with the knowledge that if the contract is awarded, their Government employment will be terminated. The implementation of OMB Circular A–76 presents a unique situation which may be considered to be an exception to the policy in FAR 3.601. Contracts between the Government and its employees are not expressly prohibited except, where the employee acts for both the Government and the contractor in a particular transaction or where the service to be rendered is such as could be required of the contractor in his/her capacity as a Government employee.

503.603 Responsibilities of the contracting officer.

Before awarding a contract to a GSA employee who responded to an A–76 solicitation, the contracting officer shall:

(a) Obtain a written certification from the employee's supervisor that: the individual was not involved in the development of the solicitation or specifications, or in the preparation of the independent Government cost estimate or in-house cost comparison; had no advance knowledge of the details of the contents of the solicitation package; and was not otherwise involved in the contracting process.

(b) Refer the proposed award to assigned legal counsel for review and approval.

(c) Ascertain whether a reduction-in-force notice has been issued to the employee.

Subpart 503.7—Voiding and Rescinding Contracts

503.702 Definitions.

"Notice" means a letter sent by certified mail with a return receipt requested to the last known address of a party, its counsel, or agent for service of process. In the case of a business, such notice may be sent to any partner, principal officer, director, owner or co-owner, or joint venturer. If no return receipt is received within 10 calendar days of mailing, receipt will be presumed.

"Voiding and rescinding official" means the Associate Administrator for Acquisition Policy or a designee.

503.705 Procedures.

(a) Where a contract has been tainted by fraud, bribery, conflict of interest, or similar misconduct, the contracting officer should consult with counsel to determine if the Government has a common law remedy such as avoidance, rescision, or cancellation. Alternatively, the matter may be referred to the voiding and rescinding official under FAR 3.705, if there has been a final conviction for any violation of 18 U.S.C. 201–224.

(b) The contracting officer may postpone a decision to exercise the Government's common law right to void, rescind, or cancel a contract pending completion of legal proceedings against a contractor.

(c) A referral to the voiding and rescinding official should identify the final conviction and include the information required by FAR 3.705(d) (2) through (5). The contracting officer should coordinate the referral with the Office of Inspector General to ascertain if a debarment referral is contemplated.

(d) The voiding and rescinding official shall review the referral and coordinate the matter with assigned legal counsel and the contracting activity. If a determination is made to declare void and rescind a contract and to recover the amounts expended and the property transferred, the voiding and rescinding official shall issue the notice required by FAR 3.705, and conduct the hearing contemplated by FAR 3.705(c)(3). If the voiding and rescinding official determines that there is a genuine dispute of material fact regarding the agency decision, the voiding and rescinding official shall refer the matter to the fact-finding official designated by the Chairman of the GSA Board of Contract Appeals. Such a referral will be made if there is a dispute of fact that relates to:

(1) The contracts affected by the final conviction giving rise to the proposed action.

(2) The amounts expended and property transferred by the Government under the contracts covered by the proposed action.

(3) The identity and value of any tangible benefits received by the Government under the affected contracts.

(e) If a referral for fact-finding is made, the fact-finding official shall:

(1) Afford the contractor the opportunity to dispute material facts relating to 503.704(d) (1) through (3).

(2) Conduct the proceedings under rules that are consistent with FAR 3.705(c)(3).

(3) Schedule a hearing within 20 calendar days of receipt of the referral. Extensions may be granted for good cause upon the request of the contractor or the agency.

(4) Deliver written findings of fact to the voiding and rescinding official (together with a transcription of the proceeding, if made) within 20 calendar days after the hearing record closes. The findings must resolve any material disputes of fact by a preponderance of the evidence.

(f) The voiding and rescinding official shall not issue the agency's final decision under FAR 3.705(e) until receipt of the fact-finding official's report, if any. The voiding and rescinding official may reject the findings of the fact-finding official only if they are determined to be clearly erroneous or arbitrary and capricious.

(g) In actions in which it is determined there are no material disputes of fact relating to the determinations required by FAR 3.705(d) (2), (4) and (5), the voiding and rescinding official will conduct the hearing contemplated by FAR 3.705(c)(3).

(h) The final decision must be coordinated with the contracting activity and a copy of the decision provided to the activity.

PART 504—ADMINISTRATIVE MATTERS

Subpart 504.1—Contract Execution

Sec.

Subpart 504.2—Contract Distribution

Subpart 504.4—Safeguarding Classified Information Within Industry

Subpart 504.8—Contract Files

Subpart 504.9—Information Reporting to the Internal Revenue Service

Subpart 504.70—Uniform Procurement Instrument Identification

Authority: 40 U.S.C. 486(c)

Subpart 504.1—Contract Execution

504.101 Contracting officer's signature.

Contracts and contract modifications must be signed personally and manually by the contracting officer. The contracting officer's name and title must be typed or stamped below the signature. In the absence of the designated contracting officer, another contracting officer may sign documents. However, in all cases the name and title of the individual actually signing the document must be typed or stamped on the document below the signature.

504.103 Contract clause.

Agency procedures do not require the use of the clause at FAR 52.204–1, Approval of Contract, in solicitations and contracts.

Subpart 504.2—Contract Distribution

504.201 Procedures.

A "Duplicate Original" of the contract or modification forwarded to the paying office must be certified as a true copy by the contracting officer's original handwritten signature, in ink, on the award or modification form (i.e., SF 26, 33, 1442 etc.). This requirement does not apply to:

(a) Leases of real property;

(b) Schedule contracts; or

(c) Standard or GSA multipage purchase/delivery order carbon forms.

Subpart 504.4—Safeguarding Classified Information Within Industry

504.402 General.

(a) This subpart prescribes procedures for safeguarding classified information required to be disclosed to contractors in connection with the solicitation of offers, and the award, performance, and termination of contracts. As used in this subpart, the term "contractor(s)" includes prospective contractors, subcontractors, vendors, and suppliers of any tier.

(b) This subpart implements the requirements of the Department of Defense's Industrial Security Regulation (ISR) and Industrial Security Manual for Safeguarding Classified Information (ISM). By agreement, the Department of Defense will act for and on behalf of GSA in rendering security services required for safeguarding classified information released by GSA to United States (U.S.) industry.

(c) As used in this subpart, the term "U.S. industry" pertains to those industries (including educational and research institutions) located within the United States, its possessions, and the Commonwealth of Puerto Rico.

504.470 Requests for release of classified information.

Prior to soliciting offers or entering into discussions or negotiations with any contractor involving the disclosure of classified information, the contracting officer shall prepare, in triplicate, Section I of GSA Form 1720, Request for Release of Classified Information to U.S. Industry (illustrated in Subpart 553.3). After signing as requesting officer and obtaining approval from the immediate supervisor, the contracting officer shall forward all copies of the completed form to the Audit Resolution and Internal Controls Division (CTR), Office of Management Services.

504.470–1 Authorization for release.

CTR, after determining that the contractor has been issued a Department of Defense facility security clearance, will complete the appropriate parts of Section II, of GSA Form 1720, and return the original and one copy to the contracting officer. Under no circumstances will classified information be disclosed or made accessible to any contractor until the completed form has been received from CTR. Where only Item 14b, Section II, of the form has been checked, the contracting officer's actions will be governed by the instructions on the reverse side of the form. When a contractor is found to be ineligible for a security clearance, CTR will advise the contracting officer.

504.470–2 Termination of authorization for release.

When circumstances support withdrawal or revocation of security clearance, CTR will advise the contracting officer of the termination of authorization to release classified information and include instructions concerning actions required to safeguard, withhold, or obtain the return

of classified information. Reasons for such termination may include:

(a) Failure of the contractor to maintain the physical standards required by the ISM.

(b) Information indicating the contractor no longer (1) is eligible for clearance or (2) requires access to classified information.

504.471 Processing security requirements checklist (DD Form 254).

(a) Contracts involving access to classified information by the contractor require preparation of DD Form 254, Contract Security Classification Specification (illustrated in FAR 53.303–DD–254), to identify and indicate to Department of Defense (DOD) and contractors the areas of classified information involved. In the case of contracts for research, advisory and assistance services, graphic arts services, or other procurements of services, written notice of classification may be used in lieu thereof.

(b) Instructions or guidance on completing DD Form 254 may be obtained from CTR.

504.472 Periodic review.

Contracting officers shall review DD Form 254 whenever a change in the phase of performance occurs or at their own discretion, but in any event at least once a year, to determine whether the classified information can be downgraded or declassified. The contractor must be informed of the results of the review by issuance of a revised specification, or by written instructions instead of DD Form 254 (where authorized), or if the review results in no change in the classification specifications, by written notification to that effect. Upon termination or completion of the contract, a final checklist must be prepared.

504.473 Recurring procurement.

When procurement is of a recurring nature, a new DD Form 254 is not required if the end item is not changed and there is no change from the previous security classification.

504.474 Control of classified information.

(a) Classified information must be recorded, marked, handled, and transmitted in accordance with instructions contained in the handbook, Information Security (ADM P 1025.2C).

(b) When classified information is originated by another agency, the consent of the originating agency must be obtained prior to releasing the classified information to the contractor.

504.475 Return of classified information.

(a) Unless the classified information has been destroyed as provided in paragraph 19 of the ISM, the contracting officer must recover the information. When classified information is furnished to a GSA contractor by another Government agency, the return of such information is the responsibility of that agency.

(b) The contracting officer is responsible for insuring that classified information furnished to prospective offerors, offerors, or contractors is returned immediately:

(1) After bid opening or closing date for receipt of proposals from non-responding offerors;

(2) After contract award from unsuccessful offerors;

(3) Upon termination or completion of the contract;

(4) Upon notification that authorization to release classified information has been withdrawn;

(5) After notification that a facility (i) does not have adequate means for safeguarding classified information, or (ii) has had its security clearance revoked or inactivated; or

(6) Whenever otherwise instructed by the authority responsible for the security classification.

504.476 Breaches of security.

When an unauthorized disclosure of classified information is discovered, the contracting officer or other GSA employee responsible for the information shall promptly refer the facts of such breach or compromise to CTR.

Subpart 504.8—Contract Files

504.800 Scope of subpart.

This subpart prescribes requirements for using standard contract file format for all contracts, except leases of real property, that exceed the small purchase limitation. The application of this subpart to small purchases is optional.

504.802 Contract files.

(a) *Standardization of files.* Contract files must contain all necessary information and documentation required by FAR 4.802 and 4.803 and be organized in the standardized contract file format in 504.803.

(b) *Responsibility for contract files.* The contracting officer is responsible for the official file. All documents pertaining to the contract must be forwarded by those initiating them to the contracting officer for inclusion in this file. The contracting officer is also responsible for the accountability of contract files transferred to the records center and for knowing the location of the files as provided by the National Archives and Records Administration.

(c) *Transfer of responsibility for contract files.* (1) When responsibility for a contract is transferred from one contracting officer to another, e.g., transfer of assignments or redelegation of contract administration (intraoffice or interoffice), the contracting officer transferring the files shall prepare a detailed listing by file number and/or name to identify the file(s) to be transferred (see also FAR 42.206).

(2) If available, duplicates of the files to be transferred must be retained by the contracting officer until acknowledgement of receipt of the transferred files by the contracting officer is received.

(3) The original contracting officer transferring the files shall retain one copy of the listing and send a copy of the listing to the successor contracting officer under a separate mailing as advance notice of the files to be transferred.

(4) The files to be transferred to the successor contracting officer must be sent by certified mail, return receipt requested, when appropriate, or by another method so as to obtain a signature of the successor contracting officer for receipt of the contract files that are transferred. The transferred files must be accompanied by two copies of the listing to the successor contracting officer.

(5) The successor contracting officer, who becomes responsible for the files, shall sign one copy of the listing, certifying receipt of the files listed, and return the signed copy to the contracting officer transmitting the files.

504.803 Contents of contract files.

(a) The contract file must be numerically tabbed, filed in reverse order starting with item (1) on the bottom of the file and item (28) on the top. Documents within the tab should be filed chronologically with the most recent document on top. If any of the documents are too voluminous to be placed under the applicable tab, they should be included in a separate file and the tab annotated with the location of the file. All of the items described will not always be needed for each contract action. If a tab is not required for a particular action, it should be omitted from that contract file. The file must be tabbed as specified below:

(1) Requisition or request for contractual action. Where technical or requirements personnel recommend the use of other than full and open competition, the certification of the accuracy and completeness of the data to support the recommendation should be filed under this tab. (See FAR 6.303–1(b).)

(2) Specifications, drawings, and other technical documents.

(3) Acquisition plan including, where applicable, the determination required by OMB Circular A–76 and/or

concurrence of the cognizant competition advocate.

(4) Determination and findings required by FAR Subpart 1.7 and Subpart 501.7, or justification required by FAR 6.303, including the certification of accuracy and completeness of the justification.

(5) Department of Labor Wage Determination.

(6) Small business and labor surplus area determinations.

(7) Source list.

(8) Statement as to synopsis of proposed procurement under FAR Subpart 5.2 or other required advertisements.

(9) Presolicitation notice.

(10) IFB/RFP and amendments.

(11) Abstract of bids/proposals including identification of the low bidder/offeror, discounted price, etc.

(12) Cost or pricing data. Where the requirement for submission of cost or pricing data is waived, as provided in FAR 15.804–3, the waiver and documentation supporting the waiver should be filed under this tab.

(13) Field pricing report (see FAR 15.805–5 and 515.805–5). Where the requirement for a field pricing report of a price proposal is waived, as provided in FAR 15.805–5, the waiver and documentation supporting the waiver should be filed under this tab.

(14) Price or cost analysis report prepared under FAR 15.808. Supporting technical analyses, other than those supporting an audit report, should be filed under this tab. The profit or fee analysis required by FAR Subpart 15.9 should be made a part of the price or cost analysis report. In those cases where an independent Government estimate is prepared, it should also be made a part of the price or cost analysis report.

(15) A price negotiation memorandum, as required by FAR 15.808, must be written so as to permit reconstruction of all the major events of the acquisition and placed under this tab.

(16) Certificate of current cost or pricing data.

(17) Pre-award survey.

(18) EEO compliance review.

(19) "No bid" or "no proposal" correspondence.

(20) Unsuccessful bids or proposals. A copy of each rejected bid or unacceptable proposal also must be included in the file under this tab.

(21) Mistakes in bids and protests. This includes all correspondence and determinations relating to mistakes in bids disclosed before award and/or protests.

(22) Actions taken on late bids or proposals.

(23) Contractual action. Successful bid or proposal and all pertinent correspondence applicable to the contractual action. Subcontracting plans that are incorporated in and made a material part of a contract, as required by FAR 19.705(a)(5), should be filed under this tab.

(24) Evidence of concurrence for legal sufficiency of the appropriate counsel (if applicable).

(25) Any required approvals—GSA Form 1535, Recommendation for Award, or GSA Form 3584, Checklist for Review of Subcontracting Plan (as applicable).

(26) Any notices of award including Standard Form 99, Notice of Award of Contract (if applicable).

(27) SF 279, FPDS Individual Contract Action Report.

(b) An index of the file tabs should be placed in the file. Items which do not apply should be so marked, and if necessary, a brief explanation included. The GSA Form 3420, Contract/ Modification File Checklist, illustrated in 553.370–3420, must be used by the contracting officers in the Public Buildings Service. The form may be used by other offices or a standard contract file checklist, based on the requirements of 504.803(a), appropriate to that particular office may be prepared. The requirements of a particular office may provide for the inclusion of subheadings under a tab or additional items as appropriate.

504.804–5 Detailed procedures for closing out contract files.

When the statement required by FAR 4.804–5(b) is completed, the administrative contracting officer (ACO) shall forward the statement and the contract files to the cognizant procuring contracting officer (PCO). The ACO shall follow the procedures outlined in 504.802(c) when transferring the files to the PCO.

504.805 Disposal of contract files.

The contracting officer's accountability for contract files terminates at the end of their retention period when the notice of disposal is received from the National Archives and Records Administration, and disposal is approved by the appropriate records liaison officer whose organization has functional responsibility for the files.

Subpart 504.9—Information Reporting to the Internal Revenue Service

504.903 Procedures.

(a) The Office of Finance makes reports required by 26 U.S.C. 6041 and 6041A as implemented in 26 CFR to the IRS on payments made to certain contractors for services performed and to lessors for providing space in buildings. In order for Finance to make the required reports, contracting officers must indicate on obligating documents (e.g. purchase/delivery orders, contracts, or the GSA Form R–620 for leases) forwarded to Finance, the contractor's organization structure (e.g. corporation, partnerships, etc.) and for contractors that are not incorporated (except as provided in FAR 4.902(a)(1)(i)), the contractor's taxpayer identification number (TIN). When certified invoice procedures (see 513.70) are used, contracting officers must identify the organization structure for Finance.

(b) Reports required by 26 U.S.C. 6050M are made through the Federal Procurement Data System.

Subpart 504.70—Uniform Procurement Instrument Identification

504.7001 Uniform procurement instrument identification.

Except for real property leasing activities and procurement activities of the Federal Supply Service, the procedures in this subpart prescribed for the identification of contracts, orders, and other procurement instruments regardless of dollar threshold are applicable for all other contracting activities, including the Federal Supply Service, Property Management Division.

504.7001–1 Policy.

(a) The uniform procurement instrument identification system must be used for procurement instruments listed in paragraph (f) of 504.7001–2. The system does not apply to purchases made through certified invoice procedures (see 513.70) or to imprest fund purchases.

(b) Identification should be placed in the contract number block provided on the applicable forms. If a space is not reserved for the prescribed number, it should be placed in the upper right-hand corner of the form.

(c) Each contracting office shall maintain records to ensure continuity and control of procurement instrument identification numbers. (See 504.7002.)

504.7001–2 Basic procurement instrument identification number.

The basic procurement instrument identification number will normally be assigned at the time of award. However, the number may be assigned at the time a procurement request is received if assignment at that time will facilitate tracking of the procurement. The basic procurement instrument identification number does not change during the life of the particular instrument and consists of 14 alphanumeric characters as follows:

(a) Characters 1 and 2 of the basic procurement instrument identification number is the symbol "GS."

(b) The third and fourth characters

reflect the region preparing the instrument as follows:

00 Central Office
01 Region 1
02 Region 2
03 Region 3
04 Region 4
05 Region 5
06 Region 6
07 Region 7
08 Region 8
09 Region 9
10 Region 10
11 National Capital Region

(c) The fifth character is a capital letter assigned to the service/office preparing the instrument as follows:

B Office of the Comptroller
D Federal Property Resources Service
F Federal Supply Service
G GSA Board of Contract Appeals
C Office of Administration
J Office of Inspector General
K Information Resources Management Service
L Office of General Counsel
P Public Buildings Service

(d) The sixth and seventh characters identify the fiscal year in which the number is assigned.

(e) The eighth and ninth characters identify the contracting office preparing the instrument. (These codes will be assigned to each GSA organization where a contracting officer is assigned.) See Appendix A for code assignment.

(f) The tenth character is a capital letter assigned to indicate the type of procurement instrument code as follows:

A Agreements, including basic agreements, basic ordering agreements, and blanket purchase agreements.
B Reserved
C Contracts, including letter contracts, contracts referencing basic agreements, or basic ordering agreements, excluding indefinite delivery type contracts.
D Indefinite delivery contracts, including definite quantity, requirements contracts and indefinite quantity contracts.
E Sales contracts.
F-L Reserved
M Purchase orders (open market small purchases)—manual
N Reserved
P Purchase orders—(open market small purchases)—automated.
Q Reserved
R Reserved
S Schedule contract
T-Z Reserved

(g) The eleventh through fourteenth characters reflect the serial number of the instrument. A separate series of numbers, maintained at the contracting office level, may be used for each type of instrument listed in paragraph (f) of 504.7001–2, depending upon procurement document volume. At the beginning of each fiscal year, these serial numbers will begin with the number 0001. Alphanumeric characters will be serially assigned, after all the numeric series are exhausted, i.e., 0001 through 9999, with an alpha as the first character, followed by three character numeric serial number. Each issuing office is responsible for controlling the serial number assignments. The following numeric and alphanumeric sequences, excluding alpha I and O, will be used:

0001 through 9999;
A001 through A999, B001 through B999; and so on to Z001 through Z999.

(h) An example of this procurement instrument identification number is:

1-2	The agency designation code	
3-4	A two-digit code identifying the region or Central Office	
5	A capital letter identifying the service/office.	
6-7	The last two digits of the fiscal year.	
8-9	A two-digit alpha code assigned to the contracting office.	
10	A capital letter assigned to the type of instrument	
11-14	The four digit serial number.	

504.7001–3 Order and call instrument identification number.

Delivery orders under indefinite delivery contracts (orders), and orders under schedule contracts must be identified by an "11" character alphanumeric identification number placed in the order number block of the order form. The basic indefinite delivery or schedule contract number must be placed in the contract number block of the order form.

(a) The first character is a capital letter assigned to the office issuing the order. This code will be identical to those assigned in paragraph (c) of 504.7001–2.

(b) The second and third characters reflect the Region issuing the order. These identification codes will be identical to the codes assigned in paragraph (b) of 504.7001–2.

(c) The fourth and fifth characters identify the fiscal year in which the number is assigned.

(d) The sixth and seventh characters identify the contracting office preparing the order. These identification codes will be the same as the codes assigned in paragraph (e) of 504.7001–2.

(e) The eighth through the eleventh characters reflect the serial number of the order. Each contracting office maintains its own serial number. Alphanumeric numbers are used when more than 9999 numbers are required. Alphanumeric numbers are serially assigned with an alpha in the first position followed by the numeric serial number. The following sequences, excluding alpha I and O will be used:

0001 through 9999;
A001 through A999; and so on to Z001 through Z999.

(f) An example of a delivery order number is:

Positions

P 01 84 PB 0001

1	Service/office issuing the order.
2-3	Region issuing the order.
4-5	Fiscal year.
6-7	A two-digit code assigned to contracting office.
8-11	Four digit serial number.

504.7001–4 Supplemental procurement instrument identification number.

Modifications to the basic contract instrument and to call/order against contracts are numbered by use of a four character alphanumeric number.The supplemental identification numbering system applies to all modifications to contracts and to call/orders against contracts.

(a) The first character is a capital letter identifying the officeissuing the modification, as indicated below:

A Contract administration office modification (Administrative Components); or
P Purchasing office modification.

(b) The second character is a capital letter identifying the type of action, as follows:

A Administrative change.
C Change order.
O Other (includes exercise of options, price adjustments under escalation clauses and other changes made under specific contract clauses.)
S Supplemental agreement (bilateral signatures).

(c) The third and fourth characters reflect the serial number. Alphanumeric numbers are used when more than 99 numbers are required. Alphanumeric numbers are serially assigned with an alpha in the first position followed by a numeric number. If additional numbers are needed, alphas may be used in both positions. The following sequences, excluding alpha I and O, will be used:

01 through 99.
A1 through A9, and so on to Z1 through Z9.
AA through AZ, and so on to ZA through ZZ.

(d) An example of the supplemental procurement instrument identificationnumber is:

Positions		EXAMPLE: ASO1
1	Identifying office A or P.	A
2	Type action.	S
3-4	The two-digit serial number.	01

504.7002 Procurement contract register.

GSA Form 2728, Procurement Contract Register, or an automated register must be used to ensure continuity and control of procurement instrument identification numbers.

PART 505—PUBLICIZING CONTRACT ACTIONS

Subpart 505.1—Dissemination of Information

Sec.

Subpart 505.2—Synopses of Proposed Contract Actions

Subpart 505.3—Synopses of Contract Awards

Subpart 505.4—Release of Information

Subpart 505.5—Paid Advertisements

Authority: 40 U.S.C. 486(c)

Subpart 505.1—Dissemination of Information

505.101 Methods of disseminating information.

(a) Contracting offices located in the same geographic area as the Business Service Center (BSC) may post the notice required by FAR 5.101(a)(2) at the BSC.

(b) The appropriate BSC must be furnished a copy of solicitations (except solicitations for space in buildings) when the estimated contract amount is expected to exceed the small purchase limitation. The BSC will display the solicitation for public examination.

(c) Unless exempt under FAR 5.202 or 505.202, proposed acquisitions must be publicized in local newspapers when the acquisition is for:

(1) Real property appraisal services, estimated to cost $10,000 or more; or

(2) Leasehold interests in real property involving blocks of space of 10,000 square feet or more. Proposed leases of less than 10,000 square feet may be publicized when the contracting officer determines such advertising will serve to promote competition.

Subpart 505.2—Synopses of Proposed Contract Actions

505.202 Exceptions.

The Administrator has determined under section 16(c)(3) of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 416(c)(3) and section 8(g)(3)) of the Small Business Act, as amended (15 U.S.C. 644(g)(3)) that:

(a) Advertising in local newspapers is more appropriate than synopsizing in the *Commerce Business Daily* (CBD) for proposed acquisitions of:

(1) Leasehold interests in real property (except lease construction on a designated site);

(2) Real property appraisal services (see 505.101); and

(b) It is not appropriate or reasonable to publish an advance notice of:

(1) Orders not exceeding $50,000 under GSA non-mandatory ADP and telecommunications schedule contracts;

(2) Acquisitions of works of art, including the design, execution and installation of the artwork, under the Art-in-Architecture Program; and

(3) Supplemental agreements to leases of real property involving:

(i) Building alterations (see 570.6);

(ii) Lease extensions (see 570.505); or

(iii) Expansion requests (see 570.503).

505.203 Publicizing and response time.

(a) When publicizing acquisitions of real property appraisal services and leasehold interests in real property is required (see 505.101 and 505.202), the notice must appear in local newspapers at least 3 calendar days before issuance of the solicitation. The solicitation must be issued at least:

(1) 10 calendar days before the date established for receipt of initial offers for real property appraisal services; or

(2) 20 calendar days before the date established for receipt of initial offers for leasehold interests in real property, unless the contracting officer makes a written determination that the urgency of the need necessitates a shorter time period.

(b) The publicizing and response times in paragraph (a) of this section do not apply to proposed acquisitions of leasehold interests in real property involving less than 10,000 square feet. In such cases, the contracting officer shall establish response times appropriate for the individual acquisition involved.

505.204 Presolicitation notices.

505.204–70 Presolicitation notices used in connection with market searches for competitive sources.

(a) The term "sources-sought synopsis" means the type of *Commerce Business Daily* (CBD) notice designed to identify potential sources for procurements. The sources-sought synopsis provides an opportunity for the marketplace to indicate its interest in submitting offers for future acquisitions. It is normally used to discover if more than one firm is interested and qualified to provide a particular product or service, although a solicitation is not yet available. This type of synopsis has particular application when one contractor is thought to be uniquely capable of meeting the Government's minimum requirements and verification of this opinion is needed.

(b) Sources-sought notices publicizing the Government's interest in anticipated supply or service procurements may be published in the CBD, using the general format outlined in 505.207, except where security considerations prohibit such publication. A sources-sought synopsis may be published in connection with

market searches for sources of supply or services, other than those discussed in FAR 5.205, when a sources-sought synopsis is required to test the marketplace for competitive sources. All potential contractors identified through the market search, including any concern which, as a result of a sources-sought synopsis, requests a copy of the solicitation must be solicited. In conjunction with that solicitation, the specific procurement of the supply or service must be publicized in the CBD as required by FAR 5.201.

505.207 Preparation and transmittal of synopses.

Notices described in 505.204–70 must include a statement similar to the following (modifications may be made to suit needs):

Concerns having the ability to furnish the following supplies (services) are requested to give written notification (including the telephone number for a point of contact) to the acquiring office listed in this notice within _____ calendar days (no less than 30 days should be entered) from the date of this synopsis:

(The contracting officer should describe the requirement so as to furnish a complete supply (service) description, and a condensation of other essential information, to provide concerns with an intelligible basis for judging whether they have an interest in the procurement. Such information may include a statement regarding the Government's belief that the supply or service may be available only from a sole source and the reasons for such belief.)

This is not a formal solicitation. However, concerns that respond should furnish detailed data concerning their capabilities and may request a copy of the solicitation when it becomes available.

505.270 Synopsis of amendments to solicitations.

All amendments to solicitations for offers increasing the anticipated value of the proposed acquisition above the dollar threshold requiring synopsis or altering the scope of the proposed acquisition so that increased interest of contractors can be reasonably anticipated must be published in the *Commerce Business Daily*.

Subpart 505.3—Synopses of Contract Awards

505.303 Announcement of contract awards.

By complying with 505.303–70 contracting officers automatically fulfill the reporting requirements of FAR 5.303(a).

505.303–70 Notification of proposed substantial awards and awards involving Congressional interest.

(a) *Applicability.* The notification procedures in (b), below, apply only to proposed award involving:

(1) A contract with the Small Business Administration (the 8(a) program).

(2) A supply contract exceeding or estimated to exceed $500,000 (except for (i) motor vehicles, (ii) products whose points of origin are not readily identifiable, or (iii) products involving foreign production points).

(3) A design (Architect/Engineer) contract or construction contract exceeding or estimated to exceed $500,000.

(4) Any other contract, or class of contract, in excess of $25,000 for which a Member of Congress has specifically requested notification of award.

(b) *Notification procedures.* (1) The Office of Congressional Affairs (S) will notify the heads of contracting activities in writing with the names of Members of Congress who wish to be notified of any or all contract awards in excess of $25,000 to contractors located within their district or State, as applicable. Upon such notification, the contracting activities will facsimile or hand deliver applicable notices of award to S. A copy of the submittal should be provided to the regional Congressional liaison office.

(2) Except for submittals hand delivered to S, the submittal must be made by facsimile transmission and, in the case of proposed 8(a) awards, on GSA Form 2677, Minority Contract Fact Sheet. Except for contracts awarded under unusual and compelling urgency, notification to S must be made 48 hours in advance of award. Notification to S of awards made under unusual and compelling urgency must be made at the same time notification is made to the contractor. If the 48 hour timeframe for advance notification to S cannot be met, the Contracting Director must notify S by telephone.

(3) The notification to S must:

(i) Describe the supplies or services acquired and the duration of the contract period.

(ii) Identify the type of contract and contractor using the following codes:

(A) *DQ* for definite quantity contract.

(B) *SC* for schedule contract.

(C) *TC* for indefinite delivery contract other than schedule.

(D) *S* for small business concern.

(E) *SD* for small disadvantaged business concern.

(F) *O* for other than a small business concern.

(G) *NLS* for not labor surplus area.

(H) *LS* for labor surplus area.

(iii) Include the contractor's name and address (including county and Congressional district, if known) and indicate the dollar value of the contract for each production point. When there are multiple production points and specific items, and their points of production are not shown, or when the number of production points exceed 10, write "multiple" and indicate immediately after, in parentheses, the total number of production points.

(iv) Indicate the quantity and unit, in parentheses, for definite quantity awards by production point. Indicate the name of the receiving agency next to the applicable quantity and identify the requirement or portion thereof for overseas use.

(v) Provide the name (where available) and telephone number for a point-of-contact for each award recipient and each production point.

(vi) Include the following statement when Congressional interest is involved.

"Congressional Interest: (*Name of Congressman/Senator*)
(*Indicate State/District*)
(*Describe interest*)"

(vii) Provide the contracting officer's name and telephone number for each award.

(4) The notification to S will contain sensitive preaward information and should be labeled accordingly. S and regional Congressional liaison offices will be responsible for the security of such information and will establish procedures governing the release of such information before official notification of award. Unless otherwise authorized by the contracting officer, the release of such information prior to award shall be limited to Members of Congress and their staff.

(c) *Release of awards.* (1) Release of notifications which require priority processing as determined by the Associate Administrator for Congressional Affairs will be accomplished at the time and date specified.

(2) Unless notified to the contrary, contracting activities may release awards of the type described in (a) and (b) of this section, or information pertinent thereto, upon the expiration of two full workdays (48 hours) after the time and date of notification to S established either by the facsimile transmission or hand delivery.

Subpart 505.4—Release of Information

505.403 Requests from Members of Congress.

When responding to a Congressional inquiry would result in disclosure of classified material, confidential business information, or information prejudicial to a competitive acquisition, the contracting officials shall consult with assigned legal counsel, refer the proposed reply to the head of the contracting activity (HCA), and inform the Office of Congressional Affairs of the action taken.

Subpart 505.5—Paid Advertisements

505.502 Authority.

(a) *Newspapers.* Written approval from the HCA or a designee is required for paid newspaper advertisements, except when such publication is required by the FAR or the GSAR (see 505.101(c)). The contracting officer shall document the contract file with the regulatory citation or written approval to support the use of paid newspaper advertisements.

(b) *Other media.* Advance approval is not required to place paid advertisements in media other than newspapers.

505.503 Procedures.

The GSA Form 300, Order for Supplies or Services, must be used instead of the Optional Form 347, Order for Supplies and Services, when the dollar amount of the acquisition does not exceed the small purchase limitation or when issuing a delivery order under a basic ordering agreement with an advertising agency for an advertisement.

505.504 Use of advertising agencies.

The services of commercial advertising agencies may be used whenever it is determined that the services rendered by those agencies can increase competition for contracts and improve the effectiveness of GSA advertising and marketing programs.

PART 506—COMPETITION REQUIREMENTS

Subpart 506.2—Full and Open Competition after Exclusion of Sources

Sec.

Subpart 506.3—Other Than Full and Open Competition

Authority: 40 U.S.C. 486(c).

Subpart 506.2—Full and Open Competition After Exclusion of Sources

506.202 Establishing or maintaining alternative sources.

The heads of contracting activities (HCA's) sign determinations and findings under FAR 6.202.

Subpart 506.3—Other than Full and Open Competition

506.302 Circumstances permitting other than full and open competition.

506.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

A class justification has been established for the acquisition of utility services (except electric utility services) that are available from only one source. A copy of the class justification may be obtained from the Office of GSA Acquisition Policy and Regulations (VP). The contract file for each action taken under the justification must contain a signed statement by the contracting officer that the action taken is within the scope of the class justification and approval.

506.303 Justifications.

506.303–1 Requirements.

(a) The contracting officer shall review the facts provided by technical and requirements personnel to support their recommendation to use other than full and open competition and must be satisfied that the facts are correct before proceeding with the acquisition.

(b) The contracting officer should determine whether the facts supporting other than full and open competition would be present in other GSA contracting activities. If the facts would be present, the contracting officer should recommend through appropriate channels that the Associate Administrator for Acquisition Policy approve a class justification for use by all GSA contracting activities.

506.303–2 Content.

Each justification for other than full and open competition must include the information required by FAR 6.302–2 (a)(1) through (12) and (b) in the same order as listed in the FAR using the following format:

General Services Administration

(Identify the contracting activity)

Justification for Other Than Full and Open Competition

Identification and description of action being approved.

Description of supplies or services required.

Identification of statutory authority.

Demonstration that the acquisition requires use of the authority cited.

Description of efforts to solicit as many offers as practicable.

Demonstration that the anticipated cost will be fair and reasonable.

Description of the market survey conducted.

Other facts supporting the use of other than full and open competition.

List of sources that expressed an interest in the acquisition.

Statement of actions to overcome barriers to competition.

Contracting Officer Certification.

Technical/Requirements Personnel Certification.

(Where technical or requirements data form the basis for the justification, a certification provided by technical or requirements personnel may either be referred to and a copy attached to the justification, or included as a part of the justification with a signature line for the technical or requirements official).

[Include appropriate signature blocks]

506.304 Approval of the justification.

The justification (except for contracts awarded under FAR 6.302–7) must be concurred in by assigned legal counsel and approved by:

(a) The contracting director for proposed contracts of $100,000 or less, unless the contract is exempt from the review and approval requirement by FAR 6.304(a)(1).

(b) The contracting activity competition advocate for contracts exceeding $100,000 but equal to or less than $1,000,000. The contracting director must concur in all justifications for contracts expected to exceed $100,000.

(c) The HCA for contracts exceeding $1,000,000 but equal to or less than $10,000,000. The contracting activity competition advocate must concur in all justifications for contracts expected to exceed $1,000,000.

(d) The senior procurement executive for contracts exceeding $10,000,000. The HCA and agency competition advocate must concur in all justifications before submitting them to the senior procurement executive for approval.

PART 507—ACQUISITION PLANNING

Subpart 507.1—Acquisition Plans

Sec.

Subpart 507.3—Contractor Versus Government Performance

Authority: 40 U.S.C. 486(c).

Subpart 507.1—Acquisition Plans

507.100 Scope of subpart.

The subpart applies to all acquisitions including leasehold interests in real property.

507.101 Definitions.

"Comprehensive acquisition plan" means a plan which covers the acquisition process from identification of agency need through contract performance and administration.

"Limited acquisition plan" means a detailed plan which covers the acquisition process from receipt of a purchase request or advanced notice of the need by the contracting office through contract award.

507.102 Policy.

(a) All acquisitions exceeding the small purchase limitation must have a limited acquisition plan unless a comprehensive acquisition plan is required under GSA Order, Comprehensive Acquisition Planning (APD 2800.13). Priced options must be included when determining the dollar threshold. An acquisition plan must be prepared before exercise of unpriced and/or unevaluated options exceeding the small purchase limitation.

(b) No solicitation may be issued until either a comprehensive acquisition plan or a limited acquisition plan has been prepared or the requirement waived under GSA Order APD 2800.13 or 507.104(d). A contract may not be entered into without full and open competition on the basis of a lack of acquisition planning or concerns related to the amount of funds available for the acquisition.

507.104 General procedures.

(a) Policies and procedures for comprehensive acquisition plans are in GSA Order, Comprehensive Acquisition Planning (APD 2800.13).

(b) The contracting officer shall be responsible for preparing a limited acquisition plan. Limited plans must be reviewed and approved at least one level above the individual writing the plan unless the requirement is received in the last month of the fiscal year and award is anticipated during the same month. In those cases, the plan must be reviewed and approved at a level no lower than the contracting director. The head of the contracting activity (HCA) may require review and approval at a higher level.

(c) Limited plans for acquisitions over $100,000 must be in writing, unless waived under paragraph (d) of this section. HCA's may authorize oral plans for acquisitions not exceeding $100,000. For oral plans, the file must be documented with the name of the individual who approved the plan.

(d) The contracting director may waive the requirement for a written limited acquisition plan in cases of unusual or compelling urgency. The individual responsible for preparing the plan will present (at the minimum) an oral plan to at least the next higher level for approval. The file must be documented to show: the nature of the urgency, the content of the oral plan, and the name of the individual who approved it. This document may be prepared after award when preparation before award would unreasonably delay the acquisition. The documentation may be included in the justification required by FAR 6.302–2(c).

(e) Acquisition plans for contracts expected to exceed $100,000 which propose using other than full and open competition must be coordinated with and concurred in by the cognizant competition advocate unless the proposed contract will be awarded under the authority at FAR 6.302–5 or will be awarded under a class justification approved by the Associate Administrator for Acquisition Policy. HCA's may require coordination and concurrence of the cognizant competition advocate for contracts equal to or less than $100,000. The cognizant competition advocate is:

(1) The contracting activity competition advocate, as defined in Subpart 502.1, for contracts exceeding $100,000, but equal to or less than $10,000,000.

(2) The agency competition advocate, as defined in Subpart 502.1, for contracts exceeding $10,000,000. The contracting activity competition advocate shall concur in all plans before submission to the agency competition advocate.

507.105 Contents of written acquisition plans.

(a) The specific content of a plan will vary depending on the nature of the acquisition and the dollar value involved. HCA's may authorize:

(1) Development of standard plan outlines meeting the needs of individual programs;

(2) Substitution of automated plans which adequately address individual elements;

(3) Modification of the suggested information by deleting inapplicable elements or adding new ones as needed.

(b) GSA Order APD 2800.13, Appendix A, describes the information to be included in a comprehensive plan. It is suggested that a limited acquisition plan include the information cited below:

(1) Acquisition background and objectives; i.e., statement of need, applicable conditions and delivery or performance-period requirements. (See FAR 7.105(a) (1), (2) and (5).)

(2) Plan of action: i.e., sources, competition, contracting considerations, acquisition milestones, and individuals preparing the plan. (See FAR 7.105(b) (1), (2), (4), (18) and (19).)

Subpart 507.3—Contractor Versus Government Performance

507.305 Solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 552.207–70, Report of Employment Under Commercial Activities, in solicitations which may result in a conversion from in-house performance to contract performance of work currently being performed by the Government and in contracts that result from the solicitations, whether or not a cost comparison is conducted.

507.307 Appeals.

Appeal procedures are in GSA Order, Implementation of the OMB Circular A–76 Productivity Improvement Program (ADM P. 5400.40).

PART 508—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 508.3—Acquisition of Utility Services

Sec.

Subpart 508.6—Acquisition From Federal Prison Industries, Inc.

Subpart 508.7—Acquisition From the Blind and Other Severely Handicapped

Subpart 508.8—Acquisition of Printing and Related Supplies

Authority: 40 U.S.C. 486(c).

Subpart 508.3—Acquisition of Utility Services

508.301 Definitions.

"Utility service," as used in FAR 8.3 and this subpart, does not include snow or trash removal services. Such services are nonpersonal in nature and must be procured as such. (See 29 CFR 4.130(a)(43) and (51).)

508.304 Acquiring utility services.

508.304-5 Agency acquisition.

(a) Except as authorized by FAR 8.304-5 (g) and (h), contracting officers shall use the GSA Form 1533, Utility Contract, when awarding utility service contracts for specific facilities.

(b) Contracting officers shall notify the Public Utilities Services Division (PPU) in accordance with FAR 8.304-5(g), when a utility service supplier refuses to execute a contract.

508.307 Precontract acquisition reviews.

508.307-1 General.

GSA contracting officers shall submit proposed utility contracts that meet the criteria at FAR 8.307-1 to the Public Utilities Services Division (PPU) for review. Requests for precontract review must be prepared in accordance with FAR 8.307-4. In those instances where it is necessary to award a letter contract for utility services pursuant to FAR 16.603-2, and the annual cost exceeds the threshold for review in FAR 8.307-1, the requirement for a preaward review is waived. However, a copy of the letter contract and the related findings and determination must be submitted to PPU within 15 days of the award. The letter contract must be definitized in accordance with FAR 16.603-2(c) and submitted to PPU for precontract review and approval under FAR 8.307.

508.370 Annual rate reviews.

Contracting officers shall review or cause to have reviewed annually each utility service contract that exceeds $25,000 per annum to determine whether the services are being billed at the rates on the contractor's lowest applicable rate schedule available to any customer under like conditions of service. The annual review will be conducted by:

(a) Accumulating the 12 most recent monthly bills for the account under review and the contractor's current rate schedules.

(b) Comparing the rate schedule used for billing with other applicable rate schedules.

(c) Requesting the contractor to place the account reviewed under another rate schedule for billing purposes, if the review indicates the services are not being billed under the rate schedule that would result in the lowest cost.

508.371 GSA forms.

(a) The GSA Form 1533, Utility Contract, is for use in awarding utility service contracts for specific facilities.

(b) The GSA Form 1684, Technical Provisions (Electric Utility Contract) is for use in contracts for electric utility services.

(c) The GSA Form 3504, Service Contract Clauses, may be used in contracts for utility services.

Subpart 508.6—Acquisition From Federal Prison Industries, Inc.

508.602 Policy.

A contract for services may not be awarded to the Federal Prison Industries, Inc. (FPI) without providing for full and open competition unless the contracting officer justifies such action in accordance with FAR 6.302. FAR 6.302-5 may not be cited as justification for a sole source acquisition of services from FPI because 18 U.S.C. 4121-4128 does not authorize or require the procurement of services from FPI.

508.604 Ordering procedures.

508.604-70 Delinquent delivery orders.

(a) Contracting officers shall establish delivery schedules based on the lead time required by Federal Prison Industries (FPI). Modifications of orders to extend the delivery schedules for excusable or inexcusable delays will not provide for a price adjustment.

(b) Delinquent orders may indicate the need to request clearance to procure from other sources until FPI can make deliveries on time.

508.605 Clearances.

FPI clearance numbers must be cited in solicitations and subsequent award documents.

Subpart 508.7—Acquisition From the Blind and Other Severely Handicapped

508.705-70 Adding items to the procurement list.

(a) When a central non-profit agency (CNA) expresses an interest in a particular commodity or service being added to the Procurement List, the contracting officer shall provide the CNA with the most recent solicitations issued for the supply or service involved and the price(s) at which the item was awarded.

(b) The Committee for Purchase From the Blind and Other Severely Handicapped (the Committee), if requested by the CNA, may assign the supply or service to the CNA for development by a workshop and will list the item in the Preliminary Evaluation Record. A copy of the record, updated monthly, is maintained by the Office of Small and Disadvantaged Business Utilization (AU).

(c) Before issuing a solicitation, contracting officers shall request from the CNA, the status of any item previously identified as one in which the Committee has expressed interest.

(d) The Committee may request that a procurement be delayed pending Committee action. The contracting activity shall consult with AU before rejecting such a request.

508.705-71 Workshop performance capability.

In addition to the annual requirement, the purchase document must include an estimated monthly requirement. The contracting officer may verify the workshop's ability to satisfy the Government's anticipated requirement by requesting a preaward survey. If it is determined that the Government's estimated monthly requirement exceeds the workshop's ability to perform, a purchase exception may be requested only for those quantities which cannot be provided in a timely manner by the workshop.

508.705-72 Allocations and orders.

In addition to the requirements prescribed in FAR 8.705, requests for allocations and orders must indicate the packaging, packing, or marking required if it differs from the specification cited, or otherwise provided in the Procurement List. Pricing of nonstandard requirements is covered in FAR 8.707.

508.705-74 Compliance with orders.

(a) Contracting officers shall take appropriate action on delinquent delivery orders until all deliveries are made. In cases of excusable delays, contract delivery schedules should be extended without obtaining consideration. However, when the delay is inexcusable, normal procedures should be followed in reviewing and adjusting contract prices if appropriate.

(b) If the CNA delays acting on a request for or refuses to grant a purchase exception, the matter should be referred to the contracting director for expeditious resolution of the problem with the Committee.

508.706 Purchase exceptions.

CNA purchase exception numbers must be cited in solicitations and subsequent award documents.

Subpart 508.8—Acquisition of Printing and Related Supplies

508.802 Policy.

The Director of the Reproduction Services Division (CAR) is the central printing authority for GSA and serves as the liaison with the Joint Committee on Printing and the Public Printer on all matters related to printing.

PART 509—CONTRACTOR QUALIFICATIONS

Subpart 509.1—Responsible Prospective Contractors

Subpart 509.2—Qualification Requirements

Subpart 509.3—First Article Testing and Approval

Subpart 509.4—Debarment, Suspension, and Ineligibility

Subpart 509.5—Organizational Conflicts of Interest

Authority: 40 U.S.C. 486(c).

Subpart 509.1—Responsible Prospective Contractors

509.105 Procedures.

509.105–1 Obtaining information.

(a) In making a determination of responsibility, the contracting officer may use the GSA Form 527, Contractor's Qualifications and Financial Information, to obtain information regarding financial capability from a prospective contractor.

(b) Advice should be obtained from all appropriate activities, including legal counsel, quality control, credit and finance, in arriving at a determination that an offeror qualifies as responsible under the standards set forth in FAR 9.104.

(c) The "auditor" in FAR 9.105–1(b)(2)(ii) is the Assistant Inspector General for Audits in the Central Office or the Regional Inspector General for Audits in the regions except for the evaluation of a prospective contractor's financial competence and credit needs, then it is the Chief, Credit and Finance Section, Region 6.

509.105–3 Disclosure of preaward information.

When an offer is rejected because of a determination by the contracting officer that the prospective contractor is not responsible, the contracting officer shall notify the prospective contractor by letter of the basis for the rejection. This will provide the offeror with the opportunity to cure the factors that lead to the nonresponsibility determination prior to the submission of offers in response to future solicitations.

509.106 Preaward surveys.

509.106–1 Conditions for preaward surveys.

(a) The contracting officer shall obtain a preaward survey, in accordance with FAR 9.106–1(a), when the contracting officer does not have sufficient information to make a determination regarding the offeror's responsibility. Factors to be considered in determining whether to initiate a preaward survey are:

(1) The experience and past performance record of the offeror and the dollar value of the procurement;

(2) The extent and currency of previous preaward surveys;

(3) Whether a bid guarantee is submitted and the type of guarantee submitted (i.e., corporate surety, individual surety, irrevocable letter of credit);

(4) Information as to the offeror's prior performance; and

(5) The adequacy of financial information submitted by the offeror (i.e., certified balance sheets and income statements, audited annual reports). Should a financial analysis be determined necessary, it should include a credit report to identify delinquent debts, especially those owed to the Federal Government.

(b) The preaward survey may be limited in scope under FAR 9.106–2(e) to those aspects of the responsibility determination for which the contracting officer is lacking information.

509.106–2 Requests for preaward surveys.

The contracting officer or a designee requests a preaward survey by forwarding the Standard Form 1403, Preaward Survey of Prospective Contractor (General), accompanied by the appropriate subparts of the preaward survey (Standard Forms 1404 through 1408) to the surveying activities. The Federal Supply Service is authorized to use GSA Form 353, Plant Facilities Report, for preaward surveys instead of Standard Forms 1403 through 1406. The contracting officer shall complete Section I of the GSA Form 353 in accordance with instructions in 553.370–353–I.

509.106–70 Disagreement with preaward survey recommendations.

When the contracting officer does not concur with the preaward survey recommendation, the contract file must be documented as to the basis of the determination of contractor responsibility. The concurrence of an official one level above the contracting director (see GSAR 502.101) must be obtained before awarding a contract to a firm which received an unfavorable preaward survey. The activity that prepared the preaward survey must be given a copy of the contracting officer's justification for overriding the preaward survey recommendation.

Subpart 509.2—Qualification Requirements

509.202 Policy.

(a) The Federal Supply Service Commodity Center Engineering Division Director shall prepare the written justification required by FAR 9.202(a)(1).

(b) The heads of contracting activities shall approve determinations under FAR 9.202(e) that a proposed procurement need not be delayed to comply with FAR 9.202(a).

509.204 Responsibility for establishment of a qualification requirement.

The Commodity Center Director shall make determinations under FAR 9.204(a)(2) that the Government should bear the cost of conducting specified testing and evaluation for a small business concern or a product manufactured by a small business concern.

509.206 Acquisitions subject to qualification requirements.

509.206–1 General.

The contracting director shall submit requests that a qualification requirement not be enforced in a particular acquisition to the Commodity Center Engineering Division Director under FAR 9.206–1(e)(3).

509.206-2 Solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 552.209-73, Product Removal from Qualified Products List, in solicitations and contracts, when qualified products are to be acquired. The clause supplements the clauses at FAR 52.209-1 and 52.209-2.

Subpart 509.3-First Article Testing and Approval

509.302 General.

When first article testing and approval is appropriate for a procurement pursuant to FAR Subpart 9.3, the general policy of the Federal Supply Service (FSS) is to require:

(a) The contractor to perform required testing, unless after coordinating with the technical specialist and Quality Assurance Division (FQA) in the Office of Quality and Contract Administration the contracting officer determines that Government testing is in the best interest of the Government;

(b) That the first article be produced at the same facility where production quantities will be produced; and

(c) That the first article serve as the manufacturing standard.

509.303 Use.

The contracting officer shall coordinate all determinations to require first article testing and approval with the technical specialist and FQA. At the time of coordination, the contracting officer should obtain the following information from the technical specialist and FQA:

(a) The test requirements for inclusion in the solicitation as outlined in FAR 9.306 (a) and (b).

(b) Advice on whether the contractor or the Government should perform required testing.

(c) The information necessary to complete the fill-in requirements of FAR clauses 52.209-3 First Article Approval— Contractor Testing [and alternates], and 52.209-4 First Article Approval—Government Testing [and alternates].

509.306 Solicitation requirements.

The contracting officer shall insert the provision at 552.209-74, Waiver of First Article Testing and Approval Requirement, in solicitations that require first article testing and approval. Any determinations to waive first article testing under FAR 9.306(c) must be approved before award by the technical specialist and the Quality Assurance Division (FQA). The first article tests to be performed by the contractor or the Government must be set forth in the solicitation.

509.308 Contract clauses.

509.308-1 Testing performed by the contractor.

In accordance with FAR 9.308-1, the FSS contracting officers shall use the clause at FAR 52.209-3 with its Alternate I and the supplemental clause at 552.209-75, Supplemental Requirements for First Article Approval—Contractor Testing.

509.308-2 Testing performed by the Government.

In accordance with FAR 9.308-2, FSS contracting officers shall use the clause at FAR 52.209-4 with its Alternate I and the supplemental clause at 552.209-76, Supplemental Requirements for First Article Approval—Government Testing.

Subpart 509.4—Debarment, Suspension, and Ineligibility

509.401 Applicability.

This subpart applies to acquisitions of personal property, nonpersonal services (including construction), space in buildings, transportation services (FPMR Subpart 101-40.4), contracts for disposal of personal property (FPMR Subpart 101-45.6), and to covered transactions as defined at GSPMR 105-68.110(a).

509.403 Definitions.

"Debarring official" and "suspending official" mean the Associate Administrator for Acquisition Policy or a designee.

"Fact-finding official" means the Chairman of the Debarment and Suspension Board within the GSA Board of Contract Appeals or a designee.

"Notice" means a letter sent by certified mail, return receipt requested, to the last known address of a party, its counsel, or agent for service of process. In the case of a business, such notice may be sent to any partner, principal officer, director, owner or co-owner, or joint venturer. If no return receipt is received within 10 calendar days of mailing, receipt will then be presumed.

509.405 Effect of listing.

(a) Before initiating a pre-award survey or any procurement or disposal action, the contracting officer shall review the Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs, as well as the list of contractors proposed for debarment by GSA. Any contractor listed in the section entitled "Parties Excluded from Procurement Programs" must receive the treatment specified therein. The contracting officer shall also review the "Parties Excluded from Nonprocurement Programs" section of the list and, if appropriate, contact the listing agency for further information in order to determine whether the listed party is responsible.

(b) Bids received from any contractor listed in the "Parties Excluded from Procurement Programs" section or proposed for debarment by GSA will be opened, entered on the Abstract of Bids, and rejected unless the debarring or suspending official determines in writing that there is a compelling reason to consider the bid. Proposals, quotations or offers received from any such contractor must not be evaluated for award or included in the competitive range, and discussions must not be conducted with such offeror, unless the debarring or suspending official determines, in writing, that there is a compelling reason to do so.

509.405-1 Continuation of current contracts.

(a) Termination of current contracts should be considered under the circumstances set forth in (a) (1) and (2) of this section.

(1) When the circumstances giving rise to the debarment or suspension also constitute a default in the contractor's performance of the contract, termination for default under the contract's "Default" clause is appropriate.

(2) If the contractor presents a significant risk to the Government in completing a current contract, the contracting officer shall determine whether termination for convenience or cancellation under appropriate contract provisions is in the Government's best interest. In making this determination, the contracting officer shall consult with counsel and should consider the following factors:

(i) Seriousness of the cause for debarment or suspension;

(ii) Extent of contract performance;

(iii) Potential costs of termination and reprocurement;

(iv) Urgency of the requirement and the impact of the delay of reprocurement;

(v) Availability of other safeguards to protect the Government's interest until completion of the contract.

(b) The debarring or suspending official shall make determinations under FAR 9.405-1(b).

(c) The contracting officer should consult with legal counsel regarding the availability of remedies under FAR Subparts 3.2 and 3.7.

509.405-2 Restrictions on subcontracting.

The debarring or suspending official shall make determinations under FAR 9.405-2.

509.406 Debarment.

509.406-1 General.

The debarring official shall make determinations under FAR 9.406-1(c).

509.406-3 Procedures.

(a) *Investigation and referral.* (1) Any element of GSA, acting as a contracting activity, that becomes aware of circumstances which may serve as the basis for a debarment shall refer the matter to the debarring official for consideration. Circumstances that involve possible criminal or fraudulent activities must first be reported to the Office of the Inspector General (OIG) in accordance with GSPMR 105.735-216, Reporting Suspected Irregularities. If appropriate, the Inspector General will refer the matter to the debarring official.

(2) At a minimum, referrals for consideration of debarment action should include:

(i) The recommendation and rationale for the referral;

(ii) A statement of facts;

(iii) Copies of documentary evidence and a list of all witnesses, including addresses and telephone numbers, together with a statement concerning their availability to appear at a fact-finding proceeding and the subject matter of their testimony;

(iv) A list of parties including the contractor, principals, and affiliates (including last known home and business addresses, zip codes, and DUNS Number);

(v) GSA's acquisition history with the contractor, including recent experience under contracts and copies of the pertinent contracts;

(vi) A list of any known active or potential criminal investigations, criminal or civil proceedings, or administrative claims before the Board of Contract Appeals; and

(vii) A statement regarding the impact of the debarment action on GSA programs. This statement is not required for referrals by the Inspector General.

(3) Referrals may be returned to the originator for further information or development.

(b) *Decisionmaking process.* (1) Upon receipt of a referral, the debarring official will decide whether to initiate debarment action, after coordinating the matter with assigned legal counsel.

(2) Contracting activities will be notified of proposed debarments.

(3) Where a determination is made not to initiate action, notice will be given to the agency official who made the referral.

(4) If a response to the notice of proposed debarment is not received by the debarring official within 30 calendar days of a party's receipt of the notice, the debarment becomes final.

(5) If the party desires to present information and arguments in person to the debarring official, an oral presentation will be held within 20 calendar days of receipt of the request, unless a longer period of time is requested by the party. The oral presentation will be informally conducted and a transcript need not be made. The party may supplement the oral presentation with written information and arguments.

(6) In actions not based on a conviction or judgment, the party may request a fact-finding hearing to resolve a genuine dispute of material fact. The party shall identify the material facts in dispute and the basis for disputing the facts. If the debarring official determines that there is a genuine dispute of material fact, the debarring official shall refer the matter to the fact-finding official. The fact-finding official will schedule a hearing within 20 calendar days of receipt of the debarring official's request. Extensions may be granted for good cause upon the request of the party or the agency.

(7) The purpose of a fact-finding hearing is to:

(i) Afford the affected party the opportunity to dispute material facts relating to the proposed debarment through the submission of oral and written evidence;

(ii) Resolve facts in dispute and provide the debarring official with written findings of fact based on a preponderance of evidence; and

(iii) Provide the debarring official with a determination as to whether a cause for debarment exists, based on facts as found.

(8) Hearings will be conducted by the fact-finding official in accordance with rules consistent with FAR 9.406-3(b)(2) promulgated by that official.

(9) The fact-finding official will notify the affected parties of the schedule for the hearing. The fact-finding official shall deliver written findings of fact to the debarring official (together with a transcription of the proceeding, if made) within 20 calendar days after the hearing record closes. The findings must resolve any facts in dispute based on a preponderance of the evidence presented and determine whether a cause for debarment exists.

509.407 Suspension.

509.407-1 General.

The suspending official shall make determinations under FAR 9.407-1(d).

509.407-3 Procedures.

(a) *Investigation and referral.* The procedures in 509.406-3(a) apply to referrals for suspension.

(b) *Decisionmaking process.* (1) Upon receipt of a referral, the suspending official will decide whether to suspend, after coordinating the matter with assigned legal counsel.

(2) In cases not based on an indictment, the suspending official must, through OIG, coordinate with the Department of Justice, or state prosecutorial authority. On the basis of advice received, the suspending official shall determine whether substantial interests of the Federal or a state government would be impaired in fact-finding.

(3) A response to a suspension notice must be received by the suspending official within 30 calendar days of receipt by the parties to be considered.

(4) When requested, an oral presentation before the suspending official will be conduted as outlined in 509.406-3(b)(5).

(5) Fact-finding hearings will not be conducted in actions based on indictments, or in cases in which the suspending official determines pursuant to FAR 9.407-3(b)(2) not to refer a matter to the fact-finding official. A party may request a fact-finding hearing to resolve genuine disputes of material fact in other cases. The party shall identify the material facts in dispute and the basis for disputing the facts. If the suspending official determines that there is a genuine dispute of material fact, the suspending official shall refer the matter to the fact-finding official. The fact-finding official will schedule a hearing within 20 calendar days of receipt of the suspending official's request. Extensions may be requested by the party or the agency.

(6) The purpose of a fact-finding hearing is to:

(i) Afford the affected party the opportunity to dispute facts relating to the suspension action through the submission of oral and written evidence;

(ii) Determine whether, in light of the evidence presented, there is adequate evidence to suspect that the material allegations in the notice are true; and

(iii) Provide the suspending official with a determination as to whether the evidence is adequate to support a cause for suspension. Hearings will be conducted as outlined in 509.406-3(c).

Subpart 509.5—Organizational Conflicts of Interest

509.503 Waiver.

The Associate Administrator for Acquisition Policy approves requests to waive the general rules or procedures of FAR Subpart 9.5.

509.507 Procedures.

If a potential contractor disagrees with the contracting officer's resolution of a potential organizational conflict of interest (see FAR 9.507(b)(4)), the matter must be referred to the Associate Administrator for Acquisition Policy for a determination.

PART 510—SPECIFICATIONS, STANDARDS, AND OTHER PURCHASE DESCRIPTIONS

Sec.

Authority: 40 U.S.C. 486(c).

510.001 Definitions.

"Specification Manager" means an official of the Federal Supply Service office responsible for Federal or Interim Federal Specifications (or the program office for other than Federal specifications) and for reviewing requests for a deviation from a specification.

510.004 Selecting specifications or descriptions for use.

(a) *Brand name products or equal*—(1) *Citing brand name products.* Brand name or equal purchase descriptions must cite all brand name products known to be acceptable and of current manufacture. The purchase description must be amended for future acquisitions to add additional acceptable brand name products or to delete brand names no longer applicable. Information on additions and deletions shall be immediately communicated to the specification manager.

(2) *Specifying essential characteristics.* Brand name or equal purchase descriptions must specify each physical or functional characteristic essential to the intended use of the product or a defective solicitation necessitating the resolicitation of the requirement may result. (See 510.004–71.) Characteristics that cannot be shown to materially affect the intended end use, and which unnecessarily restrict competition, must be avoided. When describing essential characteristics, permissible tolerances should be indicated.

(b) *Limitations on use of brand name or equal purchase descriptions.* (1) The use of brand name or equal purchase descriptions in solicitations is intended to encourage the offering of products that are equal in all material respects to brand name products cited in such descriptions. Identification by brand name does not indicate a preference for the products mentioned, but indicates the quality and salient characteristics of products that will meet the Government's minimum needs. Where a component of an item is described in the solicitation by a brand name or equal purchase description and the contracting officer determines that application of the clause at 552.210–74 would be impracticable, the requirement to include the entry described in 510.004–70(a) does not apply. If the clause is included in the solicitation for other reasons, a statement to identify either the component parts (described by brand name or equal descriptions) to which the clause applies, or those to which it does not apply, must be included in the solicitation. This also applies to accessories related to an end item where a brand name or equal purchase description of the accessories is a part of the description of an end item. Brand name or equal descriptions may not be used to procure a particular product under the guise of a competitive procurement to the exclusion of other products meeting minimum needs.

(2) In small purchases, brand name policies and procedures apply to the extent practical.

(3) A brand name or equal purchase description may not be used unless it is approved by the contracting director.

510.004–70 Solicitations, brand name or equal descriptions.

(a) An entry substantially as follows should be inserted in the item listing after each item or component part of an end item to which a brand name or equal purchase description applies.

Offering on:
Manufacturer's Name _____
Brand _____
No. _____

(b) Except when bid samples are requested for brand name or equal procurements, the following notice, substantially as shown, should be inserted in the item listing after each brand name or equal item (or component part) or at the bottom of each page listing several such items:

OFFERORS OFFERING OTHER THAN BRAND NAME ITEMS IDENTIFIED HEREIN SHOULD FURNISH WITH THEIR OFFERS ADEQUATE INFORMATION TO ENSURE THAT A DETERMINATION CAN BE MADE AS TO EQUALITY OF THE PRODUCT(S) OFFERED (SEE THE CLAUSE AT 552.210–74 BRAND NAME OR EQUAL OF THIS SOLICITATION).

510.004–71 Offer evaluation and award, brand name or equal descriptions.

An offer may not be rejected for failure of the offered product to equal a characteristic of a brand name product not specified in the brand name or equal description. Whenever it is determined after bid opening that the unspecified characteristic is essential to the intended end use, see 510.004(a)(2).

510.007 Deviations.

The head of the contracting activity shall ensure that deviations conform to the requirements of FAR 10.007 and this subpart.

510.007–70 Responsibilities of the contracting officer.

(a) The contracting officer shall obtain the concurrence of the specification manager in the Federal Supply Service (FSS) to deviate from a Federal specification before issuance of a solicitation or amendment of a solicitation. The contracting officer shall consider the following factors before forwarding a deviation request for evaluation:

(1) The impact that it might have on the ability of other offerors to furnish the item, and on future solicitations for the same item.

(2) Whether the item is the subject of a protest, is under litigation, or is sensitive or controversial.

(3) The timeliness of the deviation request.

(4) The urgency of the requirement.

(b) In addition to the information required at FAR 10.007(a)(4), a contracting officer's request to deviate from a Federal specification should include the effect of the deviation on the form, fit, or function of the item, if known.

510.011 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 552.210–70, Standard References, in solicitations and contracts for construction services when the contract amount is expected to exceed the small purchase limitation and when:

(1) Citing documents or publications not furnished with the solicitation, or

(2) Incorporating documents or publications by reference.

(b) The contracting officer shall insert the clause at 552.210–71, Reference to Specifications in Drawings, in solicitations and contracts citing Federal specifications which contain drawings.

(c) The contracting officer shall insert a clause substantially the same as the clause at 552.210–72, Acceptable Age of Supplies, or the clause at 552.210–73, Age on Delivery, in solicitations and contracts if the contractor will be required to furnish shelf-life items within a specified number of months from the date of manufacture or production of the supplies. (See 101–27.206–2 of the Federal Property Management Regulation.) The Acceptable Age of Supplies clause at 552.210–72 should be used when the required shelf-life period is 12 months or less, and lengthy acceptance testing may be involved. For items having a limited shelf-life, Alternate I to 552.210–72 must be substituted in the basic clause when requested by the director of the commodity center concerned and authorized by the Director, Operations Management Division. The Age on Delivery clause at 552.210–73 should be used when the required shelf-life period is more than 12 months, or when source inspection can be performed within a short time period.

(d) The contracting officer shall include the clause at 552.210–74, Brand Name or Equal, in solicitations and contracts using a brand name or equal purchase description.

(e) The contracting officer shall include the clause at 552.210–75, Marking, in requirements solicitations and contracts for supplies when deliveries may be made to civilian and military activities and the contract amount is expected to exceed the small purchase limitation. The clause may be used in definite quantity contracts when it is appropriate.

(f) The contracting officers shall insert the clause at 552.210–76, Charges for Marking, in solicitations and contracts that include the clause at 552.210–75 or a similar clause.

(g) The contracting officer shall include the clause at 552.210–77, Preservation, Packaging and Packing, in solicitations and contracts for supplies when the contract amount is expected to exceed the small purchase limitation. The contracting officer may include the clause in contracts awarded through small purchase procedures when appropriate.

(h) The contracting officer shall insert a clause substantially the same as the clause at 552.210–78, Charges for Packaging and Packing, in solicitations and contracts for supplies that are to be delivered to GSA distribution centers.

(i) The contracting officer shall include the clause at 552.210–79, Packing List, in solicitations and contracts for supplies including small purchases.

510.070 Specifications.

510.070–1 Exceptions to mandatory use of Federal specifications.

Contracting activities shall use an interim Federal specification when it is more suitable or there is no existing Federal specification.

510.070–2 Optional use of interim Federal specifications.

When a contracting activity finds an interim Federal specification is not practical, or that changes are desirable, the specification manager should be notified in writing of the recommended changes.

510.070–3 Use of Federal or interim Federal specifications and standards.

(a) Federal or interim Federal specifications and standards must be incorporated by reference into solicitations. The reference must identify the specifications or standard by series, i.e., Federal, military, or departmental (e.g., Forest Service), followed by the number and date. (The specification number includes the revision indicator.) Amendments must be identified, e.g., Federal Specification PPP–B–636G, dated February 17, 1972, and Interim Amendment 1, dated August 30, 1972.

(b) Specifications or standards which are canceled or superseded must not be used.

510.070–4 Other than Federal and interim Federal specifications.

(a) When the services or staff offices issue guide specifications that apply to the contracting offices within an organization, the head of the service or staff office may establish the review procedures for deviation requests.

(b) The contracting officer shall analyze requests for deviations in accordance with the requirements outlined in 510.007–70.

510.071 Standards.

The provisions of 510.070–1 and 510.070–2 regarding interim Federal specifications and the procedures and requirements concerning deviations in 510.070–4 also apply to Federal standards.

PART 511—ACQUISITION AND DISTRIBUTION OF COMMERCIAL PRODUCTS

Sec.

Authority: 40 U.S.C. 486(c).

511.001 Definitions.

"Commercial item description" (CID) is a simplified product description that describes by design, function, and/or performance the characteristics of available, acceptable, commercial supplies.

511.003 General.

(a) The specification manager with advice from the contracting officer, if necessary, shall determine if inclusion of a CID in a solicitation is the most appropriate way of describing the Government's needs.

(b) When the CID consists of only the minimum salient characteristics of the commercially available supplies (e.g., general requirements, test procedures), a commercial item certification must be included in the solicitation. (See 511.070.) Because the certification provision supplements and replaces the quality assurance provisions, the certification must be obtained to represent that the supplies being offered are of standard commercial quality.

(c) For CID's that incorporate specific salient characteristics including performance standards, packaging and packing requirements, quality assurance provisions (e.g., visual examination, sampling plans, test methods) the commercial item certification is not required. In this instance, the CID is the sole basis of determining whether the item meets the Government's needs.

511.070 Solicitation provision.

Except for supplies acquired using the Federal Prison Industries or Workshops as mandatory sources (see FAR Subparts 8.6 and 8.7), the contracting officer shall include the provision at 552.211–70, Commercial Item Certification, in solicitations for supplies when a basic or broad description of a standard commercially available product is used to describe the requirement.

PART 512—CONTRACT DELIVERY OR PERFORMANCE

Subpart 512.1—Delivery or Performance Schedules

Sec.
512.101 General.
512.104 Contract clauses.
Authority: 40 U.S.C. 486(c)

Subpart 512.1—Delivery or Performance Schedules

512.101 General.

(a) Normally, time of delivery in solicitations and contracts, except multiple award schedules, will be stated as "required" time of delivery (or shipment), expressed in specific periods from receipt by the contractor of a notice of award (or receipt of a delivery order). In multiple award schedule solicitations delivery times will usually be stated as "desired" and offerors will indicate a definite number of days for delivery.

(b) The contracting officer must be satisfied that the requisitioning office has justified, in writing, an unusually short time of delivery. This is particularly important where the time specified is so short that it may limit competition and possibly result in higher prices. Examples of justifications are:

(1) Furniture is required to outfit quarters scheduled for occupancy on a specific date;

(2) Construction material is required to meet job progress schedules; and

(3) Supplies are required at a port to meet scheduled ship departures.

(c) When a portion of the total delivery is needed early, the contracting officer should:

(1) Consider requiring that portion by the early date and the balance later; and

(2) Determine whether the portion required early and the balance should be included as separate items in the same solicitation or whether the two portions should be procured separately.

(d) When a solicitation contains a mixture of items that require different times for delivery, the delivery periods should be set forth separately and items with similar delivery time requirements should be grouped according to delivery times in the solicitation.

(e) In negotiations for multiple award schedules, the contracting officer should secure the best possible delivery time regardless of the "desired" delivery time(s) in the solicitation. For example, some offers comply with the Government's desired delivery time but others cite delivery times which are substantially shorter. The former should be negotiated to bring them in line with the latter. Variable delivery time offers (e.g., 30–90 days) should be negotiated to keep the timespan to a minimum. If the span applies to several items or several quantity breaks for one item, the items or item quantity breaks should be segregated into smaller groups which can be assigned more specific delivery times.

512.104 Contract clauses.

(a) *Supply contracts.* The contracting officer shall insert the clause at:

(1) 552.212–1(a), Time of Delivery, in solicitations and single award schedule contracts for supplies. If it is necessary to show different delivery times for different items or groups of items, use Alternate I.

(2) 552.212–1(b), Time of Delivery, in solicitations and multiple award schedule contracts for supplies. If the Government's desired delivery time is shown in the Schedule of Items, use Alternate I. If the same delivery time applies to all items, use Alternate II.

(3) 552.212–70, Time of Shipment, in solicitations and stock replenishment contracts that do not include the Availability for Inspection, Testing and Shipment/Delivery clause at 552.212–72 and require shipment within 45 calendar days after receipt of the order. If shipment is required in more than 45 days, use Alternate I.

(4) 552.212–71, Notice of Shipment, in solicitation and contracts for supplies when it is in the Government's interest to have the contractor furnish a notice of shipment.

(5) 552.212–72, Availability for Inspection, Testing and Shipment/Delivery, in solicitations and contracts that provide for source inspection by Government personnel and that require lengthy testing for which timeframes cannot be determined in advance. If the contract is for stock items, use Alternate I.

(b) *Construction contracts.* The contracting officer shall insert the clause at 552.212–74, Non-compliance with Contract Requirements, in solicitations and contracts for construction when the contract amount is expected to exceed the small purchase limitation.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 513—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES

Subpart 513.1—General

Sec.
513.106 Competition and price reasonableness.
513.106–70 Unusual and compelling urgency procurements.
513.107 Solicitation and evaluation of quotations.

Subpart 513.2—Blanket Purchase Agreements

513.203 Establishment of Blanket Purchase Agreements.
513.203–1 General.
513.204 Purchases under Blanket Purchase Agreements.

Subpart 513.3—Fast Payment Procedure

513.301 General.

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513.403 Agency responsibilities.
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Subpart 513.5—Purchase Orders

513.501 General.
513.505 Purchase order and related forms.
513.505–2 Agency order forms in lieu of Optional Forms 347 and 348.
513.505–3 Standard Form 44, Purchase Order-Invoice-Voucher.
513.505–70 Two-party contract forms.

Subpart 513.70—Certified Invoice Procedure

513.7001 Certified invoice procedure for procurements not requiring a written purchase order.
Authority: 40 U.S.C. 486(c).

Subpart 513.1—General

513.106 Competition and price reasonableness.

(a) *Purchases over $1,000.* Solicitation of at least three sources in accordance with FAR 13.106(b)(5) may be considered to promote maximum competition if there is a reasonable expectation of obtaining two or more quotations that will be competitive in terms of market price. If there is no expectation of obtaining two or more competitive quotations, more than three sources should be solicited. If only one response is received, the purchase may be made if the price is reasonable and the contractor is responsible.

(b) *Oral solicitation.* Quotations may be solicited orally under the circumstances described in FAR 13.106(b)(2) unless:

(1) The acquisition includes a wage determination issued by the Department of Labor under the Service Contract Act; or

(2) The acquisition meets the requirements in FAR 5.101(a)(1) and must be synopsized in the Commerce Business Daily.

(c) *Data to support small purchases.* (1) When other than the lowest quotation is accepted, the basis for rejecting any lower quotation must be included in the purchase file.

(2) The GSA Form 2010, Small Purchases Tabulation Source List/ Abstract, or an automated equivalent which provides substantially the same documentation, must be used to document written and oral quotations.

513.106-70 Unusual and compelling urgency procurements.

When a procurement is of unusual and compelling urgency, competition may be solicited by having prospective sources visit the site together, orally informing them of the exact requirements, and requesting them to prepare quotations while written specifications are being prepared for inclusion in the contract. Unusual and compelling urgency, as used in this subsection, includes situations which, if not corrected immediately, will result in unnecessary expenditure of funds, property damage, personal injury, or interruption of agency functions.

513.107 Solicitation and evaluation of quotations.

GSA Form 3186, Request for Quotation, is authorized for use by the Federal Supply Service with the FSS-19 system instead of the Standard Form 18, Request for Quotations.

Subpart 513.2—Blanket Purchase Agreements

513.203 Establishment of Blanket Purchase Agreements.

513.203-1 General.

(a) *Document preparation.* Blanket purchase agreements (BPA's) must be prepared on a purchase order form or on a GSA Form 3521, Blanket Purchase Agreement.

(b) *Terms and conditions.* Each blanket purchase agreement should, when appropriate, specify the geographic area to be served under the BPA.

(c) *Placing orders under the BPA.* Only the contracting officer (CO) or officials authorized by a CO and designated in the BPA are authorized to place orders under the BPA. The GSA Form 2877, Non-Depot Item Requisition/ Order/ Receiving/Payment Record, is authorized for use by the Federal Supply Service in placing orders against BPA's for customer supply center items that are not available from Government supply depots. Before placing orders against the BPA, each requirement must be screened for availability from mandatory sources of supply. Necessary controls must be maintained by the person placing orders under the BPA to ensure that any limitation stated therein is not exceeded. The BPA number and purchase number should be specified each time an order is placed.

(d) *Delivery or service tickets.* Each delivery ticket, in addition to the requirements of FAR 13.203-1(j)(6), must contain the name of the person placing the order. The delivery ticket must be signed and dated by the individual receiving the items or services. The supplier and the receiving office must retain a copy of the delivery ticket.

(e) *Invoicing.* If a supplier will not accept one of the invoicing statements outlined in FAR 13.203-1(j)(7), the contracting officer is authorized to deviate from FAR 13.203(j)(7) in order to permit the submission and payment of invoices for each delivery under the BPA. Before authorizing submission and payment of invoices for individual deliveries, the contracting officer must make every effort to get the supplier to accept one of the FAR invoicing statements. The BPA file must document the contracting officer's efforts and the supplier's refusal to accept the FAR invoicing statements.

(f) *Processing invoices.* Invoices must be time-stamped by the designated billing office to indicate the date of receipt. Invoices received by ordering offices must be forwarded to the appropriate Finance Division for payment within 5 workdays of receipt of the invoice or acceptance of the supplies or services, whichever is later, unless the BPA provides for the accumulation of invoices as outlined in FAR 13.203-1(j)(7)(iii). If the BPA provides for accumulation of invoices by the ordering office for a specified period, the ordering office must forward the accumulated invoices to the appropriate Finance Division for payment within 5 workdays after the specified period for accumulation. All invoices should be marked to indicate that purchases were made under a BPA.

513.204 Purchases under Blanket Purchase Agreements.

(a) Individual purchases under BPA's may not exceed $10,000.

(b) Individual purchases under BPA's may exceed the $10,000 threshold in paragraph (a) of this section and the small purchase threshold (FAR 13.101) if the BPA has been established in accordance with FAR 13.203-1(f).

Subpart 513.3—Fast Payment Procedure

513.301 General.

The fast payment procedure is not authorized for use by GSA contracting activities.

Subpart 513.4—Imprest Fund

513.403 Agency responsibilities.

Imprest fund cashiers must be designated and will function in accordance with HB, Accounting Users Guide—Imprest Fund and Travelers Checks (COM P 4268.1) and FAR Subpart 13.4.

513.404 Conditions for use.

The per transaction limitation for cash payments made through imprest funds is $500 ($600 for emergency disbursements by imprest fund cashiers in Alaska).

513.405 Procedures.

The SF 1164, Claim for Reimbursement for Expenditures on Official Business, or SF 1165, Receipt for Cash—Subvoucher, will serve as the authorized purchase requisition for purchases made by offices maintaining their own imprest funds, e.g., Public Buildings Service Field Offices. Purchase requisitions such as the GSA Form 49, Requisition/Procurement Request for Equipment, Supplies or Services, may be used if required by contracting activity directives. If the GSA Form 49 is used, it must be endorsed "Payment to be made from imprest fund."

Subpart 513.5—Purchase Orders

513.501 General.

The Finance Divisions will not accept facsimile signatures on machine-produced purchase orders. An original or carbon copy (but not photocopied) handwritten signature is required to obligate funds for individual purchase orders except for machine-produced purchase orders generated by the FSS-19 system.

513.505 Purchase order and related forms.

513.505-2 Agency order forms in lieu of Optional Forms 347 and 348.

(a) Unless another form is prescribed, the GSA Form 300 or 300-1 (pin-feed format), Order for Supplies and Services, must be used instead of the OF 347, Order for Supplies or Services, when making purchases payable through the National Electronic Accounting and Reporting (NEAR) System. The forms may also be used to make other purchases when a specific form is not prescribed or as a delivery order to place orders under established contracts. The GSA Form 300 must be prepared and processed in accordance with the instructions at 553.370-300-1. GSA Form 300A or 300-A(1) (pin-feed format), order for Supplies or Services

(continuation), is available for use with GSA Form 300 or 300–1.

(b) The GSA Form 1458, Motor Vehicle Shop Work Order, Repair and Purchase Order, must be used instead of the OF 347 when making purchases in connection with the maintenance, servicing or repair of GSA fleet management vehicles.

(c) The GSA Form 3186, Order for Supplies or Services, must be used instead of the OF 347 when making purchases through the FSS–19 system.

(d) GSA Form 8002, Motor Vehicle Delivery Order, is used to order fleet management vehicles. This form is not intended for use as a purchase order for small purchases and does not include provisions and clauses on the reverse.

513.505–3 Standard Form 44, Purchase Order-Invoice-Voucher.

(a) *General.* Use of the Standard Form 44 will not serve the best interest of either the Government or business when the accounting system of the seller requires production of an invoice as a matter of routine. In these cases, other authorized methods of making small purchases should be used. Whenever possible, preference should be given to the use of imprest funds and blanket purchase agreements.

(b) *Issuance of books from stock.* SF 44 books will be issued to contracting directors or their designees. Contracting directors are responsible for the custody and issuance of books to the users.

513.505–70 Two-party contract forms.

(a) When a determination is made that it is in the Government's interest to negotiate a two-party contract (See FAR 13.104(f)) for building services, the GSA Form 3514, Solicitation, Offer and Award-Small Purchases, may be used together with the GSA Form 3519, Representations and Certifications.

(b) The GSA Form 3519, Representations and Certifications, may also be used with other two-party contract forms (e.g. SF–33 or SF–1442) when a determination is made that is in the Government's interest to use a two-party contract form.

Subpart 513.70—Certified Invoice Procedure

513.7001 Certified invoice procedure for procurements not requiring a written purchase order.

(a) When advantageous to the Government, supplies or services may be acquired on the open market from local suppliers at the work site or use point using vendors' invoices instead of purchase orders. Certified invoice procedures may not be used to place orders under established contracts unless authorized in the contract.

(b) Such purchases must comply with FAR Part 13 and Part 513, subject to the following:

(1) The amount of any one purchase is $2,000 or less.

(2) A purchase order is not required by either the supplier or the Government.

(3) Appropriate invoices can be obtained from the supplier.

(c) The items to be purchased must be domestic source end products, except as provided in FAR Subpart 25.1. For special rules governing purchases of hand and measuring tools and stainless steel flatware see 525.105–70 and 525.105–71.

(d) Use of the certified invoice procedure does not eliminate the requirements to:

(1) Reserve small purchases for small business in accordance with FAR 13.105, or document the file;

(2) Solicit competitive quotations in accordance with FAR 13.106;

(3) Certify that the quality and quantity of items/services furnished are in accordance with the verbal agreement made with the vendor;

(4) Document the record in accordance with FAR 13.106(c) and 513.106(c).

(e) Quotations may be solicited by authorized personnel without contracting officer warrants. Placement of any orders must be approved in advance by a contracting officer. The approval shall be in writing unless geographic distances make it impracticable to obtain a written approval on the GSA Form 2010 or other documentation. In those cases telephonic approval may be obtained and a notation of the approval recorded.

(f) Contracting officers using this purchasing technique shall require the suppliers to immediately submit properly prepared invoices which itemize property or services furnished.

(g) Upon receiving the invoice, the receiving office shall time-stamp the invoice to indicate the date of receipt, verify the arithmetic accuracy of the invoiced amount, and verify that the supplies and/or services have been received and accepted. The contracting officer or a designated representative shall obtain a certification of receipt and acceptance from the individual that actually inspected and accepted the supplies and/or services before certifying the invoice and forwarding to the appropriate Finance Division for payment. Supplies and/or services should be inspected and accepted or rejected within 5 workdays of delivery/completion. The invoice must be forwarded to the appropriate Finance Division for payment within 5 workdays after receipt of the invoice or acceptance of the supplies and/or services, whichever is later. Before forwarding the invoice to Finance, the contracting officer shall place the following statement on the invoice along with the gummed ACT label, accounting information and the type of business; i.e. corporation, sole proprietorship/partnership, or other. A stamp which provides the equivalent information may be used.

(Note: In some organizations, the gummed ACT label is affixed by a budget or executive office within the service or staff office.)

I certify that these goods and/or services were received on _____ (Date) and accepted on _____ (Date). An oral purchase was authorized and no confirming order has been issued.

_____

Signature of Contracting/Ordering Officer

_____

Print name and telephone No.

_____

Second Certification (required by PBS)

_____

Print name and telephone No.

_____

Date Invoice received

PART 514—SEALED BIDDING

Subpart 514.2—Solicitation of Bids

Sec.

Subpart 514.3—Submission of Bids

Subpart 514.4—Opening of bids and Award of Contract

Authority: 40 U.S.C. 486(c).

Subpart 514.2—Solicitation of Bids

514.201 Preparation of invitations for bids.

See 514.270 for information on specifying a minimum bid acceptance period.

514.201-1 Uniform contract format.

All solicitations must include the following notice:

The information collection requirements contained in this solicitation/contract, that are not required by regulation, have been approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090-0163.

514.201-2 Part I—The Schedule.

Solicitations that include the Standard Form 33, Solicitation, Offer and Award, should include the following cautionary notice:

Offerors are reminded that block 13 of the Standard Form 33, Solicitation, Offer and Award, is to be used to offer prompt payment discounts. Payment terms are set forth in the Prompt Payment clause of this solicitation. Offerors are cautioned against inserting any statement in block 13 which indicates that payment is due sooner than the time stipulated in the Prompt Payment clause.

Example: Inserting "NET 20" in block 13 will cause the offer to be rejected as nonresponsive because the entry would be contrary to the 30 day payment terms specified in the Prompt Payment clause.

514.201-6 Solicitation provisions.

(a) The contracting officer shall insert the provision at 552.214-73, "All or None" Offers, in solicitations when all or none offers are considered. Alternate I should be used in requirements or indefinite quantity contracts.This provision must not be included in solicitations when the Government requires the bidder to submit bids on all items and will make only one award.

(b) The contracting officer may include the notice at 552.214-74, Solicitation Copies, in solicitations when it is necessary to reduce costs of printing solicitations.

514.201-7 Contract clauses.

(a) The contracting officer shall insert a clause substantially the same as the clause at 552.214-75, Progressive Awards and Monthly Quantity Allocations, in solicitations for stock replenishment contracts when it is determined that individual contractors may be unable to furnish the Government's monthly requirements and that it will be expedient to make progressive awards.

(b) The contracting officer shall insert the clause at 552.215-70, Examination of Records by GSA, in solicitations and contracts that (1) involve the use or disposition of Government-furnished property, (2) provide for advance payments, progress payments based on cost, or guaranteed loans, (3) contain a price warranty or price reduction clause, (4) contain an economic price adjustment clause, (5) are requirements, indefinite quantity or letter type contracts as defined in FAR Part 16, or (6) contain the provision at FAR 52.223-4, Recovered Materials Certification. The contracting officer may modify the clause to define the specific area of audit (e.g., the use or disposition of Government furnished property). Legal Counsel and the Assistant Inspector General-Auditing or Regional Inspector General-Auditing, as appropriate, must concur in any modifications to the clause.

514.201-70 GSA forms.

(a) The GSA Form 1602, Notice Concerning Your Solicitation for Offers, may be used to (1) describe the type of contract, the duration of the contract, and the type of supplies or services being procured; (2) direct the attention of prospective offerors to special requirements which, if overlooked, may result in rejection of the offer; (3) highlight significant changes from previous solicitations covering the same supplies or services; and (4) include other special notices, as appropriate.

(b) The GSA Form 3503, Representations and Certifications, may be used in solicitations and contracts, except contracts for utilities and leases of real property.

(c) The GSA Form 3501, Solicitation Provisions (Sealed Bid), may be used when bids are solicited using the Standard Form 33 or the Standard Form 1442.

(d) The GSA Form 3504, Service Contract clauses, the GSA Form 3506, Construction Contract Clauses, or the GSA Form 3507, Supply Contract Clauses, may be used in solicitations and contracts, as applicable.

514.201-71 Request for brand name information limitation.

When an item is described in a solicitation by a formal specification or a detailed purchase description (other than a brand name or equal purchase description), the solicitation may not require or request that bidders specify the brand names of the products offered. However, brand name information may be requested when—

(a) Descriptive literature for items is requested in accordance with FAR 14.202-5.

(b) First article testing is required.

(c) The procurement is for qualified products.

514.201-72 Fire or casualty hazards, or safety or health requirements.

(a) Specifications covering electrical equipment, building materials, etc., which involve fire or casualty hazards, or safety or health requirements, normally contain a clause requiring conformance to the standards of nationally recognized technical societies, associations, or laboratories, or other GSA-approved testing laboratories, regarding fire and casualty hazards, explosion protection, or safety or health requirements.

(b) When a specification is not available or the specification does not include a clause described in (a) of this section, technical advice shall be obtained from the appropriate program or technical office concerning the appropriateness for a clause. If the contracting officer then determines that the matter should be covered, an appropriate clause shall be included in the solicitation. The clause shall cite all standards that are acceptable.

514.202 General rules for solicitation of bids.

514.202-4 Bid samples.

(a) *Solicitation requirements.* (1) When a determination is made to require bidders to submit bid samples, the solicitation must include a provision incorporating the provision at FAR 52.214-20 and containing the information in FAR 14.202-4(e) and must require:

(i) Samples be from the production of the manufacturer whose products will be furnished under the resultant contract; and

(ii) Bidders use GSA Form 434, Sample Record Sheet, copies of which will be furnished with each solicitation.

(2) If a determination is made that bidders will be permitted to reapply samples furnished under a previous solicitation, FAR 52.214-20, Alternate II, shall be used.

(3) In addition to subjective characteristics of bid samples, objective characteristics may be used when it has been determined, on the basis of past experience or other valid considerations, that examination of such characteristics is necessary to determine the responsiveness of the bid. When both types of characteristics are listed in the solicitation, they must be listed separately under the headings "Subjective Characteristics" and "Objective Characteristics."

(4) Because of variations in circumstances and differences in commodities, no standard provision can be prescribed for use in all solicitations. The provision at 552.214-76, Bid Sample Requirements, is provided as an example and may be used in solicitations as shown or modified to fit the circumstances of the procurement.

(b) *Handling and disposition of samples.* (1)(i) Samples held during the period of contract performance may be disposed of after deliveries are completed and Government acceptance has occurred, in accordance with the instructions indicated on GSA Form 434.

(ii) If the contracting officer anticipates that there may be a future claim regarding a contract, the bid samples must be retained until the claim is resolved.

(2) All other bid samples should be held until awards are made and then disposed of in accordance with instructions indicated on GSA Form 434.

514.203 Methods of soliciting bids.

514.203-1 Mailing or delivery to prospective bidders.

(a) Active bidders (current contractors and bidders that responded to recent similar solicitations) should be provided with bid sets for the same or similar items. Active bidders' names should be checked against the bidders' mailing list and added if not already listed.

(b) Contracting officers shall ensure that all amendments to solicitations and related notices are furnished promptly to every addressee previously furnished a solicitation.

514.204 Records of invitations for bids and records of bids.

The contracting officer shall obtain from the Business Service Center (BSC) and include in the file the names and addresses of firms to whom the BSC furnished solicitations. Contracting officers shall furnish these firms with applicable amendments or supply the BSC with amendments for distribution.

514.205 Solicitation mailing lists.

514.205-1 Establishment of lists.

(a) Contracting officers within the Federal Supply Service (FSS) should use the computerized central solicitation mailing list maintained by Region 7 for supplies and services for all procurements expected to exceed the small purchase limitations. Other GSA contracting activities may maintain local lists. Contracting activities that maintain local mailing lists must inform the BSC of the list and provide related information regarding the list.

(b) Inquiries from or for business firms requesting inclusion on solicitation mailing lists should be referred to the BSC serving the geographic areas in which the firms are located. The BSC will assist firms to be included on the proper GSA mailing lists and will provide application forms and related information.

514.208 Amendment of invitation for bids.

The date set for bid opening must be extended when amendments relating to wage determinations issued under the Service Contract Act or the Davis-Bacon Act are issued less than 10 days before the scheduled bid opening date.

514.211 Release of acquisition information.

Before award, access to information concerning the Government cost estimate is limited to Government personnel whose official duties require knowledge of the estimate. After award, the total amount of the Government estimate may be revealed, upon request. The basis for calculating the estimate may not be released at any time.

514.270 Bid acceptance period.

(a) The 60-day period stipulated in the parenthetical statement in Item 12 of the Standard Form 33, Solicitation, Offer and Award, is neither a "standard" nor a request to bidders to allow such period.

(b) The contracting officer may specify a different minimum bid acceptance period and/or permit a bidder to insert a number of calendar days after bid opening, during which its bid is valid.

(c) When specifying a minimum bid acceptance period, the contracting officer shall:

(1) Insert in solicitations the provision at 552.214-16, Minimum Bid Acceptance Period, instead of the provision at FAR 52.214-16, and

(2) Mark Item 12 of SF 33 as follows to preclude a bidder from inadvertently rendering its bid nonresponsive by inserting a figure less than that stipulated by the Government in 552.214-16(c).

Note: Item 12 does not apply if the solicitation includes the provisions at 52.214.16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if this offer is accepted within *N/A** calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated points(s), within the time specified in the schedule. **See* Provision 552.214-16.

514.271 Aggregate awards.

514.271-1 General.

(a) *Definition.* "Aggregate award" means an arrangement, stipulated by the Government in the solicitation, whereby two or more separately-priced line items are combined for award to that bidder whose offer will result in the lowest overall cost to the Government for all of the line items within the group, without regard to whether the prices offered by the bidder are low on each item within the group. (See also the definition of a "line item" in FAR 3.302.)

(b) *Justification for use.* (1) While ordinarily prices are solicited on an individual line item basis, it sometimes may be in the Government's best interest to combine two or more line items for an aggregate award such as when—

(i) Uniformity of design, style, and finish is desired, as in the acquisition of suites of household furniture;

(ii) The articles being acquired will be assembled and used as a unit, and may not be interchangeable if acquired from different manufacturers;

(iii) The demand for certain articles is large, but the demand for other similar articles is not sufficient to attract competitive bids unless awarded in

conjunction with the high-demand articles (e.g., various sizes of socket wrenches);

(iv) One location (delivery point) has a large requirement, and another location has a requirement that is too small to individually attract competitive bids; or

(v) It is impractical to award and administer numerous small contracts for similar articles or services.

(2) Before deciding to combine items for aggregate award, the contracting officer shall include in the contract file the rationale for establishing an aggregate award formula, which must:

(i) Address the capability of bidders to furnish the types and quantities of supplies or services in the aggregate as well as the impact on bidders if different delivery points are grouped; and

(ii) Be capable of accurately projecting the lowest overall cost to the Government.

(3) Line items may not be grouped for award on an aggregate basis when it would:

(i) Preclude a significant number of firms from bidding due to an inability to provide all the types or quantities of supplies or services or to make deliveries to the various delivery points included in the prospective aggregate group; or

(ii) Increase overall prices to the Government by restricting significantly the number of eligible bidders for any other reason (see also 514.271–3).

(4) To determine the lowest cost on an aggregate group of items, it is necessary to extend unit prices by accurate weight factors calculated to reflect the true or proportionate quantities that will be purchased under a resultant contract (see 514.271–2). If weight factors must be based upon unreliable or conjectural information, or where reliable estimates on anticipated quantities are not available, the price list method described in 514.272 should be considered.

(5) If accurate weight factors and pre-established list prices are not available, an aggregate award formula should not be used because it could result in unbalanced bids and/or award could not be assured to result in the lowest overall cost to the Government.

(c) *Evaluation factors for award.* When items will be awarded on an aggregate basis, the solicitation must clearly state the basis on which bids will be evaluated.

(1) If weight factors are used, bidders shall be required to submit a price on each item within the group with award to be made to the responsive and responsible bidder whose computed overall price for the aggregate group of items is actually the lowest or can accurately be projected to result in the lowest overall cost to the Government. Failure to submit a price on each item within a group will make the bid ineligible for award with regard to that group of items.

(2) If the price method is used, bidders shall be required to express prices as a percentage to be added to or subtracted from the list price for each group of items with award to be made to the responsive and responsible bidder whose percentage factor produces the most favorable price to the Government.

514.271–2 Weighting of items for aggregate award.

(a) Unless the same weight factor is applicable to all line items in the aggregate group, accurate weight factors are essential for determining which bid would result in the lowest overall cost to the Government for the aggregate group.

(b) While the phrase "lowest overall cost to the Government" is used in this regulation, it is not always necessary that an aggregate award formula be capable of projecting actual cost. It is sufficient if the relative proportionate cost between line items within the aggregate group can be projected accurately, i.e., actual quantities may not be available, but ratios of the requirements within the line items in the aggregate group are available.

(c) Estimated quantities that apply to indefinite quantity or requirements contracts may be reduced to smaller numbers by a common denominator to facilitate the computations involved in evaluating bids, if doing so does not sacrifice precision.

(d) Actual purchase quantities will be used as weight factors for definite quantity acquisitions because a bidder might include two or more aggregate groups, or an aggregate group and various individual line items, under an "all or none" qualification. Proportionate weight factors must not be used in the evaluation process where "all or none" qualifications are permitted.

(e) Weight factors may not be based on the estimated dollar value of purchases. If the dollar value of previous purchases is the only information available, and there is no recourse but to make award on an aggregate basis, the value of previous purchases must be converted to quantities for the purpose of establishing weight factors (i.e., divide total purchases of each item by the unit price to determine number of units purchased).

514.271–3 Grouping of line items for aggregate award.

(a) *General.* While paragraphs (b) and (c) pertain to supply contracts (articles and delivery points), the same principles apply to service contracts (types of services and service areas).

(b) *Grouping of different articles.* Only related articles, normally manufactured or produced by a majority of prospective bidders, should be included in an aggregate group. The grouping of unrelated articles usually is contrary to 514.271–1(b)(3).

(c) *Grouping of geographic locations or delivery point.* The contracting officer should consider the following guidelines before deciding to group different geographic locations or delivery points for aggregate award:

(1) If different delivery points have sufficient requirements so that individual shipments to each point will involve not only economic production runs, but carload or truckload quantities, these points should be listed as separate line items.

(2) The types of bidders (i.e., small or large firms, manufacturers or distributors, etc.) responding to previous solicitations are an important consideration. For example, if previous bidders are distributors having franchises within certain territories, the grouping of different territories would tend to restrict competition.

(3) The impact of transportation costs on competition and pricing, since transporation costs may constitute a signficant portion of the total delivered cost. Depending upon the supplies being acquired:

(i) Grouping widespread geographic locations or delivery points may reduce competition and/or result in higher prices due to the loss of "area pricing" advantages when a potential supplier has a single production point.

(ii) Conversely, for many smaller commercial items (hand tools, locks, etc.) manufacturers may quote the same price for delivery anywhere in the U.S.

(iii) Contracting officers should obtain the advice and assistance of transportation specialists before grouping geographic locations or delivery points, to include information regarding the location of tariff boundaries.

514.272 Price list method.

(a) *General.* The price list method may be used to avoid unbalanced bidding in requirements and indefinite quantity/indefinite delivery contracts when aggregate awards will be made and accurate estimates of anticipated quantities are unavailable. This method

utilizes pre-established list prices for acquiring groups of similar items, services, or repairs and alterations. The following elements of the price list method must be included in the solicitation:

(1) A pre-established price list.

(2) An estimate of requirements, if available.

(3) A requirement that a bidder express its price as "net" or as a percentage added to or subtracted from the list prices for each group.

(4) The percentage factor in (a)(3) of this section is a price related factor, which must be identified in Section M of the Uniform Contract Format.

(b) *Development of pre-established list prices.* (1) Pre-established list prices may be developed by one or more of the following methods:

(i) Industry published prices.

(ii) Industry surveys.

(iii) Government cost estimates based upon knowledge of the supplies or services to be grouped and previous contract prices.

(2) When proposed list prices will be used for the first time, prospective bidders should be given an opportunity to review the proposed list and furnished information on how the list prices will be used. Copies of the draft solicitation may be provided.

(3) The contracting officer must ensure that items are properly grouped and that the list prices for the grouped items bear a reasonable and balanced relationship to one another. Before using prices resulting from awards made under the weighted item method to develop price lists, those prices must be reviewed to ensure that they did not result from unbalanced bidding.

514.272-1 Supply contracts.

(a) Estimated requirements for each item in a group or for the entire group must be shown in the solicitation. For contracts for store stock items, estimated quantities should be shown only if estimates of demand for each item within a group can be derived from Government records (or verified contractor sales reports). All the estimates must be current. If the Government's needs cannot be estimated, the solicitation may include past orders. (See CG Decision, B-209037, 82-2 CPD para 323 (1982).)

(b) The bidding schedule must clearly state that bidders must quote only one percentage factor for each group, which must be expressed as either "net" or as a deduction from or an addition to the listed prices.

(c) The following illustrates a bidding schedule arrangement for a group of items for aggregate award under the price list method:

Drills, Twist, High Speed, under Federal Specification (dated _____) and Amendment _____ (dated _____), Wire gauge sizes, straight shank, shortlength, Type C:

Item No.	National stock No.	Drill size	Est. quantity	Unit	List price
Group 1 (Items 1 through 5)					
1	5133-00-189-9246	1	2,800	Package	$11.16
2	5133-00-189-9247	2	2,400	Package	11.16
3	5133-00-189-9248	3	2,800	Package	10.44
4	5133-00-189-9249	4	1,600	Package	10.80
5	5133-00-189-9250	5	2,000	Package	10.80

The bid on each item above is the list price shown minus/plus _____ percent. (Bidder, insert "net" or a single percentage amount in the blank space and cross out minus or plus, as appropriate.)

514.272-2 Repair and alteration contracts.

(a) The solicitation shall:

(1) Contain a statement indicating the percentage of work anticipated to be performed during normal working hours;

(2) Define "normal" in terms of hours and days of the week; and

(3) List the quantities, if available, and unit prices for work performed during both normal working hours and outside of normal working hours.

(b) *Instructions, conditions, and notices to bidders.* (1)(i) Bidders should be advised of the previous year's total expenditures or portions of that total attributable to the listed items.

(ii) When estimates are provided, the solicitation must state that the quantity estimates are furnished for information only and are not to be construed as guarantees or commitments to order items under the contract.

(2) Bidders shall be instructed to quote two or more percentage factors to be applied as specified in (b)(2) (i) and (ii), of this section. The percentage factor(s) must be expressed as "net," or as an addition to or subtraction from the applicable unit prices.

(i) For the line item unit prices listed in the solicitation, two percentage factors must be solicited: one to be applied to the unit prices for the percentage of work performed during normal working hours and the second to be applied to the unit prices for the percentage of work performed outside of normal working hours.

(ii) When unit prices are further grouped by trade or business category, multiple percentages may be required.

(c) *Evaluation factors for award.* (1) When two percentage factors are solicited under (b)(2)(ii) of this section, the evaluated bid price is the sum of the percentage of work performed—

(i) During normal work hours multiplied by the Government's total estimate adjusted by the bidder's percentage factor for that portion of the work, and

(ii) During other than normal working hours multiplied by the Government's total estimate adjusted by the bidder's percentage factor for that portion of the work.

(2) Award must be made to the responsible and responsive bidder submitting the lowest evaluated bid price.

(3) When additional evaluation factors such as options are used, they must be identified in the solicitation.

Subpart 514.3—Submission of Bids

514.301 Responsiveness of bids.

514.301-70 Facsimile transmission of bids.

Bids, modifications, or withdrawals of bids transmitted through facsimile equipment may not be considered unless authorized by the solicitation. Facsimile bids, as used herein, refers to messages transmitted via facsimile equipment directly to a GSA office or facility. It does not include messages sent to commercial carriers for delivery to the office designated for receipt of bids (e.g. zap mail). Solicitations may not authorize the submission of facsimile bids unless the facsimile equipment is located in the office designated to receive bids so the incoming messages can be properly safeguarded. When authorizing the submission of facsimiles, the contracting officer must state in the

solicitation that facsimile submissions are authorized, provide the telephone number of facsimile receiving equipment and compatibility characteristics (e.g., make and model number, receiving speed, communications protocol).

514.303 Modification or withdrawal of bids.

(a) When a telegraphic modification or withdrawal of a bid is received by telephone under the circumstances in FAR 14.303, the identity of the telegraph office employee telephoning the message should be obtained and recorded in the solicitation file.

(b) The receipt required by FAR 14.303(b) for withdrawal of a bid in person should be worded as follows:

I certify as a bona fide, agent for or representative of (Bidder's name and address), I am authorized to withdraw the bid on IFB No. _____ scheduled for opening on _____ and hereby acknowledge receipt of the unopened bid.

(Name and telephone no.)

(Date)

514.304 Late bids, late modifications of bids, or late withdrawal of bids.

514.304-1 General.

Upon receipt of a late bid, the bid custodian should record it on the duplicate copy of the list of bidders and immediately notify the responsible contracting officer that the bid has been received. The contracting officer will arrange for the bid to be picked up or delivered.

514.370 Copies of bids required in submission.

Bids must be submitted in an original and at least one copy. The original will be used by the contracting activity for the tabulation of bids. The copy will be retained by the BSC for public information until the bid abstract is available to replace it. Supplemental financial forms or other information submitted with a bid, must be retained by the contracting activity and must not be retained by the BSC for public information.

Subpart 514.4—Opening of Bids and Award of Contract

514.401 Receipt and safeguarding of bids.

(a) Except as otherwise provided in paragraph (c), bids and modifications must be received and safeguarded by the appropriate BSC until the time specified for opening. Bids received should be handled as follows:

(1) At the initial point of receipt, each envelope (or other covering) received by mail and identified as containing a bid should be immediately time-stamped or indicated thereon the place, date, and time of receipt by authorized personnel. Then the bid(s) should be delivered by special handling to the bid custodian in the Business Service Center.

(2) Mailed bids and modifications delivered to the bid custodian before bid opening time should be recorded on the bidder's list on the same day they are delivered and then placed in a suitable locked cabinet.

(3) Hand-carried bids delivered before bid opening time should be deposited in the locked bid box. In the event a hand-carried bid is not placed in the bid box by the bidder, but is handed to the bid custodian or other GSA employee, it should be time stamped immediately and then handled in the same manner as provided for mailed bids. At least once daily (and immediately preceding the time for each scheduled bid opening), the bid custodian should remove and time stamp the bids, record them and place them with any other bids previously received.

(4) Telegraphic or facsimile bid, if authorized, and modifications must be sealed in envelopes immediately upon receipt, appropriately identified, and handled in the same manner as bids submitted by mail.

(5) For each invitation, the bid custodian will prepare a list indicating the invitation number and listing on the GSA Form 1378, Record of, and Receipt for, Bids and Responses, or the appropriate bid abstract form, the name and address of all responses, including any bid modification, received before bid opening time. When a bid previously recorded on this list is withdrawn, the list will so indicate.

(b) At the scheduled bid opening time, the bid custodian will deliver all bids received in response to the invitation, together with the original and one copy of the GSA Form 1378, Record of, and Receipt for, Bids and Responses, or other appropriate bid list to the authorized bid opening official or designee, who will acknowledge receipt of the bids by signing the duplicate copy of the form and returning it to the bid custodian. The original list becomes part of the contract file.

(c) Business Service Center Directors may designate an individual(s) working at a PBS Facility Support Center or Enhanced Field Office as a bid custodian, provided: (1) Adequate space and facilities are available within the Facility Support Center or Enhanced Field Office, (2) the individual(s) has been trained and (3) the Facility Support Center or Enhanced Field Office has a Small Business Technical Advisor. If such designations are made, the designated bid custodian must submit monthly reports to the BSC Director for forwarding to the Office of Small and Disadvantaged Business Utilization (AU).

514.402 Opening of bids.

514.402-1 Unclassified bids.

(a) Public bid openings will be held in the BSC when the BSC is the bid custodian. When the bid opening will be held elsewhere, the contracting officer shall inform the BSC serving the geographic area in which the contracting office is located of the invitation number and the location where the public bid opening will be held.

(b) The assistant bid opening officer shall be a qualified employee of the contracting office. Upon authorization by the HCA and the Director of Small and Disadvantaged Business Utilization in Central Office or the Director of the Business Service Center in the region, bids may be opened by selected BSC personnel. Normally, this authorization will be requested only when the geographic distance separating the BSC where bids are to be delivered and the contracting office makes it impracticable for the bid opening officer or designee to be present to open bids. (See FAR 14.402-1(b).)

(c) Bid openings are open to business representatives, members of the press, and the general public.

(d) To ensure that bids will be opened at the exact time specified, the bid opening official will verify the accuracy of the timepiece to be used.

(e) For the information of those bidders present, approximately one-minute prior notice of bid opening will be announced audibly by the bid opening official.

(f)(1) The bid opening official shall take precaution to ensure that the exact time of opening has arrived and shall announce this fact audibly, citing the invitation or invitations scheduled for opening. The opening of bids will then proceed in full view of the parties present.

(2) For construction contracts that provide for bid alternates, the amount of funds available for the award will be announced before opening bids.

(g) In reading bids, the following information from each bid should be announced when considered practicable and feasible: The bidder's name, item and unit price bid, and other pertinent information, such as delivery and discount terms. A copy of each bid submitted in multiple copies should remain in the bid opening room until the bid abstract is substituted. For bids

submitted in an original only see FAR 14.402–1(c).

(h) No alterations or notations to any bid after it has been formally opened will be permitted.

(i) Negotiable instruments submitted as bid guarantees to meet solicitation requirements must be forwarded by the bid opening official to the Finance Division in accordance with procedures established by the Comptroller. When award is made, the solicitation is cancelled, or all bids are rejected, the contracting officer shall direct the Finance Division to refund the amount of the bid guarantee to the unsuccessful bidder(s). Bid guarantees may be returned before award when a bidder requests the guarantee be returned and the bidder is not in contention for the award. Other forms of bid guarantees (e.g., bid bonds, letters of credit, corporate and individual sureties, etc.), must be retained by the contracting officer and included in the contract file.

(j) A record, including at least the names of persons attending the bid opening and the firms or organizations they represent, should be made a part of the solicitation file.

(k) When multiple copies of bids are received, the bid opening official shall verify the entries on all copies. If there is a discrepancy between the copies of a bid, the contracting officer shall direct the bidder's attention to the suspected mistake and shall follow the procedures set forth in FAR 14.406 concerning mistakes in bids.

(l) Envelopes in which bids and bid modifications are received should be retained in a temporary file until after all awards have been made. At that time, those which bear notations concerning abnormal receipt or opening for identification should be made a part of the solicitation file and the remainder may be destroyed.

514.403 Recording of bids.

(a) A copy of the abstract of bids and any amendments must be furnished to the appropriate BSC as soon as practicable and be available for public examination for at least 30 calendar days. Late bids determined eligible for consideration must be included on the bid abstract form. If eligibility is established after delivery of the original tabulation, the bids are recorded separately and identified as an amendment to the original tabulation.

(b) Abstracts involving aggregate awards must record unit prices, weight factors and aggregate totals for each aggregate group in addition to any other information required for bid evaluation.

(c) For building services, the GSA Form 3471, Abstract of Offers, is authorized for use by contracting activities in the Public Buildings Service (PBS) instead of the Standard Form 1409, Abstract of Offers.

514.404 Rejection of bids.

514.404–1 Cancellation of invitations after opening.

(a) *Cancellation of invitations.* The HCA or a designee makes any determinations required by FAR 14.404–1.

(b) *Extension of time for bid acceptance.* (1) While the number of bidders requested to extend their bids as provided in FAR 14.404–1(d) is a matter of judgment on the part of the contracting officer, consideration should be given to requesting the extension from all bidders having a reasonable chance to receive an award.

(2) Requests for time extensions may be made using GSA Form 2981 and must specify a period reasonable under the circumstances.

(3) If time is critical, the contracting officer may request an extension by telephone, facsimile, or telegraph, but the bidder's response or confirmation must be in writing.

(4) If a Standard Form 24, Bid Bond, has been executed, the consent of the surety is necessary for any extension exceeding by more than 60 calendar days the period originally allowed for acceptance.

(5) If a bidder does not grant the additional bid acceptance time requested, special action should be taken to accomplish acceptance of the bid within the time allowed by the bidder. Should it be advisable to permit the bid to expire, the contracting officer shall promptly, before expiration of the bid, refer the case to the appropriate contracting director for a decision.

514.404–2 Rejection of individual bids.

(a) Individual bids rejected on the basis of responsiveness, responsibility, or eligibility and bids rejected because the bid after evaluation is no longer low shall be documented as provided in FAR 14.404–2(j) and noted in the "Remarks" block on GSA Form 1535, Recommendation for Award(s). Examples of bids which may no longer be low after evaluation include aggregate bids (see 514.271), "all or none" bids (see 552.214–73), and bids evaluated using Buy American differentials (see FAR 25.105 and 525.105–70).

(b) Explanations which involve cases of a sensitive or controversial nature must be accompanied by all supporting documentation to justify awards, such as copies of the offer to be rejected and the proposed awardee, statements from (or record of conversation with) the requisitioning activity, plant facilities and/or financial responsibility reports, and other relevant correspondence or reports (Certificates of Competency, copies of Congressional correspondence or other high level interest, etc.).

514.405 Minor informalities or irregularities in bids.

Failure to submit all of the pages of the solicitation is a minor informality or irregularity under FAR 14.405 when the bid as submitted indicates that the bidder takes no exception to the requirements of the solicitation and intends to be bound by all its terms in any resultant contract.

514.406 Mistakes in bids.

514.406–3 Other mistakes disclosed before award.

(a) *Delegations of authority by head of the agency.* In accordance with FAR 14.406–3(e), the heads of contracting activities (HCA's) are authorized, without power of redelegation, to make the determinations regarding corrections and/or withdrawals treated in FAR 14.406–3 (a), (b), and (c), and to make the corollary determinations not to permit withdrawal or correction for reasons indicated in FAR 14.406–3(d).

(b) *Format for Determinations.* Determinations under FAR 14.406–3 must be prepared in the following format.

Findings and Administrative Determination Alleged Mistake in Bid ("Prior to Award" or "After Award") by (Name of Bidder) (IFB No.)

Pursuant to Federal Acquisition Regulation 14.406 and General Services Administration Acquisition Regulation 514.406, I hereby make the following findings:

Findings

(List in chronological order the information required by FAR 14.406, including a numerical list of exhibits.)

Determination

Based on the above findings, I hereby determine in accordance with FAR (14.406–3 (a) or (b), (c), (d), (g) or 14.406–4) that (include an appropriate statement indicating the determination to permit withdrawal, correction, etc.).

Contracting Officer (Determinations under FAR 14.406–3(g)(5) or 14.406–4)

Date

Head of Contracting Activity (Determinations under FAR 14.406–3 (a), (b), (c), or (d)) or Contracting Director (Approved under 514.406–4)

Date

I reviewed the above case as to form, technical accuracy of the proposed determination, and the general accuracy of the supporting evidence and approve it as to legal sufficiency.

Assigned Counsel

Date

(c) *Legal review and approval.* Assigned counsel must approve determinations by the HCA and contracting officer regarding mistakes in bid.

514.406–4 Mistakes after award.

Determinations by the contracting officer must be prepared in the format at 514.406–3(b) and reviewed and approved by the Contracting Director and assigned counsel.

514.407 Award.

514.407–1 General.

(a) Notice of award may be made by facsimile transmission when approved by the HCA. Oral notices shall not be used.

(b) In addition to the requirements in FAR 14.407–1(c)(5), notice of award must identify the solicitation, the item(s) awarded, the contract number, and the effective date of the award.

(c) If partial award is made to a bidder and additional items are being withheld for possible subsequent award to the same bidder, any subsequent award during the bid acceptance period must be made using SF–30, Amendment of Solicitation/Modification of Contract (except see 519.502–3(b) regarding partial set-asides). The authority cited in paragraph 13D of SF–30 for the subsequent award will be FAR 14.407–1(c)(4).

514.407–2 Responsible bidder—reasonableness of price.

(a) A single bid, received in response to a solicitation, may be considered and accepted if (1) the specifications used in the invitation were not restrictive, (2) adequate competition was solicited, (3) the price is reasonable, and (4) the bid is otherwise consistent with the solicitation.

(b) The basis for price reasonableness must be established, if possible, from data or information which is available to the contracting officer without contacting the bidder.

514.407–6 Equal low bids.

In resolving a tie-bid situation, the status of the bidders (small/large/labor surplus area) on the date the bid was signed is controlling.

514.407–7 Documentation of award.

Documentation included in the contract file must include the number of firms solicited and the GSA Form 1535, Recommendation for Award(s), or similar document (see also 514.404–2).

514.407–70 Preaward inquiries.

(a) Responses to preaward inquiries should be limited to a statement that the award decision is pending and agency policy prohibits release of additional information.

(b) Actions or discussions that may create false impressions in the eyes of prospective contractors about pending awards must be avoided.

514.407–71 Awards involving related cases referred to higher authority.

When a case is to be or has been referred to higher authority for review, any action which might prejudice the freedom of the higher authority to act on that case must be avoided. This includes partial awards to the same bidder under the same solicitation.

514.407–72 Forms for recommending award(s) (Supplies and services).

GSA Form 1535, Recommendation for Award(s), and GSA Form 1535–A, Recommendation for Award(s), Continuation Sheet, must be used to document all proposed awards (except construction contracts) exceeding $25,000. The use of the form for awards of $25,000 or less is at the discretion of the contracting activity. One or more awards may be set forth on each form. All information pertinent to the recommendation must be furnished on the form. The checklist on the back of the form must be completed.

514.408 Information to bidders.

514.408–1 Award of unclassified contracts.

The GSA Form 3577, Notification of Contract Award, may be used to notify all unsuccessful bidders other than (a) any apparent low bidder(s) or (b) unsuccessful bidders from designated countries for acquisitions subject to the Trade Agreements Act.

514.408–70 Restriction on disclosure of inspection or test data.

Before award, no inspection or test data, whether prepared by the Government or an outside inspection or testing agency, shall be disclosed to anyone other than Government officials requiring access to such information in connection with bid evaluation. For requests received after award, see FAR 14.408–1(e).

514.471 Multiple bidding.

(a) All bids received from a person, firm, or its affiliates must be considered for award if responsive and otherwise acceptable.

(b) Any bid offering two or more products for the same item received from the same bidder may be accepted if it is the lowest received and meets all requirements of the solicitation.

PART 515—CONTRACTING BY NEGOTIATION

Subpart 515.1—General Requirements for Negotiation

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Authority: 40 U.S.C. 486(c).

Subpart 515.1—General Requirements for Negotiation

515.106 Contract clauses.

515.106-70 Examination of records by GSA clause.

The contracting officer shall insert the clause at 552.215–70, Examination of Records by GSA, in solicitations and contracts that (a) involve the use or disposition of Government-furnished property, (b) provide for advance payments, progress payments based on cost, or guaranteed loan, (c) contain a price warranty or price reduction clause, (d) involve income to the Government where income is based on operations that are under the control of the contractor, (e) include an economic price adjustment clause, (f) are requirements, indefinite-quantity, or letter type contracts as defined in FAR Part 16, (g) are subject to adjustment based on a negotiated cost escalation base or (h) contain the provision at FAR 52.223–4, Recovered Materials Certification. The contracting officer may modify the clause to define the specific area of audit (*e.g.*, the use or disposition of Government-furnished property, compliance with the price reduction clause). Counsel and the Assistant Inspector General—Auditing or Regional Inspector General—Auditing, as appropriate, must concur in any modifications to the clause.

515.170 Authorization and approval.

Requirements for review and approval of contracts are in GSA Order, Contract Clearance (APD 2800.1B).

Subpart 515.4—Solicitation and Receipt of Proposals and Quotations

515.402 General.

(a) An oral solicitation is not justified solely because the acquisition is being made under the authority of FAR 6.302–2, Unusual and Compelling Urgency.

(b) Oral solicitations, other than those authorized for small purchases (See 513.106(b) and 513.106–70), may only be used under the conditions prescribed in FAR 15.402(f), with prior approval of the contracting officer.

515.403 Solicitation mailing lists.

Source lists for negotiated acquisitions must be established, maintained, and used in accordance with FAR 14.205 and 514.205.

515.405 Solicitations for information or planning purposes.

515.405-1 General.

Solicitations for information or planning purposes must be approved by the contracting director.

515.406 Preparing requests for proposals (RFP's) and requests for quotations (RFQ's).

515.406-1 Uniform contract format.

(a) Contracts for utility services and leases of real property are exempted from the requirement for use of the uniform contract format.

(b) All contracts, including leases of real property, must include the following notice:

> The information collection requirements contained in this solicitation/contract that are not required by regulation have been approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090–0163.

515.406-2 Part I—The Schedule.

The contracting officer shall insert the provision at 552.215–75, Data Universal Numbering System (DUNS), in solicitations for supplies and services when the contract amount is expected to exceed the small purchase limitation.

515.407 Solicitation provisions.

(a) The contracting officer shall insert the provision at 552.215–73, Preparation of Offers—Construction, in solicitations for construction instead of the provision at FAR 52.215–13.

(b) The contracting officer shall insert the provision at 552.215–74, Contract Award—Negotiated-Construction, in solicitations for construction instead of the provision at FAR 52.215–16.

515.411 Receipt of proposals and quotations.

(a) Solicitations should provide for proposals and modifications to proposals to be submitted to the appropriate contracting office unless arrangements have been made with the local Business Service Center (BSC) for receipt and safeguarding of proposals by the BSC.

(b) Classified proposals and quotations must be handled under FAR 15.411, GSAR Subpart 504.4, and the requirements of GSA Order, Freedom of Information Act procedures (ADM 1035.11).

515.411-70 Recording of offers.

The GSA and/or Standard Forms prescribed for abstracting bids in sealed bidding may be used to abstract proposals or quotations submitted in connection with competitively negotiated procurements where more than one offer is received in response to the solicitation. (See FAR 4.803(a)(10).) The forms may be appropriately modified to include all of the information necessary for evaluation. Abstracts must not be provided to the Business Service Center or disclosed except as provided in 515.1070. See FAR 15.411, 15.413 and 15.1001 regarding disclosure of information.

515.412 Late proposals and modifications.

(a) Contracting officers in the Federal Supply Service have been authorized to deviate from the FAR provision at 52.215–10, Late Submissions, Modifications, and Withdrawals of Proposals in solicitations for multiple award schedules by deleting paragraph (a)(3). The effect of this deviation is to establish the closing date for receipt of proposals in block 9 of the Standard Form 33, Solicitation, Offer and Award, as a firm cut-off date for receipt of proposals. Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it qualifies under paragraph (a)(1), (a)(2), or (b) of FAR 52.215–10.

(b) When contracting officers deviate from the FAR provision as outlined in paragraph (a) of this section, no additional special item numbers may be added to the proposal after the firm cut-off date established for receipt of proposals. However, additional products and/or models may be added when the item offered falls under a Special Item Number originally submitted in a timely manner.

515.414 Forms.

When an award is made to an offeror for less than all of the items that may be awarded to that offeror and additional items are being withheld for subsequent award, the first award to that offeror must state that the Government may make subsequent awards on those additional items within the offeror's offer acceptance period. Subsequent awards to the offeror must be made using SF–30, Amendment of Solicitation/Modification of Contract (except see GSAR 519.502–3(b) regarding partial set-asides). The authority cited in paragraph 13D of SF–30 for subsequent awards will be GSAR 515.414.

515.414-70 GSA Forms.

(a) The GSA Form 1602, Notice Concerning Your Solicitation for Offers, may be used to (1) describe the type of contract, the duration of the contract, and the type of supplies or services being procured; (2) direct the attention of prospective offerors to special requirements that, if overlooked, may result in rejection of the offer; (3) highlight significant changes from previous solicitations covering the same supplies or service; and (4) include other special notices as appropriate. The GSA Form 1602 is not part of the solicitation or resulting contract.

(b) The GSA Form 3503, Representations and Certifications, may be used in solicitations and contracts, except contracts for utilities and leases of real property.

(c) The GSA Form 3502, Solicitation Provisions (Negotiated), may be used when offers are solicited using the Standard Form 33 or the Standard Form 1442.

(d) The GSA Form 3504, Service Contract Clauses, the GSA Form 3506, Construction Contract Clauses, or the GSA Form 3507, Supply Contract Clauses, may be used in solicitations and contracts, except small purchases, as applicable.

Subpart 515.5—Unsolicited Proposals

515.501 Definitions.

"Coordinating office," as used in this subpart, means the (a) Director of the Office of GSA Acquisition Policy and Regulations, (b) Assistant Commissioner, Office of Commodity Management, FSS, (c) Assistant Commissioner, Office of Information Resources Procurement, IRMS, (d) Assistant Commissioner, Office of Procurement, PBS, or (e) Director, Regional Acquisition Management Staff. The Director of the Office of GSA Acquisition Policy and Regulations serves as the coordinating office for Central Office activities outside of FSS, IRMS, and PBS.

515.504 Advance guidance.

Potential offerors should be encouraged to make preliminary contacts with coordinating offices before submitting a detailed unsolicited proposal or proprietary data.

515.506 Agency procedures.

Coordinating offices shall serve as contact points and establish procedures for controlling the receipt, evaluation, and timely disposition of proposals consistent with FAR 15.5.

515.506-1 Receipt and initial review.

The contact point shall promptly (a) acknowledge receipt of the proposal and provide the name, business address, and telephone number of the individual who will evaluate the proposal, or (b) notify the offeror that the proposal does not meet the requirements of FAR 15.506-1(a) and provide an opportunity to submit the data.

515.506-2 Evaluation.

The evaluation must be completed as soon as practicable (normally within 45 calendar days). The results of the evaluation should be communicated to the submitter with a copy to the coordinating office.

Subpart 515.6—Source Selection

515.608 Proposal evaluation.

515.608-70 Rejection of all proposals.

HCA may reject all proposals received in response to a solicitation under FAR 15.608(b). This authority may be redelegated. Written documentation citing the reasons for rejecting proposals must be included in the contract file.

515.608-71 Discounts for prompt payment.

The policy of not considering discounts in the evaluation of offers applies where there is direct competition between two or more offerors for a single award. It does not apply to procurements where the evaluation process involves a comparison of the offeror's price to the Government with the offeror's price to its other customers. Accordingly, the policy in FAR 14.407-3 does not apply to multiple award schedule solicitations except in those instances where offers are received on identical products. The clause at 552.232-8, Discounts for Prompt Payment, specifies the extent to which discounts for prompt payment will be considered in the evaluation for multiple award schedules. The formula for computing the annualized rate of return addressed in the clause at 552.232-8 is as follows:

$$\text{Discount (\%)} \times \frac{\text{Number of days in a year}}{\text{Total days to due date for payment*} - \text{Days to discount due date}} = \text{Rate of return}$$

*To determine the total number of days to the due date for payment, start with the date of the invoice and allow 3 days from the date of the invoice to receipt by the Government and assume that the invoice will be received after the supplies have been delivered and accepted by the Government. Normally, the contract will provide for payment in 30 days and the total number of days to the due date for payment will be 33 days.

Subpart 515.8—Price Negotiation

515.803 General.

Access to Government cost estimates is limited to Government personnel whose official duties require knowledge of the estimate. An exception to this rule may be made during contract negotiations to allow the contracting officer to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent necessary to arrive at a fair and reasonable price. After award, the total amount of the independent Government estimate may be revealed, upon written request, to those firms or individuals who submitted proposals.

515.804 Cost or pricing data.

515.804-2 Requiring certified cost or pricing data.

When determining the contract amount for purposes of applying the threshold at FAR 15.804-2 for requesting certified cost and pricing data, the value of the contract plus any priced options must be considered. Exercise of a priced option is not considered a price adjustment and does not require submission of cost and pricing data.

515.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

(a) Under FAR 15.804-3(i), the HCA is authorized to waive the requirement for the submission of certified cost or pricing data.

(b) The request for waiver must include a draft determination and finding that addresses (1) pertinent circumstances of the procurement necessitating the waiver, (2) the price analysis techniques to be used if the award must be made (3) the steps taken by higher authority to obtain the certified cost or pricing data; and (4) the practicability of obtaining the Government's requirements from other sources.

515.804-6 Procedural requirements.

Whenever an offeror refuses to provide the required cost or pricing data, the contracting officer shall refer the matter to the contracting director for resolution. (See FAR 15.804-6(e).) The contracting director shall negotiate for the submission of the required cost or pricing data, unless the HCA determines, in writing, not to undertake such higher level negotiations and the determination is documented in the contract file.

515.805 Proposal analysis.

515.805-5 Field pricing support.

(a) "Field pricing support" is provided by the Assistant Inspector General-Auditing, or the Regional Inspector General-Auditing, as appropriate.

(b) When applying the threshold at FAR 15.805-5 for requesting field pricing support, the value of the proposal (including any priced options) must be used.

Subpart 515.9—Profit

515.902 Policy.

(a) *Structured approach for determining profit fee objectives.* The contracting officer's analysis of these profit factors is based on information available to the Government before negotiations. Such information is furnished in proposals, audit data, performance reports, preaward surveys and the like. The structured approach also provides a basis for documentation of a profit objective, including an explanation of any significant departure from this objective in reaching a final agreement. The extent of documentation should be directly related to the dollar value and complexity of the proposed procurement.

(b) *Exemptions from requirement to use the structured approach.* (1) Under exempted procurements, other methods for establishing profit objectives may be used. Generally, such methods will be supported in a manner similar to that used in the structured approach (profit factor breakdown and documentation of profit objective). However, factors within the structured approach considered inapplicable to the procurement may be excluded from the profit objectives. The following types of procurements are exempt from the structured approach:

(i) Management contracts for operation and/or maintenance of Government facilities;

(ii) Contracts primarily requiring delivery of material supplied by subcontractors;

(iii) Termination settlements;

(iv) Cost-plus-award-fee contracts;

(v) Contracts and contract modifications of $100,000 or less in value; and

(vi) Architect-engineer and construction contracts.

(2) Other exemptions may be made in the negotiation of contracts having unusual pricing situations where the structured approach is determined to be unsuitable. Such exemptions must be justified in writing and approved by the HCA.

515.905 Profit-analysis factors.

(a) The following factors must be considered whenever profit is to be negotiated. The weight ranges listed after each factor should be used when the structured approach is used.

Profit factors	Weight ranges in percent
Contractor Effort	
Material acquisition	1 to 4.
Conversion direct labor	4 to 12.
Conversion related indirect cost.	3 to 8.
	Other costs 1 to 3.
	General management 4 to 8.
Other Factors:	
Contract cost risk	0 to 7.
Capital investment	−2 to +2.
Cost-control and other past accomplishments.	−2 to +2.
Federal socio economic programs.	−5 to +.5.
Special situations and independent development.	−2 to +2.

(b) GSA Form 1766, Structured Approach Profit/Fee Objective, may be use to facilitate the profit objective computation. The contracting officer shall measure the Contractor Effort by the assignment of a profit percentage within the designated weight ranges to each element of cost recognized.

515.905-1 Common factors.

(a) The categories under Contractor Effort are broad and basic. Individual proposals may be in a different format.

(b) After computing a total dollar profit for Contractor Effort, the contracting officer shall calculate the specific profit dollars for the categories under other factors. This is done by multiplying the total Government cost objective, exclusive of any cost of money for facilities capital, by the specific weights assigned to the elements within the Other Factors category.

(c) In determining the value of each factor, the contracting officer should be governed by the definition, description, and purpose of the factors together with considerations for evaluating them as prescribed in FAR 15.905-1 and the following:

(1) *General management.* Management problems surface in various degrees and the management expertise exercised to solve them should be considered as an element of profit. For example, a new program for an item that involves advanced state of the art techniques may cause more problems and require more managerial time and abilities of a higher order than one that is a follow-on contract. If new contracts create more problems and require a higher profit weight, follow-ons should be adjusted downward, as many of the problems should have been solved. An evaluation should be made of the underlying managerial effort involved on a case-by-case basis.

(2) *Other-costs.* Include all other direct costs of contractor performance under this item (e.g., travel and relocation, direct support, and consultants). Analysis of these costs in assigning profit weights must include (i) their significance, (ii) their nature, and (iii) how much they contribute to contract performance.

(3) *Contract-cost-risk.* Where the proper contract type has been selected, the reward for risk by contract type would usually fall into the following ranges:

Cost-reimbursement type contracts	0–3%
Fixed-price type contracts	3–7%

(i) A cost-plus-a-fixed-fee contract normally would not justify a reward for risk in excess of 0 percent, unless the contract contains cost risk features such as ceilings on overheads. In such cases, up to 1 percent may be justified. Cost-plus-incentive-fee contracts fill the remaining portion of the 0 to 3 percent range with weightings directly related to such factors as confidence in target cost, share ratio of fee(s), etc. The weight

range for fixed-price contracts is wide enough to accommodate the many types of fixed-price arrangements. Weighting should indicate the cost risk assumed, with only firm fixed-price contracts reaching the top end of the range.

(ii) The contractor's subcontracting program may significantly impact the contractor's risk under a contract. It could affect risk in terms of both cost and performance. This should be a part of the contracting officer's overall evaluation in selecting a weight for cost risk. The prime contractor may effectively transfer cost risk to a subcontractor and the risk evaluation may, as a result, be below the range that would otherwise apply for the contract type being proposed. The risk evaluation should not be lowered, however, merely because a substantial portion of the contract cost represents subcontracts without any substantial transfer of contractor's risk.

(iii) In evaluating risk in the definitization of letter contracts, unpriced change orders, and unpriced orders under basic ordering agreements, the effect on risk as a result of partial performance before definitization should be considered. Under some circumstances the total risk may have been effectively reduced. Under other circumstances, the contractor's risk may have remained substantially unchanged. To be equitable, the determination of a profit weight for all recognized costs, both those incurred and those yet to be expended, must be made with consideration to all attendant circumstances, not just to the portion of costs incurred or percentage of work completed before definitization.

(iv) Service contracts should have a weight range for cost risk of 0 to 4 percent. A firm fixed-price contract, which is not priced on a labor-hour method, may warrant additional consideration for contractor cost risk. In those circumstances, a weight of up to 4 percent is authorized. Conversely, a cost-plus-a-fixed-fee service contract normally warrants a zero cost risk factor.

(4) *Capital investment.* The evaluation of this factor for profit weights should include the following:

(i) *Facilities.* To evaluate how this factor contributes to the profit objective requires knowledge of the level of facilities use needed for contract performance, the source of financing of the facilities, and the overall cost effectiveness of the facilities offered. Contractors who furnish their own facilities that significantly contribute to lower total contract costs, should receive additional profit. Contractors who rely on the Government to provide or finance facilities should receive less profit. Situations between the above examples should be evaluated on their merits with either a positive or negative profit weight adjustment, as appropriate, being made. However, when a contractor who owns a large quantity of facilities is to perform a contract that does not benefit from these facilities, or where a contractor's use of its facilities has a minimum cost impact on the contract, profit need not be adjusted.

(ii) *Payments.* The frequency of payments by the Government to the contractor should be considered. The key to this weighting is the impact the contract will have on the contractor's cash flow. Generally, for payments more frequent than monthly, negative consideration should be given, with maximum reduction as the contractor's working capital approaches zero. Positive consideration should be given for payments less frequent than monthly with additional consideration given for payments less frequent than the contractor's or the industry's normal practice.

(5) *Cost control and other past accomplishments.* See FAR 15.905–1(e).

(6) *Federal socio economic programs.* See FAR 15.905–1(c).

(7) *Special situations and independent development.* See FAR 15.905–1(f).

515.905–70 Nonprofit organizations.

(a) The structured approach was designed for arriving at profit or fee objectives for other than nonprofit organizations. However, the structured approach as modified below, should also be used to establish fee objectives for nonprofit organizations. (See FAR 31.701.) The modifications should not be applied as deductions to historical fee levels, but rather, as a reduction in the fee objective calculated under the structured approach.

(b) For contracts with nonprofit organizations, an adjustment of up to 3 percent will be subtracted from the total profit-fee objective. In developing this adjustment, it will be necessary to consider the following factors:

(1) tax position benefits;

(2) granting of financing through letters of credit;

(3) facility requirements of the nonprofit organization; and

(4) other factors that may work to the advantage or disadvantage of the contractor as a nonprofit organization.

Subpart 515.10—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

515.1070 Release of information concerning unsuccessful offerors.

(a) GSA Order, GSA Freedom of Information Act (FOI) procedure (ADM 1035.11A), should be consulted to determine what information may be disclosed.

(b) When small purchase procedures are used, the names and dollar amounts of unsuccessful offerors may be released upon request without processing through the formal FOI procedures.

(c) When the contracting officer determines, in connection with negotiated procurements (other than small purchases), that the administrative time and workload of processing regular FOIA requests (see FAR 14.408–1(c)) is greater than the workload involved in preparing an abstract of offers to be displayed at an appropriate Business Service Center, the following rules apply:

(1) An abstract of offers may be prepared for display after award in the appropriate Business Service Center in addition to the notification required by FAR 15.1001(c).

(2) The abstract must include only the names, addresses, and "best and final" prices offered for unclassified acquisitions where the award is based on price and price-related factors. The successful offeror(s) must be identified.

(3) Abstracts must not contain information regarding failure to meet minimum standards of responsibility or other notations properly exempt from disclosure under FOI regulations.

(d) The information outlined in paragraph (c) of this section must not be disclosed when the contracting officer determines, on a case-by-case basis, that it is not in the best interest of the Government or when it may be competitively harmful to offerors such as when negotiations are in process for an item that was recently awarded under another solicitation.

Subpart 515.70—Use of Bid Samples

515.7000 Scope of subpart.

This subpart supplements the policies and procedures in FAR 14.202–4 and 514.202–4 regarding bid samples required in negotiated acquisitions.

515.7001 General.

Except as provided in 515.7002 and 515.7003, the basic policy and procedures in FAR 14.202–4 and 514.202–4 apply to negotiated acquisitions. When referring to FAR 14.202–4 and 514.202–4, the term "bid" means "offer" or

"proposal" and the terms "bidder" and "invitation" or "invitation for bids" are used synonymously with "offeror" and "solicitation" or "RFP" when contracting by negotiation.

515.7002 Policy.

(a) Since the terms "responsiveness" and "nonresponsive" do not apply to negotiated acquisitions, FAR 14.202–4(b) (2) and (4) do not apply when the use of bid samples is determined necessary under this subpart.

(b) Instead of FAR 14.202–4(b) (2) and (4), apply the following:

(1) Bid samples will be used in the technical evaluation of proposals to determine the acceptability of the samples to meet the Government's specification and to ensure compliance with the subjective and any objective characteristics listed in the solicitation.

(2) A proposal may be excluded from further consideration for award if after discussion with the offeror of any deficiencies found in the samples and after the offeror has been given an opportunity to correct those deficiencies, the sample still fails to conform to each of the characteristics listed in the solicitation. (See FAR 15.609.)

515.7003 Procedural requirements.

(a) *Unsolicited samples.* The reference to FAR 14.404–2(d) in FAR 14.202–4(g) is not applicable and the following is to be applied when contracting by negotiation:

Qualifications in the proposal that are at variance with the Government's requirements are deficiencies and must be resolved as provided for in FAR 15.610.

(b) *Solicitation requirements.* (1) When the clause at FAR 52.214–20 is used in a negotiated acquisition, the second sentence in paragraph (c) of the clause does not apply. A sentence substantially as follows must be substituted in the clause when contracting by negotiation.

Failure of the bid samples to conform to all of the required characteristics listed in the solicitation shall constitute a deficiency in the proposal and shall be resolved as provided for in FAR 15.610.

(2) In addition to listing subjective characteristics that cannot be equately described in the specification, objective characteristics may be sted in the solicitation and evaluated when it has been determined, on the basis of past experience or other valid considerations, that examination of such characteristics is essential to the acquisition of an acceptable product.

(c) Samples received after the time set for receipt of offers may be considered only if they meet the requirements of FAR 52.215–10.

PART 516—TYPES OF CONTRACTS

Subpart 516.2—Fixed-Price Contracts

Sec.

Subpart 516.3—Cost-Reimbursement Contracts

Subpart 516.4—Incentive Contracts

Subpart 516.6—Time-and-Materials, Labor-Hour, and Letter Contracts

Authority: 40 U.S.C. 486(c).

Subpart 516.2—Fixed-Price Contracts

516.203 Fixed-price contracts with economic price adjustment.

516.203–4 Contract clauses.

(a) When the contracting officer decides to use a clause providing for adjustments based on cost indexes of labor or material under FAR 16.203–4, a clause must be prepared with the assistance of counsel and approved by the contracting director. The contract clause must describe:

(1) The type of labor and/or material subject to adjustment;

(2) The labor rates, including any fringe benefits and/or unit prices of materials that may be increased or decreased;

(3) The index(es) that will be used to measure changes in price levels and the base period or reference point from which changes will be measured; and

(4) The period during which the price(s) will be subject to adjustment.

(b) In Federal Supply Service (FSS) multiple award schedule (MAS) procurements, the contracting director will determine whether to use an Economic Price Adjustment (EPA) clause under FAR 16.203–2. The term of the resulting MAS contract will be considered in making this determination. An EPA clause will generally be included in multiyear contracts but not in 1-year contracts. When the contracting director decides to use an EPA clause in a 1-year contract and the prices are to be negotiated on the basis of discounts from established catalog prices of products sold in substantial quantities to the general public, the contracting officer shall include the basic clause at 552.216–71 in MAS solicitations and contracts. In multiyear contracts, the alternate clause will be used. These clauses are to be used instead of the FAR clauses at 52.216–2, –3, and –4.

516.203–70 EPA in FSS multiple award schedules.

(a) If the FSS multiple award schedule solicitation contains an EPA clause, the contracting officer should establish negotiation objectives reflecting the terms of the clause and seek appropriate discounts. If the clause is not included in the initial solicitation but is negotiated in, it must be added to the contracts at the time of award. Its inclusion is contingent on the approval of the contracting director, the need for an EPA clause, and the concessions granted by the offeror for its inclusion in the contract.

(b) The contract price ceiling may be raised during the contract period only under the following conditions:

(1) Analysis of the current market conditions, conducted in conjunction with the Office of Commodity Management (FC), reveals that the original contract price ceiling is inadequate.

(2) The causes which require an increase in the price ceiling are not unique to an individual contractor, but affect all suppliers for similar products.

(3) The HCA approves the determination to raise the ceiling.

Subpart 516.3—Cost-Reimbursement Contracts

516.301 General.

516.301–3 Limitations.

The required determination and findings (D&F) must be prepared in the format prescribed by 501.704–70(a)(1) and be signed by the appropriate official (see 501.702).

516.306 Cost-plus-fixed-fee contracts.

The required D&F must be signed by the appropriate official (see 501.707).

Subpart 516.4—Incentive Contracts

516.403 Fixed-price incentive contracts.

The required D&F must be prepared in the format prescribed by 501.704–70(a)(1) and be signed by the appropriate official (see 501.707).

516.405 Contract clauses.

Award fee clauses developed by contracting officers, under FAR 16.405(e), shall be prepared with the

advice and assistance of counsel and be approved by the contracting director.

Subpart 516.6—Time-and-Material, Labor-Hour, and Letter Contracts

516.603 Letter contracts.

516.603-3 Limitations.

(a) When acquiring architect-engineer (A–E) services the proposed A–E must provide a price proposal for the non-design effort to be performed under the contract before the letter contract is awarded. The letter contract must:

(1) Not authorize the A–E to begin the design effort. The scope of the letter contract may include the design effort but the letter contract may only authorize the A–E to perform those services that are independent of the design effort (e.g., feasibility studies, existing facility surveys or site investigation, etc.) before the letter contract is definitized.

(2) Include a definitization schedule that outlines dates for submission of the design fee proposal, start of negotiations, and definitization. The schedule must provide for definitization of the contract within 90 days after the date of the letter contract instead of 180 days as outlined in FAR 16.603–2(c).

(3) Limit the Government's liability to the amount necessary for the non-design effort to be performed under the contract by inserting that amount in the clause at FAR 52.216–24, Limitation of Government Liability.

(b) If the contracting officer must issue a unilateral price decision for an A–E contract under FAR 16.603–2(c), the maximum contract amount must not exceed a reasonable price for the excludable items plus the 6 percent statutory fee limitation for the project.

PART 517—SPECIAL CONTRACTING METHODS

Subpart 517.1—Multiyear Contracting

Sec.
517.105 Solicitation provisions and clauses.

Subpart 517.2—Options

517.201 Definitions.
517.204 Contracts.
517.207 Exercise of options.

Authority: 40 U.S.C. 486(c).

Subpart 517.1—Multiyear Contracting

517.105 Solicitation provisions and contract clauses.

Inclusion of FAR clauses 52.217–1, Limitations of Price and Contractor Obligations, and 52.217–2, Cancellation of Items, is not required for multiyear contracts authorized by the Federal Property and Administrative Services Act for maintenance and repair of fixed equipment in Federally-owned buildings and utility services.

Subpart 517.2—Options

517.201 Definitions.

"Nonevaluated option" means an option that is not considered in the award evaluation.

"Unpriced option" means an option where the prices for the option quantities or performance periods are not specified in the contract at the time of award and are negotiated at the time the option is exercised.

517.204 Contracts.

The head of the contracting activity must approve exceeding the 5-year limitations specified in FAR 17.204(e) for individual contracts. The Associate Administrator for Acquisition Policy must approve requests to exceed the limitations for classes of contracts. The contract file for individual approvals and the requests for approval of classes of contracts must completely support the need to exceed the 5-year limitation.

517.207 Exercise of options.

(a) If the synopsis for the original contract described the option provisions in sufficient detail to comply with the requirements of FAR Part 5 and the option was evaluated as part of the original competition, a synopsis of the option before it is exercised is not required. If the synopsis of the original contract did not describe the option provisions or the option was unevaluated, the option must be synopsized in accordance with FAR 5.207 before the option can be exercised.

(b) Unpriced options and unevaluated options are considered new procurement and the justification requirements of FAR Subpart 6.3 must be complied with before the option is exercised.

PART 518—[RESERVED]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 519—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

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519.706–70 Monitoring contractor compliance with subcontracting plans.
519.708 Solicitation provisions and contract clauses.
519.770 Reporting requirements under subcontracting assistance program.
519.770–1 Report forms.
519.770–3 Reporting on contractual actions under section 211 of Publ. L. 95–507.

Authority: 40 U.S.C. 486(c).

519.001 Definitions.

"Agency small business technical advisors" (SBTAs) as used in this part, means the directors of the Business Service Centers (or designees) in the regions and the individuals in FPRS, FSS, IRMS and PBS who have been designated to serve as SBTAs in the Central Office. In addition to the duties outlined at FAR 19.201(c), the agency small business technical advisors perform the functions of the small and disadvantaged business utilization specialist/representative described in FAR 19.506(a) and (b) and 19.705–4(d)(5).

Subpart 519.2—Policies

519.202 Specific policies.

519.202-2 Locating small business sources.

(a) Contracting officers should request assistance from SBTAs in locating small business sources.

(b) Business Service Centers (BSCs) will:

(1) Announce advance and current information about GSA business opportunities.

(2) Provide information, assistance, and counseling to enable small business concerns to take full advantage of business opportunities.

(3) Develop publications and public relations techniques designed to obtain maximum interest and participation of small business concerns. This activity will include, but not be limited to, the following:

(i) Arranging for and participating in meetings with business groups such as Chambers of Commerce, trade associations and similar organizations, State development corporations, Governors' and Mayors' advisory groups, local business and civic organizations, and small business councils.

(ii) Developing, preparing, and distributing informational material designed to stimulate the interest of small business concerns.

(iii) Developing interest and cooperation on the part of trade publications, the local press, and other media.

(c) BSC's will keep each other and the Office of Small and Disadvantaged Business Utilization (AU) informed on items of mutual interest regarding the small business programs.

519.202-5 Data collection and reporting requirements.

(a) Contracting officers shall submit a GSA Form 2677, Minority Contract Fact Sheet, to the SBTA when an 8(a) contract is awarded or modified.

(b) Each contracting office must submit the GSA Form 3077, FY 19____, Procurement Preference Program Goal Achievement, to the SBTA quarterly in accordance with GSA Order, GSA Form 3077, FY 19____ Procurement Preference Program Goal Achievement (ADM 2800.17).

Subpart 519.3—Determination of Status as a Small Business Concern

519.302 Protesting a small business representation.

If the Small Business Administration (SBA) determines that an offeror is not a small business and there is evidence that the offeror knowingly misrepresented itself as a small business, the contracting officer shall refer the matter to the Inspector General (J) for investigation.

519.304 Solicitation provisions.

(a) The contracting officer shall insert the provision at 552.219-1, Small Business Concern Representation, in all solicitations instead of the provision at FAR 52.219-1.

(b) The contracting officer shall insert a provision substantially the same as one of the provisions at 552.219-70, Standard Industrial Classification and Small Business Size Standard, in each solicitation, including requests for quotations issued under small purchase procedures (See FAR 19.102(b)(3) and 19.303(a)). The provision in paragraph (a) is for use when the same classification applies to all of the products or services being procured. The provision in paragraph (b) is for use when different classification codes apply to the various products or services being procured.

Subpart 519.5—Set-Asides for Small Business

519.500 Scope of subpart.

The requirements in this subpart for setting aside acquisitions and for reviewing non-set-aside determinations do not apply to construction, architectural and engineering, or trash/garbage collection services acquired under the Small Business Competitiveness Demonstration Program. (See FAR 19.10.)

519.502 Setting aside acquisitions.

519.502-1 Requirements for setting aside acquisitions.

Where a contracting officer determines that a small business set-aside of a procurement under FAR 19.5 is not feasible, the procedures in 519.502-70 must be followed. Contracting officers shall periodically review individual set-asides to identify commodities and services suitable for class set-asides.

519.502-3 Partial set-asides.

(a) *Initiating partial set-asides for stock items.* Partial set-asides for procurement of stock items may be made when the following Economic Order Quantity (EOQ) factors are present:

(1) For annual contracts, an EOQ factor not exceeding 3 months; and

(2) For 6-month contracts, an EOQ factor not exceeding 1 month.

(b) *Contract award.* When the set-aside portion of an item is awarded to the same concern as the corresponding non-set-aside portion, the award must be documented by issuing a separate contract or contract number for each group of items.

(c) *Partial coverage.* When only the non-set-aside portion of the procurement is awarded before the expiration of the current contract, contractual documents covering the transaction must be distributed to the ordering activities to provide at least partial coverage of the requirements.

(d) *Contract coding.* Information regarding partial or total set-asides must be included on GSA Form 1535, Recommendation for Award(s), as appropriate. Further, if a class set-aside is involved, the face of the GSA Form 1535 must be annotated as follows: "Class set-asides apply to items _____."

(e) *Ordering procedures.* The Inventory Manager shall ensure that the specified division of orders is made in accordance with the clause at 552.219-71 in those cases where two contractors are to supply the same item(s).

519.502-70 Review of non-set-aside determinations.

(a) If the contracting officer decides that a procurement that is expected to exceed $25,000 cannot be set aside for small business, the reasons for the decision must be recorded on the GSA Form 2689, Procurement Not Set Aside. The GSA Form 2689 must be submitted to the SBTA for review and coordination with the SBA.

(b) The SBTA will provide a copy of the GSA Form 2689 to the SBA representative as soon as possible so that the review can be made by GSA and SBA within the timeframe provided in (c) of this section.

(c) Review of the contracting officer's determination should normally be completed within 5 workdays. GSA and SBA reviewing officials should notify the contracting officer if additional time is needed and request an extension of time to complete the review.

(d) Before the GSA or SBA reviewing officials provide additional small business sources to the contracting officer when requesting reconsideration of the non-set-aside determination, the reviewing officials shall contact the sources to ensure the source is interested in submitting an offer and to obtain information regarding the capability of the source to fulfill the Government's requirements. The

information obtained should be provided to the contracting officer for consideration.

(e) If the SBTA recommends that the contracting officer set the procurement aside and the contracting officer still believes the procurement should be unrestricted, the matter must be referred to the contracting director's first level supervisor for a decision.

(f) If the SBA representative recommends that the contracting officer set the procurement aside and the contracting officer rejects the recommendation, the contracting officer shall comply with FAR 19.505.

519.503 Setting aside a class of acquisitions.

(a) A class set-aside may consist of an item (or service), a group of related items under a Federal Supply Class (FSC), or a whole FSC when restricted to small business on more than a one-time basis, as distinct from a one-time basis. A single item or a group of items restricted to small business on more than a one time basis, even though constituting only a small portion of an FSC, is defined as a class set-aside.

(b) Class set-aside determinations must be documented in the following format:

Small Business Class Set-Aside Determination

In accordance with FAR 19.502–2, it is hereby determined that procurements by the (*name of contracting activity*) of the following items or services will be set aside for small business concerns on a class basis. This determination does not apply to any individual procurement for which small purchase procedures are to be used and applies only to the contracting activity named above.

(List items or services)

The above format must be appropriately modified with respect to any class of procurements proposed to be partially set-aside. It must be signed by the contracting officer having procurement responsibility for the class of items or services involved, approved by the appropriate contracting director or a designee, and placed in the contract file.

519.508 Solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 552.219–71, Allocation of Orders—Partially Set-Aside Items, in solicitations and requirements type supply contracts that are partially set aside for small business.

Subpart 519.6—Certificates of Competency and Determinations of Eligibility

519.602 Procedures.

519.602–3 Resolving differences between the agency and the Small Business Administration.

(a) Within 5 working days or such longer period as may be agreed to after the contracting officer makes a request to the SBA Regional Office to appeal a notice of intention to issue a Certificate of Competency, the contracting office shall prepare and forward the following information to AU:

(1) Copies of all correspondence between GSA and SBA concerning the case, including initial notice to SBA that a small business had been found nonresponsible;

(2) Copies of all technical documents sent to SBA along with the notice (i.e., solicitation, preaward surveys, abstract of offers, if any, etc.);

(3) A fact sheet detailing all pertinent information to support an appeal action to SBA, including any new information and a justification of the contracting officer's decision to continue the appeal.

(b) If the SBA Central Office informs the contracting officer that it concurs with its Regional Office's intention to issue a COC, the documentation available clearly supports an appeal, and the contracting officer believes an appeal to be in the Government's interest, the contracting officer shall contact AU and request that office formally appeal the SBA decision on the agency's behalf. After considering all the facts and conferring with the applicable contracting activity, AU will decide whether or not to file a formal appeal. Before a decision is made not to appeal, AU shall notify the applicable Central Office Service. Once a decision is made regarding the appeal the contracting officer will be notified.

Subpart 519.7—Subcontracting with Small Business and Small Disadvantaged Business Concerns

519.701 Definitions.

"Commercial products plan" means an annual subcontracting plan effective during the offeror's fiscal year for all of the offeror's commercial products, and which has goals based on the offeror's production of both commercial and noncommercial products. This type of plan may apply to the production of the offeror's entire company, or it may be limited to a division or plant.

"Individual contract plan" means a subcontracting plan that applies to a specific contract and that has goals which are based upon the company's planned subcontracting and purchasing of supplies and services in support of the performance of a specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract. Individual contract plans may incorporate a master subcontracting plan.

"Master subcontracting plan" means a subcontracting plan which contains all of the required elements except goals, and which may be incorporated into an individual plan provided (a) the master plan has been approved by a Government contracting officer, (b) the offeror provides a copy of the approved master plan and evidence of its approval to the contracting officer and (c) goals and any deviations from the master plan are approved by the contracting officer. Master subcontracting plans are useful for offerors who anticipate receiving many Government contracts requiring individual subcontracting plans.

519.702 Statutory requirements.

(a) The Small Business Act treats contracts and modifications separately, not cumulatively. Accordingly, if a subcontracting plan is not required at the time of award because the value of the contract is below the threshold, a subcontracting plan will not be required if a subsequent modification increases the value of the contract to an amount which exceeds the threshold, unless the value of the modification itself exceeds $500,000 or $1 million for construction contracts.

(b) It is not necessary to obtain another subcontracting plan for a modification exceeding $500,000 ($1 million for construction contracts) if the contract already includes a subcontracting plan. Modifications may be incorporated into an existing plan and, upon approval, the original plan goals revised to include the new effort.

519.704 Subcontracting plan requirements.

(a) *Subcontracting goals.* (1) Positive subcontracting goals for small and small disadvantaged business concerns are required to establish a gauge for measuring results, and to provide an incentive for continuing efforts to increase the dollar value of contracts placed with small and small disadvantaged business concerns.

(2) Although there may be no known small or small disadvantaged business concerns that furnish the products or services required by a prospective contractor at the time a subcontracting plan is developed, a zero goal is not

acceptable because contractors are expected to make continuing efforts during the contract period to locate and identify newly emerging small and small disadvantaged business concerns as potential suppliers. In addition, there may be subcontracting opportunities in the area of indirect costs.

(3) Goals in individual plans for multiyear contracts or contracts with options to extend the period of performance may be established for a period less than the full term of the contract (including options) when it is impractical to establish goals for the full term if the plan includes a schedule for establishing goals for the balance of the term of the contract.

(b) *Types of plans.* For commercial products and public utility service contracts either a commercial products plan or an individual contract plan must be submitted. Individual contract plans must be submitted for all other contracts.

(c) *Duration of plans*— (1) *Individual plans.* The plan must cover the entire period of contract performance, including option periods (but see (a)(3), of this section, for goals).

(2) *Commercial products plans.* A commercial products plan is approved by the first Federal agency awarding a contract for commercial products during the contractor's fiscal year, and is applicable to every additional Federal contract for commercial products awarded to that contractor during the contractor's same fiscal year. If the approved plan is limited to a division or plant, it only applies to additional contracts for commercial products of that particular division or plant. The cutoff date for applying a previously approved commercial products plan to additional Federal contracts is the end of the company's fiscal year in which the plan was approved. If the contract extends beyond the contractor's fiscal year, the GSA contracting officer responsible for monitoring the existing plan, under 519.706–70(c), must request a new plan 30 days prior to the end of the contractor's fiscal year.

519.705 Responsibilities of the contracting officer under the subcontracting assistance program.

519.705–2 Determining the need for a subcontracting plan.

Before making a determination under FAR 19.705–2 that no subcontracting opportunities exist on a prospective contract, which meets the dollar threshold, the contracting officer must submit the determination to the SBTA for review and comments. The SBTA shall contact the Director, Office of Small and Disadvantaged Business Utilization (AU), and consider any comments or recommendations offered.

519.705–4 Reviewing the subcontracting plan.

(a) The GSA Form 3584, Checklist for Review of Subcontracting Plan, must be used by the procuring contracting officer (PCO) and small business technical advisor (SBTA) when reviewing subcontracting plans. Its use by SBA procurement center representatives is optional.

(b) In the goals section of the plan, small disadvantaged business goals are to be included in small business goals and, also, stated separately. If it is not clear from the plan that the offeror has done this, the contracting officer shall request clarification and have the offeror correct the goals, if necessary.

(c) The contracting officer shall question low subcontracting goals submitted by an offeror required to submit a subcontracting plan and shall require the offeror to document in its plan the steps it has taken to identify subcontracting opportunities for small and small disadvantaged business concerns.

(d)(1) Before determining the responsibility of an offeror on a contract requiring a subcontracting plan, the contracting officer shall review the offeror's compliance with previous subcontracting plans, if any, approved by the GSA contracting activity, including the contractor's performance in submitting subcontracting reports in a timely manner. The findings must be documented on the GSA Form 3584, Checklist for Review of Subcontracting Plan, in the "Remarks" block or on an attachment to the GSA Form 3584 before forwarding it to the SBTA and the SBA/PCR for review.

(2) In addition to (d)(1) of this section, PBS contracting officers must check the quarterly list of PBS contracts with plans provided by AU and contact all other GSA contracting activities holding contracts with the same contractor concerning compliance with the previous year's plan.

(3) When an offeror has consistently failed to submit SF 294 and SF 295 reports in a timely manner or has failed to make a good faith effort to meet its subcontracting goals on previous contracts with plans, the contracting officer shall include on the GSA Form 3584 in the "Remarks" block or in an attachment to the GSA Form 3584 the basis for finding the offeror responsible including the steps the offeror proposes to take that were not included in previous subcontracting plans to ensure compliance with the subcontracting program requirements on the proposed contract.

519.705–5 Awards involving subcontracting plans.

(a) In the event there is an unresolved disagreement with the SBTA and/or SBA/PCR on a proposed subcontracting plan, the contracting officer, prior to making an award, must contact the Director (AU) and consider any comments or recommendations offered.

(b) When a contractor has a commercial products plan previously approved by another GSA contracting activity or another Federal agency for the company's fiscal year, the GSA contracting officer shall request a copy of the plan and the agency approval document and include them in the contract file. The plan must also be included in and made a part of the resultant contract.

(c) When the contractor submits an individual contract plan, the contracting officer shall transmit copies of Standard Form 294, Subcontracting Report for Individual Contracts, and Standard Form 295, Summary Subcontract Report, to the contractor at the time of contract award. A letter substantially as follows must be used for this purpose.

Name
Address
City, State, Zip Code
Re: Subcontracting Plan Reports
Contract No._____
Dear _____:

Your individual contract plan, submitted under the Small Business and Small Disadvantaged Business Subcontracting Plan clause of your contract, has been approved. The clause also requires you to submit subcontracting reports on Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and Standard Form (SF) 295, Summary Subcontract Report.

The SF 294 report is used to report subcontracting activity under this contract. The report is due semiannually (within 25 days after March 31st and September 30th) and at contract completion.

The SF 295 report is used to report the aggregate of subcontracting activity under all your GSA contracts. The report is due quarterly (within 25 days after December 31st, March 31st, June 30th, and September 30th). The report is cumulative from quarter to quarter, and the final report for the year should cover the period from October 1-September 30, which is the Government fiscal year. A new reporting cycle begins October 1st of each year.

Please send the SF 294 report to: (*address of contracting office administering the contract*), and send a copy to: (*address of SBTA*).

Please send the SF 295 to the GSA Office of Small and Disadvantaged Business Utilization (AU), 18th and F Streets, NW., Washington, DC 20405.

The SF 294 and SF 295 report forms are enclosed.

Sincerely,

Contracting Officer
Enclosures (SF 294 and SF 295)

(d) When the contractor submits a commercial products plan, the contracting officer shall transmit copies of the Standard Form 295, Summary Subcontract Report, to the contractor at the time of contract award. (See 519.770–1(b)(2) for exception.) A letter substantially as follows must be used for this purpose:

Name
Address
City, State, Zip Code
Re: Subcontracting Plan Reports
Contract No._____
Dear_____:

Your commercial products plan, submitted under the Small Business and Small Disadvantaged Business Subcontracting Plan clause of your contract, has been approved by (*name, address, and telephone number of approving official*). The clause also requires you to submit subcontracting reports on Standard Form (SF) 295, Summary Subcontract Report.

The SF 295 is an annual report and is due on or before October 25th of each year. The reporting period is October 1-September 30, i.e., the Government fiscal year. The report should summarize subcontracting activity under plans for commercial products in effect during the reporting period.

Please send this report to: (*address of contracting office administering the contract*); and send a copy to the GSA Office of Small and Disadvantaged Business Utilization (AU), 18th and F Streets NW., Washington, DC 20405.

SF 295 report forms are enclosed.

Sincerely,
Contracting Officer
Enclosure (SF 295)

519.705–6 Postaward responsibilities of the contracting officer.

(a) In addition to the requirements of FAR 19.705–6, contracting officers shall notify the SBTA of each contract award or contract modification exceeding $500,000 ($1 million for construction) that contains a subcontracting plan within 5 work days of award. The notice of award must contain the following information:

(1) Contractor's name, address, phone number.

(2) Subcontracting plan administrator's name, address, phone number.

(3) Contract number.

(4) Place of performance.

(5) Dollar amount of contract award.

(6) Period of contract performance.

(7) Description of contract items.

(8) Contracting officer's name, address, phone number.

(9) Administrative contracting office address, phone number.

(10) Type of plan (individual or commercial products).

(b) The subcontracting plan checklist (GSA Form 3584) must be submitted as the notice of award, except in the case of a contract incorporating a previously approved commercial products plan. In this case, notice of award as described in paragraph (a) of this section, will be necessary as there will be no subcontracting plan checklist. The SBTAs shall forward a copy of notices and checklists to AU on a weekly basis and retain a file copy.

(c) AU will provide a report to Congress on subcontracting goals established for each contract.

519.706 Responsibilities of the cognizant administrative contracting officer.

519.706–70 Monitoring contractor compliance with subcontracting plans.

(a) Contract administration may be performed by the procuring contracting officer who awarded the contract or it may be delegated to an administrative contracting officer (ACO). When contract administration is delegated, the subcontracting plan must be included in the contract file transmitted to the contract administration office.

(b) The contracting officer administering contracts with subcontracting plans shall monitor receipt of SF 294 reports for individual contract plans and SF 295 reports for company-wide plans and review the reports for progress in meeting subcontracting plan goals by comparing the reports with the plan. If percentage goals are not met, the contractor must be required to explain the shortfall in the "Remarks" block on the subcontracting reports and may be required to submit evidence of their outreach efforts to locate and provide subcontracting opportunities to small business and small disadvantaged business concerns. The requirement for compliance with plans may be fulfilled by evidence of satisfactory outreach efforts, as described in the plan, as well as by meeting plan goals. The contracting officer responsible for monitoring receipt of the reports shall also obtain delinquent SF 295 reports from contractors for both individual and company-wide plans upon request from AU.

(c) After completion of contracts with individual contract plans, SBTA's shall forward a copy of the final SF 294 reports to AU within 20 days after the end of each quarter. If the contractors are delinquent in submitting the reports, the SBTA's shall request the contracting officers administering the contracts with the plans to obtain the reports and send them a copy.

(d) In the case of commercial products plans approved by GSA, the first contracting officer who enters into a contract with a company during the company's fiscal year approves the plan and monitors receipt of reports and compliance with the plan. This responsibility is generally assigned to the ACO if contract administration is delegated. Subsequent GSA contracts awarded during the company's same fiscal year and incorporating the previously approved plan will not require submission of subcontracting reports.

(e) In the case of commercial products plans approved by another agency, the first GSA contracting officer entering into a contract with the company during the company's same fiscal year in which the plan was approved requires the contractor to submit the SF 295 report and monitors receipt of the report. No other monitoring of this plan is required by GSA.

(f) Contractor compliance with plans must be documented in the contract file in accordance with FAR 19.706 and must be considered by the contracting officer when determining contractor responsibility for future awards. In case of noncompliance, the contracting officer shall notify AU through the SBTA.

(g)(1) Contractors who fail to submit SF 294 and SF 295 reports within 10 days of the due date must be reminded in writing that the report is past due.

(2) Contractors who do not respond to the first notice must be issued a second written notice by certified mail which must contain the following information:

(i) A statement that the named report has not been received.

(ii) A statement that failure to submit the report is a material breach of the contract (see FAR 52.219–9, Small Business and Small Disadvantaged Business Subcontracting Plan).

(iii) A statement that if the report is not received within 10 days from the date of the notice, the contracting officer will consider withholding payments as deemed appropriate under the circumstances until the report is received and may terminate the contract for default.

(iv) The contractor is also to be reminded that failure to submit the report may affect its ability to receive future awards from GSA (see FAR 9.104–3(c)) and that willful failure to perform or a history of failure to perform may result in debarment from future contracting with the Government for a period of time (see FAR 9.406–2(b)).

(v) The notice must also contain the address of the contracting officer or

administrative contracting officer to whom the report must be sent and instructions that a copy of the report must be sent to AU, if it is a SF 295 report, and to the appropriate SBTA, if it is a SF 294 report.

(3) Copies of delinquency notices concerning SF 295 or SF 294 reports must be sent to AU or the appropriate SBTA, respectively.

(4) If the contracting officer administering the contract has reason to believe that the contractor is otherwise not complying in good faith with the subcontracting plan, in addition to the requirements at FAR 19.706(b), the contracting officer must contact the Director (AU) and consider any comments or recommendations offered.

519.708 Solicitation provisions and contract clauses.

For contracting activities using GSA Form 1602, Notice Concerning Solicitation, or a similar form as a cover page of the solicitation, the contracting officer shall insert the provision at 552.219–72 on that cover page when the contract amount is expected to be over $500,000 ($1 million for construction) and the acquisition (a) is not set aside for small business, (b) is not for personal services, or (c) will not result in a contract that will be performed outside of any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

519.770 Reporting requirements under subcontracting assistance program.

519.770–1 Report forms.

(a) *Standard Form 294, Subcontracting Report for Individual Contracts.* This report is required for reporting subcontracting activity under contracts with individual contract plans. A separate report must be made on this form for each contract with an individual contract plan. This report is not required for commercial products plans.

(1) Contractors shall submit the SF 294 report to the contracting office administering the contract and a copy to the SBTA.

(2) Reports are due semiannually (within 25 days after March 31st and September 30th) and at contract completion.

(b) *Standard Form 295, Summary Subcontract Report.* This form is required for reporting subcontracting activity under both individual contract plans and commercial products plans.

(1) *Individual contract plans.* (i) Contractors shall submit the SF 295 reports to AU.

(ii) The reports are quarterly, and are due 25 days after the end of each Government quarter (December 31st, March 31st, June 30th, and September 30th).

(iii) The reports are cumulative from quarter to quarter and aggregate subcontracting activity under all GSA contracts held by the contractor, except those covered by commercial products plans.

(2) *Commercial products plans.* (i) Contractors shall submit the SF 295 reports to the contracting office administering the contract and a copy to AU.

Note: This instruction applies only for the first GSA contract covered by a commercial products plan awarded during the contractor's fiscal year. Contractors are not required to submit SF 295 reports for subsequent contracts awarded during their current fiscal year and covered by the same commercial products plan.

(ii) Reports are due annually, on or before October 25th of each year. The reports should cover the contractor's subcontracting activity under company-wide plans for commercial products in effect during the reporting period, which is October 1st to September 30th (Government fiscal year).

519.770–3 Reporting on contractual actions under section 211 of Pub. L. 95–507.

(a) *Contracting office reporting requirements.* A quarterly report of the number and dollar value of contracts awarded and modification requiring a plan (see 519.702) in excess of $500,000 ($1 million for construction) requiring subcontracting plans or a written determination that no subcontracting opportunities exist, must be prepared by contracting offices and submitted to the SBTA by the 10th calendar day after the end of the quarter. Report Control Symbol ADM 64 is assigned to this report. Negative reports are required. The SBTA will forward the reports to AU by the 20th calendar day following the end of the quarter.

(b) *Report format.* The following format is prescribed for the quarterly report.

REPORTING
OFFICE_____
Quarter beginning_____
ending_____

Report on Contracting Actions Under Section 211 of Pub. L. 95–507

(contracts estimated or actual value over $500,000)

[$1 million for construction]

Note: Do not include Contracts with Small Business Concerns.

1. Total number of contracts awarded over $500,000 ($1 million for construction).	No._____ $ value_____
2. Contracts awarded over $500,000 ($1 million for construction) which contain subcontracting plans.	No._____ $ value_____
3. Contracts awarded over $500,000 ($1 million for construction) without subcontracting plans. (Attach written justification for each contract awarded without a plan, see FAR 19.705–2).	No._____ $ value_____

(End of format)

PART 520—LABOR SURPLUS AREA CONCERNS—[RESERVED]

PART 521—[RESERVED]

PART 522—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 522.1—Basic Labor Policies

Sec.
522.101 Labor relations.
522.101–1 General.
522.103 Overtime.
522.103–4 Approvals.

Subpart 522.3—Contract Work Hours and Safety Standards Act

522.302 Liquidated damages and overtime pay.

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522.406–7 Compliance checking.
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522.406–9 Withholding from or suspension of contract payments.
522.406–11 Contract terminations.
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522.407 Contract clauses.
522.470 Forms.

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522.608 Procedures.
522.608–2 Determination of eligibility.
522.608–3 Protests against eligibility.
522.608–4 Award pending final determination.
522.608–6 Postaward.

Subpart 522.8—Equal Employment Opportunity

522.803 Responsibilities.
522.804 Affirmative action programs.
522.804–1 Nonconstruction.
522.804–70 Reports and other required information.
522.804–71 Furnishing information to contractors.

Authority: 40 U.S.C. 486(c).

Subpart 522.1—Basic Labor Policies

522.101 Labor relations.

522.101–1 General.

The contracting officer shall include the clause at FAR 52.222–1, Notice to the Government of Labor Disputes, in solicitations and contracts for items on the DOD Master Urgency List.

522.103 Overtime.

522.103–4 Approvals.

The head of the program office is the agency official responsible for approving overtime under FAR 22.103–4(a).

Subpart 522.3—Contract Work Hours and Safety Standards Act

522.302 Liquidated damages and overtime pay.

(a) The Administrator has designated the Heads of Central Office Services to make determinations under FAR 22.302(c).

(b) Upon a final administrative determination regarding the assessment of liquidated damages, the contracting officer notifies the appropriate Finance Office of the decision and provides necessary instructions regarding the disposition of funds withheld or the collection of funds. If funds were withheld from contract payments to satisfy the claim for liquidated damages pending a final administrative determination, the appropriate Finance Office shall be instructed to immediately release any funds in excess of the amount specified in the final administrative determination to the contractor. If funds were not withheld or if the amount of liquidated damages assessed exceeds that amount withheld for liquidated damages, the contracting officer initiates collection action by withholding funds from payments due on the instant contract or by issuing a demand for payment. When the contractor has other Government contracts the demand letter should indicate the Government's intent to offset if payment is not made. The contracting officer will provide the appropriate Finance Office with a copy of the demand for payment and request that the Finance Office initiate collection action under 41 CFR Part 105–55, Collection of Claims Owed the United States, if payment is not made in accordance with the demand letter.

Subpart 522.4—Labor Standards for Contracts Involving Construction

522.404 Davis-Bacon Act wage determinations.

522.404–6 Modifications of wage determinations.

Contracting directors may request extensions of the 90-day period for application of a general wage determination. See FAR 22.404–6(b)(6).

522.406 Administration and enforcement.

522.406–1 Policy.

The GSA Form 618–A, Transmittal of Contract Award, may be used to inform contractors of their obligations under the labor standards clauses of the contract.

522.406–6 Payrolls and statements.

Prime contractors and subcontractors who personally perform work are required to submit, instead of weekly payrolls and statements of compliance with respect to payment of wages, a statement clearly showing their contractual relationship, the scope and dates of work performed, that they received no wages, and that no mechanics or laborers were employed in the prosecution of the work. GSA Form 618–D, Statement to be Submitted When Work is Performed Personally, should be used to furnish this information.

522.406–7 Compliance checking.

Compliance checks must be made as frequently as necessary and before final payment is made. Compliance checking is essential to the success of the labor standards enforcement program.

522.406–8 Investigations.

(a) When compliance checks indicate such action is warranted, the contracting officer shall request the Regional Inspector General for Investigations to conduct an investigation of a contractor's compliance with the labor standards requirements.

(b) The contracting director shall review and process the contracting officer's report under FAR 22.406–8(d).

522.406–9 Withholding from or suspension of contract payments.

Upon final administrative determination regarding the assessment of liquidated damages, the contracting officer shall follow the procedures in 522.302(b).

522.406–11 Contract terminations.

Contracting officers shall submit reports required under FAR 22.406–11.

522.406–13 Semiannual enforcement reports.

Contracting activities shall submit semiannual enforcement reports to the Office of Procurement (PP), Public Buildings Service, for consolidation and submission to the Department of Labor. The reports should be submitted within 15 calendar days after the end of the reporting period.

522.407 Contract clauses.

In construction contracts with state or political subdivisions, the contracting officer shall insert the clause at 552.222–82, Preface for Labor Standards—State or Political Subdivision Contracts, as a preface to the clauses prescribed in FAR 22.407(a).

522.470 Forms.

GSA Form 3505, Labor Standards (Construction Contract), is for use in contracts subject to the Davis-Bacon and related Acts. The clauses on this form must be included in solicitations/contracts in full text, and may not be incorporated by reference.

Subpart 522.6—Walsh-Healey Public Contracts Act

522.608 Procedures.

522.608–2 Determination of eligibility.

The contracting officer shall forward ineligibility determinations under FAR 22.608–2(f)(1)(ii) through the contracting director.

522.608–3 Protests against eligibility.

The contracting officer shall forward determinations under FAR 22.608–3(b) through the contracting director.

522.608–4 Award pending final determination.

The certification required by FAR 22.608–4(b)(1) must be approved by the HCA.

522.608-6 Postaward.

The contracting officer shall notify and furnish information to the Department of Labor under FAR 22.608-6(c) after coordinating with legal counsel and the contracting director.

Subpart 522.8—Equal Employment Opportunity

522.803 Responsibilities.

The contracting officer shall submit questions under FAR 22.803(d) to legal counsel.

522.804 Affirmative action programs.

522.804-1 Nonconstruction.

In addition to the requirements of FAR 22.804, each contractor and subcontractor who serves as a depository of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, must develop a written affirmative action compliance program for each of its establishments within 120 days from the start of its first such Government contract or subcontract.

522.804-70 Reports and other required information.

For contract administration purposes, nonexempt contractors shall be instructed to submit a copy of Standard Form 100, Equal Employment Opportunity Employer Information Report EEO-1, submitted under the Equal Opportunity clause to the contracting officer (see FAR 52.222-26(b)(7)).

522.804-71 Furnishing information to contractors.

Contracting officers shall provide contractors with (a) a SF-100, and (b) a copy of the notice that is to be provided the labor union or workers' representative and posted in conspicuous places (see FAR 22.805(b) and 52.222.26(b) (3) and (5)).

522.805 Procedures.

(a) The contract amount for purposes of applying the threshold at FAR 22.805(a) includes the value of the basic contract plus priced options. A contract modification exercising an option that has been priced and evaluated does not constitute a contract award under FAR 22.805(a)(1)(ii) and does not require a preaward clearance.

(b) Requests for reviews under FAR 22.805(a)(5) are made directly by the contracting officer.

522.807 Exemptions.

Requests for exemption under FAR 22.807(c) must be submitted through the HCA to the appropriate regional office of the OFCCP.

Subpart 522.10—Service Contract Act

522.1001 Definitions.

For purpose of this subpart, the agency labor advisor is the contracting office's assigned legal counsel.

522.1003 Applicability.

522.1003-4 Administrative limitations, variations, tolerances, and exemptions.

Requests for limitations, variations, tolerances, and exemptions from the Service Contract Act must be submitted to the Wage and Hour Administrator by the contracting director.

522.1003-7 Questions concerning applicability of the Act.

Requests for determination of Service Contract Act applicability must be submitted to the Administrator, Wage and Hour Division, by the contracting director.

522.1005 Clause for contracts of $2,500 or less.

The total dollar amount of orders reasonably expected to be placed against blanket purchase or basic ordering agreements in a 1-year period should be used for comparison with the dollar threshold.

522.1006 Clauses for contracts over $2,500.

(a) The clauses prescribed in FAR 22.1006 (a) and (b) may be repeated verbatim in solicitations and contracts or the GSA Form 2166, Service Contract Act of 1965 (As amended) and Statement of Equivalent Rates for Federal Hires, may be used.

(b) The contracting officer shall, in lieu of the clause at FAR 52.222-43, insert a clause substantially the same as one of the clauses at 552.222-43, Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiyear and Option Contracts), or another clause authorized by FAR 16.203-4(d) which accomplishes the same purpose, in solicitations and fixed price contracts for building services when the contract contains the clause at FAR 52.222-41, Service Contract Act of 1965, and is a multiyear contract or a contract with options to renew that is expected to exceed the small purchase limitation. When the contract will be negotiated based on certified cost and pricing data, the clause at FAR 52.222-43 should be used. The clause may be used for small purchases.

(c) If an economic price adjustment clause is developed under FAR 16.203-4 and included in a solicitation and contract, the clauses prescribed in this section normally will not be used. If they are used, the contracting officer must ensure the clauses do not conflict with or duplicate payment under the clauses in 552.222-43.

522.1011 Response to notice by Department of Labor.

522.1011-2 Requests for status or expediting of response.

Requests to expedite wage determinations or to check the status of a request may be made by the contracting officer directly to the Wage and Hour Administrator.

522.1021 Substantial variance hearings.

Requests for hearings will be made by the contracting officer through the HCA. All requests must be coordinated with the appropriate legal counsel.

Subpart 522.13—Special Disabled and Vietnam Era Veterans

522.1303 Waivers.

Requests for waivers under FAR 22.1303(c) must be submitted to the Administrator through the HCA.

522.1306 Complaint procedures.

The contracting officer may forward complaints about the administration of the Act to the Veteran's Employment Service in accordance with FAR 22.1306.

Subpart 522.14—Employment of the Handicapped

522.1403 Waivers.

Requests for the waivers under FAR 22.1403(c) must be submitted to the Administrator through the HCA.

522.1406 Complaint procedures.

The contracting officer may forward complaints about the administration of the Act to the OFCCP in accordance with FAR 22.1406.

PART 523—ENVIRONMENT, CONSERVATION, AND OCCUPATIONAL SAFETY

Subpart 523.2—Hazardous Materials Identification and Material Safety Data

Sec.
523.303 Contract clause.
523.370 Solicitation provision.

Authority: 40 U.S.C. 486(c).

Subpart 523.3—Hazardous Materials Identification and Material Safety Data

523.303 Contract clause.

The contracting officer shall insert the clause at 552.223-70, Hazardous Substances, in solicitations and contracts for packaged items subject to the Federal Hazardous Substances Act

and the Hazardous Materials Transportation Act.

523.370 Solicitation provision.

The contracting officer shall insert the provision at 552.223-71, Hazardous Material Information, in solicitations including small purchases, which involve the shipment of hazardous materials on an f.o.b. origin basis.

PART 524—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 524.1—Protection of Individual Privacy

Sec.
524.103 Procedures.

Subpart 524.2—Freedom of Information Act

524.202 Policy.
Authority: 40 U.S.C. 486(c).

Subpart 524.1—Protection of Individual Privacy

524.103 Procedures.

See 41 CFR Part 105-64 and GSA Order, Privacy Act Program (OAD P 1878.8) when contracting for the design, development, or operation of a system of records on individuals.

Subpart 524.2—Freedom of Information Act

524.202 Policy.

See 41 CFR Part 105-60 and GSA Order, Freedom of Information Act Procedures (ADM 1035.11A) for requirements on making records available under the Freedom of Information Act.

PART 525—FOREIGN ACQUISITION

Subpart 525.1—Buy American Act—Supplies

Sec.
525.105 Evaluating offers.
525.105-70 Evaluating offers—hand or measuring tools or stainless steel flatware for other than the Department of Defense (DOD).
525.105-71 Procurement of hand or measuring tools or stainless steel flatware for DOD.
525.108 Excepted articles, materials, and supplies.
525.108-70 Determination of nonavailability.

Subpart 525.2—Buy American Act—Construction Materials

525.202 Policy.
525.203 Evaluation of offers.
525.204 Violations.
525.205 Solicitation provision and contract clause.

Subpart 525.3—Balance of Payments Program

525.302 Policy.
525.302-70 Procurements for agencies under the Foreign Assistance Act.
525.304 Excess and near-excess foreign currencies.
525.371 Restricted solicitation.

Subpart 525.4—Purchases Under the Trade Agreements Act of 1979

525.402 Policy.
525.402-70 Delegation of limited waiver authority.
525.407 Solicitation provision and contract clause.
Authority: 40 U.S.C. 486(c)

Subpart 525.1—Buy American Act—Supplies

525.105 Evaluating offers.

(a) Proposed awards, under FAR 25.105(c), must be submitted to the HCA or a designee for approval. A statement of facts containing the following information should be submitted for approval.

(1) Description of the item(s), including unit and quantity.

(2) Estimated cost.

(3) Statement as to whether duty is included in the estimated cost and, if not, the reasons for exclusion.

(4) Transportation costs for delivery to destination if the item is to be procured f.o.b. origin.

(5) Country of origin.

(6) Name and address of proposed contractor(s).

(7) Brief statement as to necessity for procurement.

(8) Reasons supporting request for approval explaining.

(i) Why the cost would not be unreasonable or inconsistent with the public interest when award to a domestic concern for more than $250,000 would be made to a small business or labor surplus area concern after the 12 percent factor is applied, but not to a firm after the 6 percent is applied.

(ii) Any proposed rejection of an acceptable low foreign offer to protect essential national security interests or rejection of any offer for other reasons of national interest when the Trade Agreements Act of 1979 is not applicable.

(b) A determination to reject a foreign offer using differentials greater than those provided at FAR 25.105 may be made.

(1) If necessary to protect national security interests; and

(2) After the HCA or a designee obtains advice from the Director, Federal Emergency Management Agency. The Executive Office of the President, Office of Management and Budget, must be apprised of the facts of each case where such a determination is made.

525.105-70 Evaluating offers—hand or measuring tools or stainless steel flatware for other than the Department of Defense (DOD).

(a) *Definitions.* "Hand or measuring tool," as used in this section, means Groups 51 and 52 in Cataloging Handbook H2-1, Federal Supply Classification Part I, Groups and Classes, published by the Defense Logistics Agency, Defense Logistics Services Center, Battle Creek, Michigan.

(b) *GSA Appropriation Act restrictions.* (1) The current GSA Appropriation Act restricts the acquisition of any hand or measuring tool and stainless steel flatware to domestic end products, except to the extent the Administrator of General Services or a designee determines that a satisfactory quality and sufficient quantity are unavailable from sources in the United States or its possessions or except as prescribed by section 6-104.4(b) of the Armed Services Procurement Regulations (ASPR) in effect on June 15, 1970.

(2) For hand or measuring tools, the GSA Appropriation Act further provides that a factor of 75 percent is to be used in evaluating foreign end products in lieu of the 50 percent in ASPR 6-104.4(b).

(c) *Evaluation procedures.* Offers for hand or measuring tools or stainless steel flatware must be evaluated using the following procedures adapted from ASPR 6-104.4(b).

(1) An offer of an end product manufactured in Canada will be evaluated on the same basis as a domestic end product after applicable duty, determined under 19 U.S.C. 1202, is included, irrespective of whether or not a duty-free entry certificate will be issued.

(2) Any other offer of a foreign end product must be evaluated at the greatest evaluated price determined by increasing either (i) the net value of the offer (exclusive of duty) by 50 percent (75 percent for hand or measuring tools) or (ii) the gross value of the offer (inclusive of duty) by 6 percent.

(3) A 12 percent factor must be used in (c)(2) (ii) above, when (i) a small business or any labor surplus area concern submits the low acceptable domestic offer or (ii) an otherwise low acceptable domestic offer would result in a contract not to exceed $100,000 based on its application, but not on the application of the factors in (c)(2) (i) and (ii).

(4) If a contract exceeding $100,000 to a small business or labor surplus area concern would result under the circumstances in (c)(3)(ii), the matter must be submitted to the HCA for a

decision whether such award would involve unreasonable cost or be inconsistent with the public interest. A statement of facts as outlined in 525.105 may be used.

(5) The above evaluation must be applied on an item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation. Award on the domestic offer will be made when any tie results from the foregoing procedures.

(d) *Solicitation provision.* The contracting officer shall insert the provision at 552.225-70, Buy American Act—Hand or Measuring Tools or Stainless Steel Flatware, in solicitations for the acquisition of hand or measuring tools or stainless steel flatware for other than Department of Defense requirements.

525.105-71 Procurement of hand or measuring tools or stainless steel flatware for DOD.

(a) *Definitions.* "Domestic end product," as used in this section, means a hand or measuring tool, other than an electric or air-motor driven hand tool, or stainless steel flatware, that is wholly produced or manufactured, including all components, in the United States or its possessions.

"Electric or air-motor driven hand tool," as used in this section, means a domestic end product if the cost of components produced or manufactured in the United States exceeds 75 percent of the cost of all components in the end product.

"Stainless steel flatware," as used in this section, means special order and stock items of stainless steel flatware purchased for DOD, including, but not limited to, the following National Stock Numbers (NSN):

7340-00-060-6057
7340-00-205-3340
7340-00-205-3341
7340-00-241-8169
7340-00-241-8170
7340-00-241-8171
7340-00-559-8357
7340-00-688-1055
7340-00-721-6316
7340-00-721-6971

(b) *DOD Appropriation Act restrictions.* (1) Except for purchases of $25,000 or less, DOD is prohibited from acquiring hand or measuring tools or stainless steel flatware (see 525.105-71(a)), that are not domestic end products, except in the case of stainless steel flatware, when the Secretary of the department concerned determines that a satisfactory quality and quantity produced or manufactured in the United States or its possessions are not available when needed at domestic market prices.

(2) In GSA procurements of such tools or flatware, a determination must be made by the appropriate Commodity Center Director whenever GSA applies the current DOD Appropriation Act restrictions. This determination must be made on a case-by-case basis for tools and flatware for NSNs other than those listed in 525.105-71(a), whenever (i) DOD requirements are included in the solicitation and (ii) the hand or measuring tools or stainless steel flatware are available from domestic sources.

(3) The basis for applying the DOD Appropriation Act restrictions to GSA acquisitions is the—

(i) Statutory prohibition on DOD, which applies when DOD requisitions such items, regardless of whether or not it is from the GSA stock program;

(ii) Impracticality of establishing a dual supply system to satisfy the requirements of civilian and military agencies; and

(iii) Language in the GSA Appropriation Act, which provides for the rejection of any offer when it is considered necessary for reasons of national interest under ASPR 6-104.4(d)(3)(ii).

(4) When no offers for a domestic end product are received or the total quantity offered by responsive and responsible offerors for a particular NSN of stainless steel flatware is insufficient to meet the requirement, the contracting officer should consider making an unavailability determination (see 525.108-70), amend the solicitation, and complete the acquisition under 525.105-70.

(c) *Contract clause.* The contracting officer shall insert the clause at 552.225-71, Notice of Procurement Restriction—Hand or Measuring Tools or Stainless Steel Flatware, in solicitations and contracts for the acquisition of hand or measuring tools or stainless steel flatware when the Commodity Center Director makes a determination under 525.105-71(b).

525.108 Excepted articles, materials, and supplies.

525.108-70 Determination of nonavailability.

(a) Determinations under FAR 25.102(a)(4), 25.202(a)(3), and 25.108 must be supported by a statement of fact (findings), including the following information, and a determination signed by the HCA or a designee:

(1) Description of the item(s), including unit and quantity;

(2) Estimated cost, including duty, if any (show the amount of duty separately);

(3) Transportation costs for delivery to destination, if item is to be procured f.o.b. origin;

(4) Country of origin;

(5) Name and address of prospective contractor(s);

(6) Brief statement as to the necessity for the procurement; and

(7) Statement of effort made to procure a similar item of domestic origin or statement that there is no domestic item that can be used as a reasonable substitute.

(b) Findings and determination of nonavailability will normally be prepared in the format shown below:

General Services Administration

Reference No. _____

Findings and Determination of Nonavailability Under the Buy American Act Regarding Purchase of (insert description)

Pursuant to the provisions of the Buy American Act (41 U.S.C. 10a-d) and Executive Order 10582, December 17, 1954 (3 CFR Supp.), and by virtue of delegated authority, the following findings of fact and determination are hereby made:

1. Findings (set forth a statement of facts).

2. Determination. In view of the foregoing, it is hereby determined that for the purposes of the Buy American Act (insert item description), is not mined, produced, or manufactured at the present time in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

Date _____

Signed

(End of Findings and Determination)

(c) When it has been determined that the Buy American Act is not applicable to the purchase of the end product or to the components from which it is manufactured, the original of the determination must be made a part of the contract file and a copy furnished to the Associate Administrator for Acquisition Policy for transmittal to the appropriate FAR Council and a statement must be inserted in the solicitation and contract that a determination has been made pursuant to FAR 25.108(b).

Subpart 525.2—Buy American Act—Construction Materials

525.202 Policy.

The HCA is authorized to make determinations required by FAR 25.202(a). The HCA may not redelegate authority to make determinations under FAR 25.202(a)(3) when the cost of the materials is estimated to exceed

$100,000. Authority to make other determinations may be redelegated.

525.203 Evaluation of offers.

(a) The HCA or a designee may authorize the use of a particular foreign construction material when the use of a comparable domestic construction material would unreasonably increase the cost of the contract. The cost of a particular domestic construction material shall be determined to be unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent. The cost of construction material includes all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

(b) The evaluation process described in paragraph (a) of this section, does not apply to excepted materials listed in the solicitation. (See paragraph (a) of the provision at 552.225–75). See FAR 25.201 for computing cost of components.

(c) The provision at 552.225–75, Buy American Act Notice—Construction Materials, requires offerors proposing to use foreign construction materials provide adequate information for Government evaluation under paragraph (a) of this section, and permits alternate offers for comparable domestic construction materials at stated prices. When a foreign construction material is not authorized under (a) of this section, evaluation of the offer must be based on the stated price, if any, for comparable domestic construction material. If an offer proposing to use foreign construction material does not furnish data on the cost of comparable domestic construction material, and use of the foreign construction material is not authorized, the offer of foreign material must be rejected, unless the contracting officer is able to obtain prices on comparable domestic material which verifies that domestic prices are unreasonable.

(d) The contracting officer shall add 6 percent of the cost of all foreign construction materials authorized for use in accordance with paragraph (a) of this section, to price(s) offered, if applicable, for evaluation purposes only.

525.204 Violations.

If a contractor fails to comply with the clause at FAR 52.225–5, Buy American Act—Construction Materials, the contracting officer shall document the failure in a report and forward the report to the debarring official for consideration for debarment action in accordance with Subpart 509.4.

525.205 Solicitation provision and contract clause.

The contracting officer shall insert the provision at 552.225–75, Buy American Act Notice—Construction Materials, in solicitations for construction that include the Buy American Act—Construction Materials clause at FAR 52.225–5.

Subpart 525.3—Balance of Payments Program

525.302 Policy.

(a) Decisions under FAR 25.302(b)(3) must be supported as provided in 525.108–70(a).

(b) Use of a greater differential than provided in FAR 25.302(c) may be authorized by the HCA or a designee.

525.302–70 Procurements for agencies under the Foreign Assistance Act.

When a contracting activity enters into contracts as the agent for an agency governed by the Foreign Assistance Act (22 U.S.C. 2151 *et seq.*) such as the Agency for International Development (AID), such contracts are governed by the policies and procedures of the agency and not by FAR 25.3 and 525.3.

525.304 Excess and near-excess foreign currencies.

When a contracting activity procures articles or services for use outside the United States for another agency, it will be assumed (unless a specific notation is made on the purchase request) that use of excess or near excess foreign currencies has been considered by the requisitioning agency and that such currencies are not available.

525.371 Restricted solicitation.

(a) Specific written estimates of comparative delivered prices of end products or service of domestic origin versus foreign origin made by the requisitioning office before submitting a purchase request is not required by the contracting activity. Procurements made directly for other agencies of items to be used outside the United States will be made under the Balance of Payments Program, except for agencies supported by GSA that come under the Foreign Assistance Act; e.g., AID and the Bureau of International Narcotics Matters.

(b) Before procuring any item for GSA use outside the United States, cost estimates must be made before restricting competition to U.S. end products or services.

Subpart 525.4—Purchases Under the Trade Agreements Act of 1979

525.402 Policy.

(a) Under FAR 25.402(a), when the estimated value of all items or products (exclusive of any item or product within any of the exceptions described in FAR 25.403) listed in the solicitation exceeds the Trade Agreements Act threshold, contracting officers shall evaluate offers without regard to the restrictions of the Buy American Act or the Balance of Payments Program. The $156,000 threshold must be inserted in paragraph (b) of the FAR clause at 52.225–9.

(b) When acquiring eligible products without full and open competition using the authorities in FAR 6.302–3(a)(2)(i) or 6.302–7, a copy of the approved justification must be furnished to the Associate Administrator for Acquisition Policy for subsequent transmittal to the U.S. Trade Representative.

525.402–70 Delegation of limited waiver authority.

(a) The U.S. Trade Representative, under section 302(b) of the Trade Agreements Act (Act), has authorized the Administrator of General Services to waive, under limited specified circumstances and on a case-by-case basis, the purchasing prohibition in section 302(a)(1) of the Act.

(b) The Administrator has delegated to the HCA authority to waive the purchasing prohibition in paragraph (a) of this section, in cases where in response to a solicitation:

(1) There are no responsive bids or technically acceptable offers received from responsible offerors of U.S. or designated country end products, or

(2) Responsible offerors do not offer a sufficient quantity to meet the Government's requirements.

(c) A copy of any waiver under paragraph (b) of this section must be furnished to the Associate Administrator for Acquisition Policy for transmittal to the U.S. Trade Representative.

525.407 Solicitation provision and contract clause.

The contracting officer shall insert the clause at 552.225–72, Eligible Products from Nondesignated Countries—Waiver, in solicitations and contracts subject to the Trade Agreements Act.

PART 526—[RESERVED]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 527—PATENTS, DATA, AND COPYRIGHTS

Authority: 40 U.S.C. 486(c).

Subpart 527.4—Rights In Data and Copyrights

527.409 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 552.227–70, Government Rights (Unlimited), in lieu of the clause at FAR 52.227–17, Rights in Data-Special Works, in contracts for architect-engineer services and construction involving architect-engineer services, except when the clause at 552.227–71 is required.

(b) The contracting officer shall substitute the clause at 552.227–71, Drawings and Other Data to Become Property of Government, for the clauses at 552.227–70 and FAR 52.227–17 in contracts for architect-engineer services and construction involving architect-engineer services, when the sole property rights and exclusive control over the design and data are required by the Government.

PART 528—BONDS AND INSURANCE

Subpart 528.1—Bonds

Sec.

Subpart 528.2—Sureties

Subpart 528.3—Insurance

Authority: 40 U.S.C. 486(c).

Subpart 528.1—Bonds

528.101 Bid guarantee.

528.101–1 Policy on use.

(a) *Construction contracts.* (1) Bid guarantees must not be required for contracts awarded under section 8(a) of the Small Business Act as amended (15 U.S.C. 637(a)).

(2) Unless waived under FAR 28.101–1(c), bid guarantees must be required for construction contracts (except section 8(a) contracts) that do not exceed $25,000 when it is determined under 528.102–1(b) that a performance bond is essential to protect the Government's interest.

(b) *Building service contracts.* Unless waived by the HCA, bid guarantees must be required for building service contracts in excess of $25,000 when it is determined under 528.103–2 that a performance bond is essential to protect the Government's interest.

(c) *All other contracts.* Refer to FAR 28.101 for guidance on the use of bid guarantees.

528.101–3 Contract clause.

(a) The contracting officer shall insert a clause substantially the same as the clause at 552.228–70, Bid Guarantee and Bonds, in solicitations and contracts when a construction contract or a contract for dismantling, demolition, or removal of improvements is contemplated and a bid guarantee and bond requirement is to be included.

(b) The contracting officer shall insert a clause substantially the same as the clause at 552.228–71, Bid Guarantee, in solicitations and contracts when a building service or other service contract is contemplated and a bid guarantee requirement is to be included.

528.101–4 Noncompliance with bid guarantee requirements.

In a negotiated acquisition, an offeror submitting a bid guarantee executed by an unacceptable surety may be determined technically unacceptable if acceptance of the most favorable initial proposal without discussion would result in the lowest overall cost to the Government (see FAR 15.610(a)). However, if the offeror's proposal could, after discussions, be made acceptable and may result in the lowest overall cost to the Government, the contracting officer must include the offeror in the competitive range and permit the deficiency to be remedied in a revised proposal (see FAR 15.610(b)).

528.102 Performance and payment bonds for construction contracts.

528.102–1 General.

(a) The performance and payment bond requirements in FAR 28.102–1 apply to contracts awarded under section 8(a) of the Small Business Act unless the requirement has been waived by SBA under section 8(a)(2) of the Small Business Act, as amended.

(b) Performance and/or payment bonds may be required on a case-by-case basis for construction contracts that do not exceed $25,000 if a written determination is made by the contracting officer and approved by the contracting director indicating that they are essential to protect the Government's interest.

528.102–3 Solicitation requirements.

The contracting officer shall insert a clause substantially the same as the clause at 552.228–70, Bid Guarantee and Bonds, in solicitations and contracts when a construction contract or a contract for dismantling, demolition, or removal of improvements is contemplated and a performance and payment bond requirement is to be included.

528.103 Performance and payment bonds for other than construction contracts.

528.103–2 Performance bonds.

(a) Performance bonds may be required on a case-by-case basis for building service contracts in excess of $25,000, if a written determination is made by the contracting officer and approved by the contracting director indicating that they are essential to protect the Government's interest.

(b) Performance bonds must not be required for building service contracts awarded under section 8(a) of the Small Business, Act as amended (15 U.S.C. 637(a)), or contracts awarded to workshops for the blind or other severely handicapped under the Javits-Wagner-O'Day Act, as amended (41 U.S.C. 46–48c).

(c) The penal amount of the performance bond generally shall be 10 to 50 percent of the contract price for the term of the contract at the time of the award. The contracting officer shall consider the circumstances and determine the amount of the performance bond on a case-by-case basis.

(d) The contracting officer shall insert a clause substantially the same as the clause at 552.228–72, Performance Bond, in solicitations and contracts when a building service or other service contract is contemplated and a

performance bond requirement is to be included.

528.103-3 Payment bonds.

(a) Payment bonds may be required for other than construction contracts when the contracting director determines, under FAR 28.103-3, that such a requirement is in the Government's interest.

(b) The penal amount of the payment bond generally will be 10 to 50 percent of the contract price for the term of the contract at the time of award. The contracting officer shall consider the circumstances and determine the amount of the payment bond on a case-by-case basis.

(c) The contracting officer shall insert a clause substantially the same as the clause at 552.228-73, Performance and Payment Bonds, in solicitations and contracts when a building service or other service contract is contemplated and a performance and payment bond requirement is to be included.

528.106 Administration.

528.106-6 Furnishing information.

The HCA or a designee shall perform the functions outlined in FAR 28.106-6(c).

528.106-70 Execution and administration of bonds.

(a) Bid guarantees, other than corporate or individual sureties, must be returned to offerors as specified in FAR clause 52.228-1, Bid Guarantee.

(b) When a performance or payment bond or acceptable alternate is not furnished within the time specified, the contract may be terminated for default. (See FAR 52.228-1 and Subpart 49.4.)

Subpart 528.2—Sureties

528.202 Acceptable sureties.

528.202-1 Corporate sureties.

(a) The current edition of Treasury Department Circular 570 must be prominently displayed in bid opening rooms, in GSA Business Service Centers, and in all places where bid forms and information are regularly available. Copies should be made available to officials having a need to know.

(b) Corporate surety bonds must be manually signed by the Attorney-in-Fact or officer of the surety company and the corporate seal affixed. Failure of the surety to affix the corporate seal may be waived as a minor informality. (See B-184120, July 2, 1975, 75-2 CPD 9.)

(c) Where an invitation for bid requires a bid guarantee and an unacceptable corporate surety is submitted in fulfillment of the requirement, the bid must be rejected as nonresponsive. A bidder must not be permitted to substitute an acceptable surety after bid opening. (See B-198687, May 23, 1980, 80-1 CPD 360.)

(d) A contractor submitting a performance or payment bond executed by an unacceptable corporate surety in satisfaction of a performance or payment bond requirement may be permitted to substitute an acceptable surety for a surety previously determined to be unacceptable.

528.202-2 Individual sureties.

(a) In addition to the requirements of FAR 28.202-2, the following criteria must be considered when making determinations regarding the acceptability of individual sureties:

(1) The contracting officer may deduct the total amount of other bonds which the surety executed (Block 10 of SF 28) from the net worth figure entered in Block 7, line g, to arrive at a realistic net worth. Alternatively, the contracting officer may deduct nothing or only a portion of the amount entered in Block 10 based upon the degree of completion of the contracts on which the bonds were provided.

(b) If the contracting officer is unable to make a determination of net worth from the SF 28, the individual surety must be required to furnish additional information. Generally, supplementary information will not be required unless the SF 28 is incomplete or improperly filled out or unless the contracting officer has reason to believe the surety's statement on the SF 28 does not reflect the true net worth.

(c) If the contracting officer determines that either surety's net worth is not equal to the penal amount of the bond, the bid of the firm utilizing the sureties must be rejected as nonresponsible. A finding of bidder nonresponsibility pursuant to FAR 9.105-2, based on unacceptability of an individual surety need not be referred to the Small Business Administration for a competency review. (See 61 Comp. Gen. 456 (1982).)

(d) Under certain circumstances, such as when there is a record indicating a continuing pattern among certain individual sureties not to disclose outstanding bond obligations, the offeror's sureties may be rejected as unacceptable. (See 61 Comp. Gen. 592 (1982).)

(e) In a sealed bid procurement an offeror submitting a bid guarantee executed by an unacceptable surety may not substitute an acceptable individual surety after bid opening. This holds even though the surety's acceptability is a matter of bidder responsibility. (See 61 Comp. Gen. 456 (1982).) When a negotiated procurement is involved, such a deficiency may be remedied by the offeror in a revised proposal.

(f) Any individual surety executing a bond furnished GSA cannot have been excluded from acting as an individual surety by the Associate Administrator for Acquisition Policy. (See 528.270.) Any bid submitted in response to an invitation for bid which is accompanied by a bid guarantee backed by an individual surety who has been excluded must be rejected as nonresponsive. When a negotiated procurement is involved, such a deficiency may be remedied by the offeror in a revised proposal.

(g) A contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted to substitute an acceptable surety for a surety previously determined to be unacceptable.

528.202-70 Acceptability of bonds and sureties.

(a) If there is a question of validity, the contracting officer should seek the advice of legal counsel. Upon receipt of a required bond, the contracting officer must check the current Treasury Department Circular 570 to determine acceptability.

(b) A contracting officer verifies the acceptability of the surety on a bond by placing the words "Acceptability of Bond Verified," with his signature immediately thereunder, on the bond or on a properly identified attachment. The bond must be retained with the original of the contract. The contracting officer shall notify the contractor that the bond(s) has been accepted.

(c) Any contracting officer who becomes aware of circumstances which may serve as the basis for exclusion of an individual from acting as an individual surety on bonds submitted by offerors on GSA procurements may refer the matter to the Associate Administrator for Acquisition Policy for consideration of exclusion action. (See 528.270.) Circumstances that involve possible criminal or fraudulent activities must first be reported to the Assistant Inspector General for Investigations or to the appropriate regional Inspector General for Investigations. The Office of Inspector General may conduct an investigation and, when appropriate, refer the matter to the Associate Administrator for Acquisition Policy. Referrals for consideration of exclusion action should include as a minimum:

(1) The basis for exclusion (see 528.270(b));

(2) A statement of facts;

(3) Copies of supporting documentary evidence;

(4) The individuals name and current or last known home and or business addresses including zip codes;

(5) A statement of GSA's history with such individuals, if any; and

(6) A statement concerning any known active or potential criminal investigations or court proceedings.

528.202-71 Assets pledged to support bonds.

(a) When bid guarantees, performance and/or payment bonds are required, the solicitation clauses at 552.228-70, 552.228-71, 552.228-72, and 552.228-73 may be expanded at the contracting officer's discretion to include the clause at 552.228-74, Pledges of Assets, which requires offerors to obtain pledges of assets from individual sureties identified in their offers, e.g., a recordable Covenant not to Convey or Encumber Real Estate and/or commercial or government securities placed in escrow accounts in accordance with 528.203.

(b) The following format or any document substantially the same, may be attached when a surety pledges real estate on Standard Form 28, Affidavit of Individual Surety.

Covenant Not To Encumber Or Convey Real Estate

I/we covenant and agree that so long as I/we shall be obligated as an individual surety on solicitation/contract no. GS-_____ in the amount of $_____ to the United States of America whether such obligation be incurred before or after the date hereof, and until this instrument is formally released. I/we shall not make, or cause to be made, any deed of trust, mortgage, conveyance or any other instrument or agreement having the effect of a lien upon or conveyance of the real estate now owned by me/us described as follows:

(address)

IN WITNESS WHEREOF, I/we have hereunto affixed my/our hand(s) and seal(s) this_____ DAY OF_____,

WITNESS:

_____

_____

(SEAL)

_____

(SEAL)

I, , a Notary Public in and for the ____(STATE)____,do hereby certify that , party to a certain Covenant and Agreement bearing date the ____ day of ____ 19____,and hereunto annexed, personally appeared before me the said being personally well known to me as the person(s) who executed the said Covenant and Agreement, and acknowledged the same to be act and deed.

GIVEN under my hand and seal this day of 19____.

_____

Notary Public, State

(c) When an offeror chooses to provide an individual surety who pledges real estate as described in 528.202-71(a), the contracting officer shall obtain from the offeror/contractor evidence to demonstrate that the covenant has been recorded in the appropriate land records office of the jurisdiction where the property is located.

528.203 Options in lieu of sureties.

(a) An irrevocable letter of credit may be accepted as a bid guarantee under FAR clause 52.228-1, Bid Guarantee.

(b) Security deposited instead of corporate or individual sureties on bonds must be safeguarded as provided in procedures issued by the Office of the Comptroller immediately after they are received. United States bonds or notes received in the District of Columbia must be deposited with the Treasurer of the United States as provided in FAR 28.203-1.

528.270 Exclusion of individual sureties.

(a) The Associate Administrator for Acquisition Policy or a designee may exclude an individual from acting as an individual surety on bonds submitted by offerors on GSA procurements in order to protect the Government.

(b) An individual may be excluded for:

(1) Failure to fulfill an obligation under a bond.

(2) Willful failure to disclose other bond obligations.

(3) Misrepresentation of available assets.

(4) Any false or misleading statement, signature or representative on a bond or affidavit of individual suretyship.

(5) Any cause that would constitute a cause for debarment or suspension under FAR 9.406-2 or 9.407-2.

(6) Any other such serious and compelling cause affecting the responsibility of a surety as may be determined by the Associate Administrator or a designee to warrant exclusion.

(c) The policies, procedures and requirements of FAR Subpart 9.4 and Subpart 509.4 are hereby incorporated by reference and will be used in exclusionary proceedings involving individual sureties.

(d) Information regarding excluded individual sureties will be distributed to GSA contracting activities.

Subpart 528.3—Insurance

528.301 General.

(a) Insurance requirements must be adequate, just, and reasonable, and should be predicated on potential loss or damage (not necessarily on the value of the contract). When it is determined that insurance coverage should be required, the solicitation and resultant contract must contain the appropriate provisions prescribed in FAR 28.309, 28.310, or 28.311. The determination as to the type of insurance, amount, and any related insurance requirements must be made by the contracting officer with the advice of assigned legal counsel. All premiums or costs incurred to comply with an insurance requirement must be paid by the contractor.

(b) Submission of a current certificate of insurance indicating the amount and coverage, to the contracting officer, will serve as certification that the required insurance has been obtained.

528.310 Contract clause for work on a Government installation.

The contracting officer shall insert the clause at 552.228-75,Workmen's Compensation Laws, in solicitations and contracts when the contract amount is expected to exceed the small purchase limitation and the contract will require work to be performed on Government property.

PART 529—TAXES

Subpart 529.4—Contract Clauses

Authority: 40 U.S.C. 486(c).

Subpart 529.4-Contract Clauses

529.401 Domestic contracts.

529.401-70 Small purchases.

The contracting officer shall insert the clause at 552.229-70, Federal, State, and Local Taxes, in small purchases.

529.401-71 Multiple award schedule contracts.

In addition to including the clause at FAR 52.229-1 in solicitations and contracts for leased equipment in accordance with FAR 29.401-1, contracting officers shall insert the clause at FAR 52.229-1, State and Local Taxes, in multiple award schedule solicitations and contracts (including new item introductory schedules).

529.401-72 Contracts usable by the DC Government.

The contracting officer shall insert the clause at 552.229-72, Federal Excise Tax—DC Government, in contracts

which involve the purchase of supplies by the District of Columbia Government.

PART 530—COST ACCOUNTING STANDARDS

Authority: 40 U.S.C. 486(c).

Subpart 530.2—CAS Program Requirements.

530.201-5 Waiver.

The Associate Administrator for Acquisition Policy may waive CAS requirements under FAR 30.201-5(c).

PART 531—CONTRACT COST PRINCIPLES AND PROCEDURES

Authority: 40 U.S.C. 486(c).

Subpart 531.1—Applicability

531.101 Objectives.

The Associate Administrator for Acquisition Policy approves individual deviations concerning cost principles under FAR 31.101.

PART 532—CONTRACT FINANCING

Subpart 532.1—General

Sec.
532.111 Contract clauses.

Subpart 532.4—Advance Payments

532.402 General.
532.407 Interest.

Subpart 532.5—Progress Payments Based on Costs

532.501 General.
532.501-2 Unusual progress payments.
532.501-70 Use of benchmarks with progress payments based on costs.
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Authority: 40 U.S.C. 486(c).

Subpart 532.1—General

532.111 Contract clauses.

(a) *Discounts for prompt payment.* The clause at 552.232-8 must be included in multiple award schedule solicitations and resultant contracts, instead of the clause at FAR 52.232-8. (See 515.608-71 for an explanation concerning this deviation.)

(b) *Invoice requirements.* The contracting officer shall insert a clause substantially the same as the clause at 552.232-72, Invoice Requirements, in all solicitations and contracts for supplies, services, construction or the acquisition of leasehold interests in real property that require the submission of invoices for payment. The contracting officer should delete subparagraph (b) of the clause when an Accounting Control Transaction (ACT) number is not required for payment.

(c) *Adjusting payments.* The contracting officer shall insert the clause at 552.232-78, Adjusting Payments, in all solicitations and contracts for recurring building services expected to exceed the small purchase limitation.

(d) *Final payment.* The contracting officer shall insert the clause at 552.232-79, Final Payment, in all solicitations and contracts for recurring building services expected to exceed the small purchase limitation.

Subpart 532.4—Advance Payments

532.402 General.

The findings and determinations required by FAR 32.402(e) must be prepared by the contracting officer in coordination with legal counsel and the contract finance office. The findings, determinations and authorization for advance payments must be approved by the head of the contracting activity (HCA).

532.407 Interest.

The contract finance office will provide the contracting officer the interest rate to be charged on the unliquidated balance of advance payments.

Subpart 532.5—Progress Payments Based on Costs

532.501 General.

532.501-2 Unusual progress payments.

The HCA must approve or disapprove requests for "unusual" progress payments.

532.501-70 Use of benchmarks with progress payments based on costs.

(a) In unusual circumstances, it may be desirable to provide for the achievement of specified benchmarks such as submission and acceptance of a preproduction or pilot model before making progress payments based on costs. When progress payments are conditioned upon achievement of specified benchmarks during performance of the contract, the HCA must make a written determination that use of benchmarks is in the best interest of the Government. When such a determination is made, the solicitation and each resulting contract must include a provision specifying the benchmarks that must be achieved before progress payments are made.

(b) Benchmarks should not be used in a manner that will convert progress payments based on costs into progress payments based on a percentage or stage of completion.

532.502 Preaward matters.

532.502-2 Contract finance office clearance.

(a) The contract finance office director must provide the approval required by FAR 32.502-2.

(b) Contracting officers must request the contract finance office to provide advice and assistance regarding a contractor's financial condition and the adequacy of the contractor's accounting system and controls before providing for progress payments based on costs.

532.502-3 Solicitation provisions.

When the notice prescribed in FAR 32.502-3 (a) or (b) is included in a solicitation, the solicitation must include the provision at 552.232-74, Progress Payments.

532.502-4 Contract clauses.

The appropriate legal counsel must concur in the progress payment clause included in each solicitation and contract when the progress payments will be based on cost.

532.503-5 Administration of progress payments.

The contracting officer must ensure that the contract finance office (1) has adequate administrative and fiscal

procedures to accomplish the fiscal aspects of FAR 32.503–5, (2) provides the contracting officer with the date and amount of each progress payment to a contractor, and (3) provides the contracting officer with written recommendations whenever findings are made which warrant action by the Government.

532.503–6 Suspension or reduction of payments.

Action recommended by the contracting officer under FAR 32.503–6 must be approved by the HCA after coordination with the assigned legal counsel. Upon approval, the contracting officer will request the contract finance office to suspend or reduce payments.

532.503–9 Liquidation rates—alternate method.

Reduction of the liquidation rates specified in paragraph (b) of the clause at FAR 52.232–16, may be made only with the approval of the contracting director after coordination with the contract finance office. Upon approval, the contracting officer will request the finance office to reduce the rate.

Subpart 532.6—Contract Debts

532.601 Definitions.

"Debt" means an amount of money or property which has been determined by a responsible official to be owed to the United States from any person, or entity except that the terms do not apply to amounts owed by another Federal agency.

"Delinquent debt" means an amount that has not been paid or otherwise collected by the date specified (usually 30 days) in the contracting officer's initial written demand for payment (i.e., final decision letter).

"Responsible official" as used in this subpart means the contracting officer. However, the contract finance office is responsible for the administration of debt collection under the Accounting Operations—Accounts Receivable and Credit and Finance Operations, and Related Activities Handbook (PFM P 4253.1).

532.606 Debt determination and collection.

532.606–70 Referral of delinquent debts.

(a) When the contracting officer determines that a debt in excess of $100 is delinquent, the contracting officer shall forward notification of the delinquent debt to the applicable finance office for collection in accordance with the Debt Collection Act of 1982, and possible forwarding to a credit reporting agency.

(b) If the contractor appeals the contracting officer's demand for payment pursuant to the Disputes clause of its contract, the contracting officer shall advise the Finance Office whether to suspend collection efforts pending resolution of the dispute.

Subpart 532.7—Contract Funding

532.700 Scope.

GSA fiscal regulations are contained in the Budget Administration Handbook (COM P 4251.3A), Accounting Classification Handbook (COM P 4240.1), and Accounting Operations—Voucher Examination, Payment Handbook (PFM P 4252.1).

532.705 Contract clauses.

532.705–1 Clauses for contracting in advance of funds.

The contracting officer shall insert the clause at 552.232–77, Availability of Funds, in solicitations and contracts for services which are "severable" when option provisions are included, when the contract will be chargeable to funds of the new fiscal year and the contract action is to be initiated before the funds are available, or when the performance period may span fiscal years.

Subpart 532.8—Assignment of Claims

532.803 Policies.

Assignment of claims is restricted to individual orders of $1,000 or more when payments under requirements or indefinite quantity type contracts are made by more than one Government agency. This limitation does not apply when orders and payments are made solely by GSA.

532.805 Procedures.

(a) Upon receipt of a notice of assignment, the contracting officer must obtain legal counsel concurrence that both the notice and the instrument of assignment are in proper form, properly executed, and are actions that the contractor is entitled to make under the terms of the contract.

(b) When acknowledging receipt of the notice of assignment, the contracting officer must notify the contractor that all future invoices or other requests for payment under the contract must specify the name and address of the assignee and include a notation that payments due thereunder have been duly assigned. A copy of the acknowledgement, evidencing legal counsel concurrence, must be sent to the contract finance office.

(c) When payments under requirements or indefinite quantity contracts that are for the sole use of GSA have been assigned, the contracting officer must provide all GSA offices that will place orders against the contract the name and address of the assignee that will receive amounts due under the contract. The notification should also state that the contractor has been requested to specify the name and address of the assignee on future invoices.

532.806 Contract clauses.

The contracting officer shall insert the clause at 552.232–23, Assignment of Claims, in solicitations and requirements or indefinite quantity contracts under which more than one agency may place orders.

Subpart 532.9—Prompt Payment

532.905 Invoice payments.

(a) Before exercising the authority to modify the date for constructive acceptance in subdivision (a)(6)(i) of the clause at FAR 52.232–25, Prompt Payment, or subdivision (a)(5)(i)(A) of the clause at FAR 52.232–26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, the contracting officer shall prepare a written justification explaining why a longer period is necessary. The time specified must be determined on a case-by-case basis and the justification must be approved by an official one level above the contracting officer. A contracting officer must not specify a constructive acceptance period that exceeds 30 days. The time specified in subdivision (a)(5)(i)(B) of the clause at FAR 52.232–26 for constructive approval of progress payments must not exceed 7 days.

(b) The time specified for payment of progress payments in subdivision (a)(1)(i)(A) of the clause at FAR 52.232–27, Prompt Payment for Construction Contracts, must be determined by the contracting officer on a case-by-case basis. Periods longer than 14 days must be justified in writing and approved by an official one level above the contracting officer. Under no circumstances may more than 30 days be specified. The time specified in subdivision (a)(4)(i) of FAR clause 52.232–27, for constructive acceptance or approval will be determined by the contracting officer on a case-by-case basis but may not exceed 7 days unless a longer period is justified, in writing, and approved by an official one level above the contracting officer. Under no circumstances may more than 30 days be specified.

532.905–70 Certification of payment to subcontractors and suppliers.

When a contract includes the clause at FAR 52.232–5, Payments Under Fixed-Priced Construction Contracts, no progress payments will be processed until the contractor submits a certification of payment to subcontractors and suppliers. The GSA Form 2419, Certification of Progress Payments Under Fixed-Price Construction Contracts, may be used for certification.

532.905–71 Final payment.

(a) The final payment on construction or building service contracts must not be processed until the contractor submits a properly executed GSA Form 1142, Release of Claims. If, after repeated attempts, the contracting officer is unable to obtain a release of claims from the contractor, final payment may be processed with the approval of appropriate legal counsel.

(b) The amount of final payment must include, as appropriate, any deductions to cover liquidated damages for late completion, liquidated damages for labor violations, amounts withheld for improper payment of labor wages, and the amount of unilateral change orders covering defects and omissions.

532.908 Contract clause.

(a) The contracting officer shall insert the clause at 552.232–70, Payments by Electronic Funds Transfer, in solicitations and contracts that include the FAR clause 52.232–28, when payments may be made by GSA and other agencies (e.g., multiple award schedule contracts).

(b) The contracting officer shall insert the clause at 552.232–71, Prompt Payment, in solicitations and contracts for the acquisition of leasehold interests in real property. The contracting officer may modify the date for constructive acceptance in subparagraph (b)(2) of the basic clause to specify a period longer than 7 calendar days (but not to exceed 30 days) if necessary due to the nature of the services to be received, inspected or accepted by the Government. A written justification for specifying the longer period must be prepared and approved by the contracting director. The contracting officer shall use Alternate I instead of the basic clause if the lease contract does not contain provisions for ordering alterations or overtime utility services.

(c) The contracting officer shall insert the clause at 552.232–73, Electronic Funds Transfer Payment, in solicitations and contracts for acquisitions of leasehold interests in real property if payment may be made by electronic funds transfer.

Subpart 532.70—[Reserved]

Subpart 532.71—Payments Under Contracts Subject to Audit

532.7101 General.

(a) The contracting officer shall not approve the initial invoice or voucher before consulting with the Assistant Inspector General—Auditing or the Field Audit Office regarding cost or other supporting data as required under:

(1) Cost-reimbursement type contracts;

(2) The cost-reimbursement portion of fixed-price type contracts;

(3) Time and materials or labor-hour contracts; or

(4) Fixed-price contracts providing for (i) progress payments based on costs, (ii) advance payments, (iii) guaranteed loans, or (iv) incentives or redetermination.

(b) The contracting officer shall not approve the final payment invoice or voucher for such contracts, nor for the final payment or settlement of other contracts subject to audit prior to (1) receipt and review of the contract audit report or (2) consultation with the Assistant Inspector General for Auditing or the Field Audit Office if no audit is to be conducted; provided, that this paragraph (b) shall not apply to fixed-price contracts with escalation where no price revision (upward or downward) is to be made.

532.7102 Submission and processing of invoices or vouchers.

(a) Contractors should be required to submit invoices or vouchers to the contracting officer. Contracting officers must annotate the invoices with the date of receipt as required by FAR 32.905. That date will be used to determine interest penalties for late payments. The processing of invoices or vouchers before payment must include a review by the contracting officer, or a designee, to determine that the items and amounts claimed are in consonance with the contract terms and represent prudent business transactions. The contracting officer must ensure that these payments are commensurate with physical and technical progress under the contract. If the contractor has not deducted from the invoice amounts which are questionable or which are required to be withheld, the contracting officer shall make the required deduction, except as provided in 532.7103.

(b) Subject to 532.7101, approval by the contracting officer of any payment, must be noted on (or attached to) the invoice or voucher submitted by the contractor. The invoice or voucher will be forwarded to the appropriate contract finance office and retained therein after certification and scheduling for payment by a disbursing office.

532.7103 Action upon receipt of an audit report.

Audit reports will be furnished to the contracting officer, with a copy to the appropriate contract finance office. Upon receipt of an audit report, the contracting officer shall, pursuant to contract terms, determine the allowability of all costs covered by audit, giving full consideration to the auditor's recommendations. When the contracting officer is in doubt or questions the recommendations of the auditor, deductions need not be made from invoices or vouchers for provisional payments. In these cases, the contracting officer shall confer with the auditor and other appropriate Government personnel (such as a price specialist or legal counsel) to determine what further action should be taken regarding the costs in question. If the contracting officer disagrees with the auditor's recommendations, the contracting officer shall document the contract file and furnish the auditor with a copy of the statement.

532.7104 Suspension and disapproval of amounts claimed.

The contracting officer shall notify the appropriate contract finance office in writing when amounts claimed for payment are (a) suspended, (b) disapproved as not being allowable according to contract terms, or (c) not allocable to the contract. This notice by the contracting officer will be the basis for the issuance by the contract finance office of GSA Form 533, Administrative Difference Statement. A copy of GSA Form 533 will be attached to each copy of the invoice or voucher from which the deduction has been made, including an explanation of the deduction.

PART 533—PROTESTS, DISPUTES, AND APPEALS

Subpart 533.1—Protests

Sec.

Subpart 533.2—Disputes and Appeals

Subpart 533.71—Processing Contract Appeals

Authority: 40 U.S.C. 486(c).

Subpart 533.1—Protests

533.101 Definitions.

"Associate General Counsel" means the Associate General Counsel of the General Law Division, Personal Property Division, or Real Property Division.

533.102 General.

Except as indicated in this subpart, the Office of General Counsel (OGC) is responsible for all contacts with the GAO or GSBCA, potential contractors, attorneys, and any other persons, concerning protests of GSA contract actions filed with the Comptroller General or GSBCA.

533.103 Protests to the agency.

The contracting officer shall consider those protests which are filed only with the agency. The protestor must be notified in writing of the contracting officer's final decision in a timely manner.

533.104 Protests to GAO.

(a) *General:* (1) In addition to the requirements of FAR 33.104(a)(2), the agency report must contain the GAO protest number (GAO case file number), the solicitation or contract number, the full corporate name of the protesting organization and other firms involved, and a statement indicating whether the protest was filed before or after award. If the protest is filed after award, the report must contain the identity of the awardee, the date of award, the contract number, the date and time of bid opening (including a statement when the date of bid opening was extended by subsequent amendments), the total number of offerors, a complete chronological statement of all relevant events and administrative actions taken (including reasons and authority for the actions taken), and any other relevant documents believed helpful in determining the validity of the protest. (This evidence should be referenced and identified within the text of the position statement, alphabetically or numerically, e.g., Tab A, Exhibit 1, etc.)

(2) GAO protests must be handled on a priority basis. The appropriate Associate General Counsel (AGC) shall prepare a report for signature of the General Counsel responding to GAO protests. These reports are to be based upon a statement of fact and position prepared by the responsible contracting officer and approved by the contracting director. When requested by the appropriate AGC, the Regional Counsel will prepare a statement of legal position analyzing the merits of a protest concerning a regional procurement.

(3) The following procedures must be followed in handling protests:

(i) When a protest is received by the agency, the AGC shall telephonically notify the contracting officer through the appropriate Central Office contracting activity or Regional Counsel. If the contracting activity or Regional Counsel receives a copy of a protest before being notified thereof by the AGC, they must immediately notify the appropriate AGC.

(ii) After receiving the formal protest, which has been filed with GAO, the AGC will formally request a statement of fact and position from the contracting officer through the appropriate Central Office contracting activity or Regional Counsel. The contracting officer shall immediately notify the affected bidders or offerors that a protest has been received.

(iii) The contracting officer shall notify assigned counsel and begin preparing a documented statement of fact and position immediately upon receiving a protest or notice thereof.

(iv) When completed, the statement of fact and position must be concurred in by the contracting director, and on regional procurements, by the Office of Regional Counsel. In appropriate cases, the AGC may request the Regional Counsel to prepare a legal position analyzing the merits of a protest against a regional procurement. In such cases, the contracting officer's statement of fact and position should be included as a referenced attachment thereto.

(v) The Regional Counsel's legal position, when requested, and the contracting officer's statement of fact and position, must be transmitted to the appropriate AGC, in triplicate. If other interested parties are involved, additional copies may be requested. The statement is due in the office of the appropriate AGC no later than 10 workdays after the date on which the contracting officer originally received the protest. This time may be reduced if GAO invokes the express option. If a contracting officer is unable to prepare a statement of fact and position within 10 workdays, the appropriate AGC must be notified promptly, by telephone, of the reasons for the delay and of the additional time needed. Additional time may be granted if the specific circumstances of the protest require a longer time. A request for an extension is proper only if the facts or legal issues affecting the resolution of a protest are so complicated that an adequate report cannot be prepared on time; the need to coordinate the report with other agencies, or with offices in distant locations, makes it impossible to prepare the report on time; or other compelling circumstances prevent preparing the report on time. Upon request of the AGC, the contracting officer shall confirm any oral requests for extensions in writing. The contracting director shall concur in the request and send a copy to the HCA. A request for an extension, which will delay submission of the agency's report to GAO beyond 25 workdays from the date GSA originally received the protest, may be granted only by the GAO. The AGC will notify the Central Office contracting activity or Regional Counsel of the GAO's decision.

(vi) After submitting the statement to the AGC, the contracting officer or Regional Counsel must advise the AGC of all later developments that may affect the case.

(vii) All documents transmitted under these procedures must be sent by the fastest means possible.

(viii) In addition to the requirements of FAR 33.104(a)(5)(ii), a copy of any comments is sent to the AGC.

(4) The Office of General Counsel (OGC) must furnish the GAO with the name, title, and telephone number of one or more officials whom the GAO may contact regarding protests. The OGC is responsible for promptly advising the GAO of any change in the designated officials.

(5) The format for notification required by FAR 33.104(a)(3) is as follows:

Name

Address

A protest concerning Solicitation No. _____ has been filed with the General Accounting Office (GAO).

The protest was filed by (*Insert the name and address of the protester, and the name of the person signing the protest.*) on (*Date*).

Copies of the protest may be obtained from this office.

You may submit your views and relevant information regarding the protest directly to the General Accounting Office within 7 calendar days of receiving this notice. A copy of any submission to the GAO should be provided to this office.

_____

Contracting Officer's signature

(b) *Protests before award.* Under FAR 33.104(b), the HCA may determine in writing that urgent and compelling circumstances significantly affecting the interests of the United States do not permit waiting for the decision of GAO and award is likely to occur within 30 calendar days. The written determinations and findings (D&F), in the format shown at 501.704–70(e)(1), should be prepared by the contracting officer for the signature of the HCA. The D&F must be concurred in by the Regional Counsel (on regional procurements), and the appropriate AGC. After the D&F is approved, it must be returned to the appropriate AGC who notifies GAO of the agency's findings and intended action before the award is made.

(c) *Protests after award.* The procedures in paragraph (a) of this section apply to the handling of protests after award. If the protest is received within 10 calendar days after an award, contract performance must be suspended under FAR 33.104(c) unless the HCA determines in writing that contract performance is in the best interests of the United States or that urgent and compelling circumstances that significantly affect the interests of the United States do not permit waiting for the GAO's decision. The written determination and findings (D&F), in the format shown at 501.704–70(e)(2), should be prepared by the contracting officer for signature of the HCA. The D&F must be concurred in by the Regional Counsel (on regional procurements), and the appropriate AGC. After the D&F is approved, it must be returned to the AGC who notifies GAO of the agency's findings and intended action before contract performance is authorized.

(d) *Notice of GAO.* The HCA responsible for the solicitation, proposed award, or award of the contract must report to the Comptroller General through the OGC within 60 calendar days of receipt of the GAO's recommendation if the agency has decided not to comply with the recommendation. The report must explain the reasons why the GAO's recommendation will not be followed.

533.105 Protests to GSBCA.

(a) *Notification procedure.* After receiving a protest, the contracting officer shall notify the following:

(1) All firms solicited, or those who have submitted sealed bids or offers if the protest is filed after the closing date of the solicitation, and the appropriate delegating official in the Information Resources Management Service. When giving such notification, the contracting officer should follow these procedures:

(i) Avoid interpreting or characterizing the nature of the protest.

(ii) Use appropriate means to ensure delivery to all the firms by the workday after the date of filing with the GSBCA.

(iii) Use the following format:

Name
Address

A protest concerning Solicitation No._____ has been filed with the General Services Administration Board of Contract Appeals (GSBCA).

The protest was filed by (*Insert the name and address of the protester, and the name of the person signing the protest.*) on (*Date*).

The protest has been purportedly filed pursuant to Section 2713 of the Competition in Contracting Act, Pub. L. 98–369.

Copies of the protest may be obtained from the Office of the Clerk of the GSBCA, 18th & F Streets NW., Washington, DC 20405, or from the contracting officer.

Contracting officer's signature

(2) The agency on whose behalf GSA is making the procurement, if any. A copy of the protest complaint, including all attachments, must be forwarded to the agency by appropriate means to ensure next day delivery.

(3) *Assigned counsel.* A copy of the protest complaint, including all attachments, must be forwarded to the appropriate AGC by appropriate means to ensure next day delivery.

(4) The Board, through assigned counsel, within 5 workdays after the date of filing with the GSBCA, that the notices described in (1) and (2) have been given. Written confirmation of notice and a listing of all persons and agencies receiving notice must be provided.

(b) *Protest file.* To ensure timely submission, the contracting officer should begin assembly of the protest file by the second workday after receiving the protest. The protest file must be forwarded to assigned counsel by overnight delivery not later than the 8th workday after the protest is filed with the GSBCA. Assigned counsel will distribute the copies to the GSBCA, the protester, and retain one copy for itself. If additional copies are needed, assigned counsel will advise the contracting officer. The following rules govern the assembly of protest files:

(1) *Format.* Protest file exhibits are true, legible, and complete copies. They must be arranged in chronological order within each submission, earliest documents first, bound on the left margin except where size or shape makes such binding impracticable, numbered, tabbed, and indexed. The numbering must be consecutive, in whole arabic numerals (no letters, decimals, or fractions), and continuous from one submission to the next, so that the complete file, after all submissions, will consist of one set of consecutively numbered exhibits. The index should include the date and a brief description of each exhibit and indicate which exhibits, if any, have been filed with the Board in camera (see (b)(3) of this section) or otherwise not served on every other party.

(2) *Contents.* In addition to the items required by FAR 33.105(b), the contents should include those items required by GSBCA Rule 4(a), when appropriate. (See 48 CFR 6101.4(a).)

(3) *Confidential, privileged, or proprietary information.* The protest file may require the inclusion of documents and information from other vendors which are confidential, proprietary, or privileged. When such information is required to be included in the protest file, it is to be placed only in the copies going to the Board and to assigned counsel. Copies going to other interested parties will only identify the information in the index. However, the index must not reveal the number and identity of the offerors whose proposals are included in the copies of the protest file going to assigned counsel and the GSBCA, and should include an identifying statement, e.g., "proposals being considered for award."

(c) *Protest conference.* Within 6 working days of filing a protest, a conference may be convened by the Board to establish further proceedings for the protest. Although the protest file and answer will most likely not have been filed, the Government must be prepared to discuss the issues in the protest, whether a record submission or hearing is desired, and other matters raised by the Board or any other interested party. The Government must also be prepared, if required, to object to the scope of discovery in any protest action.

(d) *Procedure following decision of the GSA Board of Contract Appeals.* (1) Upon a Board decision (oral or written) to suspend procurement authority pending a decision on the merits of a protest, the contracting officer, in conjunction with the appropriate AGC, shall comply with the suspension decision.

(2) If the Board suspends performance of a contract for automatic data processing goods and services, the contracting officer shall take immediate action to comply with the suspension decision (40 U.S.C. 759(h)(3)(B)). Such suspension will be effective as directed by the Board.

(3) If the Board revokes, suspends, or revises procurement authority after the award of a contract for ADP resources,

the contracting officer shall consider the contract valid as to all goods or services delivered and accepted before the Board's decision (40 U.S.C. 759(h)(6)(B)).

Subpart 533.2—Disputes and Appeals

533.214 Contract clause.

The contracting officer shall insert the clause at 552.233–70, Disputes (Utility Contract), in solicitations and contracts for utility services. This clause supplements the Disputes clause at FAR 52.233–1.

Subpart 533.71—Processing Contract Appeals

533.7100 Definitions.

"Assigned Counsel" means the attorney employed by the Office of General Counsel (including offices of Regional Counsel) assigned to provide legal review or assistance.

"Associate General Counsel" means the Associate General Counsel of the General Law Division, Personal Property Division, or Real Property Division.

533.7101 Notice of appeal.

(a) Notices of appeal are to be addressed to the GSA Board of Contract Appeals along with a copy to the contracting officer. Final decisions must be appealed within 90 calendar days from the date the decision of the contracting officer is received. Any request for an extension of the 90-day appeal period will be denied.

(b) If the notice of appeal was mailed or otherwise submitted to the contracting officer in an untimely manner, a separate letter, signed by the contracting director, shall be sent to the AGC, requesting that a motion for dismissal of the appeal be submitted to the GSA Board of Contract Appeals (the Board). The letter shall state the name of the appellant, contract number, and date of the contracting officer's final decision, and must be accompanied by (1) the certified mail receipt showing the date on which the appellant received the contracting officer's final decision, and (2) the envelope which contained the notice of appeal or other evidence of late submission of the notice of appeal.

533.7102 Contents of notices of appeal.

A notice of appeal must be in writing and should indicate that an appeal is thereby intended, should identify the decision and the date thereof from which the appeal is taken, the GSA office cognizant of the dispute, and the number of the contract in question. The appeal should describe the nature of the dispute and the relief sought, the contract provisions involved, and any other additional information or comments relating to the dispute which are considered to be important. The notice of appeal must be signed personally by the appellant (the prime contractor making the appeal) or by an officer of the appellant corporation, or member of the appellant firm, or by the contractor's duly authorized representative or attorney.

533.7103 Appeal files.

(a) Appeal files must be prepared in accordance with this section and forwarded, after concurrence by assigned counsel, to the appropriate AGC within 20 calendar days after receipt of the notice of appeal or advice that an appeal has been filed unless the AGC advises that the Board requires a shorter period under its small claims procedures. In the event the time for submission of the appeal file cannot be met, the contracting officer shall submit in writing a full explanation and a request for additional time to the AGC, before expiration of the designated time.

(b) Upon receipt of the notice of appeal, the contracting activity must establish a record to ensure the timely preparation and submission of appeal cases. The record must show, as a minimum, the name of the appellant, the date of the contracting officer's final decision, the date the appeal was filed, contract number, docket number, and name of the contracting officer.

533.7103–1 Preparation of the appeal file.

(a) *General.* Appeal files must be prepared in quadruplicate. Each file is identified by the name of the appellant, contract number, and docket number. All copies of the appeal file must be identical both as to content and position of items. If more than one appeal is filed under the same contract, upon request to, and waiver by, the Board, the appeal file for the second and subsequent appeals need not duplicate the documents included in the first appeal file, but must make reference to the appeal file which contained such documents, including the docket and item numbers. However, if changes to such documents occur subsequent to preparation of the original file, these changes must be appropriately identified and included in the later appeal file. Such files must also include any documents pertinent to the later appeal but not previously furnished.

(b) *Content of appeal file.* (1) Each appeal file must be assembled by using a two-piece red press-board binder 11 by 8½ inches punched with a 3-inch capacity fastener (NSN 7510–00–582–4201). A gummed label (NSN 7510–00–264–5460) must be used on top of the file to identify the case by contractor, contract number, and docket number.

(2) Individual appeal files must not be more than 1 inch thick. If the file will be more than 1 inch thick, two or more consecutive binders must be used and identified with the appropriate exhibit numbers contained in each.

(3) Each document to be included in the appeal file (i.e., letter, telegram, memo, report, invoice, etc.) must be legible, complete, included as a separate exhibit in the file, and listed in the "Index of Exhibits" by exhibit number and brief description. If a document cannot be legibly reproduced, the unaltered document must be submitted with an attached accurate typewritten transcription thereof. Assigned counsel will assist the contracting officer in determining which documents are relevant to the issue in the appeal or not privileged for inclusion in the appeal file.

(4) Each appeal file must contain division sheets separating the different documents listed in the "Index of Exhibits." Division sheets must be tabbed and numbered consecutively commencing with number one, in whole Arabic numbers (no letters, decimals, or fractions), and continuously from each file to the next so that the complete appeal file will consist of one set of consecutively numbered appeal file exhibits.

(c) *Arrangement of documents.* (1) The first (top) document in the appeal file must be the "Index of Exhibits." The index must list, opposite each exhibit number, the date and a brief description of the document and must indicate which exhibits, if any, have been filed with the Board but not served on the other party because of their length or bulk. The exhibits must be arranged in chronological order, earliest document first (as exhibit 1), and be separated by tabs for identification. For example:

	Exhibit	Date
Copy of basic contract, including referenced terms and conditions and any amendments	1	5/20/88
Notice of award	2	5/20/88
Notice to proceed and facsimile of Post Office receipt	3	6/5/88
Contractor's request for final decision or other documents of claim in response to which the decision was issued	4	8/5/88

	Exhibit	Date
Contracting officer's final decision letter applicable to the dispute and facsimile of Post Office receipt	5	8/25/88
Notice of Appeal with attachment, if any.	6	9/10/88
Board of Contract Appeals acknowledgement of contractor's Notice of Appeal	7	9/15/88

(2) In addition to the exhibits listed in (c)(1) of this section, other pertinent exhibits, such as the following, should be included and exhibited as applicable, in chronological order:

(i) Copy of the repurchase contract, including referenced terms and conditions.

(ii) Copies of specifications/drawings applicable to the dispute.

(iii) Copy of the abstract of offers and list of all offerors solicited for the repurchase contract.

(iv) Copy of letter of assessment, including worksheet showing calculation of excess costs and/or other damages including administrative costs.

(v) Copies of defaulted purchase/delivery orders.

(vi) Copies of purchase/delivery orders issued under the repurchase contract.

(vii) Proof of payment and a detailed disbursement listing, annotated and certified, if applicable.

Note: The information and documents needed must be obtained from the appropriate GSA finance office. The finance information will include a detailed disbursement listing, annotated with the check number and date, and the amount applicable to the repurchase order if different from the check amount. The disbursement listing will be certified by an appropriate finance division official whose title and date of signature will also be shown.

(viii) Evidence of certification of the claim or claims, as applicable.

(ix) All other correspondence between the Government and the contractor relevant to the appeal.

(x) All documents and other physical evidence on which the contracting officer relied in making a decision.

533.7103-2 Transmittal of the appeal file.

(a) The original and two copies of the appeal file must be forwarded to the AGC by a transmittal letter from the contracting director. The appeal file must be accompanied by the contracting officer's detailed statement of facts in a memorandum of position as a separate document which must be concurred in by assigned counsel who will also prepare and attach a statement of legal position. In addition, a list of recommended witnesses and the Government's estimate (when appropriate) of the amount of any claim in the event of an adverse decision must be prepared. A point of contact must be given to the AGC; name of individual, position, title, and telephone number.

(b) The contracting officer shall retain one copy of the appeal file.

(c) After reviewing the appeal file for adequacy, the trial attorney in the Office of General Counsel will transmit the appeal file to the Board and serve a copy of the appeal file upon appellant.

533.7104 The contracting officer's memorandum of position.

The memorandum of position is a chronological summary of the actions leading to the dispute and a rationale of the contracting officer's actions for the information of the trial attorney. The memorandum of position is submitted to the AGC simultaneously with the appeal file, but as a separate document; i.e., it will not be included as part of the appeal file or included in the index. Although no particular form is prescribed, the statement must identify the contract, state the nature of the contractor's claim, cite pertinent portions of the contract, state the contracting officer's decision with citations to pertinent contract provisions and a supporting explanation, and set out any new facts which may have developed since the decision was made. The contracting officer shall sign the memorandum of position.

533.7105 Procedure following decision of the GSA Board of Contract Appeals.

(a) Decisions of the Board will be promptly implemented. However, it must be recognized that the contractor may decide to appeal a Board decision in the United States Court of Appeals for the Federal Circuit. It is also possible for either party to file a motion for reconsideration by the Board within 30 calendar days from the date of the receipt of a copy of the Board decision. If further appeal of a decision or a motion for reconsideration of a decision is contemplated, the implementation of the decision may be postponed; if the issue is over quantum, however, consideration should be made to making payment of the undisputed amount to minimize interest to be paid the contractor.

(b) The contracting officer need not take any further action (other than administrative) if the Board affirms the contracting officer's original decision, provided a recovery of costs is not due from the contractor. Where a recovery is due, collection must be initiated by the contracting officer either by (1) a contract amendment adjusting the contract price or (2) a written demand for immediate payment, as appropriate. (In excess cost cases, Office of Finance will normally pursue the necessary collection.) Any written demand must instruct the contractor to make payment to the General Services Administration and address it to the appropriate GSA finance office. A copy of any written demand must be provided to the appropriate GSA finance office for information and followup.

(c) In appeals brought under the disputes clause of the contract, when the Board does not uphold the contracting officer's original decision and the Board's decision provides for payment in favor of the contractor, the contracting officer shall prepare a supplemental agreement with concurrence of assigned counsel. The supplemental agreement will ensure against further litigation of the same dispute. The contracting officer shall forward the recommendation for payment to the appropriate finance office with the original of the supplemental agreement and a copy of the Board's decision.

(d) In appeals brought under the Contract Disputes Act of 1978, when the Board does not uphold the contracting officer's original decision and the Board's decision awards the contractor an amount of money, and the AGC informs the contracting officer that the Government will not move for reconsideration of the Board's decision or appeal it to the United States Court of Appeals for the Federal Circuit, the contracting officer must complete the Certificate of Finality attached to the copy of the Board's decision and return it to the Board. The Board will forward the Certificate of Finality, completed by both parties, and a certified copy of its decision to the United States General Accounting Office to be certified for payment to the contractor.

PART 534—MAJOR SYSTEM ACQUISITION

Sec.

534.002 Policy.

534.002-70 Directives.

534.002-71 Definitions.

Authority: 40 U.S.C. 486(c).

534.002 Policy.

534.002-70 Directives.

Additional policies and procedures on major systems acquisitions are contained in the following:

(a) GSA Order, Major System Acquisitions in the General Services Administration (ADM 5400.33).

(b) FIRMR 201-32.103, The Acquisition of Major ADP Resource Systems.

(c) GSA Order, Major System Acquisitions in the Automated Data and Telecommunications Service (DTS 5400.1).

534.002-71 Definitions.

Major system acquisitions are those that are:

(a) Directed at and critical to fulfilling an agency mission;

(b) Estimated to entail the allocation of $25 million or more life cycle cost in current year dollars; or

(c) Determined by the Administrator to warrant special management attention or to be of critical importance to the agency or technologically advanced.

PART 535—RESEARCH AND DEVELOPMENT CONTRACTING—[RESERVED]

PART 536—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 536.1—General

Sec.

Subpart 536.2—Special Aspects of Contracting for Construction

Subpart 536.3—Special Aspects of Sealed Bidding in Construction Contracting

Subpart 536.5—Contract Clauses

Authority: 40 U.S.C. 486(c).

Subpart 536.1—General

536.101 Applicability.

Other requirements of this regulation are generally applicable to construction and architect-engineer contracts. However, if a requirement in this part is inconsistent with a requirement in another part of this regulation, this part takes precedence.

536.102 Definitions.

"Construction activity" means the organizational level of the agency that has authority and responsibility for the architectural, engineering, and other technical or administrative aspects of design and construction.

"Statutory cost limitations," as used in this part, means the cost limits that may be included in the agency's statutory authorization or annual appropriations act (by law).

Subpart 536.2—Special Aspects of Contracting for Construction

536.201 Evaluation of contractor performance.

(a) The construction activity shall prepare a performance report for each construction contract of $25,000 or more, and each construction contract where any element of performance was unsatisfactory or outstanding.

(b) Each regional construction activity shall establish an evaluation report file with procedures for maintaining alphabetically the evaluation reports, for cross referencing all names under which a contractor does business with GSA, and for ensuring that fully qualified personnel possessing the knowledge of the contractor's performance prepare and review the evaluation reports.

(c) The regional construction activity shall provide the contracting officer with a copy of the evaluation report for inclusion in the contract file. The evaluation reports should be used when making preaward determinations of contractor responsibility.

536.202 Specifications.

Under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6962, the Environmental Protection Agency has promulgated rules in 40 CFR Parts 248 and 249, regarding the use of certain waste by-products as generally acceptable substitutes for energy-intensive raw materials. The rules provide that when certain construction material containing energy intensive raw material is required that the technical specification allows as an alternate, construction material containing certain waste byproducts. However, specifications should not be revised to allow the use of the alternate material if it is found that performance requirements for the construction material would not be met or that the use of the alternate material would be unsatisfactory for technical reasons.

536.203 Government estimate of construction cost.

(a) A detailed independent Government estimate shall be prepared for contracts for new construction, repairs and alterations, professional services, and for any modification expected to cost $25,000 or more. When the expected cost is less than $25,000, the contracting officer may require the preparation of an estimate. Except as provided in paragraphs (c) and (d) of this section access to or disclosure of the Government estimate must be limited to Government personnel whose official duties require knowledge of the estimate.

(b) A copy of the independent Government estimate must be sealed in an envelope and submitted to the contracting officer before the date and time for bid opening or the date for receipt of proposals. (See paragraphs (c) and (d).)

(c) If the procurement is by sealed bidding, the sealed copy of the Government estimate must be stored with the bids received until bid opening. Before releasing an amendment to a solicitation that may affect the price, a revised sealed Government estimate must be stored with the bids until bid opening. After the bids are read and recorded, the sealed Government estimate will be opened and retained with the Standard Form 1419, Abstract of Offers—Construction. However, the Government's estimate must not be disclosed until after award. Immediately after award the Government estimate must be recorded on the SF 1419 as the Independent Government Estimate.

(d) If the procurement is by negotiation, the sealed copy of the Government estimate must be stored with the proposals until the closing time for receipt of proposals. Cost figures in the Government estimate may be

disclosed during negotiation, but only to the extent considered necessary for arriving at a fair and reasonable price, provided that the overall amount of the Government estimate is not disclosed before award. Before the release of a modification to the solicitation which may affect price, a revised Government estimate must be prepared, sealed, and stored, with the proposals until closing time for proposals. After award, the independent Government estimated price may be revealed, upon request, to those firms or individuals who submitted proposals.

(e) The Government estimate must be used to evaluate offers, as a guide in conducting contract negotiations or negotiations of contract modifications, and as a tool for determining the reasonableness of prices.

536.204 Disclosure of the magnitude of construction projects.

The magnitude of construction projects in excess of $10,000,000 should be shown in increments of $10,000,000 (e.g. $20,000,000 to $30,000,000).

536.206 Liquidated damages.

When liquidated damages are included in the solicitations the rate must reflect the probable damages the Government will suffer and may include items such as:

(a) The added cost of contract administration and supervision;

(b) The rental the Government would have to pay if construction is not completed on schedule; and

(c) The cost of these monies.

Subpart 536.3—Special Aspects of Sealed Bidding in Construction Contracting

536.302-70 Charges and deposits for bidding documents.

(a) Generally, bid documents will be provided free and without a requirement for either a refundable deposit or a nonrefundable charge, except as provided in paragraph (c) of this section. Bid documents will be provided free for review purposes to plan rooms, contractor service facilities, and other similar places having a legitimate interest in the bidding process.

(b) To encourage the return of specifications and drawings to GSA, a note similar to the following, must be prominently placed in each solicitation:

Note: We request your cooperation in returning the bid documents to GSA within 20 calendar days after bid opening date.

(c) If the contracting officer determines before issuance of the solicitation that an insufficient number of sets of bid documents were returned on previous projects, a refundable bid document deposit may be required. Under extraordinary circumstances, a nonrefundable charge may be required for bid documents if approved by the head of the contracting activity.

(1) The amount of deposit for bid documents should be determined on the basis of the actual printing costs of the documents. The following table is for guidance only, and the contracting officer may require amounts higher or lower than those shown. Deposits should not be so high as to discourage competition. Refundable bid document charges are intended to ensure the return of bid documents to the Government for use by the successful contractor and Government personnel, and thus minimize the need for duplication of additional sets. When the administrative cost of processing bid document deposits and returning bid documents is greater than the value of returned documents, the contracting officer should not require deposits.

Estimated project cost range	Guide for refundable bid document deposit
Up to $1,000,000	None
$1,000,000 to $5,000,000	$30
$5,000,000 to $10,000,000	40
$10,000,000 and over	50

(2) When a bid document deposit is required, the presolicitation notice must require that the deposit be made by certified check, cashier's check, or money order payable to the General Services Administration. If a deposit is not submitted as specified, a reasonable attempt must be made to obtain the deposit in the proper form without delay. A record of the attempt must be placed in the contract file. The document deposit will be refunded if bid documents are returned in good condition, without marks, notes, or mutilations, within 20 calendar days after bid opening. Refunds will not be made for bid documents returned more than 20 days after bid opening.

(3) The contracting officer must cite the amount of the refundable deposit on Standard Form 1417, Pre-Solicitation Notice (Construction Contract).

536.303 Invitations for bids.

The invitation for bids must include the following, when applicable:

(a) Special instructions concerning bids and awards of contracts that include base bid, alternates, and/or options (see 536.570–4).

(b) Instructions concerning the pre-bid conference (see FAR 14.207, Pre-bid conference).

536.303-70 Bids that include alternates.

(a) The base bid must include all features that are essential to a sound and adequate building design. However, if it appears that funds available for a project may be insufficient to include all desired features in the base bid, the contracting officer may issue a solicitation for a base bid and include one or more alternates in the order of priority. Alternates may be used only when they are clearly justified and should involve substantial amounts of work in relation to the base bid. Their use must be limited and should involve only "add" alternates.

(b) The language used in soliciting alternates must be approved in writing by counsel.

(c) All solicitations requiring a base bid and alternates must include the Alternate II provision at 552.236–73, Basis of Award—Construction Contract, which prescribes the method for evaluating bids.

(d) Before opening bids that include alternates, the contracting officer shall determine and record in the contract file the amount of funds available for the project. The amount recorded must be announced at the beginning of the bid opening and must be the controlling factor in determining the low bidder. This amount may be increased later when determining the alternate items to be awarded to the low bidder, provided that the award amount of the base bid plus the combination of alternate items do not exceed the amount offered by any other responsible bidder whose bid conforms to the solicitation for the base bid and the same combination of alternate items.

536.303-71 Bids that include options.

(a) Subject to the limitations in paragraph (c) of this section, the contracting officer may include options in contracts when it is in the Government's interest.

(b) The appropriate use of options may include, but is not limited to, the following:

(1) When additional work is anticipated but funds are not expected to be available at the time of award, and it would not be practicable to award a separate contract or to permit an additional contractor to work on the same site.

(2) When fixed building equipment, e.g. elevators, escalators, etc., will be installed under the construction contract and it is advantageous to have the installer of the equipment maintain and service the equipment during the warranty period.

(c) The contracting officer shall not employ options if:

(1) The prospective option represents known firm requirements for which funds are available unless competition for the option quantity is impracticable once the initial contract is awarded; or

(2) The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable.

(d) Solicitations containing option provisions must state the period within which the options may be exercised.

(e) The solicitations must state whether the basis of award is inclusive or exclusive of the options. Before a solicitation that includes evaluated options is issued, the contracting officer shall make a determination that there is reasonable certainty that funds will be made available to permit exercise of the option.

(f) The language of all solicitation provisions for options must be approved, in writing, by counsel.

(g) All solicitations requiring a base bid and options must include the Alternate I provision at 552.236–73, Basis of Award—Construction Contract, which prescribes the method of evaluation of bids.

536.303–72 Bids that include alternates and options.

(a) Solicitations may include alternates and options when the conditions in 536.303–70, Bids that include alternates, and 536.303–71, Bids that include options, are satisfied. In such solicitations, the low bidder for purposes of award is the responsible bidder offering the lowest aggregate price for the base bid plus those alternates in the order of priority listed in the solicitation that provide the most features of work within the funds available at bid opening, plus all options designated to be evaluated.

(b) In the case of options associated with alternates, the basis of award may require the evaluation of such options if the related alternate is selected.

(c) All solicitations requiring a base bid, alternates and options must include the Alternate III provision at 552.236–73, Basis of Award—Construction Contract, which prescribes the method of evaluation of bids.

(d) Before opening bids that include alternates and options, the contracting officer shall determine and record in the contract file the amount of funds available for the project (i.e., for the base bid and alternate work). The amount recorded must be announced at the beginning of the bid opening. This amount may be increased later when determining the alternate items to be awarded to the low bidder, provided that the award amount of the base bid and evaluated options plus such a combination of alternate items does not exceed the amount offered by any other responsible bidder whose bid conforms to the solicitation for the base bid, the evaluated options, and the same combination of alternate items.

536.370 Exercise of options.

(a) When exercising an option, the contracting officer shall notify the contractor, in writing, within the time period specified in the contract.

(b) The contracting officer may exercise options only after determining that:

(1) Funds are available;

(2) The requirement covered by the option fulfills an existing Government need; and

(3) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered.

(c) Before exercising an option, the contracting officer shall determine that such action is in accordance with the terms of the option and the requirements of this section. The written determination must be included in the contract file.

(d) The contract modification or other written document which notifies the contractor of the exercise of the option must cite the option clause as authority. In addition, when exercising an unpriced and/or unevaluated option cite the statutory authority permitting the use of other than full and open competition (see FAR 6.302 and 517.207).

Subpart 536.5—Contract Clauses

536.570 Supplemental provisions and clauses.

536.570–1 Definitions.

The contracting officer shall insert the clause at 552.236–70, Definitions, in solicitations and contracts when construction, dismantling, demolition, or removal of improvements is contemplated.

536.570–2 Authorities and limitations.

The contracting officer shall insert the clause at 552.236–71, Authorities and Limitations, in solicitations and contracts when construction, dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to exceed the small purchase limit.

536.570–3 Specialist.

The contracting officer shall insert the clause at 552.236–72, Specialist, in construction contracts when the technical sections of the contract require unusual experience or specialized facilities for adequate contract performance.

536.570–4 Basis of award—construction contract.

The contracting officer shall insert a provision substantially the same as the provisions at 552.236–73, Basis of Award—Construction Contract, in solicitations for fixed price construction contracts except when:

(a) The solicitation requires the submission of a lump sum bid only;

(b) The solicitation is for an indefinite quantity contract; or

(c) The contract amount is not expected to exceed the small purchase limitation.

If the solicitation requests the submission of a base bid and unit prices, the contracting officer shall use the basic provision. If the solicitation requests the submission of a base bid and options the contracting officer shall use the provision with its Alternate I. If the solicitation requests the submission of a base bid and alternates, the contracting officer shall use the provision with its Alternate II. If the solicitation requests the submission of a base bid, alternates, and options, the contracting officer shall use the provision with its Alternate III.

536.570–5 Working hours.

The contracting officer shall insert the clause at 552.236–74, Working Hours, in solicitations and contracts when construction, dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to exceed the small purchase limit.

536.570–6 Use of premises.

The contracting officer shall insert the clause at 552.236–75, Use of Premises, in solicitations and contracts when construction, dismantling, demolition, or removal of improvements is contemplated.

536.570–7 Measurements.

The contracting officer shall insert the clause at 552.236–76, Measurements, in solicitations and contracts when construction, dismantling, demolition, or removal of improvements is contemplated.

536.570–8 Specifications and drawings.

The contracting officer shall insert the clause at 552.236–77, Specifications and Drawings, in contracts when construction, dismantling, demolition, or removal of improvements is contemplated and the contract is

expected to exceed the small purchase limit.

536.570-9 Shop drawings, coordination drawings, and schedules.

The contracting officer shall insert the clause at 552.236-78, Shop Drawings, Coordination Drawings, and Schedules, in contracts when construction is contemplated and the contract is expected to exceed the small purchase limit.

536.570-10 Samples.

The contracting officer shall insert the clause at 552.236-79, Samples, in construction contracts when the technical sections of the contract require the submission and approval of samples.

536.570-11 Heat.

The contracting officer shall insert the clause at 552.236-80, Heat, in contracts, as appropriate, when construction, dismantling, demolition, or removal of improvements is contemplated.

536.570-12 Use of equipment by the Government.

The contracting officer shall insert the clause at 552.236-81, Use of Equipment by the Government, in contracts requiring heating and air-conditioning of existing buildings when it may be necessary for the Government to operate all or part of the equipment before final acceptance of the contract.

536.570-13 Subcontracts.

The contracting officer shall insert the clause at 552.236-82, Subcontracts, in solicitations and contracts for construction when the contract is expected to exceed the small purchase limit.

536.570-14 Furnishing information and records.

The contracting officer shall insert the clause at 552.236-83, Furnishing Information and Records, in solicitations and contracts when construction, dismantling, demolition or removal of improvements is contemplated and the contract amount is expected to exceed the small purchase limit.

PART 537—SERVICE CONTRACTING

Subpart 537.1—Service Contracts—General

Sec.

Subpart 537.2—Advisory and Assistance Service

Authority: 40 U.S.C. 486(c).

Subpart 537.1—Service Contracts—General

537.101 Definitions.

"Building service contract" means a contract for services relating to the operation and maintenance of a building, e.g., janitorial; window washing; snow removal; trash removal; lawn and grounds care; inspection, maintenance and repair of fixed equipment (elevators, air-conditioning, and heater systems, etc.) and protection or guard service.

537.106 Funding and term of service contracts.

The Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 260), authorizes GSA to enter into contracts for periods not to exceed three years for the operation, maintenance, and repair of fixed building equipment in Federally owned buildings (40 U.S.C. 490(a)(14)) and contracts for periods not exceeding ten years for utility services (40 U.S.C. 481(a)(3)). Contracts for these services may be awarded for the performance periods indicated without an "Availability of Funds" clause.

537.110 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 552.237-70, Qualifications of Offerors, in solicitations and contracts for building services when the contract amount is expected to exceed the small purchase limitation.

(b) The contracting officer shall insert the clause at 552.237-71, Qualifications of Employees, in solicitations and contracts for building services when the amount is expected to exceed the small purchase limitation. Supplemental clauses may be used with the clause at 552.237-71 to outline specific requirements regarding employees who will perform work on contracts.

(c) The contracting officer shall insert the certification at 552.237-72, Certification Regarding "Quasi-Military Armed Forces," in solicitations and contracts for guard service.

Subpart 537.2—Advisory and Assistance Service

537.205 Management controls.

All requests for advisory and assistance services must be processed in accordance with the requirements of GSA Order, Procurement of Consulting Services (ADM 2800.12D).

PART 538—GSA SCHEDULE CONTRACTING

Sec.

Subpart 538.2—Establishing and Administering Schedules

Authority: 40 U.S.C. 486(c).

538.000 Scope of part.

Except for the Information Resources Management Service (IRMS), schedule contracts awarded under the Teleprocessing Service Program (TSP) and unless otherwise stated, the policies and procedures in this part are prescribed for contracting for supplies and services by the Federal Supply Service (FSS) and the Information Resources Management Service (IRMS) under their respective schedule programs.

Subpart 538.2—Establishing and Administering Schedules

538.203 Solicitation preparation.

538.203-70 [Reserved]

538.203-71 Contract clauses.

The contracting officer shall insert the clause at 552.238-72, Contractor's Report of Orders Received, in solicitations issued and contracts awarded under the FSS and IRMS schedule programs. Paragraph (b) of the basic clause may be modified as necessary to meet program requirements. If it is necessary to identify the official responsible for preparing the report, the contracting officer may use the clause with its Alternate I. When the clause is used by IRMS, the contracting officer shall use the clause with its Alternate II.

PART 539—MANAGEMENT, ACQUISITION, AND USE OF INFORMATION RESOURCES

Authority: 40 U.S.C. 486(c).

539.000 Scope of part.

To the extent prescribed in Part 538, the policies and procedures in that part apply to IRMS schedules.

PARTS 540-541 [RESERVED]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 542—CONTRACT ADMINISTRATION

Subpart 542.2—Assignment of Contract Administration

Sec.

Sec.

Authority: 40 U.S.C. 486(c).

Subpart 542.2—Assignment of Contract Administration

542.200-70 Policy.

(a) Contracting directors shall establish procedures that will ensure that contract administration activities are performed by qualified personnel and in an effective manner.

(b) Contract administration may be performed by the contracting officer who awarded the contract or by an administrative contracting officer (ACO) within the contracting office. As an alternative, management may establish a separate contract administration office (CAO) consistent with the nature and complexities of the contracts, the need to perform contract administration at or near the contractor's facility or the place of performance, and the availability of resources.

(c) The contracting officer may designate one or more representatives to perform specified functions such as quality assurance, production, price analysis, finance and various engineering and technical specialities. These representatives may not enter into or modify a contract or otherwise perform functions reserved for a contracting officer except to the limited extent permitted for construction contracts. (See 542.201.2(d).) Designations of ACOs and contracting officers representatives must be in writing and communicated to the contractor.

542.201 Definitions.

"Assignment of contract administration" means that process whereby identified functions, duties, or responsibilities related to the administration of contracts are assigned to a CAO or an ACO within a contracting office.

"Contract administration" means the performance of actions after contract award that the Government takes to obtain compliance with contract requirements, including timely delivery of supplies or services, acceptance, payment, and closing of the contract. These actions include technical, financial, audit, legal, administrative, and managerial services in support of the contracting officer. It may include additional tasks requested or needed by the contracting activity including support in the pre-award phase of contracting.

"Contracting Officer's Representative (COR), Contracting Officer's Technical Representative (COTR), or Contract Administrator" means an individual designated and authorized in writing by the contracting officer to perform specific limited contract administration activities.

"Procuring Contracting Officer" (PCO) means, a contracting officer (see FAR Subpart 2.1). This regulation uses the term to differentiate between procuring and administrative responsibilities when contract administration authority has been delegated to an ACO within a contracting office or a CAO.

542.202 Assignment of contract administration.

(a) The contracting officer may delegate to an ACO functions not listed in FAR 42.302 and 542.302(b) provided that:

(1) The requirements of FAR 42.202(c) are met and,

(2) The Associate Administrator for Acquisition Policy approves the additional delegation. Requests for additional delegations must be submitted through the appropriate Central Office Service Commissioner or Assistant Administrator of the appropriate service or staff office to the Office of Acquisition Policy. If a service/office is providing contracting support for another service/office the request shall be sent to the Commissioner/Assistant Administrator of the contracting service/office. That official shall coordinate as necessary with the affected service/office.

(b) In addition to the requirements of FAR 42.202(d), the contracting officer shall provide or make available a complete copy of the contract file to the ACO.

Subpart 542.3—Contract Administration Office Functions

542.302 Contract Administration functions.

(a) Normal contract administration functions identified at FAR 42.302(a) are to be performed, to the extent they apply, either by the contracting office or an office specifically established to perform contract administration functions.

(b) The ACO or CAO shall perform the additional functions listed below only when and to the extent specifically authorized by the contracting officer.

(1) Negotiate and issue priced or unpriced orders under indefinite delivery type contracts and basic ordering agreements.

(2) Issue change orders to modify the method of shipment, the packing requirements, the place where supplies are to be delivered, or the specifications after coordinating with the PCO (only applies to ACO's in FSS).

(3) Accept/reject requests for acceptance of nonconforming supplies after coordinating with the PCO if other than a minor nonconformance is involved (only applies to ACO's in the Federal Supply Service (FSS)).

(4) Negotiate price adjustments and execute supplemental agreements resulting from acceptances in (b)(3) of this section.

(5) Issue cure or show cause notices under FAR 49.402-3(b) after coordinating with the PCO (only applies to ACO's in FSS).

(6) Terminate individual purchase/delivery orders after coordinating with the PCO.

(7) Terminate the contract for default after coordinating with the PCO (only applies to ACO's in FSS).

(8) Assess liquidated damages.

(c) Contracting officers may authorize COR's for construction contracts to issue change orders under $25,000, provided, the COR has been issued a Standard Form 1402, Certificate of Appointment under 501.603-70.

(d) Functions peculiar to specific programs may be delegated when approved by the Associate Administrator for Acquisition Policy. Requests to delegate contract

administration functions not found in FAR 42.302 and 542.302(b) must be submitted to the Office of Acquisition Policy by the head of the affected Central Office service for approval.

Subpart 542.4—Correspondence and Visits

542.470 Implementation.

HCA's issuing implementing guidelines or procedures must obtain the concurrence of the Associate Administrator for Acquisition Policy.

Subpart 542.11—Production Surveillance and Reporting

542.1107 Contract clause.

The contracting officer shall insert the clause at 552.242-70, Status Report of Orders and Shipments, in solicitations and indefinite quantity and requirements contracts for stock or special order program items. The clause may also be used in indefinite delivery definite quantity contracts for stock or special order program items when close monitoring is necessary because numerous shipments are involved.

Subpart 542.12—Novation and Change-of-Name Agreements

542.1203 Processing agreements.

In determining whether it is in the Government's interest to recognize a successor in interest under FAR Subpart 42.12, the contracting officer shall consider, in addition to information provided by affected contracting and contract administration offices, information provided by the agency small business technical advisor where the contract was awarded to a small business under a small business set-aside and the third-party successor is a large business. Under the following conditions the contracting officer should refuse to recognize the successor and nonconcur in the transfer of the contract(s):

(a) There is adequate reason to believe that the transaction is intended to circumvent the requirements and objectives of the small business program; or

(b) The contract involved is a multiple award schedule (MAS) contract and other MAS small business contracts exist for the same special item number(s). If the MAS contract involves both set-aside and non-set-aside special item numbers, the contracting officer shall cancel that part of the contract related to the set-aside items, and process the novation request for the non-set-aside items under FAR Subpart 42.12.

Subpart 542.70—Bankruptcy, Insolvency or Dissolution of a Business

542.7001 General.

Prompt action is vital when a contractor becomes insolvent or files under any of the laws relating to bankruptcy, insolvency, and dissolution of businesses (11 U.S.C. 101 et. seq.) to assure that the Government's rights are protected. Terminated and current contracts with the contractor must be considered in any action contemplated. Contracting officers may be advised of such difficulties by the quality assurance specialist (QAS), contracting officer's representatives (COR), the Office of Finance, the Office of Inspector General, or other means, e.g., newspaper items, Dun and Bradstreet, an industry association, other contractors, other Federal agencies, or financial institutions. The contracting officer shall verify the accuracy of the information received and follow the procedures in 542.7002.

542.7002 Procedures.

(a) When a contractor is experiencing financial difficulties the contracting officer shall:

(1) Determine whether the contractor is delivering supplies and/or performing the services within the timeframes specified in the contract and whether the contractor is making satisfactory progress toward future deliveries or performance. Obtain, if needed, the recommendations of the QAS or COR.

(2) If the contractor has failed without excuse to deliver or perform under the contract or has failed to make progress so as to endanger performance, consider terminating the contract for default.

(3) If contract termination is not considered necessary, continue to monitor contract(s) by requesting that the QAS or COR visit the contractor's plant or the work site more often than usual to ascertain that progress is being made.

(4) If a small business contractor is involved, notify the regional Small Business Administration (SBA) office and the agency Small Business Technical Advisor.

(5) If the contract has a performance bond and/or payment bond, the bonding company should be notified if the circumstances of the particular case dictate such notification.

(b) When a contractor has filed for bankruptcy, the contracting officer shall:

(1) Notify the contracting director, assigned counsel, the Office of Finance and other interested parties.

(2) Determine whether the contractor is performing in accordance with the terms of the contract and/or is making satisfactory progress towards completion of the contract. If the contractor has failed without excuse to deliver or perform under the contract or failed to make progress so as to endanger performance, consider terminating the contract for default. Termination must not be effected without concurrence of assigned counsel, who will coordinate with the assigned Assistant United States Attorney.

(3) Determine the status of and provide for the protection and disposition of Government-owned property, if applicable.

(4) If special safeguards for Government property are needed, determine the names, addresses, and phone numbers of the local Government officials concerned in the bankruptcy proceedings, e.g., sheriff, marshal, or the Receiver or Trustee in bankruptcy, if assigned.

(5) Transmit immediately all relevant communications to assigned counsel; e.g., notice of bankruptcy, notice of meeting of creditors, plan of arrangement, status of such plan, claims bar date and address of the Bankruptcy Court where proceedings were filed. Assigned counsel shall immediately transmit a copy of the notice of bankruptcy to the appropriate office in the Office of General Counsel (i.e., LG, LP, or LR) or to the assigned Assistant United States Attorney.

(6) Prepare, in consultation with assigned counsel, the preliminary, contingent and, after reprocurement (if any), final proof of claim. Such proofs of claim will be forwarded by the assigned counsel to the appropriate office in the Office of General Counsel (i.e., LG, LP, or LR) or to the assigned Assistant United States Attorney.

(7) Consult with assigned counsel regarding possible setoffs of Government claims from retained and unpaid contractor earnings.

(8) Advise the Inspector General whenever there is reason to believe that the contractor may have fraudulently transferred assets before filing for bankruptcy. Also advise the Inspector General in any case where the contracting officer is aware of an ongoing audit or investigation of the contractor.

(c) Upon receipt of information that a contractor intends to dissolve a business or to cease operations for whatever reason, e.g., because of retirement, fire sale of business (without public notice), etc., the contracting officer shall verify the accuracy of the information. If the information is accurate, the contracting

officer shall request the QAS or COR to verify status of contract(s) and notify other directly interested parties. However, the QAS or COR should not be requested to make special contract administration visits unless all other efforts to obtain the necessary information have failed. If a claim against the contractor is either pending or outstanding, the contracting officer should notify assigned counsel and simultaneously obtain information that would aid in finalizing the amount of claim(s).

Subpart 542.71—Audit of Contractor's Record

542.7101 General.

The Assistant Inspector General—Auditing and the Field Audit Offices audit contractors' records when required by law, regulation, or sound business judgment. These audits include periodic or special request audits of contractors determined to be necessary because of such matters as the financial condition, integrity, and reliability of the contractor and prior audit experience, adequacy of the accounting system, and the amount of unaudited claims. So that the Government can benefit to the maximum extent from these audits, a coordinated and cooperative effort must be made by contracting officers, technical specialists, and finance and audit personnel.

542.7102 Purpose of audit.

Audits are conducted to advise and make recommendations to the contracting officer concerning:

(a) Propriety of amounts paid, or to be paid, by GSA to contractors when such amounts are based on a cost or time determination or on variable features related to the results of contractors' operations;

(b) Adequacy of measures taken by contractors regarding the use and safeguarding of Government assets under their custody or control;

(c) Compliance by contractors with contractual provisions such as progress payments, advance payments, guaranteed loans, cash return provisions, and price adjustments; and

(d) Reasonableness of contractor's termination settlement proposals.

542.7103 Types of contracts subject to audit.

(a) The following types of contracts, (excluding small purchases) include either the Audit-Negotiation clause prescribed in FAR 15.106–2 or the Examination of Records by GSA clause at 552.215–70 and are subject to audit.

(1) Cost-reimbursement type contracts;

(2) Contracts involving the use or disposition of Government-furnished property;

(3) Contracts that provide for advance payments, progress payments based on costs, or guaranteed loans;

(4) Contracts containing a price warranty or price reduction clause;

(5) Contracts or leases involving income to the Government when the income is based on operations that are under the control of the contractor or lessee;

(6) Fixed-price contracts or leases with economic price adjustment, with incentives and with price redetermination;

(7) Requirements and indefinite quantity (call-type) contracts;

(8) Time-and-material, labor-hour, and letter contracts; and

(9) Leases when the rental is subject to adjustment based on negotiated operating cost escalation.

(b) A copy of each contract or modification of the types described in paragraph (a) of this section must be furnished to the Assistant Inspector General for Auditing (JA), General Services Administration, Washington, DC 20405, or to the Field Audit Office, as appropriate, simultaneously with distribution of other copies of the contract.

542.7104 Additional internal controls.

As a supplement to the contractual right to audit contractor records in cost-reimbursement type, time and materials, labor-hour, requirements and indefinite quantity (call-type) contracts, the contracting officer (with the assistance of the Assistant Inspector General—Auditing or the Field Audit Office) shall establish internal controls or procedures prior to the performance of those contracts with respect to any flexible or variable features. For example, if a time and materials or labor-hour contract is performed (on a Government facility or elsewhere) subject to observation or overall supervision by Government personnel approval of time records may be provided for as incidental to the Government supervision. Any reasonable and reliable method or procedure may be established to account for such matters as the time spent on the job and materials or supplies received which will assist the contract auditor and the contracting officer to determine the correctness of the charges to the contract.

542.7105 Releasing or withholding of audit reports.

The Freedom of Information Act generally requires the disclosure of Government records subject to certain exceptions. It may be to the benefit or detriment of the Government to release contract audit reports or portions of them depending upon the circumstances. However, because of the complexity of the matter, contracting officers shall consult with both the Assistant Inspector General-Auditing and the Office of General Counsel, before releasing or withholding such information.

PART 543 CONTRACT MODIFICATION

Subpart 543.1—General

Sec.

Subpart 543.2—Change Orders

Authority: 40 U.S.C. 486(c).

Subpart 543.1—General

543.102 Policy.

A modification for work outside the scope of a contract must be treated as a new procurement. Such modifications must be justified and approved under FAR Subpart 6.3, synopsized under FAR Subpart 5.2 and Subpart 505.2, and effected through a supplemental agreement.

543.170 Changes in designated subcontractors, inspection and/or production points.

(a) The contracting officer shall not execute a contract modification that authorizes a change in a designated subcontractor or any designated inspection or production point, without considering the impact of the change on the contractor's ability to fulfill the terms and conditions of the contract. When considering the impact, the contracting officer should consider the same factors that would be considered in evaluating whether a contractor is responsible. (See FAR Subpart 9.1 and Subpart 509.1.)

(b) If the contracting officer approves a change of subcontractor, inspection point, or production point, the contracting officer shall issue a contract modification specifying the nature of the change and the effective date. Where feasible, the modification should provide that delivery orders placed before the effective date will remain in effect as written. In determining the effective date, contracting officers should take into consideration the time necessary for offices concerned to take required actions.

Subpart 543.2—Change Orders

543.202 Authority to issue change orders.

(a) Change orders must be issued by the procuring contracting officer unless FAR 42.202(c) or 542.302 apply.

(b) A contracting officer's representative (COR) for a construction contract that has been issued a warrant under 501.603–70, may be authorized to issue change orders of $25,000 or less. (See 542.302.) Such change order authority may be exercised on a contract-by-contract basis by the contracting officer's written authorization. The contracting officer may further limit the authorization, e.g., to lower dollar amounts, to emergency situations, etc. In addition, the contracting officer's written authorization must instruct the COR to avoid personally performing all of the following tasks for a single change order: (1) Determining the need for a change, (2) Preparing the Government's cost estimate, (3) Conducting negotiations, (4) Issuing the change order and (5) Inspecting the work. The contracting officer shall further instruct the COR to submit change orders to a designated official for review before issuance (for price-to-be-determined-later change orders before definitization) whenever all of these activities are personally performed. The contracting officer may personally review change orders or may designate the COR's immediate supervisor or a higher-level official within the organization to review change orders. To the maximum extent possible, the same individual should review change orders issued under a particular contract.

(c) Change orders should be issued after coordination as appropriate, with counsel, quality control, finance, audit or other technical personnel.

543.205 Contract clauses.

(a) The contracting officer shall insert the clause at 552.243–70, Pricing of Adjustments, in solicitations and contracts when the contract amount is expected to exceed the small purchase limitation and a contract other than a cost type contract is contemplated.

(b) The contracting officer shall insert the clause at 552.243–71, Equitable Adjustments, in solicitations and contracts for (1) dismantling, demolishing, or removing improvements; or (2) construction, when the contract amount is expected to exceed the small purchase limitation and a fixed-price contract is contemplated.

PART 544—SUBCONTRACTING POLICIES AND PROCEDURES—[RESERVED]

PART 545—GOVERNMENT PROPERTY—[RESERVED]

PART 546—QUALITY ASSURANCE

Subpart 546.3—Contract Clauses

Sec.

Subpart 546.4—Government Contract Quality Assurance

Subpart 546.7—Warranties

Authority: 40 U.S.C 486(c)

Subpart 546.3—Contract Clauses

546.302 Fixed-price supply contracts.

546.302–70 Source inspection by Quality Approved Manufacturer.

Contracting officers in the Federal Supply Service shall insert the clause at 552.246–70, Source Inspection by Quality Approved Manufacturer, in solicitations and contracts that provide for source inspection, except multiple award schedules contracts, motor vehicle contracts, and contracts awarded by the Special Programs Division of the Office of Scientific Equipment Commodity Center, unless the contracting officer, in conjunction with the Central Office Quality Assurance Division (FQA), decides inspection by Government personnel is necessary. Contracting officers may authorize the use of manufacturing plants or other facilities located outside the United States (including Puerto Rico and the Virgin Islands) to perform inspection and testing under paragraph (a)(1) of the clause when:

(a) Inspection services are available from another Federal agency on the basis of its primary inspection responsibility in a geographic area;

(b) An inspection interchange agreement exists with another agency concerning inspection at a contractor's plant;

(c) Procurement is being made for AID and specifies the area of source; or

(d) Other considerations will ensure more economical and effective inspection consistent with the Government's interest.

Such authorization must be fully coordinated with FQA and documented in the file.

546.302–71 Source inspection.

The contracting officer shall insert the clause at 552.246–72, Source Inspection, in solicitations and contracts when it is determined that inspection is to be performed at the source by Government personnel.

546.312 Construction contracts.

The contracting officer shall insert the clause at 552.246–71, Final Inspection and Tests, in solicitations and contracts for construction that include the Inspection of Construction clause at FAR 52.246–12.

Subpart 546.4–Government Contract Quality Assurance

546.400 Scope of subpart.

This subpart prescribes policies and procedures for use by the Federal Supply Service. Use by other GSA activities is optional.

Subpart 546.4—Government Contract Quality Assurance

546.402 Government contract quality assurance at source.

(a) Source inspection of supplies shall be performed either by Government personnel or by a Quality Approved Manufacturer when the contract is:

(1) A Federal Supply Schedule contract selected for source inspection;

(2) A requirements contract which is national in scope (including shipments to GSA distribution centers);

(3) A requirements contract which is regional in scope;

(4) A definite quantity contract for stock items;

(5) For Class 8010 items; or

(6) For Special-purpose vehicles, trucks over 10,000 pounds gross vehicle weight (GVW), trucks weighing 10,000 pounds GVW or less that are not covered by a Federal standard, and vehicles to be shipped outside the coterminous United States.

(b) Contracts may also provide for source inspection when the contracting director, after coordination with FQA, determines that it is in the Government's interest due to the critical nature of the supplies.

546.403 Government contract quality assurance at destination.

Inspection of supplies at destination should be performed when the supplies are purchased using small purchase procedures, a schedule contract is involved (except for schedules selected for source inspection), or the contract is for:

(a) Commercial or off-the-shelf products;

(b) Standard vehicles purchased for domestic consignees; or

(c) Trucks weighing 10,000 pounds GVW or less purchased for domestic consignees using a Federal Standard.

546.470 Testing.

Testing to determine conformance with specifications and standards may be conducted at facilities of Federal agencies, manufacturers, independent testing laboratories, and others, as appropriate.

546.470-1 Acceptance testing.

(a) Acceptance testing is conducted to determine conformance with purchase descriptions or specifications before a shipment is accepted. Such testing must not be solely for the purpose of furnishing information to a producer or vendor as to conformance with specification requirements.

(b) The cost of services for acceptance testing of samples of a shipment normally will be borne by GSA, except for retesting necessitated by prior rejection.

546.470-2 Certification testing.

(a) Certification testing is conducted to determine conformance of an item with a specification for the purpose of executing a certificate of compliance required by the specification.

(b) When a certificate from a recognized laboratory is required by the contract and there is a lack of suitable commercial testing facilities, GSA, upon request and agreement by the contractor to pay all costs, will arrange, for the required certification testing by a Government laboratory, where feasible.

Subpart 546.7—Warranties

546.704 Authority for use of warranties.

The contracting officer must consider the criteria in FAR 46.703 and decide whether to use a warranty in a specific acquisition.

546.705 Limitations.

The use of warranties in cost reimbursement contracts, other than those in FAR clause 52.246-3 or 52.246-8, must be approved by the contracting director.

546.708 Warranties of data.

Warranties of data should be developed by the technical or specification manager when the contracting officer decides that the use of a warranty is in the Government's interest and the contracting director concurs.

546.709 Warranties of commercial items.

The specification manager shall advise the contracting officer: (a) Whether the specification contains a warranty or a commercial warranty applies and (b) when an extended warranty is necessary and recommends the duration of the extended warranty.

546.710 Contract Clauses.

(a) The contracting officer shall insert the clause at 552.246-17, Warranty of Supplies of a Noncomplex Nature, in solicitations and contracts instead of FAR 52.246-17. If commercial items, i.e., specified by brand name or equal, are to be acquired, the clause at 552.246-17 must be used with Alternate I instead of FAR 52.246-17 with its Alternate I. The term "commercial items" in the clause is not to be used in conjunction with Commercial Item Descriptions (CIDs) or specifications.

(b) The contracting officer shall insert the clause at 552.246-73, Warranty—Multiple Award Schedule, in solicitations and multiple award schedule (except international schedule) contracts.

(c) The contracting officer shall insert the clause at 552.246-74, Warranty—International Multiple Award Schedule, in solicitations and international multiple award schedule contracts.

(d) The contracting officer shall insert the clause at 552.246-76, Warranty of Pesticides, in solicitations and contracts involving the procurement of pesticides.

(e) The contracting officer shall insert the clause at 552.246-75, Guarantees, in solicitations and contracts for construction when the contract amount is expected to exceed the small purchase limitation.

PART 547—TRANSPORTATION

Subpart 547.3—Transportation in Supply Contracts

Sec.

Authority: 40 U.S.C. 486(c).

Subpart 547.3—Transportation in Supply Contracts

547.300 Scope of subpart.

This subpart prescribes policies and procedures for Federal Supply Service (FSS) acquisitions.

547.303 Standard delivery terms and contract clauses.

547.303-1 F.o.b origin.

(a) The contractor shall request a carrier routing from the applicable transportation zone office on all shipments weighing 10,000 pounds or more.

(b) The contractor shall ship on a Government bill of lading (GBL) unless:

(1) Shipment is via postal or parcel service;

(2) Shipment on a commercial bill of lading (CBL) is authorized in writing by the contracting officer because (i) shipment is urgently required and (ii) a GBL cannot be issued in a timely manner; or

(3) The transportation cost estimate is under $100 (see FAR 42.1403-2).

(c) The signature of the carrier's agent and the annotation at FAR 52.247-1 must be shown on the original and all copies of the CBL. The original of the CBL must be mailed to the office, which authorized the CBL.

547.303-6 F.o.b. destination.

The contracting officer shall insert in solicitations and contracts the clause at 552.247-34, F.o.b. Destination, in lieu of the clause at FAR 52.247-34.

547.304-5 Exceptions.

(a) Unless the contracting officer can justify more restrictive delivery terms and documents the contract file accordingly, solicitations including delivery to Alaska, Hawaii, or Puerto Rico must specify that offers:

(1) May be f.o.b origin; f.o.b. vessel, part of shipment; f.o.b. destination; or any combination of these delivery terms (other delivery terms may be provided for, if appropriate); and

(2) Will be evaluated on the basis of the lowest overall cost to the Government delivered to the ultimate destination.

(b) Federal Supply Schedules should attempt to obtain a f.o.b. destination delivery term for Alaska, Hawaii, and Puerto Rico, if such delivery term is offered for shipments within CONUS.

547.305 Solicitation provisions, contract clauses, and transportation factors.

The contracting officer shall insert in solicitations and contracts the clause at 552.247-70, Placarding Railcar

Shipments, when it is essential that the railcar doors be specially positioned next to the unloading dock, platform, or warehouse door.

547.370 Restrictions on transportation to military installations.

Solicitations and contracts specifying direct delivery to military installations must specify applicable delivery restrictions.

PART 548—VALUE ENGINEERING—[RESERVED]

PART 549—TERMINATION OF CONTRACTS

Sec.

Authority: 40 U.S.C. 486(c).

549.001 Definitions.

"Administrative costs," as used in this part, mean costs, other than excess costs, incurred by the Government as a result of the contractor's default. Administrative costs include but are not limited to:

(a) Salaries and fringe benefits paid to Government employees who perform work (e.g. reprocurement) as a result of the default.

(b) Preaward survey expenses incurred in qualifying reprocurement contractors;

(c) Costs incurred in printing and distributing the reprocurement solicitation.

"Excess costs," as used in this part, mean costs, other than administrative costs, incurred by the Government as a consequence of the contractor's default in the reprocurement of similar supplies or services or in the resulting performance of such services by the Government.

Subpart 549.1—General Principles

549.111 Review of proposed settlements.

(a) Proposed termination settlements between $25,000 and $100,000, must be reviewed and approved by the contracting director.

(b) Proposed termination settlements over $100,000, must be reviewed and approved by the head of the contracting activity (HCA).

(c) The HCA may require review and approval of proposed termination settlements less than $25,000 at least one supervisory level above the contracting officer.

Subpart 549.4—Termination for Default

549.402–6 Repurchase against contractor's account.

(a) After termination but before repurchase, the contracting officer shall revalidate the need for the supplies or services and document the file.

(b) Repurchase against a contractor's account must be based on the original contract terms, conditions, and specification. If acceptable offers cannot be obtained on this basis, similar supplies or services may be bought to substantially satisfy the original requirement. Advice of counsel must be obtained before issuing a solicitation for similar supplies or services.

(c) To protect the Government's rights to recover excess costs, the contracting officer must document the file to explain the circumstances of any delay in the reprocurement.

549.402–7 Other damages.

(a) Under the default clause, the contracting officer may assess administrative costs, if in the best interest of the Government, after considering:

(1) The expected cost to the Government of documenting and supporting the assessment.

(2) The amount the Government expects to recover.

(3) The advice of legal counsel.

(b) Documents supporting an assessment of administrative costs must be detailed and must demonstrate that the added costs incurred by the Government were a direct result of the default.

(1) To support administrative labor costs, the contracting officer must record:

(i) Name, position, and organization of each employee performing work activities as a consequence of the default.

(ii) Date(s) of work and time(s) spent by each employee on the repurchase.

(iii) Description of specific tasks performed (i.e., solicitation preparation, clerical).

(iv) Hourly rate of pay (straight time or overtime).

(v) Applicable fringe benefits.

(vi) Explanation of how the time spent by the employees during the reprocurement would have been used on other projects but for the default.

(2) Documents supporting other administrative costs (i.e., travel, per diem, printing and distribution of the repurchase contract) incurred may include travel vouchers, invoices, printing requisitions, and other appropriate evidence of expenditures.

(c) After deciding that the assessment of administrative costs is appropriate, the contracting officer shall make a written demand on the contractor. The basis of calculating the costs being assessed must be furnished to the contractor. A single demand letter may be used to recover excess costs and administrative costs.

Subpart 549.5—Contract Termination Clauses

549.502 Termination for convenience of the Government.

The contracting officer shall insert the clause at 552.249–70, Termination for Convenience of the Government (Fixed-Price), in all solicitations and contracts for the acquisition and maintenance of telephone systems to be funded through the Information Technology Fund (IT). This clause should be used with the FAR clauses at 52.249–1 or 52.249–2 and 52.249–4.

549.570 Submission of termination liability schedule.

The contracting officer shall insert the clause at 552.249–71, Submission of Termination Liability Schedule, in all solicitations for the acquisition and maintenance of telephone systems to be funded through the Information Technology Fund (IT). This provision is to be used when the clause at 552.249–70 is used.

PART 550—EXTRAORDINARY CONTRACTUAL ACTIONS

Authority: 40 U.S.C. 486(c).

550.001 Definitions.

"Approving authority," as used in FAR Part 50, means the Administrator of General Services Administration.

PART 551—USE OF GOVERNMENT SOURCES BY CONTRACTORS—[RESERVED]

Subchapter H—Clauses and Farms

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Sec.

Subpart 552.1—Instructions for Using Provisions and Clauses

Sec.

Subpart 552.2—Text of Provisions and Clauses

Subpart 552.3—Provision and Clause Matrixes

Authority: 40 U.S.C. 486(c).

552.000 Scope of part.

This part provides the text of provisions and clauses which are unique to GSA or supplement the FAR. Matrixes are also provided for acquisitions of various supplies, services and leasehold interests in real property.

Subpart 552.1—Instructions for Using Provisions and Clauses

552.101 Using Part 552.

(a) *Definition.* "Clause," as used in this subpart, means provision or clause as defined in FAR 52.101(a).

(b) *Numbering.* When a clause in this Part has the same title as a clause in the FAR, that clause is preceded by the number 5 and is included under the same subsection number and caption as in the FAR. Clauses numbered in this manner represent (1) clauses which are "substantially" the same as FAR clauses, and (2) clauses which are to be used instead of FAR clauses. All supplemental clauses are numbered in the same manner as the FAR, except that the number is preceded by the chapter number and the subsection numbers begin with 70 and are sequentially numbered, e.g., 552.232–70, 552.232–71, etc.

(c) *Matrixes.* Matrixes are included as a guide to locating clauses for supply, service, construction, and architect-engineer solicitations/contracts. There is a separate matrix for small purchases. Matrixes listing FAR and GSAR clauses for utility contracts (sole-supplier-regulated rates) and leases of real property are also included. Individuals drafting solicitations must research pertinent regulations or make other determinations to ensure that (1) the clauses selected fit the procurement, (2) there are no restrictions on their use, and (3) when one clause is dependent upon the use of another clause, all necessary clauses are included in the solicitation.

552.102 Incorporating provisions and clauses.

552.102–1 Incorporation by reference.

Clauses prescribed in the GSAR may be incorporated in solicitations/contracts by reference. As an alternative, forms containing GSAR clauses in full text may be incorporated by reference.

552.103 Identification of provisions and clauses.

(a) When a class deviation from a FAR clause is prescribed in the GSAR, the contracting officer shall identify the clause by the GSAR citation (552.232–8—Prompt Payment Discount (Nov 1987) (Deviation FAR 52.232–8)).

(b) When a "substantially the same as" clause is used that varies from a FAR or GSAR clause, the word "(Variation)," must be included as a part of the title of the clause, along with the FAR or GSAR citation (552.215–70 Examination of Records by GSA (Apr 1984) (Variation I)). If there is more than one variation of a provision or clause, the variations are titled (Variation I), (Variation II), (Variation III), etc. Variations of clauses which result from negotiations do not need to be identified unless an amendment to the solicitation is issued.

(c) Variations of FAR or GSAR clauses should generally be used for individual cases. A copy of clause variations developed for repeated use must be furnished to the Office of GSA Acquisition Policy and Regulations (VP) for potential inclusion in the GSAR.

552.105 Procedures for using alternates.

The procedures in FAR 52.105 apply to GSAR Part 552.

552.107 Provisions and clauses prescribed in Subpart 552.1.

(a) The contracting officer shall insert the provision at 552.252–5, Authorized Deviations or Variations in Provisions, in solicitations that include any FAR or GSAR clause with an authorized deviation or variation. This provision must be used in lieu of the FAR provision at 552.252–5.

(b) The contracting officer shall insert the clause at 552.252–6, Authorized Deviations or Variations in Clauses, in solicitations and contracts that include any FAR or GSAR clause with an authorized deviation or variation. This clause must be used in lieu of the FAR clause at 552.252–6.

Subpart 552.2—Text of Provisions and Clauses

552.200 Scope of subpart.

This subpart sets forth the text of all GSAR provisions and clauses, and for each provision and clause, provides a cross-reference to the location in the GSAR that prescribes its use.

552.203–4 Contingent Fee Representation and Agreement.

As prescribed in 503.404(a), insert the following provision:

Contingent Fee Representation and Agreement (May 1989)

(a) *Representation.* The Offeror represents that, except for full-time bona fide employees working solely for the offeror or bona fide established real estate agents or brokers maintained by the Offeror for the purpose of securing business, the Offeror—

Note: The Offeror must check the appropriate boxes. For interpretation of the term "bona fide employee or agency," see paragraph (b) of the Covenant Against Contingent Fees clause.

(1) _____ has, _____ has not employed or retained any person or company to solicit or obtain this contract and;

(2) _____ has, _____ has not paid or agreed to pay to any person or company employed or retained to solicit or obtain this contract any commission, percentage, brokerage, or other fee contingent upon or resulting from the award of this contract.

(b) *Agreement.* The Offeror agrees to provide information relating to the above Representation as requested by the Contracting Officer and, when subparagraph (a)(1) or (a)(2) is answered affirmatively, to promptly submit to the Contracting Officer—

(1) A completed Standard Form 119, Statement of Contingent or Other Fees, (SF 119); or

(2) A signed statement indicating that the SF 119 was previously submitted to the same contracting office, including the date and applicable solicitation or contract number, and representing that the prior SF 119 applies to this offer or quotation.

(End of provision)

552.203–5 Covenant Against Contingent Fees.

As prescribed in 503.404(b), insert the following clause:

Covenant Against Contingent Fees (May 1989)

(a) The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover the full amount of the contingent fee.

(b) "Bona fide employee or agency," as used in this clause, means licensed real estate agents or brokers having listings on property for rent, in accordance with general business practice, who have not obtained such license for the sole purpose of effecting this contract, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contracts or contracts through improper influence.

"Contingent fee," as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

"Improper influence," as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

(End of clause)

552.203-70 Restriction on advertising.

As prescribed in 503.570-2, insert the following clause:

Restriction on Advertising (May 1989)

The Contractor shall not refer to contracts awarded by the United States Government in commercial advertising in such a manner as to state or imply that the product or service provided is approved or endorsed by any element of the Federal Government or is considered by the Government to be superior to other products or services. Any advertisement by the Contractor, including price-off coupons, which refer to a military resale activity shall contain the following statement: "This advertisement is neither paid for nor sponsored in whole or in part, by any element of the United States Government."

(End of clause)

552.207-70 Report of employment under commercial activities.

As prescribed in 507.305, insert the following clause:

Report of Employment Under Commercial Activities (Apr 1984)

(a) The Contracting Officer, as soon as practicable, will provide the Contractor with a list of the Federal employees, including social security numbers, that will be involuntarily separated from Government employment as a result of this contract.

(b) The Contractor agrees:

(1) To provide the Contracting Officer, within 5 working days after the date of transfer of the operation and maintenance responsibilities of a Federal project to the Contractor (contract start date), with the names and social security numbers of individuals on the list referenced in paragraph (a) that, as of the contract start date, had accepted or rejected offers of employment comparable to their previous employment with the Federal Government. For those who reject the Contractor's employment offer, the Contractor shall include the total monetary value of the pay and benefits offered;

(2) To provide the Contracting Officer with the names and social security numbers of the individuals hired, within 5 working days of such hiring, during the first 90 days after the contract start date, if the Contractor hires any additional Federal employees on the list referenced in paragraph (a) for any job within the Contractor's organization; and

(3) To furnish the information required by this clause in a concise and clearly detailed format.

(c) The operation of the system of records identified by this clause is subject to the Privacy Act of 1974 (5 U.S.C. 552a) and the Privacy Act Notification and Clause of this contract. This clause constitutes the notice required to invoke compliance by the contractor with the provisions of the notice and clause.

(End of Clause)

552.209-73 Product removal from qualified products list.

As prescribed in 509.206-2, insert the following clause:

Product Removal From Qualified Products List (May 1989)

If, during the performance of this contract, the product being furnished is for any reason (except those outlined in paragraph 3.1.1 of the applicable Federal or Interim Federal Specification for security cabinets, security vault doors and changeable combination padlocks) removed from the Qualified Products List, the Government may terminate this contract for default under paragraph (a)(1)(ii) of the Default clause at FAR 52.249-8.

(End of Clause)

552.209-74 Waiver of first article testing and approval requirements.

As prescribed in 509.306, insert the following provision:

Waiver of First Article Testing and Approval Requirement (May 1989)

(a) The Government reserves the right to waive the requirements of first article testing set forth elsewhere in this solicitation as to those Offerors offering a product which has been previously procured and approved by the General Services Administration under the same specification and at the same facility.

(b) Offerors must submit an offer including testing and approval, however, an Offeror may submit an alternate offer excluding testing and approval, provided the Offeror satisfies the requirements for the waiving of first article testing.

(c) Before a waiver of the first article testing requirement of this solicitation will be considered, the Offeror is requested to identify the procurement under which the product offered was previously approved and accepted:_____.

(Offeror to insert both contract number and applicable national stock number.)

(End of provision)

552.209-75 Supplemental requirements for first article approval—contractor testing.

As prescribed in 509.308-1, insert the following clause:

Supplemental Requirements for First Article Approval—Contractor Testing (May 1989)

(a) The term "Contracting Officer" as used in FAR 52.209-3, First Article Approval—Contractor Testing, means the Administrative Contracting Officer (ACO).

(b) The Contractor shall have either (1) the necessary inspection and test equipment at the Contractor's plant to perform first article testing, or (2) if the inspection and test equipment is not available, a letter of commitment from a laboratory acceptable to the Government to perform the inspection and testing.

(c) When the Government elects to witness the first article testing, the Contractor shall conduct the testing between the hours of 7:00 AM and 5:00 PM, Monday thru Friday, unless a different time is agreed to by the ACO.

(d) The first article test report shall contain:

(1) The complete test data, the test method(s) used and date of test;

(2) Signature and printed name of the individual who performed the inspection;

(3) Applicable specification/CID and/or drawing numbers;

(4) Name and type of test equipment used; and

(5) All numerical values as a result of testing with each noted as to whether it passes or fails the contract test requirements.

(e) The first article shall be retained by the Contractor as the manufacturing standard and will be kept in a secure area, under control of the Quality Assurance Specialist (QAS), to protect against possible changes or alterations for the life of the contract. If the first article sample is destroyed during testing or damaged to a point making it unusable as a standard, the Contractor, upon Government request, shall provide a second sample.

(f) If the Contractor delivers the approved first article as part of the contract quantity, it shall be in the last scheduled delivery under the contract.

(End of Clause)

552.209-76 Supplemental requirements for first article approval—government testing.

As prescribed in 509.308-2, insert the following clause:

Supplemental Requirements for First Article Approval—Government Testing (May 1989)

(a) The term "Contracting Officer" as used in FAR 52.209-4, First Article Approval—Government Testing, means the Administrative Contracting Officer (ACO).

(b) The first article shall be retained by the Contractor as the manufacturing standard and will be kept in a secure area, under the control of the Quality Assurance Specialist (QAS) to protect against possible changes or alterations for the life of the contract. If the first article sample is destroyed during testing or damaged to a point making it unusable as a standard, the Contractor, upon Government request, shall provide a second sample.

(c) If the Contractor delivers the approved first article as part of the contract quantity, it shall be in the last scheduled delivery under the contract.

(End of Clause)

552.210-70 Standard references.

As prescribed in 510.011(a), insert the following clause:

Standard References (May 1989)

(a) All documents and publications (such as, but not limited to, manuals, handbooks, codes, standards and specifications) cited in this contract for the purpose of establishing requirements applicable to equipment, materials, or workmanship under this contract, shall be deemed to be incorporated herein as fully as if printed and bound with the specifications of this contract, in accordance with the following:

(1) Wherever reference is made to Standard Specifications of the Public Buildings Service, Interim Federal Specifications, Interim Amendments to Federal Specifications, Interim Federal Standards, or Interim Amendments to Federal Standards, the Contractor shall

comply with the requirements set out in the issue or edition identified in this contract.

(2) Wherever reference is made to any such document other than those specified in subparagraph (a)(1) of this clause, the Contractor shall comply with the requirements set out in the edition specified in this contract, or if not specified, the latest edition or revision thereof, as well as the latest amendment or supplement thereto, in effect on the date of the solicitation on this project, except as modified by, as otherwise provided in, or as limited to type, class or grade, by the specifications of this contract.

(b) Federal Specifications, Federal Standards, Standard Specifications of the Public Buildings Service and Public Buildings Service Standard Methods of Test may be obtained from the Business Service Center at any GSA Regional Office. Inquiries regarding "Commercial Standards," "Product Standards," and "Simplified Practice Recommendations" should be addressed to the Standard Development Service Section, National Bureau of Standards, Washington, DC 20234. Publications of Associations referred to in the specifications may be obtained directly from the Associations.

(c) Upon request the Contractor shall make available at the job site within a reasonable time, a copy of each trade manual and standard which is incorporated by reference in this contract and which governs quality and workmanship.

(End of Clause)

552.210-71 Reference to specifications in drawings.

As prescribed in 510.011(b), insert the following clause:

References to Specifications in Drawings (Apr 1986)

If military or other drawings are made a part of this contract, any reference in the drawings to Federal specifications or standards will be considered to be a reference to the date of such Federal specification or standard identified in the contract. If the date of the Federal specification or standard is not identified in the contract, the edition, including revisions thereto, in effect on the date the solicitation is issued will apply.

(End of Clause)

552.210-72 Acceptable age of supplies.

As prescribed in 510.011(c), insert the following clause:

Acceptable age of supplies (May 1989)

The supplies furnished under this contract shall not be more than_____months old, beginning with the first full month after the date of manufacture marked on the container. For the purpose of this clause, supplies shall be considered to be furnished (1) when they are offered to the Government for inspection and testing, or (2) on the date of shipment if shipment is authorized to be made without prior inspection by the Government. If the age of the supplies furnished under this contract is greater than the specified period, the Government may exercise its right to reject the supplies under paragraph (f) of FAR clause 52.246-2, Inspection of Supplies—Fixed-Price.

(End of Clause)

Alternate I (May 1989)

For items having a limited shelf-life, the sentence below should be substituted for the first sentence of the basic clause when authorized:

The supplies furnished under this contract shall not be more than_____days old, beginning with the date of manufacture (month, day, year) marked on the container.

552.210-73 Age on delivery.

As prescribed in 510.011(c), insert the following clause:

Age on Delivery (May 1989)

Included in the description of each shelf-life item is a statement regarding the "age on delivery." The age of the item(s) shall not exceed the number of months shown in the item description, counted from the first day of the month after the month of manufacture to the date of delivery to the specified delivery point(s). If the age of the supplies delivered under this contract is greater than the number of months shown, the Government may exercise its right to reject the supplies under paragraph (f) of FAR clause 52.246-2, Inspection of Supplies—Fixed Price.

(End of Clause)

552.210-74 Brand name or equal.

As prescribed in 510.011(d) insert the following clause:

Brand Name or Equal (May 1989)

(As used in this clause, the term "brand name" includes indentification of products by make and model.)

(a) Identification of items in this solicitation by a "brand name or equal" description is intended to indicate the quality and characteristics of products that will be satisfactory and is not intended to be restrictive. Offers of "equal" products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the offers and are determined by the Government to meet fully the salient characteristics requirements listed in the solicitation.

(b) Unless clearly indicated in the offer that an "equal" product is offered, the offer shall be considered as offering a referenced brand name product.

(c)(1) An offeror proposing to furnish an "equal" product shall insert the name of the product in the space provided in the solicitation or otherwise clearly identify the product. The Government's determination as to the acceptability of the "equal" product shall be based on information furnished or otherwise identified in the offer as well as other information reasonably available to the purchasing activity. Caution to Offerors. The purchasing activity is not responsible for locating or securing any information not identified in the offer and reasonably available to the purchasing activity. Accordingly, to ensure that sufficient information is available, the offeror must furnish with its offer all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the specified salient characteristics, and (ii) establish exactly what the offeror proposes to furnish. The information furnished may include specific references to information previously furnished or otherwise reasonably available to the purchasing activity.

(2) An offeror proposing to modify a product to make it conform to the requirements of the solicitation shall (i) include in its offer a clear description of the proposed modifications and (ii) clearly mark any descriptive material to show the proposed modifications.

(3) In sealed bidding, modifications proposed after bid opening to make a product conform to a brand name product referenced in the solicitation will not be considered.

(End of Clause)

552.210-75 Marking.

As prescribed in 510.011(e) insert the following clause:

Marking (Apr 1984)

(a) *General requirements.* Interior packages, if any, and exterior shipping containers shall be marked as specified elsewhere in the contract. Additional marking requirements may be specified on delivery orders issued under the contract. If not otherwise specified, interior packages and exterior shipping containers shall be marked in accordance with the following standards:

(1) *Deliveries to civilian activities.* Supplies shall be marked in accordance with Federal Standard 123, edition in effect on the date of issuance of the solicitation.

(2) *Deliveries to military activities.* Supplies shall be marked in accordance with Military Standard 129, edition in effect on the date of issuance of the solicitation.

(b) *Improperly marked material.* When Government inspection and acceptanceare at destination, and delivered supplies are not marked in accordance withcontract requirements, the Government has the right, without prior notice to the contractor, to perform the required marking, by contract or otherwise, and charge the contractor therefor at the rate specified elsewhere in this contract. This right is not exclusive, and is in addition to other rights or remedies provided for in this contract.

(End of Clause)

552.210-76 Charges for marking.

As prescribed in 510.011(f), insert a clause substantially as follows:

Charges for Marking (May 1989)

The rate provided for in paragraph (b) of 552.210-75, Marking, is $_____*_____ per man-hour or fraction thereof.

(End of Clause)

*The rate to be inserted in the above clause shall be determined and published by the Commissioner, Federal Supply Service, or a designee.

552.210-77 Preservation, packaging and packing.

As prescribed in 510.011(g), insert the following clause:

Preservation, Packaging, and Packing (Apr 1984)

Unless otherwise specified, all items shall be preserved, packaged, and packed in accordance with normal commercial practices, as defined in the applicable commodity specification. Packaging and packing shall comply with the requirements of the Uniform Freight Classification and the National Motor Freight Classification (issue in effect at time of shipment) and each shipping container of each item in a shipment shall be of uniform size and content, except for residual quantities. Where special or unusual packing is specified in an order, but not specifically provided for by the contract, such packing details must be the subject of an agreement independently arrived at between the ordering agency and the Contractor.

(End of Clause)

552.210-78 Charges for packaging and packing.

As prescribed in 510.011(h), insert a clause substantially as follows:

Charges for Packaging and Packing (May 1988)

If supplies shipped to a GSA wholesale distribution center are not packaged and packed in accordance with contract requirements, the Government has the right, without prior notice to the Contractor, to perform the required repackaging/repacking, by contract or otherwise, and charge the Contractor therefor at the rate of $_____*_____ per man-hour or fraction thereof. The Contractor will also be charged for material costs, if incurred. This right is not exclusive, and is in addition to other rights or remedies provided for in this contract.

(End of Clause)

*The rate to be inserted in the above clause shall be determined by the Commissioner, Federal Supply Service, or a designee.

552.210-79 Packing list.

As prescribed in 510.011(i), insert the following clause:

Packing List (Apr 1984)

A packing list or other suitable shipping document shall accompany each shipment and shall show the (a) name and address of consignor, (b) name and address of consignee, (c) Government purchase order number, (d) Government bill of lading number covering the shipment, if any, and (e) description of the material shipped, including item number, quantity, number of containers, and package number, if any.

(End of Clause)

552.211-70 Commercial item certification.

As prescribed in 511.070, insert the following provision:

Commercial Item Certification (May 1989)

The Offeror by signing the offer certifies that the product(s) offered meet the requirements of the Commercial Item Description (CID) and are the Offeror's commercial or commercial-type product(s) as defined below:

(a) A "commercial product" is a product such as an item, material, component, subsystem, or system, (1) regularly used for other than Government purposes and (2) sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices (see FAR 15.804-3 for explanation of terms).

(b) A "commercial-type product" is a commercial product that is modified or altered, without degrading the quality, appearance, or function of the commercial product, in compliance with Government requirements and as such is usuallysold only to the Government and not through the normal catalog or retail outlets, or (2) identified, packaged or marked differently than the commercial product normally sold to the general public.

(End of Provision)

552.212-1 Time of delivery.

(a) As prescribed in 512.104(a)(1) insert the following clause:

Time of Delivery (May 1989)

(a) The time of delivery for each item means the time required after receipt of an order (1) to make delivery to a destination in the case of delivered prices, or (2) to place shipment in transit in the case of f.o.b. origin prices.

(b) Delivery is required to be made at the point(s) specified within _____ days after receipt of order.

(End of Clause)

Alternate I (May 1989)

If it is necessary to show different delivery times for different items or groups of items, the Contracting Officer may substitute the following paragraph (b) for paragraph (b) of the basic clause.

"(b) Delivery is required to be made at the point(s) specified within the number of calendar days after receipt of order as indicated below:

Items or groups of items (special item numbers or nomenclature	Required delivery time (days ARO)

(b) As prescribed in 512.104(a)(2) insert the following clause:

Time of Delivery (May 1989)

The Government desires that delivery be made at destination within the number of calendar days after receipt of order as set forth below. Offerors are requested to insert in the "Time of Delivery (days ARO)" column in the Schedule of Items a definite number of calendar days within which delivery will be made. *If the Offeror does not insert a delivery time, the Offeror will be deemed to offer delivery in accordance with the Government's stated desired delivery time.*

Items or groups of items (special item numbers or nomenclature)	Required delivery time (days ARO)

(End of Clause)

Alternate I (May 1988)

If the Government's desired delivery time(s) is shown in a column titled "Desired Delivery Time (days ARO)" next to the column "Time of Delivery (days ARO)" in the Schedule of Items, the Contracting Officer may substitute the following as the first sentence of the basic clause and delete the column titles and blank spaces. "The Government desires that delivery be made at destination within the number of calendar days after receipt of order as set forth in the Desired Delivery Time (days ARO) column in the Schedule of Items."

Alternate II (May 1989)

If the same desired delivery time applies to all items, the Contracting Officer may substitute the following as the first sentence of the basic clause and delete the column titles and blank spaces. "The Government desires that delivery be made at destination within _____ calendar days after receipt of order."

552.212-70 Time of shipment.

As prescribed in 512.104(a)(3), insert the following clause:

Time of Shipment (May 1989)

Shipment is required within _____ calendar days after receipt of order.

(End of Clause)

Alternate I (May 1989)

If the contract will require shipment more than 45 calendar days after receipt of the order, the following paragraph should be added to the basic clause.

Each delivery order will specify that shipment is required no later than the number of days shown above. If such order also states that "Early Shipment is Precluded," the Contractor agrees to make shipment no sooner than _____ calendar days after receipt of order. Earlier shipments may result in nonacceptance of the supplies at the delivery point at the time of arrival.

(The second number to be inserted should be 15 calendar days less than the first number.)

552.212-71 Notice of shipment.

As prescribed in 512.104(a)(4), insert the following clause:

Notice of Shipment (May 1989)

If specified in an order placed under this contract, the Contractor shall, at the time each shipment is made on such order, furnish a notice of shipment to either the consignee or the ordering office or both, as specified. This requirement may be satisfied by completion and return of appropriate forms furnished by the ordering office or by the furnishing of copies of bills of lading, freight bills, or similar documents in accordance with normal commercial practice if such document clearly identifies the order number, items and quantities shipped, date of shipment, point of origin, method of shipment and routing, and the name of initial carrier.

(End of Clause)

552.212-72 Availability for inspection, testing, and shipment/delivery.

As prescribed in 512.104(d), insert the following clause:

Availability for Inspection, Testing, and Shipment/Delivery (Mar 1989)

(a) The Government requires that the supplies be made available for inspection and testing within ____*____ calendar days after receipt of [Insert "Notice of Award" or "order"], and be [Insert "shipped" or "delivered"] within ____*____ calendar days after receipt of (1) notice of approval and release by the Government inspector or (2) authorization to ship without Government inspection.

(b) Failure to make supplies available for inspection and testing or to [Insert "ship" or "deliver"] as required by this clause may result in termination of this contract for default.

(End of Clause)

Alternate I (Mar 1989).

If the contract is for stock items, the Contracting Officer shall insert "shipped" or "ship" in the basic clause, add the following paragraph (b) and redesignate paragraph (b) of the basic clause as paragraph (c).

(b) If notice of approval and release by the Government inspector or authorization to ship without Government inspection is received before ____*____ calendar days after receipt of the [Insert "Notice of Award" or "order"], receipt of such notice shall be deemed to be received on the ____*____ calendar day after receipt of [Insert "Notice of Award" or "order"]. Shipments shall not be made before the ____*____ calendar day after receipt of the [Insert "Notice of Award" or "order"] unless authorized in writing by the Contracting Officer.

*Entries are normally the same number of days specified for availability.

552.212-74 Non-compliance with contract requirements.

As prescribed in 512.104(b), insert the following clause:

Non-Compliance With Contract Requirements (Apr 1984)

In the event the Contractor, after receiving written notice from the Contracting Officer of non-compliance with any requirement of this contract, fails to initiate promptly such action as may be appropriate to comply with the specified requirement within a reasonable period of time, the Contracting Officer shall have the right to order the Contractor to stop any or all work under the contract until the Contractor has complied or has initiated such action as may be appropriate to comply within a reasonable period of time. The Contractor will not be entitled to any extension of contract time or payment for any costs incurred as a result of being ordered to stop work for such cause.

(End of Clause)

552.214-16 Minimum bid acceptance period.

As prescribed in 514.270, insert the following provision:

Minimum Bid Acceptance Period (Oct 1985) (Deviation FAR 52.214-16)

(a) "Acceptance period," as used in this provision, means the number of calendar days available to the Government for awarding a contract from the date specified in this solicitation for receipt of bids.

(b) This provision supersedes any language pertaining to the acceptance period that may appear elsewhere in this solicitation.

(c) The Government requires a minimum acceptance period of ____*____ calendar days.

(d) In the space provided immediately below, bidders may specify a longer acceptance period than the Government's minimum requirement. *(Insert any number equal to or greater than the minimum requirement stated in paragraph (c) of this provision. Failure to insert any number means the offeror accepts the minimum in paragraph (c)).*

The bidder allows the following *total* acceptance period: _____calendar days.

(e) A bid allowing less than the Government's minimum acceptance period will be rejected.

(f) The bidder agrees to execute all that it has undertaken to do, in compliance with its bid, if that bid is accepted in writing within (1) the acceptance period stated in paragraph (c) above, or (2) any longer acceptance period stated in paragraph (d) above, or (3) any extension of the offered acceptance period as may be subsequently agreed to by the bidder.

(End of provision)

*The contracting officer shall insert an appropriate number of days.

552.214-73 "All or none" offers.

As prescribed in 514.201-6(a), insert the following provision:

"All or None" Offers (Apr 1984)

(a) Unless awards in the aggregate are specifically precluded in this solicitation, the Government reserves the right to evaluate offers and make awards on an "all or none" basis as provided below.

(b) An offer submitted on an "all or none" or similar basis will be evaluated as follows: The lowest acceptable offer exclusive of the "all or none" offer will be selected with respect to each item (or group of items when the solicitation provides for aggregate awards) and the total cost of all items thus determined shall be compared with the total of the lowest acceptable "all or none" offer. Award will be made to result in the lowest total cost to the Government.

(End of Provision)

Alternate—I (Apr 1984)

For a requirements or indefinite quantity contract, the following paragraph (b) shall be substituted in the basic provision:

(b) An offer submitted on an "all or none" or similar basis will not be considered unless the offer is low on each item to which the "all or none" offer is made applicable. The term "each item" as used in this provision refers either to an item that under the terms of the solicitation may be independently awarded, or to a group of items on which an award is to be made in the aggregate.

552.214-74 Solicitation Copies.

As prescribed in 514.201-6(b), insert the following notice:

Solicitation Copies (May 1989)

To reduce costs, only one copy of this solicitation is mailed to active bidders and to addressees on our bidders' mailing list. If additional copies are required by the solicitation, you may reproduce them yourself, provided they are complete in every respect, or you may obtain them from the address specified below:

_____

_____

_____

Tel._____

(End of Notice)

552.214-75 Progressive Awards and Monthly Quantity Allocations.

As prescribed in 514.201-7(a), insert the following clause:

Progressive Awards and Monthly Quantity Allocations (May 1989)

(a) *Monthly quantity allocation.* (1) Set forth below are the Government's estimated annual and monthly requirements for each stock item covered by this solicitation. Offerors shall indicate, in the spaces provided, the monthly quantity which they are willing to furnish of any item or group of items involving the use of the same production facilities. In making monthly allocations, offerors are urged to group as many items as possible. Such groupings will make it possible for the Government to make fullest use of the production capabilities of each offeror.

(2) Offerors need not limit their monthly allocations to the Government's estimated monthly requirements, since additional unanticipated needs may occur during the period of the contract. If an offeror does not insert monthly allocation quantities, it will be deemed to offer to furnish all of the Government's requirements, even though they may exceed the stated estimated requirements.

National stock number	Estimated annual requirements	Estimated monthly requirements

BIDDERS MONTHLY QUANTITY ALLOCATIONS

Items or groups of items	Monthly allocation quantity

(b) *Progressive awards.* If the low responsive offeror's monthly quantity allocation is less than the Government's estimated requirements, the Government may make progressive awards beginning with the low responsive offeror and including each next low responsive offeror to the extent necessary to meet the estimated requirements.

(c) *Ordering procedures.* If progressive awards are made, orders will be placed first with the Contractor offering the lowest price on each item normally up to that Contractor's maximum quantity allocation and then, in the same manner, successively to other Contractors. When cumulative orders during any month, placed with a lower priced Contractor, equal or exceed 95 percent of its monthly quantity allocation, to avoid the placement of unduly small orders or the splitting of a subsequent order, the Government reserves the right to award the full quantity of the subsequent order to the next lower priced Contractor. In no case will orders be placed with any Contractor in excess of its monthly quantity allocation.

(End of Clause)

552.214-76 Bid sample requirements.

As prescribed in 514.202-4(a)(4), insert the following provision:

Bid Sample Requirements (May 1989)

This provision supplements FAR 52.214-20, which is incorporated by reference. Samples shall be from the production of the manufacturer whose products will be supplied under resultant contracts.

(a) Two bid samples are required for each of the following items in this solicitation:

(b) Two representative samples shall be submitted for each of the following items upon which a bid is submitted:

Items	Acceptable representative samples

Note: (1) Bidders ___ Are or ___ Are Not authorized to re-apply samples being retained by GSA in connection with previous solicitations and/or resultant contracts. When the block "Are" is marked by the Government, FAR 52.214-20, Alternate II, shall apply.

(2) Bidders who propose to furnish an item or group of items from more than one manufacturer or production point must submit two samples from the production of each manufacturer or production point.

(c) Samples will be evaluated to determine compliance with all characteristics listed below:

Subjective characteristics	Objective characteristics

(d) Forward samples addressed to the Sample Room indicated below. Except for samples delivered by U.S. Mail, deliveries will be accepted between the hours of _____ Mondays through Fridays, official holidays excluded. Samples must be submitted with the original copy of the attached GSA Form 434 enclosed and properly executed.

Caution: Use proper address for method of shipment selected.

Mail and parcel post	Freight or express
(Insert Address of Bid Sample Room).	(Insert Address of Bid Sample Room).

(e) Samples shall be disposed of, after they have served the Government's purpose, pursuant to a bidder's instructions indicated on GSA Form 434.

(End of Provision)

552.215-70 Examination of records by GSA.

As prescribed in 515.106-70 and 514.201-7(b), insert the following clause:

Examination of Records by GSA (Apr 1984)

The Contractor agrees that the Administrator of General Services or any duly authorized representatives shall, until the expiration of 3 years after final payment under this contract, or of the time periods for the particular records specified in Subpart 4.7 of the Federal Acquisition Regulation (48 CFR 4.7), whichever expires earlier, have access to and the right to examine any books, documents, papers, and records of the Contractor involving transactions related to this contract or compliance with any clauses thereunder. The Contractor further agrees to include in all its subcontracts hereunder a provision to the effect that the subcontractor agrees that the Administrator of General Services or any authorized representatives shall, until the expiration of 3 years after final payment under the subcontract, or of the time periods for the particular records specified in Subpart 4.7 of the Federal Acquisition Regulation (48 CFR 4.7), whichever expires earlier, have access to and the right to examine any books, documents, papers, and records of such subcontractor involving transactions related to the subcontract or compliance with any clauses thereunder. The term "subcontract" as used in this clause excludes (a) purchase orders not exceeding $10,000 and (b) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(End of Clause)

552.215-73 Preparation of offers—construction.

As prescribed in 515.407(a), insert the following provision:

Preparation of Offers—Construction (Apr 1984) (Deviation FAR 52.215-13)

(a) Offers must be (1) submitted on the forms furnished by the Government or on copies of those forms, and (2) manually signed. The person signing an offer must initial each erasure or change appearing on any offer form.

(b) The offer form may require offerors to submit offer prices for one or more items on various bases, including:

(1) Lump sum offer;

(2) Alternate prices;

(3) Units of construction; or

(4) Any combination of subparagraphs (b)(1) through (3) of this clause.

(c) If the solicitation requires an offer on all items, failure to do so will disqualify the offer. If an offer on all items is not required, offerors should insert the words "no offer" in the space provided for any item on which no price is submitted.

(d) Alternate offers will not be considered unless this solicitation authorizes their submission.

(End of Provision)

552.215-74 Contract award—negotiated—construction.

As prescribed in 515.407(b), insert the following provision:

Contract Award Negotiated—Construction (Apr 1989) (Deviation FAR 52.215-16)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government considering, cost or price and other factors specified elsewhere in this solicitation.

(b) The Government may (1) reject any or all offers if such action is in the public interest, (2) accept other than the lowest offer, and (3) waive informalities and minor irregularities in offers received.

(c) The Government may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

(d) The Government may accept any item or combination of items, unless doing so is precluded by a restrictive limitation in the solicitation or the offer.

(e) A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer, as provided in

paragraph (d) of this clause), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award. Negotiations conducted after receipt of an offer do not constitute a rejection or counteroffer by the Government.

(f) Neither financial data submitted with an offer, nor representations concerning facilities or financing, will form a part of the resulting contract.However, if the resulting contract contains a clause providing for price reduction for defective cost or pricing data, the contract price will be subject to reduction if cost or pricing data furnished is incomplete, inaccurate, or not current.

(End of Provision)

552.215-75 Data universal numbering system (DUNS).

As prescribed in 515.406-2, insert the following provision:

Data Universal Numbering System (DUNS) (Apr 1984)

(a) The offeror shall insert the DUNS number applicable to the offerors address entered on the Solicitation, Offer, and Award Form_____.

(b) If the offeror's production point (point of final assembly) is other than the location entered on the Solicitation, Offer, and Award Form, or if additional production points are involved, the offeror is requested to furnish the DUNS number applicable to each production point. Spaces for inserting these numbers are provided in the clause of this solicitation where offerors are to list production point addresses.

(c) If DUNS numbers have not been established for the addresses indicated in paragraphs (a) and (b) of these clauses, GSA will arrange for the assignment of these numbers after award of a contract, and will notify the Contractor accordingly.

(End of Provision)

552.216-71 Economic price adjustment—FSS multiple award schedule contracts

As prescribed in 516.203-4(b), insert the following clause:

Economic Price Adjustment (Oct 1985)

Price adjustments include price increases and price decreases. Adjustments will be considered as follows:

(a) Contractors shall submit price decreases anytime during the contract period in which they occur. Price decreases will be handled in accordance with the provisions of the Price Reduction Clause.

(b) Contractors may request price increases under the following conditions:

(1) Increases resulting from a reissue or other modification of the Contractor's commercial catalog/pricelist that was used as the basis for the contract award.

(2) Only three increases will be considered during the contract period.

(3) Increases are requested after the first 30 days of the contract period and prior to the last 60 days of the contract period.

(4) At least 30 days elapse between requested increases.

(c) The aggregate of the increases in any contract unit price under this clause shall not exceed _____* percent of the original contract unit price. The Government reserves the right to raise this ceiling where changes in market conditions during the contract period support an increase.

(d) The following material shall be submitted with the request for a price increase:

(1) A copy of the commercial catalog/pricelist showing the price increase and the effective date for commercial customers.

(2) Discount Schedule and Marketing Data regarding the Contractor's commercial pricing practice relating to the reissued or modified catalog/price list, or a certification that no change has occurred in the data since completion of the initial negotiation or a subsequent submission.

(3) Documentation supporting the reasonableness of the price increase.

(e) The Government reserves the right to exercise one of the following options:

(1) Accept the Contractor's price increases as requested when all conditions of (b), (c), and (d) of this clause are satisfied;

(2) Negotiate more favorable discounts from the new commercial prices when the total increase requested is not supported; or,

(3) Remove the product(s) from contract involved pursuant to the Cancellation Clause of this contract, when the increase requested is not supported.

(f) The contract modification reflecting the price adjustment shall be signed by the Government and made effective upon receipt of notification from the Contractor that the new catalog/pricelist has been mailed to the addressees previously furnished by the Contracting Officer, provided that in no event shall such price adjustment be effective prior to the effective date of the commercial price increases. The increased contract prices shall apply to delivery orders issued to the Contractor on or after the effective date of the contract modification.

(End of Clause)

* Insert the percent appropriate at the time the solicitation is issued. This percentage should normally be 10 percent, unless based on a trend established by an appropriate index such as the Producer Prices and Price Index during the most recent 6-month period indicates that a different percentage is more appro-priate. Any ceiling other than 10 percent must be approved by the contracting director.

Alternate I (Jan 1989)

The following is substituted for paragraphs (b) and (c) of the clause:

"(b) Contractors may request price increases to be effective on or after the first 12 months of the contract period providing all of the following conditions are met:

(1) Increases resulting from a reissue or other modification of the Contractor's commercial catalog/pricelist that was used as the basis for the contract award.

(2) No more than three increases will be considered during each succeeding 12-month period of the contract. (For succeeding contract periods of less than 12 months, up to three increases will be considered subject to theother conditions of this subparagraph (b)).

(3) Increases are requested before the last 60 days of the contract period.

(4) At least 30 days elapse between requested increases.

(c) In any contract period during which price increases will be considered, the aggregate of the increases during any 12-month period shall not exceed _____ * percent of the contract unit price in effect at the end of the preceding 12-month period. The Government reserves the right to raise the ceiling when market conditions during the contract period support such a change.

(End of Clause)

* Insert the percentage appropriate at the time the solicitation is issued. This percentage should be determined based on the trend established by an appropriate index such as the Producer Prices and Price Index. A ceiling of more than 10 percent must be approved by the contracting director.

552.219-1 Small business concern representation.

As prescribed in 519.304(a), insert the following provision:

Small Business Concern Representation (Aug 1986) (Deviation FAR 52.219-1)

The offeror represents and certifies as part of its offer that it_____is,_____is not a small business concern. "Small business concern," as used in this provision, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

(End of Provision)

552.219-70 Standard industrial classification code and small business size standard.

(a) As prescribed in 519.304(b), insert the following provision:

Standard Industrial Classification and Small Business Size Standard (Mar 1987)

The Standard Industrial Classification Code applicable to the supplies/services being procured is No. *_____, and the applicable small business size standard is **_____.

(End of Provision)

(b) As prescribed in 519.304(b), insert the following provision:

Standard Industrial Classification and Small Business Size Standard (Mar 1987)

The Standard Industrial Classification (SIC) Codes and the small business size standards applicable to the items being procured are as follows:

Item Nos.	SIC code	Small business size standard
	*	**

(End of Provision)

* Insert the SIC Code for the supplies or services being procured. See FAR 19.102.

** Insert (for example) "500 employees," or "$2 million annual receipts," or a similar appropriate entry. See FAR 19.102.

552.219-71 Allocation of orders—partially set-aside items.

As prescribed in 519.502-3(b)(1), insert the following clause:

Allocation of Orders—Partially Set-Aside Items (June 1986)

Where the set-aside portion of an item or group of items is awarded to a Contractor other than the one receiving the award on the corresponding non-set-aside portion, the Government will divide the requirements to be ordered between the two contractors with the objective of achieving, as nearly as possible, a 50/50 division of the total value of orders placed after the award of the set-aside portion. In no case will this division vary by more than a 60/40 division (with either the non-set-aside or set-aside Contractor receiving the larger portion) from the time of the award of the set-aside portion.

(End of clause)

552.219-72 Notice to offerors of subcontracting plan requirements.

As prescribed in 519.708 insert the following provision:

Notice to Offerors of Subcontracting Plan Requirements (Nov 1988)

Offerors, prior to being awarded any contract exceeding $500,000 ($1 million for construction), shall be required to submit an acceptable subcontracting plan (see FAR 52.219-9) or demonstrate that no subcontracting opportunities exist. This provision does not apply to small business concerns.

(End of Provision)

552.222-43 Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiyear and Option Contracts).

(a) As prescribed in 522.1006(b), insert the following clause:

Fair Labor Standards Act and Service Contract Act—Price Adjustment (Option Contract) (June 1986)

(a) The Contractor warrants that the prices in this contract do not include an allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(b) The minimum prevailing wage determination, including fringe benefits, issued under the Service Contract Act of 1965 (41 U.S.C. 351-358) by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, current at the beginning of each renewal option period, shall apply to any renewal of this contract. When a determination does not apply to the renewal option period, the current Federal minimum wage as established by section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) will apply to any renewal of this contract.

(c) The *_____ option price(s) will be adjusted upward or downward by the Contracting Officer, using the formula in paragraph (e) of this clause, when each option is exercised with the adjusted price to be effective beginning the first day of the option period. The Contracting Officer shall notify the Contractor of the adjusted price and incorporate, by contract modification, the most recent wage determination issued under the Service Contract Act of 1965.

(d) In determining the percentage of increase or decrease in labor costs, the wage determination being applied to the option period will be compared with the wage determination that applied during the initial contract period. If a wage determination is not issued for the initial contract period, but is issued for the option period, or if a wage determination is issued for the initial contract period, but not for the option period, the adjustment will be based on the increase or decrease in wages and fringe benefits that the Contractor must pay his employees under the Fair Labor Standards Act versus the wage determination issued under the Service Contract Act.

(e) **_____ percent of the *_____ option price(s) will be adjusted upward or downward based on the percentage increase or decrease in the minimum hourly wages and fringe benefits to be paid ***_____ under this contract. The *_____ option price(s) will be adjusted using the formula contained herein, provided that the *_____ contract price(s) for the first option period as adjusted does not exceed the *_____ prices(s) for the initial contract period by more than ****_____ percent. If the *_____ prices after adjustment exceed the initial contract period by more than ****_____ percent, the ceiling price (the *_____ price for the initial period increased by ****_____ percent) will be the contract price for the first option period. Similarly, the contract price(s) for the second option period as adjusted may not exceed the *_____ price(s) for the first option period by more than ****_____ percent. If the *_____ price(s) after adjustment exceeds the contract price for the first option period by more than ****_____ percent, the ceiling price(s) (the *_____ prices for the first option period increased by ****_____ percent) will be the contract price(s) for the second option period.

(End of Clause)

*The contracting officer should insert a description of the unit price, e.g., monthly, hourly, etc.

**The contracting officer should insert the percentage of the option price(s) to be adjusted. The percentage to be used is based on the portion of the total price that represents the labor and labor burden cost.

***The contracting officer should insert the class of service employee listed in the wage determination that will perform most of the work required by the contract, e.g., janitor, guard, mechanic, etc.

****The contracting officer should insert a percentage that reflects past increases of wage rates in the locality where services will be performed. For example, if increases over the past 3 years have been 5 percent, 7 percent, and 8 percent, the contracting officer should establish a ceiling of 10 percent. The ceiling is intended to force contractors to bargain with local unions to keep wage increases reasonable from year to year.

Alternate—I (June 1986)

To adjust the option price for material as well as labor, the basic clause may be modified by deleting paragraph (e) and substituting the following as paragraph (e).

"(e) _____* percent of the _____** option price(s) will be adjusted upward or downward based on the percentage increase or decrease in the minimum hourly wages and fringe benefits to be paid _____*** under this contract. _____* percent of the _____** option price(s) will be adjusted upward or downward based upon the percentage increase or decrease in material cost reflected on the_____*** published by the U.S. Department of Labor, Bureau of Labor Statistics. The material cost price adjustment for the first option period will be based on the increase or decrease in wholesale prices for _____**** period beginning with the month in which the offers were submitted for the requirement. The price adjustment for the second option period will be based upon the increase or decrease in the wholesale prices for the _____**** period beginning with the month in which the offers were submitted for the requirement. The _____** option price(s) will be adjusted using the formula contained herein, provided that the total _____** contract price(s) for the first option period as adjusted does not exceed the _____** price(s) for the initial contract period by more than _____***** percent. If the _____** price(s) after adjustment exceed the initial period by more than _____***** percent, the ceiling price(s) (the _____** price(s) for the initial period increased by _____***** percent) will be the contract price(s) for the first option period. Similarly, the contract price(s) for the second option period as adjusted may not exceed the _____** price(s) for the first option period by more than _____***** percent. If the _____** price(s) after adjustment exceeds the contract price(s) for the first option period by more than _____***** percent, the ceiling price(s) (the _____** price for the first option period increased by _____***** percent) will be the contract price(s) for the second option period."

(End of Clause)

*The contracting officer should insert the percentage of the option price(s) to be adjusted. The percentages to be used are based on the portion of the total price that represents the labor cost (first blank) and the material costs (second blank).

**The contracting officer should insert a description of the unit price, e.g., monthly, hourly, etc.

***The contracting officer should insert the class of service employee listed in the wage determination in the first blank and the index that will be used to compute the adjustment for material cost increases, e.g., Wholesale Commodity Prices for General Purpose Machinery and Equipment, code 114, in the second blank.

****The contracting officer should insert the period of time to be used for computing the adjustment, e.g., 1 year, etc. The first blank will normally read "1 year," the second "2 years."

*****The contracting officer should insert a percentage that reflects the past increases for wages and materials.

(b) As prescribed in 522.1006(b), insert the following clause:

Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiyear Contract) (June 1986)

(a) The Contractor warrants that the prices in this contract do not include an allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(b) The _____* price(s) will be adjusted upward or downward before the end of the first year of the contract period, with the adjusted price to be effective beginning the first day of the thirteenth month. The _____* prices(s) will be adjusted again before the end of the second year of the contract period with the adjusted price(s) to be effective beginning the first day of the twenty-fifth month.

(c) The Contracting Officer shall notify the Contractor of the adjusted price(s) and incorporate, by contract modification, the most recent wage determination issued under the Service Contract Act of 1965 by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor (DOL). If a wage determination is not issued by the DOL, the Federal minimum wage established by Section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) applies to this contract.

(d) In determining the percentage of the increase or decrease in labor cost, the wage determination being applied to the second or third year will be compared with the wage determination that applied to the first year. If a wage determination is not issued for the initial 12-month period but is issued for the second or third year period, or if a wage determination is issued for the initial contract period but not for the second or third period, the adjustment will be based on the increase or decrease in wages and fringe benefits that the contractor must pay the employees under the Fair Labor Standards Act versus the wage determination issued under the Service Contract Act.

(e) _____** percent of the _____* price(s) will be adjusted upward or downward based on the percentage increase or decrease in the minimum hourly wages and fringe benefits to be paid _____*** in the locality where the contract work is to be performed as determined by the Administrator, U.S. Department of Labor, and stated on the Register of Wage Determinations and fringe benefits issued under the Service Contract Act of 1965 provided that the _____* contract price(s) is not escalated more than _____**** percent per year.

(End of Clause)

*The contracting officer should insert a description of the unit price, e.g., monthly, hourly, etc.

**The contracting officer should insert the percentage of the contract price(s) to be adjusted. The percentage to be used is based on the portion of the total price that represents the labor and labor burden costs.

***The contracting officer should insert the class of service employee listed in the wage determination that is expected to perform most of the work required by the contract, e.g., elevator mechanic, maintenance mechanic, etc.

****The contracting officer should insert a percentage that reflects the past increases of wage rates in the locality where services will be performed. For example, if increases over the past 3 years have been 5 percent, 7 percent, and 8 percent, the contracting officer should establish a ceiling of 10 percent. The ceiling is intended to force contractors to bargain with local unions to keep wage increases reasonable from year to year.

Alternate—I (June 1986)

To provide for adjusting the contract price for materials as well as labor, the basic clause may be modified by deleting paragraph (e) and substituting the following paragraph (e).

"(e) _____* percent of the _____** price(s) will be adjusted upward or downward based on the percentage increase or decrease in the minimum hourly wages and fringe benefits to be paid _____*** under this contract and _____* percent of the _____** price will be adjusted upward or downward based upon the percentage increase or decrease in material cost reflected on the _____*** published by the U.S. Department of Labor, Bureau of Labor Statistics, provided that the total _____** contract price(s) is not escalated more than _____***** percent per year. The first material price adjustment will be based on the increase or decrease in wholesale price for the _____**** period beginning with the month in which the offers were submitted for the requirement. The second material price adjustment will be based upon the increase or decrease in the wholesale prices for the _____**** period beginning with the month in which offers were submitted for the requirement."

*The contracting officer should insert the percentage of the contract price(s) to be adjusted. The percentages to be used are based on the portion of the total price that represents the labor costs (first blank) and the material costs (second blank).

**The contracting officer should insert a description of the unit price, e.g., monthly, hourly, etc.

***The contracting officer should insert the class of service employee listed in the wage determination in the first blank and the index that will be used to compute the adjustment for material cost increases, e.g., Wholesale Commodity Prices for General Purpose Machinery and Equipment, code 114, in the second blank.

****The contracting officer should insert the period of time to be used for computing the adjustment, e.g., 1 year, etc. The first blank will normally read "1 year" the second "2 years."

*****The contracting officer should insert a percentage that reflects past increases for wages and materials.

552.222-82 Preface for labor standards—state or political subdivision contracts.

As prescribed in 522.407 insert the following clause:

Preface for Labor Standards—State or Political Subdivision Contracts (Apr 1984)

The Contractor shall comply with the requirements of the Contract Work Hours Safety Standards Act and shall insert the following clauses in all subcontracts under this contract with private persons or firms.

(End of Clause)

552.223-70 Hazardous substances.

As prescribed in 523.303, insert the following clause:

Hazardous Substances (May 1989)

(a) If the packaged items to be delivered under this contract are of a hazardous substance and ordinarily are intended or considered to be for use as a household item, this contract is subject to the Federal Hazardous Substances Act, as amended (15 U.S.C. 1261–1276), implementing regulations thereof (16 CFR Chapter II), and Federal Standard No. 123, Marking for Shipment (Civil Agencies), issue in effect on the date of this solicitation.

(b) The packaged items to be delivered under this contract are subject to the preparation of shipping documents, the preparation of items for transportation, shipping container construction, package making, package labeling, when required, shipper's certification of compliance, and transport vehicle placarding in accordance with Parts 171 through 178 of 49 CFR and the Hazardous Materials Transportation Act.

(c) The minimum packaging acceptable for packaging Department of Transportation regulated hazardous materials shall be those in 49 CFR 173.

(End of Clause)

552.223-71 Hazardous material information.

As prescribed in 523.370, insert the following provision:

Hazardous Material Information (Apr 1984)

Offeror shall indicate for each national stock number (NSN) the following information:

NSN	DOT shipping name	DOT hazard class	DOT label required
			Yes [ ] No [ ]
			Yes [ ] No [ ]
			Yes [ ] No [ ]

(End of Provision)

552.225-70 Buy American Act—hand or measuring tools or stainless steel flatware.

As prescribed in 525.105-70(d), insert the following provision:

Buy American Act—Hand or Measuring Tools or Stainless Steel Flatware (May 1989)

Offers of foreign end products will be evaluated in accordance with GSAR 525.105–70(c) (48 CFR 525.105–70(c)). Offerors that intend to supply foreign end products must specify below or on an attachment to this offer the amount of duty (i) applicable if a duty-free entry certificate was not issued (for Canadian end products only) or (ii) included in each offered price (for all other offers of foreign end products). If no duty is specified, the differential in GSAR 525.105–70(c)(2)(i) will be applied to the offered price.

Item No.	Unit	Amount of duty (in dollars and cents)

(End of Provision)

552.225–71 Notice of procurement restriction—hand or measuring tools or stainless steel flatware.

As prescribed in 525.105–71(c), insert the following clause:

Notice of Procurement Restriction—Hand or Measuring Tools or Stainless Steel Flatware (May 1989)

(a) Awards under this solicitation will only be made to offerors that will furnish hand or measuring tools or stainless steel flatware that are domestic end products. Pursuant to the requirements of the current Department of Defense Appropriations Act, GSA has determined, in accordance with section 6–104.4 of the Armed Services Procurement Regulation (6/15/70) (32 CFR 6–104.4), that it is in the national interest to reject foreign products.

As used in this clause, a "domestic end product" is—

(1) Any hand or measuring tool, except for an electric or air-motor driven hand tool, or stainless steel flatware, wholly produced or manufactured, including all components, in the United States or its possessions; or

(2) Any electric or air-motor driven hand tool if the cost of its components produced or manufactured in the United States exceeds 75 percent of the cost of all its components.

(b) Tool kits or sets, being procured under this solicitation, will not be considered domestic end products if any individual tool classified in FSC Group 51 or 52 and included in a tool kit or set is not a domestic end product as defined in paragraph (a) of this clause. The restrictions of this clause do not apply to individual hand or measuring tools that are contained in the tool kit or set but are not classified in FSC Group 51 or 52.

(End of Clause)

552.225–72 Eligible products from nondesignated countries—waiver.

As prescribed in 525.407, insert the following clause:

Eligible Products From Nondesignated Countries—Waiver (May 1989)

(a) In accordance with the Trade Agreements Act of 1979 and 48 CFR 25.402(b), no eligible product that originates in a nondesignated country may be purchased by a Federal agency. However, this restriction may be waived before award when it is determined to be in the national interest. Accordingly, offers to furnish products originating in a nondesignated country may be submitted in response to this solicitation and will be considered for award if a waiver is obtained from the U.S. Trade Representative or a designee (19 U.S.C. 2512) on the basis that:

(1) No responsive bid or technically acceptable offer from a responsible offeror is received offering U.S. or designated country end products (48 CFR 52.225–8 and 52.225–9); or

(2) Responsible offerors do not offer a sufficient quantity to meet the Government's requirements.

(b) The determination to seek a waiver is at the sole discretion of the acquiring activity, and the granting of such waiver will be at the sole discretion of the U.S. Trade Representative or designee. (48 CFR 525.402).

(End of Clause)

552.225–75 Buy American Act notice—construction materials.

As prescribed in 525.205, insert the following provision:

Buy American Act Notice—Construction Materials (May 1989)

(a) The Buy American Act (41 U.S.C. 10) generally requires that only domestic construction material be used in performing this contract (See the clause entitled "Buy American Act—Construction Materials"). This requirement does not apply to the excepted construction material or components listed below:

(List applicable excepted materials or indicate "none.")

(b) Offers based on the use of other foreign construction material may be acceptable for award if the Government determines that—

(1) Comparable domestic construction material in sufficient and reasonably available quantities, of a satisfactory quality, is unavailable; or

(2) Use of comparable domestic construction material is impracticable or would unreasonably increase the cost of this contract.

(c) Any offer based on the use of one or more other foreign construction materials shall include current data, based on a reasonable canvass of suppliers, in the format listed in paragraph (h) of this clause, clearly demonstrating that the cost of each foreign construction material, plus 6 percent, is less than the cost of each comparable domestic construction material. The cost of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate may be issued).

(d) For evaluation purposes, the Government will add to the offer, 6 percent of the cost of foreign construction material that qualifies for acceptance under paragraph (c) of this clause.

(e) When offering foreign construction material, offerors may also offer, at stated prices, any available comparable domestic construction material to avoid the possibility that failure of a foreign construction material to be acceptable, under (c) of this clause, will cause rejection of the entire offer.

(f) If any foreign construction material does not qualify for acceptance under paragraph (c) of this clause, the Government will evaluate the offer on the basis of the stated price for comparable domestic construction material, and the Offeror shall be required to furnish such domestic construction material at that price. If the Offeror does not state a price for a comparable domestic construction material, and the foreign construction material does not qualify for acceptance under paragraph (c) of this clause, the offer will be rejected in sealed bid procurements and may be rejected in negotiated procurements.

(g) If the foregoing procedure results in a tie between a foreign offer as evaluated and a domestic offer, award shall be made on the domestic offer. In such case, offers proposing to use any foreign construction material will be considered to be foreign offers.

(h) For evaluation purposes under paragraph (c) of this clause, the following information and any applicable supporting data based on the canvass of suppliers shall be included in the offer for the use of one or more foreign construction materials:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS COST COMPARISON

Construction material description	Unit of measure	Quantity	Cost (dollars)[1]
Item 1:			
Foreign construction material			$
Comparable domestic construction material			
Item 2:			
Foreign construction material			
Comparable domestic construction material			

[1] Include all delivery costs to the construction site and any applicable duty.

(End of Provision)

552.227–70 Government Rights (Unlimited).

As prescribed in 527.409(a), insert the following clause:

Government rights (unlimited) (May 1989)

The Government shall have unlimited rights in all drawings, designs, specifications, notes and other works developed in the performance of this contract, including the right to use same on any other Government

design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under design patent or copyright laws. The Contractor for a period of three years after completion of the project agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of Clause)

552.227-71 Drawings and other data to become property of Government.

As prescribed in 527.409(b), substitute the following clause:

Drawings and Other Data to Become Property of Government (May 1989)

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Government and may be used on any other design or construction without additional compensation to the Contractor. The Government shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under section 201(b) of Title 17, United States Code. With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights nor establish any claim under the design patent or copyright laws. The Contractor for a period of three years after completion of the project agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of works beyond such period.

(End of Clause)

552.228-70 Bid Guarantee and Bonds.

As prescribed in 528.101-3(a) and 528.102-3, insert a clause substantially the same as follows:

Bid Guarantee and Bonds (May 1989)

A bid guarantee is required as provided in Standard Form 1442, Solicitation, Offer and Award (Construction, Alteration, or Repair).

(a) If the contract price is more than $25,000, the Contractor shall furnish a performance bond in a penal amount of 100 percent of the contract price, and payment bond in a penal amount as follows:

(1) Fifty percent of the contract price if the contract price is more than $25,000 but not more than $1,000,000; or

(2) Forty percent of the contract price if the contract price is more than $1,000,000 but not more than $5,000,000; if the contract price is over $5,000,000, then forty percent of the contract price or $2,500,000, whichever is less.

(b) If offers on one or more alternate and/or unit price offers were accepted in awarding the contract, contract price as used above shall mean the aggregate of the lump sum amount plus the product of each unit price accepted multiplied by the applicable number of units specified in the bid form, plus or minus such alternate offers as were accepted.

(c) Performance and payment bonds shall be submitted within the time specified on the Standard Form 1442, Solicitation, Offer, and Award, for this contract.

(d) The Contractor shall not lose the right to receive any payment due or to become due under the contract unless and until the surety has made payment in settlement of claims by suppliers of labor or material in accordance with the requirements of the surety's undertaking under the payment or performance bond and has notified the Contracting Officer of the claims and amount so paid.

(End of Clause)

552.228-71 Bid guarantee.

As prescribed in 528.101-3(b), insert a clause substantially as follows:

Bid Guarantee (May 1989)

If the contract price is more than $25,000, offerors shall furnish a bid guarantee in a penal amount of _____ percent of the offer price for the term of the contract (excluding options to extend the term of the contract, if any) or $3,000,000, whichever is less.

For bid guarantee purposes the amount of the offer shall be deemed to be the aggregate of each unit price bid multiplied by the applicable number of units shown on the offer form or in the method of award formula.

(End of Clause)

552.228-72 Performance bond.

As prescribed in 528.103-2(d), insert a clause substantially as follows:

Performance Bond (Apr 1985)

(a) The offeror to whom the award is made shall furnish a performance bond for the protection of the Government in an amount equal to _____ percent of the contract price for the term of the contract (excluding options to extend the term of the contract, if any) within 15 calendar days after receiving the written award (or acceptance of offer) and bonding forms. The period of time for furnishing the performance bond may be extended for 10 calendar days, if fully justified in the opinion of the Contracting Officer, and if the request for the extension is received or confirmed in writing within the original 15 calendar day period.

(b) The performance bond shall be a firm commitment, supported by corporate sureties where names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, or in accordance with Treasury Department regulations, certain bonds or notes of the United States.

552.228-73 Performance and payment bonds.

As prescribed in 528.103-3(c), insert a clause substantially as follows:

Performance and Payment Bonds (Apr 1985)

(a) The offeror to whom the award is made shall furnish a performance bond for the protection of the Government in an amount equal to _____ percent of the contract price and a payment bond in an amount equal to _____ percent of the contract price. As used herein the term "contract price" means the total amount of the contract for the term of the contract (excluding options to extend the term of the contract, if any). Bonds shall be provided within 15 calendar days after receiving the written award (or acceptance of offer) and bonding forms. The period of time for furnishing bonds may be extended for 10 calendar days, if fully justified in the opinion of the Contracting Officer, and if the request for the extension is received or confirmed in writing within the original 15 calendar day period.

(b) The performance and payment bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States.

552.228-74 Pledge of assets.

As prescribed in 528.202-71(a), insert a clause substantially the same as follows:

Pledges of Assets (May 1989)

(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee, a performance bond or a payment bond (1) Pledges of Assets, and (2) Standard Form 28, Affidavit of Individual Surety.

(b) Pledges of assets from each person acting as an individual surety, in the amount of the penal sum of the bond, shall be in the form of:

(1) Evidence of an escrow account containing commercial and/or Government securities; and/or

(2) Evidence that a recorded Covenant not to Convey or Encumber Real Estate has been recorded in the appropriate land records office of the jurisdiction where the property is located. (At the Contracting Officer's discretion the Offeror may be required to provide evidence of clear title by the conduct of a title search on each piece of pledged property.)

(End of Clause)

552.228-75 Workmen's compensation laws.

As prescribed in 528.310(a), insert the following clause:

Workmen's Compensation Laws (Apr 1984)

The Act of June 25, 1936, 49 Stat. 1938 (40 U.S.C. 290) authorizes the constituted authority of the several States to apply their workmen's compensation laws to all lands and premises owned or held by the United States.

(End of Clause)

552.229-70 Federal, state, and local taxes.

As prescribed in 529.401-70, insert the following clause:

Federal, State, and Local Taxes (Apr 1984)

The contract price includes all applicable Federal, State, and local taxes. No adjustment will be made to cover taxes

which may subsequently be imposed on this transaction or changes in the rates of currently applicable taxes. However, the Government will, upon the request of the Contractor, furnish evidence appropriate to establish exemption from any tax from which the Government is exempt and which was not included in the contract price.

(End of Clause)

552.229-72 Federal excise tax—DC Government.

As prescribed in 529.401-72, insert the following clause:

Federal Excise Tax—DC Government (Apr 1984)

The District of Columbia is exempt from and will not pay Federal excise taxes. Contractors will bill shipments to the District of Columbia at prices exclusive of such excise tax and show the amount of such tax on the invoice. The Internal Revenue Tax Exempt Certificate Number will be shown on all District of Columbia Government purchase orders.

(End of Clause)

552.232-8 Discounts for prompt payments.

As prescribed in 532.111(a), insert the following clause:

Discounts for Prompt Payment (Apr 1989) (Deviation FAR 52.232-8)

(a) Discounts for early payment (hereinafter referred to as "discounts" or "the discount") will be considered in evaluating the relationship of the offeror's concessions to the Government vis-a-vis the offeror's concessions to its commercial customers, but only to the extent indicated in this clause.

(b) Discounts will not be considered to determine the low offeror in the situation described in the "Offers on Identical Products" provision of this solicitation.

(c) Uneconomical discounts will not be considered as meeting the criteria for award established by the Government. In this connection, a discount will be considered uneconomical if the annualized rate of return for earning the discount is lower than the "value of funds" rate established by the Department of the Treasury and published quarterly in the **Federal Register**. The "value of funds" rate applied will be the rate in effect on the date specified for the receipt of offers.

(d) Agencies required to use the resultant schedule will not apply the discount in determining the lowest delivered price pursuant to the FPMR, 41 CFR 101-26.408, if the agency determines that payment will probably not be made within the discount period offered. The same is true if the discount is considered uneconomical at the time of placement of the order.

(e) Discounts for early payment may be offered either in the original offer or on individual invoices submitted under the resulting contract. Discounts offered will be taken by the Government if payment is made within the discount period specified.

(f) Discounts that are included in offers become a part of the resulting contracts and are binding on the contractor for all orders placed under the contract. Discounts offered only on individual invoices will be binding on the Contractor only for the particular invoice on which the discount is offered.

(g) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

(End of Clause)

552.232-23 Assignment of claims.

As prescribed in 532.806, insert the following clause:

Assignment of Claims (May 1989)

Because this is a requirements or indefinite quantity contract under which more than one agency may place orders, paragraph (a) of the Assignment of Claims clause (FAR 52.232-23) is inapplicable and the following is substituted therefor:

In order to prevent confusion and delay in making payment, no claim(s) for amounts due or to become due under this contract, shall be assigned by the Contractor; but it shall be permissible for the Contractor to assign separately to a bank, trust company, or other financial institution, including any Federal lending agency, under the provisions of the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15 (hereinafter referred to as "the Act"), all amounts due or to become due under any delivery order amounting to $1,000 or more issued by any Government agency under this contract. Any such assignment shall be effective only if and when the assignee files written notice of the assignment together with a true copy of the instrument of assignment with the contracting officer issuing the delivery order and the finance office designated in the delivery order to make payment. Unless otherwise stated in the delivery order, payments to an assignee of any amounts due or to become due under any delivery order assigned may, to the extent specified in the Act, be subject to reduction or set-off.

(End of Clause)

552.232-70 Payments by electronic funds transfer.

As prescribed in 532.908(a), insert the following clause:

Payments by Electronic Funds Transfer (Apr 1989)

The submission of a designation of financial institution for receipt of electronic funds transfer payments in the "Electronic Funds Transfer Payment Methods" clause (FAR 52.232-28) shall be as follows. The Contractor shall submit its designation of a financial institution for receipt of electronic funds transfer payments with each invoice requesting payment of $25,000 or more (exclusive of any discount for prompt payment). The information for electronic funds transfer is not required by the Department of Defense, the United States Postal Service, or the Tennessee Valley Authority. Information required for electronic funds transfer payments shall be furnished to the Veterans Administration in accordance with instructions provided by that agency. Other agencies and departments thereof may waive the requirement for designation of a financial institution for receipt of electronic funds transfer payments and for submission of information required to make such payments by including a notice on delivery orders or otherwise notifying the Contractor.

(End of Clause)

552.232-71 Prompt payment.

As prescribed in 532.908(b), insert the following clause:

Prompt Payment (Apr 1989)

The Government will make payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. All days referred to in this clause are calendar days, unless othewise specified.

(a) *Payment due date*—(1) *Rental payments.* Rent shall be paid monthly in arrears and will be due on the first workday of each month, and only as provided for by the lease.

(i) When the date for commencement of rent falls on the 15th day of the month or earlier, the initial monthly rental payment under this contract shall become due on the first workday of the month following the month in which the commencement of the rent is effective.

(ii) When the date for commencement of rent falls after the 15th day of the month, the initial monthly rental payment under this contract shall become due on the first workday of the second month following the month in which the commencement of the rent is effective.

(2) *Other payments.* The due date for making payments other than rent shall be the later of the following two events:

(i) The 30th day after the designated billing office has received a proper invoice from the Contractor.

(ii) The 30th day after Government acceptance of the work or service. However, if the designated billing office fails to annotate the invoice with the actual date of receipt, the invoice payment due date shall be deemed to be the 30th day after the Contractor's invoice is dated, provided a proper invoice is received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(b) *Invoice and inspection requirements for payments other than rent.* (1) The Contractor shall prepare and submit an invoice to the designated billing office after completion of the work. A proper invoice shall include the following items:

(i) Name and address of the Contractor.

(ii) Invoice date.

(iii) Lease number.

(iv) Government's order number or other authorization.

(v) Description, price, and quantity of work or services delivered.

(vi) Name and address of Contractor official to whom payment is to be sent (must

be the same as that in the remittance address in the lease or the order).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.

(2) The Government will inspect and determine the acceptability of the work performed or services delivered within 7 days after the receipt of a proper invoice or notification of completion of the work or services unless a different period is specified at the time the order is placed. If actual acceptance occurs later, for the purpose of determining the payment due date and calculation of interest, acceptance will be deemed to occur on the last day of the 7-day inspection period. If the work or service is rejected for failure to conform to the technical requirements of the contract, the 7 days will be counted beginning with receipt of a new invoice or notification. In either case, the Contractor is not entitled to any payment or interest unless actual acceptance by the Government occurs.

(c) *Interest penalty.* (1) An interest penalty shall be paid automatically by the Government, without request from the Contractor, if payment is not made by the due date.

(2) The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the **Federal Register** semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date.

(3) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233–1, Disputes, or for more than 1 year. Interest penalties of less than $1.00 need not be paid.

(4) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233–1, Disputes.

(End of Clause)

Alternate I (Apr 1989)

If Alternate I is used, subparagraph (a)(1) of the basic clause should be designated as paragraph (a) and subparagraph (a)(2) and paragraph (b) should be deleted. Paragraph (c) of the basic clause should be redesignated (b).

552.232–72 Invoice requirements.

As prescribed in 532.111(b), insert the following clause:

Invoice Requirements (Apr 1989)

(a) Invoices shall be submitted in an original only, unless otherwise specified, to the designated billing office specified in this contract or purchase/delivery order.

(b) Invoices must include the Accounting Control Transaction (ACT) number provided below or on the purchase/delivery order.

ACT Number (*Contracting Officer Insert Number*)

(c) In addition to the requirements for a proper invoice specified in the Prompt Payment clause of this contract or purchase/delivery order, the following information or documentation must be submitted with each invoice:

(Contracting Officer *List Additional Requirements*)

(End of Clause)

552.232–73 Electronic funds transfer payment.

As prescribed in 532.908(c), insert the following clause:

Electronic Funds Transfer Payment (Apr 1989)

Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Fedline Payment System (FEDLINE) or the Automated Clearing House (ACH), at the option of the Government. Not later than 14 days after receipt of a notice of award or request from the Contracting Officer or other Government official, the Contractor shall provide information necessary for check payment and/or designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this information to the Contracting Officer or other Government official, as directed.

(a) For payment by check, the Contractor shall provide the full name (where practicable), title, phone number, and complete mailing address of the responsible official(s) to whom check payments are to be sent (must be the same as the remittance address in the lease or the order).

(b) For payment through FEDLINE, the Contractor shall provide the following information:

(1) Name, address, and telegraphic abbreviation of the financial institution receiving payment (must be the same as the remittance address in the lease or the order).

(2) The American Bankers Association 9-digit identifying number for wire transfers of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(3) Payee's account number at the financial institution where funds are to be transferred.

(4) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains wire transfer activity. Provide the telegraphic abbreviation and American Bankers Association identifying number for the correspondent institution.

(c) For payment through ACH, the Contractor shall provide the following information:

(1) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for FEDLINE).

(2) Number of account to which funds are to be deposited.

(3) Type of depositor account ("C" for checking, "S" for savings).

(4) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," SF 3881, must be completed before payment can be processed.

(d) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such Change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(e) The document furnishing the information required by this paragraph must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the Contractor's name and contract number.

(f) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amount otherwise properly due.

(End of Clause)

552.232–74 Progress payments.

As prescribed in 532.502–3, insert the following provision:

Progress Payments (May 1989)

If an offeror desires progress payments, a written request must accompany the offer and the appropriate box below must be checked:

[ ] Progress payments are desired, but offer is not conditioned on receiving progress payments.

[ ] Offer is conditioned on receiving progress payments.

Note: 1. If an offer is conditioned on the availability of progress payments and the offeror is found ineligible for such payments, the offer will be rejected.

2. Submission of an offer without requesting progress payments does not preclude the offeror from later requesting progress payments in accordance with applicable regulations, prior to or after award of the contract.

(End of Provision)

552.232–77 Availability of funds.

As prescribed in 532.705–1, insert the following clause:

Availability of Funds (July 1984)

The authorization of performance of work under this contract during the initial contract period and any option or extension period(s) is contingent upon the appropriation of funds to procure this service. If the contract is awarded, extended, or option(s) exercised, the Government's obligation beyond the end of the fiscal year (September 30), in which the award or extension is made or option(s) exercised, is contingent upon the availability of funds from which payment for the contract

services can be made. No legal liability on the part of the Government for payment of any money beyond the end of each fiscal year (September 30) shall arise unless or until funds are made available to the Contracting Officer for this procurement and written notice of such availability is given to the contractor.

(End of Clause)

552.232-78 Adjusting payments.

As prescribed in 532.111(c), insert the following clause:

Adjusting Payments (May 1989)

(a) Under the Inspection of Services clause of this contract, payments may be adjusted if any services do not conform with contract requirements. The Contracting Officer or a designated representative will inform the Contractor, in writing, of the type and dollar amount of proposed deductions by the 10th workday of the month following the performance period for which the deductions are to be made.

(b) The Contractor may, within 10 working days of receipt of the notification of the proposed deductions, present to the Contracting Officer specific reasons why any or all of the proposed deductions are not justified. Reasons must be solidly based and must provide specific facts that justify reconsideration and/or adjustment of the amount to be deducted. Failure to respond within the 10-day period will be interpreted to mean that the Contractor accepts the deductions proposed.

(c) All or a portion of the final payment may be delayed or withheld until the Contracting Officer makes a final decision on the proposed deduction. If the Contracting Officer determines that any or all of the proposed deductions are warranted, the Contracting Officer shall so notify the Contractor, and adjust subsequent payments under the contract accordingly.

(End of Clause)

552.232-79 Final payment.

As prescribed in 532.111(d), insert the following clause:

Final Payment (Apr 1986)

Before final payment is made, the Contractor shall furnish the Contracting Officer with a release of all claims against the Government relating to this contract, other than claims in stated amounts that are specifically excepted by the Contractor from the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. 3727, 41 U.S.C. 15), a release may also be required of the assignee.

(End of Clause)

552.233-70 Disputes (utility contract).

As prescribed in 533.214, insert the following clause:

Disputes (Utility Contract) (Apr 1984)

The requirements of the Disputes clause at FAR 52.233-1 are supplemented to provide that matters involving the interpretation of retail rates, rate schedules, tariffs, riders, and tariff related terms provided under this contract and conditions of service are subject to the jurisdiction and regulation of the utility rate commission having jurisdiction.

(End of Clause)

552.236-70 Definitions.

As prescribed in 536.570-1, insert the following clause:

Definitions (Apr 1984)

The terms "Administration" and "Service" as used in this contract shall mean the General Services Administration (GSA) and the Public Buildings Service (PBS), respectively.

(End of Clause)

552.236-71 Authorities and limitations.

As prescribed in 536.570-2, insert the following clause:

Authorities and Limitations (Apr 1984)

(a) All work shall be performed under the general direction of the Contracting Officer, who alone shall have the power to bind the Government and to exercise the rights, responsibilities, authorities and functions vested in him by the contract documents, except that he shall have the right to designate authorized representatives to act for him. Wherever any provision in this contract specifies an individual (such as, but not limited to, Construction Engineer, Resident Engineer, Inspector or Custodian) or organization, whether Governmental or private, to perform any act on behalf of or in the interests of the Government, that individual or organization shall be deemed to be the Contracting Officer's authorized representative under this contract but only to the extent so specified. The Contracting Officer may, at any time during the performance of this contract, vest in any such authorized representatives additional power and authority to act for him or designate additional representatives, specifying the extent of their authority to act for him; a copy of each document vesting additional authority in an authorized representative or designating an additional authorized representative shall be furnished to the Contractor.

(b) The Contractor shall perform the contract in accordance with any order (including but not limited to instruction, direction, interpretation, or determination) issued by an authorized representative in accordance with his authority to act for the Contracting Officer; but the Contractor assumes all the risk and consequences of performing the contract in accordance with any order (including but not limited to instruction, direction, interpretation, or determination) of anyone not authorized to issue such order.

(End of Clause)

552.236-72 Specialist.

As prescribed in 536.570-3, insert the following clause:

Specialist (Apr 1984)

The term "Specialist," as used in the contract specification, shall mean an individual or firm of established reputation (or, if newly organized, whose personnel have previously established a reputation in the same field), which is regularly engaged in, and which maintains a regular force of workmen skilled in either (as applicable) manufacturing or fabricating items required by the contract, installing items required by the contract, or otherwise performing work required by the contract. Where the contract specification requires installation by a specialist, that term shall also be deemed to mean either the manufacturer of the item, an individual or firm licensed by the manufacturer, or an individual or firm who will perform the work under the manufacturer's direct supervision.

(End of Clause)

552.236-73 Basis of award—construction contract.

As prescribed in 536.570-4, insert the following provision or the appropriate Alternate:

Basis of Award—Construction Contract (Apr 1985)

(a) The low bidder for purposes of award is the responsible bidder offering the lowest price for the base bid (consisting of the lump sum bid and any associated unit price bids extended by the applicable number of units shown on the bid form). See Standard Form 1442, Solicitation, Offer, and Award and the provision entitled "Contract Award—Sealed Bidding."

(b) A bid may be rejected as nonresponsive if the bid is materially unbalanced as to bid prices. A bid is unbalanced when the bid is based on prices significantly less than cost for some work and significantly overstated for other work.

(End of Provision)

Alternate I

If the solicitation includes a base bid and options, the Contracting Officer shall delete paragraph (a) of the basic clause and insert paragraph (a) substantially as follows:

(a) The low bidder for purposes of award is the responsible bidder offering the lowest aggregate price for (1) the base bid (consisting of the lump sum bid and any associated unit price bids extended by the applicable number of units shown on the bid form) plus (2) all options designated to be evaluated. The evaluation of options will not obligate the Government to exercise the options. See Standard form 1442, Solicitation, Offer, and Award and the provision entitled "Contract Award—Sealed Bidding."

Alternate II

If the solicitation includes a base bid and alternates, the Contracting Officer shall delete paragraph (a) of the basic clause and insert paragraphs (a), (c), and (d) substantially as follows:

(a) The low bidder for purposes of award is the responsible bidder offering the lowest aggregate price for (1) the base bid (consisting of the lump sum bid and any associated unit price bids extended by the applicable number of units shown on the bid form) plus (2) those alternates in the order of

priority listed in the solicitation that provide the most features of work within the funds available at bid opening. See the provision entitled "Contract Award—Sealed Bidding."

(c) Alternates will be added to the base bid in the order listed in the solicitation (see Standard Form 1442, Solicitation, Offer, and Award). If the addition of an alternate would make all bids exceed the funds available at bid opening, that alternate shall be skipped and the next subsequent alternate in a lower amount shall be added, provided that the aggregate of base bid and the selected alternates do not exceed the funds available at bid opening. For example, when the amount available is $100,000 and a bidder's base bid is $85,000, with its separate bids on four successive alternates being $10,000, $8,000, $6,000, and $4,000, the aggregate amount of the bid for purposes of selecting the alternates would be $99,000 (base bid plus the first and fourth alternates). The second and third alternates are skipped because each of them would cause the aggregate of the base bid and alternates to exceed the $100,000 amount available when considered with the first alternate. All bids shall be evaluated on the basis of the same alternates.

(d) After the low bidder has been determined in accordance with paragraph (a), an award may be made to that low bidder on the base bid, plus any combination of alternates for which funds are available at the time of award, but only if the award amount does not exceed the amount offered by any other responsible bidder. If the base bid plus the proposed combination of alternates exceed the amount offered by any other responsible bidder for the same combination of alternates, the award cannot be made on that combination of alternates.

Alternate III

If the solicitation includes a base bid, alternates, and options, the Contracting Officer shall delete paragraph (a) of the basic clause and insert paragraphs (a), (c), and (d) substantially as follows:

(a) The low bidder for purposes of award is the responsible bidder offering the lowest aggregate price for (1) the base bid (consisting of the lump sum bid and any associated unit price bids extended by the applicable number of units shown on the bid form) plus (2) those alternates in the order of priority listed in the solicitation that provide the most features of work within the funds available at bid opening plus (3) all options designated to be evaluated except those options associated with alternates which are skipped during the selection process outlined in paragraph (c) below. The evaluation of options will not obligate the Government to exercise the options. See the provision entitled "Contract Award—Sealed Bidding."

(c) Alternates will be added to the base bid in the order listed in the solicitation (see Standard Form 1442, Solicitation, Offer, or Award). If the addition of an alternate would make all bids exceed the funds available at bid opening, that alternate shall be skipped and the next subsequent alternate in a lower amount shall be added, provided that the aggregate of base bid and the selected alternates do not exceed the funds available at bid opening. For example, when the amount available is $100,000 and a bidder's base bid is $85,000, with its separate bids on four successive alternates being $10,000, $8,000, $6,000, and $4,000, the aggregate amount of the bid for purposes of selecting the alternates would be $99,000 (base bid plus the first and fourth alternates). The second and third alternates are skipped because each of them would cause the aggregate of the base bid and alternates to exceed the $100,000 amount available when considered with the first alternate. All bids shall be evaluated on the basis of the same alternates.

(d) After the low bidder has been determined in accordance with paragraph (a), award may be made to that low bidder on the base bid and evaluated options plus any combination of alternates for which funds are available at the time of award, but only if that low bidder is still low on the sum thereof plus any previously unevaluated options designated to be evaluated which are associated with proposed alternates that were skipped during the selection under paragraph (c). If that low bidder is not still low, award cannot be made on the proposed combination of alternates.

552.236-74 Working hours.

As prescribed in 536.570-5, insert the following clause:

Working Hours (Apr 1984)

(a) It is contemplated that all work will be performed during the customary working hours of the trades involved unless otherwise specified in this contract. Work performed by the Contractor at his own volition outside such customary working hours shall be at no additional expense to the Government.

(b) Any requests received by the Contractor from occupants of existing buildings to change the hours of work shall be referred to the Contracting Officer for determination.

(End of Clause)

552.236-75 Use of premises.

As prescribed in 536.570-6, insert the following clause:

Use of Premises (Apr 1984)

(a) If the premises are occupied, the Contractor, his subcontractors, and their employees shall comply with the regulations governing access to, operation of, and conduct while in or on the premises and shall perform the work required under this contract in such a manner as not to unreasonably interrupt or interfere with the conduct of Government business.

(b) Any request received by the Contractor from occupants of existing buildings to change the sequence of work shall be referred to the Contracting Officer for determination.

(c) If the premises are occupied, the Contractor, his subcontractors and their employees shall not have access to or be admitted into any building outside the scope of this contract except with official permission.

(End of Clause)

552.236-76 Measurements.

As prescribed in 536.570-7, insert the following clause:

Measurements (Apr 1984)

All dimensions shown of existing work and all dimensions required for work that is to connect with work now in place, shall be verified by the Contractor by actual measurement of the existing work. Any discrepancies between the contract requirements and the existing conditions shall be referred to the Contracting Officer before any work affected thereby has been performed.

(End of Clause)

552.236-77 Specifications and Drawings.

As prescribed in 536.570-8, insert the following clause:

Specifications and Drawings (Apr 1984)

The requirements of the clause entitled "Specifications and Drawings" at FAR 52.236-21, are supplemented as follows:

(a) In case of difference between small and large-scale drawings, the large-scale drawings shall govern. Schedules on any contract drawing shall take precedence over conflicting information on that or any other contract drawing. On any of the drawings where a portion of the work is detailed or drawn out and the remainder is shown in outline, the parts detailed or drawn out shall apply also to all other like portions of the work.

(b) Where the word "similar" occurs on the drawings, it shall have a general meaning and not be interpreted as being identical, and all details shall be worked out in relation to their location and their connection with other parts of the work.

(c) Standard Details or Specification Drawings are applicable when listed, bound with the specifications, noted on the drawings or referenced elsewhere in the specifications. Where the notes on the drawings indicate modifications, such modifications shall govern.

(d) In case of difference between Standard Details or Specification Drawings and the specifications, the specifications will govern. In case of difference between the Standard Details or Specification Drawings and the drawings prepared specifically for this contract, the later shall govern.

(End of Clause)

552.236-78 Shop drawings, coordination drawings, and schedules.

As prescribed in 536.570-9, insert the following clause:

Shop Drawings, Coordination Drawings, and Schedules (Apr 1984)

The requirements, of the clause entitled "Specifications and Drawings" at FAR 52.236-21, are supplemented as follows:

(a) The Contractor shall submit shop drawings, coordination drawings, and schedules for approval as required by the specifications or requested by the Contracting Officer as follows:

(b) Shop drawings shall include fabrication, erection and setting drawings, schedule

drawings, manufacturers' scale drawings, wiring and control diagrams, cuts or entire catalogs, pamphlets, descriptive literature, and performance and test data.

(c) Drawings and schedules, other than catalogs, pamphlets and similar printed material, shall be submitted in reproducible form with two prints made by a process approved by the Contracting Officer. Upon approval, the reproducible form will be returned to the Contractor who shall then furnish the number of additional prints, not to exceed 10, required by the specifications. The Contractor shall submit shop drawings in catalog, pamphlet and similar printed form in a minimum of four copies plus as many additional copies as the Contractor may desire or need for his use or use by subcontractors.

(d) Before submitting shop drawings on the mechanical and electrical work, the Contractor shall submit and obtain the Contracting Officer's approval of such lists of mechanical and electrical equipment and materials as may be required by the specifications.

(e) Each shop drawing or coordination drawing shall have a blank area 5 by 5 inches, located adjacent to the title block. The title block shall display the following:
Number and title of drawing
Date of drawing or revision
Name of project building or facility
Name of contractor and (if appropriate) name of subcontractor submitting drawing
Clear identity of contents and location on the work
Project title and contract number

(f) Unless otherwise provided in this contract, or otherwise directed by the Contracting Officer, shop drawings, coordination drawings and schedules shall be submitted to the Contracting Officer, with a letter in triplicate, sufficiently in advance of construction requirements to permit no less than 10 working days for checking and appropriate action.

(g) Approval of drawings and schedules will be general and shall not be construed as permitting any departure from the contract requirements, or as approving departures from full-size details furnished by the Contracting Officer.

(End of Clause)

552.236-79 Samples.

As prescribed in 536.570-10, insert the following clause:

Samples (Apr 1984)

(a) After the award of the contract, the Contractor shall furnish for the approval of the Contracting Officer samples required by the specifications or by the Contracting Officer. Samples shall be delivered to the Contracting Officer or to the Architect as specified or as directed. The Contractor shall prepay all shipping charges on samples. Materials or equipment for which samples are required shall not be used in the work until approved in writing by the Contracting Officer.

(b) Each sample shall have a label indicating:

(1) Name of project building or facility, project title and contract number

(2) Name of Contractor and, if appropriate, name of subcontractor

(3) Identification of material or equipment with specification requirement

(4) Place of origin

(5) Name of producer and brand (if any)

Samples of finished materials shall have additional markings that will identify them under the finish schedules.

(c) The Contractor shall mail under separate cover a letter in triplicate submitting each shipment of samples and containing the information required in paragraph (b) of this clause. He shall enclose a copy of this letter with the shipment and send a copy to the Government representative on the project. Approval of a sample shall be only for the characteristics or use named in such approval and shall not be construed to change or modify any contract requirement. Substitutions will not be permitted unless they are approved in writing by the Contracting Officer.

(d) Approved samples not destroyed in testing will be sent to the Government representative at the project. Approved samples of hardware in good condition will be marked for identification and may be used in the work. Materials and equipment, incorporated in the work shall match the approved samples. Other samples not destroyed in testing or not approved will be returned to the Contractor at his expense if so requested at time of submission.

(e) Failure of any material to pass the specified tests will be sufficient cause for refusal to consider, under this contract, any further samples of the same brand or make of that material or equipment which previously has proved unsatisfactory in service.

(f) Samples of various materials or equipment delivered on the site or in place may be taken by the Government representative for testing. Samples failing to meet contract requirements will automatically void previous approvals of the items tested. The Contractor shall replace such materials or equipment found not to have met contract requirements, or there shall be a proper adjustment of the contract price as determined by the Contracting Officer.

(g) Unless otherwise specified, when tests are required only one test of each sample proposed for use will be made at the expense of the Government. Samples which do not meet specification requirements will be rejected. Testing of additional samples will be made by the Government at the expense of the Contractor.

(End of Clause)

552.236-80 Heat.

As prescribed in 536.570-11, insert the following clause:

Heat (Apr 1984)

Unless otherwise specified or unless already provided by the Government the Contractor shall:

(a) Provide heat, as necessary to protect all work, materials, and equipment against injury from dampness and cold;

(b) Protect, cover and/or heat as may be necessary, to produce and maintain a temperature of not less than 50 degrees Fahrenheit (1) in the concrete during the placing, setting and curing of concrete, and (2) in the plaster during the application, setting and curing of plaster; and

(c) Provide heat as necessary in the area where work is to be done to provide the minimum temperature recommended by the supplier or manufacturer of the material, but in no case less than 50 degrees Fahrenheit, for a period beginning 10 days before placing of interior finishes and finish materials and continuing until completion or beneficial occupancy of the area, whichever is earlier.

(End of Clause)

552.236-81 Use of equipment by the Government.

As prescribed in 536.570-12, insert the following clause:

Use of Equipment by the Government (Apr 1984)

(a) The Government may take over and operate, with Government employees, such equipment as is necessary for heating or cooling such areas of the building as require the service, as soon as the installation is sufficiently complete.

(b) The Contracting Officer will advise the Contractor by letter, prior to the use of equipment, which items of equipment will be operated, and the date and time such operation will begin.

(c) Government operation of equipment will not relieve the Contractor of the one-year guarantee on materials and workmanship elsewhere provided for in this contract.

(d) The guarantee period, elsewhere provided for in this contract, for each piece of equipment shall be in accordance with the "Guarantees" clause of this contract.

(End of Clause)

552.236-82 Subcontracts.

As prescribed in 536.570-13, insert the following clause:

Subcontracts (Apr 1984)

(a) Nothing contained in the contract shall be construed as creating any contractual relationship between any subcontractor and the Government. The divisions or sections of the specifications are not intended to control the Contractor in dividing the work among subcontractors, or to limit the work performed by any trade.

(b) The Contractor shall be responsible to the Government for acts and omissions of his own employees and of subcontractors and their employees. He shall also be responsible for the coordination of the work of the trades, subcontractors and suppliers.

(c) The Government will not undertake to settle any differences between or among the Contractor, subcontractors, or suppliers.

(End of Clause)

552.236-83 Furnishing information and records.

As prescribed in 536.570-14, insert the following clause:

Furnishing Information and Records (Apr 1984)

(a) If the Contractor or any subcontractor under this contract or the officers or agents of the Contractor or any subcontractor, refuses, except as provided by the terms of this contract, to furnish to any Government agency or any establishment in the legislative or judicial branch of the Government information or records reasonably pertinent to this contract, the following actions may be taken:

(1) In the case of a refusal by the Contractor, its officers or agents, the Government may, after affording an opportunity to explain or justify such refusal, terminate the Contractor's right to proceed with the work. The rights and remedies provided in this clause are in addition to those outlined in paragraph (a) of the Default (Fixed-Price Construction) clause at FAR 52.249–10, paragraph (b) of the Liquidated Damages—Construction clause at FAR 52.212–5 and to any other rights and remedies provided by law or under this contract;

(2) In the case of a refusal by a subcontractor, its officers or agents, the Government may, after affording an opportunity to explain or justify such refusal, require the Contractor to terminate the subcontract without cost to the Government, or if the Contractor fails or refuses to effect such termination, the Government may terminate the Contractor's right to proceed with the work under this contract and thereupon the Government may avail itself of the rights and remedies referred to in subparagraph (a)(1) of this clause.

(b) The term "subcontract" as used in this paragraph means any contract entered into or any purchase order issued by a prime contractor under a contract with the Government in connection with the performance of the prime contractor's obligations under this contract.

(c) The term "subcontractor" as used in this paragraph means a party to a subcontract other than the prime contractor under this contract.

(End of Clause)

552.237–70 Qualifications of offerors.

As prescribed in 537.110(a), insert the following provision:

Qualifications of Offerors (May 1989)

(a) Offers will be considered only from responsible organizations or individuals now or recently engaged in the performance of building service contracts comparable to those described in this solicitation. In order to determine an Offeror's qualifications, the Offeror may be requested to furnish a narrative statement listing comparable contracts which it has performed; a general history of its operating organization; and its complete experience. An Offeror may also be required to furnish a statement of its financial resources; show that it has the ability to maintain a staff of regular employees adequate to ensure continuous performance of the work; and, demonstrate that its equipment and/or plant capacity for the work contemplated is sufficient, adequate, and suitable.

(b) Competency in performing comparable building service contracts, demonstration of acceptable financial resources, personnel staffing, plant, equipment, and supply sources will be considered in determining whether an Offeror is responsible.

(c) Prospective Offerors are advised that in evaluating these areas involving any small business concern(s), any negative determinations are subject to the Certificate of Competency procedures set forth in the Federal Acquisition Regulation.

(End of Provision)

552.237–71 Qualifications of employees.

As prescribed in 537.110(b), insert the following clause:

Qualifications of Employees (May 1989)

(a) The contracting officer or a designated representative may require the Contractor to remove any employee(s) from GSA controlled buildings or other real property should it be determined that the individual(s) is either unsuitable for security reasons or otherwise unfit to work on GSA controlled property.

(b) The Contractor shall fill out and cause each of its employees performing work on the contract work to fill out, for submission to the Government, such forms as may be necessary for security or other reasons. Upon request of the Contracting Officer, the Contractor and its employees shall be fingerprinted.

(c) Each employee of the contractor shall be a citizen of the United States of America, or an alien who has been lawfully admitted for permanent residence as evidenced by Alien Registration Receipt Card Form I–151, or, who presents other evidence from the Immigration and Naturalization Service that employment will not affect his immigration status.

(End of Clause)

552.237–72 Certification regarding "Quasi-Military Armed Forces."

As prescribed in 537.110(c), insert the following certification:

Certification Regarding "Quasi-Military Armed Forces" (Apr 1984)

(a) By signing this offer, the Offeror certifies that the individual, firm, or corporation submitting this offer is not a "Quasi-Military Armed Force" within the meaning of the decision of the court in United States ex. rel. Weinberger v. Equifax, 557 F. 2d 456 (5th Cir., 1977).

(b) The Offeror further certifies that it will not, during the term of this contract, offer "Quasi-Military Armed Forces" for hire.

(End of Certification)

552.238–72 Contractor's report of orders received.

As prescribed in 538.203–71, insert the following clause:

Contractor's Report of Orders Received (May 1989)

(a) Contractors shall furnish quarterly the dollar value (rounded to the nearest whole dollar) of all Government agencies' and Government Contractor's orders received during the preceding 3-month period to include any partial month. A separate report for each National Stock Number (NSN), Special Item Number (SIN), or subitem shall be prepared and submitted, unless otherwise specified, on GSA Form 72A.

(b) The report is due in the office specified below or specified at the time of award 15 days following the completion of the reporting period or completion of the contract. A report is required even when no billings or invoices are issued or no orders are received during the reporting period.

(c) The Government reserves the right to inspect without further notice, such records of the Contractor as pertain to sales under any contract resulting from this solicitation. Willful failure or refusal to furnish the required reports, or falsification thereof, shall constitute sufficient cause for terminating the contract for default under FAR 52.249–8, Default (Fixed-Priced Supply and Service).

(d) The report shall be forwarded to the following address:

General Services Administration

_____

_____

_____

_____

(End of Clause)

Alternate I (May 1989).

If it is necessary to identify the official responsible for preparing the report, the Contracting Officer may add a paragraph substantially the same as the following paragraph (e) to the basic clause:

(e) Within _____ days of contract award, the Contractor shall provide to the Contracting Officer, the name, title, address, and telephone number of the individual who will be responsible for the report.

Alternate II (May 1989).

When the clause is used in IRMS schedule contracts, substitute a paragraph substantially the same as the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contractor shall furnish quarterly the dollar value (rounded to the nearest whole dollar) of orders received or invoices issued during the preceding 3-month period to include any partial month. A separate report for each Special Item Number (SIN) shall be prepared and submitted, unless otherwise specified, on GSA Form 72.

552.242–70 Status report of orders and shipments.

As prescribed in 542.1107, insert the following clause:

Status Report of Orders and Shipments (Mar 1989)

(a) The Contractor shall furnish to the Administrative Contracting Officer (ACO) a report covering orders received and shipments made during each calendar month of contract performance. The information required by the Government shall be reported on GSA Form 1678, Status Report of Orders and Shipments, in accordance with instruction on the form, or in an automated printout form as an attachment to the GSA Form 1678 when authorized by the ACO.

Blocks 1 through 5 of the GSA Form 1678 must be completed and attached as a cover page to the automated report. Reports shall be forwarded to the ACO not later than the seventh workday of the succeeding month.

(b) An initial supply of GSA Form 1678 will be forwarded to the Contractor with the contract. Additional copies of the form, if needed, may be obtained from the ACO, or reproduced by the Contractor.

(End of Clause)

552.243-70 Pricing adjustments.

As prescribed in 543.205(a), insert the following clause:

Pricing of Adjustments (Apr 1989)

When costs are a factor in any determination of a contract price adjustment, such costs shall be in accordance with the contract cost principles and procedures in Part 31 of the Federal Acquisition Regulation (48 CFR Part 31) in effect on the date of this contract.

(End of Clause)

552.243-71 Equitable Adjustments.

As prescribed in 543.205(b), insert the following clause in solicitations and contracts for (a) dismantling, demolition, or removal of improvements; and (b) construction, when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation:

Equitable Adjustments (Apr 1984)

(a) The provisions of the "Changes" clause prescribed by FAR 52.243-4 are supplemented as follows:

(1) Upon written request, the Contractor shall submit a proposal, in accordance with the requirements and limitations set forth in the "Equitable Adjustments" clause, for work involving contemplated changes covered by the request. The proposal shall be submitted within the time limit indicated in the request or any extension of such time limit as may be subsequently granted. The Contractor's written statement of the monetary extent of a claim for equitable adjustment shall be submitted in the following form:

(i) Proposals totaling $5,000 or less shall be submitted in the form of a lump sum proposal with supporting information to clearly relate elements of cost with specific items of work involved to the satisfaction of the Contracting Officer, or his/her authorized representative.

(ii) For proposals in excess of $5,000, the claim for equitable adjustment shall be submitted in the form of a lump sum proposal supported with an itemized breakdown of all increases and decreases in the contract in at least the following detail:

Direct Costs

Material quantities by trades and unit costs
(Manufacturing burden associated with material fabrication performed will be considered to be part of the material costs of the fabricated item delivered to the job site)
Labor breakdown by trades and unit costs
(Identified with specific item of material to be placed or operation to be performed)
Construction equipment exclusively necessary for the change
Costs of preparation and/or revision to shop drawings resulting from the change
Workmen's Compensation and Public Liability Insurance
Employment taxes under FICA and FUTA
Bond Costs—when size of change warrants revision

Overhead, Profit and Commission

(2) The allowable overhead shall be determined in accordance with the contract cost principles and procedures in Part 31 of the Federal Acquisition Regulation (48 CFR Part 31) in effect on the date of this contract. The percentages for profit and commission shall be negotiated and may vary according to the nature, extent and complexity of the work involved, but in no case shall exceed the following unless the contractor demonstrates entitlement to a higher percentage:

	Overhead	Profit	Commission
To Contractor on work performed by other than his own forces			10%
To first tier subcontractor on work performed by his subcontractors			10%
To Contractor and/or the subcontractors for that portion of the work performed with their respective forces.	To be Negotiated	10%	

Not more than four percentages will be allowed regardless of the number of tier subcontractors. The Contractor shall not be allowed a commission on the commission received by a first tier subcontractor. Equitable adjustments for deleted work shall include credits for overhead, profit and commission. On proposals covering both increases and decreases in the amount of the contract, the application of overhead and profit shall be on the net change in direct costs for the Contractor or subcontractor performing the work.

(3) The Contractor shall submit with the proposal his request for time extension (if any), and shall include sufficient information and dates to demonstrate whether and to what extent the change will delay the contract in its entirety.

(4) In considering a proposal, the Government shall make check estimates in detail, utilizing unit prices where specified or agreed upon, with a view to arriving at an equitable adjustment.

(5) After receipt of a proposal the Contracting Officer shall act thereon, within 30 days; provided, however, that when the necessity to proceed with a change does not allow time properly to check a proposal or in the event of failure to reach an agreement on a proposal, the Government may order the Contractor to proceed on the basis of price to be determined at the earliest practicable date. Such price shall not be more than the increase or less than the decrease proposed.

(6) If a mutually acceptable agreement cannot be reached, the Contracting Officer may determine the price unilaterally.

(b) The provisions of the "Differing Site Conditions" clause prescribed by FAR 52.236-2 are supplemented as follows: The Contractor shall submit all claims for equitable adjustment in accordance with, and subject to the requirements and limitations set out in paragraph (a) of this "Equitable Adjustments" clause.

(End of Clause)

552.246-17 Warranty of supplies of a noncomplex nature.

As prescribed in 546.710(a), insert the following clause:

Warranty of Supplies of a Noncomplex Nature (May 1989) (Deviation FAR 52.246-17)

(a) *Definitions.* "Acceptance," as used in this clause, means the act of an authorized representative of the Government by which the Government assumes for itself, or an agent of another, ownership of existing supplies, or approves specific services as partial or complete performance of the contract.

"Correction," as used in this clause, means the elimination of a defect.

"Supplies," as used in this clause, means the end item furnished by the Contractor and related services required under the contract. The word does not include "data."

(b) *Contractor's obligations.* (1) Notwithstanding inspection and acceptance by the Government of supplies furnished under this contract, or any condition of this contract concerning the conclusiveness thereof, the Contractor warrants that for * * *

(i) All supplies furnished under this contract will be free from defects in material or workmanship and will conform with the requirements of this contract.

(ii) The preservation, packaging, packing, and marking, and the preparation for, and method of, shipment of such supplies will conform with the requirements of this contract.

(2) When return, correction, or replacement is required, transportation charges and responsibility for the supplies while in transit shall be borne by the Contractor. However, the Contractor's liability for the transportation charges shall not exceed an amount equal to the cost of transportation charges by the usual commercial method of shipment between the place of delivery

specified in the contract and the Contractor's plant, and return.

(3) Any supplies or parts thereof, corrected or furnished in replacement under this clause, shall also be subject to the terms of this clause to the same extent as supplies initially delivered. The warranty, with respect to supplies or parts thereof, shall be equal in duration to that in paragraph (b)(1) of this clause and shall run from the date of delivery of the corrected or replaced supplies.

(4) All implied warranties of merchantability and "fitness for a particular purpose" are excluded from any obligation contained in this contract.

(c) *Remedies available to the Government.* (1) The Contracting Officer shall give written notice to the Contractor of any breach of warranties in paragraph (b)(1) of this clause within * * *.

(2) Within a reasonable time after the notice, the Contracting Officer may either—

(i) Require, by written notice, the prompt correction or replacement of any supplies or parts thereof (including preservation, packaging, packing, and marking) that do not conform with the requirements of this contract within the meaning of paragraph (b)(1) of this clause; or

(ii) Retain such supplies and reduce the contract price by an amount equitable under the circumstances. When the nature of the defect in the nonconforming item is such that the defect affects an entire batch or lot of material, then the equitable price adjustment shall apply to the entire batch or lot of material from which the nonconforming item was taken.

(3)(i) If the contract provides for inspection of supplies by sampling procedures, conformance of supplies or components subject to warranty action shall be determined by the applicable sampling procedures in the contract. The Contracting Officer—

(A) May, for sampling purposes, group any supplies delivered under this contract;

(B) Shall require the size of the sample to be that required by sampling procedures specified in the contract for the quantity of supplies on which warranty action is proposed;

(C) May project warranty sampling results over supplies in the same shipment or other supplies contained in other shipments even though all of such supplies are not present at the point of reinspection; *Provided*, That the supplies remaining are reasonably representative of the quantity on which warranty action is proposed; and

(D) Need not use the same lot size as on original inspection or reconstitute the original inspection lots.

(ii) Within a reasonable time after notice of any breach of the warranties specified in paragraph (b)(1) of this clause, the Contracting Officer may exercise one or more of the following options:

(A) Require an equitable adjustment in the contract price for any group of supplies.

(B) Screen the supplies grouped for warranty action under this clause at the Contractor's expense and return all nonconforming supplies to the Contractor for correction or replacement.

(C) Require the Contractor to screen the supplies at locations designated by the Government within the continental United States and to correct or replace all nonconforming supplies.

(D) Return the supplies grouped for warranty action under this clause to the Contractor (irrespective of the f.o.b. point or the point of acceptance) for screening and correction or replacement.

(4)(i) The Contracting Officer may, by contract or otherwise, correct or replace the nonconforming supplies with similar supplies from another source and charge to the Contractor the cost occasioned to the Government thereby if the Contractor—

(A) Fails to make redelivery of the corrected or replaced supplies within the time established for their return; or

(B) Fails either to accept return of the nonconforming supplies or fails to make progress after their return to correct or replace them so as to endanger performance of the delivery schedule, and in either of these circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Office may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(ii) Instead of correction or replacement by the Government, the Contracting Officer may require an equitable adjustment of the Contract price for all nonconforming supplies, including batch or lot materials which have either been consumed or other disposition has been made. In addition, if the Contractor fails to furnish timely disposition instructions, the Contracting Officer may dispose of the nonconforming supplies for the contractor's account in a reasonable manner. The Government is entitled to reimbursement from the Contractor, or from the proceeds of such disposal, for the reasonable expenses of the care and disposition of the nonconforming supplies, as well as for excess costs incurred or to be incurred.

(5) The rights and remedies of the Government provided in this clause are in addition to and do not limit any rights afforded to the Government by any other clause of this contract.

(6) Unless otherwise provided, this warranty is applicable both within and outside the continental limits of the United States.

(7) In addition to other marking requirements of this contract, the Contractor shall stamp or mark the supplies delivered or otherwise furnish notice with the supplies of the existence of the warranty. The marking should briefly include (i) a statement that the warranty exists, (ii) the substance of the warranty, (iii) its duration, and (iv) who to notify if the supplies are found to be defective.

(End of Clause)

* Contracting Officer shall state the specific period of time after delivery or the specified event whose occurrence will terminate the warranty period; e.g., the number of miles or hours of use, or combination of any applicable event or periods of time.

** Contracting Officer shall insert specific period of time; e.g., "45 days from the last delivery under this contract," or "45 days after discovery of the defect." The number of days specified shall be no less than 30.

Alternate I (May 1989)

If commercial items, i.e., specified by brand name or equal, are to be acquired, substitute the following for paragraph (b)(1) of the basic clause and delete paragraph (b)(4) of the basic clause.

(1) Notwithstanding inspection and acceptance by the Government of supplies furnished under this contract, or any condition of this contract concerning the conclusiveness thereof, the Contractor warrants that for ____* ____ all supplies furnished—

(i) Are of a quality to pass without objection in the trade under the contract description;

(ii) Are fit for the ordinary purposes for which the supplies are used;

(iii) Are within the variations permitted by the contract, and are of an even kind, quality, and quantity within each unit and among all units;

(iv) Are adequately contained, packaged, and marked as the contract may require; and

(v) Conform to the promises or affirmations of fact made on the container.

552.246-70 Source inspection by quality approved manufacturer.

As prescribed in 546.302-70, insert the following clause:

Source Inspection by Quality Approved Manufacturer (Mar 1989)

(a) *Inspection system and inspection facilities.* (1) The inspection system maintained by the Contractor under the Inspection of Supplies—Fixed Price clause (FAR 52.246-2) of this contract shall be maintained throughout the contract period and shall comply with all requirements of Federal Standard 368, edition in effect on the date of the solicitation. A written description of the inspection system shall be made available to the Government before contract award. The Contractor shall immediately notify the Contracting Officer and the designated GSA quality assurance office of any changes made in the inspection system during the contract period. As used herein, the term "inspection system" means the Contractor's own facility or any other facility acceptable to the Government that will be used to perform inspections or tests of materials and components before incorporation into end articles and for inspection of such end articles before shipment. When the manufacturing plant is located outside of the United States, the Contractor shall arrange delivery of the items from a plant or warehouse located in the United States (including Puerto Rico and the Virgin Islands) equipped to perform all inspections and tests required by the contract or specifications to evidence conformance therewith, or shall arrange with a testing laboratory or other facility in the United States, acceptable to the Government, to perform the required inspections and tests.

(2) In addition to the requirements in Federal Standard 368, records shall include the date when inspection and testing were performed. All records shall be available for at least 12 months after contract performance is completed.

(3) Offerors are required to specify, in the space provided elsewhere in this solicitation, the name and address of each manufacturing plant or other facility where supplies will be available for inspection, indicating the item number(s) to which each applies.

(4) Within 10 calendar days after receipt of the written notice of award, the Contractor shall provide the Contracting Officer with the name of the individual and an alternate that will be responsible for inspecting each shipment under this contract.

(b) *Inspection and receiving reports.* (1) For each shipment, the Contractor shall prepare and distribute DD Form 250, Material Inspection and Receiving Report, not later than the close of business the workday following shipment. The Contractor will be provided a supply of the DD Form 250 with complete instructions for preparation and distribution. When shipments are released, one of the officials named by the Contractor under paragraph (a)(4) above, shall certify that the supplies have been inspected and found to be in conformity with contract requirements. The certification shall be placed in block 16 of the DD Form 250 and shall read as follows:

I certify that the shipment of supplies shown on this form was inspected and found to comply with all requirements of the contract.

Signature of Certifying Official

(c) *Inspection by Government personnel.* (1) Although the Government will normally rely upon the Contractor's certification as to the quality of supplies shipped, it reserves the right under the Inspection of Supplies—Fixed Price clause to inspect and test all supplies called for by this contract, before acceptance, at all times and places, including the point of manufacture. When the Government notifies the Contractor of its intent to inspect supplies before shipment, the Contractor shall notify or arrange for subcontractors to notify the designated GSA quality assurance office 7 workdays before the date when supplies will be ready for inspection. Shipment shall not be made until inspection by the Government is completed and shipment is authorized by the Government.

(2) Government inspection responsibility will be assigned to the GSA quality assurance office which has jurisdiction over the State in which the Contractor's or subcontractor's plant or other designated point for inspection is located.

(3) During the contract period, a Government representative may periodically select samples of supplies produced under this contract for Government verification inspection and testing. Samples sent to a Government testing facility will be disposed of as follows: Samples from an accepted lot, not damaged in the testing process, will be returned promptly to the Contractor after completion of tests. Samples damaged in the testing process will be disposed of as requested by the Contractor. Samples from a rejected lot will be returned to the Contractor or disposed of in a time and manner agreeable to both the Contractor and the Government.

(d) *Quality deficiencies.* (1) Notwithstanding any other clause of this contract concerning the conclusiveness of acceptance by the Government, any supplies or production lots shipped under this contract found to be defective in material or workmanship, or otherwise not in conformity with the requirements of this contract within a period of _____* months after acceptance shall, at the Government's option, be replaced, repaired or otherwise corrected by the Contractor at no cost to the Government within 30 calendar days (or such longer period as the Government may authorize in writing) after receipt of notice to replace or correct. When the nature of the defect affects an entire batch or lot of supplies, and the Contracting Officer determines that correction can best be accomplished by retaining the nonconforming supplies and reducing the contract price by an amount equitable under the circumstances, then the equitable price adjustment shall apply to the entire batch or lot of supplies from which the nonconforming item was taken.

(2) If supplies in process, shipped, or awaiting shipment to fill Government orders are found not to comply with contract requirements, or if deficiencies in either plant quality or process controls are found, the Contractor may be issued a Quality Deficiency Notice (QDN). Upon receipt of a QDN, the Contractor shall take immediate corrective action and shall suspend shipment of the supplies covered by the QDN until such time as corrective action has been completed. The Contractor shall notify the GSA quality assurance office, within 5 workdays, of corrective action taken or to be taken to permit onsite verification by a Government representative. Shipments of nonconforming supplies will be returned at the Contractor's expense and may be cause for termination. Delays due to the issuance of a QDN do not constitute excusable delay under the Default clause. Failure to complete corrective action in a timely manner may result in termination of this contract.

(3) This contract may be terminated for default if subsequent Government inspection discloses that plant quality or process controls are not being maintained, supplies which do not meet the requirements of the specification are being shipped, or there is failure to comply with any other requirement of this clause.

(e) *Additional cost for inspection and testing.* The Contractor will be charged for any additional cost of inspection/testing or reinspecting/retesting supplies for the reasons stated in paragraph (e) of FAR 52.246–2, Inspection of Supplies—Fixed Price. When inspection or testing is performed by or under the direction of GSA, charges will be at the rate of $_____** per man-hour or fraction thereof if the inspection is at a GSA distribution center; $_____** per man-hour or fraction thereof, plus travel costs incurred, if the inspection is at any other location; and $_____** per man-hour or fraction thereof for laboratory testing, except that when a testing facility other than a GSA laboratory performs all or part of the required tests, the Contractor shall be assessed the actual cost incurred by the Government as a result of testing at such facility. When inspection is performed by or under the direction of any agency other than GSA, the charges indicated above may be used, or the agency may assess the actual cost of performing the inspection and testing.

(f) *Responsibility for rejected supplies.* When the Contractor fails to remove or provide instructions for the removal of rejected supplies under FAR 52.246–2(h) pursuant to the Contracting Officer's instructions, the Contractor shall be liable for all costs incurred by the Government in taking such measures as are expedient to avoid unnecessary loss to the Contractor. In addition to the remedies provided in FAR 52.246–2(l), supplies may be stored for the Contractor's account or sold to the highest bidder on the open market and the proceeds applied against the accumulated storage and other costs, including the cost of the sale.

(g) *Subcontracting requirements.* The Contractor shall insert in any subcontracts the inspection or testing provisions set forth in paragraphs (a) through (d) of this clause and the Inspection of Supplies—Fixed Price clause of this contract. The Contractor shall be responsible for compliance by any subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause and the Inspection of Supplies—Fixed Price clause.

* The Contracting Officer shall normally insert 12 months as the period during which defective or otherwise nonconforming supplies must be replaced. However, when the supplies being bought have a shelf life of less than 1 year, the shelf-life period should be used, or in the instance where a longer period may reasonably be expected to be available, the longer period should be used.

** The rates to be inserted are established by the Commissioner of the Federal Supply Service or a designee.

(End of Clause)

552.246–71 Final inspection and tests.

As prescribed in 546.312, insert the following clause:

Final Inspection and Tests (May 1989)

The Contractor shall give written notice to the Contracting Officer at least 10 calendar days before the date the work will be completed and ready for final inspection and tests. Final inspection and tests will begin within 10 calendar days after the date specified in the Contractor's notice unless the Contracting Officer determines that the work is not ready for final inspection and so informs the Contractor.

(End of Clause)

552.246–72 Source inspection by Government.

As prescribed in 546.302–71, insert the following clause:

Source Inspection by Government (May 1989)

(a) *Inspection by Government personnel.* (1) Supplies to be furnished under this contract will be inspected at source by the Government before shipment from the manufacturing plant or other facility designated by the Contractor, unless the Contractor is otherwise notified in writing by the Contracting Officer or a designated representative. Notwithstanding the foregoing, the Government may perform any

or all tests contained in the contract specifications at a Government facility without prior written notice by the Contracting Officer before release of the supplies for shipment. Samples sent to a Government testing facility will be disposed of as follows: Samples from an accepted lot, not damaged in the testing process, will be returned promptly to the Contractor after completion of tests. Samples damaged in the testing process will be disposed of as requested by the Contractor. Samples from a rejected lot will be returned to the Contractor or disposed of in a time and manner agreeable to both the Contractor and the Government.

(2) Government inspection responsibility will be assigned to the GSA quality assurance office which has jurisdiction over the State in which the Contractor's or subcontractor's plant or other designated point for inspection is located. The Contractor shall notify or arrange for subcontractors to notify the designated GSA quality assurance office 7 workdays before the date when supplies will be ready for inspection. Shipment shall not be made until after inspection by the Government is completed and shipment is authorized by the Government.

(b) *Inspection and receiving reports.* For each shipment, the Contractor shall be responsible for preparation and distribution of inspection documents as follows: (1) DD Form 250, Material Inspection and Receiving Report, for deliveries to military agencies; or (2) GSA Form 308, Notice of Inspection for deliveries to GSA or other civilian agencies. When required, the Contractor will be furnished a supply of GSA Form 308 and/or DD Form 250, and complete instructions for their preparation and distribution.

(c) *Inspection facilities.* (1) The inspection system required to be maintained by the Contractor in accordance with FAR 52.246–2, Inspection of Supplies—Fixed Price, may be the Contractor's own facilities or any other facilities acceptable to the Government. These facilities shall be utilized to perform all inspections and tests of materials and components before incorporation into end articles, and for the inspection of such end articles before shipment. The Government reserves the right to evaluate the acceptability and effectiveness of the Contractor's inspection system before award and periodically during the contract period.

(2) Offerors are required to specify, in the spaces provided elsewhere in the solicitation, the name and address of each manufacturing plant or other facility where supplies will be available for inspection, indicating the item number(s) to which each applies.

(3) The Contractor shall deliver the items specified in this contract from a plant or warehouse located within the United States (including Puerto Rico and the Virgin Islands) that is equipped to perform all inspections and tests required by this contract or specifications to evidence conformance therewith, or shall arrange with a testing laboratory or other facility in the United States, acceptable to the Government, to perform the required inspections and tests.

(d) *Availability of records.* In addition to any other requirement of this contract, the Contractor shall maintain records showing the following information for each order received under the contract: (1) Order number; (2) date order received by the Contractor; (3) quantity ordered; (4) date scheduled into production; (5) batch or lot number, if applicable; (6) date inspected and/or tested; (7) date available for shipment; (8) date shipped or date service completed; and (9) National Stock Number (NSN), or if none is provided in the contract, the applicable item number or other contractual identification. These records should be maintained at the point of source inspection and available to the Contracting Officer, or an authorized representative, for at least 12 months after contract performance is completed.

(e) *Additional cost for inspection and testing.* The Contractor will be charged for any additional cost for inspecting/testing or reinspection/retesting supplies for the reasons stated in paragraph (e) of FAR 52.246–2, Inspection of Supplies—Fixed Price. When inspection or testing is performed by or under the direction of GSA, charges will be at the rate of $_____* per man-hour or fraction thereof if the inspection is at a GSA distribution center; $_____* per man-hour or fraction thereof, plus travel costs incurred, if the inspection is at any other location; and $_____* per man-hour or fraction thereof for laboratory testing, except that when a testing facility other than a GSA laboratory performs all or part of the required tests, the Contractor shall be assessed the actual cost incurred by the Government as a result of testing at such facility. When inspection is performed by or under the direction of any agency other than GSA, the charges indicated above may be used, or the agency may assess the actual cost of performing the inspection and testing.

(f) *Responsibility for rejected supplies.* When the Contractor fails to remove or provide instructions for the removal of rejected supplies under FAR 52.246–2(h) pursuant to the Contracting Officer's instructions, the Contractor shall be liable for all costs incurred by the Government in taking such measures as are expedient to avoid unnecessary loss to the Contractor. In addition to the remedies provided in FAR 52.246–2(l), supplies may be stored for the Contractor's account or sold to the highest bidder on the open market and the proceeds applied against the accumulated storage and other costs, including the cost of the sale.

(End of Clause)

*The rates to be inserted are established by the Commissioner of the Federal Supply Service or a designee.

552.246–73 Warranty—multiple award schedule.

As prescribed in 546.710, insert the following clause:

Warranty—Multiple Award Schedule (May 1989)

The Contractor's standard commercial warranty as stated in the Contractor's commercial price list will apply to this contract if its warranty is equal to or better than the warranty required by 552.246–17 (Alternate I).

(End of Clause)

552.246–74 Warranty—International multiple award schedule.

As prescribed in 546.710(c), insert the following clause:

Warranty—International Multiple Award Schedule (May 1989)

Unless specified otherwise in this contract, the Contractor's standard commercial warranty as stated in the commercial price list applies to this contract, except: (a) The Contractor shall provide, at a minimum, a warranty on all non-consumable parts for a period of 90 days from the date that the Government accepts the product; (b) parts and labor required under the warranty provisions shall be supplied free of charge; (c) transportation costs of returning the products to and from the repair facility, or the costs involved with contractor personnel traveling to the Government facility for the purpose of repairing the product onsite shall be borne by the Contractor during the 90-day warranty period.

(End of Clause)

552.246–75 Guarantees.

As prescribed in 546.710(b), insert the following clause:

Guarantees (May 1989)

(a) Unless otherwise provided in the specifications, the Contractor guarantees all work to be in accordance with contract requirements and free from defective or inferior materials, equipment, and workmanship for 1 year after the date of final acceptance or the date the equipment or work was placed in use by the Government, whichever occurs first.

(b)(1) If, within any guarantee period, the Contracting Officer finds that guaranteed work requires repair or change because of defective or inferior materials, equipment, or workmanship or is not in accordance with contract requirements, the Contracting Officer shall notify the Contractor in writing. The Contractor shall promptly, and without additional expense to the Government, correct:

(i) All guaranteed work;

(ii) All damage to equipment, the site, the building or its contents resulting from the unsatisfactory guaranteed work; and

(iii) Any work, materials, and equipment that are disturbed in fulfilling the guarantee, including any disturbed work, materials, and equipment that may have been guaranteed under another contract.

(2) If the Contractor fails to proceed promptly in accordance with the guarantee, the Government may have such work performed at the expense of the Contractor.

(c) Any special guarantees that may be required under the contract will be subject to paragraphs (a) and (b), insofar as they do not conflict with special guarantees.

(d) The Contractor shall furnish to the Government: (1) Each transferable guarantee or warranty of equipment, materials, or installation furnished by any manufacturer, supplier, or installer in the ordinary course of business; (2) All information required to

make such guarantee or warranty legally binding and effective; and (3) The information and the guarantee or warranty in sufficient time to permit the Government to meet any time limit specified in the guarantee or warranty or, if no time limit is specified, prior to completion and acceptance of all work under this contract.

(End of Clause)

552.246-76 Warranty of pesticides.

As prescribed in 546.710, insert the following clause:

Warranty of Pesticides (May 1989)

(a) Notwithstanding acceptance of pesticides by the Government, the Contractor warrants that for 1 year after the date of shipment, all pesticides furnished under this contract shall meet the requirements of Pub. L. 92-516, as amended, and shall be registered with the Environmental Protection Agency (EPA).

(b) If EPA takes action to stop sale, stop use, remove, seize, or cancel registration of a pesticide within 1 year after date of shipment, the Contractor shall immediately notify the Contracting Officer. The notification will include: (1) Contract number; (2) identification of the pesticide; (3) reason for the EPA action against the pesticide; and (4) list of Government agencies and addresses to which it was delivered.

(End of Clause)

552.247-34 F.o.b. destination.

As prescribed in 547.303-6, insert the following clause:

F.O.B Destination (May 1989) (Deviation FAR 52.247-34)

(a) The term "f.o.b. destination," as used in this clause, means:

(1) Free of expense to the Government, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2) Supplies shall be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the Contractor. The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or "constructive placement" as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity. If rail carrier is used, supplies shall be delivered to the specified unloading platform of the consignee. If motor carrier (including "piggyback") is used, supplies shall be delivered to truck tailgate at the unloading platform of the consignee, except when the supplies delivered meet the requirements in Item 568 of the National Motor Freight Classification for "heavy or bulky freight." When supplies meeting the requirements of Item 568 are delivered, unloading (including movement to the tailgate) shall be performed by the consignee, with assistance from the truck driver, if requested. If the Contractor uses rail carrier or freight forwarder for less than carload shipments, the Contractor shall assure that the carrier will furnish tailgate delivery, when requested, if transfer to truck is required to complete delivery to consignee.

(b) The Contractor shall:

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule and designate the mode of delivering carrier; and

(6) Pay and bear all charges to the specified point of delivery.

(End of clause)

552.247-70 Placarding railcar shipments.

As prescribed in 547.305, insert the following clause:

Placarding Railcar Shipments (May 1989)

When a railcar is loaded in such a manner that it can be or should be unloaded from only one side, the Contractor shall place on the appropriate railcar door a placard reading "Unload From This Side" and on the opposite door a placard reading "Unload From Other Side."

(End of Clause)

552.249-70 Termination for convenience of the Government (fixed-price) (short form).

As prescribed in 549.502 insert the following clause:

Termination for Convenience of the Government (Fixed-Price) (Short Form) (May 1988) (Deviation FAR 52.249-1 and 52.249-2)

(a) If the Government terminates this contract for convenience, the rights of the Government and the Contractor shall be determined under paragraph (b) unless there is a termination liability schedule, in which case the rights of the parties shall be determined under paragraph (c).

(b) The clause at [Contracting Officer inserts 52.249-1 or 52.249-2, as applicable] of the FAR shall apply to the supply portion of the contract and the clause at 52.249-4 of the FAR shall apply to the service portion of the contract.

(c) If the Contractor specifies a schedule of termination liability charges that would be incurred by the Government if the Government terminates this lease contract without taking title to the equipment, the payment of such charges shall be the only responsibility of the Government to compensate the Contractor for such termination; except that, there shall be no termination liability for equipment installed after termination of this contract.

(End of Clause)

552.249-71 Submission of termination liability schedule.

As prescribed in 549.570 insert the following clause:

Submission of Termination Liability Schedule (May 1989)

(a) An offeror may submit, as part of its proposal, a termination liability schedule to be applied if any resultant contract is terminated by the Government for reasons other than default. The offeror shall provide and explain the amount and method of computation of the termination liability charge(s).

(b) If submitted, the termination liability schedule will be incorporated into Part I, Section B of the contract document. If a termination liability schedule is not submitted and the Government terminates any resultant contract for its convenience, the rights of the parties shall be determined under paragraph (b) of the GSAR Termination for Convenience of the Government clause at 552.249-70.

(c) Any termination liability charges existing at the end of the evaluated contract period will be considered in the evaluation of offers.

(End of Clause)

552.252-5 Authorized deviations or variations in provisions.

As prescribed in 552.107(a), insert the following provision:

Authorized Deviations or Variations in Provisions (Deviation FAR 52.252-5) (Jul 1985)

(a) The use in this solicitation of any Federal Acquisition Regulation (48 CFR Chapter 1) provision with an authorized deviation or variation is indicated by the addition of "(Deviation)" or "(Variation)" after the date of the provision, if the provision is not published in the General Services Administration Acquisition Regulation (48 CFR Chapter 5). The use in this solicitation of any Federal Acquisition Regulation (FAR) provision with an authorized deviation or variation that is published in the General Services Administration Acquisition Regulation is indicated by the addition of "(Deviation (FAR provision no.))" or "(Variation (FAR provision no.))" after the date of the provision.

(b) The use in this solicitation of any General Services Administration Acquisition Regulation provision with an authorized deviation or variation is indicated by the addition of "(Deviation)" or "(Variation)" after the date of the provision.

(c) Changes in wording of provisions that are prescribed for use on a "substantially the same as" basis are not considered deviations. Therefore, when such provisions are not worded exactly the same as the FAR or GSAR provision, they are identified by th word "(Variation)."

(End of Provision)

552.252-6 Authorized deviations or variations in clauses.

As prescribed in 552.107(b), insert the following clause:

Authorized Deviations or Variations in Clauses (Deviation FAR 52.252-6) (Jul 1985)

(a) The use in this solicitation or contract of any Federal Acquisition Regulation (48 CFR Chapter 1) clause with an authorized deviation or variation is indicated by the addition of "(Deviation)" or "(Variation)" after the date of the clause, if the clause is not published in the General Services Administration Acquisition Regulation (48 CFR Chapter 5). The use in this solicitation of any Federal Acquisition Regulation (FAR) clause with an authorized deviation or variation that is published in the General Services Administration Acquisition Regulation is indicated by the addition of "(Deviation (FAR clause no.))" or "(Variation (FAR clause no.))" after the date of the clause.

(b) The use in this solicitation of any General Services Administration Acquisition Regulation clause with an authorized deviation or variation is indicated by the addition of "(Deviation)" or "(Variation)" after the date of the clause.

(c) Changes in wording of clauses that are prescribed for use on a "substantially the same as" basis are not considered deviations. Therefore, when such clauses are not worded exactly the same as the FAR or GSAR clause, they are identified by the word "(Variation)."

(End of Clause)

552.253-70 Forms containing solicitation provisions and/or contract clauses incorporated by reference.

As prescribed in 553.171, insert the following clause:

Forms Containing Solicitation Provisions and/or Contract Clauses Incorporated by Reference (May 1989)

This solicitation incorporates the following forms containing solicitation provisions and/or contract clauses by reference, with the same force and effect as if they were included in full text. Upon request, the Contracting Officer will make the forms available.

[Insert the form number, title, and the revision date]

(End of Clause)

552.270-1 Preparation of offers.

As prescribed in 570.701-1, insert the following provision:

Preparation of Offers (Apr 1985)

(a) Offerors are expected to read all parts of this solicitation.

(b) Offers must be (1) submitted on the forms prescribed and furnished by the Government as a part of this solicitation or on copies of those forms, and (2) signed. The person signing an offer must initial each erasure or change appearing on any offer form. If the offeror is a partnership, the names of the partners composing the firm must be included with the offer.

(c) Offers will be construed to be in full and complete compliance with this solicitation unless the offer describes any deviation in the offer.

(End of Provision)

552.270-2 Explanation to prospective offerors.

As prescribed in 570.701-2, insert the following provision:

Explanation to Prospective Offerors (June 1985)

Any prospective offeror desiring an explanation or interpretation of the solicitation should request it in writing. Oral explanations or instructions given to a prospective offeror will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished promptly to all other prospective offerors, if that information is necessary in submitting offers or if the lack of it would be prejudicial to any other prospective offeror.

(End of Provision)

552.270-3 Late submissions, modifications, and withdrawals of offers.

As prescribed in 570.701-3, insert the following provision:

Late Submissions, Modifications, and Withdrawals of Offers (June 1985)

(a) Any offer or modification of an offer which is received after the exact time specified for receipt of "best and final" offers will not be considered unless it is received before award is made, and:

(1) It was sent registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier);

(2) It was sent by mail (telegram or mailgram if authorized) and it was determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(3) It is the only offer received.

(b) The only acceptable evidence to establish:

(1) The date of the mailing of a late offer or modification sent either by registered or certified mail is the U.S. Postal Service postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the offer or modification will be deemed to have been mailed late. (The term "postmark" means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. Postal Service. Therefore, offerors should request that the postal clerk place a hand canceled postmark on both the receipt and the envelope or wrapper.)

(2) The time of receipt at the Government installation is the time-date stamp of such installation on the offer wrapper or other documentary evidence of receipt maintained by the installation.

(c) Notwithstanding (a), of this provision, a late modification of an otherwise successful offer which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(d) Offers may be withdrawn by written notice or telegram (including mailgram) received at any time prior to award. Offers may be withdrawn in person by an offeror or his authorized representative, provided his identity is made known and he signs a receipt for the proposal before award.

(End of Provision)

552.270-4 Historic preference.

As prescribed in 570.701-4, insert the following provision:

Historic Preference (June 1985)

(a) Preference will be given to offers of space in buildings on, or formally listed as eligible for inclusion in the National Register of Historic Places and to historically significant buildings in historic districts listed in the National Register. Such preference will be extended to historic buildings and will result in award if:

(1) The offer for space meets the terms and conditions of this solicitation as well as any other offer received. (It is within the discretion of the Contracting Officer to accept alternatives to certain architectural characteristics and safety features defined elsewhere in this solicitation to maintain the historical integrity of the building such as high ceilings, wooden floors, etc.); and

(2) The rental is no more than 10 percent higher on a total annual square foot (net usable area) cost to the Government than the lowest otherwise acceptable offer.

(b) If more than one offer of an historic building is received and they meet the above criteria, an award will then be made to the lowest priced historic property offered.

(End of Provision)

552.270-5 Lease award.

As prescribed in 570.701-5, insert the following provision:

Lease Award (June 1985)

(a) The Government will award a lease resulting from this solicitation to the responsible offeror, whose offer conforming to the solicitation, will be most advantageous to the Government, price and other factors specified elsewhere in this solicitation, considered.

(b) The Government may (1) reject any or all offers, (2) accept other than the lowest priced offer, and (3) waive informalities and minor irregularities in offers received.

(c) Negotiations conducted after receipt of an offer do not constitute a rejection or counteroffer by the Government.

(d) The unconditional acceptance of an offer establishes a valid contract.

(End of Provision)

552.270-6 Parties to execute lease.

As prescribed in 570.701-6, insert the following provision:

Parties to Execute Lease (June 1985)

(a) If the lease is executed by an attorney, agent, or trustee on behalf of the Lessor, an authenticated copy of his power of attorney, or other evidence to act on behalf of the Lessor, must accompany the lease.

(b) If the Lessor is a partnership, the lease must be signed with the partnership name, followed by the name of the legally authorized partner signing the same.

(c) If the Lessor is a corporation, the lease must be signed with the corporate name, followed by the signature and title of the officer or other person signing the lease on its behalf, duly attested, and, if requested by the Government, evidence of this authority so to act must be furnished.

(End of Provision)

552.270-10 Definitions.

As prescribed in 570.702-1, insert the following clause:

Definitions (June 1985)

(a) The terms "contract" and "Contractor" shall mean "lease" and "Lessor," respectively.

(b) If the lease is a sub-lease, the term "Lessor" means the sub-lessor.

(c) The term "Lessor shall provide" means the Lessor shall furnish and install.

(End of Clause)

552.270-11 Subletting the premises.

As prescribed in 570.702-2, insert the following clause:

Subletting the Premises (June 1985)

The Government may sublet any part of the premises but shall not be relieved from any obligations under this lease by reason of any such subletting.

(End of Clause)

552.270-12 Maintenance of premises.

As prescribed in 570.702-3, insert the following clause:

Maintenance of Premises (June 1985)

The Lessor shall maintain the demised premises, including the building and all equipment, fixtures, and appurtenances furnished by the Lessor under this lease in good repair and tenantable condition, except in case of damage arising from the act or the negligence of the Government's agents or employees. For the purpose of so maintaining said premises and property, the Lessor may at reasonable times, and with the approval of the authorized Government representative in charge, enter and inspect the same and make any necessary repairs thereto.

(End of Clause)

552.270-13 Damage by fire or other casualty.

As prescribed in 570.702-4, insert the following clause:

Damage by Fire or Other Casualty (June 1985)

If the said premises be destroyed by fire or other casualty, this lease will immediately terminate. In case of partial destruction or damage, so as to render the premises untenantable, as determined by the Government, the Government may terminate the lease by giving written notice to the Lessor within 15 calendar days thereafter; if so terminated, no rent will accrue to the Lessor after such partial destruction or damage; and if not so terminated, the rent will be reduced proportionately by supplemental agreement hereto effective from the date of such partial destruction or damage.

(End of Clause)

552.270-14 Condition report.

As prescribed in 570.702-5, insert the following clause:

Condition Report (June 1985)

A joint physical survey and inspection report of the demised premises will be made as of the effective date of this lease, reflecting the then present condition, and will be signed on behalf of the parties hereto.

(End of Clause)

552.270-15 Applicable codes and ordinances.

As prescribed in 570.702-6, insert the following clause:

Applicable Codes and Ordinances (June 1985)

The Lessor, as part of the rental consideration, agrees to comply with all codes and ordinances applicable to the ownership and operation of the building in which the leased space is situated and, at his own expense, to obtain all necessary permits and related items.

(End of Clause)

552.270-16 Inspection of premises.

As prescribed in 570.702-7, insert the following clause:

Inspection of Premises (May 1989)

At all times after receipt of offers, prior to or after acceptance of any offers, or during any construction, remodeling, or renovation work, the premises and the building or any parts thereof, upon reasonable and proper notice, must be accessible for inspection by the Contracting Officer, or architects, engineers, or other technicians representing him, to determine whether the essential requirements of the solicitation or the lease requirements are met. Additionally, the Government reserves the right, upon reasonable notice, to: (a) Inspect and perform bulk sampling and analysis of suspected asbestos-containing materials; (b) monitor the air for asbestos fibers in the space offered or under lease as well as other areas of the building deemed necessary by the Contracting Officer; (c) inspect the premises for any leaks, spills, or other potentially hazardous conditions which may involve tenant exposure to hazardous or toxic substances (e.g., PCBs); (d) inspect the site upon which the space is offered for any current or past hazardous waste operations, and ensure that appropriate mitigating actions were taken to alleviate any environmentally unsound activities in accordance with Federal, State and local regulations.

(End of Clause)

552.270-17 Failure in performance.

As prescribed in 570.702-8, insert the following clause:

Failure in Performance (June 1985)

The covenant to pay rent and the covenant to provide any service, utility, maintenance, or repair required under this lease are dependent. In the event of failure by the Lessor to provide any of these items, the Government may, by contract or otherwise perform the service, maintenance, utility, or repair, and charge to the Lessor any cost incurred by the Government that is related to the performance of such service, maintenance etc., including any administrative costs, and deduct such cost from any rental payments. Alternately, the Government may reduce rental payments by the corresponding value of the contract requirement not performed, as determined by the Contracting Officer. These remedies are not exclusive and are in addition to any other remedies which may be available under this contract or in the law.

(End of Clause)

552.270-18 Lessor's successors.

As prescribed in 570.702-9, insert the following clause:

Lessor's Successors (June 1985)

The terms and provisions of this lease and the conditions herein bind the Lessor and the Lessor's heirs, executors, administrators, successors, and assigns.

(End of Clause)

552.270-19 Alterations.

As prescribed in 570.702-10, insert the following clause:

Alterations (June 1985)

The Government shall have the right during the existence of this lease to make alterations, attach fixtures, and erect structures or signs in or upon the premises hereby leased, which fixtures, additions or structures so placed in, on, upon, or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government. If the lease contemplates that the Government is the sole occupant of the building, for purposes of this clause, the leased premises include the land on which the building is sited and the building itself. Otherwise, the Government shall have the right to tie into or make any physical connection with any structure located on the property as is reasonably necessary for appropriate utilization of the leased space.

(End of Clause)

552.270-20 Proposals for adjustment.

As prescribed in 570.702-11, insert the following clause:

Proposals for Adjustment (June 1985)

(a) The Contracting Officer may, from time to time during the term of this lease, require changes to be made in the work or services to be performed and in the terms or conditions of this lease. Such changes will be required under the Changes clause.

(b) If the Contracting Officer makes a change within the general scope of the lease, the Lessor shall submit, in a timely manner, an itemized cost proposal for the work to be accomplished or services to be performed when the cost exceeds $25,000. The proposal, including all subcontractor work, will contain at least the following details:

(1) Material quantities and unit costs,

(2) Labor costs (identified with specific item or material to be placed or operation to be performed),

(3) Equipment costs,

(4) Workman's compensation and public liability insurance,

(5) Overhead,

(6) Profit, and

(7) Employment taxes under FICA and FUTA.

(End of Clause)

Alternate I (June 1985)

For the acquisition of leasehold interests in real property of 10,000 square feet or more, add paragraphs (c) and (d) to the basic clause.

(c) The following Federal Acquisition Regulation (FAR) provisions also apply to all proposals exceeding $100,000 in cost:

(1) The Lessor shall provide cost or pricing data including subcontractor cost or pricing data (48 CFR 15.804–2),

(2) The Lessor's representative, all Contractors, and subcontractors whose portion of the work exceeds $100,000 must sign and return the "Certificate of Current Cost or Pricing Data" (48 CFR 15.804–4), and

(3) The agreement for "Price Reduction for Defective Cost or Pricing Data" must be signed and returned (48 CFR 15.804–8).

(d) Lessors shall also refer to 48 CFR Part 31, Contract Cost Principles, for information on which costs are allowable, reasonable, and allocable in Government work.

(End of Clause)

552.270–21 Changes.

As prescribed in 570.702–12, insert the following clause:

Changes (June 1985)

(a) The Contracting Officer may at any time, by written order, make changes within the general scope of this lease in any one or more of the following:

(1) Specifications.

(2) Work or services.

(3) Amount of space.

(4) Facilities or space layout.

(b) If any such change causes an increase or decrease in the Lessor's cost of, or the time required for, performance under this contract, whether or not changed by the order, the Contracting Officer shall modify the lease by (1) making an equitable adjustment in the rental rate, (2) making a lump sum price adjustment, or (3) revising the delivery schedule.

(c) If such change causes an increase in costs under this contract, the Lessor shall submit any "proposal for adjustment" (hereafter referred to as proposal) under the clause at 552.270–20, Proposal for Adjustment.

(d) Adjustments for operating expenses in vacant leased premises will be in accordance with the clause at 552.270–25, Adjustment for Vacant Premises.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause.

(f) No services or work for which an additional cost or fee will be charged by the Lessor will be furnished without the prior written authorization of the Contracting Officer or a designated representative of the Contracting Officer.

(End of Clause)

552.270–22 Liquidated damages.

As prescribed in 570.702–13, insert the following clause:

Liquidated Damages (June 1985)

In case of failure on the part of the Lessor to complete the work within the time fixed in the lease contract or letter of award, the Lessor shall pay the Government as fixed and agreed liquidated damages, pursuant to this clause, the sum of $_____for each and every calendar day that the delivery is delayed beyond the date specified for delivery of all of the space ready for occupancy by the Government.

(End of Clause)

552.270–23 Operating costs.

As prescribed in 570.702–14, insert the following clause:

Operating Costs (June 1985)

(a) Beginning with the second year of the lease and each year after, the Government shall pay adjusted rent for changes in costs for cleaning services, supplies, materials, maintenance, trash removal, landscaping, water, sewer charges, heating, electricity, and certain administrative expenses attributable to occupancy. Applicable costs listed on GSA Form 1217, Lessor's Annual Cost Statement, when negotiated and agreed upon, will be used to determine the base rate for operating costs adjustment.

(b) The amount of adjustment will be determined by multiplying the base rate by the percent of change in the Cost of Living Index. The percent change will be computed by comparing the index figure published for the month prior to the lease commencement date with the index figure published for the month which begins each successive 12-month period. For example, a lease which commences in June of 1985 would use the index published for May of 1985 and that figure would be compared with the index published for May of 1986, May of 1987, and so on, to determine the percent change. The Cost of Living Index will be measured by the U.S. Department of Labor revised Consumer Price Index for Wage Earners and Clerical Workers, U.S. City Average, All Items Figure, (1967=100) published by the Bureau of Labor Statistics. Payment will be made with the monthly installment of fixed rent. Rental adjustments will be effective on the anniversary date of the lease. Payment of the adjusted rental rate will become due on the first workday of the second month following the publication of the Cost of Living Index for the month prior to the lease commencement date.

(c) If the Government exercised an option to extend the lease term at the same rate as that of the original term, the option price will be based on the adjustment during the original term. Annual adjustments will continue.

(d) In the event of any decreases in the Cost of Living Index occurring during the term of occupancy under the lease, the rental amount will be reduced accordingly. The amount of such reductions will be determined in the same manner as increases in rent provided under this clause.

(e) The offer must clearly state whether the rental is firm throughout the term of the lease or if it is subject to annual adjustment of operating costs, as indicated above. If operating costs will be subject to adjustment, it should be specified on block 19 of GSA Form 1364, Proposal to Lease Space, contained elsewhere in this solicitation.

(End of Clause)

552.270–24 Tax adjustment.

As prescribed in 570.702–15, insert the following clause:

Tax Adjustment (June 1985)

(a) The Government shall pay additional rent for its share of increases in real estate taxes over taxes paid for the calendar year in which its lease commences (base year). Payment will be in a lump sum and become due on the first workday of the month following the month in which paid tax receipts for the base year and the current year are presented, or the anniversary date of the lease, whichever is later. The Government will be responsible for payment only if the receipts are submitted within 60 calendar days of the date the tax payment is due. If no full tax assessment is made during the calendar year in which the Government lease commences, the base year will be the first year of a full assessment.

(b) The Government's share for the tax increase will be based on the ratio of the square feet occupied by the Government to the total rentable square feet in the building. If the Government's lease terminates before the end of a calendar year, payment will be based on the percentage of the year in which the Government occupied space. The payment will not include penalties for nonpayment or delay in payment. If there is any variance between the assessed value of the Government's space and other space in the building, the Government may adjust the basis for determining its share of the tax increase.

(c) The Government may contest the tax assessment by initiating legal proceedings on behalf of the Government and the Lessor or the Government alone. If the Government is precluded from taking legal action, the Lessor shall contest the assessment upon reasonable notice by the Government. The Government shall reimburse the Lessor for all costs and shall execute all documents required for the legal proceedings. The Lessor shall agree with the accuracy of the documents. The Government shall receive its share of any tax refund. If the Government elects to contest the tax assessment, payment of the adjusted rent shall become due on the first workday of the month following conclusion of the appeal proceedings.

(d) In the event of any decreases in real estate taxes occurring during the term of occupancy under the lease, the rental amount will be reduced accordingly. The amount of any such reductions will be determined in the same manner as increases in rent provided under this clause.

(End of Clause)

552.270-25 Adjustment for vacant premises.

As prescribed in 570.702-16, insert the following clause:

Adjustment for Vacant Premises (June 1985)

(a) If the Government fails to occupy any portion of the leased premises or vacates the premises in whole or in part prior to expiration of the firm term of the lease, the rental rate will be reduced.

(b) The rate will be reduced by that portion of the costs per square foot of operating expenses not required to maintain the space. Said reduction must occur after the Government gives 30 calendar days prior notice to the Lessor, and must continue in effect until the Government occupies the premises or the lease expires or is terminated.

(End of Clause)

552.270-26 If minimum not delivered.

As prescribed in 570.702-17, insert the following clause:

If Minimum Not Delivered (June 1985)

If delivered space contains less than the minimum square footage, the Government may cancel the lease. If such cancellation occurs, the Government may exercise its legal rights including charging the Lessor and its surety the increased cost of providing replacement space.

(End of Clause)

552.270-27 Delivery and condition.

As prescribed in 570.702-18, insert the following clause:

Delivery and Condition (June 1985)

Unless the Government elects to have the space occupied in increments, the space must be delivered ready for occupancy as a complete unit. The Government reserves the right to determine when the space is ready to occupy.

(End of Clause)

552.270-28 Time extensions.

As prescribed in 570.702-19, insert the following clause:

Time Extensions (June 1985)

The lease will not be terminated nor the Lessor charged with resulting damage if delays arise from unforeseeable causes beyond the control of the Lessor and/or its contractors, subcontractors, suppliers, or another Government contractor. However, the Lessor shall notify the Contracting Officer, in writing, of any delay within 10 calendar days after it begins. The Contracting officer shall ascertain the facts, determine the extent of the delay, and grant extensions when justified.

(End of Clause)

552.270-29 Termination for default.

As prescribed in 570.702-20, insert the following clause:

Termination for Default (June 1985)

If the Lessor fails to prosecute the work required to deliver the leased premises ready for occupancy by the Government with such diligence as will ensure delivery of the leased premises within the time required by the lease agreement, or any extension of the specified time, or if the Lessor fails to complete said work within such time, the Government may, by written notice to the Lessor, terminate the lease agreement. Regardless of whether the lease is terminated, the Lessor and his sureties shall be liable for any damage to the Government resulting from his failure to deliver the premises ready for occupancy within the specified time.

(End of Clause)

552.270-30 Progressive occupancy.

As prescribed in 570.702-21, insert the following clause:

Progressive Occupancy (June 1985)

The Government shall pay rent only when the entire premises or suitable units are ready for occupancy. If the agency occupies the space in partial increments, rent will accrue or be paid on a pro rata basis. Rental payments shall become due on the first workday of the month following the month in which an increment of space is occupied, except that should an increment of space be occupied after the fifteenth day of the month, the payment due date will be the first workday of the second month following the month in which it was occupied. The commencement date of the firm term will be a composite determined from all dates of incremental occupancy.

(End of Clause)

Subpart 552.3—Provision and Clause Matrixes

552.300 Scope of subpart.

This subpart consists of a series of matrixes, one each for supply, service, construction, architect-engineer and small purchase contracts which lists the applicable GSA provisions and clauses; and one each for utility contracts (sole supplier-regulated rates) and leases of real property which list the applicable FAR and GSAR provisions and clauses.

Note: The matrixes do not appear in this volume of the **Federal Register** or Title 48, Chapter 5 of the Code of Federal Regulations. Individual copies may be obtained from the Director of the Office of GSA Acquisition Policy and Regulations (VP), 18th and F Streets NW., Washington, DC 20405.

PART 553—FORMS

Subpart 553.1—General

Subpart 553.3—Illustrations of Forms

Authority: 40 U.S.C. 486(c).

Subpart 553.1—General

553.101 Requirements for use of forms.

(a) The requirements for use of GSA forms are explained in other parts of this regulation.

(b) The location in the text where a form is prescribed is identified by a cross-reference shown on the illustration of the form. When a form is mentioned in more than one place in this regulation, the section referenced on the illustration is the section where the basic prescription can be found.

553.102 Current editions.

Contracting officers shall use the current edition of the forms in Subpart 553.3 unless otherwise authorized under this regulation.

553.170 Establishing and revising GSA Forms.

(a) If two or more GSA services/offices use a GSA form, the Office of Acquisition Policy is responsible for maintaining the form. When a GSA form is used by a particular GSA service/office or if the form is used in connection with a type of contract which is unique to one service/office (e.g., construction contracts), that service/office is responsible for maintenance of the form.

(b) Proposed new or revised GSA procurement related forms must be submitted to the Office of Acquisition Policy for review and concurrence.

553.171 Forms incorporated by reference.

Forms containing solicitation provisions and/or contract clauses may be incorporated by reference in solicitations/contracts.

The contracting officer shall insert a clause substantially the same as the clause at 552.253-70 in solicitations and contracts when GSA Forms containing solicitation provisions and/or contract clauses are incorporated by reference.

Subpart 553.3—Illustrations of Forms

553.300 Scope of subpart.

Standard and GSA forms prescribed or referenced in the text of this chapter are illustrated in and made a part of the

GSAR loose-leaf edition. The forms are not illustrated in this volume of the Federal Register or Title 48, Chapter 5 of the Code of Federal Regulations. Copies may be obtained from the Director of the Office of GSA Acquisition Policy and Regulations (VP), 18th and F Streets NW., Washington, DC 20405.

SUBCHAPTERS I THROUGH M—[RESERVED]

SUBCHAPTER N—SPECIAL CONTRACTING PROGRAMS

PART 570—ACQUISITION OF LEASEHOLD INTERESTS IN REAL PROPERTY

Subpart 570.1—General

Subpart 570.2—Special Aspects of Contracting for Leasehold Interests of 10,000 Square Feet or More

Subpart 570.3—Special Aspects of Contracting for Leasehold Interests of Less Than 10,000 Square Feet

Subpart 570.4—Mistakes, Protests, Miscellaneous

Subpart 570.5—Special Aspects of Contracting for Continuing Space Requirements

Subpart 570.6—Special Aspects of Contracting for Lease Alterations

Subpart 570.7—Solicitation Provisions and Contract Clauses

Subpart 570.8—Forms Used for Contracting for Leasehold Interests in Real Property

Authority: 40 U.S.C. 486(c).

Subpart 570.1—General

570.101 Applicability.

(a) This part does not apply to the acquisition of leasehold interests in real property by the power of eminent domain, or by donation, or to the acquisition of leasehold interests in bare or unimproved land.

(b) Other parts of the GSAR apply to the acquisition of leasehold interests in real property only to the extent specified in this part and 501.103(b).

570.102 Definitions.

"Acquisition" means the acquiring by lease with appropriated funds of an interest in improved real property for use by the Federal Government whether the space is already in existence or must be constructed. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, market survey, solicitation, award of lease, lease performance, lease administration, and those technical and management functions directly related to the process of fulfilling agency space needs by contract.

"Contract" means lease.

"Contractor" means lessor.

"Fair Rental" means the amount of the rental that reasonably can be expected to be paid for the lease of real property as established by competition and/or by a value estimate based on accepted real property appraisal procedures.

"Landlord" or "lessor" means any individual, firm, partnership, trust, association, state or local government, or other legal entity that leases real property to the Government.

"Lease" or "leasehold interest in real property" means a conveyance to the Government of the right of exclusive possession of real property for a definite period of time by a landlord. It may include services provided by the landlord such as heating, ventilation, air conditioning, utilities, custodial services, and other related services furnished by the landlord.

"Lessee" or "tenant" means the United States of America.

"Rent and related services" means the consideration paid for the use of leased property plus the costs of operational services such as heat, light, and janitor services whether furnished by the lessor, the Government, or both.

"Small business" means a concern including affiliates, which is organized for profit, is independently-owned and operated, is not dominant in the field of leasing commercial real estate, and has annual average gross receipts of $10 million or less for the preceding three fiscal years.

"Solicitation for Offers (SFO)" means invitation for bids in sealed bidding or request for proposals in negotiations.

"Space in buildings" means the premises leased, or to be leased, including improvements. Its quantity is normally expressed in terms of square feet. It does not include space acquired by the power of eminent domain, donation, or condemnation or acquisitions of bare or unimproved land.

"Substantially as follows" or "substantially the same as," when used in the prescription of a provision or clause, means that authorization is granted to prepare and utilize a variation of that provision or clause to accommodate requirements that are peculiar to an individual acquisition, provided that the variation includes the salient features of the FAR/GSAR provision or clause, and is not

inconsistent with the intent, principle, and substance of the FAR/GSAR provision or clause or related coverage on the subject matter.

570.103 Authority to lease.

The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(h)(1)), as amended, and Section 1 of the Reorganization Plan No. 18 of 1950 (40 U.S.C. 490 Note) authorize the Administrator of General Services to acquire leasehold interests in real property for use by Federal agencies. The authority is limited to leases for buildings and improvements that do not bind the Government for periods in excess of 20 years.

570.104 Contracting officers.

(a) Contracting officers, acting within the scope of their appointments, are the exclusive GSA agents to enter into and administer leases on behalf of the Government in accordance with agency procedures.

(b) The contracting officer shall perform, or have performed, all administrative actions necessary for effective contracting.

570.105 Competition.

(a) The competition requirements of FAR Part 6 and Part 506 apply to the acquisition of leasehold interests in real property.

(b) Contracts for leasehold interests in real property must be awarded through the use of competitive procedures (sealed bidding or negotiation), unless the use of other than full and open competition is permitted by one of the exceptions in FAR 6.302.

(c) The acquisition of space in buildings through other than full and open competition must be held to the smallest number practicable and be justified in writing and approved in accordance with FAR 6.303, 6.304, and 506.304.

570.106 Methods of contracting.

(a) The use of sealed bidding to acquire space in buildings is generally not feasible, unless a building site has been preselected and a building is to be constructed on the site in accordance with Government furnished plans and specifications for lease to the Government. When using sealed bidding, see the procedures in FAR Part 14 and Part 514.

(b) The negotiated method is normally the best suited for acquiring space in buildings through a lease contract because it is necessary to conduct discussions with offerors about their proposals and factors other than price must be considered in making the award.

Subpart 570.2—Special Aspects of Contracting for Leasehold Interests of 10,000 Square Feet or More

570.201 Market surveys.

A market survey must be conducted by Government employees or by contractor personnel for every acquisition. The market survey must include:

(a) Solicitation of information on the availability of space through the use of circulars or newspaper advertisements and consultations (telephonically or in person) with realtors, brokers, owners, and others, as appropriate.

(b) An inspection of available locations that appear to meet the minimum requirements regarding quantity, quality, availability, and probable cost, unless a justification for use of other than competitive procedures has been approved. Results of inspections must be documented.

570.202 Advertising.

(a) Requirements for blocks of space of 10,000 or more square feet must be publicized in local newspapers and/or periodicals unless exempt under FAR 5.202 or 505.202.

(b) When the Government intends to acquire a leasehold interest in a building to be constructed on a preselected site, the proposed acquisition must be synopsized in the Commerce Business Daily (CBD).

(c) See FAR Part 5 and Part 505 for further information on advertising and synopsizing.

570.203 Solicitation for offers (SFO).

(a) The SFO is the basis for the entire lease negotiation process and must be made a part of the lease. SFO's must contain the information necessary to enable the prospective offeror to prepare a proposal. Each solicitation, as a minimum, must:

(1) Be in writing.

(2) Contain a description of the minimum requirements of the Government, including:

(i) A description of the required space.

(ii) Specifications. The type of specification will depend upon the nature of the space needed by the agency and the market available to satisfy the needs. Specifications may be stated in terms of function, performance, or design requirements. The specification must be drafted to promote full and open competition and include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law.

(iii) Any special requirements.

(iv) A delivery schedule.

(3) Describe the method used to measure space.

(4) Specify a date and place for the submission of offers.

(5) Indicate whether offers will be evaluated based on the initial lease term, or on the full term (initial term plus options).

(6) Require offers to be submitted on an annual rate per square foot basis for the amount of space offered.

(7) Identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the lease and state the relative importance the Government places on those evaluation factors and subfactors. Numerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. The solicitation must inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

(i) Offers will be reduced to an annual rental rate per square foot for the amount of space offered.

(ii) When different types of space are solicited, the lowest offer as to price will be determined on the basis of the composite square foot rate per year for the total amount of space offered.

(iii) When lump sum payments for initial tenant alterations are solicited, the lowest offer as to price will be determined by adding the annualized lump sum amount to the annual square foot rental rate (or the composite square foot rate). The lump sum amount will be annualized by dividing the lump sum by the number of years in the term (initial plus options) and dividing by the square footage offered.

(iv) The other factors that will be considered in evaluating proposals should be tailored to each acquisition and include only those factors that will have an impact on the award decision. The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of the contracting officer. However, price or cost to the Government must be included as an evaluation factor in every case. Other evaluation factors that may apply to a particular acquisition are the availability of public transportation, the availability of adequate food service within a reasonable distance, the neighborhood and building quality, the availability of daycare and physical fitness facilities, and any other relevant factors.

(8) Include provisions and clauses substantially the same as those listed on the matrix at 552.370 when the prescription for use of the provision or clause requires its use. The omission of any provision or clause when its prescription requires its use constitutes a deviation which must be approved under Subpart 501.4. Approval may be granted to deviate from provisions or clauses that are mandated by statute (e.g. FAR 52.203–5, Covenant Against Contingent Fees, FAR 52.203–1, Officials Not to Benefit, FAR 52.215–1, Examination of Records by the Comptroller General, etc.) in order to modify the language of the provision or clause. However, the statutory provisions and clauses may not be omitted from the SFO unless the statute provides for waiving the requirements of the provision or clause.

(9) Include appropriate forms as prescribed in Subpart 570.8.

(b) The SFO must be released to all prospective offerors at the same time.

(c) A reasonable number of extra copies of SFO's should be maintained at the issuing office in order to respond to individuals and firms requests for the SFO.

570.204 Changes to SFO's.

(a) When the Government's requirements change (either before or after receipt of proposals), the solicitation must be amended in writing.

(b) When time is of the essence, information on modifications may be provided orally if:

(1) The modifications are not complex;

(2) A record is made of the information provided;

(3) All offerors or prospective offerors are given notice on the same day, if possible; and

(4) The information provided orally is promptly confirmed by a written amendment.

(c) When modifications in the Government's requirements occur, the following procedures apply:

(1) If proposals have not been submitted, amendments must be sent to all offerors solicited.

(2) If proposals have been received but not evaluated, the amendments must be sent to all of the offerors.

(3) If a modification is so substantial that it requires a complete revision of the solicitation, the solicitation should be canceled and a new solicitation issued. New solicitations must be issued to all concerns solicited originally, any concerns added to the original SFO mailing list, and any other interested concerns.

570.205 Negotiations.

(a) Negotiations will be conducted with all offerors that are within the competitive range. The contracting officer shall determine the competitive range on the basis of cost and other factors that were stated in the solicitation and shall include in the competitive range all offers that have a reasonable chance of being selected for award. When there is doubt as to whether an offer is in the competitive range, the offer should be included.

(b) The content and extent of the negotiations are a matter of the contracting officer's judgement based on the particular facts of each acquisition. The contracting officer shall:

(1) Control all discussions;

(2) Advise the offeror of deficiencies in its offer so that the offeror is given an opportunity to satisfy the Government's requirements;

(3) Attempt to resolve any uncertainties concerning the offer;

(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process; and

(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its offer that may result from the discussion.

(c) No indication may be given to any offeror of a price which must be met since such practice constitutes an auction technique that is prohibited. Likewise, no offeror should be advised of its relative standing with other offerors.

(d) After receipt of offers, no information regarding the number or identity of the offerors participating in the negotiation may be made available to anyone whose official duties do not require such knowledge.

(e) Negotiations must be closed by establishing a date and time for closing of negotiations and requesting in writing that offerors submit a "best and final offer" by that date.

(f) Negotiations may not be conducted after the closing date for best and final offers unless negotiations are reopened with all offerors in the competitive range.

(g) Negotiations are confidential and must reflect complete agreement on all items and conditions of the lease contract. Information regarding the transaction will not be announced or made available until after the contract is awarded.

(h) A written negotiation record must be placed in the lease file.

570.206 Evaluating offers.

(a) An abstract of final offers must be prepared to aid in the analysis of offers received.

(b) Offers will be evaluated on the basis of the lowest annual price per square foot cost to the Government and other award factors as stated in the SFO.

570.207 Late offers, modifications of offers, and withdrawals of offers.

Offers determined to be received late will be considered under FAR 15.412.

570.208 Preaward requirements.

570.208–1 General.

(a) In order to comply with the warranty requirement of 41 U.S.C. 254(a) concerning contingent fees, the requirements of FAR Subpart 3.4 and Subpart 503.4 must be followed.

(b) Applicable certifications as prescribed in 552.370 must be reviewed for compliance with regulations.

(c) Leases must be cleared in accordance with the requirements of GSA Order, Contract Clearance (APD 2800.1B).

570.208–2 Cost or pricing data.

(a) Cost and pricing data is required under the circumstances described in FAR 15.804–2.

(b) The exemptions from and waivers of submission of certified cost or pricing data are outlined in FAR 15.804–3. The competition exemption applies when adequate price competition, as defined in FAR 15.804–3(b), is obtained. The market price exemption from submission cost or pricing data may be applied to proposed leases where there is evidence that the price is based on an established market price for similar space leased to the general public. A market survey and an appraisal conducted in accordance with accepted real property appraisal procedures may be used as evidence to establish the market price. The contracting officer may grant an exemption and need not require the prospective lessor to submit a Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data, when there is evidence, before solicitation, that there is an acceptable established market price (see FAR 15.804–3(e)(3)).

(c) In exceptional cases, the requirement for submission of certified cost or pricing data may be waived under FAR 15.804–3(i) and 515.804–3.

(d) When certified cost or pricing data is required, the contracting officer shall follow the procedural requirements in FAR 15.804–6(e).

(e) In the event the proposed lessor refuses to provide the data when required, the contracting officer shall follow the procedures in FAR 15.804–6(e) and 515.804–70.

570.208–3 Appraisal.

When the net annual rental exceeds $2,000, an appraisal of the fair rental is required for the property to be leased. However, an appraisal is not required for leases under 10,000 square feet where the contracting officer receives three or more best and final offers that are responsive to the solicitation requirements, except where lease construction projects are involved, the term is more than 10 years, or the total rental (firm term plus options) exceed $1 million.

570.208–4 Proposal evaluation.

(a) The contracting officer shall use cost or price analysis to evaluate the offers in accordance with the general guidance provided in FAR 15.805. The contracting officer shall document the lease file to demonstrate that the fair rental value has been properly established and show how it relates to the proposed contract rental.

(b) The lease file must also document the evaluation of other award factors listed in the solicitation. The file should include the basis for evaluation, an analysis of each offer, and a summary of findings.

570.208–5 Financial responsibility.

(a) The contracting officer shall make a determination that the prospective offeror is financially responsible with respect to the lease being considered. The contracting officer's signature on the contract is deemed to be an affirmative determination.

(b) In cases where the contracting officer has reason to question the offeror's financial ability to perform, a financial responsibility check may be requested from the Credit and Finance Branch, Region 6.

(c) All documents generated as a result of financial responsibility checks must be placed in the permanent lease file.

570.209 Award.

(a) An award will be made to the responsible offeror whose proposal is most advantageous to the Government considering price and other factors included in the solicitation.

(b) Award will be made in writing within the time frame specified in the SFO. If an award cannot be made within that time, the contracting officer shall request in writing from each offeror an extension of the acceptance period through a specific date.

(c) Unsuccessful offerors will be notified in writing, of the award.

(d) All proposals received in response to a solicitation may be rejected if the head of the contracting activity or designee determines that such action is in the public interest.

570.210 Inspection and certification.

A Government representative shall:

(a) Inspect the space, and

(b) Certify that the space is in substantial compliance with the Government's requirements and specifications before occupancy.

Subpart 570.3—Special Aspects of Contracting for Leasehold Interests of Less Than 10,000 Square Feet

570.301 Definitions.

"Small lease" means a lease for a block of space of less than 10,000 square feet that is awarded using the simplified procedures prescribed in this subpart.

"Small lease procedure" means the procedures prescribed in this subpart for making small leases using a simplified process and a short form lease contract.

570.302 Purpose.

The purpose of this subpart is to prescribe simplified procedures for small leases in order to reduce administrative costs while providing for the efficient and economical acquisition of leasehold interests in real property.

570.303 Policy.

The procedures prescribed in this subpart should be used to the maximum extent practicable for acquiring leasehold interests in real property involving blocks of space aggregating less than 10,000 square feet.

570.304 Procedures.

570.304–1 General.

(a) The contracting officer or a designated representative will:

(1) Locate and inspect buildings where space may be available to satisfy the Government's requirements;

(2) Present a proposed lease to prospective offerors together with a notice identifying all factors, including price or cost, and any significant subfactors that will be considered in awarding the lease and stating the relative importance the Government places on the evaluation factors or subfactors;

(3) Ask the prospective offerors to review the proposed lease and provide an offer;

(4) Negotiate directly with the offerors; and

(5) Award the lease.

(b) This procedure does not eliminate the requirements for legal review, contract clearance, etc., if the lease would be subject to such requirements based on the amount of the transaction or the nature of the agreement.

570.304–2 Market survey.

A market survey must be conducted in accordance with 570.201. The market survey is a crucial aspect of the small lease procedure.

570.304–3 Advertising.

Requirements may be publicized in local newspapers and/or periodicals when the contracting officer determines such advertising will serve to promote competition. For further information on advertising, refer to FAR Part 5 and Part 505.

570.304–4 Soliciting offers.

(a) Offers will be solicited by presenting each prospective offeror with a proposed short form lease and a notice identifying all factors, including price or cost, and any significant subfactors that will be considered in awarding the lease and stating the relative importance the Government places on the evaluation factors or subfactors.

(b) The proposed lease must describe the Government's requirements and include applicable provisions and contract clauses substantially the same as those listed on the matrix at 552.370.

570.304–5 Negotiation and award.

The policies and procedures in 570.205, 570.208 and 570.209 apply to small leases.

570.304–6 Inspection and certification.

A Government representative must inspect the space and certify that the space is in substantial compliance with the Government's requirements and specifications before occupancy.

Subpart 570.4—Mistakes, Protest, Miscellaneous

570.401 Disclosure of mistakes after award.

When a mistake in a lessor's offer is not discovered until after award, the mistake should be handled as provided in FAR 14.406–4 and Subpart 514.4.

570.402 Protests.

Protests regarding the award of lease contracts are handled as provided in FAR Subpart 33.1 and Subpart 533.1.

570.403 Awards to Federal employees.

Offers from officers or employees of the Government must be handled as provided in FAR 3.6 and 503.6.

Subpart 570.5—Special Aspects of Contracting for Continued Space Requirements

570.501 Renewal options.

(a) *Exercise of options.* Before exercising an option, the provisions of Part 517 must be followed.

(b) *Notification.* When a contracting officer determines that it is in the best interest of the Government to continue to lease a property, the lessor must be notified within the timeframe required by the lease.

(c) *Market survey.* When the right to renew a lease exists, a renewal must be based on a market survey and other applicable considerations. Surveys should focus on the prevailing rental rates for comparable space.

(d) *Reappraisal.* The original appraisal must be updated (e.g., by memorandum) or a new appraisal performed when the annual net rental exceeds $2,000.

(e) *Cancellation.* When a determination is made that a lease which has an automatic renewal clause is no longer required, the lessor will be notified in writing that the lease has been canceled.

570.502 Succeeding leases.

(a) *General.* Succeeding leases for the continued occupancy of space in a building may be entered into when a cost-benefit analysis has been conducted and the results indicate that an award to an offeror other than the present lessor would result in substantial relocation and duplication costs to the Government that are not expected to be recovered through competition.

(b) *Procedure*—(1) *Advertising.* The contracting officer shall publish a notice in local newspapers and/or periodicals when blocks of space of 10,000 or more square feet are involved. The notice should normally (i) indicate the Government's lease is expiring, (ii) describe the agency's needs in terms of type and quantity of space, (iii) indicate the Government is interested in considering alternative space if economically advantageous, (iv) advise prospective offerors that the Government will consider the cost of moving, alterations, etc., when deciding whether it should relocate, and (v) tell interested parties who to contact if they are interested in providing space to the Government.

(2) *Market survey.* A market survey must be conducted in accordance with 570.201.

(3) *Competition determination.* (i) If no potential acceptable locations are identified through the notice or the market survey, the contracting officer may prepare a justification to negotiate directly with the present lessor. The justification must be prepared and approved in accordance with FAR Subpart 6.3 and Subpart 506.3 and should fully document the efforts to locate alternative sources.

(ii) If potential acceptable locations are identified through the advertisement or market survey and relocation costs (including estimated moving costs, telecommunications costs, and the estimated cost of alterations, amortized over the firm term of the lease) are not significant enough to preclude recovery of such costs through competition, the contracting officer may proceed to develop a formal SFO and negotiate with all interested parties in accordance with the procedures in Subpart 570.2 or 570.3.

(iii) If potential acceptable locations are identified through the advertisement or market survey and substantial relocation costs are involved, the contracting officer shall conduct a cost-benefit analysis to determine whether the duplication of costs to the Government could be recovered through competition. The cost-benefit analysis must give consideration to the prices of other potentially available properties, relocation costs, and other appropriate considerations. The prices for other potentially available properties must be established by requesting the prospective offeror to provide an informational quotation for standard space for comparison purposes. The prices quoted for standard space will be adjusted by the Government for special requirements. A formal solicitation for offers (SFO) is not required for the purpose of obtaining the informational quotation. The contracting officer shall provide a general description of the Government's needs when requesting informational quotations. If oral quotations are provided, the record must be documented to reflect the following information, as a minimum: the name and address of the firm solicited, the name of the firm's representative providing the quote, the price(s) quote, the description of the space and services for which the quote is provided, the name of the Government employee soliciting the quotation, and the date of the conversation. The informational quotations must be compared to the present lessor's price, adjusted to reflect the anticipated price for a succeeding lease. Based on the results of the cost-benefit analysis, the contracting officer will:

(A) Prepare a justification for approval in accordance with FAR Subpart 6.3 and Subpart 506.3 to support the determination to negotiate with the present lessor for continued occupancy because it is likely that award to any other offeror would result in substantial duplication of costs to the Government that are not expected to be recovered through competition; or

(B) Develop a formal SFO and negotiate with all interested parties in accordance with the procedures in Subpart 570.2 or 570.3.

570.503 Expansion requests.

(a) When the expansion space needed is within the general scope of the lease, the space may be acquired through a modification to the lease.

(b) When the expansion space needed is outside the general scope of the lease, the contracting officer must determine whether it is more prudent to provide the expansion space by supplemental agreement to the existing lease or to satisfy the requirement through relocation. A market survey must be conducted to determine whether suitable alternative locations are available. If the market survey reveals alternate locations that can satisfy the total requirement, a cost-benefit analysis must be performed to determine whether it is in the Government's best interest to relocate. This analysis may include—

(1) The cost of the alternate space compared to the cost of expanding at the existing location;

(2) The cost of moving;

(3) The cost of duplicating existing improvements; and

(4) The cost of the unexpired portion of the firm term lease (unless a termination is possible, in which case the actual cost of such an action should be used).

(c) If no suitable alternative location is available and the cost of the space exceeds $25,000, a justification may be prepared for approval in accordance with FAR Subpart 6.3 and Subpart 506.3 in order to negotiate a Supplemental Lease Agreement to provide expansion space, provided the original lease term is not extended. When the cost is $25,000 or less, the contracting officer must prepare the justification for inclusion in the file.

570.504 Superseding leases.

(a) Consideration should be given to the execution of a superseding lease that would replace the existing lease when the changes or modifications to the space contemplated are so numerous or detailed as to cause complications, or would substantially change the present lease.

(b) The justification and approval requirements in FAR Subpart 6.3 and Subpart 506.3 must be complied with before negotiating a superseding lease if the amount of the lease for the firm term exceeds $25,000. When the cost is $25,000 or less, the contracting officer must prepare a justification for inclusion in the file.

570.505 Lease extensions.

(a) The justification and approval requirements in FAR Subpart 6.3 and Subpart 506.3 must be complied with before negotiating a Supplemental Lease Agreement exceeding $25,000 to extend the term of the lease to provide for continued occupancy on a short-term basis (usually not to exceed 1 year). For extensions of $25,000 or less the contracting officer must prepare the justification for inclusion in the contract file.

(b) FAR 6.302–1 provides for contracting without providing for full and open competition when the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency. This authority may be used to extend the term of a lease by supplemental agreement in situations such as the following:

(1) When the agency occupying the leased space is scheduled to move into other Federally controlled space but unexpected delays are encountered in preparing the new space for occupancy.

(2) When unexpected delays which are outside of GSA's control (i.e., protests, etc.) are encountered in acquiring replacement space.

(3) When various agencies occupying leased space are being consolidated and it is necessary to extend the terms of some leases to establish a common expiration date.

Subpart 570.6—Special Aspects of Contracting for Lease Alterations

570.601 General.

(a) Although the Government generally has a contractual right to alter the space leased, normally most alterations are acquired through a modification to the lease because they fall within the general scope of the lease and it is in the Government's interest to acquire the alterations from the lessor.

(b) As the need for alterations arise during the term of a lease contract, the contracting officer must examine each project and make a determination as to whether the alterations fall within the general scope of the lease and may be acquired through a modification to the lease. The primary test is whether the work can be regarded as fairly and reasonably an inseparable part of the lease requirement originally contracted for. If the alterations are outside the general scope, the contracting officer must make a decision to acquire the alterations through a separate contract, through a Supplemental Lease Agreement, or to request the work be performed by Federal employees.

570.602 Alterations by the lessor.

570.602–1 Justification and approval requirements.

(a) The justification and approval requirements in FAR Subpart 6.3 and 506.3 must be complied with before negotiating directly with the lessor for any alteration project exceeding $25,000 that is outside the general scope of the lease contract.

(b) Before negotiating directly with the lessor for any alteration project of $25,000 or less, that is outside the general scope of the lease, the contracting officer shall document, in writing, the reasons for the absence of competition.

570.602–2 Procedures.

(a) *Scope of work.* A scope of work must be prepared for all alteration projects.

(b) *Independent Government estimate.* An independent Government estimate must be prepared for all alteration projects, including changes to alteration agreements with lessors.

(c) *Request for proposal.* (1) The lessor must be provided with a scope of work, including any plans and specifications which have been developed, and should be requested to submit a proposal. The request for proposal should indicate whether progress payments will be made and provide for retainage, when appropriate.

(2) The proposal must be requested to be submitted in such detail that a cost or price analysis can be made.

(3) The requirements for the submission of certified cost or pricing data outlined in FAR 15.804–2 apply to alteration projects over $100,000. The procedural requirements at FAR 15.804–6 must be followed when requesting cost and pricing data. Exemptions from or waivers to submission of certified cost or pricing data must be processed in accordance with the requirements of FAR 15.804–3 and 515.804–3. If the lease does not include the clauses at FAR 52.215–22 and 52.215–24 or the clauses at FAR 52.215–23 and 52.215–25, the modification to the lease for the alterations must add the clauses at FAR 52.215–23 and 52.215–25 if cost and pricing data is submitted.

(d) *Audits.* Unless the cost or pricing data requirement is exempt or waived in accordance with FAR 15.804–3 and 515.804–3, an audit must be requested for negotiated alteration projects which are not competed as a part of the lease and exceed $500,000.

(e) *Evaluation of proposals.* The contracting officer shall:

(1) Determine whether the proposal will meet the Government's requirements;

(2) Analyze cost as compared to the independent estimate and the audit;

(3) Analyze profit in accordance with FAR Subpart 15.9 if the project exceeds $25,000; and

(4) Document analysis leading to negotiation objectives developed from paragraphs (e) (1) through (3) of this section.

(f) *Price negotiations.* (1) The contracting officer is responsible for exercising sound judgment and may make reasonable compromises as necessary.

(2) The negotiated price should provide the lessor with the greatest incentive for efficient and economical performance.

(3) Negotiations must be documented by a price negotiation memorandum.

(g) *Award.* Alterations may be procured using the GSA Form 276, Supplemental Lease Agreement, or the GSA Form 300, Order for Supplies or Services (alteration project of $25,000 or less) provided a reference is made to the lease.

(h) *Inspection and payment.* Final payment for alterations must not be made until the work is:

(1) Inspected by a qualified Government employee or independent Government contractor; and

(2) Certified as completed in a satisfactory manner.

570.603 Alterations by the Government.

When the Government elects to exercise its rights to make the alterations rather than contract directly with the lessor, the work may be performed by Federal employees or may be contracted out using all of the standard contracting procedures that would apply to a construction contract if the work were to be performed on Federal property. If the Government decides to contract for the work, the lessor, as well as all other prospective contractors, should be invited to submit an offer for the project.

Subpart 570.7—Solicitation Provisions and Contract Clauses

570.701 Solicitation provisions.

570.701-1 Preparation of offers.

The contracting officer shall insert a provision substantially the same as the provision at 552.270-1, Preparation of Offers, in solicitations for leasehold interests in real property.

570.701-2 Explanation to prospective offerors.

The contracting officer shall insert a provision substantially the same as the provision at 552.270-2, Explanation to Prospective Offerors, in solicitations for leasehold interests in real property.

570.701-3 Late submissions, modifications, and withdrawals of offers.

The contracting officer shall insert a provision substantially the same as the provision at 552.270-3, Late Submissions, Modifications, and Withdrawals of Offers, in solicitations for leasehold interests in real property.

570.701-4 Historic preference.

The contracting officer shall insert a provision substantially the same as the provision at 552.270-4, Historic Preference, in solicitations for leasehold interests in real property when the market survey indicates that space is available in both historic and non-historic buildings.

570.701-5 Lease award.

The contracting officer shall insert a provision substantially the same as the provision at 552.270-5, Lease Award, in solicitations for leasehold interests in real property.

570.701-6 Parties to execute lease.

The contracting officer shall insert a provision substantially the same as the provision at 552.270-6, Parties to Execute Lease, in solicitations for leasehold interests in real property.

570.702 Contract clauses.

570.702-1 Definitions.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-10, Definitions, in solicitations and contracts for leasehold interests in real property.

570.702-2 Subletting the premises.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-11, Subletting the Premises, in solicitations and contracts for leasehold interests in real property.

570.702-3 Maintenance of premises.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-12, Maintenance of Premises, in solicitations and contracts for leasehold interests in real property.

570.702-4 Damage by fire or other casualty.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-13, Damage by Fire or Other Casualty, in solicitations and contracts for leasehold interests in real property.

570.702-5 Condition report.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-14, Condition Report, in solicitations and contracts for leasehold interests in real property.

570.702-6 Applicable codes and ordinances.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-15, Applicable Codes and Ordinances, in solicitations and contracts for leasehold interests in real property.

570.702-7 Inspection of premises.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-16, Inspection of Premises, in solicitations and contracts for leasehold interests in real property.

570.702-8 Failure in performance.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-17, Failure in Performance, in solicitations and contracts for leasehold interests in real property.

570.702-9 Lessor's successors.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-18, Lessor's Successors, in solicitations and contracts for leasehold interests in real property.

570.702-10 Alterations.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-19, Alterations, in solicitations and contracts for leasehold interests in real property.

570.702-11 Proposals for adjustment.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-20, Proposals for Adjustment, in solicitations and contracts for leasehold interests in real property. If the lease is for 10,000 square feet or more, the contracting officer shall use the clause with its Alternate I.

570.702-12 Changes.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-21, Changes, in solicitations and contracts for leasehold interests in real property.

570.702-13 Liquidated damages.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-22, Liquidated Damages, in solicitations and contracts for leasehold interests in real property when there is a critical requirement that the delivery date be met and an actual cost cannot be established for the loss to the Government resulting from late delivery.

570.702-14 Operating costs.

If the contracting officer determines operating cost escalation is necessary, a clause substantially the same as the clause at 552.270-23, Operating Costs, must be included in solicitations and contracts for leasehold interests in real property.

570.702-15 Tax adjustment.

If the contracting officer determines tax escalation is necessary, a clause substantially the same as the clause at 552.270-24, Tax Adjustment, must be included in solicitations and contracts for leasehold interests in real property.

570.702-16 Adjustment for vacant premises.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-25, Adjustment for Vacant Premises, in solicitations and contracts for leasehold interests in real property.

570.702-17 If minimum not delivered.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-26, If Minimum Not Delivered, in solicitations and contracts for leasehold interests in real property.

570.702-18 Delivery and condition.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-27, Delivery and Condition, in solicitations and contracts for leasehold interests in real property.

570.702-19 Time extensions.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-28, Time Extensions, in solicitations and contracts for leasehold interests in real property.

570.702-20 Termination for default.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-29, Termination for Default, in solicitations and contracts for leasehold interests in real property.

570.702-21 Progressive occupancy.

The contracting officer shall insert a clause substantially the same as the clause at 552.270-30, Progressive Occupancy, in solicitations and contracts for leasehold interests in real property.

Subpart 570.8—Forms Used for Contracting for Leasehold Interests in Real Property

570.801 Standard forms.

(a) Standard Form 2, U.S. Government Lease for Real Property, should be used to award leases of 10,000 square feet or more. The reference to the Standard Form 2A in paragraph 7 should be deleted. Its use for leases of less than 10,000 square feet is optional.

(b) Page 1 of the Standard Form 2-B, U.S. Government Lease for Real Property (Short Form), may be used to award leases for less than 10,000 square feet. Page 2 of the form should not be used because the clauses are obsolete.

570.802 GSA forms.

(a) GSA Form 276, Supplemental Lease Agreement, should be used to amend existing leases that involve the acquisition of additional space or partial release of space, revisions in the terms of a lease, restoration settlements, and alterations.

(b) GSA Form 387, Analysis of Values Statement, should be completed whenever an appraisal is provided by in-house or contract appraiser.

(c) GSA Form 1364, Proposal To Lease Space To The United States of America, may be used to obtain offers from prospective offers.

(d) GSA Form 3516, Solicitation Provisions, should be included as a part of all solicitations for the acquisition of leasehold interests in real property.

(e) GSA Form 3517, General Clauses, should be included as a part of all solicitations and contracts for the acquisition of leasehold interests in real property.

(f) GSA Form 3518, Representations and Certifications, should be included as a part of all solicitations for the acquisition of leasehold interests in real property.

Appendix A to Chapter 5—Contracting Office Assignment Codes

Note: Appendix A is illustrated in and made a part of the GSAR loose-leaf edition. Appendix A is not illustrated in this volume of the **Federal Register** or Title 48, Chapter 5 of the Code of Federal Regulations.

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Part III

Environmental Protection Agency

40 CFR Part 148 et al.
Land Disposal Restrictions for Second Third Scheduled Wastes; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 148, 264, 265, 266, 268, and 271

[SWH-FRL-3564-9]

Land Disposal Restrictions for Second Third Scheduled Wastes

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating regulations implementing the Congressionally mandated prohibitions on land disposal of hazardous wastes listed in 40 CFR 268.11 (the second one-third of the Schedule of restricted hazardous wastes, hereafter referred to as the Second Third). This action is taken in response to amendments to the Resource Conservation and Recovery Act (RCRA), enacted in the Hazardous and Solid Waste Amendments (HSWA) of 1984. Today's notice promulgates specific treatment standards and prohibition effective dates for certain Second Third wastes, and imposes the "soft hammer" provisions of 40 CFR 268.8 on Second Third wastes for which the Agency is not establishing treatment standards. In addition, this notice promulgates treatment standards and effective dates for certain First Third (40 CFR 268.10) "soft hammer" wastes, as well as for certain wastes originally contained in the Third Third of the schedule (40 CFR 268.12). Wastes for which treatment standards are being promulgated can be land disposed after the applicable effective dates only if the respective treatment standards are met, or if disposal occurs in units that satisfy the "no migration" standard.

EFFECTIVE DATE: This final rule is effective June 8, 1989, except for EPA Hazardous Waste F006—cyanide (nonwastewater) which is effective July 9, 1989.

ADDRESSES: The official record for this rulemaking is identified as Docket Number F–89–LD11–FFFFF and is located in the EPA RCRA docket, Room 2427, 401 M Street SW., Washington, DC 20460. The docket is open from 9:00 to 4:00, Monday through Friday, except for Federal holidays. The public must make an appointment to review docket materials by calling (202) 475–9327. The public may copy a maximum of 100 pages from any regulatory document at no cost. Additional copies cost $.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; Telephone: 800–424–9346 (toll-free) or 382–3000 locally. For general information on specific aspects of this final rule, contact Bob Scarberry or Michaelle Wilson, Office of Solid Waste (OS–333), (202) 382–4770. For specific information on BDAT treatment standards, contact James Berlow, Office of Solid Waste (OS–322), (202) 382–7917. For specific information on the Underground Injection Control Program and hazardous waste injection wells, contact Bruce Kobelski, Office of Drinking Water (WH–550), (202) 382–5508. For specific information on capacity determinations or national variances, contact Jo-Ann Bassi, Office of Solid Waste (OS–322), (202) 475–6672.

SUPPLEMENTARY INFORMATION:

OUTLINE

I. Background

A. Summary of the Hazardous and Solid Waste Amendments of 1984 and the Land Disposal Restrictions Framework

1. Statutory Requirements

The Hazardous and Solid Waste Amendments (HSWA), enacted on November 8, 1984, prohibit the land disposal of hazardous wastes. Specifically, the amendments specify dates when particular groups of hazardous wastes are prohibited from land disposal unless "it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous" (RCRA sections 3004 (d)(1), (e)(1), (g)(5); 42 U.S.C. 6924 (d)(1), (e)(1), (g)(5)). Congress established a separate schedule for restricting the disposal by underground injection of solvent- and dioxin-containing hazardous wastes, wastes referred to collectively as California list hazardous wastes (RCRA section 3004(f)(2), 42 U.S.C. 6924(f)(2)), and soil and debris resulting from CERCLA section 104 and 106 response actions and RCRA corrective actions when the soil and debris contains listed spent solvent, dioxin, and California list hazardous wastes.

The amendments also require the Agency to set "levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized" (RCRA section 3004(m)(1), 42 U.S.C. 6924(m)(1)). Wastes that meet treatment standards established by EPA are not prohibited and may be land disposed. In addition, a hazardous waste that does not meet the treatment standard may be land disposed provided the "no migration" demonstration specified in RCRA sections 3004 (d)(1), (e)(1) and (g)(5) is made.

For the purposes of the restrictions, HSWA defines land disposal "to include, but not be limited to, any placement of * * * hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave" (RCRA section 3004(k), 42 U.S.C. 6924(k)). Therefore, because HSWA defines land disposal to include underground injection wells, disposal of hazardous wastes in injection wells is subject to the land disposal restrictions.

The land disposal restrictions are immediately effective unless the Administrator grants a national variance from the statutory or regulatory deadline and establishes a different date (not to exceed two years beyond the applicable deadline) based on "the earliest date on which adequate alternative treatment, recovery, or disposal capacity which protects human health and the environment will be available" (RCRA section 3004(h)(2), 42 U.S.C. 6924(h)(2)). The Administrator may also grant a case-by-case extension of the effective date for up to one year, renewable once for up to one additional year, when an applicant successfully makes certain demonstrations (RCRA section 3004(h)(3), 42 U.S.C. 6924(h)(3)). A case-by-case extension can be granted whether or not a national capacity variance has been granted.

The statute also allows treatment of hazardous wastes in surface impoundments that meet certain minimum technological requirements (or certain exceptions thereto). Treatment in surface impoundments is permissible provided the treatment residues that do not meet the treatment standard(s) (or applicable statutory prohibition levels) are "removed for subsequent management within one year of the entry of the waste into the surface impoundment" (RCRA section 3005(j)(11)(B), 42 U.S.C. 6925(j)(11)(B)).

In addition to prohibiting the land disposal of hazardous wastes, Congress prohibited storage of any waste which is prohibited from land disposal unless "such storage is solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal" (RCRA section 3004(j), 42 U.S.C. 6924(j)).

2. Applicability to Injected Wastes

As noted above, disposal of hazardous wastes in injection wells is subject to the provisions of HSWA. The Agency has previously proposed and promulgated regulations pertaining to injected wastes separately from regulations addressing wastes disposed in surface facilities. The Agency chose this approach for two reasons. First, injection of hazardous wastes is controlled by two statutes, RCRA and the Safe Drinking Water Act (SDWA). The regulations governing injection of these wastes have been codified along with other regulations of the Underground Injection Control (UIC) program under the SDWA in Parts 124, 144, 145, 146, 147, and 148 of the Code of Federal Regulations (CFR). EPA believes that it is useful to the regulated community and to the State regulators to have requirements regarding restrictions on hazardous waste injection located in the same portion of the CFR as are other requirements pertaining to injection wells. Second, the statute established a separate schedule for the restrictions on injection of certain wastes.

3. Solvents and Dioxins

Effective November 8, 1986, HSWA prohibited land disposal (except by underground injection into deep wells) of dioxin-containing hazardous wastes numbered F020, F021, F022, and F023 and solvent-containing hazardous wastes numbered F001, F002, F003, F004, and F005 listed in 40 CFR 261.31. (RCRA sections 3004 (e)(1), (e)(2), 42 U.S.C. 6924 (e)(1), (e)(2)).

On November 7, 1986, EPA promulgated a final rule (51 FR 40572) implementing RCRA section 3004(e). This rule not only established the general framework for the land disposal restrictions program, but also established treatment standards for the F001–F005 solvent wastes and F020, F023 and F026–F028 dioxin-containing wastes.

4. California List Wastes

Effective July 8, 1987, the statute prohibited further land disposal (except by deep well injection) of the following listed or identified wastes (RCRA section 3001) set out in RCRA sections 3004 (d)(1) and (d)(2) (42 U.S.C. 6924 (d)(1), (d)(2)).

(A) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing free cyanides at concentrations greater than or equial to 1,000 mg/l.

(B) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing the following metals (or elements) or compounds of these metals or elements) at concentrations greater than or equal to those specified below:

(i) arsenic and/or compounds (as As) 500 mg/l;

(ii) cadmium and/or compounds (as Cd) 100 mg/l;

(iii) chromium (VI and/or compounds (as Cr VI)) 500 mg/l;

(iv) lead and/or compounds (as Pb) 500 mg/l;

(v) mercury and/or compounds (as Hg) 20 mg/l;

(vi) nickel and/or compounds (as Ni) 134 mg/l;

(vii) selenium and/or compounds (as Se) 100 mg/l; and

(viii) thallium and/or compounds (as Tl) 130 mg/l.

(C) Liquid hazardous wastes having a pH less than or equal to two (2.0).

(D) Liquid hazardous wastes containing polychlorinated biphenyls (PCBs) at concentrations greater than or equal to 50 ppm.

(E) Hazardous wastes containing halogenated organic compounds (HOCs) in total concentration greater than or equal to 1,000 mg/kg.

On July 8, 1987, EPA promulgated a final rule (52 FR 25760) implementing RCRA section 3004(d). This rule established treatment standards for California list wastes containing PCBs and certain HOCs, and codified the statutory prohibition for liquid corrosive wastes. The statutory prohibition is also in effect for California list wastes containing free cyanides, metals, and dilute HOC wastewaters.

5. Disposal of Solvents, Dioxins and California List Wastes in Injection Wells

Section 3004(f) of RCRA required that the Administrator prohibit the disposal of solvents, dioxins and California list wastes in deep wells, effective August 8, 1988, unless such disposal had been determined to be protective of human health and the environment for as long as the wastes remained hazardous or unless a variance had been granted under RCRA section 3004(h). On July 26, 1988, the Agency established effective dates for the prohibition on injection of solvents and dioxin wastes (53 FR 28118). In another regulation, effective August 6, 1988 and published August 16, 1988 in the **Federal Register**, the Agency established, in part, effective dates for the prohibition on injection of California list wastes (53 FR 30908).

6. Scheduled Wastes

The amendments required the Agency to prepare a schedule for restricting the land disposal of all hazardous wastes listed or identified as of November 8, 1984 in 40 CFR Part 261, excluding solvent- and dioxin-containing wastes and California list wastes covered under the schedule set by Congress. The schedule, based on a ranking of the listed wastes that considers their intrinsic hazard and their volume, is to ensure that prohibitions and treatment standards are promulgated first for high volume hazardous wastes with high intrinsic hazard before standards are set for low volume wastes with low intrinsic hazard. The statute further requires that these determinations be made by the following deadlines:

(A) At least one-third (the First Third) of all listed hazardous wastes by August 8, 1988.

(B) At least two-thirds (the Second Third) of all listed hazardous wastes by June 8, 1989.

(C) All remaining listed hazardous wastes and all hazardous wastes identified by one or more of the characteristics defined in 40 CFR Part 261 (the Third Third) by May 8, 1990.

On May 28, 1986, EPA promulgated the schedule for setting treatment standards for the listed and identified hazardous wastes (51 FR 19300). This schedule is incorporated in 40 CFR 268.10, 268.11, and 268.12.

If EPA fails to set a treatment standard by the statutory deadline for any hazardous waste in the First or Second Third, the waste may be disposed in a landfill or surface impoundment provided "such facility" is in compliance with the minimum technological requirements specified in RCRA section 3004(o) for new facilities (RCRA section 3004(g)(6)).

Note: On August 17, 1988, EPA interpreted the term "such facility" in 3004(g)(6) to refer to the individual surface impoundment or landfill unit. See 53 FR 31181. This interpretation was upheld by the D.C. Circuit in *Steel Bar Mills v. EPA*, No. 88–1608 (Order of Feb. 22, 1989).

In addition, prior to land disposal, the generator must certify to the Administrator that he has investigated the availability of treatment capacity and has determined that he has contracted to use the practically available technology that yields the greatest environmental benefit, or that disposal in such landfill or surface impoundment is the only practical alternative to treatment currently available to the generator. This restriction on the use of landfills and surface impoundments applies until EPA sets a treatment standard for the waste or until May 8, 1990, whichever is sooner. Other forms of land disposal, including underground injection, are not similarly restricted and may continue to be used for disposal of untreated wastes until EPA promulgates a treatment standard and sets an effective date, or until May 8, 1990, whichever is sooner. If the Agency fails to set a treatment standard for any scheduled hazardous waste by May 8, 1990, the waste is automatically prohibited from all forms of land disposal after that time unless the waste is the subject of a successful "no migration" demonstration (RCRA section 3004(g)(5), 42 U.S.C. 6924(g)(5)).

For the scheduled wastes, the statute does not provide different deadlines for restriction of underground injected versus surface land disposed wastes; however, the Agency proposed and promulgated First Third regulations for surface disposed and injected wastes on separate dates. The First Third final rule, promulgated on August 8, 1988 and published in the **Federal Register** on August 17, 1988 (53 FR 31138), set out the conditions under which wastes may continue to be land disposed by means other than by injection. Effective dates for the prohibition of injection of certain First Third wastes are included in the final regulation published August 16, 1988 (53 FR 30908). In addition, the Agency promulgated effective dates for the prohibition on injection of another group of First Third wastes on June 14, 1989 (54 FR 25416). Today's final rule promulgates the conditions under which Second Third wastes may continue to be land disposed. It also promulgates treatment standards for some First Third and Third Third restricted hazardous wastes. This rule applies to all forms of land disposal including deep well injection, and finalizes the January 11, 1989 proposed rulemaking (54 FR 1056).

7. Newly Identified and Listed Wastes

RCRA requires the Agency to make a land disposal prohibition determination for any hazardous waste that is newly identified or listed in 40 CFR Part 261 after November 8, 1984 within six months of the date of identification or listing (RCRA section 3004(g)(4), 42

U.S.C. 6924(g)(4)). However, the statute does not provide for an automatic prohibition of the land disposal of such wastes if EPA fails to meet this deadline.

B. Regulatory Framework

The November 7, 1986 final rule (51 FR 40572) established the regulatory framework for implementing the land disposal restrictions program. Some changes to the framework were made in the July 8, 1987 California list final rule (52 FR 25760), as well as in the August 17, 1988 First Third final rule (53 FR 31138). Regulations specifying how the framework applies to injected wastes were promulgated July 26, 1988 (53 FR 28118).

The following discussion summarizes the major provisions of the land disposal restrictions framework. (For a comprehensive understanding of the Land Disposal Restrictions program, refer to the aforementioned final rules.) It is included for purposes of information only, any does not reopen and of the previously-stated principles for judicial review.

1. Applicability

The land disposal restrictions apply prospectively to the affected wastes. In other words, hazardous wastes land disposed after the applicable effective dates are subject to the restrictions, but wastes land disposed prior to the effective dates are not required to be removed or exhumed for treatment (51 FR 40577). Similarly, only surface impoundments receiving restricted wastes after the applicable deadline are subject to the restrictions on treatment in surface impoundments contained in 40 CFR 268.4 and RCRA 3005(j)(11). Also, the storage restrictions apply to wastes placed in storage after the effective dates.

The provisions of the land disposal restrictions program apply to wastes produced by generators (including small quantity generators) of greater than 100 kilograms of hazardous waste (or greater than 1 kilogram of acutely hazardous waste) in a calendar month. Wastes produced by small quantity generators of less than 100 kilograms of hazardous waste (or less than 1 kilogram of acute hazardous waste) per calendar month are conditionally exempt from RCRA, including the land disposal restrictions (see 40 CFR 268.1).

The land disposal restrictions apply to both interim status and permitted facilities. The requirements of the land disposal restrictions program supersede 40 CFR 270.4(a); therefore, even though the requirements may not be specified in the permit conditions, all permitted facilities are subject to the restrictions.

2. Treatment Standards

By each statutory deadline, the Agency must establish the applicable treatment standards under 40 CFR Part 268 Subpart D for each restricted hazardous waste. After the applicable effective dates, restricted wastes may be land disposed if they meet the treatment standards. If EPA does not promulgate treatment standards by the statutory deadlines, such wastes are prohibited from land disposal (with the exception of First Third and Second Third wastes that are subject to the "soft hammer" provisions of 40 CFR 268.8).

A treatment standard is based on the performance of the best demonstrated available technology (BDAT) to treat the waste (51 FR 40578). EPA may establish treatment standards either as specific technologies or as performance standards based on the performance of BDAT technologies. Compliance with performance standards may be monitored by measuring the concentration level of the hazardous constituents (or in some circumstances, indicator pollutants) in the waste, treatment residual, or in the extract of the waste or treatment residual. When treatment standards are set as performance levels, the regulated community may use any technology not otherwise prohibited (such as impermissible dilution) to treat the waste to meet the treatment standard. Treaters thus are not limited to use of only a particular technology. However, when treatment standards are expressed as specific technologies, such technologies must be employed.

3. National Variances from the Effective Dates

The Agency has the authority to grant national variances from the statutory or regulatory effective dates, not to exceed two years, if there is insufficient alternative protective treatment, recovery or disposal capacity for the wastes (RCRA section 3004(h)(2)). If there is a significant shortage of such capacity nationwide, EPA will establish an alternative effective date based on the earliest date such capacity will be available.

During the period a capacity variance is in place, disposal in a landfill or surface impoundment may be made only in a unit meeting the minimum technological requirements of RCRA section 3004(o). The D.C. Circuit recently upheld the Agency's interpretation of the term "such facility" in section 3004(h)(4) to refer to the disposal unit. (*Steel Bar Mills Ass'n.* v. *EPA*, No 88-1608, Order of Feb. 22, 1989; *Mobil Oil Corp.* v. *EPA*,—F.2d—(D.C. Cir., April 4, 1989)). It is the Agency's opinion, however, that if a waste subject to a national capacity variance is treated to meet the applicable treatment standards (or meets the standards as generated), the land disposal restrictions allow such waste to be disposed in a Subtitle C landfill or surface impoundment regardless of whether the unit meets minimum technological requirements (MTRs) (but see RCRA sections 3004(o)(1) and 3005(j)(1), which independently require that certain surface impoundments and landfills meet MTRs). This is because such waste, once treated to meet the promulgated treatment standard (or which meets such standard as generated), is no longer prohibited from land disposal. In addition, from a policy perspective, if a person treats a national capacity variance waste to meet a treatment standard, thus electing not to take advantage of the variance, he should receive some benefit under the law and thus should be able to utilize non-MTR landfills and impoundments as he would if the Agency had not granted the national capacity variance.

4. Case-By-Case Extensions of the Effective Dates

The Agency will consider granting up to a one-year extension (renewable once) of a ban effective date on a case-by-case basis. The requirements outlined in 40 CFR 268.5 must be satisfied. During the period that such a case-by-case extension is in place, disposal in a landfill or surface impoundment may be made only in a unit meeting the minimum technological requirements of RCRA section 3004(o). In considering whether to grant a case-by-case extension, the Agency has stated that it will consider the feasibility of providing alternative capacity during the extension period, and that the determination of feasibility "may involve considerations of the technical and practical difficulties associated with providing alternative capacity." (51 FR 40603, Nov. 7, 1986.) EPA wishes to clarify that in assessing questions of feasibility, it will never base a decision solely on the assertion that alternative treatment is too costly.

5. "No Migration" Exemptions From the Restrictions

The Agency has the authority to allow the land disposal of a restricted hazardous waste which does not meet the treatment standard upon the successful demonstration that there will be no migration of hazardous

constituents from the disposal unit or injection zone for as long as the waste remains hazardous (for surface disposed wastes see 40 CFR 268.6; for underground injected wastes see 40 CFR 148.20). If a "no migration" petition is granted, it can remain in effect for no longer than ten years for disposal in interim status land disposal units, and for no longer than the term of the RCRA permit for disposal in permitted units (40 CFR 268.6(h)).

The Agency's plan for implementing the "no migration" provisions of RCRA with respect to injected wastes are outlined in detail in 40 CFR 148.20 (53 FR 28118, July 26, 1988). A petitioner is required to demonstrate through modeling that there is no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This demonstration can be made in one of two ways: The use of flow and transport models to show that injected fluids will not migrate vertically out of the injection zone for a period of 10,000 years or laterally within the injection zone to a point of discharge or interface with an underground source of drinking water; or, use of geochemical modeling to show that the waste is transformed so it will become nonhazardous at the edge of the injection zone. Also, a showing must be made that the well is in compliance with the substantive area of review, corrective action, and mechanical integrity requirements of Part 146.

6. Variances From the Treatment Standards

The variance from the treatment standard procedures were established to account for cases where the treatment standard is expressed as a performance level and the waste, after properly-conducted treatment, cannot meet the level, or where the treatment technology is not appropriate for the waste. The petitioner must demonstrate that because the physical or chemical properties of the waste differs significantly from the wastes analyzed in developing the treatment standard, the waste cannot be treated to specified levels or by the specified methods (51 FR 40605 and 40 CFR 268.44). The variance procedure can result in the establishment of a new treatability group and corresponding treatment standard that applies to all wastes meeting the criteria of the new waste treatability group. A site-specific variance from the treatment standard may also be granted administratively (without rulemaking), but the variance has no generic applicability to the waste if it is generated at other sites (53 FR 31199, August 17, 1988).

7. Exemption for Treatment in Surface Impoundments

Wastes that would otherwise be prohibited from one or more methods of land disposal may be treated in a surface impoundment that meets certain technological requirements (RCRA section 3005(j)(11) and 40 CFR 268.4(a)(3)) as long as treatment residuals that do not meet the applicable treatment standard (or statutory prohibition levels where no treatment standards are established) are removed for subsequent management within one year of entry into the impoundment and are not placed into any other surface impoundment. The owner or operator must certify to the Regional Administrator that the impoundment meets the liner, leachate collection system and ground water monitoring requirements imposed by RCRA section 3004(o)(1) (unless the impoundment qualifies for an exemption from those requirements under RCRA sections 3005 (j)(2) and (j)(4)). The owner or operator must also submit a copy of the waste analysis plan that has been modified to provide for testing treatment residuals in accordance with § 268.4 requirements.

8. Storage of Restricted Wastes

Storage of restricted wastes is prohibited except where storage is solely for the purpose of accumulating sufficient quantities of wastes to facilitate proper treatment, recovery, or disposal (RCRA section 3004(j) and 40 CFR 268.50). A facility that stores a prohibited waste for more than one year bears the burden of proving that such storage is solely for this purpose. The Agency bears the burden of proof if it believes that storage of a restricted waste by a facility for up to one year is not for the purpose of accumulating sufficient quantities to facilitate proper treatment, recovery, or disposal. Since any placement of wastes in landfills, piles, impoundments, etc. is defined as land disposal (RCRA section 3004(k)), only storage in tanks and containers is affected by the storage prohibition in § 268.50 (see 52 FR 21013, June 4, 1987).

9. The "Soft Hammer" Provisions

The First and Second Third wastes for which EPA has not promulgated treatment standards may be disposed in landfill and surface impoundment units, provided certain demonstrations are made, and provided these units meet the minimum technology requirements of section 3004(o) as specified in 40 CFR 268.8.

The Agency's reading that "soft hammer" wastes destined for landfill or impoundment disposal can only be disposed in minimum technology landfills and surface impoundment units was upheld by the D.C. Circuit in *Steel Bar Mills Ass'n.* v. *EPA*, No. 88-1608 (order of Feb. 22, 1989), and endorsed in *dicta* in *Mobil Oil Corp.* v. *EPA*, __F.2d__ (D.C. Cir., April 4, 1989, slip op. at 7-8). The "soft hammer" provisions apply only until May 8, 1990, or until EPA promulgates treatment standards, whichever is sooner. Other types of land disposal are not restricted until EPA promulgates treatment standards and effective dates, or until May 8, 1990.

C. Summary of the Proposed Rule

The Agency proposed treatment standards and effective dates for 32 Second Third wastes. In addition, the Agency proposed treatment standards and effective dates for 19 First Third wastes which previously had been subject to the "soft hammer" provisions, as well as for 14 Third Third wastes and 4 newly listed wastes. Effective dates for wastes being underground injected were also proposed. No changes to the land disposal restrictions framework were proposed. The proposed approach, as well as any changes being made in today's final rule, is discussed in preamble section III of today's rule.

D. Comments Received on the Proposed Rule

The Agency received 92 comments addressing various elements of the proposed rule. Some of the most frequently discussed issues were: the proposed treatment standards for cyanide wastes, the use of "no land disposal" as a treatment standard, and rescheduling of wastes from the Third Third to the Second Third. A summary of these issues, along with the Agency's response, is provided in the appropriate preamble sections related to the individual waste codes of today's rule.

The Agency also received comments on the applicability of the land disposal restrictions to wastes included in lab packs and on the advance notice of the Agency's proposed approach for regulating the remaining listed and characteristic wastes by May 8, 1990. A summary of these comments and the Agency's responses follows in this section.

Detailed summaries of all comments and the Agency's responses can be found in the documents "Comment Response Document for the Second Third Land Disposal Restrictions Proposed Rule", Volumes 1-3, in the RCRA docket.

1. Regulation of Lab Packs

The Agency received several comments related to the regulation of lab packs under the land disposal restrictions framework. Some commenters requested an exemption from the land disposal restrictions for lab packs. Other commenters requested that the Agency establish as the treatment standard a specified treatment method for the entire lab pack, disregarding the treatment standards applicable to the wastes it contains. Several commenters requested relief from the paperwork burden associated with providing notice of each restricted waste in the lab pack and its corresponding treatment standard (as required under the land disposal restrictions recordkeeping requirements). Commenters also stated that there may be hundreds of wastes included in a lab pack and the land disposal restrictions require that applicable treatment standards or "soft hammer" requirements be met for each waste prior to land disposal. They assert that such regulation is inappropriate for lab packs.

The Agency addressed the issue of applicability of the land disposal restrictions to lab packs in the final rule promulgated on November 7, 1986 (see 51 FR 40584–85), and is not changing its position in today's final rule. The Agency maintains that these wastes cannot be exempt from the statutory requirements since the plain language of the statute includes them, and there is no indication in the legislative history to exclude lab packs from the land disposal restrictions if they contain restricted wastes.

With respect to means of easing the administrative burden on lab packs, the Agency is sympathetic to the concerns voiced, but lacks the time and resources (given the pressing statutory deadlines) to take action in this rulemaking, particularly when no clearly acceptable approach is now apparent. The Agency is thus today soliciting further comment and data on issues associated with lab packs. The Agency requests data and specific suggestions supporting treatment options for lab packs. The Agency also solicits specific suggestions on modifications that could be made to the notification and certification requirements, in order that the administrative burden for lab packs might be somewhat relieved, while at the same time satisfying the "cradle to grave" paper trail for hazardous wastes regulated under the land disposal restrictions.

2. Advance Notice of Third Third Approach

Several comments addressed the Agency's advance notice of an approach for regulating the remaining listed and characteristic hazardous wastes by May 8, 1990. The Agency appreciates these comments and suggestions, and will consider them when proposing land disposal restrictions for the Third Third later this year. The Agency will respond to comments received on the advance notice in the Response to Comments Document for Third Third wastes.

3. Comments on Stabilization of Organics

Comments were received in response to the Agency's request for data on the effectiveness of stabilization of organic constituents. The Agency will evaluate these comments prior to promulgation of the Third Third final rule.

II. Summary of Today's Final Rule

Today's notice describes the Agency's final approach to implementing RCRA section 3004(g) requirements with respect to certain listed hazardous wastes included in 40 CFR 268.11 (as well as §§ 268.10 and 268.12). The Agency is required to promulgate regulations establishing conditions under which Second Third wastes may be land disposed by the statutory deadline of June 8, 1989.

A. Applicability of Treatment Standards

Today the Agency is promulgating treatment standards and effective dates for only certain Second Third wastes. Wastes listed in 40 CFR 268.11 for which EPA does not establish treatment standards or effective dates are subject to the "soft hammer" provisions that allow continued land disposal until May 8, 1990, or until treatment standards are promulgated, whichever is sooner (40 CFR 268.8).

The Agency is also promulgating treatment standards for certain First Third "soft hammer" wastes, as well as certain Third Third wastes, to become effective immediately upon promulgation. The Third Third wastes included in today's final rule were originally scheduled to be prohibited from land disposal by May 8, 1990. These wastes are included in today's rule because of the similarity of the Third Third wastes to First or Second Third waste treatability groups for which treatment standards are being promulgated. The Agency maintains that the original schedule promulgated May 26, 1986 (51 FR 19300) is not irrevocable: the Agency retains a continuing authority to shift particular wastes from one third of the schedule to another (see *Chemical Waste Management* v. *EPA*, 839 F. 2d 1526, 1529 n.2 (D.C. Cir. 1989). The statutory language likewise indicates that scheduling decisions are committed solely to the Agency's discretion (RCRA section 3004(g)(3)), and that prohibitions need not be delayed until the end of a scheduling period to take effect (see, e.g., RCRA section 3004(g)(1): "Not later than * * *"). Given the Congressional concern about an expeditious end to land disposal of untreated hazardous wastes (see e.g., RCRA sections 1002(b)(7), 1003(5), 1003(6)), it also makes sense from a policy perspective to accelerate prohibitions where it is possible to do so. Thus, the Agency is not precluded from proposing or promulgating treatment standards for any wastes ahead of schedule.

In addition, the Agency is amending the schedule so that certain Second Third wastes are moved to the Third Third. The Agency is moving wastewater residues resulting from certain treatment methods (i.e., metals recovery, metals precipitation, cyanide destruction, carbon adsorption, chemical oxidation, steam stripping, biodegradation, and incineration or other direct thermal destruction provided such treatment methods are well-designed and well-operated) for which EPA has not promulgated wastewater treatment standards. This action is being taken in order that residues from substantial treatment of these "soft hammer" wastes may be further treated in land disposal units that do not meet minimum technology requirements. As was explained in the First Third final rule (53 FR 31184), the Agency finds justification for such action in that wastes that have undergone substantial treatment to levels that may ultimately satisfy treatment standards should not be precluded from further treatment in polishing or advanced biological treatment units (RCRA sections 3005 (j)(3) and (j)(13)) that are substantially protective of human health and the environment.

It should be noted that the Agency moved all multi-source leachate derived from most listed hazardous wastes to the Third Third in a final rule promulgated on February 27, 1989 (54 FR 8264). The February 27, 1989 rule thus applies to multi-source leachate derived from disposal of Second Third listed hazardous wastes. This action has the effect of rescheduling the residues from treating the leachate and to contaminated ground water or soil that contain such leachate. *Id.* Other

restricted wastes not initially part of the leachate that are mixed with it, however, are not rescheduled and thus remain subject to all applicable statutory and regulatory prohibitions. *Id.*

EPA is today deleting § 268.12(c), as adopted in the August 17, 1988 First Third regulation. That provision rescheduled leachate derived from management of soft hammer wastes to the Third Third. By rescheduling all multi-source leachate to the Third Third, this provision is no longer necessary. The only leachate to which it would still apply would be single-source leachate, and EPA has already determined that all prohibitions and standards for single-source leachate should take effect immediately (see 54 FR 8265, Feb. 27, 1989). Consequently, there is no reason for this provision to remain in effect.

The Agency is moving Second Third wastes that are mixed hazardous/radioactive wastes to the Third Third. As was explained in the First Third final rule (53 FR 31147), there are relatively small volumes of such waste mixtures being generated, so such waste is more appropriately addressed in the Third Third.

B. Best Demonstrated Available Technologies (BDAT)

Today's final rule defines waste treatability groups and identifies the Best Demonstrated Available Technology (BDAT) for each (see preamble section III.A.). Treatment standards applicable to each treatability group are based on the performance levels achievable by the corresponding BDAT. Any technology not otherwise prohibited (i.e., impermissible dilution) may be used to meet concentration-based treatment standards. Where treatment standards are expressed as a specified technology, the waste must be treated using the specified technology prior to land disposal.

Following are tables listing BDAT for the wastes for which treatment standards are promulgated in today's rule:

Best Demonstrated Available Technologies for Wastes Included in Today's Final Rule

1. Alkaline chlorination, followed by precipitation, settling, and sludge dewatering:

F007 wastewaters
F008 wastewaters
F009 wastewaters
F010 wastewaters
F011 wastewaters
F012 wastewaters
P013 wastewaters
P021 wastewaters
P029 wastewaters
P030 wastewaters
P063 wastewaters
P074 wastewaters
P098 wastewaters
P099 wastewaters
P104 wastewaters
P106 wastewaters
P121 wastewaters

2. Alkaline chlorination, followed by precipitation, settling, filtration, and stabilization of metals:

F006 nonwastewaters
(note: metal standards for this wastecode were establisehd as part of the First Third final rule and are not being repromulgated)
F007 nonwastewaters
F008 nonwastewaters
F009 nonwastewaters

3. Electrolytic oxidation followed by alkaline chlorination, followed by precipitation, settling, filtration, and stabilization of metals:

F011 nonwastewaters
F012 nonwastewaters
P074 nonwastewaters
P099 nonwastewaters
P104 nonwastewaters

4. Electrolytic oxidation followed by alkaline chlorination, followed by precipitation, settling, filtration:

P013 nonwastewaters
P021 nonwastewaters
P029 nonwastewaters
P030 nonwastewaters
P063 nonwastewaters
P098 nonwastewaters
P106 nonwastewaters
P121 nonwastewaters

4. Incineration:

F010 nonwastewaters
F024
K009 nonwastewaters
K010 nonwastewaters
K011 nonwastewaters
K013 nonwastewaters
K014 nonwastewaters
K023
K028
K029 nonwastewaters
K038 nonwastewaters
K039 nonwastewaters*
K040 nonwastewaters
K043
K093
K094
K095 nonwastewaters
K096 nonwastewaters
P039 nonwastewaters
P040 nonwastewaters*
P041 nonwastewaters*
P043 nonwastewaters*
P044 nonwastewaters*
P062 nonwastewaters*
P071 nonwastewaters
P085 nonwastewaters*
P089 nonwastewaters
P094 nonwastewaters
P097 nonwastewaters
P109 nonwastewaters*
P111 nonwastewaters*
U028
U058 nonwastewaters*
U069
U087 nonwastewaters*
U088
U102
U107
U109
U235 nonwastewaters
*Required method of treatment

5. Incineration or fuel substitution:

K027 nonwastewaters*
K113 nonwastewaters*
K114 nonwastewaters*
K115 nonwastewaters*
K116 nonwastewaters*
U221 nonwastewaters*
U223 nonwastewaters*
*Required method of treatment

6. Carbon adsorption or incineration; or pretreatment (such as biological treatment or chemical oxidation) followed by carbon adsorption and incineration:

K027 wastewaters*
K039 wastewaters*
K113 wastewaters*
K114 wastewaters*
K115 wastewaters*
K116 wastewaters*
P040 wastewaters*
P041 wastewaters*
P043 wastewaters*
P044 wastewaters*
P062 wastewaters*
P085 wastewaters*
P109 wastewaters*
P111 wastewaters*
U058 wastewaters*
U087 wastewaters*
U221 wastewaters*
U223 wastewaters*
*Required method of treatment

7. Biological treatment:

K036 wastewaters
K038 wastewaters
K040 wastewaters
P039 wastewaters
P073 wastewaters
P089 wastewaters
P094 wastewaters
P097 wastewaters
U235 wastewaters

8. Steam stripping followed by biological treatment:

K009 wastewaters
K010 wastewaters

9. No land disposal based on no generation (generated from the process in the listing description and disposed after June 8, 1989):

K005 nonwastewaters
K007 nonwastewaters

10. Stabilization:

K115—nickel

11. No standards for the Second Third waste codes ("soft hammer"):

K025 wastewaters
K029 wastewaters
K041
K042
K095 wastewaters
K096 wastewaters
K097
K098
K105
P002, P003, P007, P008, P014, P026, P027, P049, P054, P057, P060, P066, P067, P072, P107, P112, P113, P114,
U002, U003, U005, U008, U011, U014, U015, U020, U021, U023, U025, U026, U032, U035, U047, U049, U057, U059, U060, U062, U070, U073, U080, U083, U092, U093, U094, U095, U097, U098, U099, U101, U106, U109, U110, U111, U114, U116, U119, U127, U128, U131, U135, U138, U140, U142, U143, U144, U146, U147, U149, U150, U161, U162, U163, U164, U165, U168, U169, U170, U172, U173, U174, U176, U178, U179, U189, U193, U196, U203, U205, U206, U208, U213, U214, U215, U216, U217, U218, U239, U244

C. Applicability of Today's Rule to Class I–H Hazardous Waste Injection Wells Regulated Under 40 CFR Part 148

The Agency has previously proposed and promulgated regulations and effective dates for underground injected hazardous wastes covered under RCRA sections 3004(f) and (g) separately from regulations addressing wastes disposed in surface facilities. The Agency is today addressing all methods of land disposal, including injection wells regulated jointly under the Safe Drinking Water Act (SDWA) and RCRA.

D. Waste Analysis Requirements

The Agency is today finalizing for Second Third wastes the waste analysis requirements already promulgated in the First Third final rule (53 FR 31146). Where BDAT is a destruction or removal technology, a total waste analysis is required because it is most appropriate for measuring such destruction or removal. Similarly, where BDAT is identified as an immobilization technology such as stabilization, analysis of a TCLP waste extract is required because it is the most appropriate measure of immobilization. In cases where both types of technology are identified as BDAT, both types of waste analyses are required.

In order for the initial generator to determine whether his waste meets the applicable treatment standard as generated, he should analyze the total waste if a treatment standard is in § 268.41, or he should analyze a waste extract if the treatment standard is found in § 268.43. The generator may also make this determination based on his knowledge of the waste provided there is a reasonable basis for doing so as, for example, the generator using so little of a key constituent that it could not be found in the waste at levels exceeding a treatment standard (51 FR 40597, Nov. 7, 1986; and § 268.7(a)).

E. Nationwide Extensions of the Effective Date

Due to lack of sufficient alternative protective treatment or recovery capacity, EPA is granting a national capacity extension for soil and debris contaminated with certain waste codes covered by today's final rule. A two-year extension, until June 8, 1991, is granted for soil and debris contaminated with First, Second, and Third Third wastes for which treatment standards promulgated in today's rule are based upon the performance of incineration. (See preamble section III.C.2.)

A capacity variance is also granted for certain wastes disposed by underground injection. A two-year extension of the effective date, until June 8, 1991, is granted for hazardous waste codes F007, K009 (wastewaters), K011 (nonwastewaters), and K013 (nonwastewaters) (see preamble section III.C.3.).

EPA has determined to establish an effective date of July 8, 1989 for the F006—cyanide (nonwastewater) treatment standard. Although existing information indicates that the treatment standard is readily achievable with existing treatment systems, the delayed effective date will provide any time needed for generators to adjust or fine tune existing treatment systems, or to enter into contracts with commercial treaters. At the same time, given the information showing that well over 90 percent of generators are already achieving treatment standards and the existence of excess commercial treatment capacity (see preamble section III.C.), EPA does not believe that the regulated community needs any longer period to come into compliance with the new standard (see RCRA section 3010(b)(1)).

EPA does not believe that section 3004(h)(1) mandates an immediate effective date for the cyanide standard for F006 nonwastewaters. Section 3004(h)(1) applies to prohibitions issued under sections 3004(d)–(g). The cyanide standard is not a prohibition of the waste (since F006 is already prohibited under the First Third rule), but rather an additional treatment standard issued pursuant to section 3004(m). The general policy of section 3004(h), however, provides good cause within the meaning of section 3010(b)(3) for not delaying the new standard's effective date for any more than 30 days.

The Agency is also delaying the effective date for 30 days, until July 8, 1989, for F007, F008, and F009 wastewaters and nonwastewaters. EPA has determined that no long term national capacity variance for these wastes is warranted. The extension is being granted, however, in order to be cautious and allow time (if any is truly needed) for facilities to adjust existing cyanide treatment processes to operate more efficiently, or to enter into contracts with commercial treatment facilities.

EPA is also granting a 30-day capacity extension to F011 and F012 wastewaters and nonwastewaters, until July 8, 1989. Additionally, for the period between July 8, 1989 and December 8, 1989, F011 and F012 nonwastewaters will be subject to the same cyanide standards as the electroplating wastes (i.e., 590 mg/kg for total cyanide and 30 mg/kg for amenable cyanide). Effective December 8, 1989, however, these wastes must meet the 110 mg/kg total cyanide standard and the 9.1 mg/kg amenable cyanide standard (see preamble section III.C.1. for further discussion of the effective dates).

F. Treatment Standards for Prohibited Wastes that are Mixed with Non-Prohibited Wastes

Prohibited wastes are not exempted from the land disposal prohibitions when they are mixed with other wastes (or any other materials, for that matter.) Were this not the case, land disposal prohibitions would be without meaning since they could be evaded by the expedient of mixing with a non-prohibited waste. (See 54 FR 8265, Feb. 27, 1989.)

Prohibited wastes are sometimes mixed with other materials in the course of treatment. If the prohibited waste is no longer capable of being treated to meet the treatment standard after mixing, it is possible that an improper form of mixing is occurring. The Agency realizes and acknowledges, however, that mixing wastes can be a normal part of treatment. Therefore, to the extent that such mixing occurs and can be

determined to be a legitimate part of the treatment process, the mixture could be eligible for a treatability variance pursuant to § 268.44. Part of the demonstration, however, would be whether mixing has made the prohibited waste more difficult to treat, and if so, whether the treatment method utilized is still legitimate.

It should be evident that intentional mixing to evade a treatment standard is impermissible, and if such intentional mixing occurs, it never could serve as grounds for granting a treatability variance under § 268.44. The Agency further expects that generators and treatment facilities would take reasonable steps to avoid mixing waste streams that are generated separately if such mixing is not a legitimate part of the treatment process. For example, it would ordinarily be inappropriate to mix a metal-bearing waste like F006 with a halogenated organic waste like F024.

The status of mixtures that consist of multi-source leachate and other non-leachate First Third prohibited wastes is presently controlled by a recent order filed by the D.C. Court of Appeals for the District of Columbia Circuit. In that order, the Court left in effect (by mutual consent of the parties) a judicial stay of the applicability of the so-called waste code carry-through principle to multi-source leachate. The order continues, "[a]s to anything contaminated both by leachate and by other first-third prohibited wastes, the other wastes must, to the extent technically feasible, be treated to the applicable treatment standards. Prohibited wastes intentionally mixed with leachate for the purpose of avoiding applicable treatment standards remain subject to all of the standards and requirements in the August 8, 1988 rule." Order of April 24, 1989 in *Chemical Waste Management* v. *EPA*, No. 88–1581.

EPA interprets this order in the following way: First, by requiring that all non-leachate First Third prohibited wastes be treated "to the extent technically feasible", the Court made clear that only technical considerations are involved in the determination, and that the cost of treatment is not a relevant consideration. (In fact, the Court amended its earlier order of September 23, 1988, which required treatment "to the extent feasible", in response to the government's pleading that cost could not legally be considered in determining treatment standards.) In determining whether treatment has occurred to the extent technically feasible, it ordinarily would be necessary to address the possible means of treating all of the hazardous constituents in the prohibited waste, including both organics and inorganics.

Second, all of the parties in their pleadings to the Court represented that any mixing of prohibited wastes and multi-source leachate that occurred *after* September 23, 1988, the date of the first amended order entered by the Court related to this situation, would be deemed to be mixing with the purpose of avoiding a treatment standard and that therefore all applicable treatment standards would continue to apply to the non-leachate prohibited waste(s) in such mixtures. (See Petitioners' Response of April 13, 1989 at pp. 5–6, 8 expressing this understanding, and Petitioners' Supplemental Response of April 24, 1989 characterizing language suggested by petitioners that documents this understanding as stating that "restricted wastes in such mixtures occurring on or after the date of amendment of the stay order will have to be treated to the applicable treatment standards, notwithstanding the presence in the mixture of multi-source leachates.") Consequently, any prohibited waste that was mixed with multi-source leachate after September 23, 1988 remains subject to treatment standards.

EPA believes that any person seeking to dispose of a leachate-non-leachate First Third prohibited waste mixture would have the burden of demonstrating that the mixture has been treated to the extent technically feasible. This is because that person would be claiming an exception to a remedial statutory scheme, see, e.g., *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 126 (1953), and in addition would be in possession of facts within its special knowledge. The Agency notes in addition that States could evaluate the validity of an "extent technically feasible" claim only if the State is authorized to administer the land disposal prohibition regulations. Since no State is so authorized at the present time, any regulatory concurrence would have to come from EPA.

EPA believes it important that the Court's order not be used as a means to evade technically achievable treatment standards. Therefore, the Agency recommends careful evaluation of any claim that one of these mixtures has been treated to the extent technically feasible. In addition, the Agency recommends that EPA headquarters personnel be notified of such claims in order to assist in the technical determination and in order to have technology-based determinations of waste treatability be as consistent as possible.

G. Rationale for Immediate Effective Date

The regulations promulgated today will be effective immediately except where the Agency has specified a national extension of the effective date or otherwise specified an alternative effective date. HSWA requires that today's regulations become effective on or before the June 8, 1989 effective date of the restrictions on the second one-third of the wastes scheduled pursuant to RCRA section 3004(g)(4)(A). If the Agency fails to promulgate regulations for any of these wastes by the statutory effective date, the restrictions on disposal of the waste in a landfill or surface impoundment, stipulated in section 3004(g)(6)(B) take effect automatically on June 8, 1989. If the Agency has not promulgated treatment standards for any scheduled waste by May 8, 1990, that waste is prohibited from all forms of land disposal unless a generator has been granted an extension of the effective date (either a national capacity extension or a case-by-case extension) or a "no migration" finding has been made. Hence, June 8, 1989 is the latest date for EPA to promulgate regulations that will prevent the "soft hammer" in section 3004(g) from becoming effective for all Second Third wastes.

Section 3004(h) requires that regulations established under sections 3004 (d), (3), (f), or (g) be effective immediately upon promulgation. Furthermore, section 3004(m) specifies that regulations setting treatment standards must have the same effective date as applicable regulations established under sections 3004 (d), (e), (f), or (g). For today's regulations which set treatment standards and are promulgated under section 3004(g), this date will be June 8, 1989. Since the statute clearly states that the regulations implementing section 3004(g) must go into effect on or before June 8, 1989 in order to prevent the "soft hammer" from falling, EPA finds that good cause exists under section 3010(b)(3) to have an immediate effective date. For the same reason, EPA finds that good cause also exists under section 554(d)(3) of the Administrative Procedure Act, 5 U.S.C. section 553(d)(3), to waive the requirements that regulations be published at least 30 days before the effective date.

III. Detailed Discussion of Today's Rule

A. Development and Identification of Treatment Standards

Today's rule promulgates BDAT treatment standards for many Second Third wastes, some First Third wastes for which land disposal has been previously restricted according to the "soft hammer" provisions, and several Third Third wastes. Sections III.A.1. through III.A.11. of the January 11, 1989 Proposed Rule (54 FR 1062–1104) presented discussions on the determination of treatability groups and the development of treatment standards for RCRA hazardous wastes. Sections III.A.1. through III.A.7. (54 FR 1062–1065) presented an overview of the general procedures that the Agency follows for these determinations. A detailed discussion of the methodology for identification of BDAT is provided in the November 7, 1986 Final Rule for Solvents and Dioxins (51 FR 40572). The Agency specifically stated that it did not reopen the issues presented in these sections for public comment, but merely restated the Agency's position on these issues in order to save readers the trouble of referring to earlier documents. The same is true for most of the reiterated discussions in today's preamble. However, the Agency is also adding a clarifying discussion of certain issues, particularly the comparison of treatment standards to Practical Quantitation Limits (PQLs), and the use of grab and composite samples for purposes of establishing and enforcing treatment standards.

1. Clarification of the General Applicability of BDAT

a. *Wastewater versus nonwastewater standards.* The treatment standards in today's rule are generally expressed as constituent concentrations for "wastewaters" and for "nonwastewaters". The treatment standards apply to the prohibited waste as well as to all residuals generated by treating the original prohibited waste. Therefore, solids generated from treatment of a particular waste must meet the nonwastewater treatment standards and wastewaters generated from treatment of this waste must meet the wastewater treatment standards. Section III.A.3.(f.) and (h.) of today's rule provides a discussion of the applicability of treatment standards to treatment residuals where BDAT is established as a method of treatment rather than as numerical concentration-based standards.

For purposes of this rule, the Agency defines wastewaters as those wastes (listed wastes, including wastes generated as a result of the "mixture" and "derived-from" rules) that contain less than 1% total organic carbon (TOC) and less than 1% total suspended solids, except for those wastes identified as F001, F002, F003, F004, and F005 solvent-water mixtures. See 53 FR 31145 (August 17, 1988) adopting this definition for First Third wastes and 51 FR 40579 (November 7, 1986) for the definition of F001, F002, F003, F004, and F005 solvent-water mixtures. Those wastes (listed wastes, including wastes that are hazardous as a result of the "mixture" and "derived-from" rules) that do not meet these criteria are defined as nonwastewaters and thus would contain greater than or equal to 1% TOC, or greater than or equal to 1% total suspended solids. It is not permissible to dilute or perform partial treatment on a waste in order to switch the applicability of a nonwastewater standard to a wastewater standard (or vice versa). (See 52 FR 21012 (June 4, 1987); but see 52 FR 25767 (June 8, 1987) noting special circumstances when California list wastes are involved). Dewatering technologies (such as filtration and centrifugation) that are designed to separate wastewater from nonwastewaters are not prohibited.

b. *Analytical requirements and relationship of PQLs to BDAT.* For all wastes in today's rule, BDAT has been identified as a destruction technology for all of the organic constituents and for cyanides. The corresponding treatment standards for these constituents are based on the analysis of total concentration. Since these technologies are specifically designed to destroy the organics and cyanides, the Agency maintains that the best measure of treatment performance is the one that reflects the extent to which these organics and cyanides have been destroyed.

Note: The land disposal restrictions for solvent waste codes F001–F005 (51 FR 40572) require the analysis of TCLP extracts as a measure of performance. At the time that the treatment standards for F001–F005 were promulgated, useful data were not available on total constituent concentrations in treated residuals and, as a result, the TCLP was considered to be the best available measure of performance.

In cases where treatment standards for metals in nonwastewaters are based on stabilization, the use of the TCLP is required as a measure of the performance of the treatment technology. The Agency maintains that where data are available, the TCLP data best reflect the extent to which the mobility of these metals can be minimized. Where treatment standards for nonwastewaters are based on multiple treatment processes due to the presence of organics and metals, the waste has to meet both total constituent concentrations for organics and TCLP concentrations for metals prior to land disposal.

The Agency evaluates all BDAT list constituents when establishing treatment standards. This list of chemicals was derived from the constituents listed in 40 CFR Part 261 Appendix VII and Appendix VIII. The rationale for selection of the particular constituents to be regulated can be found in the background document for each waste or waste treatability group. The Agency believes that it is not restricted to regulating only those constituents for which a waste is listed (40 CFR Part 261 Appendix VII). This is appropriate given that Appendix VII, setting forth the constituents that were the basis for listing, is not an exhaustive list of hazardous constituents in each waste, and was never intended to be. (See RCRA section 3001(f), a provision designed to force EPA to consider hazardous constituents other than those for which the waste was listed when evaluating delisting petitions. Section 3001(f) thus acknowledges that Appendix VII is only a partial list of the hazardous constituents that can be present in a listed waste.)

EPA has been asked a number of questions about the relationship of BDAT treatment standards to the practical quantitation limits (PQLs) for a number of constituents. In response, it is important to clarify the definition of PQLs, their intended use, and their relationship to BDAT treatment standards.

In the September, 1986, edition of SW–846 (Volume 1B, Chapter 1, p. 1–9), the Agency defines PQLs as follows: "The practical quantitation limit (PQL) is the lowest level that can be reliably achieved within the specified limits of precision and accuracy during routine laboratory operating conditions." Further, in Method 8250 of SW–846 (the analytical method for determination of semivolatile organics in wastes by gas chromatography/mass spectrometry) the Agency states "Sample PQLs are highly matrix-dependent. The PQLs listed herein are provided for guidance and may not always be achievable" (*Ibid*, Table 2, p. 8250–5), and further defines PQLs as the method detection limit (from Table 1, p. 8250–2, 3, and 4) multiplied by a matrix dependent factor that was estimated for four matrices (Table 2, p. 8250–5).

As evident from the above citations, the Agency recognizes the importance of the dependency of the waste matrix to

the level of PQLs obtainable. The Agency also recognizes that PQLs listed in SW–846 are not always achievable for constituents as measured in untreated wastes. However, the Agency points out that the levels of PQLs are directly related to the amount of interferences that are present in the different waste matrices. Most treatment processes, particularly destructive technologies such as incineration, do not destroy only the hazardous constituents of the waste. They destroy other organics present that typically interfere with the analysis for constituents in untreated wastes. Thus, PQLs are typically significantly lower for treatment residuals such as incinerator ash than for untreated wastes. These differences in PQLs for untreated and treated wastes are demonstrated in almost every BDAT background document where incineration has been established as BDAT.

With respect to the use of PQLs, the Agency points out that PQLs were established as a means of guidance for analysis of waste samples and were intended to act as minimum performance criteria for analytical laboratories. They do not necessarily represent the lowest limits of achievable analytical performance for any given waste. They were also intended to be broadly applied to groups of wastes. The matrix dependent correction factors were not developed for any particular waste code, and as listed in Table 2 (cited above) do not specifically apply to any particular treatment residuals (i.e., Table 2 only lists correction factors for matrices identified as ground water, low-level soil, high-level soil, and non-water miscible waste). Further, the Agency is currently in the process of modifying and expanding these matrix correction factors, as well as modifying the detection limits from which the PQLs are derived.

The major point of confusion regarding PQLs is that the PQLs noted in SW–846 for some constituents are higher than some of the promulgated treatment standards. This apparent anomaly results primarily from the fact that the PQLs in SW–846 were not based on testing the matrices that were tested in developing the treatment standards. The treatment standards for a given waste code, in contrast, are based on analytical testing of the residuals from the treatment of that waste (or in some cases, a similar waste from which the treatment standards are transferred). Thus, the resulting treatment standards appropriately reflect the level of analytical performance achievable for that waste.

Other commenters questioned whether constraints posed by the limits of applicable analytic methods allow the treatment standards to be met on a reliable, routine basis. The Agency points out that the laboratories used in the development of the BDAT standards are themselves reliable and must maintain compliance with all QA/QC requirements on a routine basis. Further, the background documents for all wastes for which incineration has been established as BDAT, indicate a consistency of the laboratories in obtaining low detection limits for the regulated constituents in these wastes, thus providing additional support that these treatment standards are achievable on a routine and reliable basis.

In cases where a facility believes that particular, waste-specific treatment standards cannot be obtained due to the inability of their laboratory to achieve PQLs below the treatment standards on certain treatment residuals, the facility may submit a petition for a variance from those particular treatment standards for that particular waste or wastes. In such a case, the facility must demonstrate that the analyses are in compliance with all other BDAT QA/QC provisions and that the treatment process is a well-designed and well-operated BDAT process. (As outlined in the BDAT Generic Quality Assurance Project Plan (EPA/530–SW–87–011, March 1987), the Agency may also use analytical methods for setting treatment standards that are not specifically identified in SW–846, provided that the methods comply with all appropriate detection limits, spike/surrogate recoveries, and other quality assurance criteria.)

c. *Restrictions on the use of technologies identified as BDAT.* All of the treatment standards expressed as concentrations of specific constituents in the waste reflect performance achieved by the Best Demonstrated Available Technology (BDAT). As such, compliance with these standards only requires that these concentrations (treatment levels) be achieved prior to land disposal. The standard generally does not require or restrict the use of any particular treatment technology to achieve these levels. The Agency emphasizes that the technologies identified as BDAT (for those wastes with only concentration-based standards) are simply those technologies that EPA utilized to develop the waste specific concentration-based performance standards. The waste need not be treated by that specific technology. Any treatment, including recycling or any combination of treatment technologies, unless prohibited (such as impermissible dilution), can be used to achieve these concentration-based standards unless that technology is defined as land disposal (i.e., land treatment).

Treatment standards promulgated today are expressed as numerical concentration levels, with a few exceptions. Because of difficulties associated with analysis of specific constituents in wastes from the production of toluene diisocyanate (K027, K113, K114, K115, K116, U221 and U223) and certain organophosphorus pesticides (K039, P040, P041, P043, P044, P062, P085, P109, P111, U058 and U087), some treatment standards in today's rule are expressed as a technology rather than as a concentration-based standard (see sections III.A.3.(f.) and III.A.3.(h.)). In addition, treatment standards for K005 and K007 wastes that are generated from the process described in the listing for these waste codes (rather than derived from residuals from prior disposal of these wastes) are expressed as "No Land Disposal Based on No Generation" (see section III.A.3.(c.)).

In situations where wastes subject to concentration-based standards are mixed with wastes subject to treatment standards that are specified technologies, the mixture would have to be treated by the specified BDAT method, and would have to meet the concentration-based treatment standards for any other prohibited wastes that are contained in the matrix. See generally 53 FR 31146–147 (August 17, 1988).

It may not be appropriate to apply the specified technology to every mixture that contains the waste subject to that technology. However, EPA has structured the final rule in a way that the technology specified as BDAT is likely to be appropriate for the types of mixtures that are most likely to be encountered in the near term application of this rule.

For example, EPA has specified incineration or fuel substitution as the treatment technology for certain wastes prohibited by today's regulation. The most likely mixture for which these technologies might be inappropriate is contaminated soil and debris. In today's rule, however, EPA is granting a two-year national capacity variance for soil and debris for those wastes where BDAT has been specified as incineration. Multi-source leachate might also be contaminated with these wastes, but EPA has deferred standards for such leachates until the Third Third.

See 54 FR 8264 (February 27, 1989). EPA also notes that in other situations it may be inappropriate for multi-waste mixtures to be treated by the specified treatment methods which are demonstrated treated methods for most wastes that contain organic contaminants. Given the lack of immediate applicability to soil and debris and multi-source leachate, the Agency does not believe that there are may other situations where the promulgated treatment standards would prove inappropriate. However for those situations, the treatability variance in 40 CFR 268.44 is available.

d. *Applicability of treatment standards to treatment residues identified as "derived-from" wastes.* BDAT typically consists of a treatment operation, or series of operations, that generate additional waste residues. For example, the BDAT for K001 nonwastewaters is incineration followed by stabilization. (See 53 FR 31153 (August 17, 1988).) Incineration generates two residues that may require further treatment, namely ash and scrubber waters. Treatment of scrubber waters to remove metals may generate additional inorganic residues also requiring stabilization. Ultimately these additional wastes (i.e., treatment residues) may be land disposed, so they must meet the same standards as the stabilized ash. With respect to these additional wastes, the Agency emphasizes that all residues from treating the original listed waste are likewise considered to be the listed waste by virtue of the "derived-from" rule contained in 40 CFR 261.3(c)(2). Consequently, all wastes generated in the course of treatment are prohibited from land disposal unless they comply with the treatment standard or are otherwise exempted from the prohibition through a no-migration petition or by a capacity variance.

The Agency is, however, developing "de minimis" levels for certain hazardous constituents in listed wastes below which the waste will no longer be a hazardous waste for purposes of Subtitle C regulation. At this time, EPA has not proposed these "de minimis" levels. In addition, the Agency has not completed its evaluation of the regulations that would be impacted by these "de minimis" levels—in particular, their relationship to BDAT treatment standards.

e. *Transfer of treatment standards.* Some treatment standards are not based on testing the performance of BDAT on the specific waste subject to the treatment standard. Rather, in certain instances, the Agency examines similarities in waste characteristics and constitutents and determines whether the treatment standards can be transferred. EPA believes that transferring treatment performance data to establish standards for untested wastes or constitutents is technically valid when the untested wastes are generated from similar industries and/or similar processing steps or when the constituents have similar chemical and physical properties. Transfer of treatment standards to wastes from similar processing steps involves relatively minimal amount of analysis because of the likelihood that the production processes will produce a waste matrix with similar characteristics.

In cases where only the industry is similar, EPA closely examines the waste characteristics prior to concluding that the untested waste constitutents can be treated to levels associated with tested wastes. EPA reviews the available waste characteristic data to identify those parameters which are expected to affect treatment selection. Some of the most important constitutents, as well as other parameters, are identified to facilitate the selection of the appropriate treatment technology for a given waste. When the analysis suggests that the untested waste can be treated with the same technology as a waste for which treatment performance data are already available, a more detailed list of constituents is analyzed to identify the most important waste characteristics which the Agency believes will affect the performance of the technology. By examining and comparing these characteristics, the Agency determines whether the untested wastes will achieve the same level of treatment as the tested waste. Where the Agency determines that the untested waste can be treated to the same concentration-based levels as well as the tested waste, the treatment standards can be transferred. A detailed discussion of this transfer process can be found in the BDAT background documents for each waste or waste treatability group.

f. *Treatment standards based on single facility data and grab samples versus composite samples.* As discussed previously in the August 17, 1989 final rule for First Third wastes, the Agency believes that the use of a small number of data sets from a single treatment facility can be representative of the treatment achieved by the particular treatment system. This is particularly true when no other treatment data is available, or when data exist but there is no verification that the treatment process from which the data was obtained was well-designed or well-operated. It is not possible for the Agency to sample every facility generating the waste or every treatment system treating the waste. For the purposes of determining BDAT treatment standards, the Agency has established a procedure and methodology for selecting particular facilities and treatment systems that it considers to be well-designed and well-oeprated (53 FR 31138). The Agency also selects wastes that are representative of those most difficult to treat.

The Agency recognizes that there are certain variabilities inherent to every treatment system as well as a certain amount of variability in the characteristics of the wastes. In the calculation of the treatment standards, the Agency accounts for these by multiplying the mean of the concentration of the constituents to be regulated by a correction factor known as the variability factor. This factor is derived utilizing a quantitative procedure that determines the statistical 99th percentile for the treatment standard. This results in the establishment of a treatment standard that is believed to be achievable 99 percent of the time by a well-designed, well-operated system.

The Agency further accounts for variability due to analytical reproducibility by adjusting the treatment standard for the analytical recovery data for constituents. In addition, the Agency performs all analyses of hazardous constituents used in the development of the treatment performance data, in accordance with an established quality assurance/quality control plan (as outlined in the BDAT Generic Quality Assurance Project Plan).

Where performance data exist based on both the analysis of composite samples and on the analysis of grab samples, the Agency establishes the treatment standards based on the analysis of grab samples. There are two principal reasons for this. It is normally easier and more expeditious for EPA to enforce on the basis of grab samples. In addition, grab samples normally reflect maximum process variability, and thus would reasonably characterize the ranges of treatment system performance.

In cases where only composite data exist, the Agency considers the QA/QC of the data, the inherent efficiency of the process design, and the level of performance achieved. The Agency may then choose to use this composite data to develop the treatment standard. Where this data is used to establish the treatment standard, the treatment

standard is identified as based on analysis of a composite sample. Enforcement of that standard thus would also be based on composite samples.

An individual facility's waste analysis plan will provide the basis for that facility's compliance monitoring. This plan must be adequate to assure compliance with Part 268. However, a facility remains strictly liable for meeting the treatment standards, so that if it disposes of a waste that does not meet a treatment standard, it is in violation of the land disposal restrictions regulations. If the facility complied with its waste analysis plan, it would not be in violation of the waste analysis plan provisions. Put another way, a waste analysis plan cannot immunize land disposal of prohibited wastes, although such plans may be written to authorize types of sampling and monitoring different from those used to develop the treatment standard(s).

If a waste analysis plan were to authorize a different mode of sampling or monitoring, there would need to be a demonstration that the plan (and the specific deviating feature) is adequate to assure compliance with Part 268 (see 40 CFR 264.13(a)). This might require, for example, a demonstration of statistical equivalence between a composite sampling protocol and one based on grab sampling, or a demonstration of why monitoring for a subset of pollutants would assure compliance of those not monitored. (EPA repeats that enforcement of the rule is based on the treatment standard, not the facility's waste analysis plan, so that enforcement officials would normally take grab samples and analyze for all constituents regulated by the applicable treatment standards.)

2. Second Third Wastes From Specific Sources for Which BDAT Standards are not Promulgated in Today's Rule

K019 and K025 wastes were originally scheduled to be examined as part of the Second Third rulemaking. However, EPA promulgated treatment standards for these wastes in the First Third final rule on August 8, 1988 (53 FR 31155, 31156 and 31174 (August 17, 1988)). Concentration-based treatment standards, based on the performance of rotary kiln incineration, were promulgated for the wastewater and nonwastewater forms of K019 and a treatment standard of "No Land Disposal Based on No Generation" was promulgated for nonwastewater forms of K025. EPA recently amended the standard for K025 nonwastewaters so that it applies only to wastes generated from the process description in the listing of K025 wastes and that are disposed after August 17, 1988. See 54 FR 18836 (May 2, 1989).

EPA did not promulgate treatment standards for the K025 wastewaters on August 8, 1988. The "soft hammer" provisions, however, did not apply because K025 wastes were originally scheduled in the Second Third. The Agency is not promulgating treatment standards for these wastewaters in today's rule (i.e., prior to their statutory deadline); therefore, land disposal of K025 wastewaters is now restricted according to the "soft hammer" provisions in 40 CFR 268.8. EPA is presenting this information in today's preamble as a matter of convenience, in order to show treatment standards for all of the Second Third wastes. EPA did not reopen the comment period on the promulgated concentration-based treatment standards for K019 wastes or on the promulgated "No Land Disposal Based on No Generation" standards for K025 nonwastewaters.

The Agency has not completed its evaluation of BDAT for Second Third wastes identified as K029 wastewaters, K095 wastewaters, K096 wastewaters, nonwastewater and wastewater forms of K041, K042, K097, K098, K105 as well as certain other Second Third wastes identified with a "U" or "P" waste code. Therefore, the Agency is not promulgating treatment standards for these wastes in today's rule. Since the Agency is not promulgating standards for these Second Third wastes by their statutory deadline, land disposal of these wastes is regulated by the "soft hammer" provisions of 40 CFR 268.8. The Agency believes that the majority of these "soft hammer" wastes, as generated, are nonwastewaters containing relatively high concentrations of chlorinated organics. In addition, EPA believes that the majority of these wastes contain high enough concentrations of halogenated organics (greater than 0.1%), that they are already restricted from land disposal as Halogenated Organic Compounds (HOCs) under the California List Rule.

Treatment standards for some wastewater or nonwastewater forms of other Second Third wastes have not been promulgated in today's rule. An explanation of each can be found in the discussion of treatment standards for the appropriate treatability group in the ensuing section (III.A.3.) of today's preamble.

3. Treatment Standards and Responses to Major Comments for All Wastes Proposed With the Second Third Wastes

This section of today's rule discusses treatment standards for all wastes and waste treatability groups proposed in the Second Third proposal. This includes many of the Second Third wastes, some of the First Third wastes that were, until today, regulated under the "soft hammer" provisions, and some Third Third wastes for which the Agency decided to promulgate restrictions ahead of schedule. A more detailed explanation of the Agency's action is found in relevant background documents and response to comment documents which are part of the administrative record to this rule.

a. *Cyanide wastes.* Today's rule promulgates treatment standards for many wastewater and nonwastewater forms of RCRA hazardous wastes that contain cyanides. Wastes containing cyanides are generated primarily by facilities performing operations such as electroplating (generating F006, F007, F008 and F009 wastes), heat treating (F010, F011 and F012), chemical conversion coating of aluminum (F019), other metal finishing, and acrylonitrile production (K011, K013 and K014). Facilities in these industries as well as others can also generate cyanide wastes listed as P013, P021, P029, P030, P063, P074, P098, P099, P104, P106 and/or P121. Wastes designated with these "P" codes are typically discarded, out-of-date, or off-specification chemicals used by these industries. Detailed technical descriptions of the specific production processes generating these "F" and "K" wastes and background on the specific chemical represented by the "P" waste codes can be found in the background documents for the listing of these wastes.

The same industries often generate other reactive cyanide wastes identified simply as D003 wastes (as defined in 40 CFR 261.23(a)(5)). Today's rule, however, does not promulgate treatment standards for these D003 wastes.

In the January 11, 1989 proposed rule, the Agency defined three subcategories of cyanide wastes from the metal finishing industry: Metal Finishing Aqueous Liquids, Metal Finishing Organic Liquids, and Metal Finishing Sludges. The Agency has re-examined the need for these subcategories and believes they are unnecessary for the establishment of separate treatment standards. Rather, the Agency has decided that presentation of the treatment standards on a waste code basis (according to the wastewater and

nonwastewater forms of the waste) provides a significant distinction of the treatability groups.

The treatment standards for all of these cyanide wastes are based on testing performed by the Agency or on testing performed by the commercial hazardous waste treatment industry. Additional performance data were submitted during the comment period. Analysis of these dates support the positions of many of the commenters (as well as the Agency). EPA has determined that the use of these data to promulgate revised treatment standards for many of the cyanide wastes is technically justified. The Agency provided notice of these additional data (that provide the basis for many of the final treatment standards for cyanides) by sending a letter to all persons submitting initial comments on the issue of cyanide treatability. This letter included: (1) A copy of the additional data on the treatment of cyanide that was received by the Agency; (2) a notice of the anticipated changes in the appropriate treatment standards; and (3) a request for additional comments. All of this information, including the Agency's response to the additional comments, have been placed in the administrative record for today's rule.

The treatment standards for total cyanides, amenable cyanides, and organics (i.e., those in K011, K013, and K014) were developed based on the performance of destructive technologies such as alkaline chlorination, electrolytic oxidation, wet air oxidation and/or incineration. The treatment standards for metals are based on the performance of technologies such as hexavalent chromium reduction, lime or sulfide precipitation, filtration, and stabilization. Other treatment technologies that can achieve these concentration-based treatment standards are not precluded from use by this rule (see the detailed discussion on the use of alternative technologies in section III.A.1.(c) of today's rule). The specific regulated constituents and treatment standards for each waste code are listed in the tables at the end of such section according to the wastewater and nonwastewater forms of the waste.

1. Comments with general applicability to cyanide wastes. This section discusses the Agency's response to those comments that pertain to all or many of the cyanide wastes. This includes comments on the following: precision of the analytical methods for amenable and total cyanides; establishment of alkaline chlorination versus electrolytic oxidation as BDAT; the forcing of pretreatment by BDAT; effects of iron-cyanide complexes on cyanide treatability; potential stabilization of cyanides; and use of the TCLP for development of alternative leachable cyanide standards.

i. Precision of analytical methods. Several commenters had serious reservations regarding the precision and accuracy of the analysis for total and amenable cyanides in nonwastewaters. They pointed out that the reproducibility (i.e., precision) of the analytical method for analyzing total cyanide in nonwastewaters (using the official test methods of the Office of Solid Waste i.e., EPA Publication SW-846) exceeded the proposed standard for amenable cyanides in nonwastewaters. Analysis of amenable cyanide involves two measurements of total cyanides, i.e., one analysis of total cyanide before and one after a laboratory alkaline chlorination step. The Agency has re-examined the data used to develop the treatment standards for amenable cyanides. Although the Agency maintains the overall validity of these analytical methods, it agrees, in part, with the commenters that at certain levels of total cyanides the reproducibility of the analytical method may indeed exceed the standards for amenable cyanide as originally proposed. Thus, the Agency has recalculated the standards for amenable cyanides, and in doing so has taken into account the reproducibility of the analytical method for total cyanides. The standards presented in today's rule have been developed based on these calculations. Details on the recalculation of the amenable cyanide standards for each waste treatability group are provided in the background document for cyanide wastes.

ii. Alkaline chlorination versus electrolytic oxidation. Several commenters questioned whether an electrolytic oxidation treatment system, typically a batch process, could be implemented in a continuous wastewater treatment process The commenters explained that most electroplating job shops that generate F006, F007, F008, and F009 wastes employ a continuous alkaline chlorination process as part of their wastewater treatment process. The commenters further stated that they could not possibly retrofit existing facilities by June 8, 1989, the promulgation date of this rule.

The commenters' point was addressed chiefly to F006 wastes. However, the comment no longer has applicability for F006 wastes (nor for F007, F008 or F009) because electrolytic oxidation is no longer the technology basis for the final cyanide standards for these waste codes. Rather, for these wastes, the promulgated BDAT treatment standards are based on the performance of alkaline chlorination, without electrolytic oxidation.

The Agency has determined that electrolytic oxidation is applicable primarily as a pretreatment step, particularly when cyanide concentrations in the raw waste are quite high (several percent, at least). It is part of the basis for final treatment standards only for waste codes F011 and F012 nonwastewaters and certain discarded commercial chemical products (i.e., those cyanide wastes identified with a "P").

In addition, the Agency reemphasizes that where BDAT treatment standards are expressed as concentration limits, it is not required to use technologies identified as BDAT. Other treatment technologies that can achieve these concentration-based standards are not precluded from use by this rule. Further discussion on the restrictions on the use of technologies identified as BDAT can be found in section III.A.1.(c.) of this rule.

iii. Pretreatment standards. According to 40 CFR 261.31, F006, F012 and F019, wastes are specifically listed as wastewater treatment sludges (Note: at this time the Agency is not promulgating treatment standards for F019 wastes as discussed in section III.A.1.(c.)(4.)). Many commenters stated that by establishing treatment standards for cyanides in these wastes, the Agency is requiring pretreatment (of the cyanides) before the listed waste is generated. They assert that the Agency lacks the authority to take such action under RCRA.

EPA rejects the view that the statutory language of HSWA precludes the approach adopted today. The statute requires EPA to establish treatment standards "which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste * * *" (section 3004(m)(1)). Alkaline chlorination of aqueous cyanide streams is a standard method of treatment that destroys cyanides, and thus substantially diminishes the toxicity of the wastewater treatment sludge, thereby satisfying this statutory requirement. In addition, Congress focused specifically on the treatment of cyanides in promulgating the 1984 amendments and indicated that "[d]estruction of total cyanides should be required as a precondition to land disposal." 130 Cong. Rec. S 9179 (daily ed. July 25, 1984) (Statement of Senator

Chaffee explaining the amendment which became section 3004(m)). Cyanides in these wastes are customarily destroyed by treating aqueous wastestreams. Given the evident Congressional purpose of the land disposal restriction provisions, and the specific Congressional intention (quoted above) that cyanides be destroyed, EPA believes that Congress was not concerned whether cyanides were destroyed before or after the listed waste technically is generated, but rather was concerned with the cyanide content in the waste when disposed. Consequently, it is reasonable for the Agency to develop a standard which is achievable by treating cyanides before the listed waste is generated. (EPA emphasizes, however, that cyanide treatment does not require any change to the manufacturing process. It may in certain cases involve changes in treatment of wastewaters from the manufacturing processes.)

Commenters also stated that the BDAT technology studied by the Agency was not based on the treatment of wastewater treatment sludges and that the technology could not be applied to F006, F012 or F019 after generation particularly when the wastewater treatment processes included a dewatering step. They asserted that after dewatering, the wastewater treatment sludges have high solid content (approximately 40–60%) and as a result, could not be processed through the systems EPA determined to be BDAT. The Agency maintains that the BDAT technologies can be applied prior to the dewatering step or can be applied after dewatering by slurrying the waste with water. In this case, the dewatering step would probably only be performed in order to reduce the volume of these wastes prior to transportation to a treatment and disposal facility. Indeed, one of the commercial facilities that treat cyanide wastes informed EPA that some solid cyanide wastes were being dissolved and slurried prior to treatment through the BDAT process (after which treatment they are able to meet the cyanide treatment standards). While the Agency does not believe that slurrying these wastes is necessarily the most cost-effective way to perform alkaline chlorination (or other cyanide treatment), this treatment option remains available. In addition, generators of these sludges need not dewater them but rather may send the high water content sludges to alkaline chlorination. In either of these situations, cyanide treatment would be performed on the listed waste itself.

The Agency also points out that this "pretreatment" argument appears academic, in that many of the wastes and wastewaters entering the wastewater treatment process that generate F006, F012 and F019 are already RCRA hazardous wastes or are mixed with hazardous wastes (such as F007, F008, F009, F010, and/or F011). In these situations, EPA would be applying treatment standards to a cyanide-containing hazardous waste already generated, and in most cases, the cyanide standard would be the same as for F006.

In conclusion, the commenter's arguments regarding "pretreatment" appear artificial, and may have no practical consequences. The Agency maintains that these BDAT technologies are applicable to these wastes and thus is promulgating the appropriate treatment standards for cyanides.

iv. Treatment of iron-cyanide complexes. As stated in the proposed rule and the proposed cyanide background document, the Agency believed that the F011 and F012 wastes that were treated by the Agency had similar chemical characteristics as F006, F007, F008, F009, and F019 wastes, and therefore believed that the performance of the treatment system of electrolytic oxidation followed by alkaline chlorination could be transferred to these wastes. Many commenters stated that EPA's performance data for electrolytic oxidation followed by alkaline chlorination for total and amenable cyanide constituents in F011 and F012 nonwastewaters could not be transferred to F006, F007, F008, F009 and F019 nonwastewaters because of the differences in the concentration of iron-cyanide complexes. They stated that these complexes are more difficult to treat by conventional cyanide oxidation processes.

Based on a re-examination of the chemical composition and waste characteristics of these wastes, the Agency agrees with the commenters that the F006, F007, F008, F009 and F019 wastes have different waste treatability characteristics than the F011 and F012 wastes because of the iron-cyanide complexes. The Agency believes that the source of the high iron concentration in these wastes may be due to the fact that these wastes are generated from the electroplating industry and that the material being plated is steel. The iron contained in steel is replaced with the metal contained within the electroplating baths (for example zinc in zinc cyanide plating baths). The iron that is thus released is believed to then react with the cyanide to form compounds that are referred to as iron-complex cyanides.

Some iron in these wastes results, not from the plating process itself, but rather from other sources that are generated sporadically. These sources include: other metal finishing operations such as acid cleaning, descaling and pickling; the degradation of process tank linings or racks; or the intermingling of electroplating rinse water streams with other wastes with high iron content.) It is possible that these sources of iron can be avoided by implementing waste audits and by application of simple source reduction techniques such as proper equipment maintenance, segregation of high iron waste streams, and substitution of pickling/descaling acids. Because the principal source of iron appears to be the steel plating process itself, however, EPA views this as an intrinsic characteristic of the electroplating wastewaters that needs to be taken into account in assessing the treatability of F006, F007, F008 and F009 wastes.

The Agency agrees that the high concentrations of iron in the cyanide wastes (when present as iron-cyanide complexes) appear to effect the level of cyanide destruction that is achievable (i.e., they appear to be more difficult to treat). Data also indicate that some F006, F007, F008 and F009 wastes containing low concentrations of iron (or no iron) appear to be treatable to lower cyanide concentrations than those with high iron. At this time, however, the Agency has not determined a specific concentration of iron in these wastes that would indicate a difference in treatability for the cyanides (i.e., a separate treatability group for F006, F007, F008 and F009 wastes containing low iron), and thus promulgated a higher total cyanide treatment standard of 590 mg/kg for all F006, F007, F008 and F009 wastes based on the new data provided by industry (that included wastes treatment performance data on wastes with high iron content).

Where the Agency could determine that specific cyanide waste codes (i.e., F011, F012, P013, P021, P029, P030, P063, P074, P098, P099, P104, P106, and P121) normally contain relatively low concentrations of iron, the Agency promulgated the proposed total cyanide treatment standard of 110 mg/kg.

Other commenters further stated that not only are the F006, F007, F008, and F009 wastes and F011 and F012 wastes different in waste characteristics (such as iron content) but also in the type of metal finishing processes that generate these wastes. The F006, F007, F008, and F009 wastes are generated from the

electroplating process and the F011 and F012 wastes are generated from a heat treating process. The commenters stated that electroplaters have pretreatment requirements for NPDES permits for total and amenable cyanides and that heat treaters are not subject to the same requirements. Since alkaline chlorination is also the technology basis for most of the cyanide treatment standards in today's rule, there is no inconsistency in the approach between the Clean Water Act limitations and standards and the treatment standards adopted in today's rule. (As noted elsewhere, existing data show that the great majority of generators are meeting the F006 treatment standards for cyanides with their existing wastewater treatment technology.)

Clean Water Act effluent limitations and standards could technically be achieved by adding reagents such as ferrous sulfate to the wastewaters. EPA, however, did not base the NPDES and pretreatment standards on precipitation with ferrous sulfate but rather on alkaline chlorination to destroy cyanides and hydroxide precipitation to remove metals. If a company chooses to precipitate with ferrous sulfate, there is an increase in concentration of the iron-cyanide complexes that results in an increase of the measured total cyanide concentration in the sludge (i.e., nonwastewaters) generated from the wastewater treatment. The Agency maintains that, in most cases, this type of addition of ferrous ions can be eliminated through proper design and operation of the existing onsite cyanide destruction technologies without significantly impacting the achievement of the NPDES effluent limitations on cyanides.

By reducing the concentration of iron-cyanide complexes that end up in the wastewater treatment sludges, the potential for release of toxic cyanides from land disposal units is reduced. This is entirely consistent with the Congressional intent with respect to the destruction of cyanide. (See further discussion in section III.A.3.(a.)(1.)(vi.) of today's rule.)

v. *Stabilization of cyanides.* Several commenters stated that the Agency should consider stabilization as an effective technology for the treatment of cyanides. Commenters also stated that the Agency did not provide any stabilization data in the background document or the administrative record. At the time of proposal, the Agency had not reviewed any performance data for stabilization that meet the QA/QC requirements for determining BDAT. During the comment period, the Agency had an opportunity to review some stabilization data that was generated by both the Agency and industry. (This data appears in the final background document for cyanide wastes and has been placed in the administrative record.)

The Agency does not agree with commenters that stabilization is an applicable technology for the treatment of the majority of cyanide wastes. While some data may indicate that stabilization processes appear to reduce the leachability of some forms of cyanide, the Agency contends that destruction of cyanide is clearly a preferred treatment method (as further discussed in section III.A.3.a.1.vi. of today's rule). The Agency believes that the majority of commercially available conventional stabilization technologies are primarily designed to stabilize cationic species (such as many of the BDAT list metals) and are not specifically designed for anionic species (such as cyanide). The Agency believes that the presence of certain metal complex cyanides may appear to give the effect of "stabilization" due to the low solubility of these cyanide complexes. The Agency believes that the extrapolation of stabilization data on wastes containing complexed cyanides could lead to erroneous assumptions on the ability of cyanides that are somewhat more soluble to be "stabilized". In addition, solitary use of treatment processes that convert the soluble cyanides present in the wastes to a less soluble state (i.e., complexed cyanides) for purposes of stabilization does not provide an overall reduction in toxicity. (See following discussion of leachable cyanides.)

vi. Use of the TCLP for leachable cyanide. Many commenters stated that the Agency should develop treatment standards for cyanides based on a leachable level of cyanide as opposed to a total cyanide level. The Agency has reviewed the data submitted by commenters on the level of leachable cyanides and the analysis of the data appears in the background document for cyanide wastes and in the administrative record for today's rule. The Agency strongly disagrees with the commenters that the cyanide treatment standards should be based on leachable levels. The Agency believes that the legislative history to RCRA section 3004(m) indicates that Congress intended that the "destruction of total cyanides would be required as a precondition to land disposal" (130 Congressional Record S9179, July 25, 1984, statement of Senator Chafee).

The treatment standards for cyanides are based on a total waste analysis for two reasons. First, the Agency believes that by only regulating the leachable cyanide concentration, the complex-metal cyanides that are present in the wastes would not be regulated. Second, based on the review of the available treatment data, the Agency believes that the conventional cyanide treatment technologies provide substantial treatment of both the amenable and total cyanide concentration as measured by the Cyanide Amenable to Chlorination test in Method 9010 (EPA Publication SW-846).

Finally, the Agency believes that there is a real potential for the complexed cyanides that are present in these wastes to at least partially degrade into the more toxic form of cyanides known as "free" cyanides. This process is anticipated to result from exposure to ultraviolet light (from sunlight) when the wastes are placed into certain land disposal units such as a surface impoundment. This is consistent with the Agency's approach to establishing effluent guideline limitations for total cyanides in wastewater discharges from these same metal finishing industries.

In today's rule, the Agency is promulgating a total cyanide standard for F006, F007, F008, and F009 nonwastewaters as 590 mg/kg. This standard is higher than the proposed standard of 110 mg/kg and thereby allows for an overall higher concentration of iron cyanide complexes to be present in the nonwastewaters. At the same time, based on the same performance data, the total cyanide standard for wastewaters has been reduced from 12 mg/l to 1.9 mg/l and the amenable cyanide standard for wastewaters has been reduced from 1.3 mg/l to 0.10 mg/l. Since the complexed cyanides present in wastewaters are more likely to be subject to photodegradation to "free" cyanide than those in the nonwastewaters, the Agency believes that these revised total and amenable cyanide standards promulgated in today's rule provide a significant overall reduction in potential toxicity from the photodegradation of iron-cyanide complexes.

2. Wastes from electroplating operations

F006—Wastewater treatment sludges from electroplating operations except from the following processes: (1) Sulfuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (segregated basis) on carbon steel; (4) aluminum or zinc-aluminum plating on carbon steel; (5) cleaning/stripping associated with tin, zinc and

aluminum plating on carbon steel; and (6) chemical etching and milling of aluminum.

F007—Spent cyanide plating bath solutions from electroplating operations.

F008—Plating bath sludges from the bottom of plating baths from the electroplating operations where cyanides are used in the process.

F009—Spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process.

Today's rule promulgates treatment standards for amenable and total cyanides in F006 nonwastewaters, and for amenable cyanides, total cyanides, and metal constituents in F007, F008, and F009 nonwastewaters and wastewaters. BDAT treatment standards for the nonwastewaters are based on the performance of alkaline chlorination for the amenable and total cyanides and stabilization for the metal constituents. BDAT treatment standards for the wastewaters are based on the performance of alkaline chlorination for the amenable and total cyanides and chemical precipitation followed by settling and filtration for the metals.

i. Nonwastewaters. In the January 11, 1989 proposed rule (54 FR 1066–1071), the Agency proposed nonwastewater treatment standards based on the performance of electrolytic oxidation followed by alkaline chlorination for amenable and total cyanides. The Agency received comments that questioned whether the performance of electrolytic oxidation is considered demonstrated because of the limited number of data points. The Agency maintains that the use of a small number of data points from a single facility can be representative of the treatment achieved by any particular treatment system (such as those data from electrolytic oxidation). However, the Agency has received a significant amount of new data on alkaline chlorination that form the basis for the cyanide treatment standards for F006, F007, F008 and F009 wastes promulgated in today's rule.

The Agency also received extensive comments that questioned the devisability of the proposed standards. In particular, many commenters stated that performance data for F011 and F012 wastes (based on electrolytic oxidation followed by alkaline chlorination) should not be transferred to F006, F007, F008, F009 wastes because of the differences in concentration of iron-cyanide complexes in these wastes. (See section III.A.3.(a.)(1.)(iv.) for a more complete discussion of the Agency's position on the treatment of iron-cyanide complexes). The Agency agrees with the commenters that a sufficient number of F006, F007, F008 and F009 electroplating wastes have different treatablity characteristics (i.e., high iron concentration) than F011 and F012 wastes, and that the proposed transfer of the treatment standards is no longer warranted. Therefore, the Agency is promulgating revised cyanide treatment standards based on the new alkaline chlorination performance data received by the Agency during the comment period. (This data appeared as part of the record for the proposed rule and is also part of the administrative record for this final rule. See further discussion of how the Agency noticed this data and solicited additional comment in the introduction to section III.A.3.(a.) of today's preamble.)

In supplemental comments on this new data, certain commenters questioned the devisability of the revised treatment standard of 590 mg/kg for total cyanide in nonwastewaters. (The proposed standard was 110 mg/kg.) They reiterated their previous argument that this standard was only representative of the treatment of wastewaters and not representative of the treatment of F006 as generated. In addition, they stated that the revised standard was based on insufficient operating data. Some commenters also indicated that some of their F006 wastes (as generated) would not be able to meet even the revised standard for total cyanides.

EPA is responding in detail to both the initial comments to the proposed rule and these additional comments in the background document for cyanide wastes and in the response to comments background document, and will address a few of the major points in today's preamble. First, the treatment standard is based on one month of operating data (14 data points) which the Agency has examined carefully and believes (based on detailed descriptions of the treatment process plus descriptions of sampling and analysis data) represent a well-designed and well-operated treatment process and that represent BDAT treatment for F006, F007, F008 and F009 wastes.

Second, although not all of the data came from treating F006 wastes (in fact, treatment was performed during a one month period on RCRA wastes identified as F006, F007, F008, F009, F011, F012, D002, D003, P029, P030 and P106), the waste mixtures that were treated should be more difficult to treat than segregated F006 wastes. This is because the mixtures of these RCRA wastes contained roughly an order of magnitude more iron and cyanide and greater concentrations of the minor complexing metals, nickel, zinc, and copper than typical F006 precursor wastewaters from electroplating (based on a review of the data used to develop the effluent guidelines limitations for cyanides from the metal finishing industries).

Third, with respect to the devisability of the revised standards, the Agency points out that most of the treatment and waste characterization data submitted to the Agency corroborates that the 590 mg/kg standard for total cyanide is achievable. Over 90 percent of the waste characterization data for F006 sludges reported to the Agency in comments to the proposed rule (submitted by both the affected industry and treatment facilities alike) meet the promulgated standard for total cyanides in F006 nonwastewaters. Not only do these comments confirm the ultimate standard's devisability, but also imply generators do not need to make significant modifications in their current treatment processes in order to meet the standard.

In addition, EPA reviewed treatment and waste characterization data contained in over 1500 individual facility's responses submitted to the Agency as part of the 1986 Treatment Storage, Disposal and Recycling Survey and the 1986 Generator Survey (which responses were selected by EPA from generators generating the largest volumes of F006 wastes). Again, these responses corroborated the standard's devisability (plus the lack of need to modify existing treatment processes). The responses EPA reviewed showed that over 90 percent of the F006 wastewater treatment sludges generated contained less than the 590 mg/kg total cyanide treatment standard required as a result of today's rule. That is, treatment performed with existing treatment technology before imposition of treatment standards for cyanides in wastewater treatment sludge indicate that over 90 percent of facilities are already achieving the standard. The Agency believes that these data show that most of the industry is capable of meeting the total cyanide standard through proper operation of the treatment technology that is already in place at the generators' facilities.

Further, for those few instances where commenters claimed to be unable to meet the 590 mg/kg standard, they provided no information on the circumstances of treatment or generation, leaving the Agency no means of ascertaining why the cyanide standards promulgated in today's rule

were not achievable. In short, EPA believes there is ample support for stating that the total cyanide standard for F006, F007, F008 and F009 nonwastewaters promulgated in today's rule is achievable.

The standards for amenable cyanides in the nonwastewater forms of F006, F007, F008 and F009 reflect the limits of precision of the analytical method for cyanides amenable to chlorination (so that the amenable cyanide is approximately 5 percent of the standard for total cyanides). EPA believes that properly conducted alkaline chlorination actually destroys free cyanides to a greater extent, but that it is difficult to measure amenable cyanides in nonwastewaters. No commenter suggested that a free cyanide standard of 30 mg/kg was not achievable for these nonwastewaters.

The Agency is promulgating treatment standards for the metal constituents in F007, F008, and F009 nonwastewaters, based on the transfer of performance data from the stabilization of F006 wastes. (The metal standards for F006 nonwastewaters were promulgated in the First Third final rule (see 53 FR 31152–31153) and are not being revised in today's rule.) The Agency received no comments or data refuting this transfer.

ii. Wastewaters. Today's rule promulgates revised treatment standards for amenable and total cyanides and metal constituents in F007, F008, and F009 wastewaters. In the January 11, 1989 proposed rule (54 FR 1066–1071), EPA proposed treatment standards based on performance of wet air oxidation for cyanides, and chemical precipitation followed by settling and filtration for metals.

Many commenters expressed concerns that the data base used by the Agency to establish treatment standards for cyanide were limited. They therefore questioned whether wet air oxidation is a demonstrated technology. However, the issue is essentially moot for these waste codes because during the comment period the Agency received cyanide treatment data for F007, F008, and F009 wastewaters based on the performance of alkaline chlorination. EPA performed a statistical comparison of wet air oxidation and alkaline chlorination and found that there is a statistical difference between the two technologies for cyanides. The Agency determined that alkaline chlorination technology performs better than wet air oxidation for these particular wastes based on a comparison of the available data. Therefore, the Agency is promulgating revised wastewater treatment standards for cyanides to reflect BDAT as alkaline chlorination.

These data (which substantially expand the treatment data base for these wastewaters) also indicate that the standard for these wastewaters should be decreased from the proposed level to 1.9 mg/l total cyanide and 0.10 mg/l amenable cyanide (from 12 mg/l and 1.3 mg/l respectively). These standards are more similar to the promulgated effluent guidelines limitations and standards for the metal finishing industries. Commenters, in fact, raised no significant challenges to EPA's solicitation to lower the wastewater standard for these wastes.

The Agency is promulgating the wastewater treatment standards for metals in F007, F008, and F009 based on the transfer of the treatment performance data for chemical precipitation, settling, filtration and sludge dewatering for K062 wastes. The Agency believes that the K062 wastewaters are more difficult to treat than F007, F008, and F009 wastewaters based on the higher concentrations of dissolved metals in K062 (up to 100,000 mg/l).

The Agency is not promulgating the treatment standards for total and amenable cyanide in F006 wastewaters at this time. Concentration-based treatment standards for cyanides and metal constituents in the F006 wastewaters will be promulgated by May 8, 1990. It is likely that the total and amenable cyanide treatment standard for the F006 wastewaters will be based on a data transfer from the performance of alkaline chlorination for the F007, F008, and F009 wastewaters. It is likely that the metal treatment standards will be based upon information available from EPA's effluent limitations guidelines and standards program. Since no treatment standards are promulgated in today's rule for F006 wastewaters, these wastes continue to be subject to the "soft hammer" provisions of 40 CFR 268.8.

BDAT TREATMENT STANDARDS FOR F006

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Cyanides (total)	590	[1]
Cyanides (amenable)	30	[1]

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR F007, F008 AND F009

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Cyanides (total)	590	[1]
Cyanides (amenable)	30	[1]
Cadmium	[1]	0.066
Chromium	[1]	5.2
Lead	[1]	0.51
Nickel	[1]	0.32
Silver	[1]	0.072

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR F007, F008 AND F009

[Wastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/l)	TCLP (mg/l)
Cyanides (total)	1.9	[1]
Cyanides (amenable)	0.10	[1]
Chromium	0.32	[1]
Lead	0.04	[1]
Nickel	0.44	[1]

[1] Not applicable.

3. Wastes from Metal Heat Treating Operations.

F010—Quenching bath sludge from oil baths from metal heat treating operations where cyanides are used in the process.

F011—Spent cyanide solutions from salt bath pot cleaning from metal heat treating operations.

F012—Quenching wastewater treatment sludges from metal heat treating operations where cyanides are used in the process.

Today's rule promulgates treatment standards for F010, F011, and F012 wastewaters and nonwastewaters. Treatment standards for total cyanide in F010 nonwastewaters are based on the performance of incineration. Treatment standards for F011 and F012 nonwastewaters are based on the performance of electrolytic oxidation followed by alkaline chlorination for amenable and total cyanides, and based on the performance of stabilization for the metal constituents. Treatment standards for amenable and total cyanide in F010, F011 and F012 wastewaters are based on the performance of alkaline chlorination. Treatment standards for metals in F011 and F012 wastewaters are based on the performance of chemical precipitation,

settling, and filtration. Other technologies that can achieve these concentration-based treatment standards are not precluded from use by this rule.

EPA notes that the technology basis for treating cyanides in the wastewaters from F010, F011 and F012 differ from the technology basis for treatment of the corresponding nonwastewaters. EPA, however, expects that the technology used to treat the cyanides in the nonwastewaters will achieve the standards promulgated for the wastewaters.

Thus, EPA expects that if an F010 waste is incinerated, then the F010 scrubber water that may be generated as a residue from incineration will not need further treatment for cyanides because they will already meet the promulgated treatment standards. If any F010 wastewaters are generated by a process other than incineration and they do not meet the treatment standards, then it would be reasonable to treat these wastewaters with alkaline chlorination rather than incineration.

In a similar manner, wastewaters generated from the treatment of F011 or F012 nonwastewaters using electrolytic oxidation followed by alkaline chlorination are not expected to need further treatment for cyanides because the Agency believes that these wastewaters will also already meet the promulgated standards. However, if any F011 or F012 wastewaters are generated by another treatment technology and do not meet the treatment standards as generated, it would also be reasonable to treat these wastewaters with alkaline chlorination alone rather than electrolytic oxidation followed by alkaline chlorination. (Electrolytic oxidation is applicable primarily as a pretreatment step, particularly when cyanide concentrations in the raw waste are quite high.)

i. Standards for F010 wastes. In the January 11, 1989 proposed rule, the Agency proposed a treatment standard for total cyanide in F010 nonwastewaters based on BDAT as incineration. Also, EPA indicated that these wastes could contain up to 5 percent oil and grease content and can exist as a bi-layered waste, i.e. organic and aqueous layer. Based on conversations with the treaters of this waste, the Agency believes that the F010 wastes can be separated into an organic layer and an aqueous layer. This F010 organic layer is what is typically incinerated, while the F010 aqueous layer can be treated by conventional cyanide treatment rather than incineration. At the time of the proposal, the Agency had not examined the efficiency of this separation process, and so proposed standards for all F010 nonwastewaters based on the incineration of the wastes.

Also, in the proposal, the Agency did not clarify what the treatment standards would be for F010 nonwastewaters that could be generated from the alkaline chlorination treatment of the separated aqueous layer (an F010 wastewater). During the comment period, the Agency received no comments (or data) indicating the efficiency of the separation of the layers or whether the proposed treatment standard (based on incineration) could be met.

In this rule, the Agency is clarifying its position on the treatment standards for the F010 nonwastewaters that might be generated from treating a separated F010 aqueous layer or other F010 wastewaters. As a point of clarification, the Agency first notes that treatment residues from treating F010 wastewaters are listed under the F012 waste code (wastewater treatment sludge from metal heat treating operation) and would therefore be subject to the cyanide standards for F012 nonwastewaters. Such sludges would therefore not be subject to the standards based on performance of incineration. With respect to F010 wastewaters, the Agency believes that aqueous F010 wastewaters have similar waste characteristics to F011 and F012 wastewaters. The Agency is therefore transferring the performance of the treatment system of alkaline chlorination for the cyanide constituents (based on the new data obtained on alkaline chlorination during the comment period). See the following discussion of treatment standards for F011 and F012 wastewaters. Therefore, the treatment standards for amenable cyanides and total cyanides in F010 wastewaters are 0.10 mg/l and 1.9 mg/l respectively. The promulgated treatment standard for residues from the incineration of the F010 organic layer (i.e., F010 nonwastewaters high in organics) is 1.5 mg/kg, the same standard that EPA proposed. The Agency notes that if a generator or treater of a F010 wastes does not separate the waste into the two layers, that facility would have to meet the 1.5 mg/kg treatment standard for total cyanides in the nonwastewater residuals (based on incineration).

The Agency did not propose treatment standards for any metals contained n F010 wastewaters or nonwastewaters. At the time, the Agency had no waste characterization data that indicated the presence of hazardous metals in the untreated wastes. In addition, the Agency received no comments or data indicating that metals were present in these wastes. As a result, the Agency is promulgating only the treatment standards for cyanides contained in F010 wastewaters and nonwastewaters. This does not preclude the Agency from proposing the regulation of metals in these wastes if any F010 waste characterization data or treatment performance data become available.

ii. Standards for F011 and F012 wastes. The treatment standards proposed on January 11, 1989, for F011 and F012 nonwastewaters were based on the performance of electrolytic oxidation followed by alkaline chlorination for the cyanides (both total and amenable) and stabilization for the metal constituents. The Agency is not basing treatment standards for these wastes on the new alkaline chlorination data used to establish standards for F006, F007, F008 and F009 wastes. The treatment standards for F011 and F012 wastes are thus substantially lower than those for the other waste codes. The Agency believes that this is appropiate not only because of the existing performance data supporting the lower standard, but because these wastes do not have the treatability characteristics (i.e., high iron concentrations) that justify the higher standards for F006, F007, F008, and F009 nonwastewaters.

The Agency is promulgating a total cyanide standard of 100 mg/kg and an amenable cyanide standard of 9.1 mg/kg for F011 and F012 nonwastewaters. The amenable cyanide standard is based on measured concentrations of amenable cyanides in F011 and F012 treatment residuals rather than based only on the reproducibility of the analytic method for total cyanides.

(Note.—The Agency used the reproducibility of the analysis for total cyanides to establish the amenable cyanide standards for F006, F007, F008 and F009 nonwastewaters because the data indicated that the amenable cyanides could be reduced to below the reproducibility of the analysis for total cyanides. The treatment data indicated that this was not the case for F011 and F012 wastes.)

Two commenters believed that the calculation of the variability factor for the total cyanide treatment standard (100 mg/kg) for these wastes was incorrect. The Agency disagrees with the commenters. The calculation of a variability factor for two data points is based on the standard deviation and the mean. EPA uses the two data points as the limits on lognormal distribution. Based on this information, the calculated variability factor is 1.58. Thus, the variability factor multiplied by the mean of the two data points

represents the treatment standard. The calculation of these standards is further clarified and presented in the final background document for cyanide wastes and the administrative record for this rule.

The Agency received extensive comments on its use of only two data points to establish the treatment standards for cyanides based on the performance of electrolytic oxidation followed by alkaline chlorination. As discussed previously in section III.A.1.(f.) of today's rule and in the August 17, 1989 final rule for First Third wastes, the Agency believes that the use of a small number of data sets from a single facility can be representative of the treatment achieved by the particular treatment system. EPA has a mandatory duty to issue standards on a very tight timetable, and automatic consequences occur should the Agency fail to act. Under these circumstances, EPA must base standards on the best data available to it, even if the data is limited. If better sources of data were made available, EPA would make every effort to use them (as has occurred with a number of wastes in this rulemaking, such as in the development of standards for the organophosphorus waste treatability group as discussed in section III.A.3.(h.) of today's preamble). Therefore, the Agency is promulgating the final standard based on the information available.

For F012 nonwastewaters (as with F006), many commenters stated that the Agency is requiring a pretreatment for the cyanides before the hazardous waste (as listed) is actually generated. The Agency has responded to this issue on pretreatment in detail in section III.A.3.(a.)(1.)(a)(iii.) of today's preamble.

The proposed treatment standards for F011 and F012 wastewaters were based on the performances of wet air oxidation for the cyanides and chemical precipitation, settling, and filtration for the metal constituents. During the comment period the Agency received performance data for the treatment of cyanides in wastewaters by alkaline chlorination. EPA performed a statistical comparison of the data from wet air oxidation and the new data from alkaline chlorination and found that alkaline chlorination performed better. Therefore, EPA is promulgating revised treatment standards for total and amenable cyanides for F011 and F012 wastewaters based on these new data and is transferring these standards to F010 wastewaters as previously discussed.

The Agency is promulgating the metal standards for F011 and F012 nonwastewaters based on the transfer of the treatment performance data for chemical precipitation, settling, filtration and sludge dewatering for K062 wastes. The Agency believes that the K062 wastes are more difficult to treat than the residues from treatment of F011 and F012 based on the higher concentrations of dissolved metals in K062 (up to 100,000 mg/l).

BDAT TREATMENT STANDARDS FOR F010

[Nonwastewaters]

Constitutent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Cyanides (total)	1.5	(1)

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR F010

[Wastewaters]

Constitutent	Maximum for any single grab sample	
	Total composition (mg/l)	TCLP (mg/l)
Cyanides (total)	1.9	(1)
Cyanides (amenable)	0.10	(1)

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR F011 AND F012

[Nonwastewaters]

Constitutent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Cyanides (total)	110	(1)
Cyanides (amenable)	9.1	(1)
Cadmium	(1)	0.066
Chromium	(1)	5.2
Lead	(1)	0.51
Nickel	(1)	0.32
Silver	(1)	0.072

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR F011 AND F012

[Nonwastewaters]

Constitutent	Maximum for any single grab sample	
	Total composition (mg/l)	TCLP (mg/l)
Cyanides (total)	1.9	(1)
Cyanides (amenable)	0.10	(1)
Chromium	0.32	(1)
Lead	0.04	(1)
Nickel	0.44	(1)

[1] Not applicable.

4. F019 wastes.

F019—Wastewater treatment sludges from the chemical conversion coating of aluminum.

Today's rule does not promulgate treatment standards for the wastewater or nonwastewater forms of F019. This waste was originally scheduled for regulation in the First Third, with the statutory deadline of August 8, 1988. Since the Agency did not promulgate standards for the wastewater or nonwastewater forms of F019, land disposal of these wastes shall continue to be regulated by the "soft hammer" provisions in 40 CFR 268.8. EPA intends to promulgate concentration-based treatment standards for cyanides and metals constituents in F019 wastes by May 8, 1990.

The Agency believes that F019 wastes are in a different treatability group than F006, F007, F008, and F009 electroplating wastes or F010, F011, and F012 heat treating wastes due to the very high concentration of iron-cyanide complexes in both the wastewaters and nonwastewaters. These iron levels are significantly higher than those found in F006 wastewater precursors, and higher than any of the wastes used to establish BDAT for the electroplating wastes. The Agency believes that the source of the iron-cyanide complexes is the soluble ferrocyanide compounds (such as potassium ferrocyanide) that are used as constituents in aluminum conversion coating compounds or baths. Therefore, the cyanides present in these conversion coating baths would be the iron-cyanide complexes which are used as a component of the coating. The Agency believes that F019 nonwastewaters or the wastewater treated to generate this waste have substantial concentrations of iron-cyanide complexes. The Agency believes that the source of iron for the F019 waste is a legitimate source of iron and that F019 wastes represent a separate treatability group of cyanide wastes.

The Agency is investigating ultraviolet/ozonation, wet air oxidation, hydrolysis and incineration as potential candidates for BDAT. Recovery or reuse of the wastes containing iron-cyanide complexes is also being considered. In the interim, the "soft hammer" provisions continue to apply to the land disposal of F019 wastes.

5. Wastes from Acrylonitrile Production.

K011—Bottom stream from the wastewater stripper in the production of acrylonitrile.

K013—Bottom stream from the acetonitrile column in the production of acrylonitrile.

K014—Bottoms from the acetonitrile purification column in the production of acrylonitrile.

Wastes identified as K011, K013, and K014 are generated primarily in the organic chemicals manufacturing industry, specifically those engaged in the production of acrylonitrile. Detailed technical descriptions of the specific production processes generating these wastes can be found in the final background document for these wastes.

Today's rule promulgates treatment standards for K011, K013, and K014 nonwastewaters based on the performance of incineration. Other treatment technologies that can achieve these concentration-based standards, such as wet air oxidation, are not precluded from use by this rule. EPA is promulgating treatment standards for four organic constituents and for total cyanide. At this time the Agency is not promulgating any standards for K011, K013, or K014 wastewaters. The specific regulated constituents and treatment standards for these wastes are listed in tables at the end of this section.

i. *Nonwastewaters.* In the January 11, 1989 proposed rule (54 FR 1066–1071), the Agency proposed treatment standards for nonwastewaters based on the performance of incineration for total cyanide and organics and stabilization for the metal constituents, specifically nickel.

Several commenters argued against developing a treatment standard for nickel because, based on waste characterization data, nickel was not present in significant concentrations in the raw waste. Commenters also stated that the presence of certain constituents (e.g., sulfates and ammonia) would make the removal of nickel from wastewaters, and the stabilization of nickel in the sludge and ash, much more difficult than the Agency has estimated, thereby making the BDAT treatment standards unachievable.

The Agency has concluded, based on extensive review of existing data, that nickel is not present in concentrations that would merit regulation as part of the K011, K013, and K014 treatment standards, and therefore is removing nickel from the list of regulated constituents for K011, K013, and K014 nonwastewaters. If additional treatment performance data for nickel becomes available, the Agency is not precluded from regulating nickel as a nonwastewater treatment standard for K011, K013, and K014 wastes. As a result of this determination, the Agency is revising its BDAT treatment standards for K011, K013, and K014 nonwastewaters to be based solely on the performance of incineration.

ii. *Wastewaters.* In the January 11, 1989 proposed rule (54 FR 1066–1071), the Agency proposed wastewater treatment standards based on the performance of wet air oxidation followed by biological treatment for amenable cyanides, total cyanides, and organic constituents, and chemical precipitation, settling, and filtration for metal constituents. The Agency received many comments concerned with EPA's rationale for transferring performance data for the cyanide constituents from wet air oxidation of F007 wastes, and for organic constituents from the effluent limitations for facilities in the Organic Chemical Plastics and Synthetic Fibers (OCPSF) industry for biological treatment. Because of these comments and the additional treatment data that are being compiled by the Ad Hoc Acrylonitrile Producers UIC Group, the Agency believes that additional data collection and analysis is necessary prior to promulgation of these treatment standards.

Therefore, today's rule does not promulgate treatment standards for the wastewater forms of K011, K013 and K014. These wastes were originally scheduled for regulation in the First Third, with a statutory deadline of August 8, 1988. Since the Agency still has not promulgated standards for the wastewater forms of K011, K013 and K014, land disposal of these wastewaters shall continue to be regulated by the "soft hammer" provisions in 40 CFR 268.8. EPA intends to promulgate concentration-based treatment standards for cyanides, organics, and metals constituents for these wastes prior to May 8, 1990.

BDAT TREATMENT STANDARDS FOR K011, K013, AND K014

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Acetonitrile	1.8	[1]
Acrylonitrile	1.4	[1]
Acrylamide	23.	[1]
Benzene	0.03	[1]
Cyanides (Total)	57.	[1]

[1] Not applicable.

6. Cyanide wastes designated with a "P" waste code.

P013—Barium cyanide
P021—Calcium cyanide
P029—Copper cyanide
P030—Soluble cyanides salts (NOS)
P063—Hydrogen cyanide
P074—Nickel cyanide
P098—Potassium cyanide
P099—Potassium silver cyanide
P104—Silver cyanide
P106—Sodium cyanide
P121—Zinc cyanide

Wastes identified as P013, P021, P029, P030, P063, P074, P098, P099, P104, P106, and P121 are usually discarded, out-of-date, or off-specification chemicals. Facilities in industries such as electroplating, heat treating, chemical conversion coating of aluminum, and acrylonitrile production typically generate these wastes.

P013, P021, P099, and P121 and Third Third wastes that were originally scheduled to be regulated no later than May 8, 1990. Several commenters opposed accelerating the schedule for these wastes. However, the statute does not preclude EPA from prohibiting the land disposal of a given waste ahead of schedule (and the schedule in §§ 268.10 through 268.12 itself says that wastes will be evaluated by a given date, indicating that the specified date is the latest time by which EPA must act). The Agency believes that this is a particularly prudent approach for P013, P021, P099, and P121 because these wastes are not only generated, but are similar to F011 and F012 wastes from the heat treating industry.

Today's rule promulgates concentration-based treatment standards for wastewater and nonwastewater forms of these wastes. BDAT for the nonwastewater forms of these wastes is based on the performance of electrolytic oxidation followed by alkaline chlorination for the cyanide constituents, and stabilization for the metal constituents. BDAT for the wastewater forms of these wastes is based on the performance of alkaline chlorination for the cyanide constituents and chemical precipitation, settling, and filtration for the metal constituents (where regulated). Treatment standards for these wastes were transferred from the performance of the BDAT for the F011 and F012 waste codes generated from heat treating operations. These discarded commercial chemical products do not contain high concentrations of iron and therefore the Agency believes that the treatment standards need not reflect the difficulties of treating complex cyanides.

The Agency is thus promulgating these concentration-based treatment standards in this section due to the similarity of these "P" wastes to the listed metal heat treating wastes.

Treatment standards for nickel in P074 and silver in P099 and P104 nonwastewaters are based on the performance of stabilization of F006 nonwastewaters. Treatment standards for nickel in P074 wastewaters are based on the performance of chemical precipitation and filtration of K062 wastewaters. The Agency believes that these wastes are more difficult to treat than the corresponding P wastes based on the higher concentrations of metals and dissolved solids anticipated to be present in F006 and K062 as compared to the P wastes (i.e., up to 100,000 ppm). The Agency is not promulgating treatment standards for barium in any P013 wastes or for silver in P099 and P104 wastewaters due to the current lack of treatment data for these metals in their respective waste types. The Agency is not precluded from developing standards for barium or silver in these particular wastes if treatment data becomes available.

One commenter argued that the Agency should not regulate copper or zinc, as EPA proposed to do, because they are not hazardous constituents specifically listed in Appendix VIII of 40 CFR Part 261. The Agency does not totally agree, in that both zinc and copper are components of zinc cyanide and copper cyanide. EPA has determined that both zinc and copper exhibit aquatic toxicity, and has considered adding these constituents to Appendix VIII for that reason. However, EPA has decided to reserve that determination for a later rulemaking, and is only regulating cyanides in these wastes (P029 and P121).

BDAT TREATMENT STANDARDS FOR P013, P021, P029, P030, P063, P074, P098, P099, P104, P106, AND P121

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Cyanides (total)	110	(1)
Cyanides (amenable)	9.1	(1)
Nickel (P074 only)	(1)	0.32
Silver (P099 and P104 only)	(1)	0.072

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR P013, P021, P029, P030, P063, P074, P098, P099, P104, P106, AND P121

[Wastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/l)	TCLP (mg/l)
Cyanides (total)	1.9	(1)
Cyanides (amenable)	0.10	(1)
Nickel (P074 only)	0.44	(1)

[1] Not applicable.

7. Cyanide Wastes Designated as D003 Reactive.

Today's rule does not promulgate treatment standards for wastes identified as D003 wastes. In the January 11, 1989 proposed rule, the Agency presented a strategy for the development of treatment standards for cyanide wastes designated as D003 (see 54 FR 1071) and proposed a subcategory for D003 identified as the Reactive Cyanides Subcategory. According to 40 CFR 261.23(a)(5), a waste can be identified as D003 when it is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in quantities sufficient to present a danger to human health or the environment. No specific comments were received that challenged the development of this D003 Subcategory.

In general, the Agency received many comments that supported the development of concentration-based treatment standards. However, some commenters expressed concerns about what the treatment standard levels should be. The Agency believes that some of the general concerns about the measurement of cyanides and the selection of technologies for electroplating and heat treating cyanide wastes may also be applicable to D003 cyanide wastes. The Agency will respond to these comments and propose treatment standards for D003 wastes in the Reactive Cyanide Subcategory in a future notice of proposed rulemaking for the Third Third wastes.

b. *Wastes from chlorinated aliphatics production.*

F024—Wastes including but not limited to, distillation residues, heavy ends, tars, and reactor clean-out wastes from the production of chlorinated aliphatic hydrocarbons, having carbon content from one to five, utilizing free radical catalyzed processes. (This listing does not include light ends, spent filters and filter aids, spent dessicants, wastewater, wastewater treatment sludges, spent catalysts, and wastes listed in 261.32).

Wastes identified as F024 are generated primarily by facilities in the organic chemicals manufacturing industry, specifically those engaged in the production of chlorinated aliphatic hydrocarbons. Detailed technical descriptions of the specific production processes generating these wastes can be found in the background document for the listing of this waste code.

Today's rule promulgates treatment standards for F024 wastewaters and nonwastewaters as proposed for all constituents except 2-chloro-1,3-butadiene, 3-chloropropene, di-n-octyl phthalate, chromium and nickel. BDAT treatment standards for F024 are based on rotary kiln incineration for nonwastewaters, and rotary kiln incineration followed by chemical precipitation and vacuum filtration for wastewaters. Other treatment technologies that can achieve these concentration-based treatment standards are not precluded from use by this rule. EPA is promulgating treatment standards for two metals in F024 wastewaters and fourteen organic constituents in F024 nonwastewaters and wastewaters. The specific regulated constituents and treatment standards for these wastes are listed in the tables at the end of this section.

Several commenters suggested that the Agency specify a method of treatment as the BDAT treatment standard for the polychlorinated dioxins (PCDDs) and polychlorinated furans (PCDFs) instead of establishing concentration-based treatment standards. Where treatment performance data are available, the Agency prefers to set concentration-based treatment standards rather than specifying a method of treatment as the BDAT treatment standard. Defining concentration-based treatment standards in terms of concentrations of hazardous constituents in the treated waste ensures that treatment standards are achievable, in practice, using available technologies, but does not specifically mandate the use of any particular treatment technology in order to comply with the treatment standard. Because treatment performance data were available for the constituents regulated in F024, concentration-based treatment standards were established.

Several other commenters stated that the PCDDs and PCDFs should be regulated for the following reasons: (1) F024 is not listed for these constituents; (2) their levels in F024 were below the practical quantitation limits (PQLs); (3)

QA/QC data did not affirm their presence in F024; and (4) a quantitation level below 10 ppb is difficult to achieve and standards should not be set any lower than the PQLs demonstrated in F024 incinerator ash.

In response to the first issue, the Agency points out the hazardous constituents for which a waste is listed are considered by the Agency in selection of constituents for regulation. However, these constituents only provide a minimum basis for listing a waste as hazardous. The Agency believes that it is not restricted to regulation of these constituents. Indeed, to do so would (at least in some cases) fail to substantially reduce toxicity or mobility of hazardous constituents in the waste, as required by section 3004(m). Moreover, the language of 3004(m) applies to all "hazardous constituents", not just those for which the waste is listed. The Agency uses waste characterization data and treatment performance data collected under the BDAT program to determine the constituents that should be regulated. A more detailed explanation of the selection of regulated constituents in F024 is provided in the BDAT background document for this waste code.

With respect to the second issue, the commenters were incorrect in stating that PCDD and PCDF levels measured in the F024 wastes were below the PQLs. In fact, these constituents were detected in untreated F024 at levels of 0.3 to 50 ppb (parts per billion), which were well above the PQLs (0.2 to 30 ppt (parts per trillion)) for these constituents. Section III.A.1.(b.) of today's preamble provides a further discussion of the applicability of Appendix VII and the relationship of PQLs to BDAT treatment standards.

The commenters were also incorrect with respect to the third issue on the QA/QC. As evidenced in the background document for this waste, the available QA/QC data does confirm the presence of dioxins and furans in F024.

The Agency also disagrees with the commenters' fourth issue. A quantitation level below 10 ppb is not difficult to achieve. The Agency does not anticipate any difficulties in achieving detection at the treatment standard of 1 ppb for either the nonwastewater or wastewater. The treatment standards for all of the PCDDs and PCDFs regulated in F024 are greater than the PQLs demonstrated on F024 incinerator ash (30 to 80 ppt). Finally, the Agency believes that these treatment standards are analytically achievable on a routine basis and points out that quantitation levels for these PCDDs and PCDFs have been achieved by commercial laboratory facilities at low ppt levels in nonwastewaters and low ppq (parts per quadrillion) levels in wastewaters.

The treatment standards set for bis(2-ethylhexyl) phthalate and di-n-octyl phthalate were opposed by one commenter who argued that setting treatment standards for these constituents was unnecessary because they were not detected in the F024 feed streams at levels above their PQLs. This commenter further stated that since the treatment standards for these two constituents are below their PQLs, the treatment standards are invalid and unreasonable. The commenter suggested that the low levels of these phthalates could be a result of cross-contamination and thus, recommended that the Agency either set a method of treatment as the treatment standard instead of establishing a concentration-based treatment standard or reserve the standards for these two phthalate constituents until more complete information is available.

The premise to the commenter's argument is incorrect in that both of these phthalate constituents were quantified above their respective PQLs in the F024 feed streams. The treatment performance data for bis(2-ethylhexyl) phthalate in F024 demonstrate that substantial treatment was achieved by rotary kiln incineration. Because bis(2-ethylhexyl) phthalate was not found in either the laboratory blanks or the treatment residuals, the commenter's claim that this constituent could be present as a result of cross-contamination does not appear to be supportable. Thus, the Agency has no reason to believe that the presence of bis(2-ethylhexyl) phthalate in F024 sampled by the Agency was due to cross-contamination. (See also the Agency's response to comments on cross-contamination of phthalates in section III.A.3.(e.) of today's preamble.)

The Agency's data indicated, however, that di-n-octyl phthalate was identified in only a few characterization samples at treatable concentrations. Further, bis(2-ethylhexyl) phthalate was also found at treatable concentrations in each of these samples. These two phthalate constituents have similarities in chemical properties and structure such that the Agency believes that they can be treated to similar concentrations by incineration. Due to the similarity in treatability of these constituents, any di-n-octyl phthalate present in F024 will be effectively controlled by regulating the bis(2-ethylhexyl) phthalate (using incineration as BDAT). Accordingly, the Agency is promulgating the treatment standards for bis(2-ethylhexyl) phthalate, but is not promulgating the treatment standards for di-n-octyl phthalate.

Several commenters stated that the concentration-based treatment standards for F024 nonwastewaters should be identical with treatment standards previously promulgated for the same constituents in other waste codes. The Agency disagrees with these commenters. BDAT treatment standards for a particular waste are developed based on treatment performance data for that waste or for a waste judged to be similar. Constituents may be treated to different levels depending on the waste matrices in which they are present. Accordingly, treatment standards for a constituent may vary among the waste codes in which the constituent is regulated.

Another commenter suggested that the nonwastewater treatment standards be raised by two orders of magnitude because they believed the proposed treatment standards could not be analytically achieved on a routine basis. However, based on routine analysis performed by contract laboratories supporting the Agency's various programs, the Agency does not anticipate any analytical difficulties in achieving the F024 treatment standards on a routine basis.

One commenter suggested that the Agency consider the composition of F024 wastewater when it is comingled with wastewater from other treated listed wastes. However, the Agency cannot take into account all of the possible mixes of waste residuals. (See also the previous discussion of mixing in section III.A.1.(c.) in today's preamble.) For these cases, the regulated community must consider the treatment standards for each regulated waste stream and comply with the strictest standards for each of the regulated constituents (or if mixing is part of a legitimate treatment process, seek a treatability variance).

One commenter felt that stabilization of incinerator ash should not be required unless leachable metal levels were higher than characteristic hazardous waste levels. The Agency reminds the commenter that F024 treated waste residuals are also considered to be listed hazardous wastes under the "derived-from" rule, regardless of whether or not the waste exhibits a characteristic. The metal constituents originally proposed for regulation (chromium and nickel) were found in F024 at treatable levels. Because incineration does not provide treatment for metals, the Agency chose to stabilize the incinerator ash to immobilize these and other metal constituents.

One commenter felt that treatment of chromium and nickel was not demonstrated by the stabilization testing performed on K048 and K051 wastes, thereby invalidating the transfer of the treatment standards for chromium and nickel from these waste codes to F024. This commenter suggested transferring treatment performance data from F006 instead.

The Agency has recently completed an analysis of TCLP extracts obtained from the stabilization of F024 incinerator ash residues. The results of this analysis show substantial reduction of metals in TCLP extracts after stabilization. However, since this data was not available for public notice and comment, and since the resultant treatment standards are significantly different from the proposed standards, the Agency has decided not to promulgate treatment standards for metals in F024 nonwastewaters in today's rule. The Agency is reserving treatment standards for metals in F024 nonwastewaters in order to provide notice that revised standards will be proposed for restrictions in a future rulemaking. No specific comments or data were received disputing the validity of the proposed standards for the metals in F024 wastewaters and thus the Agency is promulgating these standards as proposed.

The Agency discovered an error in its calculation of the proposed treatment standards for 2-chloro-1,3-butadiene and 3-chloropropene for F024 nonwastewater (i.e., 0.014 mg/kg for each constituents). Because the data used to calculate these standards were correct and in the public record, the Agency is promulgating the recalculated standards in today's rule (i.e., 0.28 mg/kg for each constituent).

BDAT TREATMENT STANDARD FOR F024

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
2-Chloro-1,3-butadiene.	0.28	Not applicable
3-Chloropropene	0.28	"
1,1-Dichloroethane	0.014	"
1,2-Dichloroethane	0.014	"
1,2-Dichloropropane	0.014	"
cis-1,3-Dichloropropene	0.014	"
trans-1,3-Dichloropropene.	0.014	"
Bis(2-ethylhexyl)phthalate.	1.8	"
Hexachloroethane	1.8	"
Hexachlorodibenzofurans.	0.001	"
Hexachlorodibenzo-p-dioxins.	0.001	"
Pentachlorodibenzofurans.	0.001	"
Pentachlorodibenzo-p-dioxins.	0.001	"
Tetrachlorodibenzofurans.	0.001	"
Chromium (Total)	Not applicable.	Reserved
Nickel	"	Reserved

BDAT TREATMENT STANDARD FOR F024

[Wastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/l)	(mg/l)
2-Chloro-1,3-butadiene.	0.28	Not applicable
3-Chloropropene	0.28	"
1,1-Dichloroethane	0.014	"
1,2-Dichloroethane	0.014	"
1,2-Dichloropropane	0.014	"
cis-1,3-Dichloropropene	0.014	"
trans-1,3-Dichloropropene.	0.014	"
Bis(2-ethylhexyl)phthalate.	0.036	"
Hexachloroethane	0.036	"
Hexachlorodibenzofurans.	0.001	"
Hexachlorodibenzo-p-dioxins.	0.001	"
Pentachlorodibenzofurans.	0.001	"
Pentachlorodibenzo-p-dioxins.	0.001	"
Tetrachlorodibenzofurans.	0.001	"
Chromium (Total)	0.35	"
Nickel	0.47	"

c. *Wastes from pigment production.*

K002—Wastewater treatment sludge from the production of chrome yellow and orange pigments.

K003—Wastewater treatment sludge from the production of molybdate orange pigments.

K004—Wastewater treatment sludge from the production of zinc yellow pigments.

K005—Wastewater treatment sludge from the production of chrome green pigments.

K006—Wastewater treatment sludge from the production of chrome oxide green pigments (anhydrous and hydrated).

K007—Wastewater treatment sludge from the production of iron blue pigments.

K008—Oven residues from the production of chrome oxide green pigments.

Wastes identified as K002, K003, K004, K005, K006, K007 and K008 are generated primarily by facilities in the inorganic chemicals manufacturing industry, specifically those engaged in the production of pigments. Detailed technical descriptions of the specific production processes generating these wastes can be found in the background document for the listing of these wastes.

1. Nonwastewaters. Today's rule promulgates a "No Land Disposal Based on No Generation" treatment standard for K005 and K007 nonwastewaters as proposed—applicable only to wastes generated from the process described in the listing description and disposed after June 8, 1989. Many commenters opposed any standard that specifies "No Land Disposal" for a particular waste. The Agency maintains that for *certain* wastes, this standard is appropriate. The Agency believes that the following clarification of the applicability of this standard to K005 and K007 wastes may remove the majority of the commenters' concerns.

Based on conversations with representatives of manufacturers of inorganic pigments and responses to EPA's RCRA section 3007 questionnaires, the Agency believes that the last company producing chrome-green and iron blue pigments (from which K005 and K007 wastes are generated), shut down production in 1987. Thus, the proposed "No Land Disposal" standard is appropriate for these wastes, with one important caveat. This standard applies only to wastes generated from the process described in the listing description for these wastes (in 40 CFR 261.32) that are disposed after June 8, 1989 (the effective date of this standard). The Agency recently modified existing regulatory standards for most of the "No Land Disposal" treatment standards promulgated with the First Third wastes to adopt this distinction. See 53 FR 31174 (August 17, 1988) promulgating these standards, and the subsequent revision in 54 FR 18836 (May 2, 1989). The Agency adopts the explanation in the May 2, 1989 notice for its action here with respect to the waste from pigment production that are no longer being generated (i.e., K005 and K007).

K005 and K007 are Third Third Wastes that were originally scheduled to be promulgated by May 8, 1990. Several commenters opposed the

proposed accelerated schedule for these wastes as well as other wastes. However, the statute does not preclude EPA from prohibiting the land disposal of a given waste ahead of schedule (and the schedule in 40 CFR 268.10–268.12 itself says that wastes will be evaluated by a given date, indicating that the specified date is the latest time by which EPA must act), and in fact compels the Agency to prohibit the land disposal of hazardous wastes as soon as possible. The Agency believes that this is a particularly prudent approach for K005 and K007 nonwastewaters, since the basis of the treatment standard for these wastes is that they are not being generated and since no comments were received disputing this premise specifically for K005 and K007.

In the January 11, 1989, proposed rule for Second Third Wastes (54 FR 1072–74), EPA proposed a treatment standard of "No Land Disposal Based on Recycling" for K002, K003 and K006 nonwastewaters and proposed to revise the promulgated treatment standard (53 FR 31174) for K004 and K008 nonwastewaters from "No Land Disposal Based on No Generation", to "No Land Disposal Based on Recycling". EPA received comments, however, suggesting that there may be wastes generated as part of the recycling process that could remain subject to the land disposal prohibitions, and which otherwise called into question the circumstances of recycling. Although EPA does not necessarily endorse these comments, the Agency believes that these issues warrant further study and, therefore, has decided that K002, K003 and K006 wastes will remain in the Third Third of the schedule. Thus, the Agency is not promulgating the treatment standard of "No Land Disposal Based on Recycling" for K002, K003, and K006 nonwastewaters.

The methods of recycling, which EPA has determined require further evaluation, also apply to K004 and K008 wastes; therefore, since EPA's initial premise of no generation has not proven correct, EPA has decided to revoke the promulgated treatment standard of "No Land Disposal Based on No Generation" for K004 and K008 nonwastewaters, and to reschedule the development of treatment standards for the nonwastewater forms of K004 and K008 wastes to the Third Third of the schedule. The Agency will study these wastes along with K002, K003 and K006 nonwastewaters.

2. Wastewaters. In today's rule, the Agency is not promulgating treatment standards for the wastewater forms of K002, K003, K004, K005, K006, K007 or K008. Since K004 and K008 were First Third wastes, land disposal of these wastewaters continues to be subject to the "soft hammer" provisions in 40 CFR 268.8. Because K002, K003, K005, K006 or K007 wastes were originally scheduled for development of BDAT treatment standards with the Third Third Wastes, land disposal of these wastewaters is not subject to the "soft-hammer" restrictions.

The Agency may develop concentration-based treatment standards for all of these wastewaters prior to May 8, 1990, if there is an identified need for such standards (i.e. if wastewater forms of the listed waste are proven to be generated). Wastewater forms of these wastes are expected to be generated from only a few sources. The Agency is currently evaluating the possibility of transferring treatment performance data from wastes having similar physical and chemical characteristics. The Agency has identified several sources of chromium reduction, cyanide destruction, and metals precipitation/stabilization performance data which may be applicable.

As a point of clarification, nonwastewater residuals generated from treatment of K005 or K007 wastewaters are also considered to be the listed wastes (based on the derived-from rule) and would be required to meet the treatment standards for nonwastewaters when EPA develops them. However, as noted above, the "No Land Disposal Based on No Generation" standard does not apply to these wastes. It only applies to the waste as originally generated, according to the description of the waste in the listing (as listed in 40 CFR 261.32).

BDAT TREATMENT STANDARD FOR K005 AND K007

[Nonwastewater forms of these wastes generated by the process described in the waste listing description and disposed after June 8, 1989, and not generated in the course of treating wastewater forms of these wastes]

No Land Disposal Based on No Generation

d. *Wastes from acetaldehyde production.*

K009—Distillation bottoms from the production of acetaldehyde from ethylene.

K010—Distillation side cuts from the production of acetaldehyde from ethylene.

Wastes identified as K009 and K010 are generated primarily by facilities in the organic chemicals manufacturing industry, specifically those engaged in the production of acetaldehyde. Detailed technical descriptions of the specific production processes generating these wastes can be found in the background document for the listing of these wastes.

Today's rule promulgates treatment standards for organic constituents in nonwastewater and wastewater forms of wastes identified as K009 and K010. Standards applicable to nonwastewaters are based on the performance achieved by rotary kiln incineration and the concentration of organics measured in ash residuals. Standards applicable to wastewaters are based on the performance achieved by steam stripping followed by biological treatment and the concentration of organics measured in the resultant effluent wastewaters. Other treatment technologies that can achieve these concentration-based treatment standards are not precluded from use by this rule. The regulated constituents and treatment standards for these wastes are listed in the tables at the end of this section.

In comments to the proposed rule, one of the two generators of K009 and K010 wastes indicated to the Agency that some of the organic constituents proposed for regulation were extraneous to the manufacturing process of acetaldehyde and that another of the proposed constituents could be effectively controlled by the proposed regulation of chloroform. After reviewing the commenter's rationale and the available data on the manufacturing of acetaldehyde, the Agency has determined that the proposed standards for 1,1-dichloroethane, acrolein, methylene chloride, and/or ethyl methacrylate in wastewaters are unnecessary and is therefore not promulgating the proposed standards for these constituents. However, the Agency is promulgating treatment standards for chloroform in both nonwastewater and wastewater forms of K009 and K010.

The same commenter questioned EPA's legal authority to regulate constituents that were not explicitly identified by the Agency as toxic constituents of concern when K009 and K010 were listed as hazardous wastes under Subtitle C of RCRA.

The Agency strongly disagrees with the commenter's interpretation of section 3004(m) and its interpretation of toxicity. RCRA section 3004(m) mandates EPA to promulgate treatment standards that sustantially reduce the

toxicity of the waste or that substantially reduce the likelihood of migration of hazardous constituents from the wastes. Section 3004(m) applies to all hazardous constituents and does not limit the concern to those constituents for which the waste is listed. The Agency has thus interpreted the intent of the statutory language to measure reduction of toxicity in terms of the amount and types of constituents that define the chemical composition of the waste. Thus, the Agency believes that in the development of treatment standards, the Agency can regulate any of the Appendix VII and VIII (40 CFR Part 261) constituents.

Further, the Agency has interpreted this statutory mandate as authorizing the Agency to develop treatment standards for constituents that serve as indicators of performance, thereby accounting for the reduction in either the amount or mobility of Appendix VII and VIII constituents contained in the wastes. The Agency believes that the use of surrogate or indicator constituents fully responds to the intent of section 3004(m) because there could be instances that available analytical methods cannot satisfactorily analyze for Appendix VII and VIII constituents in complex waste matrices and thus, the Agency would be unable to develop concentration-based treatment standards for the waste.

In addition, Appendix VII constituents supporting the listing of K009 and K010 were intended to support the Administrative Record of EPA in assessing the need to regulate K009 and K010 as hazardous wastes under RCRA. These constituents were by no means an exhaustive list of hazardous constituents contained in the waste, but merely provided a minimum basis for listing a waste as hazardous. Therefore, the Agency believes that it is not restricted to regulation of only these constituents. See further clarification of the use of Appendix VII constituents in section III.A.1.(b.) of today's preamble.

As noted in the proposal, performance data supporting the development of treatment standards were not generated from the direct treatment of K009 and K010 wastes. Instead, these performance data are from the treatment of wastes either judged to be as difficult to treat as the wastes of concern or containing treatable concentrations of the constituents that are candidates for regulation in the wastes of concern.

For wastewaters, these performance data were originally developed specifically to support the effluent guidelines limitations for facilities in the Organic Chemical Plastics and Synthetic Fibers (OCPSF) industry and represent the performance of Best Practical Technologies and Best Available Technologies for treatment of wastewaters. The Agency has determined that it is technically feasible to transfer the OCPSF performance data to K009 and K010, and thus is promulgating treatment standards developed from these data. Further details of the Agency's evaluation of performance data and determinations of BDAT are found in the BDAT background document for K009 and K010 wastes.

Also, this commenter pointed out that the data used by the Agency in supporting the wastewater standards may not have been adjusted for analytical spiked recoveries. The adjustment that the commenter is referring to is known as a "correction factor", which may be obtained by injecting a known quantity of a pollutant into water and determining the percent of known amount measured. During preliminary stages of the OCPSF rulemaking, EPA in fact used this adjustment technique for a variety of data, including the chloroform data discussed by the commenter in the present rulemaking. However, the Chemical Manufacturers Association submitted comments in the OCPSF rulemaking arguing that the use of correction factors for these data are technically unsound. EPA agreed that these data are "better represented as unadjusted for recovery", and decided to present the data in unadjusted form (48 FR 11856, March 21, 1983).

For purposes of the current rulemaking under RCRA section 3004(m), however, EPA believes that it is appropriate to apply a correction factor to the chloroform data to ensure consistency with the BDAT Generic Quality Assurance Project Plan (EPA/530–SW–87–011, March 1987). This Plan presents data and uses it to establish standards in a conservative manner that assures that variability in calculating correction factors is accounted for.

Thus, EPA has recalculated the wastewater standard for chloroform. At proposal, the chloroform standard for wastewaters was 0.09 mg/l. Today's rule promulgates a revised chloroform standard of 0.10 mg/l. Although this revision is minimal, the Agency believes this recalculation of the chloroform standard was necessary and fully complies with Agency methodology for developing treatment standards. Detailed information of the Agency's revisions to this standard are provided in the BDAT background document for K009 and K010 wastes.

The proposed treatment standards for wastewaters were originally presented as based on analysis of grab samples. The Agency received comments that pointed out that the data used to determine the treatment standards represented analysis of composite rather than grab samples. At the time of proposal, the Agency believed that since the standards were for volatile organic constituents, analysis of grab samples had been performed due to potential losses of volatiles during a composite sampling. However, the Agency has since determined that while grab samples are indeed used during sampling, the analysis of the samples is performed by careful compositing of the grab samples in the analytical laboratory immediately prior to analysis. Therefore, the treatment standard for methylene chloride in K009 and K010 wastewaters promulgated in today's rule are corrected and expressed as based on a composite sample. See further discussion of issues concerning grab versus composite sampling in section III.A.1.(f.) of today's preamble.

The Agency also solicited comments on the need for regulating other chlorinated organic constituents that are not on the BDAT list but were found at treatable concentrations. The only commenter supported the Agency's approach that no regulation is necessary, indicating that available data appear to indicate that these constituents are unlikely to interfere with the treatment of the regulated constituents. As a result, EPA is not promulgating, at this time, additional requirements for these other organic constituents present in K009 and K010 wastewaters.

BDAT Treatment Standards for K009 and K010

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Chloroform	6.0	(1)

[1] Not applicable.

BDAT Treatment Standards for K009 and K010

[Wastewaters]

Constituent	Maximum for any composite sample	
	Total composition (mg/l)	TCLP (mg/l)
Chloroform	0.10	(1)

[1] Not applicable.

e. *Phthalates and phthalic anhydride production wastes.*

K023—Distillation light ends from the production of phthalic anhydride from naphthalene.
K093—Distillation light ends from the production of phthalic anhydride from ortho-xylene.
K094—Distillation bottoms from the production of phthalic anhydride from ortho-xylene.
U028—Bis-(2-ethylhexyl) phthalate
U069—Di-n-butyl phthalate
U088—Diethyl phthalate
U102—Dimethyl phthalate
U107—Di-n-octyl phthalate
U190—Phthalic anhydride

Wastes identified as K023, K093, and K094 are wastes generated primarily by facilities in the organic chemicals manufacturing industry, specifically those engaged in the production of phthalic anhydride. Detailed technical descriptions of the specific production processes generating these three wastes can be found in the background document for the listing of these wastes. Phthalic anhydride, when discarded, out-of-date, off-specification, or spilled often becomes the waste identified as U190. In contact with water, phthalic anhydride reacts readily to become phthalic acid. Phthalic anhydride and phthalic acid can be reacted with other simple compounds to form a class of chemicals known as phthalic acid esters. Generally, these esters are simply referred to as phthalates. The chemicals for which wastes identified as U028, U069, U088, U102, and U107 are listed are all phthalates.

All of these compounds are very similar in chemical composition and structure (i.e., they contain one aromatic ring and are comprised of only carbon, hydrogen and oxygen). For the purposes of determining BDAT, all of these wastes have been grouped together into one treatability group identified as "phthalates and phthalic anhydride production wastes" or "phthalates" (for short).

Treatment standards for the majority of these wastes were originally scheduled to be promulgated as part of the Third Third wastes (i.e., promulgation by May 8, 1990). Only U028 and U107 wastes were originally scheduled for promulgation with the Second Third wastes. However, in the January 11, 1989, proposed rule for Second Third wastes, the Agency proposed standards for all nine of these phthalate and phthalic anhydride production wastes based on a transfer of treatment standards from similar wastes identified as K024 (distillation bottoms from the production of phthalic anhdride from naphthalene). Standards for K024 wastewaters and nonwastewaters were promulgated with the First Third wastes on August 8, 1988, based on the performance of incineration of K024 nonwastewaters in a rotary kiln as measured by the concentrations of hazardous constituents found in the ash and scrubber water residuals.

Several commenters opposed the accelerated schedule for these wastes. However, the statute (i.e., HSWA) does not preclude EPA from prohibiting the land disposal of a given waste ahead of schedule (and the schedule in §§ 268.10 through 268.12 itself says that wastes will be evaluated by a given date, indicating that the specified date is the latest time by which EPA must act). The Agency believes that setting the treatment standards and restrictions as early as possible is consistent with Congressional intent to move away from land disposal and towards treatment. Moreover, Congress created the capacity variance in section 3004(h) to address the concerns of providing additional time (where necessary) to develop protective treatment or disposal capacity. Thus, in today's rule, the Agency is promulgating treatment standards as proposed for K023, K093, K094, U028, U069, U088, U102, U107, and U190 based on the direct transfer of standards for K024.

While the treatment standards are based on the performance of incineration of K024 in a rotary kiln, other treatment technologies such as fluidized bed incineration, fuel substitution, biodegradation, and solvent extraction, that can achieve these standards are not precluded from use by this rule. The treatment standards in today's rule for all of these wastes are listed in the tables at the end of this section.

1. K023, K093 and K094 wastes. The Agency has data that indicate that there are relatively few generators of K023, K093 and K094. Information also suggests that many of these wastes, as generated, are not typically land disposed. The Agency considered promulgating a treatment standard of "No Land Disposal Based on No Generation" for the nonwastewater forms of K023, K093 and K094. However, several commenters provided information that these wastes are indeed being generated. Since the premise of no generation is not valid, the Agency decided to promulgate the proposed concentration-based standards.

The Agency determined that the treatment standards for K024 may be transferred to K023, K093 and K094 wastes because: (1) All of these wastes are generated from the production of phthalic anhydride; (2) distillation residues generated from production processes using naphthalene (corresponding to K023 and K024 wastes) are expected to contain higher concentrations of less volatile constituents than distillation residues generated from production processes using ortho-xylene (corresponding to K093 and K094 wastes). Since these constituents in K023 and K024 have lower volatility, they are more difficult to vaporize and subsequently be destroyed in a rotary kiln. K023 and K024 are thus more difficult to treat than K093 and K094; and (3) distillation *bottoms* (K024) are expected to contain lower concentrations of volatile constituents than the distillation *light ends* (K023) and thus would be more difficult to treat than K023. Based on this analysis, the Agency has determined that K024 represents the most difficult to treat of the four wastes generated from the production of phthalic anhydride. In addition, since K023, K024, K093 and K094 are all wastes from the production of phthalic anhydride, they are expected to contain a greater concentration of interfering constituents than off-spec or discarded phthalic anhydride (U190) and thus would be more difficult to treat than U190. Therefore, the Agency is directly transferring the concentration-based standards for phthalic anhydride (as measured by the analysis for phthalic acid) in K024 wastewaters and nonwastewaters to K023, K093, K094 and U190 wastewaters and nonwastewaters respectively.

One commenter questioned why the Agency did not simply establish treatment standards for K023, K024, K093, K094 and U190 measuring for phthalic anhydride rather than phthalic acid. The commenter reasoned that: (1) Analytical methods for the direct measurement of phthalic anhydride exist and are available; (2) measurement should be for phthalic anhydride because it has a significantly higher toxicity than phthalic acid; and (3) treatment standards for phthalic anhydride would allow treatment by hydrolysis and hydrolysis significantly reduces the toxicity of the waste.

The Agency's response to these issues is twofold: (1) Although methods for the measurement of phthalic anhydride exist, the measurement of phthalic acid as a surrogate provides a more effective means of measuring treatment, due to the instability of phthalic anhydride in water (i.e., hydrolysis of the anhydride in the wastes prior to analysis of treatment residuals could result in false

positive measurements of treatment efficiency if analysis were performed only for the anhydride); and (2) destruction of phthalic anhydride by incineration provides a more complete reduction in total toxicity than simple hydrolysis (i.e., incineration completely destroys both the phthalic anhydride and the phthalic acid to carbon dioxide and water, while hydrolysis does not provide any significant destruction of the organics, but rather enlarges the phthalic anhydride molecule to the acid form).

Several commenters pointed out that, as initially generated, K023, K024, K093, K094 and U190 nonwastewaters are comprised primarily of phthalic anhydride and would contain practically no phthalic acid. Thus, the wastes would probably meet the treatment standard based on analysis for phthalic acid without any treatment. Commenters suggested that the treatment standard should include a hydrolysis step prior to analysis for phthalic acid.

The Agency never intended, by establishing the standard only for phthalic acid, that these wastes should avoid treatment. In the proposed rule (54 FR 1088 (January 11, 1989)), the standards for U190 were correctly expressed as "phthalic anhydride (U190) reported as phthalic acid". The Agency thus clearly intended that the phthalic anhydride be converted to phthalic acid prior to analysis. The Agency recognizes that the standards for K023, K093 and K094 were expressed in the proposed rule (54 FR 1078 (January 11, 1989)) only as "phthalic acid". However, today's rule corrects this inconsistency by expressing all of the wastewater and nonwastewater standards for K023, K093, and K094 and U190 as "phthalic anhydride * * * (measured as phthalic acid)". Thus, the Agency is specifically requiring analysis for phthalic acid after hydrolysis of K023, K093, K094 and U190 nonwastewaters.

For the same reason, EPA is also making this same clarifying change as a technical correction to the standards for K024 wastewaters and nonwastewaters that were adopted in the First Third rule. Thus, these standards are now expressed as "phthalic anhydride * * * (measured as phthalic acid)". (EPA is not altering the numerical standards for these K024 wastes.)

For the wastewater forms of these wastes, the Agency is not requiring an additional hydrolysis step provided that complete hydrolysis of the anhydride can be reasonably assumed to have occurred (such as in cases where the phthalic anhydride in the waste has been in prolonged contact with water in the waste, been sufficiently mixed with the water, or suspected to have been present in low concentrations in the water).

2. Standards for U028, U069, U088, U102, and U107. EPA proposed concentration-based treatment standards for U028, U069, U088, U102, and U107 based on the transfer of data on the performance of rotary kiln incineration for K024 nonwastewaters. Standards for these wastes are derived from a direct transfer of the numerical values for phthalic acid to each of the individual phthalate esters (i.e., 28 mg/kg for all nonwastewaters and 0.54 mg/l for all wastewaters as measured by each phthalate).

One commenter argued that the Agency has not adequately demonstrated the transferability of the treatment standards for K024 wastes to these phthalate esters. The commenter stated that it had found no support for EPA's statement that all of these compounds are anticipated to be easier to burn than phthalic acid. At the same time, the commenter claimed the following information as support to their position: (1) The K024 phthalic anhydride residue is a solid and the phthalates are typically liquids; and (2) the autoignition temperature (a measure of the ease of ignition) for phthalic anhydride is 1083°F; 1032°F for dimethyl phthalate; 950°F for phthalic acid; and 735°F for bis-(2-ethylhexyl)phthalate.

The Agency recognizes that there are many factors that affect how easily a compound can be burned, such as boiling point, activation energy, bond dissociation energy, heat of combustion, heat of formation, and general structural class. However, the information provided by the commenter appears to support the Agency's position rather than the commenter's. In general, solids should be more difficult to burn than liquids. In addition, phthalic anhydride with the highest autoignition temperature appears to be more difficult to burn than the phthalic acid or the other identified phthalates.

Moreover, these data support that these phthalates pose relatively the same difficulty in burning because their autoignition temperatures are within the same order of magnitude. More important, the Agency maintains that the performance data available to the Agency support that the treatment standards for the incineration of K024 are not only transferable to these wastes but also achievable on a routine basis.

Incineration data for K024 indiate that untreated K024 wastes contained from 1.3 to 22% phthalic anhydride, approximately 10% ash, and up to 83% polymeric materials. Analysis of the incinerator residues for phthalic acid, the surrogate for phthalic anhydride (see previous discussion for K023, K093 and K094 wastes above), indicated destruction to detection limits of 8.2 mg/kg in the ash and 0.16 mg/1 in the scrubber water. Thus, if phthalic anhydride is, as the commenters' data indicates, one of the more difficult phthalates to burn, then the other phthalates and phthalic acid should be able to be destroyed to these levels. The Agency points out that the ash and the polymeric materials present in the untreated K024 waters also contribute to the difficulty in incineration of this waste. Thus, the Agency concluded that the K024 wastes are the most difficult to treat of these wastes.

The commenters expressed concern about several other issues that led them to believe that the standards could not be achieved. These include the potential for false positives due to cross-contamination from: (1) The co-incineration of nonhazardous materials containing phthalates; (2) plastic materials used during sampling and analysis; (3) nonhazardous materials co-disposed with treatment residuals; (4) liners and covers used in a roll-off containers used to transport ash (containing 35 mg/kg of phthalates); and (5) plastic materials used in the scrubber water systems. They also argued that household garbage (containing 22 mg/kg of phthalates) and landfill liners would exceed the treatment standards. Thus, they concluded that the treatment standards were not meaningful nor could they possibly be met. Several commenters further concluded that since the treatment standards could not be met, the Agency should simply establish incineration as a technology, rather than set concentration-based standards. Finally, one commenter also stated that the Agency has an insufficient number of data points on which to base the standards.

In response to the majority of these comments, the Agency points to the data on phthalate concentrations in the residuals from the test burns of four different waste types that support the Agency's key positions. The wastes include: (1) K019 (heavy ends from the distillation of ethylene dichloride in ethylene dichloride production); (2) K037 (wastewater treatment sludges from the production of Disulfoton); (3) F024 (various wastes from the production of chlorinated aliphatics such distillation residues, heavy ends, tars, and reactor clean-out wastes); and (4) K101/K102 (distillation tar residues from the distillation of aniline-based compounds

and residue from activated carbon in the production of veterinary pharmaceuticals). These wastes represent a myriad of different hazardous waste types and these data are from more than one different incineration facility.

EPA analyzed for various phthalates in the incineration residues from these test burns as follows: (1) Six data sets for di-n-butyl and bis-(2-ethylhexyl) phthalate in K019 ash residues and six data sets for di-n-octyl, di-n-butyl, and bis-(2-ethylhexyl) phthalate in K019 scrubber waters; (2) six data sets for bis-(2-ethylhexyl) phthalate in K037 ash and scrubber waters; (3) six data sets for diethyl and bis-(2-ethylhexyl) phthalate in F024 ash and scrubber waters; and (4) six data sets for bis-(2-ethylhexyl) phthalate in K101 and K102 ash and scrubber waters.

In general, the majority of the measured values for phthalates were approximately at the detection limit for the majority of phthalates that were analyzed. In kiln ash the measured values or detection limits ranged from <0.42 to <2.0 mg/kg. This is consistent with the estimated PQLs for these phthalates in ash residues (as calculated by multiplying the detection limits for the individual phthalates as measured by SW-846 Method 8250 by the correction factor of 670 for low-level contaminated soil) ranging from 1.6 mg/kg for dimethyl phthalate to a maximum of 2.5 mg/kg for di-n-butyl, di-n-octyl, and bis-(2-ethylhexyl) phthalate. The data from these four test burns also indicated that in the scrubber waters the measured values for these phthalates (or their detection limits) ranged from <0.002 to <0.050 mg/l. The concentrations of phthalates in the untreated wastes ranged from 0.05 to 500 mg/kg.

The concentrations of phthalates in the untreated wastes (for the aforementioned data) were relatively low. Accordingly, EPA did not attempt to transfer standards for phthalates from these wastes. However, these data illustrate several important points with regard to cross-contamination and the achievability of the standards. For four different test burns on four completely different waste types, analysis of treatment residuals indicated concentrations or achievable detection limits well below the promulgated treatment standards (typically an order of magnitude less). Thus the commenters' cross-contamination concerns during incineration, scrubber water processing, sample collection, transport of analytical samples, and laboratory preparation and analysis of the samples are not supported by these data. In addition, the proper use of analytical techniques in accordance with standard QA/QC in their laboratories can also reduce the potential for incidental cross-contamination.

With respect to cross-contamination concerns from incineration of nonhazardous wastes, the Agency notes that in general, a facility operator may need to segregate wastes to meet treatment standards and that need is fully consistent with the intent of the land disposal restrictions. However, based on the demonstration of incinerability of the high concentrations of phthalic anhydride in K024 wastes, the demonstration of achievability of low detection limits for ash and scrubber waters, and the basic high efficiency of destruction inherent to hazardous waste incinerators, the Agency believes that segregation of other wastes from these phthalate wastes is unnecessary and that compliance with the treatment standards for phthalate wastes would not be mitigated by co-incineration with other wastes containing phthalates.

With respect to cross-contamination concerns from co-disposal with nonhazardous wastes, from liners and covers of roll-off containers, or from the landfill liners, the Agency notes that contamination from these materials (as evidenced in the commenters' data referenced above) would be expected to be small compared to the standards. It appears unlikely that an ash residue that typically contains <2.0 mg/kg of phthalates would be significantly contaminated to a level above the treatment standard of 28 mg/kg by wastes containing only 22 mg/kg or 35 mg/kg. The fact that these materials contain phthalate levels at or near the treatment standards has no relevance to the achievability of the treatment standards. The fact that incineration can destroy hazardous wastes to a level that may be deemed nonhazardous is exactly the goal of incineration treatment.

One commenter suggested that the Agency set technology-based treatment standards for these wastes instead of concentration-based standards. This commenter felt that setting technology-based standards would eliminate the concerns of achievability of the treatment standards due to cross-contamination. Though section 3004(m) specifies that BDAT treatment standards may be expressed as either concentration-based levels or as a method of treatment (technology-based), the Agency maintains that where treatment performance data are available concentration-based treatment standards should be established rather than specifying a method of treatment. Concentration-based standards allow industry the flexibility to use any treatment technology or combination of technologies to treat the wastes as long as land disposed residuals produced, have concentrations of the regulated constituents less than or equal to the treatment standards.

Moreover, none of the commenters supported their claims (that the treatment standards could not be achieved) with data on the measurement of phthalates in treatment residuals. Because acceptable treatment performance data were available for treatment of K024 and since the data support that cross-contamination is not anticipated to affect the achievability of the standards, the Agency is promulgating the concentration-based treatment standards for U028, U069, U088, U102, and U107.

BDAT TREATMENT STANDARDS FOR K023, K024, K093, K094, AND U190

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Phthalic anhydride . . . (measured as Phthalic acid).	28	Not applicable

BDAT TREATMENT STANDARDS FOR K023, K024, K093, K094, AND U190

[Wastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Phthalic anhydride . . . (measured as Phthalic acid).	0.54	Not applicable

BDAT TREATMENT STANDARDS FOR PHTHALATES U028, U069, U088, U102, AND U107

[Nonwastewaters]

Waste code	Regulated constituent	Maximum for any single grab sample	
		Total composition (mg/kg)	TCLP (mg/l)
U028	Bis-(2-ethylhexyl) phthalate	28	Not Applicable
U069	Di-n-butyl phthalate	28	"
U088	Diethyl phthalate	28	"
U102	Dimethyl phthalate	28	"
U107	Di-n-octyl phthalate	28	"

BDAT TREATMENT STANDARDS FOR PHTHALATES U028, U069, U088, U102, AND U107 [WASTEWATERS]

Waste code	Regulated constituent	Maximum for any single grab sample	
		Total composition (mg/kg)	TCLP (mg/l)
U00.28	Bis-(2-ethylhexyl) phthalate	0.54	Not Applicable
U069	Di-n-butyl phthalate	0.54	"
U088	Diethyl phthalate	0.54	"
U102	Dimethyl phthalate	0.54	"
U107	Di-n-octyl phthalate	0.54	"

f. *Wastes from the production of dinitrotoluene, toluene diamine and toluene diisocyanate.*

K027—Centrifuge and distillation residues from toluene diisocyanate production.

K111—Product washwasters from the production of dinitrotoluene via nitration of toluene.

K112—Reaction by-product water from the drying column in the production of toluenediamine via hydrogenation of dinitrotoluene.

K113—Condensed liquid light ends from the production of toluenediamine via hydrogenation of dinitrotoluene.

K114—Vicinals from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.

K115—Heavy ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.

K116—Organic condensate from the solvent recovery column in the production of toluene diisocyanate via phosgenation of toluenediamine.

U221—Toluenediamine (TDA).

U223—Toluene diisocyanate (TDI).

Today's rule promulgates treatment standards for nonwastewater and wasterwater forms of K027, K113, K114, K115, K116, U221, and U223 wastes. Detailed technical descriptions of the specific production processes generating these wastes can be found in the background document for the listing of these wastes. The treatment standards for the organic hazardous constituents are expressed as specific methods of treatment. For the nonwastewater forms of these wastes, the treatment methods are either incineration or fuel substitution. For the wastewater forms of these wastes, the methods are either carbon adsorption followed by incineration or fuel substitution of the spent carbon, or direct incineration of the wastewaters. In addition, for K115 wastes, the Agency is promulgating concentration-based treatment standards for nickel. The Agency did not propose treatment standards for K111 and K112 wastes, and therefore is not promulgating treatment standards in today's rule. At this tme, K111 and K112 wastes are not prohibited from land disposal.

The Agency determined that the analytical methods available during the development of today's rule could not satisfactorily measure the principal hazardous organic constituents contained in K027, K113–K116, U221, and U223 wastes and treatment residuals. One commenter identified a preliminary method of analysis for at least one constituent and urged the Agency to establish concentration-based standards based on the use of this method. However, since the Agency has not finalized this or any other analytical method for the major constituents in these wastes, performance data could not be obtained using this method that would allow the Agency to develop concentration-based treatment standards for today's rule. The Agency has also been unable to identify any surrogate constituents or gross parameters that could be used to assure reduction of the hazardous organic constituents of concern. Thus, the Agency is unable to promulgate concentration-based treatment standards for organics in these wastes.

EPA prefers concentration-based treatment standards due to the greater flexibility in choice of technology used to achieve the standard, and to the greater control afforded in ensuring efficient design and operation of the chosen technology. However, in the absence of analytical methods the Agency believes that the only logical alternative to a concentration-based standard is to establish a method of treatment as the BDAT treatment standard.

It should be noted that promulgating standards expressed as specified methods of treatment does not preclude the Agency from establishing concentration-based standards in the future, should an analytical method be developed with sufficient QA/QC that will measure the hazardous constituents, or should an adequate surrogate or indicator constituent be identified.

The majority of commenters addressing this issue supported this approach. Further, EPA believes that this approach is consistent with the BDAT methodology and with RCRA section 3004(m) which authorizes the Agency to establish either levels or methods of treatment. Therefore, today's rule promulgates treatment standards expressed as required methods for these wastes.

The Agency also points out that when treatment standards are expressed as a specific technology rather than as concentration-based standards, it is possible for a generator or treater to

demonstrate that an alternative technology can achieve an equivalent level of performance as that specified treatment method (40 CFR 268.42(b)). This demonstration could be based on: (1) A newly developed analytical method for the primary hazardous constituent; (2) a concentration-based standard utilizing a surrogate or indicator compound; or (3) other demonstrations of equivalence for an alternative method of treatment. The resultant treatment standard, as well as any analytical methodology used in the demonstration, could then be proposed by the Agency to be applicable to all wastes in this group.

EPA's full rationale for finalizing the treatment standards promulgated today is contained in the BDAT background document for these wastes. The treatment standards promulgated today for nonwastewaters and wastewater forms of K027, K113–K116, U221, and U223 are summarized in the set of tables at the end of this section.

1. Nonwastewaters. The Agency believes that incineration and fuel substitution represents BDAT for the organics in nonwastewater forms of these wastes. The Agency is promulgating a treatment standard of "Incineration or Fuel Substitution as a Method of Treatment" for the nonwastewater forms of K027, K113–K116, U221, and U223. Incinerators must comply with the requirements of 40 CFR Part 264 Subaprt O, or Part 265 Subpart O. Similarly, fuel substitution units must comply with the requirements of 40 CFR Part 266, Subpart D.

The majority of commenters addressing the nonwastewater treatment standards agreed with the Agency's rationale for requiring that these hazardous wastes be burned in incinerators regulated under 40 CFR Part 264 Subpart O or Part 265 Subpart O, or in fuel substitution units burning for energy recovery under requirements set out in 40 CFR Part 266 Subpart D (see 54 FR 1078–1080).

There were a number of comments concerning the regulatory status of residues resulting after burning these wastes. In the January 11, 1989 proposal, the Agency limited its discussion of residues from incineration/fuel substitution to those that are routinely generated during the burning of the restricted wastes (e.g., ashes, incineration/fuel substitution scrubber waters, spent filters and/or sludges from the treatment of scrubber waters). When EPA specifies a treatment method as the treatment standard, residues resulting from the required treatment method are no longer prohibited from land disposal (unless EPA should otherwise specify other requirements, as it is doing in this proceeding for nickel in K115 wastes and for organics concentrated in the spent carbon from the treatment of K027, K113–K116, U221, or U223 wastewaters).

However, some commenters asked the Agency to clarify the regulatory status of wastes that are generated sporadically (e.g., aging equipment which have been exposed to the treated wastes). In response to the commenters who pointed out that wastes resulting from maintenance operations (e.g., replacing of aging materials in the combustion chambers, descaling of boiler soot, or debris equipment) as well as post treatment residues (e.g., filter cakes from water discharges of incineration scrubber waters and washes from the rinsing of incineration equipment) were not addressed by the Agency in the proposed rule, EPA notes that none of these sporadically generated residues are prohibited from land disposal so long as they originate from the treatment method specified in this rule. See further discussion clarifying the applicability of the treatment standards to incinerator equipment and other treatment residues where the treatment standards are promulgated as a specific method or method(s) of treatment in section III.A.3.(h.)(2.) of today's preamble.

For K115, the concentration-based standard for nickel is based on the performance achieved by stabilization of F006 sludges as measured by analysis of the TCLP extract. The Agency has determined that it is technically feasible to transfer the F006 performance data to the K115 incinerator residues because these residues are believed to show similar treatability characteristics to F006 wastes (high concentrations of nickel), and none of the constituents in K115 residuals are likely to interfere with the treatability of nickel. K115 wastes and its incineration/fuel substitution treatment residuals must comply with the concentration-based treatment standards promulgated for nickel.

2. Wastewaters. For organics in the wastewater forms of K027, K113–K116, U221 and U223 wastes, the Agency proposed as the BDAT treatment method carbon adsorption followed by incineration of spent carbon. Based on analysis of the comments received, today's rule promulgates treatment standards for these requiring the use of either: (1) Carbon adsorption of wastewaters followed by incineration of the spent carbon, or (2) direct incineration of wastewaters as a method of treatment. For K115 wastewaters, the Agency is also promulgating concentration-based treatment standards for nickel. The total concentration level for nickel is based on the transfer of performance data that EPA has for metal bearing wastewaters containing nickel. K115 must comply with both the organic and metal standards.

Most of the commenters supported EPA's proposal specifying carbon adsorption followed by incineration of the spent carbon as the method of treatment for K027, K113–K116, U221, and U223 wastewaters. The commenters agreed that this treatment train substantially reduces the amount of soluble organics in wastewaters by concentrating the soluble organics in the activated carbon. The spent carbon is generated by a nondestructive treatment process and thus, the spent carbon must undergo further treatment in order to destroy the amount of organics concentrated in the spent carbon. As a result, spent carbon treatment residues must comply with the nonwastewater treatment standards being promulgated in today's rule for the organics in the nonwastewater form of these wastes (i.e., incineration or fuel substitution).

Carbon adsorption is often used at the end of a treatment train, after the constituent concentrations are reduced by technologies such as chemical oxidation, hydrolysis or biodegradation. It should be noted that the use of such other treatment technologies prior to carbon adsorption is not prohibited by this rule provided that the activated carbon is utilized at a point prior to placing the treated wastewaters in a surface impoundment and that the other forms of treatment do not involve land disposal. (Treatment in an impoundment that meets the requirements of RCRA section 3005(j)(11) (implemented by 40 CFR 261.4) is also not prohibited). For example, biological treatment in a tank followed by activated carbon treatment, followed by discharge of treated wastewaters to a surface impoundment is not precluded.

Any nonwastewater residues from treatment technologies prior to carbon adsorption must meet the same treatment standards applicable to the spent carbon (i.e., they would have to be incinerated in order to meet BDAT). The wastewater effluent from carbon adsorption is considered to meet the treatment standard. See further discussion on the applicability of the land disposal restrictions on the residues from carbon adsorption in section III.A.3.(h.)(2.) of today's preamble.

EPA is further specifying that, to avoid ineffective treatment, effluent wastewaters must be treated by well-

designed and well-operated activated carbon unit. This is a unit that is designed and operated in a manner where operating parameters are consistent with the range of operational parameters for which the units were designed.

For instance, wastewaters contaminated with K027 generate insoluble organics (polymers) that may upset the operation of the carbon-adsorption unit and thus, these insoluble organics (typically measured as total suspended solids, TSS) must be removed from the wastewaters prior to carbon adsorption. Pretreatment of wastewaters will minimize operating problems such as plugging of the carbon bed by keeping the TSS of influent wastewaters to the carbon adsorption unit at levels that allow the unit to operate properly. Carbon adsorption units thus must be operated such that breakthrough of TDI and TDA does not occur. Selection of an indicator gross parameter or indicator constituent that can account for the performance of this technology should be made on a case-by-case basis (for example, as part of a facility's waste analysis plan). (See also the discussion of waste analysis plans in section III.A.1.(f.) of today's preamble.) The BDAT background document for K027, K111–K116, U221, and U223 wastes provides additional information of these and other parameters that are typically monitored and considered for the design and operation of carbon adsorption units.

EPA emphasizes that the specified method of treatment includes incineration or fuel substitution of the spent carbon and any other nonwastewater forms of the wastes that are generated up-stream from the effluent discharge of the carbon adsorption column (e.g., spent filters or biotreatment sludges). The spent carbon and other nonwastewaters generated prior to carbon adsorption could presumably be burned for energy recovery in a boiler or industrial furnace. Such additional treatment is necessary to thermally destroy the organic constituents left behind in the spent carbon or nonwastewaters. Without these treatment steps, the hazardous constituents would be merely transferred from one environmental media (water), to another (the carbon or other solid waste).

Commenters also urged the Agency to consider direct incineration of these wastewaters either as the BDAT or as an alternative BDAT method of treatment. The Agency believes that incineration of these restricted wastewaters is a treatment equivalent to carbon adsorption followed by incineration of spent carbon because the amount of organics concentrated in the spent carbon undergo further treatment by incineration prior to land disposal (i.e., incineration or fuel substitution of spent carbon and spent filters). Further, incineration/fuel substitution alone is capable of substantially reducing the organics in these restricted wastewaters. Therefore, EPA is promulgating incineration or fuel substitution as an equivalent BDAT method for these wastewaters. Treatment residues from incineration or fuel substitution of these wastewaters are not prohibited from land disposal.

One commenter indicated that it thermally regenerates the spent carbon used to treat wastewaters contaminated with TDI wastes. Thermal regeneration of the spent carbon is not prohibited providing that the nonwastewater residues resulting from thermal regeneration of the spent carbon undergo incineration or fuel substitution (i.e., meet the K027, K113–K116, U221, and U223 nonwastewater standards promulgated today). The regenerated carbon is no longer a solid waste provided that it is further reused or marketed (See 40 CFR 261.3(c)(2)(i)).

Several commenters urged the Agency to consider currently available treatment methods that deactivate the reactivity of wastewaters containing TDI constituents (K027 and/or U223). The methods of treatment consist of adding large amounts of water with or without chemical reagents, in order to polymerize most of the free TDI to ureas and/or polyurethanes. Commenters argued that these deactivated TDI wastewaters could be land disposed without causing any harm to the human health and the environment.

The Agency disagrees with the commenters because deactivation methods alone cannot be deemed BDAT. For instance, the addition of large amounts of water may successfully remove the reactivity of TDI. This technology, however, leaves behind residues of aromatic organic rings containing nitrogen constituents such as TDA. Since this method of treatment, alone, neither removes the long term toxicity of the organic constituents in the waste nor reduces the potential for migration of organics, the Agency has ruled out this method of treatment as a potential candidate for BDAT.

BDAT TREATMENT STANDARDS FOR K027, K113–K116, U221 AND U223

[Nonwastewaters]

Incineration or fuel substitution [1] as a method of treatment

[1] Incinerators must comply with 40 CFR 264 Subpart O or 265 Subpart O. Fuel substitution units must be in compliance with 40 CFR Part 266 Subpart D.

BDAT TREATMENT STANDARDS FOR K027, K113–K116, U221 AND U223

[Wastewaters]

Carbon adsorption [2] or incineration [1] as a method of treatment

[1] Incinerators must comply with 40 CFR 264 Subpart O or 265 Subpart O. Fuel substitution units must be in compliance with 40 CFR Part 266 Subpart D.

[2] Spent carbon and any other nonwastewater residuals generated upstream from a carbon adsorption unit must meet the nonwastewater standards applicable to these wastes prior to land disposal. Carbon adsorption units must be operated such that breakthrough of TDI and TDA does not occur. Selection of a surrogate or indicator compound as a measure of breakthrough should be considered on a case-by-case situation.

BDAT TREATMENT STANDARDS FOR K115

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Nickel	(1)	0.32

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR K115

[Wastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/l)	TCLP (mg/l)
Nickel	0.47	(1)

[1] Not applicable.

g. *Wastes from 1,1,1-trichloroethane production.*

K028—Spent catalyst from the hydrochlorinator reactor in the production of 1,1,1-trichloroethane

K029—Waste from the product steam stripper in the production of 1,1,1-trichloroethane.

K095—Distillation bottoms from the production of 1,1,1-trichloroethane.

K096—Heavy ends from the heavy end column from the production of 1,1,1-trichloroethane.

Wastes identified as K028, K029, K095, and K096 are generated primarily by facilities in the organic chemicals manufacturing industry, specifically those engaged in the production of 1,1,1-

trichloroethane. Detailed technical descriptions of the specific production processes generating these wastes can be found in the background document for the listing of these wastes. Today's rule promulgates treatment standards for nonwastewater forms of K028, K029, K095 andK096 and wastewater forms of K028. The regulated constituents and treatment standards for these wastes are listed in the tables at the end of this section.

1. Revision of the "No Land Disposal" standards. At the time of the proposed rule, information available to the Agency indicated that K029 wastes were no longer being generated and that K095 and K096 wastes were being completely recycled. According to available waste characterization data, all three of these wastes would be classified as nonwastewaters for the purposes of BDAT. Therefore, the Agency proposed a treatment standard of "No Land Disposal Based on No Generation" for K029 nonwastewaters and "No Land Disposal Based on Recycling" for K095 and K096 nonwastewaters. The Agency simultaneously proposed that concentration-based standards for the nonwastewaters could be transferred from treatment performance data for incineration of either K019 or F024 nonwastewaters. This data transfer would be possible because these two wastes were more difficult to treat than K029, K095 and K096.

Many commenters opposed any standard that specified "No Land Disposal" for a particular waste because of complications arising from EPA's application of the "derived-from" and "mixture" rules. The commenters were concerned that during the process of recycling their K095 and K096 wastes, an accidental spill may occur thus creating a nonrecyclable K095 or K096 nonwastewater based on either the "derived-from" or the "mixture" rule. The commenters also pointed out that potential fluctuations in the generation processes, or modifications to the generation process may result in the generation of a waste that could no longer be recycled. They indicated that these wastes, if generated, would probably require incineration and may produce an ash that would most likely require land disposal. Thus, a genuine need for a concentration-based treatment standard would arise.

The Agency maintains that for *certain* wastes, the "No Land Disposal" standard is appropriate. The Agency believes that the clarification of the applicability of this standard may remove the majority of the commenters' concerns. Such a standard is appropriate, provided that it applies to wastes generated from the process described in the listing description for this waste that appears in 40 CFR Part 261, and is disposed after the date of the applicable land disposal prohibition for that waste. A final rule published on May 2, 1989 provides a complete explanation of the basis for limiting the "No Land Disposal Based on No Generation" standard in this way (54 FR 18836).

However, most commenters supported the Agency's proposed alternative (i.e., the transfer of concentration-based treatment standards for K019 wastes to K029, K095 and K096). Thus, the Agency is not promulgating the "No Land Disposal Based on No Generation" standard for K029 nonwastewaters nor is it promulgating the "No Land Disposal Based on Recycling" standard for K095 and K096 nonwastewaters.

2. Standards for organic constituents. Commenters pointed out that K019 wastes were more similar to K028, K029, K095 and K096 nonwastewaters than F024 wastes. The Agency reexamined the data and agrees with the commenters. Waste characterization data on K019 nonwastewaters indicate that the K019 wastes do contain higher concentrations of chlorinated organic compounds than the F024 wastes and are more difficult to treat than K028, K029, K095 and K096 nonwastewaters. The Agency is therefore promulgating treatment standards for the organic constituents present in these nonwastewaters based on the transfer of performance data from rotary kiln incineration in K019 wastes rather than F024 wastes.

Because characterization data on K029, K095, and K096 show the presence of treatable concentrations of several organic constituents that the Agency had not found present in K028, the Agency developed standards for these other organic constituents based on a transfer of performance data and existing concentration-based standards for K019 wastes. Details on the rationale for the transfer of performance data and the development of treatment standards for these organic constituents can be found in the BDAT background document for these wastes.

One commenter stated that the proposed organic constituent treatment standards fall below PQLs achievable in the commenter's analytical laboratories. However, the background documents for K019 and for F024 demonstrate that detection levels in ash and scrubber water residuals can be achieved in laboratories. In fact, the limits achieved by the laboratories used in the BDAT studies are well below the proposed or final standards for all regulated organic constituents. The Agency believes this evidence verifies that analytical laboratories that are in compliance with EPA's QA/QC requirements can quantify these regulated constituents at the treatment standard levels. See also a more complete discussion of the relationship of PQLs to BDAT treatment standards in section III.A.1.(b.) of today's preamble.

Several commenters stated that the treatment standards for the organic constituents should be consistent with treatment standards previously promulgated for the same constituents in other waste codes. The Agency disagrees with these commenters. Treatment standards for a particular waste are developed based on BDAT performance data for that waste or for a waste judged to be similar. Treatment standards for particular constituents may vary for different wastes due to differences in the waste matrices which may alter the constituent treatability. The Agency also believes that these commenters concerns may be moot by the Agency's decision to transfer treatment standards from K019 wastes to K028, K029, K095 and K096 nonwastewaters.

3. Standards for metal constituents. In today's rule, only the proposed treatment standards for cadmium, chromium, lead and nickel in K028 wastewaters are being promulgated. These wastewater standards are being transferred based on the reanalysis of the performance data from the lime and sulfide precipitation treatment of metals from K062 wastewaters. The Agency has determined that these metals present in K062 wastewaters are more difficult to treat than when present in K028 wastewaters. K062 wastewaters typically contain much higher levels of these metals as well as other metals (such as iron) and much higher levels of dissolved solids (such as sulfates or chlorides). These higher concentration of metals and dissolved solids interfere with the effectiveness of the precipitation reactions which are intended to remove the metals of interest. Thus, the K062 wastewaters are more difficult to treat than K028 wastewaters. A more detailed explanation of the transfer of these data for metal constituents in K028 is provided in the BDAT background document for these wastes. The Agency did not receive any comments opposing the transfer of these K062 treatment performance data specifically to K028 wastewaters nor were any comments or data received indicating that these

standards could not be achieved. Therefore, the Agency is promulgating these standards as proposed.

Standards for nickel and chromium in K028 nonwastewaters were originally proposed based on performance data for these metal constituents from the stabilization of K048 and K051 incinerator ash. One commenter felt that these data were not demonstrated by the stabilization testing performed, thereby invalidating the transfer of the treatment standards. This commenter suggested transferring treatment performance data from F006 instead.

Meanwhile, the Agency has recently completed an analysis of TCLP extracts obtained from the stabilization of F024 incinerator ash residues. The results of this analysis show substantial reduction of metals in TCLP extracts after stabilization. At the same time, the Agency reexamined the data for the stabilization of F006, K048, and K051 nonwastewaters and concluded that these new stabilization data for F024 wastes may better represent the levels of treatment obtainable for the metals expected to be contained in K028 ash residues (as well as those for K029, K095, and K096). However, since these data were not available for public notice and comment, and since the resultant treatment standards are significantly different from the proposed standards, the Agency has decided not to promulgate treatment standards for these metals in K028 nonwastewaters in today's rule. The Agency is reserving standards for nickel and chromium in K028 nonwastewaters in order to provide notice that these constituents will be proposed for restrictions in a future rulemaking.

Another commenter challenged transferring stabilization data in order to regulate inorganic constituents in treatment residues from K028 wastes because the commenter believed that if the concentrations for metals fall below the levels which define a characteristic waste (40 CFR Part 261 Subpart C), no treatment should be required. The Agency reminds the commenter that the treatment residuals are also considered to be listed hazardous wastes under the "derived-from" rule, regardless of whether or not the waste exhibits a characteristic. See further discussion of the relationship of BDAT to the "derived-from" rule in section III.A.1.(d.) of today's preamble.

In a similar manner, one commenter questioned the need to regulate metals constituents in residues derived from a predominantly organic waste. Because incineration is designed specifically to destroy organics and because it does not provide treatment for metals (which end up in the ash), the Agency believes that stabilization of the ash to immobilize metal constituents is a technically valid approach.

Other commenters stated that these metals should not be regulated because these wastes are not listed for these constituents. The hazardous constituents for which a waste is listed are considered by the Agency is selection of constituents for regulation. However, these constituents are by no means an exhaustive list, but merely provide a minimum basis for listing a waste as hazardous. As discussed in section III.A.1.(b.) of today's preamble, the Agency therefore believes that it is not restricted to regulation of only these constituents. The Agency uses waste characterization and treatment performance data collected under the BDAT program to determine the constituents that should be regulated.

At the time of proposal, there was apparently no need for metals standards in K029, K095 and K096 nonwastewaters, because K095 and K096 nonwastewaters were being totally recycled and because K029 nonwastewaters were identified as no longer being generated. The Agency intends to develop standards for metals in nonwastewaters forms of K029, K095, and K096 and propose them with the Third Third wastes prior to promulgation by May 8, 1990.

4. Standards for K029, K095 and K096 wastewaters. The Agency also did not propose treatment standards for the wastewater forms of K029, K095 and K096. The Agency stated that it believed that there was no need for their development because it was unlikely that these wastewaters were being generated nor could be generated. Commenters indicated that they believe that the likelihood for generation of these wastewaters is reasonably good, and thus a need exists for standards. In particular, wastewaters may be generated during the recycling of K095 and K096 (e.g., wash waters, contaminated cooling water, and spill rinsings). (However, if K095 and/or K096 wastes are used as intermediates and thus not discarded, these materials would not be solid wastes, and any residues from their use would therefore not be deemed to be derived from management of a listed hazardous waste.)

The Agency agrees with these commenters that wastewater forms of K029, K095 and K096 may be generated and thus treatment standards are needed. However, today's rule cannot promulgate any treatment standards because no standards were previously proposed. The Agency intends to develop standards for wastewater forms of K029, K095, and K096 and propose them with the Third Third wastes prior to promulgation by May 8, 1990.

K029, K095, and K096 are all considered Second Third wastes for which treatment standards were to be established by the statutory deadline of June 8, 1989. Since the Agency is not promulgating standards for the wastewater forms of K029, K095 and K096 by their statutory deadline, land disposal of these wastewaters shall be regulated by the "soft hammer" provisions in 40 CFR Part 268.

BDAT TREATMENT STANDARDS FOR K028

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
1,1-Dichloroethane	6.0	[1]
trans-1,2-Dichloroethene	6.0	[1]
Hexachlorobutadiene	5.6	[1]
Hexachloroethane	28.	[1]
Pentachloroethane	5.6	[1]
1,1,1,2-Tetrachloroethane	5.6	[1]
1,1,2,2-Tetrachloroethane	5.6	[1]
1,1,1-Trichloroethane	6.0	[1]
1,1,2-Trichloroethane	6.0	[1]
Tetrachloroethylene	6.0	[1]
Chromium (Total)	[1]	Reserved.
Nickel	[1]	Reserved.

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR K028

[Wastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/l)	TCLP (mg/l)
1,1-Dichloroethane	0.007	"
trans-1,2-Dichloroethene.	0.033	"
Hexachlorobutadiene	0.007	"
Hexachloroethane	0.033	"
Pentachloroethane	0.033	"
1,1,1,2-Tetrachloroethane.	0.007	"
1,1,2,2-Tetrachloroethane.	0.007	"
Tetrachloroethylene	0.007	"
1,1,1-Trichloroethane	0.007	"
1,1,2-Trichloroethane	0.007	"
Cadmium	6.4	"
Chromium (Total)	0.35	"
Lead	0.037	"
Nickel	0.47	"

BDAT TREATMENT STANDARDS FOR K029

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
Chloroform	6.0	Not applicable
1,2-Dichloroethane	6.0	"
1,1-Dichloroethylene	6.0	"
1,1,1-Trichloroethane	6.0	"
Vinyl chloride	6.0	"

BDAT TREATMENT STANDARDS FOR K095

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
1,1,1,2-Tetrachloroethane.	5.6	"
1,1,2,2-Tetrachloroethane.	5.6	"
Tetrachloroethene	6.0	"
1,1,2-Trichloroethane	6.0	"
Trichloroethylene	5.6	"
Hexachloroethane	28.0	"
Pentachloroethane	5.6	"

BDAT TREATMENT STANDARDS FOR K096

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
1,3-Dichlorobenzene	5.6	"
Pentachloroethane	5.6	"
1,1,1,2-Tetrachloroethane.	5.6	"
1,1,2,2-Tetrachloroethane.	5.6	"
Tetrachloroethylene	6.0	"
1,2,4-Trichlorobenzene	19.	"
Trichloroethylene	5.6	"
1,1,2-Trichloroethane	6.0	"

h. *Organophosphorus pesticide wastes.*

K036—Still bottoms from toluene reclamation distillation in the production of Disulfoton.
K038—Wastewater from the washing and stripping of Phorate production.
K039—Filter cake from the filtration of diethyl phosphorodithioic acid in the production of Phorate.
K040—Wastewater treatment sludge from the production of Phorate.
P039—Disulfoton
P040—Diethyl 2-pyrazinyl phosphorothioate
P041—Diethyl-p-nitrophenyl phosphate
P043—Diisopropylfluorophosphate
P044—Dimethoate
P062—Hexaethyl tetraphosphate
P071—Methyl parathion
P085—Octamethyl pyrophosphoramide
P089—Parathion
P094—Phorate
P097—Famphur
P109—Tetraethyl dithiopyrophosphate
P111—Tetraethyl pyrophosphate
U058—Cyclophosphamide
U087—0,0-Diethyl S-methyl dithiophosphate
U235—tris-(2,3-Dibromopropyl) phosphate

Today's rule promulgates treatment standards for wastewater and nonwastewater forms of K038, K039, K040, P039, P040, P041, P043, P044, P062, P071, P085, P089, P094, P097, P109, P111, U058, U087 and U235. It also promulgates standards for wastewater forms of K036. Detailed technical descriptions of the specific production processes generating these wastes can be found in the background document for the listing of these wastes.

The principal constituents of concern in each of these wastes are members of a group of organic compounds known as organophosphorus compounds. The majority of these constituents also contain sulfur and are often referred to as phosphorothioates. All of these compounds are somewhat similar in structure and elemental content. Most are typically manufactured for use as pesticides. Therefore, the Agency has classified all of these compounds as one treatability group identified as the organophosphorus pesticides.

In the January 11, 1989 proposed rule for Second Third wastes, the Agency proposed a direct transfer of the concentration-based standards from the incineration of K037 wastes (wastewater treatment sludge from the production of Disulfoton) to some of these organophosphorus pesticide wastes (i.e., those that have analytical methods) and proposed incineration as a method of treatment for the others. The basis of all of these standards is the similarities in structure and elemental composition of all of the organophosphorus pesticides to each other and to Disulfoton, the principal hazardous constituent of concern in K037 wastes. (EPA promulgated concentration-based treatment standards for K037 wastewaters and nonwastewaters with the First Third wastes on August 8, 1988.) In addition, the Agency believes that Disulfoton is one of the most difficult chemicals in this group of organophosphorus pesticides to incinerate. Given that Disulfoton can be effectively treated by incineration and that the chemicals in this group are structurally similar, the Agency believes that all the other organophosphorus pesticides in this section can be effectively treated by incineration, and that the concentration-based standard for each representative regulated organophosphorus pesticide can be identical to that achieved by incineration of Disulfoton in K037 wastes. Therefore, the Agency believes that the performance achievable by incineration represents BDAT for all of the organophosphorus pesticide chemicals and is promulgating concentration-based treatment standards for the wastewaters and nonwastewater forms of K038, K040, P039, P071, P089, P094, P097 and U235 as well as wastewater forms of K036 based on this transfer.

EPA is establishing incineration as a method of treatment for the nonwastewater forms of K039, P040, P041, P043, P044, P062, P085, P109, P111, U058 and U087. Standards for the wastewater forms of these organophosphorus pesticides have been developed based on the performance of biological degradation, incineration and carbon adsorption. These are discussed in detail in the following sections.

1. *Wastes with concentration-based BDAT standards.* The Agency has determined that, currently, there are analytical methods (most of which comply with the EPA, Office of Solid Waste, Publication: SW–846 (generally referred to as SW–846)) that allow the measurement of the principal hazardous constituent (organophosphorus pesticide) contained in wastes and treatment residuals for wastes identified as K036, K038, K040, P039, P071, P089, P094, P097 and U235. Thus, the Agency is able to promulgate concentration-based treatment standards for: Disulfoton in K036 wastewaters; Disulfoton in P039 wastewaters and nonwastewaters; Phorate in K038, K040 and P094 wastewaters and nonwastewaters; and Methyl parathion, Parathion, Famphur, and tris-(2, 3-Dibrompropyl) phosphate in P071, P089, P097 and U235 wastewaters and nonwastewaters, respectively. Standards applicable to nonwastewaters are based on the performance achieved by rotary kiln incineration and the concentration of organophosphorus pesticide measured in the ash residuals. Standards applicable to wastewaters are based on the performance achieved by biological treatment and the concentration of organophosphorus pesticide measured in the resultant effluent wastewaters. Where the treatment standards are

expressed as concentration-based standards, other treatment technologies that can achieve these concentration-based treatment standards are not precluded from use by this rule. The regulated constituents and treatment standards for these wastes are listed in the tables at the end of this section.

The proposed treatment standards for the wastewater forms of these organophosphorus pesticides were based on the concentrations of Disulfoton as measured in grab samples of scrubber water from the incineration of K037 nonwastewaters. EPA has decided to change these standards in the final rule based on additional performance data for a biological wastewaters treatment system submitted during the comment period. These data were from the treatment of industrial wastewaters containing low concentrations of Parathion. Although, these data (based on analysis of grab samples for influent wastes and composite samples for effluent) were not generated specifically for this rulemaking and do not result from the direct treatment of the RCRA waste identified as P089 (Parathion), the Agency believes that these wastewaters have concentrations of Parathion that are similar to those wastewaters identified specifically as K036, K038, K040, P039, P071, P089, P094, P097 or U235. The Agency has also determined that these data are valid and represent the level of performance that appears to be achievable for this type of biological wastewater treatment system.

The Agency points out that the promulgated concentration-based treatment standards for wastewaters for these organophosphorus wastes are based on the analysis of composite samples rather than grab samples, because this new performance data received during the comment period were based on the analysis of composite effluent samples. See further discussion of when EPA uses composite samples to establish treatment standards in section III.A.1.(f.) of today's preamble.

EPA believes these data to be a preferable measure of treatment performance because where the Agency has performance data (that conform with BDAT methodology) on wastewater treatment processes and data on incineration (constituent concentrations in scrubber water), the Agency prefers to establish treatment standards based on the wastewater treatment processes. (Note.—This does not preclude the Agency from establishing treatment standards for other wastes based on constituent concentrations in incinerator scrubber waters.)

EPA also believes that these data for biological treatment of Parathion can be validly transferred to the wastewaters forms of the other organophosphorus pesticide waste codes. This is due to the structural similarity between Parathion and the other organophosphorus wastes. Thus, today's rule promulgates revised concentration-based standards for the wastewater forms of K036, K038, K040, P039, P071, P089, P094, P097 and U235 based on analysis of composite samples from wastewater treatment. (EPA also intends to investigate if these wastewater standards are appropriate for K037 wastewaters—a First Third waste—as part of the Third Third rulemaking.)

The Agency received one comment disagreeing with the proposed concentration-based standards for P089, P097, and U235, because of a perceived lack of analytical methods to detect Parathion (P089), Famphur (P097) and tris-(2,3-dibromopropyl) phosphate. The Agency disagrees with this comment, and believes that all three chemicals can be analyzed. Famphur and Parathion can be analyzed by Method 8270 of SW-846, and have been proposed in the January 23, 1989 update to the third edition of SW-846. Tris-(2,3-dibromopropyl) phosphate can be analyzed by Method 8350 of SW-846, and will be included in the second update to the third edition of SW-846, due to be proposed as an official method in early 1990. All three chemicals have been previously included on the BDAT List for that reason.

One commenter questioned why, in the January 11, 1989 proposal, standards were proposed for K036 wastewaters, but not for K036 nonwastewaters. The Agency promulgated a BDAT standard of "No Land Disposal based on No Generation" for K036 nonwastewaters with the First Third wastes on August 8, 1988. (See 53 FR 31174). EPA amended this standard on May 2, 1989, to apply to wastes generated from the process described in the listing description and disposed after August 17, 1988 (54 FR 18836). In the forthcoming proposed rule for Third Third wastes, the Agency intends to propose a standard for other forms of K036 nonwastewaters, such as K036 spill residues or solid residues from the treatment of K036 leachate.

One commenter stated that K036 and P039 may be harder to destroy by incineration than K037, because the concentration of Disulfoton in K036 and P039 may be many times higher than the concentration in K037. The Agency disagrees with this comment. While it recognizes that higher concentrations of Disulfoton may occur in K036 and P039 wastes, the Agency believes that the concentrations would not be significantly different from that measured in the untreated K037 wastes. The data in the background document for K037 show Disulfoton concentrations of 10.4% to 24.6% for the untreated wastes. The Agency believes that these concentration levels would be within the same order of magnitude of those anticipated to be in K036 and P039. The Agency successfully incinerated this high level of Disulfoton such that the concentrations in the residuals were at or near the detection limit in the residuals. Further, the K037 waste tested also contained approximately 75% solids (filter paper and diatomaceous earth filter aid) which the Agency believes could interfere with the destruction of Disulfoton and thus make K037 more difficult to destroy than K036 and P039 wastes that may have slightly higher concentrations of the chemical, but a lesser amount of interferences.

2. Wastes with treatment methods as BDAT. The Agency determined that the analytical methods available during the development of today's rule could not satisfactorily measure the principal hazardous organic constituents (organophosphorus pesticide) contained in wastes and treatment residuals for wastes identified as K039, P040, P041, P043, P044, P062, P085, P109, P111, U058 and U087. Thus, the Agency is unable to promulgate concentration-based treatment standards for these wastes and is promulgating methods of treatment. Although EPA prefers a concentration-based standard (due to both the greater flexibility in choice of technology used to achieve the standard and in the greater control afforded to ensure efficient design and operation of the chosen technology), in the absence of analytical methods (that would measure and assure compliance), the Agency believes that establishing a method of treatment is the only logical alternative for BDAT. In general, the majority of commenters on this issue supported this approach. Further, EPA believes that this is consistent with the promulgated BDAT methodology and with RCRA Section 3004(m) which authorizes the Agency to establish either levels or methods of treatment. Therefore, today's rule promulgates methods of treatment for these wastes.

As discussed previously, the Agency believes that incineration represents BDAT for the nonwastewater forms of these wastes. Besides the fact that EPA does not currently have an analytical method for this group of

organophosphorus pesticides, EPA has currently not identified any organic constituents in these wastes that could be used as a surrogate or as an indicator compound in order to develop alternative concentration-based standards for these wastes. It should be noted that promulgating BDAT standards expressed as specific methods of treatment does not preclude the Agency from establishing concentration-based standards in the future, should an analytical method be developed with sufficient QA/QC that will measure the hazardous constituents or should an adequate surrogate or indicator constituent be identified. Therefore, the Agency is promulgating a BDAT treatment standard of "Incineration as a Method of Treatment" for the nonwastewater forms of K039, P040, P041, P043, P044, P062, P085, P109, P111, U058 and U087. Incinerators must comply with 40 CFR 264 Subpart O or 265 Subpart O.

For the wastewater forms of these organophosphorus wastes, the Agency proposed carbon adsorption as the BDAT treatment method in 54 FR 1086 (January 11, 1989). The residual from this type of nondestructive treatment (i.e., the spent carbon) is still considered to be the same waste code as before treatment, and must be managed as such. It therefore must be incinerated prior to land disposal.

It should be noted that the use of other treatment technologies prior to carbon adsorption is not prohibited by this rule. Carbon adsorption is often used at the end of a treatment train, after the constituent concentrations are reduced by technologies such as chemical oxidation, hydrolysis or biodegradation. Any nonwastewater residues from these treatment technologies prior to and including carbon adsorption would have to be incinerated in order to meet the treatment standard. The wastewater effluent from carbon adsorption would be considered to meet the treatment standard. See section III.A.3.(j.) of today's preamble for a similar discussion on carbon adsorption for wastewaters associated with K027 wastes.

Several commenters suggested that there are cases where it may be preferable to incinerate the wastewater, rather than have the waste adsorbed by carbon. Two examples of these situations occur when: (1) The waste appears as a result of the "mixture-rule" with other waste codes for which the BDAT treatment method requires incineration; and (2) the waste is generated such that it contains a relatively high level of TOC but just under the 1% TOC cut-off and maintains its classification (for purposes of BDAT) as a wastewater. In either case, the Agency agrees with the commenter that incineration would then be the preferred or required (as in the case of the first example) method of treatment. In fact, the Agency did consider incineration as an alternative destructive technology to carbon adsorption. However, it seemed impractical to require all wastewater streams to be incinerated. (Some data indicated that the majority of hazardous wastewaters contain significantly less than 1% TOC.)

For those wastewaters that do contain just under the 1% TOC level, incineration may be more desirable and possibly more effective than carbon adsorption. This might lead one to believe that for these "high" TOC wastewaters, the Agency should therefore dictate incineration over carbon adsorption. However, at this time the lack of a method to analyze for the constituents of concern makes it difficult (but not impossible) to correlate the performance efficiency of the two treatment methods for the constituents of concern to performance efficiency of a surrogate or indicator compound. One possible surrogate to measure treatment efficiency is total organic carbon (TOC); however, the Agency is currently unaware of the level of TOC for which carbon adsorption would be more efficient than incineration.

Thus, the Agency is promulgating "Incineration or Carbon Adsorption as a Method of Treatment" as BDAT for the wastewater forms of wastes identified as K039, P040, P041, P043, P044, P062, P085, P109, P111, U058 and U087. Spent carbon and any other nonwastewater residuals generated up-stream from a carbon adsorption unit must meet the nonwastewater standards applicable to these wastes prior to land disposal, and so must be incinerated. Carbon adsorption units must be operated such that breakthrough of organophosphorus compounds does not occur. (See section III.A.3.(f.) of today's preamble for a discussion on the need for specifying some level of proper operating conditions for carbon adsorption technology.) Selection of a surrogate or indicator compound of this breakthrough should be made on a case-by-case basis (for example, as part of a facility's waste analysis plan). See also the discussion of waste analysis plans in section III.A.1.(f.) of today's preamble.

Commenters asked the Agency to specifically clarify the applicability of the "treatment as a method" BDAT standards to treatment residuals. They suggested that the Agency could clarify the standards by stating that they do not apply to "derived-from" wastes. While the Agency agrees that clarification is necessary, it does not agree that the standards should be identified as suggested for several reasons: (1) all wastes identified as "derived-from" are not necessarily treatment residues (e.g., leachate); (2) all nonwastewater treatment residues (such as spent carbon, residues from recycling, and residues from wastewater treatment processes prior to carbon adsorption) may contain leachable hazardous organics; (3) some wastewaters (such as scrubber waters from steam stripping operations or recovery process waters) may contain significant amounts of untreated constituents.

However, the Agency believes that the previous discussions in this section assist in clarifying the applicability to these residues. As a summary, the Agency points out the following: (1) Scrubber waters from incinerators in compliance with 40 CFR Part 264 Subpart O of Part 265 Subpart O are considered to meet BDAT for these wastes and can be land disposed; (2) the scrubber waters from incinerators in compliance with 40 CFR Part 264 Subpart O or Part 265 Subpart O therefore are not required to undergo "Carbon Adsorption as a Method of Treatment"; (3) incinerator ashes and residues from the treatment of scrubber waters from incinerators in compliance with 40 CFR Part 264 Subpart O of Part 265 Subpart O are considered to meet BDAT for these wastes and can be land disposed; (4) incinerator equipment (such as fire brick) that are derived from sections of the incinerator that have been directly subjected to the high temperatures of the incinerator (that was operated in compliance with 40 CFR Part 264 Subpart O of Part 265 Subpart O) or are downstream from the high temperature zones are considered to meet BDAT for these wastes and can be land disposed. The Agency believes that the hazardous constituents contained in these wastes are destroyed in the high temperature zones of the incinerator and would not be expected to be present in the high temperature zones or in the equipment down stream of these zones; (5) wastewater effluent (and their subsequent nonwastewater treatment residues) from the carbon adsorption units treating wastewater forms of these waters are considered to meet BDAT for these wastes and can be land disposed; and (6) spent carbon (and nonwastewater residues from the pretreatment of these wastes prior to carbon adsorption) from the treatment

of wastewater forms of these wastes are not considered to meet BDAT for these wastes and must meet the BDAT treatment standards for nonwastewaters prior to land disposal.

As noted earlier, when treatment standards are expressed as a specific technology rather than concentration-based standards, it is possible for a generator or treater to demonstrate that an alternative technology can achieve an equivalent level of performance as that specific treatment method (40 CFR 268.42(b)). This demonstration could be based on: (1) A newly developed analytical method for the primary hazardous constituent; (2) a concentration-based standard utilizing a surrogate or indicator compound; or (3) other demonstrations of equivance for an alternative method of treatment. The resultant treatment standard as well as any analytical methodology used in the demonstration could then be proposed by the Agency to be applicable to all wastes in this group.

BDAT TREATMENT STANDARDS FOR ORGANOPHOSPHORUS WASTES K038, K040, P039, P071, P089, P094, P097 AND U235

Waste code	Regulated constituent	Maximum for any single grab sample	
		Total composition, (mg/kg)	TCLP (mg/l)
K038	Phorate	0.1	[1]
K040	Phorate	0.1	[1]
P039	Disulfoton	0.1	[1]
P071	Methyl parathion	0.1	[1]
P089	Parathion	0.1	[1]
P094	Phorate	0.1	[1]
P097	Famphur	0.1	[1]
U235	tris-(2,3-Dibromopropyl) phosphate	0.1	[1]

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR ORGANOPHOSPHORUS WASTES K036, K038, K040, P039, P071, P089, P094, P097 AND U235

[Wastewaters]

Waste code	Regulated constituent	Maximum for any composite sample	
		Total composition (mg/l)	TCLP (mg/l)
K036	Disulfoton	0.025	[1]
K038	Phorate	0.025	[1]
K040	Phorate	0.025	[1]
P039	Disulfoton	0.025	[1]
P071	Methyl parathion	0.025	[1]
P089	Parathion	0.025	[1]
P094	Phorate	0.025	[1]
P097	Famphur	0.025	[1]
U235	tris-(2,3-Dibromopropyl) phosphate		

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR ORGANOPHOSPHORUS WASTES K039, P040, P041, P043, P044, P062, P085, P109, P111, U058 AND U087

[Nonwastewaters]

Incineration as a method of treatment

[1] Incinerators must comply with 40 CFR 264 Subpart O or 265 Subpart 0.

BDAT TREATMENT STANDARDS FOR ORGANOPHOSPHORUS WASTES K039, P040, P041, P043, P044, P062, P085, P109, P111, U058 AND U087

[Wastewaters]

Carbon adsorption [2] or incineration [1] as a method of treatment

[1] Incinerators must comply with 40 CFR 264 Subpart O or 265 Subpart O.

[2] Spent carbon and any other nonwastewater residuals generated upstream from a carbon adsorption unit must meet the nonwastewater standards applicable to these wastes prior to land disposal. Carbon adsorption units must be operated such that breakthrough of the organophosphorus compounds does not occur. Selection of a surrogate or indicator compound as a measure of breakthrough should be considered on a case-by-case situation.

i. Wastes from 2,4–D production.

K043—2,6–Dichlorophenol wastes from the production of 2,4–D.

Wastes identified as K043 are generated primarily by facilities in the organic chemicals manufacturing industry, specifically those engaged in the production of 2,4–D. The Agency has data that indicate that there is only one current generator of this waste. Detailed technical descriptions of the specific production process generating these wastes can be found in the background document for the listing of this waste code. The treatment standards for this waste are based on data obtained from wastes generated and treated at this facility.

Today's rule promulgates treatment standards for K043 wastewaters and nonwastewaters based on incineration. Other treatment technologies that can achieve these concentration-based treatment standards are not precluded from use by this rule. EPA is

promulgating treatment standards for thirteen organic constituents including tetrachloroethene, six chlorinated phenols, and six polychlorinated dibenzo-p-dioxins and dibenzofurans (PCDDs and PCDFs, respectively). The specific regulated constituents and treatment standards for these wastes are listed in the tables at the end of this section.

The promulgated treatment standards for the regulated chlorinated phenols in wastewaters are based on new data received by the Agency from the sole generator/treater of K043 during the comment period. The original data for wastewaters consisted of two data points. The new data provided six additional wastewater data points. The Agency believes these new data are more representative of treatment that can be achieved for K043.

In general, the comments submitted on the proposed rule for K043 related to four general issues: (1) The establishment of treatment standards for PCDDs and PCDFs; (2) specifying a treatment technology as the treatment standards for K043 rather than establishing concentration-based standards; (3) the validity of the performance data upon which the treatment standards are based; and (4) the regulation of tetrachloroethene in K043.

Commenters were concerned with the treatment standards established for the six regulated PCDDs and PCDFs. Some commenters thought that the PCDDs and PCDFs should not be regulated because K043 is not listed for these constituents. This is not a sufficient reason for not establishing a treatment standard, for the reasons given a number of times earlier in this preamble. (See further discussion of the use of Appendix VII in establishing BDAT in section III.A.1.(b.) of today's preamble and the discussion of the analysis for analysis of PCDDs and PCDFs in F024 wastes in section III.A.3.(b.) of today's preamble.) The Agency thus uses waste characterization and treatment performance data to determine the constituents that should be regulated for a waste. A more detailed explanation of the selection of regulated constituents in K043 is provided in the background document for this waste code.

Another commenter felt that the tetrachlorodibenzo-p-dioxins (TCDDs) and tetrachlorodibenzofurans (TCDFs) should not be regulated because the incineration data (submitted by the commenter) did not indicate the presence of these constituents in K043 wastes. In response, the Agency points out that the availability of specific treatment data for a given constituent in a particular waste, is not a requirement for the selection of that constituent for regulation. This is particularly true when EPA has sufficient additional waste characterization data that indicate the presence of that constituent in treatable levels in wastes other than what was specifically treated. While the Agency did not have specific treatment data for TCDDs and TCDFs in the submitted K043 incineration data, it did not waste characterization data indicating the presence of several of these constituents in other untreated K043 wastes at concentrations that the Agency determined were treatable by incineration.

This same commenter expressed concern that the BDAT treatment standards for these constituents in K043 were transferred from treatment standards for K099. According to the commenter, the wastes are not sufficiently similar to justify transferring standards. As stated in the proposed rule (54 FR 1083), the Agency also has data on six PCDDs and PCDFs in untreated and treated K099 wastes. Since K099 is generated at the same site as K043 (in the next step of the 2,4-D production process) and since they contain similar types and concentrations of hazardous constituents as contained in untreated K043 wastes, the Agency believes that K099 wastes are sufficiently similar in order to justify transferring standards for these constituents to K043 wastes.

In addition, the Agency feels that incineration of K043 waste will treat the PCDDs and PCDFs to levels that are comparable to those achieved by chlorination of the K099 waste. Further, the Agency points out that standards for PCDDs and PCDFs are the same as those promulgated for F024 wastes (which are also based on incineration). The Agency believes that the F024 wastes tested by the Agency are more difficult to incinerate than K043, based on available characterization data, and that the resultant F024 incinerator ash is as difficult or more difficult to analyze than the respective K043 nonwastewater residuals. While the Agency maintains that the transfer of standards from K099 is supportable, the Agency believes that the data from F024 also lends support to establishment of these standards for K043. See section III.A.1.(e.) of today's preamble for a more detailed discussion related to the transfer of treatment standards.

Several commenters expressed general concerns about the ability to comply with the treatment standards for PCDDs and PCDFs because they are too low (i.e., near the practical quantitation limits (PQLs) for these constituents). They claim that the 1 ppb detection limit is not routinely achievable, that only a handful of laboratories can perform the analysis to this level, and that analysis and reporting of these constituents typically takes three to eight months.

The Agency disagrees that these treatment standards are too low and does not anticipate any difficulties in achieving detection at the treatment standard of 1 ppb for either the nonwastewaters or wastewaters. While the Agency has no data for PCDDs and PCDFs in treated K043 residuals, data do exist for these constituents in treatment residues of other wastes indicating that detection limits of less than 1 ppb can routinely be achieved. For example, performance data from incineration of F024 show detection limits of less than 10 parts per trillion (ppt) in residual wastewater and less than 100 ppt in residual ash. The Agency believes that these treatment standards are analytically achievable on a routine basis and points out that quantitation levels for these PCDDs and PCDFs have been achieved by commercial laboratory facilities at low ppt levels in nonwastewaters and low parts per quadrillion (ppq) levels in wastewaters. The Agency also contends that there are a sufficient number of laboratories capable of performing the analysis of PCDDs and PCDFs to the 1 ppb level and that the analysis can be performed in a timely manner, as was the case for F024 sample analyses. Furthermore, because there currently is just one generator of K043, the Agency does not believe that the regulation of PCDDs and PCDFs in K043 will adversely affect laboratory capacity to perform such analyses. See also further discussion of PQLs in section III.A.1.(b.) of today's preamble.

One commenter suggested that the Agency set technology-based treatment standards for K043 instead of concentration-based standards. This commenter felt that setting technology-based standards would be equivalent to establishing concentration-based levels because the concentrations were based on performance data from the sole generator of K043 whose treatment facility is well designed and operated. Though section 3004(m) specifies that BDAT treatment standards may be expressed as either concentration-based levels or as a method of treatment (technology-based), the Agency maintains that where treatment performance data are available, concentration-based treatment standards should be established rather than specifying a method of treatment. Concentration-based standards allow

industry the flexibility to use any treatment technology or combination of technologies to treat K043 as long as the treatment residuals produced (that are destined for land disposal) have concentrations of the regulated constituents less than or equal to the treatment standards. In addition, other facilities in the future may generate K043 wastes and the Agency has no guarantee that such facilities will have treatment systems that are as well-designed and well-operated as that of the current sole generator/treater. Because acceptable treatment performance data were available for treatment of K043, the Agency established concentration-based treatment standards for this waste.

One commenter claimed that the wastewater performance data supplied to EPA were insufficient to establish statistically valid concentration-based treatment standards because the background levels of chlorinated phenols were no different than levels in the scrubber water collected during the test burn. EPA does not concur with the claim that the supplied data are not useful in establishing statistically valid treatment standards for wastewaters. The sole generator provided the Agency with results from the analysis of eight scrubber water samples collected during incineration treatment tests. The concentrations of the regulated constituents in these samples are substantially lower than those in the untreated waste. Thus, incineration has been demonstrated to provide substantial treatment of these constituents. The Agency's own statistical analysis confirms the fact that the levels of regulated constituents found in the scrubber water sampled showed statistically significant reduction from the levels identified in the raw waste. The fact that background samples of scrubber water and the scrubber water collected during the treatment test were similar in their concentrations of regulated constituents indicates simply that the incineration of K043 completely destroys these constituents in the waste.

A concern of the sole generator/treater was that concentration-based treatment standards would force the facility to incinerate dilute K043 wastewaters or seek a treatment standard variance because of difficulties arising from the "derived-from" and "mixture" rules. The Agency does not believe the generator/treater would be forced to incinerate or seek a treatment variance for dilute "derived-from" or "mixed" K043 wastewaters. First, the K043 wastewater treatment standards would apply only if the wastewaters were placed in land disposal units. Second, if such wastewaters are being placed in land disposal units, the facility has the option of delisting the scrubber waters following the incineration of K043 waste such that the "derived-from" and "mixture" rules would no longer apply. Third, the treated K043 wastewaters could be isolated in a land disposal unit such that other plant wastewaters would not become subject to the BDAT treatment standards set for K043 under the "mixture" rule.

Finally, it is clear that the type of problem referred to by the commenter would arise only if the other wastes at the facility also contain treatable levels of the regulated hazardous constituents in K043, in which case it furthers RCRA's goals to have effective treatment of those constituents before land disposal of the combined waste. For example, if waste A has a treatment standard of 10 mg/l for hazardous constituent X and is treated to meet the standard but then is combined with other waste streams and the combined waste stream now contains greater than 10 mg/l of X, the other wastes must contain X in treatable concentrations. Further treatment to minimize threats to human health and the environment thus would be appropriate before land disposal (See also RCRA section 3004(m)).

One commenter believes that tetrachloroethene should not be a regulated constituent in K043 because it is used as a cleaning solvent for K043 process equipment and is not present in the waste as a result of the production process that generates K043. Further, the commenter states that this constituent is already being regulated under the Solvents and Dioxins Rule (under F002 waste) for this use.

In this case, the waste stream in question is a process waste that has become contaminated with small amounts of solvent; it is not a mixture of spent solvent and K043. Furthermore, the K043 waste does not contain a spent solvent since the tetrachloroethene that contaminated the K043 had not been generated as a waste when the contamination took place. Data provided to EPA indicated that tetrachloroethene was present in the untreated K043 as a treatable level and showed substantial treatment by incineration in K043 treatment residuals. The solvent cleaning step is part of the production process and any contamination present in the waste before treatment becomes part of that waste and, thus, can be made subject to BDAT treatment standards. Therefore, the Agency chose to regulate tetrachloroethene in K043 at a total constituent concentration of 0.006 mg/l in wastewaters and 1.7 mg/kg in nonwastewaters.

BDAT TREATMENT STANDARDS FOR K043

[Nonwastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/kg)	TCLP (mg/l)
2,4-Dichlorophenol	0.38	[1]
2,6-Dichlorophenol	0.34	[1]
2,4,5-Trichlorophenol	8.2	[1]
2,4,6-Trichlorophenol	7.6	[1]
Tetrachlorophenols (Total)	0.68	[1]
Pentachlorophenol	1.9	[1]
Tetrachloroethene	1.7	[1]
Hexachlorodibenzo-p-dioxins	0.001	[1]
Hexachlorodibenzo-furans	0.001	[1]
Pentachlorodibenzo-p-dioxins	0.001	[1]
Pentachlorodibenzo-furans	0.001	[1]
Tetrachlorodibenzo-p-dioxins	0.001	[1]
Tetrachlorodibenzo-furans	0.001	[1]

[1] Not applicable.

BDAT TREATMENT STANDARDS FOR K043

[Wastewaters]

Constituent	Maximum for any single grab sample	
	Total composition (mg/l)	TCLP (mg/l)
2,4-Dichlorophenol	0.049	[1]
2,6-Dichlorophenol	0.013	[1]
2,4,5-Trichlorophenol	0.016	[1]
2,4,6-Trichlorophenol	0.039	[1]
Tetrachlorophenols (Total)	0.018	[1]
Pentachlorophenol	0.22	[1]
Tetrachloroethene	0.006	[1]
Hexachlorodibenzo-p-dioxins	0.001	[1]
Hexachlorodibenzo-furans	0.001	[1]
Pentachlorodibenzo-p-dioxins	0.001	[1]
Pentachlorodibenzo-furans	0.001	[1]
Tetrachlorodibenzo-p-dioxins	0.001	[1]
Tetrachlorodibenzo-furans	0.001	[1]

[1] Not applicable.

B. "Soft Hammer" Applicable Treatment Standards

(Note: EPA is not reinterpreting any of the principles relating to the RCRA "soft hammer" provision (RCRA section 3004(g)(6)) contained in the First Third rule and preamble. See 53 FR 31179–31185. The Agency is adding the following discussion, which repeats those principles, solely for purposes of providing information.)

The Agency has not promulgated treatment standards for the First Third and Second Third wastes in Tables B.(a)

and B.(b). If EPA fails to set treatment standards for any hazardous waste included in 40 CFR 268.10 or 268.11 by the August 8, 1988 or June 8, 1989 statutory deadlines, such waste is subject to the "soft hammer" provisions.

Under the "soft hammer" provisions, these wastes may be land disposed in a landfill or surface impoundment only if the generator makes certain certifications, and only if the unit meets the RCRA 3004(o) minimum technological requirements. Among other things, the "soft hammer" provisions require that prior to disposal in a landfill or surface impoundment unit meeting the minimum technological requirements, a generator must demonstrate his good faith effort to treat his waste by the best practically available treatment technology(ies). The Agency has interpreted this to mean practically available treatment that provides the greatest environmental benefit (40 CFR 268.8(a)(1)). Where no treatment is practically available, the generator may so demonstrate. The required demonstration and certification must be submitted to the Regional Administrator. "Soft hammer" wastes become subject to the statutory hard hammer as of May 8, 1990.

The Agency is amending § 268.12 to include wastewater residues derived from the treatment of "soft hammer" wastes by certain processes (shifting such wastewater residues to the Third Third). This action will allow these wastewater residues to be disposed in units not meeting minimum technological requirements and such residues will not be subject to the certification requirements of § 268.8. This action is being taken because a number of companies use BDAT-type treatment to treat "soft hammer" wastes, and then further treat the resulting treatment residues in impoundments that do not satisfy minimum technological requirements, but meet the requirements of section RCRA section 3005(j)(3) or 3005(j)(13). The Agency believes that persons who are substantially treating their wastes to levels that may satisfy ultimate treatment standards are not precluded from further treatment of these wastes in polishing (i.e., 3005(j)(3)) or advanced biological treatment (i.e., 3005(j)(13)) units that are substantially protective of human health and the environment, although not equivalent to minimum technology impoundments from the standpoint of preventing migration from the unit. Furthermore, EPA does not believe that these types of treatment residuals are the types of contaminated wastes deserving of prioritization in the second third of the schedule.

The Agency has identified several treatment technologies that are generally considered appropriate for the nonwastewater forms of "soft hammer" wastes (see 53 FR 31175). These technologies include: metal recovery, leaching/oxidation, metals stabilization, ash stabilization, chemical oxidation, biodegradation, incineration, and PCB incineration. Treatment technologies generally considered appropriate for the wastewater forms of "soft hammer" wastes include: aqueous metal recovery, chromium reduction, metals precipitation, steam stripping, carbon adsorption, oxidation/reduction, chemical oxidation, biodegradation, incineration, and PCB incineration.

The technologies are listed as general categories of technologies that EPA believes have a reasonable probability of application to the waste codes listed. These categories do not specify any particular type of technology (e.g., incineration can represent liquid incinerators, rotary kiln, or fluidized bed incinerators). The actual choice of a particular technology or even train of technologies depends on the physical and chemical characteristics of the specific waste. Specific selection of one technology depends on its functional design.

The Agency notes that many of these wastes, when existing as untreated wastes, are already prohibited from land disposal because they are California list wastes. However, as was discussed in the August 17, 1988 final rule, treatment to comply with the California list prohibitions (including the codified statutory prohibition levels) does not necessarily satisfy the "soft hammer" requirements of 40 CFR 268.8 and, in fact, the California list prohibitions represent the minimum treatment required for such "soft hammer" wastes prior to land disposal (53 FR 31187). In the case of an overlap between a "soft hammer" waste and a California list statutory prohibition, the "soft hammer" provisions still apply because they are potentially more protective. However, in no case may a waste be disposed of in excess of the California list prohibition levels.

Where EPA has promulgated a California list treatment standard, however, the soft hammer does not apply. *Id.* Thus, the "soft hammer" does not apply to California list HOCs for which EPA has established a treatment standard. *Id.*

The following tables are presented as an aid to generators seeking appropriate technologies to treat "soft hammer" F- and K-listed wastes. Several technologies are listed for each waste code, in descending order of preference. EPA notes that certain technologies are only appropriate for certain constituent types and that more than one treatment technology may be required (if practically available) to treat the different constituents of concern in the waste.

The Agency emphasizes that these tables are not to be considered as strict treatment requirements. In general, however, EPA will use these tables in evaluating the demonstrations and certifications received for these wastes and is providing this information to aid the generator in determining the best practically available technology (if any) for treating his waste in compliance with § 268.8.

TABLE B.a.—APPROPRIATE TREATMENT TECHNOLOGIES FOR FIRST THIRD AND SECOND THIRD "NONWASTEWATERS"

RCRA Waste Code	Potential California List Applicability	Primary Applicable Treatment Technologies
F019	Cyanide	Electrolytic Oxid. Alkaline Chlorin. UV Ozonation Incineration Ash Stabil.
K004	Chromium	Metals Recovery.
K008		Metals Stabil.
K041	Halogenated Organics	Incineration.
K097		
K098		
K042		
K105	PCBs/Halogen. Organ	PCB Incineration.
K017	Halogenated Organics	Incineration.

TABLE B.a.—APPROPRIATE TREATMENT TECHNOLOGIES FOR FIRST THIRD AND SECOND THIRD "NONWASTEWATERS"—Continued

RCRA Waste Code	Potential California List Applicability	Primary Applicable Treatment Technologies
K073		Biodegradation Ash Stabilization.
K031	Arsenic	Metals Recovery.
K084		Leaching/Oxidation.
K101, K102/high Ar		Metals Stabil.
K046/explosive	Lead	Open Detonate/Burn Oxidation. Incineration Metals Stabil.
K069/$CaSO_4$	Lead	Leaching/Oxidation Metals Stabil.
K085	Halogenated Organics & PCB's	PCB Incineration Biodegradation Ash Stabilization.
K035	Organics and/or Metals	Incineration.
K083		Wet Air Oxidation.
K086 solv. sludges caust. water.		Biodegradation Ash Stabilization.
K106	Mercury	Metals Recovery Metals Stabil.

TABLE B.b.—APPROPRIATE TREATMENT TECHNOLOGIES FOR FIRST THIRD AND SECOND THIRD "WASTEWATERS"

RCRA Waste Code	Potential California List Applicability	Primary Applicable Treatment Technologies
F006	Cyanide	Alka. Chlorination.
K011	Cyanide	Wet Air Oxidation.
K013		
K014		
K025	Halogenated Organics	Carbon Adsorption.
K029	Halogenated Organics	Chemical Oxidation.
K095		Carbon Adsorption.
K096		
K041	Halogenated Organics	Steam Stripping.
K097		Carbon Adsorption.
K098		Biodegradation.
K042	Halogenated Organics	Steam Stripping. Carbon Adsorption. Biodegradation.
K105	PCBs/Halog. Organics	Carbon Adsorption. Biodegradation.
K004	Chromium	Chromium Reduction.
K008		Metals Precip.
K061		
K017	Halogenated Organics	Steam Stripping.
K021		Carbon Adsorption.
K073		Biodegradation.
K022	Unlikely to be applicable	Steam Stripping.
K035		Carbon Adsorption.
K060		Chemical Oxidation.
K083		Biodegradation. Metals Precip.
K031	Arsenic, lead or mercury	Oxidation/Reduction
K046/nonexpl		Metals Precip.
K069/all		
K084		
K106		
K046/expl	Lead	Oxidation. Metals Precip.
K085	Halogenated Organics & PCB's	Biodegradation. Carbon Adsorption.
K086	Halogenated Organics	Biodegradation.
solv. sludges	Metals	Carbon Adsorption.
caust. water		Chromium Reduction Metals Precip.

C. Capacity Determinations

1. Determination of Alternative Capacity and Effective Dates for Surface Land-Disposed Wastes for Which Treatment Standards Are Promulgated

a. *Total Quantity of Land-Disposed Wastes.* The capacity analyses for wastes for which EPA is today finalizing treatment standards were performed using the National Survey of Hazardous Waste Treatment, Storage, Disposal, and Recycling Facilities (the TSDR Survey). EPA conducted the TSDR Survey during 1987 and early 1988 to obtain comprehensive data on the nation's capacity for managing hazardous waste and on the volumes of hazardous waste being disposed of in or on the land (i.e., land disposal). Survey data are part of the record for this final rule.

In addition, EPA recently conducted the National Survey of Hazardous Waste Generators (the Generator Survey). The Generator Survey was designed to gather data on waste generators and exempt hazardous waste treatment capacity, along with detailed waste characterization data. Although the majority of these data are not yet available, EPA used a subset of the data to corroborate conclusions as to the amount of treatment capacity required for the electroplating wastes (F006–F012). These data are available as part of the administrative record.

The various land disposal methods used and the quantities of waste handled are presented in Table III.C.1.a. Since publication of the proposed rule, EPA has received additional data from late-reporting TSDR facilities. Although the new data do not affect any of the national capacity variance decisions for surface disposed wastes, they have been included in this discussion for completeness. Some methods of land disposal, including use of salt domes, salt bed formations, and underground caves and mines, are not addressed in the capacity analyses because of insufficient data on the types and volumes of wastes disposed of by these methods.

The TSDR Survey indicated that about 623 million gallons of wastes for which standards are finalized today were disposed in or on the land in 1986. This includes approximately 3 million gallons of wastes that were stored in surface impoundments, and 1 million that were stored in waste piles. These stored wastes will eventually be treated, recycled, or permanently disposed in other units. To avoid double counting, the volumes of wastes reported as being stored in surface impoundments or waste piles have not been included in the volume of wastes requiring alternative treatment capacity. Furthermore, this final rule prohibits the placement of wastes affected by this rule in waste piles or surface impoundments for storage.

The TSDR Survey indicated that less than 50,000 gallons of the wastes addressed today were treated annually in surface impoundments that do not meet EPA's minimum technology requirements. However, this amount is actually a treatment residual from an impoundment that was replaced with a tank. Because the Agency assumes that this waste is now being sent off-site for treatment, this amount is included as treatment capacity required in today's rule.

In addition, 5 million gallons are treated in waste piles, less than 1 million gallons were disposed in surface impoundments, 10 million gallons were disposed in land treatment units or landfills, and 604 million gallons are injected underground. All of these wastes will require alternative treatment capacity.

b. *Required Alternative Capacity for Surface Land Disposed Wastes.* EPA assessed the requirements resulting from today's final rule for alternative treatment capacity for surface land disposed wastes. EPA first characterized the volumes of wastes for which treatment standards are being established, since these wastes require alternative treatment. Waste streams were characterized on the basis of land disposal method, waste code, and physical/chemical form. Using this information, EPA placed the wastes into treatability groups identifying applicable treatment technologies. The waste volumes were then summed by treatability group to determine the amount and type of alternative treatment capacity that would be required when owners or operators comply with the land disposal restrictions being promulgated today.

Based on this analysis, the EPA estimates that today's rule could affect about 623 million gallons of wastes that are land disposed annually. This total includes wastes that were stored only; consequently, only about 619 million gallons will require alternative treatment capacity. Of this total, 15 million gallons were surface disposed (i.e., excluding underground injection), and the remaining 604 million gallons were underground injected. (See section III.C.3. for determinations of alternative capacity and effective dates for wastes injected underground.)

The volumes of surface land disposed wastes that require alternative commercial treatment/recycling capacity are presented in Table III.C.1.b. This table does not include wastes that can be treated on site by the generator.

As explained in preamble section III.A.1., with limited exceptions, EPA is finalizing treatment standards expressed as concentration limits based on the performance of the Best Demonstrated Available Technology (BDAT), rather than requiring treatment using BDAT. Where the treatment standard is a specific level of performance to be met, then any treatment method may be used to achieve the concentration level specified by the standard. However, BDATs (and technologies that the Agency finds perform comparably) as discussed in preamble section III.A., were used as the basis for determining available capacity.

The TSDR Survey contains data on specific treatment processes at facilities. The data enable EPA to identify specific BDAT treatment (and treatment the Agency finds performs comparably) in its assessment of both off-site and on-site capacity. Therefore, EPA believes that the capacity identified as available for a specific treatment technology will be capable of meeting the treatment standards, since a well-designed and well-operated BDAT treatment process should be capable of complying with the promulgated treatment standards.

c. *Capacity Currently Available and Effective Dates.* Table III.C.1.c presents an estimate of the volume of wastes that will require alternative treatment before land disposal to comply with the standards finalized today. The amount of capacity that is available at commercial facilities in each case is also presented. Available capacity is equal to the specific treatment system's maximum capacity less the amount used in 1986, and was calculated using the TSDR Survey data. In addition, the available capacity presented in this section was adjusted to account for wastes previously restricted from land disposal by subtracting the capacity required for land disposed solvent wastes, California List Halogenated Organic Compound (HOC) wastes, and First Third wastes.

It is important to note that some of the wastes, because of their actual physical form, cannot meet treatment standards simply by using the technology identified as BDAT. These wastes must be treated through several steps, called a "treatment train". EPA assumes that the resultant residuals will also need to be treated using alternative technologies before land disposal; therefore, the total volumes reported were assigned to appropriate technologies.

The following sections discuss the results of the individual capacity analyses and effective dates for each waste code included in today's rule.

Wastes from Electroplating Operations. For today's final rule, EPA has revised the proposed cyanide treatment standards for cyanide-containing F007, F008, F009 waste from electroplating operations. The final wastewater and nonwastewater treatment standards are based on alkaline chlorination. The treatment standards for metals in treatment residuals from alkaline chlorination are based on chemical precipitation followed by settling and filtration for wastewaters, and stabilization for the nonwastewaters. EPA estimates that 2 million gallons of wastewaters and nonwastewaters will require cyanide treatment before stabilization as a result of today's treatment standards.

After analyzing the TSDR Survey data, EPA has determined that sufficient commercial capacity exists for these wastes (both wastewaters and nonwastewaters). EPA has therefore determined that no long term national capacity variance for these wastes is warranted. However, in order to be cautious and allow time (if any is truly needed) for facilities to adjust existing cyanide treatment processes to operate more efficiently, EPA has determined to grant a 30-day extension for the electroplating wastes (see also the discussion in preamble section II.E.). As shown below, however, EPA believes that there will be ample treatment capacity at the end of 30 days (if not sooner) to accommodate demand for treatment of these wastes.

In response to public comments, EPA reevaluated the amount of alternative treatment capacity necessary to treat F006 wastes as a result of today's final rule. The results of this analysis corroborate the Agency's position that the majority of F006 wastes containing cyanides are already being pretreated on-site to cyanide levels that meet the treatment standard, and therefore, only limited additional commercial capacity is needed.

EPA evaluated TSDR Survey data and Generator Survey data from approximately 1,500 facilities, selected from those generating the largest volumes of F006 wastes. The TSDR Survey contained data on 358 facilities generating F006 wastes in 1986. Of the total volume generated, 69 percent is generated at facilities with on-site cyanide treatment, and 27 percent was determined to be non-cyanide bearing F006. Consequently, only 4 percent of the F006 waste reported as generated in the TSDR Survey would need alternative off-site treatment capacity for cyanides.

EPA also evaluated a subset of Generator Survey data currently available. This analysis involved evaluating data from almost 1,500 facilities. The analysis identified 322 facilities generating F006 waste. Since the Generator Survey contains waste concentration data, EPA was able to identify the volume of wastes with the following: Cyanide concentrations above and below the treatment standards; with unknown cyanide concentration; and where the presence of cyanide is unknown. This analysis showed that only 7 percent of the F006 waste for this data subset was not analyzed by the generator for the presence of cyanide, or the cyanide concentration in the waste was unknown, or had a cyanide concentration in excess of the treatment standard. However, less than 0.7 percent of the volume of the F006 waste had a cyanide concentration above the treatment standard or had cyanides with unknown concentration levels. In summary, 93 percent of this sample reported meeting the treatment standard, approximately 1 percent reported exceeding the treatment standard, and 6 percent reporting unknown cyanide levels. The percentage of compliance could be higher since it is reasonable to assume that most of the unknown wastes will contain cyanides in concentrations less than the treatment standard, otherwise generators would know and report that cyanides were present.

Although EPA has only evaluated data from a subset of F006 generators, it believes this pattern to be representative of the total census of F006 wastes. (As noted in section III.A.3.a.2.i., the data on total cyanide submitted to EPA in the public comments to the rulemaking also showed greater than 90 percent compliance with the final treatment standard.)

In order to be cautious in assessing the need for alternative treatment capacity, EPA is assuming that, as a worst case, 10 percent of F006 waste may need alternative commercial treatment capacity. EPA therefore assumes for this rule that 10 percent of the 129 million gallons of land disposed F006 (or about 13 million gallons) may require alternative commercial treatment. Sufficient commercial alkaline chlorination capacity exists to treat this volume of waste. Consequently, EPA does not believe that any extended national capacity variance is warranted for F006 nonwastewaters. As stated earlier, the Agency is delaying the effective date of the cyanide standard for F006 nonwastewaters 30 days in order to give facilities a short period of time to adjust equipment performance should this be necessary. (Technically, the basis for this 30-day delay is section 3010(b) rather than section 3004(h)(2), as noted in preamble section II.E.)

EPA also has determined that no extended capacity variance is appropriate for the F007–F009 wastes. These wastes are generated in considerably smaller volumes than F006 and are no more difficult to treat. EPA has determined to delay the effective date of the new standards for 30 days, however, for the same reasons as for the cyanide standard for F006. The basis for this action is RCRA section 3004(h)(2).

Wastes from Heat Treatment Operations and Cyanide-Bearing "P" Wastes. EPA is also promulgating in today's final rule treatment standards for F011 and F012 cyanide-containing wastes from heat treating operations and P013, P021, P029, P030, P063, P074, P098, P099, P104, P106, and P121. The nonwastewater treatment standards for cyanide in these wastes are promulgated based on the performance of electrolytic oxidation followed by alkaline chlorination. The wastewater standard is promulgated based on the performance of alkaline chlorination.

One commenter on the proposed rule pointed out than no commercial facilities offer the specific treatment trains identified as BDAT for nonwastewaters (i.e., electrolytic oxidation followed by alkaline chlorination). EPA agrees that no commercial facilities with a treatment train consisting of electrolytic oxidation followed by alkaline chlorination were identified in the TSDR Survey. However, EPA believes that alkaline chlorination alone will meet the treatment standards (see the Background Document on cyanides for the basis of this conclusion). The Agency received numerous public comments supporting this position. Consequently, EPA included commercially available alkaline chlorination capacity in its capacity determinations for these wastes.

After analyzing the TSDR Survey data, EPA has determined that adequate treatment capacity is commercially available to treat the small volume of F011, F012, P030, P063, P074, P098, P099, P104, P106, and P121 wastes (both wastewaters and nonwastewaters) surface land disposed. (As noted above, the nonwastewater form of the wastes are amenable to wastewater treatment because they can by hydrated (i.e.,

dissolved easily.)) EPA does not believe that any extension is warranted for the discarded commercial chemical product wastes. They are generated in small volumes at sporadic intervals and do not have to be treated in existing treatment systems that conceivably require major adjustments.

The F011 and F012 wastes could be treated in such existing treatment systems, however, and EPA has consequently decided to delay the prohibition effective date for 30 days for these wastes as a result. Further, if F011 nonwastewaters and F012 nonwastewaters are commingled with electroplating nonwastewaters, the entire mixture will become subject to the lowest treatment standard for common constituents, in this case 110 mg/kg total cyanide. This limit is not uniformly attainable for the electroplating wastes due to significant concentrations (in some streams, at least) of complexed cyanides. Thus, EPA expects that F011 nonwastewaters and F012 nonwastewaters will be segregated and treated separately—an appropriate result since otherwise the electroplating wastes would interfere with the treatment of the free (i.e., non-complexed) cyanides in the heat-treating wastes. It will, however, take some time to adjust processes to segregate these heat-treating and electroplating wastes. Accordingly, the Agency is deferring the effective date of the 110 mg/kg total cyanide standard and the 9.1 mg/kg amenable cyanide standard for the F011 and F012 heat-treating nonwastewaters until December 8, 1989. Between July 8, 1989 and December 8, 1989 these wastes will be subject to the same cyanide standards as the electroplating nonwastewaters, i.e., 590 mg/kg total cyanide and 30 mg/kg amenable cyanide (the alternative, which the Agency has rejected as contrary to policy and RCRA sections 3004 (h) and (m), being to leave these heat-treating wastes subject to no cyanide standard at all even though some treatment is available and achievable).

The treatment standards for F010 nonwastewaters have not been changed from the proposal. The nonwastewater standard for total cyanide concentration is based on incineration, and the wastewater standard is based on alkaline chlorination. EPA estimates that less than 1 million gallons a year of F010 nonwastewater will require incineration as a result of today's final rule. There is no shortage of this technology, nor would any short term adjustments be needed in the technology's operation. No F010 wastewaters were identified in the TSDR Survey as being surface land disposed. Consequently, there is no basis for delaying the effective date of the prohibition and treatment standards for these wastes.

F019 Wastes. For today's final rule, EPA has decided not to finalize the proposed standards for F019 wastewaters and nonwastewaters (see preamble section III.A.3.a.4.). Consequently, F019 wastes will continue to be subject to the "soft hammer" requirements.

Wastes From Acrylonitrile Production. Nonwastewater treatment standards for K011, K013, and K014 wastes are being promulgated based on incineration. However, EPA is not promulgating the proposed wastewater standards for K011, K013, and K014. Therefore, these wastewaters will be subject to the "soft hammer" provisions of 40 CFR 268.8.

After analyzing the TSDR Survey data, the Agency has determined that enough commercial incineration capacity is available to treat the less than 1 million gallons of nonwastewater K011, K013, and K014 that are not injected underground. Therefore, EPA is not granting a national capacity extension for K011, K013, and K014 nonwastewaters that are surface land disposed.

Wastes From Acetaldehyde Production. Nonwastewater treatment standards for K009 and K010 are based on incineration. For K009 and K010 wastewaters, steam stripping followed by biological treatment has been identified as BDAT. No surface disposed K009 or K010 wastes were identified from the TSDR Survey. Consequently, EPA is not granting a variance to these wastes.

Wastes from the Production of Dinitrotoluene, Toluene, Diamine, and Toluene Diisocyanate. For K027, K113–K116, U221, and U223 wastes, EPA is requiring the use of incineration or reuse as fuel as a method of treatment for nonwastewaters, and carbon adsorption, incineration, or reuse as fuel as a method of treatment for wastewaters. Based on TSDR Survey data, EPA estimates that about 8 million gallons per year of surface land disposed nonwastewaters will require incineration as a result of today's treatment standards. No wastewaters were identified from the TSDR Survey or from public comments as requiring alternative treatment.

After analyzing the TSDR Survey data, EPA has determined that there is enough commercial capacity available to treat the K027, K113–K116, U221, and U223 nonwastewaters and wastewaters. EPA is therefore not granting a capacity extension for surface land disposal of these wastes.

Organophosphorus Pesticide Wastes. For K039, P040, P041, P043, P044, P062, P085, P109, P111, U058, and U087 wastes, EPA is requiring the use of incineration as a method of treatment for nonwastewaters, and either carbon adsorption or incineration as a method of treatment for wastewaters. After analyzing the TSDR Survey data, EPA has determined that enough commercial capacity is available to treat both the wastewater and nonwastewater forms of these wastes. EPA is therefore not granting a national capacity variance to surface disposed K039, P040, P041, P043, P044, P062, P085, P109, P111, U058, and U087 wastes.

For K038, K040, P039, P071, P089, P094, P097, and U235 nonwastewaters, EPA is promulgating treatment standards based on incineration/reuse as fuel. For K036, K038, K040, P039, P071, P089, P094, P097, and U235 wastewaters the standard is based on biological treatment (today's final rule does not affect the "no land disposal" standard for K036 nonwastewaters previously promulgated). After analyzing the TSDR Survey data, the Agency has determined that enough capacity is commercially available to treat the wastewater and nonwastewater forms of these wastes. EPA is therefore not granting a capacity extension for wastes K036 (nonwastewaters only), K038, K040, P039, P071, P089, P094, P097, and U235.

Wastes From Pigment Production. EPA is promulgating a treatment standard of "no land disposal" only for K005 and K007 nonwastewaters generated from the manufacturing processes listed in 40 CFR 261.32 and disposed after June 8, 1989. At this time, EPA is not promulgating treatment standards for K005 and K007 wastewaters or other nonwastewaters (e.g., "derived-from" wastes). The TSDR Survey identified about 2 million gallons of K005 and K007 nonwastewaters as being surface land disposed at one facility. However, as stated earlier in this preamble, EPA has determined that this was the only facility generating these wastes, and that the facility is no

longer generating or land disposing K005 or K007.

The Agency is not promulgating the proposed treatment standard of "no land disposal" for K002, K003, K004, K006, and K008 nonwastewaters. Since K004 and K008 wastes are First Third wastes, their land disposal will continue to be restricted by the "soft hammer" provisions. Treatment standards for K002, K003, and K006 wastes will be established with the remaining Third Third wastes by May 8, 1990.

Wastes From Chlorinated Aliphatics Production, From 1,1,1-Trichloroethane Production, From 2,4-D Production, and Phthalates and Phthalic Anhydride Production Wastes. Today EPA is promulgating treatment standards based on incineration/reuse as fuel for F024, K023, K028, K043, K093, K094, U028, U069, U088, U102, U107, and U190 wastewaters and nonwastewaters, and for K029, K095, and K096 nonwastewaters. The wastewater forms of K029, K095, and K096 wastes are subject to the "soft hammer" provisions. The treatment standards for metals in treatment residuals for F024 and K028 are based on stabilization.

The Agency estimates that less than 1 million gallons of F024, K023, K028, K029, K043, K093, K094, K095, K096, U028, U069, U088, U102, U107, and U190 wastes will require commercial incineration or reuse as fuel as a result of today's treatment standards. After analyzing the TSDR Survey data, the Agency has determined that enough incineration capacity is commercially available to treat these wastes. EPA is therefore not granting a capacity extension for surface land disposed F024, K023, K028, K029, K043, K093, K094, K095, K096, U028, U069, U088, U102, U107, and U190 wastes.

TABLE III.C.1.a.—VOLUME OF WASTES BY LAND DISPOSAL METHOD FOR WHICH STANDARDS ARE BEING ESTABLISHED

Land disposal method	Volume (million gallons/year)
Storage:	
Waste piles	1
Surface impoundments	3
Treatment:	
Waste piles	5
Surface impoundments	<1
Disposal:	
Landfills	10
Land treatment	<1
Surface impoundments	<1
Injected underground	604
Total	623

TABLE III.C.1.b.—REQUIRED ALTERNATIVE COMMERCIAL TREATMENT/RECYCLING CAPACITY FOR SURFACE LAND DISPOSED WASTES [1]

[Millions gallons/year]

Waste Code	Capacity required for surface land disposed wastes
First third wastes:	
F007	1.3
F008	2.7
F009	0.3
K011	0.2
K013	0.1
K014	<0.1
K036	0.0
P030	<0.1
P039	<0.1
P041	0.0
P063	<0.1
P071	<0.1
P089	<0.1
P094	<0.1
P097	0.0
U221	0.3
U223	<0.1
Second third wastes:	
F010	0.2
F011	0.1
F012	0.1
F024	<0.1
K009	0.0
K010	0.0
K027	7.6
K028	0.0
K029	0.0
K038	0.0
K039	0.0
K040	0.0
K043	0.0
K095	0.0
K096	0.0
P029	0.0
P040	0.0
P043	0.0
P044	<0.1
P062	0.0
P074	0.0
P085	0.0
P098	<0.1
P104	0.0
P106	<0.1
P111	0.0
U028	<0.1
U058	0.0
U107	0.0
U235	0.0
Third third wastes	
K005	[2] 0.0
K007	[2] 0.0
K023	0.0
K093	<0.1
K094	<0.1
P013	0.0
P021	0.0
P099	0.0
P109	0.0
P121	0.0
U069	<0.1
U087	0.0
U088	0.0
U102	0.0
U190	<0.1
Newly listed wastes:	
K113	0.0
K114	0.0
K115	0.2
K116	0.0

[1] The volumes presented here include all types of treatment required (i.e., all phases of treatment trains, where applicable.

[2] Waste no longer generated from the process described in 40 CFR Part 261.32.

TABLE III.C.1.c.—REQUIRED ALTERNATIVE COMMERCIAL TREATMENT/RECYCLING CAPACITY FOR SURFACE LAND DISPOSED WASTES

Technology	Available capacity (mil gal/year)	Required surface land disposed (mil gal/year)
Incineration:		
Liquids	282	<1
Solid/sludge	17	9
Wastewater Treatment:		
Alkaline chlorination	[2] 33	2
Electrolytic oxidation followed by alkaline chlorination	0	[1] 0
Carbon adsorption	2	0
Biological treatment	44	<1
Steam stripping followed by biological treatment	0	0
Stabilization	516	2

[1] These wastes have been included with the wastes requiring alkaline chlorination.

[2] Available capacity has been adjusted to account for 13 million gallons of capacity that may be needed for F006.

2. Extension of the Effective Date for Contaminated Soil and Debris

The Agency is today granting an extension of the effective date for certain First, Second, and Third Third contaminated soils and debris for which treatment standards established by today's rule are based on incineration. RCRA section 3004(h)(2) allows the Administrator to grant an extension to the effective date which would otherwise apply on the basis of the earliest date on which adequate protective capacity will be available, not to exceed two years "* * * after the effective date of the prohibition which would otherwise apply under subsection (d), (e), (f), or (g)." For First Third wastes that have heretofore been subject to the "soft hammer" provisions but for which treatment standards are being promulgated today, the Agency is interpreting the statutory language "* * * effective date of the prohibition that would otherwise apply" to be the date treatment standards are promulgated for these wastes (i.e., June 8, 1989) rather than the date the "soft hammer" provisions took effect (i.e., August 8, 1988). The Agency finds this the best interpretation for two reasons. Extensions of the effective date are based on the available capacity of the BDAT technology for the waste, so it is

reasonable that such an extension initiate from the date treatment standards based on performance of BDAT are established. Furthermore, it is not the intent of the Agency to, in effect, penalize First Third wastes by allowing less time (i.e., 38 months) for the development of needed capacity, while Second and Third Third wastes in the same treatability group are allowed the maximum 48 months (assuming capacity does not become available at an earlier date). The capacity extension, therefore, commences for First, Second, and Third Third wastes on June 8, 1989, and extends (at maximum) until June 8, 1991.

For the purpose of determining whether a contaminated material is subject to this capacity extension, soil is defined as materials that are primarily geologic in origin such as silt, loam, or clay, and that are indigenous to the natural geological environment. In certain cases soils will be mixed with liquids or sludges. The Agency will determine on a case-by-case basis whether all or portions of such mixtures should be considered soil (52 FR 31197, November 8, 1986).

Analysis of the TSDR survey data indicated that relatively small volumes of soil contaminated with Second Third wastes were land disposed in 1986. However, the Superfund remediation program has expanded significantly since that time. Plans for remediation at Superfund sites indicate far greater excavation of soil and debris requiring treatment, including incineration, and subsequent land disposal in 1989 than in 1986. Because of the major increase in the Superfund remediation program, the Agency believes that capacity is still inadequate for incineration of Second Third contaminated soil and debris. Therefore, a two year extension of the effective date is granted to Second Third contaminated soil and debris for which BDAT is incineration or fuel substitution.

EPA is not promulgating a national capacity variance for soil and debris that are contaminated with any of the prohibited cyanide wastes. The treatment technology on which the Agency based treatment standards is alkaline chlorination (preceded by electrolytic oxidation in certain cases involving heavily contaminated wastes). The record for this rulemaking documents that there is ample commercial cyanide treatment capacity providing alkaline chlorination. It is true that this is a wastewater treatment technology, and that contaminated soils and debris are not liquids. However, contaminated soils could be slurried into liquid form and so be treatable by this technology. The Agency consequently does not believe that a national capacity variance is warranted.

3. Capacity Determinations for Underground Injected Wastes

The Agency received comments from 8 different parties concerning the establishment of effective dates for underground injected wastes. The Agency is taking this opportunity to discuss its position on the two comments which it feels are most crucial to this rule and to the regulated community. A response to all comments made on the January 11, 1989, proposed rule can be found in the Response to Comments Background Document in the RCRA docket.

A number of commenters indicated that treatment capacity variances should commence not from the statutory deadline of RCRA section 3004(g), but rather from May 8, 1990 or from an earlier date which EPA may establish by regulation after promulgating a BDAT treatment standard (and after making a decision on the availability of national protective treatment or disposal capacity). EPA first addressed this issue in the June 7, 1989, promulgation of effective dates for the ban on underground injection of certain First Third wastes published in the **Federal Register** on June 14, 1989 (54 FR 25416). EPA adopted the commenters' approach for the wastes addressed in that rule, and is likewise adopting the same approach for today's rule. Briefly, RCRA section 3004(g) sets no statutory prohibitions for disposal of hazardous wastes into UIC wells until May 8, 1990. Any earlier prohibition date is set by regulation. Thus, any extension of the effective date would commence from that regulatory prohibition date, and be based on anaylsis of available adequate alternative treatment, recovery, or disposal capacity existing as of the regulatory prohibition date (see RCRA section 3004(h)(2)). For a further discussion of this issue, see 54 FR 25416, June 14, 1989. This decision changes the effective dates for F007 wastewaters and nonwastewaters, and K011 and K013 nonwastewaters from August 8, 1990 to June 8, 1991, as indicated in the January 11, 1989 proposed rule.

Commenters also requested that the Agency defer setting any section 3004(g) prohibitions for UIC wastes until May 8, 1990. As previously articulated in the **Federal Register** on June 14, 1989 (54 FR 25416), the Agency disagrees with this position. EPA believes that it is the intent of Congress to ban the disposal of section 3004(g) wastes as expeditiously as possible upon the establishment of treatment standards and determination of alternative treatment capacity. If capacity exists, then consistent with section 3004(g)(5), the Agency will ban the underground disposal of such waste. Facilities that are able to make a demonstration of "no migration" in compliance with the requirements of 40 CFR 148 and 40 CFR 268.6 or meet the treatment standards in Part 268 may continue to inject hazardous wastes beyond the specified effective dates.

In previous rules, the Agency used a hierarchical approach in making decisions to allocate limited protective treatment or disposal capacity when evaluating national capacity variances (52 FR 32450, August 27, 1987; and 53 FR 30912, August 16, 1988). Briefly, available treatment capacity was first apportioned to demand from waste originally destined for surface disposal units, then to wastes from CERCLA remedial actions and RCRA section 3004(u) corrective actions, and finally to wastes disposed in injection wells. For the reasons discussed in the recent Final Rule for a group of First Third Wastes effective June 7, 1989 and published in the **Federal Register** on June 14, 1989 (54 FR 25416). This hierarchy has no effect on the Agency's decisions today. The UIC wastes being prohibited are relatively low volume. Prohibiting these small volumes of wastes will not result in capacity becoming unavailable for either wastes that are surface disposed, or for CERCLA/RCRA cleanup wastes.

a. *Effective date determinations for Second Third scheduled wastes for which EPA has not set treatment standards.* The Agency has not set treatment standards for the Second Third wastes listed in Table III.C.3.a. These wastes are not prohibited from land disposal by underground injection until the Agency sets treatment standards and effective dates, or until May 8, 1990, if EPA takes no action.

On January 11, 1989, the Agency proposed, in part, to set treatment standards and UIC effective dates for the following First Third wastes: F019, K011, K013, and K014. In today's rule, EPA is not finalizing the treatment standards or effective dates for F019 wastes, and K011 wastewaters, K013 wastewaters, or K014 wastewaters. These wastes, consequently, remain subject to the "soft hammer" provisions of 40 CFR 268.8. Similarly, the Agency proposed to set treatment standards and UIC effective dates for the following Third Third wastes: K002 nonwastewaters, K003 nonwastewaters, and K006 nonwastewaters. In today's rule, EPA is not finalizing these standards or effective dates. Since the statutory deadline for these wastes is

May 8, 1990, and no prohibitions are being established in today's rule, these wastes are not subject to the land disposal restrictions until promulgation of the Third Third final rule.

Treatment standards for K004 nonwastewaters and K008 nonwastewaters were finalized on August 16, 1988 (No Land Disposal Based on No Generation). Amendments to these standards were proposed on January 11, 1989 (No Land Disposal Based on Recycling). These treatment standards were finally amended on May 2, 1989 (No Land Disposal Based on No Generation for forms of these wastes generated by the process described in the waste listing description and disposed after August 17, 1988, and not generated in the course of treating wastewater forms of these wastes; 54 FR 18836). EPA is today rescinding all treatment standards for these nonwastewaters; therefore, all K004 and K008 wastes (wastewaters and nonwastewaters) are under the effect of the "soft hammer" provisions of 40 CFR 268.8.

b. *Scheduled wastes with established treatment standards which current data indicate are not being injected.* The wastes listed in Table III.C.3.b. are wastes for which standards are being established today and for which current data indicate are not being injected. No comment was received indicating that any of these wastes are being underground injected. Therefore, EPA is prohibiting the underground injection of these wastes unless they meet the treatment standards on June 8, 1989. The Agency believes these decisions will have no effect on the remaining national capacity available to treat wastes generated from RCRA/CERCLA cleanup actions requiring the type of treatment associated with these wastes.

The Agency has not established treatment standards for F006 wastewaters; accordingly, today's rule does not ban injection of F006 wastewaters. F006 nonwastewaters were banned from injection on June 7, 1989 published in the **Federal Register**, June 14, 1989 (54 FR 25416).

EPA is also banning the underground injection of K009 nonwastewaters and K010 wastewaters. Data received since the January 11, 1989, proposal indicate that these wastes are not being underground injected.

c. *Scheduled wastes with established treatment standards which current data indicate are being injected.* Table III.C.3.c. lists those wastes with treatment standards being established today which are underground injected. The Table summarizes the volumes requiring alternative treatment capacity. Table III.C.3.d. lists effective dates for the prohibitions against the underground injection of these wastes. The Agency believes these decisions will have little effect on the remaining national capacity available to treat wastes generated from RCRA/CERCLA cleanup actions requiring the type of treatment associated with these wastes. Moreover, these waste streams are sufficiently low volume not to affect transportation capacity for these wastes (see 53 FR 30914, August 16, 1988).

(1) Capacity determinations for injected wastes requiring alkaline chlorination or electrolytic oxidation followed by alkaline chlorination (F007, F008, F009, F011, F012, P029, P030, P063, and P098). The wastewater treatment standards for F007, F008, F009, F011, F012, P029, P030, and P098 are based on alkaline chlorination. The nonwastewater treatment standards for F007, F008, and F009 are based on alkaline chlorination followed by precipitation. The treatment standards for F011, F012, P029, P030, P063, and P098 nonwastewaters are based on electrolytic oxidation followed by alkaline chlorination. (As indicated in preamble section III.C.1.c., no commercial facilities with a treatment train consisting of electrolytic oxidation followed by alkaline chlorination were identified in the TSDR Survey. The Agency believes that alkaline chlorination alone will be able to meet the BDAT treatment standards for F011, F012, P029, P030, P063, and P098 nonwastewaters.)

An estimated 130 million gallons per year of these wastes will require cyanide wastewater treatment. Of the 130 million gallons, approximately 128 million gallons are being disposed by underground injection. Table III.C.3.c. gives the volumes of wastes injected for the indicated waste codes. These wastes may be injected in individual streams or as mixtures of wastes.

There is no need to use the allocation hierarchy in this situaiton. A straight comparison of available versus required capacity indicates a shortfall in alkaline chlorination capacity for injected F007 wastewaters and nonwastewaters (33 million gallons available versus 128 million gallons of injected F007). Comments received on the proposed effective date supported that determination. The Agency is therefore granting a two-year national capacity variance for F007 wastes which are underground injected. As indicated earlier in the preamble, EPA will grant a two-year variance not from the August 8, 1988 statutory First Third deadline, but rather from the effective date of this rule.

Over 33 million gallons per year of available alternate commercial treatment capacity has been identified for the low volumes of F008, F009, F011, F012, P029, P030, and P098 wastewaters and nonwastewaters being injected; therefore, no capacity variances were proposed for these wastes. No comment was received on this action. The Agency is banning the underground injection of P029, P030, and P098 wastes upon promulgation of this rule. As indicated in preamble section III.C.1.a., EPA is granting 30-day extensions of the effective date for F008, F009, F011, and F012 wastes. These wastes will therefore be banned from underground injection on July 8, 1989. (See preamble section III.C.1.a. describing the bifurcated treatment standard for F011 nonwastewaters and F012 nonwastewaters).

P063 wastes are reported in the TSDR survey as part of mixed waste streams with K011, K013, and K014. In the proposal EPA requested information on the quantities of P063 being underground injected, indicating a belief that such wastes are being injected in much smaller quantities than the data in the TSDR survey might suggest. Information received since this rule was proposed indicates that only relatively small amounts of P063 are being disposed by underground injection. Consequently EPA is banning the underground injection of P063 wastes upon the promulgation of this rule.

(2) Capacity determination for injected P071, P089, U028, U088, U107, and U190. Treatment standards for P071 and P089 nonwastewaters, and U028, U088, U107, and U190 wastewaters and nonwastewaters are based on incineration. Treatment standards for P071 and P089 wastewaters are based on biological treatment.

These wastes are currently injected in low volumes, if at all (see Table III.C.3.c.). The Agency has determined that adequate treatment capacity exists for these wastes (281 million gallons of available capacity and 44 million gallons of available biological treatment capacity versus a maximum of 300,000 gallons injected). No comments were received on the proposed effective dates. The Agency is therefore banning the underground injection of these wastes upon promulgation of this rule.

(3) Capacity determination for injected K009 wastewaters and K010 nonwastewaters. On January 11, 1989, the Agency proposed to grant capacity variances for all K009 and K010 wastes. New information indicates that only K009 wastewaters and K010 nonwastewaters are being injected. The

Agency is setting treatment standards for K009 wastewaters based on steam stripping followed by biological treatment. Treatment standards for K010 nonwastewaters are based on incineration. Inadequate alternative treatment capacity exists to treat the K009 wastewaters that are annually being injected (0 gallons of capacity available versus approximately 79 million gallons injected). There is adequate alternative treatment capacity to treat the K010 nonwastewaters that are being injected annually (281 million gallons of capacity available versus approximately 5 million gallons injected). Consequently, EPA is today granting a two-year capacity variance to the prohibition of underground injection of K009 wastewaters. The underground injection of K010 nonwastewaters is banned on June 8, 1989. As indicated previously, K009 nonwastewaters and K010 wastewaters not meeting the treatment standards are banned on June 8, 1989, based upon assessment of the best data available to the Agency, which indicate that these wastes are not being underground injected.

(4) Capacity determination for injected K011 nonwastewaters, K013 nonwastewaters, and K014 nonwastewaters. A significant volume of K011 nonwastewaters and K013 nonwastewaters (wastes from acrylonitrile production) are currently being land disposed by underground injection. Treatment standards for these wastes are based on incineration. The data indicate that approximately 282 million gallons of commercial incineration capacity exists versus 347 million gallons of injected K011 nonwastewaters and K013 nonwastewaters requiring incineration.

The Agency received extensive support for the proposed capacity variance for these waste codes. As indicated earlier in the preamble, EPA will grant a two-year variance not from the August 8, 1988, statutory First Third deadline, but rather from the effective date of this rule. K011 nonwastewaters and K013 nonwastewaters will be banned from underground injection on June 8, 1991. At proposal, EPA had treated K011, K013, and K014 injected nonwastewaters as one nonsegregable treatability group for the purpose of the national capacity determination. Upon further evaluation, EPA believes injected K014 nonwastewaters are segregable from K011 and K013 injected nonwastewaters. EPA plans to publish a notice to provide an opportunity to comment on this issue and will set an effective date for injected K014 nonwastewaters after evaluating comments. Thus, EPA is not taking final action on the proposal for setting an effective date for injected K014 nonwastewaters. Until final action, injected K014 nonwastewaters remain under the effect of the "soft hammer" provisions of 40 CFR 268.8.

(5) Capacity determination for injected U221, U223, and P044 Wastes. Table III.C.3.c. indicates that approximately 27 million gallons per year of U221 wastes are being injected underground, and additional volumes of U223 and P044 wastes are being injected in mixed waste streams. Treatment standards for P044 nonwastewaters, and U221 and U223 wastewaters and nonwastewaters are based on incineration. Treatment standards for P044 wastewaters are based on carbon adsorption or incineration. The data indicates that there is adequate treatment capacity for both injected nonwastewaters and wastewaters (282 million gallons of incineration capacity available versus 27 million gallons injected; 2 million gallons of carbon adsorption capacity available versus <100,000 injected). No national capacity variances were proposed for U221, U223 or P044 wastes. No comment was received on this decision. The Agency is therefore banning the underground injection of U221, U223, and P044 on June 8, 1989, unless these wastes meet the treatment standards.

Table III.C.3.a.—Second Third Wastes for Which Treatment Standards Are Not Established

K025 (wastewaters), K029 (wastewaters), K041, K042, K095 (wastewaters), K096 (wastewaters), K097, K098, K105

P002, P003, P007, P008, P014, P026, P027, P049, P054, P057, P060, P066, P067, P072, P107, P112, P113, P114

U002, U003, U005, U008, U011, U014, U015, U020, U021, U023, U025, U026, U032, U035, U047, U049, U057, U059, U060, U062, U070, U073, U080, U083, U092, U093, U094, U095, U097, U098, U099, U101, U106, U109, U110, U111, U114, U116, U119, U127, U128, U131, U135, U138, U140, U142, U143, U144, U146, U147, U149, U150, U161, U162, U163, U164, U165, U168, U169, U170, U172, U173, U174, U176, U178, U179, U189, U193, U196, U203, U205, U206, U208, U213, U214, U215, U216, U217, U218, U239, U244

Table III.C.3.b.—Wastes for Which Treatment Standards Are Today Established and Which Are Not Underground Injected

(Banned from underground injection on June 8, 1989)

First Third

K036 (wastewaters), P039, P041, P094, P097

Second Third

F010, F024, K009 (nonwastewaters), K010 (wastewaters), K027, K028, K029 (nonwastewaters), K038, K039, K040, K043, K095 (nonwastewaters), K096 (nonwastewaters), P040, P043, P062, P074, P085, P104, P106, P111, U058, U235

Third Third

K005 (nonwastewaters), K007 (nonwastewaters), K023, K093, K094, P013, P021, P099, P109, P121, U069, U087, U102

Newly Listed Wastes

K113, K114, K115, K116

TABLE III.C.3.c.—WASTES FOR WHICH TREATMENT STANDARDS ARE TODAY ESTABLISHED AND WHICH ARE BEING UNDERGROUND INJECTED

[Millions of gallons per year]

Waste code	Volume of injected waste requiring treatment capacity
First Third:	
F007	[1] 127.6
F008	[1] <0.1
F009	[1] <0.1
K011 nonwastewaters	[1] 173.4
K013 nonwastewaters	[1] 173.4
P030	[1] <0.1
P063	[1] <0.1
P071	[1] <0.1
P089	[1] <0.1
U221	[1] 26.8
U223	[1] <0.1
Second Third:	
F011	[1] 0.0
F012	[1] 0.0
K009 wastewaters	79.0
K010 nonwastewaters	5.0
P029	[1] <0.1
P044	[1] 0.0
P098	[1] <0.1
U028	[1] 0.0
U107	[1] <0.1
Third Third:	
U088	[1] 0.0
U190	<0.1

[1] Indicates wastes are injected in mixed waste streams. Wastes with no volumes indicated may be injected as part of these mixed streams.

TABLE III.3.C.d.—SUMMARY OF EFFECTIVE DATES FOR UNDERGROUND INJECTED WASTES WITH STANDARDS ESTABLISHED IN TODAY'S RULE

Waste code	Effective date
First Third:	
F007, K011 nonwastewaters, K013 nonwastewaters.	June 8, 1991.
P030, P063, P071, P089, U221, U223.	June 8, 1989.
F008, F009	July 8, 1989.
Second Third:	
K009 wastewaters	June 8, 1991.
K010 nonwastewaters, P029, P044, P098, U028, U107.	June 8, 1989.
F011, F012 (590 mg/kg, 30 mg/kg).	July 8, 1989.

TABLE III.3.C.d.—SUMMARY OF EFFECTIVE DATES FOR UNDERGROUND INJECTED WASTES WITH STANDARDS ESTABLISHED IN TODAY'S RULE—Continued

Waste code	Effective date
F011, F012 (110 mg/kg, 9.1 mg/kg).	Dec. 8, 1989.
Third Third:	
U088, U190	June 8, 1989.

IV. State Authority

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility. The standards and requirements for authorization are found in 40 CFR Part 271.

Prior to HSWA, a State with final authorization administered its hazardous waste program in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities that the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out these requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, HSWA applies in authorized States in the interim.

Today's rule is promulgated pursuant to sections 3004(d) through (k), and (m), of RCRA (42 U.S.C. 6924(d) through (k), and (m)). Therefore, it will be added to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and take effect in all States, regardless of their authorization status. States may apply for either interim or final authorization for the HSWA provisions in Table 1, as discussed in the following section. When this rule is promulgated, Table 2 in 40 CFR 271.1(j) will be modified also to indicate that this rule is a self-implementing provision of HSWA.

B. Effect on State Authorizations

As noted above, EPA will implement today's final rule in authorized States until their programs are modified to adopt these rules and the modification is approved by EPA. Because the rule is promulgated pursuant to HSWA, a State submitting a program modification may apply to receive either interm or final authorization under RCRA section 3006(g)(2) or 3006(b), respectively, on the basis of requirements that are substantially equivalent or equivalent to EPA's. The procedures and schedule for State program modifications for either interim or final authorization are described in 40 CFR 271.21. It should be noted that HSWA interim authorization will expire on January 1, 1993 (see 40 CFR 271.24(c)).

Section 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes and must subsequently submit the modification to EPA for approval. The deadline by which the State must modify its program to adopt this regulation will be determined by the promulgation of the final rule in accordance with § 271.21(e). These deadlines can be extended in certain cases (see § 271.21(e)(3)). Once EPA approves the modification, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those in today's final rule. These State regulations have not been assessed against the Federal regulations being promulgated today to determine whether they meet the tests for authorization. Thus, a State is not authorized to implement these requirements in lieu of EPA until the State program modification is approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law. In implementing the Federal program, EPA will work with States under agreements to minimize duplication of efforts. In many cases, EPA will be able to defer to the States in their efforts to implement their programs rather than take separate actions under Federal authority.

States that submit official applications for final authorization less than 12 months after the effective date of these regulations are not required to include standards equivalent to these regulations in their application. However, the State must modify its program by the deadline set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of these regulations must include standards equivalent to these regulations in their application. The requirements a State must meet when submitting its final authorization application are set forth in 40 CFR 271.3.

The amendments being promulgated today need not affect the State's Underground Injection Control (UIC) primacy status. A State currently authorized to administer the UIC program under the Safe Drinking Water Act (SDWA) could continue to do so without seeking authority to administer these amendments. However, a State which wished to implement Part 148 and receive authorization to grant exemptions from the land disposal restrictions would have to demonstrate that it had the requisite authority to administer sections 3004(f) and (g) of RCRA. The conditions under which such an authorization may take place are summarized below and are discussed in a July 15, 1985 final rule (50 FR 28728).

C. State Implementation

The following four aspects of the framework established in the November 7, 1986, rule (51 FR 40572) affect State implementation to today's final rule and impact State actions on the regulated community:

1. Under Part 268, Subpart C, EPA is proposing land disposal restrictions for all generators, treaters, storers, and disposers of certain types of hazardous waste. In order to retain authorization, States must adopt the regulations under this Subpart since State requirements can be no less stringent than Federal requirements.

2. Also under Part 268, EPA is proposing to grant two-year national variances from the effective dates of the land disposal restrictions based on an analysis of available alternative treatment, recovery, or disposal capacity. Under section 268.5, case-by-case extensions of up to one year (renewable for one additional year) may be granted for specific applicants lacking adequate capacity.

The Administrator of EPA is solely responsible for granting variances to the effective dates because these determinations must be made on a

national basis. In addition, it is clear that RCRA section 3004(h)(3) intends for the Administrator to grant case-by-case extensions after consulting the affected States, on the basis of national concerns which only the Administrator can evaluate. Therefore, States cannot be authorized for this aspect of the program.

3. Under § 268.44, the Agency may grant waste-specific variances from treatment standards in cases where it can be demonstrated that the physical and/or chemical properties of the wastes differ significantly from wastes analyzed in developing the treatment standards, and the wastes cannot be treated to specified levels or treated by specified methods.

The Agency is solely responsible for granting such variances since the result of such an action may be the establishment of a new waste treatability group. All wastes meeting the criteria of these new waste treatability groups may also be subject to the treatment standard established by the variance. Granting such variances may have national impacts; therefore, this aspect of the program is not delegated to the States at this time.

4. Under § 268.6, EPA may grant petitions of specific duration to allow land disposal of certain hazardous wastes where it can be demonstrated that there will be no migration of hazardous constituents for as long as the waste remains hazardous. States which have the authority to impose restrictions may be authorized under RCRA section 3006 to grant petitions for exemptions from the restrictions. Decisions on site-specific petitions do not require the national perspective required to restrict wastes or grant extensions. EPA will be handling "no migration" petitions at Headquarters, though the States may be authorized to grant these petitions in the future. The Agency expects to gain valuable experience and information from review of "no migration" petitions which may affect future land disposal restrictions rulemakings. In accordance with RCRA section 3004(i), EPA will publish notice of the Agency's final decision on petitions in the **Federal Register**.

States are free to impose their own disposal restrictions if such actions are more stringent or broader in scope than the actions of Federal programs (RCRA section 3009 and 40 CFR 271.1(i)). Where States impose such restrictions, the broader and more stringent State restrictions govern.

V. Effect Of the Land Disposal Restrictions Program on Other Environmental Programs

A. Discharges Regulated Under the Clean Water Act

As a result of the land disposal restrictions program, some generators might switch from land disposal of restricted Second Third wastes to discharge to publicly-owned treatment works (POTWs) in order to avoid incurring the costs of alternative treatment. In shifting from land disposal to discharge to POTWs, an increase in human and environmental risks could occur. Also as a result of the land disposal restrictions, hazardous waste generators might illegally discharge their wastes to surface waters without treatment, which could cause damage to the local ecosystem and potentially pose health risks from direct exposure or bioaccumulation.

Some generators might treat their wastes prior to discharging to a POTW, but the treatment step itself could increase risks to the environment. For example, if incineration were the pretreatment step, metals and other hazardous constituents present in air scrubber waters could be discharged to surface waters. However, the amount of Second Third waste shifted to POTWs would be limited by such factors as the physical form of the waste, the degree of pretreatment required prior to discharge, and State and local regulations.

B. Discharges Regulated Under the Marine Protection, Research, and Sanctuaries Act

Management of some of the hazardous wastes included in today's rulemaking could be shifted from land disposal to ocean dumping and ocean-based incineration. If the cost of ocean-based disposal plus transportation were lower than the cost of land-based treatment, disposal, and transportation, this option could become an attractive alternative. In addition, ocean-based disposal could become attractive to the regulated community if land-based treatment were not available.

However, the Ocean Dumping Ban Act of 1988 has restricted ocean dumping of sewage sludge and industrial wastes to existing, authorized dumpers until December 31, 1991, after which " . . . it shall be unlawful for any person to dump (sewage sludge or industrial wastes) into ocean waters". Therefore, the Ocean Dumping Ban Act has made moot any economic or other incentive to ocean dump industrial hazardous wastes, including the wastes subject to this regulation.

C. Air Emissions Regulated Under the Clean Air Act

Some treatment technologies applicable to Second Third wastes could result in cross-media transfer of hazardous constituents to air. For example, incineration of metal-bearing wastes could result in metal emissions to air. Some constituents, such as chromium, can be more toxic if inhaled than if ingested. Therefore, it might be necessary to issue regulatory controls for some technologies to ensure they are operated properly.

The Agency has taken several steps to address this issue. EPA has initiated a program to address metal emissions from incinerators. It has also initiated two programs under section 3004(n) to address air emissions from other sources. The first program will address fugitive emissions from equipment such as pumps, valves, and vents from units processing concentrated organic waste streams. The second program will address other sources of air emissions, such as tanks and waste transfer and handling.

D. Clean Up Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act

The land disposal restrictions may have significant effects on the selection and implementation of response actions that are taken under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). There are three primary areas in which these effects may occur.

One area that may be affected by the LDR is in the selection of treatment standards at the remedial action site. The cleanup standards set at CERCLA sites are risk-based, while treatment standards developed under the land disposal restrictions program are technology-based. Therefore, the technology-based treatment standards may be more stringent than the risk-based cleanup standards developed based on the CERCLA selection of remedy criteria, and vice versa. Another matter that may be affected is the treatment of soil and debris contaminated with wastes restricted from land disposal. Contaminated soil and debris are a primary type of waste that must be remediated at most CERCLA sites. In many cases, the soil matrix is different from that of the industrial waste for which treatment standards are set. CERCLA site managers must either comply with the treatment standards or request and be granted a variance from the treatment

standard (§ 268.44) or request and be granted a "no-migration" variance (§ 268.6).

Finally, even though the hazardous substances at a CERCLA remediation site may have been disposed prior to the effective date of RCRA, if the action involves removal of restricted wastes after the prohibition effective date, the land disposal restrictions are legally applicable (51 FR 40577). For example, if a waste is excavated from a unit, treated, and redisposed, EPA has indicated that "placement" (see RCRA section 3004(k)) of the waste in a land disposal unit has occurred and the applicable treatment standards must be met (see 53 FR 51444 and 51445, Dec. 21, 1988). However, if the waste is capped in place, removal or "placement" has not occurred and the treatment standards are not legally applicable.

E. Applicability of Treatment Standards to Wastes from Pesticides Regulated Under the Federal Insecticide, Fungicide, and Rodenticide Act

A number of generators of pesticide waste that have heretofore been comparatively unaware of the land disposal restrictions may be regulated when today's rulemaking is promulgated. This will require that the Agency develop guidance materials and provide training on how to comply with the requirements of the land disposal restrictions.

Generators of significant quantities of pesticide P and U wastes are farmers and commercial pesticide applicators. The provisions of 40 CFR 268.1(c)(5) exempt farmers from regulation under the land disposal restrictions program; however, no such exemption exists for commercial applicators. Such generators of hazardous wastes have traditionally land disposed their pesticide wastes. Subsequent to promulgation of today's final rule, these generators must comply with the requirements of the land disposal restrictions if they dispose a hazardous waste subject to treatment standards of "soft hammer" provisions.

F. Regulatory Overlap of Polychlorinated Biphenyls (PCBs) Under the Toxic Substance Control Act and Resource Conservation and Recovery Act

Certain wastes listed as P or U contain PCBs. The PCB component of such a waste mixture is regulated primarily under TSCA, whereas the listed P or U component of the waste is regulated under RCRA. Such a mixture of listed/PCB waste must meet the applicable requirements under both statutes. Such a waste must ordinarily go to an incinerator permitted under both TSCA and RCRA. Any ash residual from incineration must meet the treatment standard for the listed waste component prior to land disposal.

VI. REGULATORY REQUIREMENTS

A. Regulatory Impact Analysis

1. Purpose

The Agency estimated the costs, benefits, and economic impacts of today's final rule to determine if it is a "major" regulation as defined by Executive Order No. 12291. For all major rules, the Agency is required by the Executive Order to conduct a Regulatory Impact Analysis, and by the Regulatory Flexibility Act to assess small business impacts. The cost and economic impact estimates serve, additionally, as measures of the practical capability of facilities to comply with the final rule.

The results indicate that today's final rule is not a major rule. This section of the preamble discusses the results of the analyses of the final rule.

2. Executive Order No. 12291

Executive Order No. 12291 requires EPA to assess the effect of final Agency actions and alternatives during the development of regulations. Such an assessment consists of a quantification of the potential benefits and costs of the rule, as well as a description of any beneficial or adverse effects that cannot be quantified in monetary terms. In addition, Executive Order No. 12291 requires that regulatory agencies prepare a Regulatory Impact Analysis (RIA) for major rules. Major rules are defined as those likely to result in:

- An annual cost to the economy of $100 million or more; or
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, employment, investment, innovation, or international trade.

The Agency has conducted cost analysis and has concluded that the final rule is not a major rule. Annual costs to the economy are estimated at approximately $24.9 million to $32.4 million for wastes not injected underground and an additional $3.9 million for those injected underground.

3. Basic Approach

The Agency analyzed costs and benefits using the same approach and methodology that was used for the August 17, 1988 First Third final rule (53 FR 31138). The effects of the final rule were estimated by comparing post-regulatory costs, benefits, and economic impacts with those resulting under baseline conditions. The baseline for all Second and Third wastes is defined as continued land disposal of wastes in units meeting minimum technological requirements. The baseline was not adjusted to reflect treatment requirements that would automatically occur in the absence of a rule after May 8, 1990.

The baseline for First Third wastes included in this rule is defined as treatment needed to comply with the First Third Land Disposal Restrictions rule or the soft hammer provisions that went into effect on August 8, 1988. This baseline corresponds to treatments evaluated under Alternative A Scenario 2 in the First Thirds RIA (53 FR 31138, August 17, 1988).

4. Results

Table VI(A) summarizes the results of the Regulatory Impact Analysis, as discussed in the following section.

TABLE VI(A)—REGULATORY IMPACT ANALYSIS RESULTS

	Surface Disposal	Underground Injection
Affected facilities:		
• Promulgated Wastes	27	20
• "Soft hammer" Wastes	8	.....
Total	35	20
Costs (annual) in millions:		
• Promulgated Wastes	24.9	3.9
• "Soft hammer" Wastes	7.5	.....
Total	32.4	3.9
Economic Impact: Significantly affected facilities	0	0
Benefits (over 70 yrs.):		
• Cancer case avoided	.07	.....
• Noncarcinogenic exposures avoided	555	.....

a. *Population of affected facilities.* The final rule will affect 27 facilities that surface-dispose wastes. An additional 8 facilities would be affected by the soft hammer provisions that will take effect on June 8, 1989.

Only 20 injection facilities will be required to either treat wastes or file "no migration" petitions. These facilities will not significantly contribute to compliance costs already incurred by injection well owners/operators managing solvents, dioxins, California list, and First Third wastes.

b. Costs. The standards promulgated by this final rule are estimated to cost industry $24.9 million per year for surface-disposed wastes, and 3.9 million per year for injected wastes. If there is not enough capacity to treat the wastes subject to the soft hammer provisions, the facilities may be able to continue managing their wastes in minimum technology units at no additional cost.

If treatment capacity is available, surface-disposed wastes subject to the soft hammer provisions would need to be treated. The Agency estimated the upper range costs of treating those wastes by assuming these wastes would be incinerated. This treatment could add as much as $7.5 million to the cost of the rule. Less costly forms of treatment would be available for the soft hammered wastes, which would reduce the cost.

In general, the Agency assumed that the least costly treatment would be selected. This assumption had negligible effects on the estimated costs except for the case of a combined waste stream containing K027 and D007, a Third Third chromium waste. The Agency assumed that the combined waste would be treated to comply with the final rule. The Agency also assumed that no treatment of the residual scrubber sludges to remove chromium would take place because treatment standards for D007 have not been promulgated. Promulgation of standards for D007 under the Third Third rule would increase costs for this combined waste by approximately $28 million annually.

The additional volume of injected wastes attributable to the Second Third schedule is small by comparison to the volumes of wastes regulated by previous rulemakings. The Agency performed an analysis to assess the economic effect of associated compliance costs for Second Third wastes and found total compliance costs to be $3.9 million annually and petition costs are estimated at $0.1 million annually.

c. *Economic impacts.* The economic impact analysis for surface-disposed wastes estimates that none of the affected facilities would be significantly affected by the final rule. None of the affected facilities is expected to close as a result of the rule.

d. *Benefits.* The benefits analysis for surface-disposed wastes estimated that, over a 70 year lifetime, the final rule would reduce the number of cancer cases by 0.07 and the number of exposures to noncarcinogenic chemicals above threshold levels by 555.

Benefits other than reduction in human health risk—such as resouce damage avoided and corrective action costs avoided—were not quantified. As a result, the benefits of the land disposal restrictions for Second Third wastes are likely to be understated.

B. Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, whenever an agency is required to publish a notice of rulemaking for a final rule, it must prepare and make available for public comment a Regulatory Flexibility Analysis (RFA) that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). This analysis is unnecessary, however, if the Agency's Administrator certifies that the rule will not have a significant economic effect on a substantial number of small entities.

According to EPA's guidelines for conducting an RFA, if over 20 percent of the population of small businesses, small organizations, or small government jurisdictions is likely to experience financial distress based on the costs of the rule, then the agency is required to consider that the rule will have a significant effect on a substantial number of small entities and to perform a formal RFA. EPA evaluated the economic effect of the final rule, as required by the Regulatory Flexibility Act, and determined that no facilities would be significantly affected. The Administrator certifies that Part 268 and Part 148 will not have significant economic effects on a substantial number of small entities. As a result of this finding, the Agency has not prepared a formal RFA.

C. Paperework Reduction Act

All information collection requirements in this final rule were promulgated in previous land disposal restrictions rulemakings (other than those for the Underground Injection Control Program) and approved by the Office of Management and Budget at that time. Since there are no new information collection requirements being promulgated today, an Information Collection Request has not been prepared.

For the Underground Injection Control Program, the information collection requirements in this final rule have been approved by the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Reporting and recordkeeping burden on the public for this collection is estimated at 745 hours for the respondents, with an average of 14 hours per response. These burden estimates include all aspects of the collection effort and may include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, 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 the burden, (please reference ICR No. 370.09), to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 (202-382-2745); and Office of Management and Budget, Paperwork Reduction Project (2040-0042), Washington, DC 20503, marked "Attention: Desk Officer for EPA."

D. Review of Supporting Documents

The primary source of information on current land disposal practices and industries affected by this rule was EPA's 1986 "National Survey of Hazardous Waste Treatment, Storage, Disposal, and Recycling Facilities (the TSDR Survey). The average quantity of waste contributed by generator facilities was obtained from EPA's "National Survey of Hazardous Waste Generators and Treatment, Storage, and Disposal Facilities Regulated under RCRA in 1981" (April 1984).

VII. REFERENCES

(1) U.S. EPA, "Treatment Technology Background Document." June, 1989. EPA/530-SW-89-048A.

(2) U.S. EPA, "Methodology for Developing Treatment Standards," June, 1989. EPA/530-SW-89-048B.

(3) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for Cyanide Wastes, F006 (Cyanide Only), F007-F012, F019, P012, P013, P021, P029, P030, P033, P063, P074, P098, P099, P104, P106, and P121, U246." June 1989. EPA/530-SW-89-048K.

(4) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for K011, K013, and K014. June 1989. EPA/530-SW-89-048J.

(5) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for K009 and K010. June 1989. EPA/530-SW-89-048I.

(6) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for K043. June 1989. EPA/530-SW-89-048L.

(7) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for Phthalate Wastes, K023, K093, K094, U028, U069, U088, U102, U107, U190. June 1989. EPA/530/SW-89-048H.

(8) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for Organophosphorous Wastes, K038-K040, P039, P040, P041, P043, P044, P062, P071, P085, P089, P094, P097, P109, P111, U059, U087, and U235. June 1989. EPA/530-SW-89-048G.

(9) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for F024. June 1989. EPA/530-SW-89-048M.

(10) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for Waste from the Production of Dinitrotoluene, Toluenediamine, and Toluenediisocyanate, K027, K111–K116, U221, and U223. June 1989. EPA/530–SW–89–0480.
(11) U.S. EPA, "Best Demonstrated Available Technology (BDAT) for Wastes From the Production of 1,1,1,-Trichloroethene K028, K029, K095, and K096. December 1988. EPA/530–SW–89–048N.
(12) ICF, Memorandum From Ralph Braccio, Jean Tilley to William Vocke, "Results of Preliminary Analysis of Proposed Second Thirds Land Disposal Restrictions Rule. December 19, 1988.
(13) U.S. EPA, "Background Document for Second Third Wastes to Support 40 CFR Part 268 Land Disposal Restrictions Proposed Rule. Second Third Wastes Volumes, Characteristics, and Required and Available Treatment Capacity". June 1989. EPA/530–SW–89–048F.
(14) U.S. EPA, "Evaluation of Availability of Alternate Treatment and Disposal Capacity for Injected Hazardous Wastes"; Tischler and Kocurek. October 1987.
(15) U.S. EPA, "Information Collection Request for the Proposed Hazardous Waste Disposal Restrictions for Class I Injection of Second Thirds List Wastes", Cadmus Group, Inc. November 1988.
(16) U.S. EPA, "Second and Third Thirds Cost Estimate", Cadmus Group, Inc. December 1988.
(17) U.S. EPA, "Response to Comments Background Document for Second Third Scheduled Wastes, Vol. 1"; June 1989. EPA/530–SW–89–048D.
(18) U.S. EPA, "Response to Comments Background Document for Second Third Scheduled Wastes, Vol. 2"; June 1989. EPA/530–SW–89–048E.
(19) U.S. EPA, "Response to Comments Background Document for Second Third Scheduled Wastes, Vol. 3"; June 1989. EPA/530–SW–89–048C.

List of Subjects in 40 CFR Part 148, 264, 265, 268, and 271

Administrative practice and procedure, Confidential business information, Environmental protection, Hazardous materials, Hazardous materials transportation, Hazardous waste, Imports, Indian lands, Insurance, Intergovernmental relations, Labeling, Packaging and containers, Penalties, Recycling, Reporting and recordkeeping requirements, Security measures, Surety bonds, Waste treatment and disposal, Water pollution control, Water supply.

Dated: June 8, 1989.

William K. Reilly,

Administrator.

For the reasons set out in the preamble, Title 40, Chapter I, of the Code of Federal Regulations is amended as follows:

PART 148—HAZARDOUS WASTE INJECTION RESTRICTIONS

1. The authority citation for Part 148 continues to read as follows:

Authority: Section 3004, Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*

2. Section 148.14 is amended by redesignating paragraphs (b), (c), and (d) as paragraphs (d), (e), and (g); by revising the introductory text of newly redesignated paragraph (g); and by adding new paragraphs (b), (c), and (f) to read as follows:

§ 148.14 Waste specific prohibitions—first third wastes.

* * * * *

(b) Effective June 8, 1989, the waste specified in 40 CFR 261.32 as EPA Hazardous Waste number K036 (wastewaters); and the wastes specified in 40 CFR 261.33 as P030, P039, P041, P063, P071, P089, P094, P097, U221, and U223 are prohibited from underground injection.

(c) Effective July 8, 1989, the wastes specified in 40 CFR 261.31 as EPA Hazardous Waste numbers F008 and F009 are prohibited from underground injection.

* * * * *

(f) Effective June 8, 1991, the waste specified in 40 CFR 261.31 as EPA Hazardous Waste number F007; and the wastes specified in 40 CFR 261.32 as K011 (nonwastewaters) and K013 (nonwastewaters) are prohibited from underground injection.

(g) The requirements of paragraphs (a), (b), (c), (d), (e), and (f) of this section do not apply:

* * * * *

3. Section 148.15 is amended by redesignating paragraph (b) as paragraph (e); by revising the introductory text of newly redesignated paragraph (e); and by adding new paragraphs (b), (c), and (d) to read as follows:

§ 148.15 Waste specific prohibitions—second third wastes.

* * * * *

(b) Effective June 8, 1989, the wastes specified in 40 CFR 261.31 as EPA Hazardous Waste numbers F010, F024; the wastes specified in 40 CFR 261.32 as K009 (nonwastewaters), K010, K027, K028, K029 (nonwastewaters), K038, K039, K040, K043, K095 (nonwastewaters), K096 (nonwastewaters), K113, K114, K115, K116; and wastes specified in 40 CFR 261.33 as P029, P040, P043, P044, P062, P074, P085, P098, P104, P106, P111, U028, U058, U107, and U235 are prohibited from underground injection.

(c) Effective July 8, 1989, and continuing until December 8, 1989, the wastes specified in 40 CFR 261.31 as EPA Hazardous Waste numbers F011 and F012 are prohibited from underground injection pursuant to the treatment standards specified in §§ 268.41 and 268.43 applicable to F007, F008, and F009 wastewaters and nonwastewaters. Effective December 8, 1989, F011 (nonwastewaters) and F012 (nonwastewaters) are prohibited pursuant to the treatment standards specified in §§ 268.41 and 268.43 applicable to F011 and F012 wastewaters and nonwastewaters.

(d) Effective June 8, 1991, the waste specified in 40 CFR 261.32 as EPA Hazardous Waste number K009 (wastewaters) is prohibited from underground injection.

(e) The requirements of paragraphs (a), (b), (c), and (d) of this section do not apply:

* * * * *

4. Section 148.16 is amended by redesignating paragraph (b) as paragraph (c); by revising the introductory text of newly redesignated paragraph (c); and by adding new paragraph (b) to read as follows:

§ 148.16 Waste specific prohibitions—third third wastes.

* * * * *

(b) Effective June 8, 1989, the wastes specified in 40 CFR 261.32 as EPA Hazardous Waste numbers K005 (nonwastewaters), K007 (nonwastewaters), K023, K093, K094; and the wastes specified in 40 CFR 261.33 as P013, P021, P099, P109, P121, U069, U087, U088, U102, and U190 are prohibited from underground injection.

(c) The requirements of paragraphs (a) and (b) of this section do not apply:

* * * * *

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES

1. The authority citation for Part 264 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, and 6925.

Subpart E—Manifest System, Recordkeeping, and Reporting

§ 264.73 [Amended]

2. Section 264.73 is amended by revising the first sentence in the parenthetical statement to read as follows: (Approved by the Office of

Management and Budget under control numbers 2050–0012, 2050–0013 and 2040–0042 * * *).

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. The authority citation for Part 265 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, 6925, and 6935.

Subpart E—Manifest System, Recordkeeping, and Reporting

§ 265.73 [Amended]

2. Section 265.73 is amended by revising the parenthetical statement to read as follows: (Approved by the Office of Management and Budget under control numbers 2050–0039 and 2040–0042).

PART 268—LAND DISPOSAL RESTRICTIONS

1. The authority citation for Part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

Subpart A—General

§ 268.7 [Amended]

2. Section 268.7 is amended by revising the parenthetical statement to read as follows: (Approved by the Office of Management and Budget under control numbers 2050–0062 and 2040–0042).

Subpart B—Schedule for Land Disposal Prohibitions and Establishment of Treatment Standards

3. Section 268.12 is amended by removing paragraph (c); by redesignating paragraphs (d), (e), (f), (g), and (h) as paragraphs (c), (d), (e), (f), and (g); and by revising paragraphs (b) and newly redesignated paragraph (c) to read as follows:

§ 268.12 Identification of wastes to be evaluated by May 8, 1990.

* * * * *

(b) Wastewater residues (less than 1% total organic carbon and less than 1% total suspended solids) resulting from the following well-designed and well-operated treatment methods for wastes listed in §§ 268.10 and 268.11 for which EPA has not promulgated wastewater treatment standards: metals recovery, metals precipitation, cyanide destruction, carbon adsorption, chemical oxidation, steam stripping, biodegradation, and incineration or other direct thermal destruction.

(c) Hazardous wastes listed in §§ 268.10 and 268.11 that are mixed hazardous/radioactive wastes.

* * * * *

Suppart C—Prohibitions on Land Disposal

4. Section 268.34 is added to read as follows:

§ 268.34 Waste specific prohibitions—second third wastes.

(a) Effective June 8, 1989, the following wastes specified in 40 CFR 261.31 as EPA Hazardous Waste Nos. F010; F024; the wastes specified in 40 CFR 261.32 as EPA Hazardous Waste Nos. K005, K007; K009 (nonwastewaters), K010; K023; K027; K028; K029 (nonwastewaters); K036 (wastewaters); K038; K039; K040; K043; K093; K094; K095 (nonwastewaters); K096 (nonwastewaters); K113; K114; K115; K116; and the wastes specified in 40 CFR 261.33 as EPA Hazardous Waste Nos. P013; P021; P029; P030; P039; P040; P041; P043; P044; P062; P063; P071; P074; P085; P089; P094: P097; P098; P099; P104; P106; P109; P111; P121; U028; U058; U069; U087; U088; U102; U107; U221; U223; and U235 are prohibited from land disposal.

(b) Effective June 8, 1989, the following wastes specified in 40 CFR 261.32 as EPA Hazardous Waste Nos. K009 (wastewaters), K011 (nonwastewaters), K013 (nonwastewaters), and K014 (nonwastewaters) are prohibited from land disposal except when they are underground injected pursuant to 40 CFR 148.14(f) and 148.15(d).

(c) Effective July 8, 1989, the wastes specified in 40 CFR 261.31 as EPA Hazardous Waste Nos. F006—cyanide (nonwastewater); F008; F009; F011 (wastewaters) and F012 (wastewaters) are prohibited from land disposal.

(1) Effective July 8, 1989, the following waste specified in 40 CFR 261.31 as EPA Hazardous Waste No. F007 is prohibited from land disposal except when it is underground injected pursuant to 40 CFR 148.14(f).

(2) Effective July 8, 1989 and continuing until December 8, 1989, F011 (nowastewaters) and F012 (nonwastewaters) are prohibited from land disposal pursuant to the treatment standards specified in §§ 268.41 and 268.43 applicable to F007, F008, and F009 nonwastewaters. Effective December 8, 1989 F011 (nowastewaters) and F012 (nonwastewaters) are prohibited from land disposal pursuant to the treatment standards specified in §§ 268.41 and 268.43 applicable to F011 (nonwastewaters) and F012 (nonwastewaters).

(d) Effective June 8, 1991, the wastes specified in this section having a treatment standard in Subpart D of this part based on incineration, and which are contaminated soil and debris are prohibited from land disposal.

(e) Between June 8, 1989 and June 8, 1991, (for wastes F007, F008, F009, F011, and F012 between June 8, 1989 and July 8, 1989) wastes included in paragraphs (c) and (d) of this section may be disposed in a landfill or surface impoundment, regardless whether such unit is a new, replacement, or lateral expansion unit, only if such unit is in compliance with the technical requirements specified in § 268.5(h)(2).

(f) The requirements of paragraphs (a), (b), (c), and (d) of this section do not apply if:

(1) The wastes meet the applicable standards specified in Subpart D of this Part; or

(2) Persons have been granted an exemption from a prohibition pursuant to a petition under § 268.6, with respect to those wastes and units covered by the petition.

(g) The requirements of paragraphs (a), (b), and (c) of this section do not apply if persons have been granted an extension to the effective date of a prohibition pursuant to § 268.5, with respect to those wastes covered by the extension.

(h) Between June 8, 1989 and May 8, 1990, the wastes specified in § 268.11 for which treatment standards under Subpart D of this Part are not applicable, including California list wastes subject to the statutory prohibitions of RCRA section 3004(d) or codified prohibitions under § 268.32, are prohibited from disposal in a landfill or surface impoundment unless the wastes are the subject of a valid demonstration and certification pursuant to § 268.8.

(i) To determine whether a hazardous waste listed in §§ 268.10, 268.11, and 268.12 exceeds the applicable treatment standards specified in §§ 268.41 and 268.43, the initial generator must test a representative sample of the waste extract or the entire waste, depending on whether the treatment standards are expressed as concentrations in the waste extract or the waste, or the generator may use knowledge of the waste. If the waste contains constituents in excess of the applicable Subpart D levels, the waste is prohibited from land disposal and all requirements of Part 268 are applicable, except as otherwise specified.

Subpart D—Treatment Standards

6. In § 268.41, Table CCWE is amended by removing from the subtable for F006 nonwastewaters "Cyanides (Total) * * * Reserved", and by adding the following subtables to Table CCWE in alphabetical/numerical order by EPA Hazardous Waste Number:

§ 268.41 Treatment standards expressed as concentrations in waste extract.

(a) * * *

TABLE CCWE—CONSTITUENT CONCENTRATIONS IN WASTE EXTRACT

* * * * *

F007, F008, and F009 nonwastewaters (see also table CCW in § 268.43)	Concentration (in mg/l)
Cadmium	0.066
Chromium (total)	5.2
Lead	0.51
Nickel	0.32
Silver	0.072

F011 and F012 nonwastewaters (see also table CCW in § 268.43)	Concentration (in mg/l)
Cadmium	0.066
Chromium (total)	5.2
Lead	0.51
Nickel	0.32
Silver	0.072

F024 nonwastewaters (see also table CCW in § 268.43)	Concentration (in mg/l)
Chromium (total)	Reserved.
Nickel	Reserved.

K028 nonwastewaters (see also table CCW in § 268.43)	Concentration (in mg/l)
Chromium (total)	Reserved.
Nickel	Reserved.

K115 nonwastewaters (see also table CCW in § 268.43)	Concentration (in mg/l)
Nickel	0.32

P074 nonwastewaters (see also table CCW in § 268.43)	Concentration (in mg/l)
Nickel	0.32

P099 nonwastewaters (see also table CCW in § 268.43)	Concentration (in mg/l)
Silver	0.072

P104 nonwastewaters (see also table CCW in § 268.43)	Concentration (in mg/l)
Silver	0.072

* * * * *

7. In § 268.42, paragraphs (a)(3) and (a)(4) are added to read as follows:

§ 268.42 Treatment standards expressed as specified technologies.

(a) * * *

(3) The nonwastewater form of the following hazardous wastes listed in §§ 268.10, 268.11, and 268.12 must be incinerated in accordance with the requirements of Part 264, Subpart O, or Part 265, Subpart O, or burned in boilers or industrial furnaces burning in accordance with applicable regulatory standards: K027, K039, K113, K114, K115, K116, P040, P041, P043, P044, P062, P085, P109, P111, U058, U087, U221, and U223.

(4) The wastewater form of the following hazardous wastes listed in §§ 268.10, 268.11, and 268.12 must be treated by carbon adsorption, or incineration, or pretreatment followed by carbon adsorption: K027, K039, K113, K114, K115, K116, P040, P041, P043, P044, P062, P085, P109, P111, U058, U087, U221, and U223.

* * * * *

8. In § 268.43, paragraph (a) is revised; Table CCW is amended by revising the subtable for F006 nonwastewaters; by revising the subtables for K024 wastewaters and nonwastewaters; by removing K004 and K008 from the subtable for No Land Disposal; by adding the following subtables in alphabetical/numerical order by EPA hazardous waste number, and by adding paragraph (b) and K005 and K007 to the subtable for No Land Disposal to read as follows:

§ 268.43 Treatment standards expressed as waste concentrations.

(a) Table CCW identifies the restricted wastes and the concentrations of their associated hazardous constituents which may not be exceeded by the waste or treatment residual (not an extract of such waste or residual) for the allowable land disposal of such waste or residual. The wastewater and nonwastewater treatment standards in Table CCW are based on analysis of grab samples except the wastewater treatment standards that are based on analysis of composite samples for wastes, K009, K010, K036, K038, K040, P039, P071, P089, P094, P097, and U235.

TABLE CCW—CONSTITUENT CONCENTRATION IN WASTES

* * * * *

F006 nonwastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/kg)
Cyanides (Total)	590
Cyanides (Amenable)	30

F007, F008, and F009 nonwastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/kg)
Cyanides (Total)	590
Cyanides (Amenable)	30

F007, F008, and F009 wastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10
Chromium (Total)	0.32
Lead	0.04
Nickel	0.44

F010 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	1.5

F010 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

F011 and F012 nonwastewaters [1]	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

[1] Effective December 8, 1989; from July 8, 1989 until December 8, 1989, these wastes are subject to the same treatment standards as F007, F008, and F009 nonwastewaters (see also Table CCWE in § 268.41).

F011 and F012 wastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10
Chromium (Total)	0.32
Lead	0.04
Nickel	0.44

F024 nonwastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/kg)
2-Chloro-1,3-butadiene	0.28
3-Chloropropene	0.28

F024 nonwastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/kg)
1,1-Dichloroethane	0.014
1,2-Dichloroethane	0.014
1,2-Dichloropropane	0.014
cis-1,3-Dichloropropene	0.014
trans-1,3-Dichloropropene	0.014
Bis(2-ethylhexyl)phthalate	1.8
Hexachloroethane	1.8
Hexachlorodibenzo-furans	0.001
Hexachlorodibenzo-p-dioxins	0.001
Pentachlorodibenzo-furans	0.001
Pentachlorodibenzo-p-dioxins	0.001
Tetrachlorodibenzo-furans	0.001

F024 wastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/l)
2-Chloro-1,3-butadiene	0.28
3-Chloropropene	0.28
1,1-Dichloroethane	0.014
1,2-Dichloroethane	0.014
1,2-Dichloropropane	0.014
cis-1,3-Dichloropropene	0.014
trans-1,3-Dichloropropene	0.014
Bis(2-ethylhexyl) phthalate	0.036
Hexachloroethane	0.036
Hexachlorodibenzo-furans	0.001
Hexachlorodibenzo-p-dioxins	0.001
Pentachlorodibenzo-furans	0.001
Pentachlorodibenzo-p-dioxins	0.001
Tetrachlorodibenzo-furans	0.001
Chromium (Total)	0.35
Nickel	0.47

K009 and K010 nonwastewaters	Concentration (in mg/kg)
Chloroform	6.0

K009 and K010 wastewaters	Concentration (in mg/l)
Chloroform	0.10

K011, K013, and K014 nonwastewaters	Concentration (in mg/kg)
Acetonitrile	1.8
Acrylonitrile	1.4
Acrylamide	23
Benzene	0.03
Cyanides (Total)	57

K023, K093, and K094 nonwastewaters	Concentration (in mg/kg)
Phthalic anhydride (measured as Phthalic acid)	28

K023, K093, and K094 wastewaters	Concentration (in mg/l)
Phthalic anhydride (measured as Phthalic acid)	0.54

K024 nonwastewaters	Concentration (in mg/kg)
Phthalic anhydride (measured as Phthalic acid)	28

K024 wastewaters	Concentration (in mg/l)
Phthalic anhydride (measured as Phthalic acid)	0.54

K028 nonwastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/kg)
1,1-Dichloroethane	6.0
trans-1,2-Dichloroethane	6.0
Hexachlorobutadiene	5.6
Hexachloroethane	28
Pentachloroethane	5.6
1,1,1,2-Tetrachloroethane	5.6
1,1,2,2-Tetrachloroethane	5.6
1,1,1-Trichloroethane	6.0
1,1,2-Trichloroethane	6.0
Tetrachloroethylene	6.0

K028 wastewaters	Concentration (in mg/l)
1,1-Dichloroethane	0.007
trans-1,2-Dichloroethane	0.033
Hexachlorobutadiene	0.007
Hexachloroethane	0.033
Pentachloroethane	0.033
1,1,1,2-Tetrachloroethane	0.007
1,1,2,2-Tetrachloroethane	0.007
Tetrachloroethylene	0.007
1,1,1-Trichloroethane	0.007
1,1,2-Trichloroethane	0.007
Cadmium	6.4
Chromium (Total)	0.35
Lead	0.037
Nickel	0.47

K029 nonwastewaters	Concentration (in mg/kg)
Chloroform	6.0
1,2-Dichloroethane	6.0
1,1-Dichloroethylene	6.0
1,1,1-Trichloroethane	6.0
Vinyl chloride	6.0

K036 wastewaters	Concentration (in mg/l)
Disulfoton	0.025

K038 and K040 nonwastewaters	Concentration (in mg/kg)
Phorate	0.1

K038 and K040 wastewaters	Concentration (in mg/l)
Phorate	0.025

K043 nonwastewaters	Concentration (in mg/kg)
2,4-Dichlorophenol	0.38
2,6-Dichlorophenol	0.34
2,4,5-Trichlorophenol	8.2
2,4,6-Trichlorophenol	7.6
Tetrachlorophenols (Total)	0.68
Pentachlorophenol	1.9
Tetrachloroethene	1.7
Hexachlorodibenzo-p-dioxins	0.001
Hexachlorodibenzo-furans	0.001
Pentachlorodibenzo-p-dioxins	0.001
Pentachlorodibenzo-furans	0.001
Tetrachlorodibenzo-p-dioxins	0.001
Tetrachlorodibenzo-furans	0.001

K043 wastewaters	Concentration (in mg/l)
2,4-Dichlorophenol	0.049
2,6-Dichlorophenol	0.013
2,4,5-Trichlorophenol	0.016
2,4,6-Trichlorophenol	0.039
Tetrachlorophenols (Total)	0.018
Pentachlorophenol	0.22
Tetrachloroethene	0.006
Hexachlorodibenzo-p-dioxins	0.001
Hexachlorodibenzo-furans	0.001
Pentachlorodibenzo-p-dioxins	0.001
Pentachlorodibenzo-furans	0.001
Tetrachlorodibenzo-p-dioxins	0.001
Tetrachlorodibenzo-furans	0.001

K095 nonwastewaters	Concentration (in mg/kg)
1,1,1,2-Tetrachloroethane	5.6
1,1,2,2-Tetrachloroethane	5.6
Tetrachloroethene	6.0
1,1,2-Trichloroethane	6.0
Trichloroethylene	5.6
Hexachloroethane	28
Pentachloroethane	5.6

K096 nonwastewaters	concentration (in mg/kg)
1,3-Dichlorobenzene	5.6
Pentachloroethane	5.6
1,1,1,2-Tetrachloroethane	5.6
1,1,2,2-Tetrachloroethane	5.6
Tetrachloroethylene	6.0
1,2,4-Trichlorobenzene	19
Trichloroethylene	5.6
1,1,2-Trichloroethane	6.0

K115 wastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/l)
Nickel	0.47

P013 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P013 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P021 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P021 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P029 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P029 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P030 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P030 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P039 nonwastewaters	Concentration (in mg/kg)
Disulfoton	0.1

P039 wastewaters	Concentration (in mg/l)
Disulfoton	0.025

P063 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P063 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P071 nonwastewaters	Concentration (in mg/kg)
Methyl parathion	0.1

P071 wastewaters	Concentration (in mg/l)
Methyl parathion	0.025

P074 nonwastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P074 wastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10
Nickel	0.44

P089 nonwastewaters	Concentration (in mg/kg)
Parathion	0.1

P089 wastewaters	Concentration (in mg/l)
Parathion	0.025

P094 nonwastewaters	Concentration (in mg/kg)
Phorate	0.1

P094 wastewaters	Concentration (in mg/l)
Phorate	0.025

P097 nonwastewaters	Concentration (in mg/kg)
Famphur	0.1

P097 wastewaters	Concentration (in mg/l)
Famphur	0.025

P098 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P098 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P099 nonwastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P099 wastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P104 nonwastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P104 wastewaters (see also Table CCWE in § 268.41)	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P106 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P106 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

P121 nonwastewaters	Concentration (in mg/kg)
Cyanides (Total)	110
Cyanides (Amenable)	9.1

P121 wastewaters	Concentration (in mg/l)
Cyanides (Total)	1.9
Cyanides (Amenable)	0.10

U028 nonwastewaters	Concentration (in mg/kg)
Bis-(2-ethylhexyl) phthalate	28

U028 wastewaters	Concentration (in mg/l)
Bis-(2-ethylhexyl) phthalate	0.54

U069 nonwastewaters	Concentration (in mg/kg)
Di-n-butyl phthalate	28

U069 wastewaters	Concentration (in mg/l)
Di-n-butyl phthalate	0.54

U088 nonwastewaters	Concentration (in mg/kg)
Diethyl phthalate	28

U088 wastewaters	Concentration (in mg/l)
Diethyl phthalate	0.54

U102 nonwastewaters	Concentration (in mg/kg)
Dimethyl phthalate	28

U102 wastewaters	Concentration (in mg/l)
Dimethyl phthalate	0.54

U107 nonwastewaters	Concentration (in mg/kg)
Di-n-octyl phthalate	28

U107 wastewaters	Concentration (in mg/l)
Di-n-octyl phthalate	0.54

U190 nonwastewaters	Concentration (in mg/kg)
Phthalic anhydride (measured as Phthalic acid)	28

U190 wastewaters	Concentration (in mg/l)
Phthalic anhydride (measured as Phthalic acid	0.54

U235 nonwastewaters	Concentration (in mg/kg)
tris-(2,3-Dibromopropyl) phosphate	0.1

U235 wastewaters	Concentration (in mg/l)
tris-(2,3-Dibromopropyl) phosphate	0.025

No Land Disposal for:

* * * * *

K005 Nonwastewaters generated by the process described in the waste listing description, and disposed after June 8, 1989, and not generated in the course of treating wastewater forms of these wastes. (Based on No Generation)

K007 Nonwastewaters generated by the process described in the waste listing description, and disposed after June 8, 1989, and not generated in the course of treating wastewater forms of these wastes. (Based on No Generation)

* * * * *

(b) When wastes with differing treatment standards for a constituent of concern are combined for purposes of treatment, the treatment residue must meet the lowest treatment standard for the constituent of concern.

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

1. The authority citation for Part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

Subpart A—Requirements for Final Authorization

2. § 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication in the **Federal Register**:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	FEDERAL REGISTER reference	Effective date
[Insert date of publication]	Land Disposal Restrictions for Second Third wastes.	[Insert page numbers]	June 8, 1989.

3. § 271.1(j) is amended by revising the entry for June 8, 1989 in Table 2 to read as follows:

§ 271.1 Purpose and Scope

* * * * *

(j) * * *

TABLE 2.—SELF-IMPLEMENTING PROVISIONS OF THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Effective	Self-implementing provision	RCRA citation	FEDERAL REGISTER reference
June 8, 1989	Prohibition on land disposal ⅔ of listed wastes.	3004(g)(6)(B)	[Insert date of publication and page numbers of this document.]

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federal register

Friday
June 23, 1989

Part IV

Environmental Protection Agency

40 CFR Part 311

Worker Protection Standards for Hazardous Waste Operations and Emergency Response; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 311

[FRL-3550-5]

Worker Protection Standards for Hazardous Waste Operations and Emergency Response

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The purpose of this final rule is to require the application of worker protection standards for employees engaged in hazardous waste operations pursuant to section 126(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA). These standards will apply to employees of State and local governments in States without approved State plans under section 18(b) of the Occupational Safety and Health Act of 1970 (OSH Act). The Occupational Safety and Health Administration (OSHA) has promulgated standards that apply to private employees, Federal employees through Executive Order No. 12196, and, through State action, to State and local employees in States with OSHA-approved State plans. Today EPA is promulgating identical standards for State and local employees in States without OSHA-approved State plans.

DATES: Effective date: July 24, 1989. The information collection requirements contained in 40 CFR 311.1 have not been approved by the Office of Management and Budget (OMB) and are not effective until OMB has approved them. EPA will publish notice of the effective date.

Compliance dates: For emergency response operations: March 6, 1990. For other hazardous waste operations: September 21, 1989.

ADDRESS: The record supporting this rulemaking is available for public inspection in the Superfund Docket, Room M2427, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 (Docket Number 126WPS). The docket may be inspected between 9 a.m. and 4 p.m. Monday through Friday, excluding Federal holidays. To review docket materials, you may make an appointment by calling 202–382–3046. The public may copy a maximum of 50 pages from any regulatory docket at no cost. Additional copies cost $0.20 per page.

FOR FURTHER INFORMATION CONTACT: Ms. Vickie Santoro, Project Manager, Environmental Response Branch, Emergency Response Division (MS–101), U.S. Environmental Protection Agency, Woodbridge Avenue, Building 18, Edison, NJ 08837, or the RCRA/Superfund Hotline, 800–424–9346 (or in Washington, DC, at 202–382–3000).

SUPPLEMENTARY INFORMATION: The contents of today's preamble are as follows:

I. Introduction

A. Statutory Authority

Section 126(a) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) requires the Secretary of Labor to promulgate, within one year after the date of enactment of SARA, health and safety standards pursuant to section 6 of the Occupational Safety and Health Act of 1970 (OSH Act), for employees engaged in hazardous waste operations. These section 126(a) standards were proposed by the Department of Labor's Occupational Safety and Health Administration (OSHA) on August 10, 1987 (52 FR 29620) to replace the existing interim final rule that had been published on December 19, 1986 (51 FR 45654). Final regulations were published on March 6, 1989 (54 FR 9294). Pursuant to section 126(c) of SARA, the OSHA worker protection regulations are effective on March 6, 1990, one year after the date of their promulgation as a final rule. The OSHA final regulations contain standards for all private employees, and for Federal employees through Executive Order No. 12196. State and local employees in States that have OSHA-approved plans under section 18 of the OSH Act must comply with standards at least as stringent as the OSHA standards.

Section 126(f) of SARA requires the Administrator of the U.S. Environmental Protection Agency (EPA) to promulgate standards identical to those contained in the section 126(a) OSHA regulations (codified at 29 CFR 1910.120) no later than 90 days after the date of promulgation of the OSHA final regulations. The EPA regulations are to cover State and local government employees in States that are without an OSHA-approved State plan under section 18 of the OSH Act. Today's final rule implements the requirements of section 126(f).

B. Background of this Rulemaking

On October 17, 1988, EPA published a Notice of Proposed Rulemaking (NPRM) (53 FR 40692) on Worker Protection Standards for Hazardous Waste Operations and Emergency Response. In the NPRM, EPA requested that the public review the proposed OSHA regulations of August 10, 1987 (52 FR 29620). In addition, EPA sought comment on two issues beyond the substance of the OSHA standards—the definition of "employee" and the effective date for final EPA regulations. EPA noted that within 90 days after the promulgation of OSHA's final regulations, EPA would promulgate identical standards.

The official public comment period for the October 17, 1988 NPRM ended on November 16, 1988. EPA received a total of 17 comment letters, including seven letters postmarked after the close of the official comment period. The comments received, together with the Agency's responses, are contained in the document "Response to Comments on the October 17, 1988 Notice of Proposed Rulemaking on Worker Protection Standards," which is available for inspection in the Superfund Docket, Room M2427, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 (Docket Number 126WPS).

Today, the Agency is promulgating the final rule on Worker Protection Standards for Hazardous Waste Operations and Emergency Response. In preparing the final rule, EPA considered all of the public comments submitted on the October 17, 1988 NPRM. Section II of this preamble addresses the issues and comments relating to the application of the OSHA standards by EPA.

This final rule includes two different effective dates. The emergency response portions of today's final rule are effective on March 6, 1990, the same date as the OSHA rule. For other hazardous waste operations, EPA is retaining an effective date of 90 days from promulgation September 21, 1989. The reasons for this two-part approach are explained in Section II.B. of this preamble. EPA encourages all State and local governments who are able to apply these standards sooner than the applicable effective dates to do so.

C. Organization of the Final Rule

Today's final rule amends 40 CFR by adding Part 311—Worker Protection. Section 311.1 will extend the application of the OSHA standards to State and local employees in States without OSHA-approved plans. Section 311.2 will provide the definition of the term "employee" applicable to § 311.1.

The substantive provisions of 29 CFR 1910.120 will apply to State and local employees engaged in "hazardous waste operations," as defined in 29 CFR 1910.120(a), in States that do not have a State plan approved under section 18 of the OSH Act. Section 126 does not provide a definition of "State" for purposes of determining the universe of entities to be regulated by EPA under subsection (f). Because EPA's standards under section 126(f) apply in "each State which does not have in effect an approved State plan * * *," EPA believes it is appropriate in section 126(f) to use the OSHA definition of State. The OSH Act defines "State" to include the States of the U.S., the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territories of the Pacific Islands. Thus, EPA's regulations use the term "State" to refer to these same entities, and EPA's final rule extends to any State that does not have an OSHA-approved plan. An employee is defined in this final rule as a compensated or non-compensated worker who is controlled directly by a State or local government, as contrasted to an independent contractor.

II. Worker Protection Standards for Hazardous Waste Operations and Emergency Response

A. General Requirements

Today's final rule applies worker protection standards to certain State and local employees engaged in hazardous waste operations, pursuant to section 126(f) of the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499) (SARA). The Occupational Safety and Health Administration (OSHA) has promulgated standards that apply to all private employees, and to all Federal employees through Executive Order No. 12196. States that operate under an OSHA-approved plan are required to adopt standards at least as stringent as the OSHA standards to protect its State and local employees. Today's rule will apply the OSHA standards to employees of States without approved plans under section 18(b) of the Occupational Safety and Health Act of 1970 (OSH Act). Employees covered by these standards will include non-compensated workers as well as compensated workers. The following States currently do not have OSHA-approved State plans and, therefore, are subject to today's final rule [1]:

Alabama	Missouri
Arkansas	Montana
Colorado	Nebraska
Delaware	New Hampshire
District of Columbia	New Jersey
Florida	North Dakota
Georgia	Ohio
Guam	Oklahoma
Idaho	Pennsylvania
Illinois	Rhode Island
Kansas	South Dakota
Louisiana	Texas
Maine	West Virginia
Massachusetts	Wisconsin
Mississippi	

B. Clarification of Key Issues in the Rulemaking

1. Definition of "Employee" of State and local Governments

In the October 17, 1988 NPRM, EPA proposed to allow individual States to develop their own definition of the term "employee", so long as the definition was consistent with other State statutes or regulations. This approach would have been consistent with the approach taken by OSHA. Due to limitations in the OSH Act, individual OSHA-plan States are allowed to establish their own definition of the term employee and as a result, some States include volunteers and some do not. The definition of employee is important because whether that term is defined narrowly or broadly determines whether non-compensated workers, such as volunteer fire fighters, first responders, and emergency medical technicians responding to emergency incidents, are protected by the EPA standards.

Fourteen commenters on the NPRM addressed the issue of the definition of employee; eleven of them supported the inclusion of volunteers within the definition and three had concerns about such a broad definition. Those supporting the inclusion of volunteers cited several reasons for their position, particularly noting that all responders deserved the same level of protection and that Congress' intent to protect the health and safety of workers would be achieved only through a broad definition of the term employee that included both paid and unpaid workers. In fact, one commenter indicated that allowing States to define employee under section 126(f) would be contrary to Congressional intent. Another commenter noted that training in safe work procedures enhances the safety and efficiency of the cleanup itself. The three commenters holding the view that volunteers should not be included in the definition of employee believed that such an approach would put a strain on available resources or that the costs exceeded the benefits (particularly when supervisory personnel are likely to be trained and volunteers may not routinely be in immediate contact with hazardous materials), as taxes would need to be raised or current funding priorities revised in order to meet health and safety training and equipment needs for the additional employees covered by a broad definition.

Under today's final rule, EPA has defined the term "employee" of State and local governments to include both compensated and non-compensated workers. This definition has no applicability beyond this regulation and does not affect the definition of employee used for other purposes. The Agency agrees with the majority of commenters that this broad definition of "employee" is appropriate because whether or not wages are paid is an insufficient basis for failing to require standards of protection for individuals who can be exposed to hazardous situations in the course of performing emergency response duties. Under today's final rule, employees in non-OSHA plan States will be allowed to participate in response activities only if such employees received proper training and are in compliance with the other worker protection standards imposed in this rulemaking. Not to include volunteers in the definition of employee would leave these responders subject to greater health and safety risks. In States that are without an OSHA-approved plan, approximately eighty percent of the fire fighters (about 500,000) are volunteers.

This approach is consistent with the requirement of SARA section 126(f) to promulgate standards identical to those promulgated by OSHA. The definition of employee deals with the scope of coverage of those standards and not the substance of the standards themselves. Further, this approach is fully consistent with Congress' intent in passing section 126(f). As discussed by OSHA (see 54 FR 9297-9298, 9312; March 6, 1989), Congress used broad language to express its intent to provide broad coverage for all emergency response situations, not just for a limited class of hazardous waste operations. This broad coverage was supported by the fact that Congress made section 126 a free-standing provision and did not amend

[1] The specific States covered by today's final rule may vary over time, depending upon whether a State has in place an OSHA-approved State plan. The States listed in today's preamble represent the affected States as of today's date of publication.

the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, nor the OSH Act.

Further, in section 126(d)(4), Congress directed OSHA to provide training standards for "workers who are responsible for responding to hazardous emergency situations who may be exposed to toxic substances in carrying out their responsibilities." This language is also broad, and volunteers who take on emergency responsibilities at the direction of a State or locality clearly "may be exposed" by carrying out such responsibilities.

Finally, the legislative history of section 126 indicates that Congress intended broad coverage for all persons conducting emergency response. For example, Senator Metzenbaum specifically addressed his concern for providing training to "fire fighters who are called in to deal with toxic explosions * * *" 131 Cong. Rec. S11996 (Sept. 24, 1985). EPA's interpretation would apply regulatory standards to all State or local fire fighters engaged in emergency response in relevant jurisdictions; a narrow interpretation would exclude eighty percent of these fire fighters.

In requiring worker protection standards, Congress thus intended to minimize health and safety risks for responders in hazardous waste cleanup activities. A reasonable interpretation of Congress' intent is that training, medical surveillance, maximum exposure limits, and other worker protection standards should apply to *all* persons whose duties bring them into contact with hazardous wastes during site cleanup and emergency response, whether or not they receive monetary compensation for the activity. Inclusion of noncompensated employees in this regulation also is consistent with recently proposed revisions to the National Oil and Hazardous Substances Pollution Contingency Plan (the NCP) that require compliance with OSHA standards for volunteers in cleanups undertaken pursuant to the NCP (40 CFR 300.185, 53 FR 51493, December 21, 1988).

OSHA itself has not taken this approach because of the long standing limitation in the OSH Act (enacted in 1970) on OSHA regulation of employees of State and local government. EPA is not subject to that limitation as section 126(f) is free-standing, and was created by Congress' removing language from section 126(a), which remained under OSHA control. Moreover, OSHA acknowledges that volunteers are an important component of the emergency response network and supports use of a broad interpretation by EPA, as well as application of these standards to volunteers by States with OSHA-approved plans that do not generally apply to volunteers.

EPA acknowledges that the expanded definition of "employee" may impose additional costs on State and local governments in States without OSHA-approved plans. However, grants are available to universities and other nonprofit organizations for developing and administering tuition-free health and safety training for workers engaged in hazardous waste operations, which could offset some portion of these increased costs. Among the sources for grants are the National Institute of Environmental Health Sciences (NIEHS) and, through September 1989, the Federal Emergency Management Agency (FEMA). In addition, EPA has developed tuition-free training courses available to State and local government employees, and training materials that are available free of charge to State and local governments. Organizations interested in further information about EPA training courses and materials should contact the Operational Support Section of the Environmental Response Team, U.S. EPA, 26 West Martin Luther King Drive, Cincinnati, Ohio 45268, (513) 569–7537.

EPA believes that there are significant benefits to including volunteers within the scope of today's rule. These benefits accrue both to the communities that could be endangered by inadequately trained responders and to the responders themselves. EPA believes these factors outweigh any additional costs that may be incurred in complying with today's final rule, and that adoption of the broad definition is reasonable.

Five commenters requested that EPA develop a national definition of employee that includes non-compensated workers and that would be applied in all States, whether or not they have OSHA-approved State plans. They stated that inclusion of volunteers in the definition of employee would facilitate interstate commerce, because of the steady stream of interstate hazardous waste transport, and would minimize risks to the communities. The commenters further stated that standardization would ensure safe response actions by all State and local governments to incidents requiring mutual aid operations. EPA has not complied with the commenters' request because EPA has no authority to establish a national definition of "employee". Section 126(f) of SARA requires EPA to promulgate identical standards to those promulgated by OSHA (codified at 29 CFR 1910.120) that apply to State and local employees in States without an OSHA-approved State plan. EPA lacks authority to extend the regulation to volunteers in States with OSHA-approved plans.

2. Effective Date of Final Rule

EPA requested comments in the NPRM on the appropriate effective date of its final rule. EPA proposed 90 days as sufficient time for preparing for compliance. Nine commenters addressed the effective date issue. Of the nine, seven commenters stated that more than 90 days was needed for compliance, one supported EPA's 90-day proposal, and one believed the rule should be effective immediately. Several commenters suggested use of a sequenced compliance schedule or a timetable for compliance.

EPA has decided to adopt different effective dates for two separate groups of employees affected by this final rule. The effective date for emergency responders is March 6, 1990; the effective date for all other employees engaged in hazardous waste operations is 90 days after the date of promulgation of this rule. EPA acknowledges that, in the case of emergency responders, a full understanding of the new requirements was not possible until OSHA promulgated its final standards pursuant to section 126(a) of SARA, and a full understanding of the scope (i.e., the broader definition of employee) was not possible until EPA promulgated this final rule. In addition, the larger number of emergency responders subject to the EPA regulations may lead to scheduling complications for training and other provisions of the rule. Thus, 90 days might not provide sufficient time for some State and local governments to apply the standards to all employees in an orderly fashion. Therefore, EPA is making the emergency response portions of today's final rule effective on March 6, 1990, the same date as the OSHA rule. EPA believes that this effective date is reasonable. EPA encourages all State and local governments to comply sooner, if possible.

For other hazardous waste operations, including those conducted at treatment, storage, and disposal facilities, EPA is retaining an effective date of 90 days from promulgation, September 21, 1989. At these sites, private employers have had to comply with essentially the same OSHA standards since the date of OSHA's interim final rule (December 19, 1986). State and local governments are often involved in a coordinated response with private employees at these sites, and EPA wants to minimize the time in which State and local

employees do not receive the protection of this rule. EPA believes that training courses for hazardous waste operations other than emergency response, which fully reflect the standards in 29 CFR 1910.120, can be used by States and localities to provide an orderly transition for the subject employees. EPA believes, therefore, that it is important and possible for State and local governments to apply these standards in an orderly fashion sooner than in the case of emergency responders Thus, EPA believes that this effective date is reasonable.

III. Summary of Supporting Analysis

A. Executive Order No. 12291

Executive Order (E.O.) No. 12291 requires that regulations be classified as major or non-major for purposes of review by the Office of Management and Budget (OMB). According to E.O. No. 12291, major rules are regulations that are likely to result in:

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

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

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

EPA has determined that today's final rule is non-major. The Agency estimates that the annual costs of compliance with EPA's application of OSHA's worker protection standards to State and local employees in non-OSHA States is approximately $38 million. The benefits attributable to EPA's application of OSHA's worker protection standards include chronic illnesses and deaths avoided, acute injuries and fatalities avoided, medical costs avoided and work days saved, and greater protection of community properties and lives. Many of these benefits are difficult to quantify. EPA estimates, however, that over five lives will be saved annually and about $12 million in medical costs and lost productivity will be avoided annually when today's final rule is implemented. For further information on EPA's benefits estimates see "Benefits Attributable to EPA's Worker Protection Standards," available in the Superfund Docket at EPA.

The EPA cost and benefit estimates are based on an analysis conducted by OSHA of the economic effects in all 50 States of the SARA section 126 worker protection standards.[2] The OSHA economic analysis includes cost estimates for applying the standards to both compensated and non-compensated employees. EPA's analysis attributes some of the costs and benefits contained in the OSHA economic report to EPA's worker protection regulations. The EPA costs and benefits, therefore, are a subset of the OSHA estimates.

In general, the costs attributable to the EPA regulations are incurred by employers of two categories of workers in non-OSHA States: (1) Public emergency response teams (e.g., police and fire fighters); and (2) public employees, including On-Scene Coordinators, engaged in cleanups of hazardous waste at uncontrolled sites and at treatment, storage, and disposal facilities. The estimated net annual costs attributable to these two categories of employees are $36.6 million and $1.6 million, respectively.

Thus, the total estimated annual cost is about $38 million. For further details, see "Compliance Cost Analysis in Support of EPA Worker Protection Standards Under Section 126(f) of the Superfund Amendments and Reauthorization Act of 1986" (Cost Analysis). This rule has been submitted to the Office of Management and Budget (OMB) for review as required by E.O. No. 12291.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires that a Regulatory Flexibility Analysis be performed for all rules that are likely to have a "significant impact on a substantial number of small entities." In OSHA's Regulatory Flexibility Analysis for its worker protection standards, OSHA determined that the standards may have some impact on local subcontractors performing hazardous waste operations. The EPA regulations do not affect these workers because they are private employees. There is a possibility, however, that some small municipalities in non-OSHA States may be unable to afford the costs of compliance with the worker protection standards. These small communities have the option of pooling resources with neighboring communities to form a regional response capability. In addition, through tuition-free training courses and the extension of the effective date for emergency responders, EPA believes that the costs to small municipalities have been minimized and should not present a significant burden. Such municipalities also have the option of not acting as first responders to hazardous materials incidents, in which case they should coordinate with the Local Emergency Planning Committees and the State Emergency Response Commission to ensure proper hazardous materials incidents response within their municipalities.[3]

On the basis of the analysis contained in the Cost Analysis supporting this rulemaking and in the OSHA Economic Document, I hereby certify that this rule will not have a significant impact on a substantial number of small entities. This rule, therefore, does not require a Regulatory Flexibility Analysis

C. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to OMB under the *Paperwork Reduction Act of 1980*, 44 U.S.C. 3501 *et seq*. These requirements are not effective until OMB approves them and a technical amendment to that effect is published in the **Federal Register.**

Public reporting burden for this collection of information is estimated to average 3.7 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 Street SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503, marked "Attention: Desk Officer for EPA."

List of Subjects in 40 CFR Part 311

Containers, Drums, Emergency response, Hazardous materials, Hazardous substances, Hazardous waste, Materials handling and storage, Personal protection equipment, Storage areas, Training, Waste disposal.

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[2] See U.S. Department of Labor, Occupational Safety and Health Administration, "Regulatory Impact and Regulatory Flexibility Analysis of the Occupational Safety and Health Standards for Hazardous Waste Operations and Emergency Response," December 14, 1988. (OSHA Economic Document)

[3] Under section 301 of Title III of SARA (also known as the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA)), States have established State Emergency Response Commissions (SERCs), which in turn have appointed Local Emergency Planning Committees (LEPCs), for the purpose of establishing a framework for State and local emergency planning.

Date: June 6, 1989

William K. Reilly,

Administrator.

For the reasons set out in the preamble, Title 40 of the Code of Federal Regulations, Chapter I is amended by adding a new Part 311 to read as follows:

PART 311—WORKER PROTECTION

Sec.

Authority: 29 U.S.C. 655, Pub. L. 99-499

§ 311.1 Scope and application.

The substantive provisions found at 29 CFR 1910.120 on and after March 6, 1990, and before March 6, 1990, found at 54 FR 9317 (March 6, 1989), apply to State and local government employees engaged in "hazardous waste operations," as defined in 29 CFR 1910.120(a), in States that do not have a State plan approved under section 18 of the Occupational Safety and Health Act of 1970.

§ 311.2 Definition of employee.

"Employee" in § 311.1 is defined as a compensated or non-compensated worker who is controlled directly by a State or local government, as contrasted to an independent contractor.

[FR Doc. 89-14161 Filed 6-22-89; 8:45 am]

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federal register

Friday
June 23, 1989

Part V

Department of Health and Human Services

National Institutes of Health

Recombinant DNA Advisory Committee; Meeting; Recombinant DNA Research; Request for Public Comment; Notices

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Recombinant DNA Advisory Committee Human Gene Therapy Subcommittee; Meeting

Pursuant to Pub. L. 92–463, notice is hereby given of a meeting of the Recombinant DNA Advisory Committee—Human Gene Therapy Subcommittee at the National Institutes of Health, Building 31C, Conference Room 6, 9000 Rockville Pike, Bethesda, Maryland 20892, on July 31, 1989, from approximately 9:00 a.m. to adjournment at approximately 5:00 p.m. The purpose of the meeting will be to discuss the revisions to the document entitled: "Points to Consider in the Design and Submission of Protocols for the Transfer of Recombinant DNA into Human Subjects." This meeting will be open to the public. Attendance by the public will be limited to space available.

Following this notice is a request for public comment on the "Points to Consider in the Design and Submission of Protocols for the Transfer of Recombinant DNA into Human Subjects."

Further information can be obtained from Ms. Rachel E. Levinson, Executive Secretary of the Human Gene Therapy Subcommittee, Recombinant DNA Advisory Committee, Office of Recombinant DNA Activities, Office of Science Policy and Legislation, National Institutes of Health, Building 31, Room 4B11, Bethesda, Maryland 20892, telephone (301) 496–9838.

OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements" (45 FR 39592) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers not only virtually every NIH program but also essentially every Federal research program in which DNA recombinant molecule techniques could be used, it has been determined to be not cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, we well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

Dated: June 15, 1989.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 89–14851 Filed 6–22–89; 8:45 am]

BILLING CODE 4140–01–M

Recombinant DNA Research: Request for Public Comment on "Points to Consider in the Design and Submission of Protocols for the Transfer of Recombinant DNA into Human Subjects"

AGENCY: National Institutes of Health, PHS, DHHS.

ACTION: Request for public comment.

SUMMARY: This notice publishes for public comment "Points to Consider in the Design and Submission of Protocols for the Transfer of Recombinant DNA into Human Subjects" which was developed by the Points to Consider Subcommittee of the Recombinant DNA Advisory Committee at its March 31, 1989, meeting.

DATE: Comments must be received by July 17, 1989.

ADDRESS: Written comments and recommendations should be submitted to Ms. Rachel E. Levinson, Executive Secretary, Human Gene Therapy Subcommittee, Office of Recombinant DNA Activities, Office of Science Policy and Legislation, National Institutes of Health, Building 31, Room 4B11, Bethesda, Maryland 20892 (FAX number (301) 496–9839). All comments received in timely response to this notice will be considered and will be available for public inspection in the above office on weekdays between the hours of 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Further information can be obtained from Ms. Rachel E. Levinson, Executive Secretary of the Human Gene Therapy Subcommittee, Office of Recombinant DNA Activities, Office of Science Policy and Legislation, National Institutes of Health, Building 31, Room 4B11, Bethesda, Maryland 20892, telephone (301) 496–9838.

SUPPLEMENTARY INFORMATION: On September 29, 1986, the Recombinant DNA Advisory Committee (RAC) adopted the "Points to Consider in the Design and Submission of Human Somatic Cell Gene Therapy Protocols," which had been prepared by the Human Gene Therapy Subcommittee. At the January 30, 1989, meeting, RAC endorsed a proposal to form a subcommittee to update and report to the Human Gene Therapy Subcommittee and the RAC any recommendations to amend the "Points to Consider." A Points to Consider Subcommittee was formed and met on March 31, 1989. The Human Gene Therapy Subcommittee will meet on July 31, 1989, at the National Institutes of Health, Building 31C, Conference Room 6, 9000 Rockville Pike, Bethesda, Maryland 20892, from approximately 9:00 a.m. to adjournment to discuss the recommendations from the Points to Consider Subcommittee for updating the "Points to Consider." Any comments received by July 17, 1989, will be circulated to the Human Gene Therapy Subcommittee as its meeting on July 31, 1989, and to the RAC at its next meeting.

Human Gene Therapy Subcommitee—NIH Recombinant DNA Advisory Committee

Outline

Applicability
Introduction
I. *Description of Proposal*
A. Objectives and rationale of the proposed research
B. Research design, anticipated risks and benefits
1. Structure and characteristics of the biological system
2. Preclinical studies, including risk assessment studies
3. Clinical procedures, including patient monitoring
4. Public health considerations
5. Qualifications of investigators, adequacy of laboratory and clinical facilities
C. Selection of patients
D. Informed consent
E. Privacy and confidentiality
II. *Special Issues*
A. Provision of accurate information to the public
B. Timely communication of research methods and results to investigators and clinicians
III. *Requested Documentation*
A. Original protocol
B. IRB and IBC minutes and recommendations
C. One-page abstract of gene transfer protocol
D. One-page description of proposed experiment in non-technical language
E. Curricula vitae for professional personnel
F. Indication of other federal agencies to which the protocol is being submitted

G. Other pertinent material
IV. *Reporting Requirements.*

Applicability

These "Points to Consider" apply to research conducted at or sponsored by an institution that receives any support for recombinant DNA research from the National Institutes of Health (NIH). Other researchers (e.g., those employed by private companies, institutions, non-United States organizations, non-profit organizations, etc.) are encouraged to use the "Points to Consider." Experiments in which recombinant DNA is introduced into cells of a human subject with the intent of stably modifying the subject's genome are covered by Section III–A–4 of the NIH Guidelines for Research Involving Recombinant DNA Molecules (51 FR 16958). Section III–A–4 applies both to recombinant DNA and to DNA or RNA derived from recombinant DNA.

Introduction

(1) Section III–A–4 requires experiments involving the transfer of recombinant DNA into human subjects be reviewed by the NIH Recombinant DNA Advisory Committee (RAC) and approved by the NIH. RAC consideration of each proposal will be on a case-by-case basis and will follow publication of a precis of the proposal in the **Federal Register**, an opportunity for public comment, and a review of the proposal by the Human Gene Therapy Subcommittee of the RAC. RAC recommendations on each proposal will be forwarded to the NIH Director for a decision which will then be published in the **Federal Register**. In accordance with Section IV–C–1–b of the NIH Guidelines, the NIH Director may approve proposals only if he finds that they present "no significant risk to health or the environment."

(2) In general, it is expected that the transfer of recombinant DNA into human subjects will not present a risk to the environment as the recombinant DNA is expected to be confined to the human subject. Nevertheless, Section I–B–4–b of the "Points to Consider" document specifically asks the researchers to address this point.

(3) This document is intended to provide guidance in preparing proposals for NIH consideration under Section III–A–4 of the NIH Guidelines for Research Involving Recombinant DNA Molecules. The document will be considered for revision as experience in evaluating proposals accumulates and as new scientific developments occur. This review will be carried out periodically as needed.

(4) A proposal will be considered by the RAC only after the protocol has been approved by the local Institutional Biosafety Committee (IBC) and by the local Institutional Review Board (IRB) in accordance with Department of Health and Human Services (DHHS) Regulations for the Protection of Human Subjects (45 Code of Federal Regulations, Part 46). If a proposal involves children, special attention should be paid to subpart D of these DHHS regulations. The IRB and IBC may, at their discretion, condition their approval on further specific deliberation by the RAC and its Subcommittee. Consideration of proposals by the RAC may proceed simultaneously with review by any other involved federal agencies (See Footnote 1) provided that the RAC is notified of the simultaneous review. Meetings of the Committee and the Subcommittee will be open to the public except where trade secrets or proprietary information would be disclosed. The Committee prefers that the first proposals submitted for RAC review contain no proprietary information or trade secrets, enabling all aspects of the review to be open to the public. The public review of these protocols will serve to inform the public not only on the technical aspects of the proposals but also on the meaning and significance of the research.

(5) The clinical application of recombinant DNA techniques raises two general kinds of questions: (1) The questions usually discussed by IRBs in their review of any proposed research involving human subjects; and (2) broader issues. The first type of question is addressed principally in Part I of this document. Several broader issues are discussed later in this Introduction and in Part II below.

(6) Following the Introduction, this document is divided into four parts. Part I requests a description of the protocol with special attention to the short-term risks and benefits of the proposed research to the patient (See Footnote 2) and to other people, the selection of patients, informed consent, and privacy and confidentiality. In Part II, investigators are requested to address special issues pertaining to the free flow of information about the clinical trials. These issues lie outside the usual purview of IRBs and reflect general public concerns about biomedical research. Part III summarizes other requested documentation that will assist the RAC and its Subcommittee in their review of the proposals. Part IV specifies reporting requirements.

(7) The RAC and its Subcommittee will not at present entertain proposals for germ line alterations but will consider for approval protocols involving somatic cell gene therapy. The purpose of somatic cell gene therapy is to treat an individual patient, e.g., by inserting a properly functioning gene into a patient's somatic cells. In germ line alterations, a specific attempt is made to introduce genetic changes into the germ (reproductive) cells of an individual, with the aim of changing the set of genes passed on to the individual's offspring.

(8) The acceptability of human somatic cell gene therapy has been addressed in several public documents as well as in numerous academic studies. The November 1982 report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavorial Research, Splicing Life, resulted from a two-year process of public deliberations and hearings; upon release of that report, a House subcommittee held three days of public hearings with witnesses from a wide range of fields from the biomedical and social sciences to theology, philosophy, and law. In December 1984, the Office of Technology Assessment released a background paper, Human Gene Therapy, which concluded:

> Civic, religious, scientific, and medical groups have all accepted, in principle, the appropriateness of gene therapy of somatic cells in humans for specific genetic diseases. Somatic cell gene therapy is seen as an extension of present methods of therapy that might be preferably to other technologies.

In light of this, the RAC is prepared to consider proposals for somatic cell gene therapy.

(9) The RAC and its Subcommittee are also prepared to consider for approval proposals involving the transfer of recombinant DNA into human subjects, provided that the design of such experiments offers adequate assurance that their consequences will not go beyond their purpose, which is the same as the traditional purpose of all clinical investigations, namely, to benefit the health and well-being of the individual being treated while at the same time gathering generalizable knowledge.

(10) Two possible undesirable consequences of the transfer of recombinant DNA would be unintentional: (1) Vertical transmission of genetic changes from an individual to his or her offspring or (2) horizontal transmission of viral infection to other persons with whom the individual comes in contact. Accordingly, this document requests information that will enable the RAC and its Subcommittee to assess the likelihood that the proposed experiments will inadvertently affect

reproductive cells or lead to infection of other people (e.g., treatment personnel or relatives).

(11) In recognition of the social concern that surrounds the general discussion of recombinant DNA, the Subcommittee will continue to consider the possible long-range effects of applying knowledge gained from these and related experiments. While research in molecular biology could lead to the development of techniques for germ line intervention or for the use of genetic means to enhance human capabilities rather than to correct defects in patients, the Subcommittee does not believe that these effects will follow immediately or inevitably from experiments with somatic cell gene therapy. The Subcommittee will cooperate with other groups in assessing the possible long-term consequences of the transfer of recombinant DNA and related laboratory and animal experiments in order to define appropriate human applications of this emerging technology.

(12) Responses to the questions raised in these "Points to Consider" should be provided in the form of either written answers or references to specific sections of the protocol or its appendices.

(13) Investigators should indicate points which are not applicable with a brief explanation. Investigators submitting proposals that employ essentially the same vector systems (or with minor variations), and/or that are based on the same preclinical testing as proposals previously reviewed by the RAC, may refer to preceding documents without having to rewrite material already reviewed by the Human Gene Therapy Subcommittee and the RAC.

I. Description of Proposal

A. Objectives and rationale of the proposed research

State concisely the overall objectives and rationale of the proposed study. Please provide information on the following specific points:

1. *Use of recombinant DNA for therapeutic purposes.* For research in which recombinant DNA is transferred in order to treat a disease or disorder (e.g., genetic diseases, cancer, metabolic diseases, etc . . .), the following questions should be addressed:

a. Why is the disease selected for treatment by means of gene therapy a good candidate for such treatment?

b. Describe the natural history and range of expression of the disease selected for treatment. What objective and/or quantitative measures of disease activity are available? In your view, are the usual effects of the disease predictable enough to allow for meaningful assessment of the results of gene therapy?

c. Is the protocol designed to prevent all manifestations of the disease, to halt the progression of the disease after symptoms have begun to appear, or to reverse manifestations of the disease in seriously ill victims?

d. What alternative therapies exist? In what groups of patients are these therapies effective? What are their relative advantages and disadvantages as compared with the proposed gene therapy?

2. *DNA Transfer for Other Purposes.* a. Into what cells will the recombinant DNA be transferred? Why is the transfer of recombinant DNA necessary for the proposed research? What questions can be answered by using recombinant DNA?

b. What alternative methodologies exist? What are their relative advantages and disadvantages as compared to the use of recombinant DNA?

B. Research Design, Anticipated Risks and Benefits

1. *Structure and characteristics of the biological system.* Provide a full description of the methods and reagents to be employed for gene delivery and the rationale for their use. The following are specific points to be addressed:

a. What is the structure of the cloned DNA that will be used?

(1) Describe the gene (genomic or cDNA), the bacterial plasmid or phage vector, and the delivery vector (if any). Provide complete nucleotide sequence analysis or a detailed restriction enzyme map of the total construct.

(2) What regulatory elements does the construct contain (e.g., promoters, enhancers, polyadenylation sites, replication origins, etc.)?

(3) Describe the steps used to derive the DNA construct.

b. What is the structure of the material that will be administered to the patient?

(1) Describe the preparation, structure, and composition of the materials that will be given to the patient or used to treat the patient's cells.

(a) If DNA, what is the purity (both in terms of being a single DNA species and in terms of other contaminants)? What tests have been used and what is the sensitivity of the tests?

(b) If a virus, how is it prepared from the DNA construct? In what cell is the virus grown (any special features)? What medium and serum are used? How is the virus purified? What is its structure and purity? What steps are being taken (and assays used with their sensitivity) to detect and eliminate any contaminating materials (for example, V130 RNA, other nucleic acids, or proteins) or contaminating viruses or other organisms in the cells or serum used for preparation of the virus stock?

(c) If co-cultivation is employed, what kinds of cells are being used for co-cultivation? What steps are being taken (and assays used with their sensitivity) to detect and eliminate any contaminating materials? Specifically, what tests are being done to assess the material to be returned to the patient for the presence of live or killed donor cells or other non-vector materials (for example, V130 sequences) originating from those cells?

(d) If methods other than those covered by (a)–(c) are used to introduce new genetic information into target cells, what steps are being taken to detect and eliminate any contaminating materials? What are possible sources of contamination? What is the sensitivity of tests used to monitor contamination?

(2) Describe any other material to be used in preparation of the material to be administered to the patient. For example, if a viral vector is proposed, what is the nature of the helper virus or cell line? If carrier particles are to be used, what is the nature of these?

2. *Preclinical studies, including risk-assessment studies.* Describe and justify the experimental basis (derived from tests in cultured cells and animals) for claims about the efficacy and safety of the proposed system for gene delivery and explain why the model(s) chosen is (are) the most appropriate.

a. Laboratory studies of the delivery system. (1) What cells are the intended recipients of recombinant DNA? If recipient cells are to be treated in vitro and returned to the patient, how will the cells be characterized before and after treatment? What is the theoretical and practical basis for assuming that only the treated cells will act as recipients?

(2) Is the delivery system efficient? What percentage of the target cells contain the added DNA?

(3) How is the structure of the added DNA sequences monitored and what is the sensitivity of the analysis? Is the added DNA extrachromosomal or integrated? Is the added DNA unrearranged?

(4) How many copies are present per cell? How stable is the added DNA both in terms of its continued presence and its structural stability?

b. Laboratory studies of gene expression. Is the added gene expressed? To what extent is expression only from the desired gene (and not from

the surrounding DNA)? To what extent does the insertion modify the expression of other genes? In what percentage of cells does expression from the added DNA occur? Is the product biologically active? What percentage of normal activity results from the inserted gene? Is the gene expressed in cells other than the target cells? If so, to what extent?

c. Laboratory studies pertaining to the safety of the delivery/expression system. (1) If a retroviral system is used:

(a) What cell types have been infected with the retroviral vector preparation? Which cells, if any, produce infectious particles?

(b) How stable are the retroviral vector and the resulting provirus against loss, rearrangement, recombination, or mutation? What information is available on how much rearrangement or recombination with endogenous or other viral sequences is likely to occur in the patient's cells? What steps have been taken in designing the vector to minimize instability or variation? What laboratory studies have been performed to check for stability, and what is the sensitivity of the analyses?

(c) What laboratory evidence is available concerning potential harmful effects of the transfer, e.g., development of neoplasia, harmful mutations, regeneration of infectious particles, or immune responses? What steps have been taken in designing the vector to minimize pathogenicity? What laboratory studies have been performed to check for pathogenicity, and what is the sensitivity of the analyses?

(d) Is there evidence from animal studies that vector DNA has entered untreated cells, particularly germ line cells? What is the sensitivity of the analyses?

(e) Has a protocol similar to the one proposed for a clinical trial been carried out in non-human primates and/or other animals? What were the results? Specifically, is there any evidence that the retroviral vector has recombined with any endogenous or other viral sequences in the animals?

(2) If a non-retroviral delivery system is used: What animal studies have been done to determine if there are pathological or other undesirable consequences of the protocol (including insertion of DNA into cells other than those treated, particularly germ line cells)? How long have the animals been studied after treatment? What tests have been used and what is their sensitivity?

3. *Clinical procedures, including patient monitoring.* Describe the treatment that will be administered to patients and the diagnostic methods that will be used to monitor the success or failure of the treatment. If previous clinical studies using similar methods have been performed by yourself or others, indicate their relevance to the proposed study.

a. Will cells (e.g., bone marrow cells) be removed from patients and treated in vitro? If so, what kinds of cells will be removed from the patients, how many, how often, and at what intervals?

b. Will patients be treated to eliminate or reduce the number of cells containing malfunctioning genes (e.g., through radiation or chemotherapy)?

c. What treated cells (or vector/DNA combination) will be given to patients? How will the treated cells be administered? What volume of cells will be used? will there be single or multiple treatments? If so, over what period of time?

d. What are the clinical endpoints of the study? Are there objective and quantitative measurements to assess the natural history of the disease? Will such measurements be used in following patients? How will patients be monitored to assess specific effects of the treatment on the disease? What is the sensitivity of the anlayses? How frequently will follow-up studies be done? How long will patient follow-up continue?

e. What are the major beneficial and adverse effects of treatment that you anticipate? What measures will be taken in an attempt to control or reverse these adverse effects if they occur? Compare the probability and magnitude of potential adverse effects on patients with the probability and magnitude of deleterious consequences from the disease if recombinant DNA is not used.

f. If a treated patient dies, what special post mortem studies will be performed?

4. *Public health considerations.* Describe any potential benefits and hazards of the proposed therapy to persons other than the patients being treated. Specifically:

a. On what basis are potential public health benefits or hazards postulated?

b. Is there a significant possibility that the added DNA will spread from the patient to other persons or to the environment?

c. What precautions will be taken against such spread (e.g., to patients sharing a room, health-care workers, or family members)?

d. What measures will be undertaken to mitigate the risks, if any, to public health?

5. *Qualifications of investigators, adequacy of laboratory and clinical facilities.* Indicate the relevant training and experience of the personnel who will be involved in the preclinical studies and clinical administration of recombinant DNA. In addition, please describe the laboratory and clinical facilities where the proposed study will be performed.

a. What professional personnel (medical and nonmedical) will be involved in the proposed study? What are their specific qualifications and experience with respect to the disease to be treated or the techniques employed in molecular biology? Please provide curricula vitae (see Section III–E).

b. At what hospital or clinic will the treatment be given? Which facilities of the hospital or clinic will be especially important for the proposed study? Will patients occupy regular hospital beds or clinical research center beds? Where will patients reside during the follow-up period? What special arrangements will be made for the comfort and consideration of the patients?

C. Selection of Patients

Estimate the number of patients to be involved in the proposed study. Describe recruitment procedures and patient eligibility requirements, paying particular attention to whether these procedures and requirements are fair and equitable.

1. How many patients do you plan to involve in the proposed study?

2. How many eligible patients do you anticipate being able to identify each year?

3. What recruitment procedures do you plan to use?

4. What selection criteria do you plan to employ? What are the exclusion and inclusion criteria for the study?

5. How will patients be selected if it is not possible to include all who desire to participate?

D. Informed consent

Indicate how patients will be informed about the proposed study and how their consent will be solicited. The consent procedure should adhere to the requirements of DHHS regulations for the protection of human subjects (45 Code of Federal Regulations, Part 46). If the study involves pediatric or mentally handicapped patients, describe procedures for seeking the permission of parents or guardians and, where applicable, the assent of each patient. Areas of special concern highlighted below include potential adverse effects, financial costs, privacy, long-term follow-up, and post mortem examination.

1. How will the major points covered in Sections I–A through I–C of this document be disclosed to potential participants in this study and/or parents

or guardians in language that is understandable to them?

2. How will the innovative character and the theoretically possible adverse effects of the experiment be discussed with patients and/or parents or guardians? How will the potential adverse effects be compared with the consequences of the disease? What will be said to convey that some of these adverse effects, if they occur, could be irreversible?

3. What explanation of the financial costs of the experiment and any available alternatives will be provided to patients and/or parents or guardians?

4. How will patients and/or their parents or guardians be informed that the innovative character of the experiment may lead to great interest by the media in the research and in treated patients?

5. How will patients and/or their parents or guardians be informed:

a. About the irreversible consequences of some of the procedures performed?

b. That there may be adverse medical consequences of withdrawal from the study once it has begun?

c. About a willingness to cooperate in long-term follow-up will be expected?

d. That a willingness to permit an autopsy to be performed in the event of a patient's death following transfer is also a precondition for a patient's participation in the study? (This stipulation is included because an accurate determination of the precise cause of a patient's death would be of vital importance to all future patients.)

E. Privacy and confidentiality

Indicate what measures will be taken to protect the privacy of patients and their families as well as to maintain the confidentiality of research data.

1. What provisions will be made to honor the wishes of individual patients (and the parents or guardians of pediatric or mentally handicapped patients) as to whether, when, or how the identity of patients is publicly disclosed?

2. What provision will be made to maintain the confidentiality of research data, at least in cases where data could be linked to individual patients?

II. Special Issues

Although the following issues are beyond the normal purview of local IRBs, the RAC and its Subcommittee request that investigators respond to questions A and B below.

A. What steps will be taken, consistent with point I–E above, to ensure that accurate information is made available to the public with respect to such public concerns as may arise from the proposed study?

B. Do you or your funding sources intend to protect under patent or trade secret laws either the products or the procedures developed in the proposed study? If so, what steps will be taken to permit as full communication as possible among investigators and clinicians concerning research methods and results?

III. Requested Documentation

In addition to responses to the questions raised in these "Points to Consider," please submit the following materials:

A. Your protocol as approved by your local IRB and IBC.

B. Results of local IRB and IBC deliberations and recommendations that pertain to your protocol.

C. A one-page scientific abstract of the protocol.

D. A one-page description of the proposed experiment in nontechnical language.

E. Curricula vitae for professional personnel.

F. An indication of other federal agencies to which the protocol is being submitted for review.

G. Any other material which you believe will aid in the review.

IV. Reporting Requirements

A. Serious adverse effects of treatment should be reported immediately to both the local IRB and the NIH Office for Protection from Research Risks, and a written report should be filed with both groups. A copy of the report should also be forwarded to the NIH Office of Recombinant DNA Activities (ORDA).

B. Reports regarding the general progress of patients should be filed with both your local IRB and ORDA within 6 months of the commencement of the experiment and at six-month intervals thereafter. These twice-yearly reports should continue for a sufficient period of time to allow observation of all major effects. In the event of a patient's death, a summary of the special post mortem studies and statement of the cause of death should be submitted to the IRB and ORDA, if available.

Footnotes:

1. The Food and Drug Administration (FDA) has jurisdiction over drug products intended for use in clinical trials of human somatic cell gene therapy. For general information on FDA's policies and regulatory requirements, please see the **Federal Register**, Volume 51, pages 23309–23313, 1986.

2. The term "patient" and its variants are used in the text as a shorthand designation for "patient-subject."

OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements" (45 FR 39592) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers not only virtually every NIH program but also essentially every Federal research program in which DNA recombinant molecule techniques could be used, it has been determined to be not cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

Dated: June 15, 1989.

Jay Moskowitz,

Associate Director for Science Policy and Legislation.

[FR Doc. 89–14852 Filed 6–22–89; 8:45 am]

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Federal Register

Friday
June 23, 1989

Part VI

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Northern Spotted Owl; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB32

Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Northern Spotted Owl

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) proposes to determine the northern spotted owl (*Strix occidentialis caurina*) as a threatened species pursuant to the Endangered Species Act (Act) of 1973, as amended. The present range of the subspecies is from southwestern British Columbia through western Washington, western Oregon, and the coast range area of northwestern California south to San Francisco Bay. The northern spotted owl is threatened throughout its range by the loss and adverse modification of old-growth and mature forest habitat primarily from commercial timber harvesting. This proposed rule, if made final, will extend the Act's protection to the northern spotted owl. The Service seeks data and comments from the public on this proposed rule.

DATES: Comments from all interested parties must be received by September 21, 1989. The Act requires the Service to promptly hold one public hearing on the proposed listing regulation should a person file a request for such a hearing by August 7, 1989 (section 4(b)(5)(E); 16 U.S.C 1533(b)(5)(E)). Because of anticipated widespread public interest, the Service has decided to hold four public hearings. See **"SUPPLEMENTARY INFORMATION"** for dates of hearings.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Regional Director (Attn: Listing Coordinator), U.S. Fish and Wildlife Service, 1002 NE Holladay Street, Portland, Oregon 97232. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address. See **"SUPPLEMENTARY INFORMATION"** for location of hearings.

FOR FURTHER INFORMATION CONTACT: Mr. Robert P. Smith, Assistant Regional Director for Fish and Wildlife Enhancement at the above address (503/231-6150 or FTS 429-6150.

SUPLEMENTARY INFORMATION:

Hearing Information

August 14, 1989—Columbia River Red Lion Inn, Riverview Room, 1401 N. Hayden Island Drive, Portland, Oregon 97217.

August 17, 1989—Redding Convention Center, 700 Auditorium Drive, Redding, California 96001.

August 21, 1989—Washington Center for the Performing Arts, 512 South Washington Street, Olympia, Washington 98501.

August 28, 1989—Lane County Convention Center Auditorium, 796 West 13th Street, Eugene, Oregon 97402.

A public hearing will be conducted at each of these locations from 1:00 to 4:30 p.m., and from 6:00 to 9:00 p.m. Oral statements may be limited to 5 or 10 minutes, if the number of parties present desiring to give such statements necessitates some limitation. There are no limits to the lengths of any written statement presented at a hearing or mailed to the Service. Oral comments presented at the public hearings are given the same weight and consideration as are comments submitted in written form. Should the public hearings scheduled be insufficient to provide all individuals with an opportunity to speak, anyone not accommodated will be requested to submit their comments in writing.

Background

The spotted owl (*Strix occidentalis*), consisting of three subspecies (northern, California, and Mexican), is a medium-sized owl with dark eyes, dark-to-chestnut brown coloring, with whitish spots on the head and neck and white mottling on the abdomen and breast. The first record of the spotted owl was made in 1858 in the west end of the Tehachapi Mountains in southern California (Xantus 1859). It was first observed in the Pacific Northwest in 1892 (Bent 1938). Though observed only occasionally prior to the 1970's, northern spotted owls since that time have been found to be more common in certain types of forested habitat throughout its range (USDA 1986).

Although a secretive and mostly nocturnal bird, the northern spotted owl is apparently unafraid of humans (Bent 1938, Forsman *et al.* 1984, USDA 1986). The spotted owl is site-tenacious and maintains a territory year-round: however, in some cases, individuals may migrate seasonally on a local basis, changing their home range size or location between the summer and winter. Monogamous and long-lived, spotted owls tend to mate for life, although it is not known if pair-bonding or site-tenacity is the determining factor. The adult female is slightly larger than the male.

Spotted owls are perch-and-dive predators and over 50 percent of their prey items are arboreal or semiarboreal species. Spotted owls subsist on a variety of mammals, birds, reptiles, and insects, with small mammals such as flying squirrels (*Glaucomys sabrinus*), red tree voles (*Arborimus longicaudus*) and dusky-footed woodrats (*Neotoma fuscipes*) making up the bulk of the food items throughout the species' range (Solis and Gutierrez 1982, Forsman *et al.* 1984, Barrows 1985).

Three subspecies of the spotted owl currently are recognized by the American Ornithologists' Union (1957): the northern spotted owl (*Strix occidentalis caurina*), the California spotted owl (*S. o. occidentalis*), and the Mexican spotted owl (*S. o. lucida*). Northern spotted owls are distinguished from the other subspecies by their darker brown color and smaller white spots and markings (Merriam 1898, Nelson 1903, Bent 1938). Juvenile plumage is similar to adult plumage except for ragged white downy tips on the tail feathers of the juvenile. Oberholser (1915) reported that there was considerable overlap in color of plumage between the northern and California spotted owl subspecies in California. The geographical separation between these two subspecies presumably occurs within a 12-to-15-mile gap of forested habitat between southeastern Shasta and northwestern Lassen National Forests, where the Sierra Nevada contacts the Klamath physiographic province; the Pit River is generally accepted as the boundary between the two California subspecies (USDA 1986; G. Gould, California Dept. of Fish and Game, Sacramento, CA, pers. comm.).

Barrowclough (1987) examined available museum specimens of all three spotted owl subspecies to investigate geographical variation within and between these taxa. In his unpublished findings, he reported clinal variation over the range of the northern and California subspecies and questioned the validity of considering these two taxa as distinct subspecies. It should be noted that Barrowclough's (1987) draft manuscript has yet to be accepted and published, and that the Service generally relies on the latest published information in peer-reviewed ornithological journals to establish taxonomic affinities. Although the geographical separation between the northern and California subspecies is within the dispersal capabilities of the

owl (E.C. Meslow, U.S. Fish and Wildlife Service Coop. Unit, Oregon State Univ., Corvallis, OR, pers. comm.), there are no data available to determine whether genetic exchange occurs between the two subspecies in California.

Spotted owls usually do not nest every year nor are nesting pairs successful every year. Early nesting behavior begins in February to March with nesting occurring March to June. The average clutch size is 2 eggs, with a range of 1 to 4. A 1:1 sex ratio of adult males to adult females is assumed from known data. Fledging occurs from mid-May to late June, with parental care continuing into September. Females are capable of breeding as 2-year-olds, but most probably do not breed until they are at least 3 years of age (Barrows 1985, Miller and 1985b, Franklin *et al.* 1986). A few subadult males have been observed paired with adult females (Wagner and Meslow 1986, Miller and Meslow 1985b). Males do most of the foraging during incubation and assist with foraging during the fledging period.

Reproduction by spotted owls has fluctuated dramatically from year to year in some areas (Forsman *et al.* 1984, Barrows 1985, USDA 1986, Allen *et al.* 1987). In some years most pairs may breed, whereas in other years very few pairs even attempt to nest. Gutierrez *et al.* (1984) noted a broad failure in reproduction from northern California through Washington in 1982. It has been suggested that fluctuations in reproduction and numbers of pairs breeding may be related to fluctuations in prey availability (Forsman *et al.* 1984, Barrows 1985, Gutierrez 1985). Both the proportion of pairs occupying territories that attempt to breed and the proportion of pairs attempting to breed that are successful (i.e., fledge young) vary from year to year (Franklin *et al.* 1987; Forsman *et al.* 1984; Meslow *et al.* 1986; The Washington Department of Wildlife 1987; Miller and Meslow 1985b; Gutierrez *et al.* 1984; G.S. Miller, pers. comm.). Average reproductive rates for Oregon and California (Marcot 1986) range from 0.49 to 0.67 juveniles per pair (Franklin *et al.* 1987; Marcot and Holthausen 1987; Forsman *et al.* 1984; Gutierrez *et al.* 1985a; Barrowclough and Coats 1985).

Mortality rates of juveniles are significantly higher than adult rates (Forsman *et al.* 1984, Miller and Meslow 1985a and 1986b, Gutierrez *et al.* 1985a and b). Recent studies of juvenile dispersal in Oregon and California indicate that few of the juvenile spotted owls survived to reproduce (Gutierrez *et al.* 1985a and b, Miller and Meslow 1985a and b, 1986b). These research studies all report very high mortality during predispersal and the first months of dispersal. In one study, out of 48 juveniles radiotracked during a 3-year study, only 3 were known to be alive after 1 year (the fate of 6 was unknown because transmitter signals were lost) (Meslow and Miller 1986b). Twelve of 23 juveniles in a 2-year study in California died during the dispersal period; the fate of the other 11 was unknown (Gutierrez *et al.* 1985b). It is not known whether the use of radio transmitters attached to juveniles for tracking purposes contribute to juvenile mortality (Irwin 1987; Dawson *et al.* 1986); researchers using this technique believe it should not measurably influence juvenile survival if done properly (Meslow, pers. comm.).

Using the data for the few years available, Marcot and Holthausen (1987) estimated that about 60 percent of juveniles live until they disperse from their nesting areas, but only about 18 percent of those fledged survive for 1 year. Miller and Meslow's (1986a) 4-year study in Oregon estimated first year post-dispersal survival at 19 percent. Gutierrez *et al.* (1985b) estimated a maximum of 50 percent survival in California based on 2 years of data, while Marcot (1986) estimated overall survival of juvenile owls from hatching through the first year of life at 11 to 12 percent.

The current range of the northern spotted owl is from southwestern British Columbia, western Washington, western Oregon, and northern California south to San Francisco Bay. The southeastern boundary of its range, separating this subspecies from the California spotted owl, is the Pit River area of Shasta County, California. Populations are not evenly distributed throughout its present range. The majority of individuals is found in the Cascades of Oregon and the Klamath Mountains in southwestern Oregon and northwestern California (USDA 1988; Gould, pers. comm.; USDI 1989). This area represents the core of the present range of this subspecies. Evidently, northern spotted owls reach their highest population densities and have their best reproductive success in suitable habitat in this part of their range (Franklin and Gutierrez 1988; Franklin *et al.* 1989; Miller and Meslow 1988; USDI 1987, 1989; Robertson 1989). Habitat in southwestern Oregon begins to change south of Roseburg to a drier Douglas-fir/mixed conifer habitat with a corresponding change in prey base (from flying squirrels to woodrats) (Meslow, pers. comm.). In addition, historical logging practices in the mixed conifer zone consisted of more selective timber harvesting than in other areas, leaving remnant stands of old growth or stands of varying ages with old-growth characteristics; this situation is also present along the east side of the Cascades in Washington.

Northern Washington and southern British Columbia represent the northern extent of the range of the northern subspecies; population densities and numbers are lowest in these areas. Very few pairs have been located in British Columbia; all have been located near the United States border. Few owls (pairs or singles) are presently found in the Coast Ranges in southwestern Washington or in the northwestern Oregon Coast Ranges (north from the southern portion of the Siuslaw National Forest). The population also decreases in size and density toward its southern extreme along the coast range in Marin, Napa, and Sonoma Counties, California. Little data on numbers and distribution on private, State, or tribal lands in these areas are available, although the spotted owl may have been nearly extirpated from much of these lands due to reduction of old-growth habitat (Forsman 1986; E. Forsman, USDA Forest Service, Pacific NW Research Station, Olympia, WA, pers. comm.; Gould, pers. comm.).

The northern spotted owl is known from most of the major types of coniferous forests in the Pacific Northwest (Forsman *et al.* 1977, 1984; Forsman and Meslow 1985; Gould 1974, 1975, 1979; Garcia 1979; Marcot and Gardetto 1980; Solis 1983; Sisco and Gutierrez 1984; Gutierrez *et al.* 1984). The historical range of the northern spotted owl extended throughout the coniferous forest region from southwestern British Columbia south through western Washington, western Oregon, and the Coast Ranges of California to San Francisco Bay (USDA 1986). The current range and distribution of the northern subspecies is similar to the historical range where forested habitat still exists. The owl has been extirpated or is uncommon in certain areas as the result of decline or modification of old-growth and mature habitat and thus its distribution is now discontinuous over its range (Dawson *et al.* 1986, Forsman 1986).

In California, northern spotted owls most commonly use the Douglas-fir (*Pseudotsuga menziesii*) and mixed conifer forest types (Marcot and Gardetto 1980, Solis 1983, and Gutierrez 1985). Gould (1974) reported finding spotted owls in northwestern California in coast redwood (*Sequoia sempervirens*), Douglas-fir and Bishop pine (*Pinus muricata*) forests, and also

in stands dominated by ponderosa pine (*Pinus ponderosa*). In Washington's coastal forest, the spotted owl is found in forests dominated by Douglas-fir and western hemlock (*Tsuga heterophylla*). At higher elevations in western Washington, Pacific silver fir (*Abies amabilis*) is commonly used by owls whereas on the east side of the Cascades Douglas-fir and grand fir (*Abies grandis*) are used (Postovit 1977). Availability of forest types within a region may be responsible for the observed differences in use among types (Gutierrez 1985; Meslow *et al.* 1986). Gould (pers. comm.) observed that preferred habitat particularly in California is not continuous, but occurs naturally in a mosaic pattern, especially in the southern portions of the State.

Spotted owls have been observed over a wide range of elevations, although they seem to avoid higher elevation, subalpine forests (USDA 1986). Garcia (1979) reports that spotted owl densities in Washington were greatest below 4,100 feet elevation. Postovit (1977) found owls on the Olympic Peninsula at elevations ranging from 70 to 3,200 feet and an elevation range of 1,600 to 4,200 feet in the Cascade Mountains of Washington. On the east side of Washington's Cascades, J. Casson (USDA Forest Service, Wenatchee N.F., WA, pers. comm.) found owls up to 5,000 feet elevation and almost always in association with Douglas-fir. Northern spotted owls have been observed occasionally at elevations up to 6,000 feet or more in California (Gould, pers. comm.).

Preferred forest habitat used by spotted owls is generally characterized by the presence of a multi-layered stand structure, dense tree canopy closure, and large trees with cavities or broken tops. These are characteristics that generally typify old-growth forests, although some old-growth characteristics preferred by spotted owls may appear in mature forests. Old-growth stands tend to have a high degree of decadence with abundant standing and down dead trees, and supporting a high density of prey species (Forsman 1976, 1980; Gould 1977; Postovit 1977; Barrows and Barrows 1978; Garcia 1979; USDA 1986; Barrows 1981; Solis and Gutierrez 1982; Forsman *et al.* 1984; Gutierrez *et al.* 1984; Carey 1985; Ruediger 1985).

Northern spotted owl preferences for old-growth forests and forests with old-growth characteristics have been established using different types of information, including relative abundance, proportion of occupied sites containing old growth, and allocation of time. For the coniferous forest within the range of the northern spotted owl, young or second-growth forest is generally defined as less than 100 years of age, mature forest as stands from 100 to 200 years old, and old growth as forest more than 200 years old. Forsman *et al.* (1977) computed the relative abundance of spotted owls in Oregon, and found that densities of spotted owl pairs were 12 times higher in old growth than in young-growth forests. Of 1,502 observations of owls, Forsman *et al.* (1987) found that 1,282 were in old growth, 22 in mature forest, 131 in old-growth/mature forest, and 67 in stands less than 100 years of age, demonstrating an overwhelming preference for old growth (USDI 1989). Pairs were evident at 928 of these 1,502 sites. Other studies by Forsman *et al.* (1984, 1987) analyzed the habitat characteristics of spotted owl sites in Oregon and observed that more than 90 percent of sites occupied by owls contained a major component of old-growth forest. Similar studies conducted by Marcot and Gardetto (1980) in northern California found that 95 percent of spotted owl sites were in old-growth stands. Ninety-seven percent of the spotted owl population in Washington was found in old-growth/mature forest; there were no known reproductive pairs in managed second-growth forest (Allen 1988). Many apparently suitable sites are not occupied every year. Marcot and Holthausen (1987) compared percent occurrence of occupancy to amount of area in old growth at each site. The results of their analysis showed probability of use is positively correlated with the percent of area containing old-growth forest types.

Forsman *et al.* (1984) analyzed home range data for eight radio-equipped adult spotted owls in the H.J. Andrews Study Area on the west slope of the Cascade Range. Home range is defined as an area within which the activities of an animal are confined. Whereas the percent of old-growth conifer forest in their home ranges varied from 33 to 66 percent, the percent of time spent foraging in old growth by the eight owls ranged from 85 to 99 percent, demonstrating a non-random use and pronounced preference for old growth. All eight owls foraged in old-growth conifer forest significantly more than expected based upon availability of that habitat relative to other habitat types in the study area. Use of 5- to 60-year-old stands was significantly less than expected except in the case of a single bird whose use of a small portion of 31- to 60-year-old forest within its range was in direct proportion to availability. Recent clearcuts or burned areas were rarely used (Forsman *et al.* 1984). Similar trends have been noted for northern spotted owls in the Coast Range of Oregon (Forsman *et al.* 1984; Reid *et al.* 1987), and the Klamath and Cascade Mountains (Meslow *et al.* 1986).

In addition, this preference for old growth has been evident from observations of roosting owls as well as during the dispersal period by juveniles. In analyzing dispersal patterns by juvenile owls, Miller (1989) found that the 18 radio-equipped individuals he studied used a variety of habitats. However, 12 of the 18 birds selected old-growth/mature forests significantly more than expected based on availability. Forsman *et al.* (1984) reported that 97.6 percent of 1,098 adult spotted owl roost sites in the central Oregon Cascades were in old-growth forest; 91 percent of 555 roost sites on BLM Coast Ranges forests were in old growth.

Although the literature strongly supports the generalization that owls preferentially select old-growth forests over young growth (USDI 1989), there are records of owls using young-growth forests. These data on young-growth forests have led to questions on the importance of old-growth habitat to spotted owl populations (e.g., Irwin 1987). In addition to the studies noted earlier (Irwin *et al.* 1989a), Irwin *et al.* (1989b) examined the immediate vicinity surrounding and including 29 nest sites on the Wenatchee and Okanogan National Forests in the Washington Cascades. Each of these nests apparently had successfully fledged at least one young in 1987 and/or 1988. The authors noted that while characteristics of many of these sites did not completely coincide with the general description of old growth, most of the sites retained dense, multi-layered canopies; no estimate was made of the amount of old growth within the home ranges of the owls whose nest sites were included in the analysis. As noted earlier, the presence of a dense, multi-layered canopy is an important structural characteristic typical of old-growth forests. Surveys in the northern third of the Oregon Coast Ranges (Forsman 1986) and in southwestern Washington (Irwin *et al.* 1989a) revealed a low density of spotted owls within this portion of their range and a paucity of old-growth habitat in this area, suggesting that this type of habitat (i.e., 40- to 120-year-old managed forest or predominantly young-growth forest) is

not preferred or suitable habitat for northern spotted owls.

Northern spotted owls have relatively large home ranges. Researchers, using radiotelemetry techniques, have recorded home range sizes used by adult spotted owls ranging from approximately 300 acres to more than 19,000 acres (Solis 1983; Forsman *et al.* 1984; Sisco and Gutierrez 1984; Allen and Brewer 1985; Forsman and Meslow 1985; Brewer 1985; Forsman 1986; Meslow *et al.* 1986; Allen *et al.* 1987; Reid *et al.* 1987; N. Tilghman, USDA Forest Service, Redwoods Sciences Research Station, Arcata, CA, pers. comm.). In a sample of 14 pairs of northern spotted owls in the Coast Ranges of Oregon, A. Carey (USDA Forest Service, Pacific NW Research Station, Olympia, WA, pers. comm.) calculated mean home range size to be 5,425 acres of which 2,549 acres were old growth. Estimated mean home range size for northern spotted owl pairs ranges from 1,700 acres in northwestern California to about 12,500 acres on the Olympic Peninsula (USDI 1987, 1989). The estimated mean home range size and amount of included preferred habitat is smaller for a single bird than for a pair in those areas studied (USDA 1988). In general, home range sizes are smallest during the spring and summer (reproductive period), largest during the fall and winter (non-reproductive), increase from south to north, and increase with increasing elevation. Pairs of owls may also occupy overlapping home ranges (Forsman *et al.* 1984; Solis 1983).

Significantly, research indicates that spotted owls on the Olympic Peninsula and Oregon Coast Ranges consistently occupy larger home ranges than owls in the other provinces. These areas also have the fewest pairs of spotted owls and the least remaining old-growth forest (USDA 1989). The large home range sizes reported for owl pairs on the Olympic Peninsula, Oregon Coast Ranges, and on the west side of the Cascade Range in Washington (USDI 1989) may reflect: (1) The adverse influence of forest fragmentation resulting from timber harvest; and (2) the fact that the Washington locations are near the periphery of the subspecies' range. Forests within these provinces are highly fragmented and have the least amount of old-growth forest remaining within the range of the owl. For example, on the Siuslaw National Forest, located within the Coast Ranges of Oregon, remaining old-growth timber occurs in widely separated and relatively small parcels (Harris 1984). In this area, the owls utilize the available old growth in a highly fragmented and patchy environment (Friesen and Meslow 1988). This pattern is probably true for the Olympic Peninsula as well. The above findings and those of Allen and Brewer (1985), Forsman *et al.* (1984), Carey (1985), and Dawson *et al.* (1986), suggest that home range size increases as quality and quantity per unit area of preferred habitat declines (USDI 1989).

There are no estimates of the historical population size and distribution of the northern spotted owl within preferred habitat, although spotted owls are believed to have inhabited most old-growth forests throughout the Pacific Northwest prior to modern settlement (mid-1800s), including northwestern California (USDI 1989). Spotted owls are still found within their historical range in most areas where preferred and suitable habitat exist, although most of the owls are restricted within this range to mature and old-growth forests managed by the Federal government. Over 90 percent of the known number of spotted owls have been located on federally managed lands (Forsman *et al.* 1987; USDA 1988; USDI 1989; Gould, pers. comm.). Little information is available on numbers and distribution of owls on private, State, or tribal lands in these areas, although the spotted owl may be nearly extirpated from much of these lands due to reduction of old-growth habitat (Forsman 1986; Forsman, pers. comm.; Gould, pers. comm.).

Petition Process Background

On January 28, 1987, the Fish and Wildlife Service (Service) received a petition submitted by Greenworld requesting the listing of the northern spotted owl (*Strix occidentalis caurina*) as an endangered species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act). On July 23, 1987, the Service accepted the Greenworld petition as presenting substantial information indicating that listing might be warranted and initiated a status review.

On August 4, 1987, the Service received a second petition, submitted by the Sierra Club Legal Defense Fund, Inc. on behalf of 29 conservation organizations, requesting that the populations of northern spotted owls on the Olympic Peninsula in Washington and the Coast Ranges of Oregon be listed as endangered pursuant to the Act, and that the subspecies be listed as threatened throughout the remainder of its range in Washington, Oregon, and northern California. The Sierra Club Legal Defense Fund, Inc. requested that its petition be consolidated with the petition by Greenworld. In accordance with its established policy, the Service treated this second petition as a public comment to be considered in evaluating the original listing petition. As a result, the time frames and schedules required by the first petition remained the same. Both petitions sought the designation of critical habitat.

Section 4(b)(3) of the Act requires the Secretary of the Interior to reach a final decision on any petition accepted for review within 12 months of its receipt. In conducting its review, the Service published a notice in the **Federal Register** (52 FR 34396) on September 11, 1987, requesting public comments and biological data on the status of the northern spotted owl. In addition, a status review team of three Service biologists was established. This team reviewed and evaluated all comments and information received in response to the September 11 notice as well as all other information in the Service's files or gathered in the effort to review the status of the subspecies. Two sequential drafts of the status review were prepared by the Service team and submitted for review by scientists, researchers, and others knowledgeable about the spotted owl in the Pacific Northwest.

On December 14, 1987, the Service team completed its status review on the northern spotted owl. On December 17, 1987, the Service's Regional Director for Region 1 made a finding, based on the review, that listing the northern spotted owl pursuant to Section 4(b)(3)(B)(i) of the Act was not warranted at that time. The Regional Director noted that because of the need for population trend information and other biological data, high priority would be given to this subspecies for continued monitoring and further research. Notice of this finding was published in the **Federal Register** on December 23, 1987 (52 FR 48552).

On May 5, 1988, the Sierra Club Legal Defense Fund, Inc. filed suit on behalf of 23 environmental organizations in the U.S. District Court for the Western District of Washington (Northern Spotted Owl v. Hodel, No. C88–573Z, W.D., Wash. 1988) challenging the Service's finding on the listing petitions. In an order issued on November 17, 1988, the Court concluded that the Service's finding was arbitrary and capricious or contrary to law, and remanded the matter to the Service for further review. The Service was specifically ordered to: provide an analysis and explanation for its finding; explain the reasoning for not listing the owl as threatened; and to supplement its status review and petition finding.

On December 5, 1988, the Director of the Service established a new status review team, consisting of 12 Service biologists, to conduct an in-depth review and interpretation of all data and other information that had been made available to the Service in 1987 on the issue. After reviewing the 1987 administrative record, the Service concluded that there was considerable new information available that had not been present in the original record and that such information was needed to respond sufficiently to the Court's request and to meet the Act's requirement to evaluate the best available biological information. In an order issued on January 12, 1989, the Court granted the Service's request to reopen the administrative record for the status review and petition finding for a period not to extend beyond February 28, 1989. The Service published a notice in the **Federal Register** (54 FR 4049; January 27, 1989) reopening the status review and soliciting comments, data, and other information. In its order of January 12, the Court gave the Service until May 1, 1989, to complete the additional status review, supplement the status review report, and submit to the court a new analysis and finding on the petition to list the northern spotted owl as endangered or threatened. On April 21, 1989, the team completed the review and submitted a supplemental status review report to the Regional Director, Region 1, Fish and Wildlife Service. On April 25, 1989, the Regional Director issued a revised petition finding indicating that listing the northern spotted owl as a threatened species throughout its entire range is warranted and that the Service would pursue promptly the listing process for the species. This proposal constitutes the final revised finding for the petitioned action.

The entire spotted owl species (*Strix occidentalis*) is listed on the Service's Notice of Review for vertebrate wildlife as a candidate species for listing, category 2. A category 2 species is one for which listing may be appropriate but additional information is needed. The information submitted and reviewed as part of the status review process for the northern spotted owl contributed to the supplemental information needed on which to base a decision to propose this subspecies for listing.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations promulgated to implement the listing provisions of the Act (50 CFR Part 424) set forth the procedures for adding species to the Federal lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in Section 4(a)(1). These factors and their application to the northern spotted owl (*Strix occidentalis caurina*) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Western Oregon and Washington were covered by approximately 24 to 28 million acres of forest at the time of modern settlement (early to mid–1800's), of which about 70 percent (14 to 19 million acres) may have been old growth (Society of American Foresters Task Force 1983, Spies and Franklin 1988, Morrison 1988, Norse 1988). Historical estimates for northwestern California are not as precise, but suggest there were between 1.3 and 3.2 million acres of old-growth Douglas-fir/mixed conifer and about 2.2 million acres of old-growth coastal redwood (Society of American Foresters Task Force 1983, Laudenslayer 1985, Fox 1988, California Department of Forestry and Fire Protection 1988, Morrison 1988).

An estimated 70 to 80 percent reduction in old-growth forests has occurred since the time of modern settlement in Oregon and Washington (USDI 1989). Old-growth forests in the Douglas-fir/mixed conifer region of northwestern California may have undergone a similar reduction of about 45 to 80 percent since the mid-1800's (Laudenslayer 1985; Green 1985; Fox 1988; California Department of Forestry and Fire Protection 1988). Some recent estimates (Spies and Franklin 1988, Morrison 1988, Norse 1988) suggest that this reported decline in historical habitat, in fact, may have been as high as 83 to 88 percent. Habitat reduction has not been uniform throughout the range of the spotted owl, but has been concentrated at lower elevations and the Coast Ranges. Reduction of old growth is largely attributable to timber harvesting and land conversion practices, although natural perturbations, such as forest fires, have caused losses as well.

Current surveys and inventories have shown that while northern spotted owls are not found in all old-growth forests, nor exclusively in old-growth forests, they are overwhelmingly associated with forests of this age and structure (USDI 1989). Therefore, trends in amount and distribution of old-growth forests may be used as a reasonable indicator of trends in the abundance and distribution of spotted owl populations and habitat over time.

By examining the trends in old-growth forest reduction from the mid-1800's to the present, the Service has extrapolated the loss of old-growth and mature habitat to the middle of the next century (USDI 1989). Based on the assumption that current timber harvest management practices and rates will continue, most commercial old-growth and mature forests (those available for commercial logging) will have been logged and converted to younger stands by the year 2050. Since over 90 percent of presently known spotted owl occurrences and habitat are found on federally managed lands (Forsman *et al.* 1987), future estimates are based upon average annual logging rates and published trend estimates for federal lands only. Relatively speaking, little old growth presently exists on private, State, or tribal lands (Society of American Foresters Task Force 1983; Old-Growth Definition Task Group 1986; Morrison 1988; Spies and Franklin 1988; California Department of Forestry and Fire Protection 1988; Thomas *et al.* 1988; Greene 1988). In addition, current logging practices, such as clearcutting, even-aged management, and short logging rotations, preclude development of future old-growth conditions from existing young forest stands. These non-federal lands historically might have contained a significant amount of owl habitat and may still offer the opportunity to provide vital linkages between islands of federally managed habitat in many areas.

At the current rate of timber harvest, the existing old-growth and mature habitat of the northern spotted owl throughout its range is expected to decline by an additional 50 to 60 percent between 1989 and 2050, from an estimated 7 million acres currently to about 2.7 million acres (USDI 1989). This would represent a total decline of at least 80 to 85 percent from the amount of spotted owl habitat originally estimated for the western part of the Pacific Northwest, including northern California. The figures used to derive this estimate do not include any young-growth forest acreages that might develop old-growth characteristics or conditions during the next 60 years (USDI 1989); as noted earlier, however, conversion of younger habitat to old-growth condition is not expected to be significant unless current logging practices change (Beuter *et al.* 1976; Heinrichs 1983; Society of American Foresters Task Force 1983; Harris 1984; Spies and Franklin 1988). As a result of habitat fragmentation, reduction in individual stand size, and edge effects, it has been speculated that the amount of

biologically effective habitat presently available for the spotted owl (i.e., habitat patches of sufficient size to support reproductively successful owls) may actually be less than 50 percent of the total preferred habitat remaining today. This reduction in the quality of remaining forest habitat under present logging patterns will continue to the point where less than 10 percent of historical levels remains (Harris 1984; Harris *et al.* 1982; Morrison 1988, 1989; Norse 1988).

Under current management plans, the distribution of spotted owl habitat remaining by the year 2050 will closely coincide with National Parks, reserved areas on federally managed forests, or other lands that are not considered suitable or available for timber harvest for other reasons (e.g., lands too steep or rocky for timber production, lands needed for hydrologic protection, scenic areas, etc.). These areas will contribute to maintaining spotted owl populations only to the extent that they contain suitable habitat of adequate size and quality for the birds (USDI 1989). By then, most remaining preferred habitat will not longer be continuous, but will exist as islands of varying size, spacing, and suitability spread over the range of the subspecies. Many of the current wilderness areas and parks are largely high-elevation lands above timberline. Lands unsuited for timber production may have poor soil conditions or be too steep or rocky; such areas generally are not suitable habitat for spotted owls nor are they likely to effectively support successfully reproducing pairs of owls (Meslow, pers. comm.)

To achieve the primary objective of timber management in Oregon, Washington, and northern California of producing wood at a non-declining rate, forests must be intensively managed with average cutting rotations of 70 to 120 years (USDI 1984, USDA 1988). Current preferred timber harvest systems emphasize dispersed clearcut patches for even-age management as the pattern of harvest. Thus, public forest lands that are intensively managed for timber production are, in general, not allowed to develop "old-growth characteristics," which require about 200 years to develop. As a result, loss and fragmentation of remaining forests and old-growth stands suitable for spotted owls will continue if current management practices are unchanged.

Annual cutting rates of old-growth and old-growth/mature age classes of trees have been established by the Forest Service and the Bureau of Land Management (Bureau) (USDI 1989). During the 1980's, the Bureau has been harvesting old-growth and old-growth/mature trees at the rate of about 22,000 acres per year in Oregon. The Forest Service estimates its harvesting of spotted owl habitat (mature and old-growth classes) at the rate of about 36,000 to 40,000 acres per year in Oregon and Washington combined, and 12,000 acres annually in California. Several legal actions against the Forest Service and the Bureau delayed harvest in 1988 and 1989. Unless these cutting rates or patterns of cutting are altered, that portion of existing spotted owl habitat remaining that is available for timber harvest will be gone within about 60 years (USDI 1989).

As a result of past and present harvest patterns, potential isolation of several subpopulations of northern spotted owls is also of considerable concern (e.g., the Olympic Peninsula, the Coast Ranges in southwestern Washington and northwestern Oregon, and the Marin County area in California) (USDA 1988, USDI 1989). The central problem of subpopulation isolation is one of maintaining a critical population size level in the absence of genetic or demographic contributions from other subpopulations. The smaller a population of subpopulation and the greater its isolation from other populations, the greater the risk of its elimination as a result of chance demographic and environmental events or genetic effects (Shaffer 1987b).

The population of spotted owls on the Olympic Peninsula may be isolated demographically, and perhaps even genetically, from other owl populations, since there does not appear to be an effective, self-sustaining population in either southwestern Washington adjacent to the Olympic Peninsula or the northwestern Oregon Coast Ranges (Irwin *et al.* 1988, 1989a; A. Potter, Wash. Dept. of Wildlife, Olympia, WA, pers. comm.; Forsman *et al.* 1977; Forsman 1986; W. Logan, Bureau of Land Management, Salem, OR, pers. comm.). While the population in the Oregon Coast Ranges may not be currently isolated due to a tenuous connection to the Cascade populations at the southern part of the range provided by lands managed by the Bureau, the scale of habitat fragmentation throughout the range is of considerable concern USDI 1989). As one moves north along the Oregon Coast Ranges, habitat ownership becomes fragmented because of checkerboarding of Bureau and private lands and remaining old growth and mature forests become more fragmented as well. During the next 10 to 15 years, given the existing direction of land management, the current degree of isolation on the Olympic Peninsula and the potential for isolation of portions of the Oregon Coast Ranges province are likely to become exacerbated, as most intervening habitat is privately owned.

The Washington and Oregon Cascade populations of owls are at risk of becoming demographically isolated from one another by loss of habitat along the Columbia River corridor. The impounded section of the Columbia River upstream of Bonneville Dam and the associated transportation and urban/agricultural corridor downstream from Bonneville Dam may serve as a significant dispersal barrier to the north-south movement of owls. In addition, the Columbia River downstream from Portland is very wide with little or no old-growth and mature habitat adjacent to the river, nor is there a viable owl population in this area (Logan, pers. comm.; Forsman *et al.* 1977; Forsman 1986; Potter, pers. comm.). In California, isolation of spotted owls may be as great in the tri-county area of Marin, Sonoma, and Napa Counties as it is on the Olympic Peninsula or in the Oregon Coast Ranges (Bontadelli 1989, Gould, pers. comm.).

Most remaining private forest lands as well as much of the publicly owned lands in the range of the northern spotted owl no longer provide continuous parcels of preferred habitat, primarily due to logging practices resulting in fragmentation of the owl's forest habitat. Habitat fragmentation may be defined as the breakup of contiguous tracts of forest habitat into smaller, more isolated parcels (USDI 1989). Timber harvest, employing a pattern of small, dispersed clearcuts, eventually leads to a situation where parcel sizes are so small as to be influenced by edge effects (windthrow, invasion by alien species, microclimatic changes, etc.). As a result, the original parcels may no longer be able to sustain the species or the community originally found in the larger and contiguous tracts of habitat and the quality (i.e., biological effectiveness of the habitat to support successful reproduction) of remaining preferred forest stands may be lessened considerably when the effects of adjacent roads and clearcuts are considered. Impacts from edge effects and environmental disturbances may be most noticeable in areas where little old growth currently remains, for example, in the Oregon Coast Ranges. Fragmentation of habitat can also adversely affect spotted owls by: (1) Directly eliminating key roosting, nesting, or foraging stands; (2) indirectly reducing the survival of dispersing

juvenile owls; (3) perhaps increasing competition or predation, and (4) reducing population densities and interaction between individuals. These factors all interact to decrease habitat quality, suitability, or effectiveness for supporting a well-distributed population of spotted owls over time (Greene 1988, Harris 1984, Meslow *et al.* 1981, Spies and Franklin 1988, Thomas *et al.* 1988).

The patchwork pattern of even-age, dispersed, clearcut timber harvest systems has imposed a checkerboard pattern on present old-growth and mature forests, fragmenting remaining habitat throughout the owl's range and reducing the total amount of suitable spotted owl habitat. This fragmentation of spotted owl habitat may be especially noticeable on Bureau lands which are additionally checkerboarded because of land ownership patterns. Forest Service modeling (USDA 1986) predicts that the mortality of dispersing juvenile owls will increase whenever the amount of suitable habitat areas decreases. As spotted owl habitat continues to be reduced further by timber harvest, the current spotted owl population is expected to decline correspondingly, and perhaps more precipitously. It is unknown whether the amount and distribution of spotted owl habitat remaining at the end of commercial harvest of old-growth forests on public lands (USDI 1989) will be adequate to support a viable population of the northern spotted owl. Attempts to answer this question by using the concepts and tools of population viability assessments have been undertaken by the Forest Service (USDA 1986, 1988) and Lande (1987a, 1987b, 1988). Although subject to criticism on a number of grounds, these assessments indicate that implementation of the Forest Service's preferred alternative for managing the spotted owl in Oregon and Washington (Alternative F, USDA 1988) will not provide a high probability of persistence for the spotted owl over the next 50 to 100 years, at least not in significant portions of its range. Litigation has been initiated regarding the Forest Service's preferred alternative. At this time it is not known whether this alternative will be implemented. Moreover, at this writing, individual forest plans pertaining to spotted owl management based on the regional guidelines have not been finalized.

Although the actual numbers of owl sites and pairs on all lands is not precisely known, recent surveys indicate that there are about 1,500 pairs of northern spotted owls within the present range of the subspecies, of which over 90 percent are found on federally managed lands (USDI 1989). The present population is predicted to decline by about 50 percent (on Forest Service lands) to 75 percent (BLM lands) from present levels over the next 50 to 60 years under current management plans (USDA 1988).

Data contributing to estimates of present population size have been collected for about 20 years, with counts of owls increasing over that period as greater areas of habitat were surveyed (Gould 1985; Gould, pers. comm.; Forsman *et al.* 1987; USDA 1988; Robertson 1989; Vetterick 1989). However, the increase in numbers of spotted owls counted in these surveys reflects an increase in inventory effort and improvements in inventory methods rather than an indication of any upward population trend. Not all forest habitat has been fully surveyed, as some areas, particularly wilderness areas, are difficult to inventory. However, Forest Service and Bureau biologists believe that about 70 to 80 percent of the northern spotted owl population has been inventoried in most cases (Potter, pers. comm.; Logan, pers. comm.; D. Smithey, Bureau of Land Management, Coos Bay, OR, pers. comm.; D. Bonn, Bureau of Land Management, Medford, OR, pers. comm.; J. Lint, Bureau of Land Management, Roseburg, OR, pers. comm.; Gould, pers. comm.; T. Simon-Jackson, USDA Forest Service, San Francisco, CA, pers. comm.; Forsman, pers. comm.). An estimate of population trends in relation to habitat over time is likely to provide a better understanding of this or any habitat specific species than just total numbers of individuals and pairs.

Information about population trends for spotted owls is provided by three different kinds of data: (1) Changes in spotted owl habitat; (2) changes in spotted owl population size; and (3) survival and reproductive rates. Both the close association between the spotted owl and old-growth forests and the dramatic reductions in old growth that have occurred have been thoroughly discussed earlier. This loss of old-growth and mature habitat continues, with projected losses on Federal lands of about 1.5 percent per year (USDA 1988) or greater (Morrison 1988). A number of biologists knowledgeable about spotted owls have reported declines in owl populations in many areas over the species' range in recent years, commensurate with declines in habitat (A. Franklin, Humboldt State Univ. Arcata, CA, pers. comm.; Meslow pers. comm.). Finally, when the best available estimates of spotted owl survival and reproductive rates are combined and analyzed, resulting values point to a declining population (USDI 1989).

Based on ecological theory, several predictions about the effects of continued harvesting of preferred habitats on the future demographic performance of spotted owls can be made. Given the data, it is likely that continued harvest of preferred habitat will adversely affect spotted owl populations. As more of this habitat is removed and fragmented, the following is expected to occur: (1) Individual owls will have to use habitats comprised of a higher proportion of young forests, necessitating an increase in their home range size to meet their energetic and nutritional requirements and resulting in an overall decrease in density of spotted owls; and (2) as more owls use less suitable habitats, there will likely be a decrease in the average reproductive success of the population as a whole. Analysis of available information for spotted owls seems to support these theoretical predictions (USDI 1989).

The reported variation in per capita reproductive rates between habitats of different suitability implies that owls using young-growth forests may actually contribute proportionately less to population recruitment than their numbers would suggest. Because of apparent differences in reproductive rates, it would be incorrect to assume that a given owl population, normally concentrated in old-growth forests, could be maintained for any length of time on a relatively larger area of less suitable, young forests. The data on spotted owls suggest that use of young forests by owls is dependent on the presence of old-growth stands within the home range.

Fragmentation can also have harmful genetic consequences through its effect on the effective population size. Each subpopulation occupying a discrete habitat patch, such as those that result from habitat fragmentation, comprises a component of the overall population, referred to as a "metapopulation." The processes of extinction and colonization within individual patches can have deleterious genetic effects that might not be predicted by models that do not consider metapopulation structure (USDI 1989).

Although natural habitat is never constant, the original old-growth forest habitat probably was fairly stable and continuous over much of the owl's historical range. Natural perturbations would generally tend to be small and localized, creating occasional openings in an otherwise fairly continuous and

closed-canopy forest environment. The current habitat situation for spotted owls continues to change from the original condition where unsuitable habitat patches were small and isolated, to the reverse where suitable habitat now occurs in small and isolated patches. These factors all interact to decrease habitat suitability or effectiveness for supporting a well-distributed population of spotted owls over time (Greene 1988; Harris 1984; Meslow *et al.* 1981; Spies and Franklin 1988; Thomas *et al.* 1988).

Spotted owl population viability assessments performed to date (USDA 1986, 1988; Lande 1987a, 1987b, 1988) have not explicitly considered habitat differences in reproductive rates and how different fitnesses of owls in different habitats would affect population dynamics. In particular, the life table and population viability analyses that have been performed to date may present an optimistic view of the future status of spotted owl populations for two reasons (USDI 1989). First, the population viability analyses conducted by the Forest Service were based on a single frequency distribution of reproduction rates, with a mean value from owl pairs in the most preferred habitats. However, as discussed previously, theory and empirical data suggest that owl pairs in less suitable, younger habitats may have significantly lower per capita reproductive rates. Therefore, as more preferred habitat is cleared, population growth rates may be reduced to values lower than were used in existing models. Second, the Forest Service's population viability analyses assume that a given Spotted Owl Habitat Area (SOHA) will be occupied with a probability proportional to the amount of old-growth forest within the SOHA. However, the assumed relationship is based on the present landscape configuration, the existing amounts of old growth, and the current spatial relationships between old growth and young growth forests. The assumed SOHA occupancy probabilities are likely to decline as surrounding old growth is cleared and SOHAs become more isolated from other large patches of preferred habitat. These points are intended to emphasize the fact that the models should be interpreted cautiously, and that planning for the owl should include built-in safety factors to insure that future habitat requirements for a viable population are not underestimated.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Considerable research by Federal, State, and private groups is being conducted on this subspecies. This work is providing valuable information and is not having a negative impact on the subspecies. The spotted owl is not a game bird, nor is there any known commercial or sporting use.

C. Disease or Predation

Predation by great horned owls (*Bubo virginianus*) has been identified as a major source of juvenile mortality in spotted owls (USDI 1987; Dawson *et al.* 1986; USDA 1986; Simberloff 1987; and USDA 1988). Concern has been expressed that increasing habitat fragmentation may be subjecting spotted owls to greater risks of predation as they move into or across more open terrain, or come into more frequent contact with forest edges where horned owls may be more numerous. Hamer (1989) has been studying spotted owl and great horned owl interactions in the north Cascades of Washington. His survey of the 145-square-mile Mt. Baker study area showed that great horned owls were more common than spotted owls in this mostly fragmented and young-growth dominated habitat. He found, with a limited sample size, that spotted owls avoided areas intensively used by pairs of great horned owls. In young-growth forests in southwestern Washington, Irvin *et al.* (1989a) reported that great horned owls, along with the western screech owl (*Otus asio*), were the most commonly found owls, and that spotted owls were infrequently found. Specific impacts of great horned owl predation on the overall spotted owl population are unknown, but this remains an issue of concern. Parasites have been found in blood samples of the northern spotted owl, although their significance and potential impact on the subspecies are unknown at the present time (Gould, pers. comm.).

D. The Inadequacy of Existing Regulatory Mechanisms

There are numerous State and federal laws and regulations that, if enforced, may protect spotted owls and, to a lesser extent, spotted owl habitat. Implementation and effectiveness of these laws to date, however, has been variable.

Each of the three States in which the subspecies occurs has recognized the precarious status of the owl. It is listed as endangered by the State of Washington, threatened by the State of Oregon, and as a sensitive species by the State of California. State laws in Washington and Oregon offer little regulatory protection to the spotted owls other than a prohibition against taking. In California, timber management plans require the approval of the Department of Fish and Game.

The Federal Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*) prohibits taking of spotted owls or their eggs or nests unless and except as permitted by regulation. The Act imposes criminal penalties for unlawful taking.

The National Park Service is required by statute to manage National parks to conserve their wildlife (16 U.S.C. 1). Approximately 8 to 10 percent of spotted owl habitat is located within National parks.

The National Forest Management Act of 1976 and its implementing regulations require the Forest Service to manage National Forests to provide enough habitat to maintain viable populations of native vertebrate species, such as the spotted owl. These regulations define a viable population as one which "has the estimated numbers and distribution of reproductive individuals to ensure its continued existence is well-distributed" (36 CFR 219.19).

The Forest Service manages about two-thirds of the current northern spotted owl habitat. Spotted owl management on National Forest lands in California, Oregon, and Washington is based on regional guidelines adopted by the Pacific Southwest Region (Region 5) for California and by the Pacific Northwest Region (Region 6) for Oregon and Washington. These guidelines provide for a network of forest-wide owl sites (Spotted Owl Habitat Areas or SOHAs) containing 1,000 acres in California and from 1,000 to 3,000 acres in Washington and Oregon. Some of these sites will be located in areas not available for timer harvest (e.g., natural areas, research areas, wilderness), but the majority of the sites (60 to 70 percent) would be surrounded by commercial timber land available for logging.

The Forest Service has prepared a Final Supplement Environmental Impact Statement (USDA 1988) with a preferred alternative to implement forest plans to manage about 300 spotted owl habitat areas within its lands in Oregon and Washington. In California, the Forest Service is implementing a similar network system to manage about 250 owl habitat areas within its lands. The intent of this system in both Forest Service Regions is to maintain the viability of the subspecies through a network system that is evenly distributed over the range of the owl.

Sites were to be selected based upon known owl presence, although some sites were actually selected on their potential to contain owls rather than current occupancy. The potential success of this effort cannot be determined yet, since there have been insufficient time and data to determine trends.

In late 1988, the Forest Service made its final Record of Decision on spotted owl management guidelines for National Forests in Washington and Oregon. The decision provides guidance (habitat amount, location, juxtaposition) to set aside a network of selected SOHAs, totaling approximately 374,000 to 477,000 acres in Washington and Oregon forests. The Forest Service in California is preparing to finalize Forest plans implementing a similar habitat management plan on the four National Forests in the northern spotted owl's range.

The Forest Service's Record of Decision for Oregon and Washington set a timetable of 5 years for a full review of the Forest Service's owl management program, continued implementation of a $5 million annual Research, Development, and Application Program, and reaffirmed the Forest Service's commitment to coordinate and cooperate with other agencies. The Forest Service's spotted owl habitat guidelines are the subject of several current lawsuits. Whether or not the current habitat guidance will stand is unknown. In addition, the final Forest Service spotted owl decision only addresses regional standards and guidelines for spotted owl management. The actual implementation of owl management will be based on individual forest plans once they are finalized. A thorough assessment of the impacts of the Forest Service's preferred alternative for each forest is not possible at this time since the actual arrangements (location and juxtaposition) of occupied management areas (SOHAs) have not been tested or available for interagency or public review.

The Bureau of Land Management administers approximately 11 percent of spotted owl habitat, mostly in Oregon. Most Bureau forest lands in Oregon are administered under the provision of the Oregon and California Act, which mandates management of these lands for permanent forest production. These lands cannot be withdrawn or set aside for other long-term management objectives unless other applicable statutes permit. However, short-term (10-year) restrictions can be placed on certain tracts during a 10-year planning period (W. Nietro, Bureau of Land Management, Portland, OR, pers. comm. 1989). Currently, there are timber harvesting restrictions on 110 Spotted Owl Management Areas (SOMAs) that are managed by the Bureau under a cooperative agreement with the Oregon Department of Fish and Wildlife through 1990. The intent is to provide linkages and habitat for 90 pairs of owls between Forest Service lands in the Oregon Cascades and Coast Ranges and to preserve the integrity of these sites into the next planning period. These pairs constitute approximately one-third of the known spotted owl pairs on Bureau lands in Oregon. The Bureau only manages small parcels of owl habitat in California and none in Washington.

The success (viability) of spotted owl pairs, in terms of survival and reproductive output, is predicted largely on the sufficiency of their habitat to support the full range of physical, behavioral, and nutritional needs of the subspecies as expressed by measurement of owl use. Selected SOHA or SOMA size in the Forest Service's FSEIS and the Bureau of Land Management/Oregon Department of Fish and Wildlife agreement is generally less than the mean amount of preferred habitat documented within the home ranges of paired owls studied in all physiographic provinces (USDI 1989). As a consequence, some pairs may not persist in less than optimally sized habitats (Ruggiero *et al.* 1988).

According to the final regional guidance, and the Record of Decision (for Oregon and Washington), the Forest Service does not quantitatively provide for long-term contingencies in the case of catastrophic environmental events. Similarly, current spotted owl habitat management by the Bureau does not take into consideration or provide for such events.

In August 1988, an Interagency Agreement established in 1987 between the Fish and Wildlife Service and the Forest Service was expanded to include the Bureau of Land Management and the National Park Service. This agreement requires the four agencies to cooperate, coordinate, exchange data, and review proposals designed to manage and protect owl habitat; it also commits them to manage land to maintain viable, well-distribute spotted owl populations. However, at this time, there are no coordinated management schemes in place among the agencies; the Forest Service and Bureau have developed timber harvest proposals and spotted owl protection strategies independently of each other.

The cumulative impact of timber-cutting practices by land managing agencies increases and exacerbates the fragmentation of existing owl habitat. The proposed spotted owl management plans of the Forest Service and Bureau of Land Management are untested. Recent legal actions aside, there is no indication from the land management agencies that the current rate of change from old growth to young, even-aged forest management will diminish. Further, as agencies concentrate their clearcutting activities outside of designated spotted owl habitat management areas, future habitat management options will be lost if currently planned habitat networks prove later to be deficient.

E. Other Natural or Man-Made Factors Affecting Its Continued Existence

The barred owl (*Strix varia*), has undergone rapid range expansion over the past 20 years into the range of the spotted owl in the northwestern United States (Hamer 1988; USDI 1989). Gould (pers. comm.) indicates that the barred owl now occurs as far south as Mendocino County, California. Furthermore, it has at least replaced, and possibly displaced, the northern spotted owl in some areas (Forsman and Meslow 1986; Allen *et al.* 1985; Hamer and Samson 1987). Hamer (1988, 1989) noted that the barred owl seems to be more prevalent in cut-over areas than spotted owls. On his study area in the northern Cascade Mountains of Washington, the barred owl is now 2.1 times more numerous than the spotted owl.

The barred owl's adaptability and aggressive nature appear to allow it to take advantage of habitat perturbations, such as those that result from habitat fragmentation, and to expand its range where it may compete with the spotted owl for available resources. The long-term impact to the spotted owl is unknown, but of considerable concern. Continued examination is warranted of the role and impact of the barred owl as a congeneric intruder in historical spotted owl range and its relationship to habitat fragmentation. The potential for interbreeding of the two species also merits concern and monitoring.

There are numerous examples of extrinsic factors such as fires, wind damage, and volcanic action affecting forest habitat, including known spotted owl habitat. These natural occurrences have not been factored into any future projections of population persistence of the spotted owl, and their impact is unknown. Genetic problems (such as

inbreeding) have not yet been considered a problem with spotted owls.

In its Status Review and Supplement (USDI 1987, 1989), the Service has compiled and carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to propose this rule. Based on this evaluation, the Service has found that listing the northern spotted owl as a threatened species throughout its range is warranted. The Endangered Species Act of 1973 (Act), as amended, states that the term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range. The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Given the loss of a substantial amount (70 to 80 percent) of historical habitat from timber harvesting, and continuing and planned reduction and fragmentation of a large portion of the remaining old-growth and mature habitat, the northern spotted owl population will continue to decline unless steps are taken to offset these losses.

The northern spotted owl shows a clear preference throughout its range for old-growth forests and forests with old-growth characteristics for nesting, foraging, and roosting. Forests are considered "old growth" when about 200 or more years of age, although some old-growth characteristics preferred by spotted owls may appear prior to that age in mature timber (from about 100 to 200 years of age). As a result of historical and ongoing timber harvest, the once extensive and continuous old-growth forests are being converted to a patchwork landscape dominated by young, even-aged stands. Existing timber management planning and policies do not provide for old growth replacement because of rotation periods ranging from about 70 to 120 years on federal lands to as little as 40 years on private lands.

If current management practices continue, by the year 2050, most commercial old-growth forests will have been logged and converted to younger, even-aged managed forests. This would represent a total decline of at least 80 to 85 percent from the amount of preferred habitat originally estimated for the western part of the Pacific Northwest, including northern California. Impacts from timber harvesting are rangewide and, in addition to causing the direct loss of preferred habitat, appear to be affecting the quality of the remaining forest habitat throughout much of the species' range. Moreover, the total population of spotted owls is relatively low (recent surveys report about 1,500 pairs) and pairs are relatively widely spaced. This subspecies has very specific and narrow habitat requirements. With a low, variable reproductive rate and a low population density, a consequence partly of its large home range requirements, the spotted owl would be especially vulnerable to localized catastrophic events. Lastly, current and proposed management practices may not be designed for nor be sufficient to ensure long-term population viability of the spotted owl. On the basis of the best scientific and commercial data available, the Service believes that threatened status is warranted rangewide for the entire population of the northern spotted owl.

Under the Act's definition, to be considered for endangered classification, the spotted owl would have to be in danger of extinction throughout all or a significant portion of its range. While the available data indicate a gradual, rangewide decline in the species commensurate with habitat loss, they do not suggest that extinction is an imminent possibility. The Service recognizes that the situation is most serious in the California Coast Range (especially Marin and Sonoma Counties), the Oregon Coast Ranges (beginning with Coos Bay Bureau of Land Management lands north to the Columbia River), and from the Olympic Peninsula south to the Columbia River. However, when the status of the entire subspecies is analyzed rangewide, it is the Service's conclusion that the likelihood of extinction of the subpopulations of the owls in these areas is not so immediate as to justify a rangewide endangered classification at this time. The Olympic Peninsula population of the northern subspecies may be the only unit that could qualify as a distinct population under the Act. However, it was not clear that identifying this as a separate population was fully justified by the data or that the immediacy of threat in relationship to other areas was sufficient to warrant a separate designation as endangered at this time.

Critical Habitat

Section 4(a)(3) of the Endangered Species Act (Act), as amended, requires that, to the maximum extent prudent and determinable, the Secretary propose critical habitat at the time the species is proposed to be listed as endangered or threatened.

The Service finds that critical habitat for the northern spotted owl is not presently determinable. The Service's regulations (50 CFR 424.12(a)(2)) state that critical habitat is not determinable if information sufficient to perform required analyses of the impacts of the designation is lacking or if the biological needs of the species are not sufficiently well known to permit identification of an area of critical habitat. By critical habitat is meant "specific areas within the geographical area currently occupied by a species on which are found the physical or biological features essential to the conservation of the species and that may require special management considerations or protection" (50 CFR 424.02(d)).

The extensive range of the northern spotted owl, from British Columbia to San Francisco Bay, involves over 7 million acres of its preferred old-growth and mature forest habitat and an undetermined amount of other forest types that may also be of significance to the survival and recovery of the subspecies. Much of this habitat has been fragmented by logging, and many stands are isolated from each other or of such small size as not to support viable populations of spotted owls. The specific size, spatial configuration and juxtaposition of these essential habitats as well as vital connecting linkages between areas necessary for ensuring the conservation of the subspecies throughout its range have not been determined at this time, nor have analyses been conducted on the impacts of a designation.

During the proposed comment period, the Service will seek additional agency and public input on critical habitat, along with information on the biological status of and threats to the spotted owl. The Service intends to use this and other information in formulating a decision on critical habitat designation for the spotted owl.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of

Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Regulations governing these conferences are found at 50 CFR 402.10. If a species is listed subsequently, Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

The U.S. Forest Service and Bureau of Land Management have active timber sale programs in the Pacific Northwest, including northern California, whereby private timber companies bid for the right to log Federal land. In Fiscal Year 1989, the Forest Service had 425 timber sales containing about 48,000 acres that included at least some northern spotted owl habitat. To date, the Forest Service has been enjoined through court action from completing 165 timber sales, totalling approximately 22,500 acres, largely because of spotted owls and old growth issues. About 52 timber sales, representing roughly 2,600 acres, have been released by the Court and subsequently offered for sale (G. Gunderson, USDA Forest Service, Portland, OR, pers. comm.). It is anticipated that future proposed sale activity will be similar, but will depend in part, upon the outcome of a number of unresolved court challenges.

In 1988, the Bureau of Land Management advertised 229 timber sales for a total of 29,798 acres. Of these planned sales, 41 (5,330 acres) are involved in an existing lawsuit. During 1989, the Bureau plans to advertise 190 timber sales to harvest 24,655 acres; there is also an existing lawsuit involving 75 of these sales, covering 9,750 acres, (Nietro, pers. comm.). On an annual basis, the Bureau awards contracts to harvest 32,940 acres, of which 22,800 acres are clearcut and 10,140 acres are partially cut. Of the acreage cut, approximately 66 percent of the harvest is in forests over 200 years old (Nietro, pers. comm.).

Because habitat loss and modification resulting from timber harvesting activities represents the primary threat to the northern spotted owl, the Forest Service and Bureau will review and assess the potential impacts of timber sales on this species to ensure compliance with Section 7 of the Act, as described above.

The Act and implementing regulations found at 50 CFR 17.21 and 17.31 set forth a series of general prohibitions and exceptions that generally apply to threatened wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving threatened wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22, 17.23, and 17.32. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. For threatened species, there are also permits for zoological exhibition, educational purposes, or special purposes consistent with the purposes of the Act.

On June 28, 1979, the order Strigiformes, which includes all owls, was included in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The effect to this listing is that export permits are generally required before international shipment may occur. Such shipment is strictly regulated by CITES party nations to prevent effects that may be detrimental to the species' survival.

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to this species;

(2) The location of any additional populations of this species and the reasons why any habitat should or should not be determined to be critical habitat as provided by Section 4 of the Act;

(3) Additional information concerning the range, distribution, and population size of this species; and

(4) Current or planned activities in the subject area and their possible impacts on this species.

Final action concerning this proposal will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this proposal.

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to Section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the Federal Register on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available upon request from the Regional Director (Attention: Listing Coordinator), U.S. Fish and Wildlife Service, 1002 NE Holladay Street, Portland, Oregon 97232.

Authors

The primary author of this proposed rule is Joseph J. Dowhan, U.S. Fish and Wildlife Service, Pacific Regional Office, 1002 NE. Holladay St., Portland, Oregon 97232–4181 (503/231–6150 or FTS 429–6150), and the Service's Northern Spotted Owl Status Review Team.

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Proposed Regulation Promulgation

PART 17—[AMENDED]

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, as set forth below:

1. The authority citation for Part 17 continues to read as follows:

Authority: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411; Pub. L. 100–478, 102 Stat. 2306; Pub. L. 100–653, 102 Stat. 3825 (16 U.S.C. 1531 *et seq.*); Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. It is proposed to amend § 17.11(h) by adding the following, in alphabetical order under Birds, to the list of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Birds							
*	*	*	*	*	*	*	
Owl, northern spotted.	*Strix occidentalis caurina.*	U.S.A. (WA, OR, CA); Canada (British Columbia).	Entire	T		NA	NA
*	*	*	*	*	*	*	

Dated: June 15, 1989.

Susan Recce Lamson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 89–14889 Filed 6–22–89; 8:45 am]

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federal register

Friday
June 23, 1989

Part VII

Department of Transportation

Federal Aviation Administration

14 CFR Part 71

Proposed Establishment of the Salt Lake City Terminal Control Area and Revocation of the Salt Lake City International Airport, Airport Radar Service Area; UT; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88-AWA-9]

RIN 2120-AD02

Proposed Establishment of the Salt Lake City Terminal Control Area and Revocation of the Salt Lake City International Airport, Airport Radar Service Area; UT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish a Terminal Control Area (TCA) at the Salt Lake City International Airport, UT. The TCA would consist of airspace from the surface or higher within a 25-mile radius of Salt Lake City International Airport up to and including 10,000 feet above mean sea level (MSL). Establishment of this TCA would impose certain operating rules and pilot/equipment requirements, including requirements for an operable two-way radio, a 4096 transponder with automatic altitude-reporting equipment, an operable very high frequency omni-directional radio range (VOR) or tactical air navigational aid (TACAN) receiver, and restrictions on student pilot operations. This action is intended to increase the capability of the air traffic control (ATC) system to separate all aircraft in the terminal airspace around the Salt Lake City International Airport. The objective of this proposal is to substantially increase safety while accommodating the legitimate concerns of airspace users. Salt Lake City International Airport is currently served by an Airport Radar Service Area (ARSA) which would be rescinded concurrent with the establishment of this TCA.

DATES: Comments must be received on or before August 22, 1989.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket [AGC-10], Airspace Docket No. 88-AWA-9, 800 Independence Avenue, SW., Washington, DC 20591.

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) 267-9255.

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, aeronautical, 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-AWA-9." 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. 11-2A which describes the application procedure.

Related Rulemaking Actions

On May 21, 1970, the FAA published FAR Amendment 91-78 (35 FR 7782) which enabled the establishment of TCA's. On October 14, 1988, the FAA published a final rule which revised the classification and pilot/equipment requirements for conducting operations in a TCA (53 FR 40318). Specifically, the rule: (a) Establishes a single-class TCA; (b) requires the pilot-in-command of a civil aircraft operating within a TCA to hold at least a private pilot certificate, except for a student pilot who has received certain documented training; and (c) eliminates the helicopter exception from the minimum navigational equipment requirement.

The FAA published a final rule on June 21, 1988, which requires Mode C equipment when operating within 30 miles of any designated TCA primary airport from the surface up to 10,000 feet MSL, except for operations by certain aircraft types specifically excluded (53 FR 23356).

On February 3, 1987, the FAA published a final rule which established requirements pertaining to the use, installation, inspection, and testing of Air Traffic Control Radar Beacon System (ATCRBS) and Mode S transponders in U.S.-registered civil aircraft (53 FR 3380). The rule adopted continues to require a transponder for operation in each TCA.

Background

The TCA program was developed to reduce the midair collision potential in the congested airspace surrounding airports with high density air traffic by providing an area in which all aircraft will be subject to certain operating rules and equipment requirements.

The density of traffic and the type of operations being conducted in the airspace surrounding major terminals increase the probability of midair collisions. In 1970, an extensive study found that the majority of midair collisions occurred between a general aviation (GA) aircraft and an air carrier, military or another GA aircraft. The basic causal factor common to these conflicts was the mix of uncontrolled aircraft operating under visual flight rules (VFR) and controlled aircraft operating under instrument flight rules (IFR). TCA's provide a method to accommodate the increasing number of IFR and VFR operations. The regulatory requirements of TCA airspace afford the greatest protection for the greatest number of people by providing ATC with an increased capability to provide aircraft separation service, thereby

minimizing the mix of controlled and uncontrolled aircraft.

To date, the FAA has established a total of 23 TCA's. The FAA is proposing to take action to modify or implement the application of these proven control techniques to more airports to provide greater protection of air traffic in the airspace regions most commonly used by passenger-carrying aircraft.

On August 22, 1987, the Secretary of Transportation announced nine locations for which the FAA would issue Notices proposing the establishment of TCA's. The nine candidates cited qualify for TCA status by meeting the criteria published in FAA Handbook 7400.2C, "Procedures for Handling Airspace Matters." The criteria for establishing a TCA are based on factors which include the number of aircraft and people using that airspace, the traffic density, and the type or nature of operations being conducted. Accordingly, guidelines have been established to identify TCA locations based on two elements—the number of enplaned passengers and the number of aircraft operations.

Pre-NPRM Public Input

Airspace Meetings

Informal airspace meetings were held in the Salt Lake City area on October 4, 5, and 6, 1988. The FAA received 23 written comments as a result of these meetings. These comments were from congressional offices, county offices, military organizations, aviation organizations/services, airport management and individual pilots. All comments received were in reference to the FAA TCA proposal presented at the informal airspace meetings. In addition to the comments, the FAA received a TCA proposal from the Airports System Planning Advisory Committee (ASPAC). This committee represents 25 aviation organizations in the Salt Lake City area. All comments received, along with FAA analyses, are summarized as follows:

1. Two major airlines supported the 12,500-foot MSL ceiling proposed by the FAA, while several independent airspace users favored a lower ceiling. These independent users stated that a 12,500-foot MSL ceiling would be too restrictive for pilots not wishing to participate in the TCA. The ASPAC TCA design proposed a ceiling of 10,000 feet MSL.

After considering all comments, the FAA is proposing a 10,000-foot TCA ceiling.

2. Several commenters were concerned that the proposed eastern boundary would force those aircraft not wishing to participate in the TCA too close to high terrain.

Since this is a known VFR transit area, the FAA moved the proposed boundary west to a longitudinal line of 111°45'00" W. This will allow VFR aircraft ample room to navigate around the TCA as well as over high terrain.

3. Several commenters requested a "cutout" around the Salt Lake Skypark Airport. Commenters indicated that the FAA proposal would hamper training operations for aircraft based at the Salt Lake Skypark Airport.

This area is not involved in the major traffic flows for the primary airport; therefore, the FAA is proposing an exclusion of that portion of airspace surrounding the Salt Lake Skypark Airport below 5,300 feet MSL. This exclusion will allow aircraft to depart, land, and operate around Skypark Airport without entering the TCA.

4. Some commenters requested that the proposed TCA be delineated by prominent visual landmarks.

The FAA has altered the proposed TCA boundaries using available visual landmarks while ensuring that the TCA conforms to the desired TCA configuration.

5. Tooele County officials requested that the FAA delete the Tooele Valley Airport from the proposed TCA. This exclusion would accommodate all general aviation pilots who do not wish to participate, circumnavigate, or fly beneath the TCA.

After analyzing this request, the FAA altered the proposed TCA boundaries in this area by deleting the Tooele Valley Airport from the proposed TCA.

6. Several commenters complained that the proposed TCA extends to 30 miles from the primary airport.

The FAA reduced the proposed TCA boundaries. The boundaries proposed in the Notice extend to 25 miles from the primary airport in certain areas. These areas are needed to provide the best service for aircraft transitioning in and out of the Salt Lake City International Airport.

7. The FAA received one request for a corridor-type TCA.

The FAA conducted a test of "climb and descent corridors" in the Boston, MA, area. It was concluded that corridors do not provide the desired degree of safety nor the most efficient use of airspace necessary to contain aircraft in high density terminal areas.

8. One suggestion was received to exclude airspace northwest of the primary airport below 5,500 feet MSL outside the Salt Lake City Control Zone from the inner core of the TCA to allow low-level operations.

Such low-level operations can be conducted within TCA airspace. In addition, air traffic control services provide separation which would create a safer environment.

9. Cedar Valley Airport operators requested that the FAA delete Cedar Valley Airport from the TCA proposal. Excluding Cedar Valley Airport will ensure that current sport-related aviation procedures will remain unchanged.

As a result of these comments, the FAA considered this request and altered the TCA proposal to exclude Cedar Valley Airport from the TCA design.

10. Some commenters requested that the shelf over the Salt Lake City Municipal 2 Airport be altered to reflect an even altitude. Commenters stated that the proposed floor restricts the number of available altitudes for VFR flight beneath the floor of the TCA.

The FAA raised the proposed floor in this area up to 6,000 feet MSL to allow VFR aircraft an additional 2,000 feet.

11. Several commenters expressed concern that the TCA floor west of Morgan precludes VFR flight. Commenters stated that a combination of high terrain and a low floor creates an unsafe environment for VFR aircraft.

The proposed boundary in this area was altered to delete the airspace east of the Hill Air Force Base and Ogden Municipal Airport Airport Traffic Areas (ATA).

12. United States Air Force representatives expressed concern that implementing a TCA may impede military operations.

The military operations addressed will be accommodated through inter-facility agreements. The FAA contends that a TCA will result in a safer environment for both civil and military aircraft.

The Proposal

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish a TCA at Salt Lake City International Airport, UT. In 1987, the total number of annual enplaned passengers at Salt Lake City International Airport was 4,895,326 which exceeds the 3.5 million necessary for consideration as a TCA candidate. The total number of airport operations were 292,050, over 50 percent of which were air carrier. Additionally, within the proposed boundaries, more than 750,000 flight operations are conducted annually. Consequently, the FAA has determined that establishment of a TCA at Salt Lake City International Airport is in the interest of flight safety and will

result in a greater degree of protection for the greater number of people during flight in that terminal area. Salt Lake City International Airport is currently served by an ARSA, which would be rescinded concurrent with the establishment of this TCA. The proposed location is depicted on the attached chart.

Section 91.90 of Part 91 of the Federal Aviation Regulations (14 CFR Part 91) defines TCA's and prescribes operating rules for aircraft in airspace designated as a TCA. The TCA rule provides, in part, that prior to entering the TCA, any pilot arriving at any airport within the TCA or flying through a TCA must: (1) Obtain appropriate authorization from ATC; (2) comply with applicable procedures established by ATC for pilot training operations at an airport within a TCA; (3) hold at least a private pilot certificate; (4) meet the requirements of § 61.95 if the aircraft is operated by a student pilot. Any aircraft arriving at any airport within the TCA or flying through a TCA must: have an operable VOR or TACAN receiver; have an operable two-way radio capable of communications with ATC on appropriate frequencies for that TCA; and be equppped with the applicable operating transponder and automatic altitude reporting equipment specified in paragraph (a) of § 91.24, except as provided in paragraph (d) of that section. Unless otherwise authorized by ATC, all large turbine-engine-powered aircraft operating to or from a primary airport must be operated above the designated floors of the TCA. The pilot of any aircraft departing from an airport located within a TCA is required to receive a clearance from ATC prior to takeoff.

All aircraft operating within a TCA are required to comply with all ATC clearances and instructions, and any FAA arrival or departure traffic pattern for the airport of intended operation. However, the rule permits ATC to authorize deviations from any of the operating requirements of the rule when safety considerations justify the deviation or more efficient utilization of the airspace can be attained. Ultralight vehicle operations and parachute jumps in a TCA may only be conducted under the terms of an ATC authorization.

Definitions, operating requirements, and specific airspace designations applicable to TCA's may be found in §§ 71.12, 71.401, and 71.403 of Part 71 (14 CFR Part 71); and Sections 91.1 and 91.90 of Part 91 (14 CFR Part 91).

The standard configuration of a TCA consists of three concentric circles centered on the primary airport extending to 10, 20, and 30 miles respectively. The vertical limits of the TCA are 12,500 feet above MSL, with the floor established at the surface in the inner area and at levels appropriate to containment of operations in the outer areas. Variations of these criteria may be authorized contingent upon terrain, adjacent regulatory airspace, and factors unique to the terminal area. The airspace configuration contained herein is the result of an extensive staff study conducted by the local FAA authority after obtaining public input from informal airspace meetings and coordinating with the FAA regional office. The FAA has determined the following proposed TCA airspace configuration is consistent with TCA objectives and allows consideration of terminal area flight operations and terrain:

1. That airspace extending upward from the surface up to and including 10,000 feet MSL, beginning at a point where the 13-mile arc of the Salt Lake City International Airport Runway 16 ILS (I—MOY) localizer/distance measuring equipment (LOC/DME) antenna intercepts Interstate 15 (I–15), extending south on I–15 until intercepting the Salt Lake City International Airport ATA, extending south along the Salt Lake City International Airport ATA boundary until intercepting I–15, extending south on I–15 until intercepting the 11-mile arc on the I–MOY LOC/DME antenna clockwise until intercepting the Union Pacific railroad tracks, extending southwest along the Union Pacific railroad tracks until intercepting the 13-mile arc of the I–MOY LOC/DME antenna clockwise until the point of beginning. This airspace is needed to contain aircraft departing from and arriving at the primary airport. The reduced areas to the north and south provide sufficient airspace for skydiving, gliders, etc.

2. That airspace extending upward from 7,600 feet MSL up to and including 10,000 feet MSL between the 13-mile radius and the 25-mile radius of the I–MOY LOC/DME antenna, excluding that airspace south of the Union Pacific railroad tracks, and that airspace beginning at a point where the 25-mile arc intercepts the Hill AFB ATA and U.S. Highway 89. This segment of airspace allows for terrain clearance and is necessary for climb and descent into the primary airport.

3. That airspace extending upward from 7,000 feet MSL up to an including 10,000 feet MSL, beginning at a point where the 11-mile arc of the I–MOY LOC/DME antenna intercepts a line at long. 112°09'00" W., bounded on the west by a line at long. 112°09'00" W., on the south by a line at lat. 40°27'30" N., to a point at lat. 40°27'30" N., long. 112°00'30" W., extending north to a point at lat. 40°35'30" N., long. 112°00'00" W., on a 11-mile arc of the I–MOY LOC/DME antenna; and that airspace directly east of the previously described area and west of I–15 extending upward from 6,000 feet MSL up to and including 10,000 feet MSL; and that airspace south of the 7,000 to 10,000 feet MSL area and 6,000 to 10,000 feet MSL area north of a line at lat. 40°23'30" N., west of a line at long. 112°09'00" W., east of I–15 extending upward from 9,000 feet MSL to and including 10,000 feet MSL, excluding Restricted Areas R–6412A and R–6412B when active. This airspace is configured for terrain clearance and areas limited in radar and radio coverage.

4. That airspace extending upward from 9,000 feet MSL up to and including 10,000 feet MSL east of I–15, south of Interstate 84 west of a line at long. 111°45'00" W., and north of a line at lat. 40°31'30" N. This airspace is configured for terrain clearance east of Salt Lake City International Airport.

The preceding general summary of the proposed TCA airspace configuration identifies that airspace which is necessary to contain large turbojet aircraft operations at Salt Lake City International Airport. ATC will provide control and separation of all flights within the proposed airspace boundaries. Furthermore, ATC authorization is requisite to aircraft operations within that airspace. Establishment of this TCA will greatly enhance the safety of flight within the congested airspace overlying the Salt Lake City metropolitan area by facilitating the separation of controlled and uncontrolled flight operations. Section 71.403 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6E dated Jaunary 3, 1989.

Regulatory Evaluation Summary

The FAA is required to assess the benefits and costs of each proposed rulemaking action to assure that the public is not burdened with rules having costs which outweigh their benefits. This section contains an analysis which quantifies, to the maximum possible extend, the costs and benefits of establishing a TCA at Salt Lake City, UT. This regulatory evaluation summary should be read in conjunction with the NPRM since it provides additional background information.

This proposal is intended to lower the likelihood of midair collisions by increasing the capability of the ATC

system to separate all aircraft in terminal airspace around the Salt Lake City International Airport. This action was prompted by data indicating that a high percentage of near midair collisions reported to the FAA in terminal areas involve VFR aircraft that are not required to be under the control of ATC. Thus, the overall objective of this proposal is to substantially increase safety while accommodating the ligitimate concerns of airspace users.

Costs-Benefits Analysis

a. Costs

The FAA estimates the total cost expected to accrue from implementation of the proposed rule to be $4.4 million ($2.6 million, discounted, 15 years) in 1987 dollars. Approximately $2.5 million (discounted) or 97 percent of the total estimated costs would be incurred by the FAA primarily for additional personnel. The remaining costs would be incurred by small GA aircraft operators who would be required under this proposal to equip their aircraft with Mode C transponders sooner than they would have for the ARSA under the previous FAA rule: "Transponder With Automatic Altitude Reporting Capability Requirement (Mode C)" (53 FR 23356, June 21, 1988). This rule became effective June 21, 1988, and will be implemented in two phases. Phase I, to begin in July 1989, will require a transponder with Mode C at and above 10,000 feet MSL and in the vicinity (30 nautical miles) of TCA primary airports. There are currently 23 TCA's.

Phase II will implement a transponder with Mode C requirement in the airspace in the vicinity (10 nautical miles) of ARSA primary airports. Phase II becomes effective on December 30, 1990, and will affect over 135 ARSA's. Also in Phase II, a transponder with Mode C will be required at other designated airports for which either a TCA or ARSA has not been adopted. Consequently, most aircraft without Mode C transponders would need ATC authorization to fly within 30 nautical miles of a TCA primary airport, within 10 nautical miles of an ARSA primary airport, or within controlled airspace of other designated airports that would also require Mode C transponders.

Thus, this evaluation, as well as the Mode C rule, assumes that all aircraft without Mode C would acquire such equipment rather than circumnavigate the subject airport. The only aircraft without this equipment would be nonelectrical and antique types. Costs to those types of aircraft operators have already been accounted for by the Mode C rule. As a result, aircraft operators impacted by this proposal would only incur the opportunity cost of capital by requiring them to acquire, install, and maintain Mode C transponders one year earlier than they would be required to do so in accordance with Phase II of the Mode C rule.

b. Benefits

This proposed rule is expected to generate potential benefits primarily in the form of enhanced safety to the aviation community and the flying public. Such safety, for instance, would take the form of reduced casualty losses (namely, aviation fatalities and property damage) resulting from a lowered likelihood of midair collisions due to increased positive control in airspace to be established by the TCA. In addition, potential benefits are expected to accrue in the form of improved operational efficiency on the part of FAA air traffic controllers.

Ordinarily, the potential benefits of this proposal would be the reduction in the probability of midair collisions resulting from converting the existing ARSA to a TCA. However, due to the recent Mode C rule (and to some extent, the rule for Traffic Alert and Collision Avoidance (TCAS), 54 FR 940, January 10, 1969). the number of potential midair collisions avoided by this proposal is expected to be significantly lower. Nevertheless, this proposal is still expected to accrue benefits in terms of enhanced safety, though on a much smaller scale.

This point can be illustrated with the use of statistical models based on actual and projected critical near midair collision (NMAC) incidents in lieu of actual midair collisions. (A critical NMAC is an event involving two aircraft coming within 100 feet of each other; the fact that they do not collide is not due to an action on the part of either pilot but, rather, is due purely to chance.) Since midair collisions involving Part 135 aircraft and especially Part 121 aircraft are rare, the use of critical NMAC's will serve to illustrate, to some degree, the potential improvements in aviation safety of implementing this proposal.

Simple regression analyses were prepared for this evaluation which focused on critical NMAC's and aircraft operations in the 23 existing TCA's and in a random sample of 23 of the existing 79 ARSA's (as of 1986 and 1987). The results of these analyses indicated that TCA's have approximately 68 percent fewer critical NMAC's annually, on average, than ARSA's. While there is no demonstrated relationship between NMAC's and actual midair collisions, the lower NMAC rate does indicate a more efficient separation of aircraft in congested airspace.

As the result of these findings, if the existing Salt Lake City ARSA were to remain unchanged (and the recent Mode C and TCAS rules were not in effect), the Salt Lake City Terminal Area would be expected to experience approximately 2.1 critical NMAC's annually (or 31 critical NMAC's over the next 15 years). If, however, the ARSA were to become a TCA, this figure would reduce to approximately 0.7 critical NMAC's annually (or 11 critical NMAC's over the next 15 years). Thus, over the next 15 years, this proposal could result in the reduction of approximately 21 critical NMAC's. However, it is important to note that many, if not most, of these potential critical NMAC's would never materialize as predicted primarily because of the "Mode C" rule as it is applied to the Salt Lake City ARSA and, to some extent, the "TCAS" rule.

According to Phase II of the Mode C rule, all aircraft operating within 10 nautical miles (except for flights under the outer 5-mile "shelf") of an ARSA primary airport must be equipped with a Mode C Transponder. Phase I of the Mode C rule requires, as of July 1989, aircraft operating within 30 nautical miles of a TCA to be equipped with a Mode C transponder. These requirements are expected to significantly reduce the risk of midair collisions in ARSA's and TCA's. For this reason, the primary safety benefit of this proposal to create a TCA in 1989 at Salt Lake City is that the safety enhancements of the Mode C and TCAS requirements will occur one year earlier than would be otherwise expected without this proposal. A second safety benefit would be in terms of the lowered likelihood of midair collisions as a result of expanding the lateral boundaries of positive ATC by 20 nautical miles through replacing the Salt Lake City ARSA with a TCA.

Thus, the safety benefits of the establishment of a new TCA, while positive, would be less than would otherwise accrue in the absence of the Mode C and TCAS rules. Since this proposal essentially extends the effects of the Mode C rule, virtually all of its potential safety benefits are assumed to be part of that rule. Such benefits cannot be estimated separately and, therefore, are considered to be inextricably linked primarily to the Mode C rule. Over a 15-year period, the Mode C rule is expected to generate total potential safety benefits of $344 million (discounted, in 1987 dollars). (The Mode C rule benefits estimate of $310 million for 10 years has

been adjusted to a 15-year period for the purpose of comparability with the TCAS rule and other FAA rulemaking actions.) It is important to note that part of these safety benefits would be attributed to the TCAS rule. Thus, the potential safety benefits of this proposal, and the Mode C and TCAS rules are considered to be inextricably linked.

Another potential benefit of the proposed rule would be improved operational efficiency on the part of FAA air traffic controllers. Under the proposed rule, Mode C transponder requirements would ease controller workload as a result of aircraft being controlled due to a reduction in radio communications. The proposed rule would also make potential traffic conflicts more readily apparent to the controller. As the result of improved operational efficiency, the impact of controller workload increased by separation requirements in the proposed TCA would be somewhat offset due to the controller's ability to adjust the volume of VFR traffic in any given portion of the TCA.

Improved operational efficiency should generate other types of benefits in the form of significant reductions in the number of VFR aircraft requests denied and VFR aircraft delayed during the busy periods. As the result of converting the existing Salt Lake City ARSA to a TCA, the improved operational efficiency would accrue due to the availability of additional air traffic controllers. If the Salt Lake City ARSA were to remain intact, such air traffic personnel would not be required. Therefore, potential benefits of improved operational efficiency, which are not considered to be quantifiable in monetary terms in this evaluation, would be attributed to this proposal rather than either the Mode C rule or TCAS rule.

c. Comparison of Benefits and Costs

The total cost that would accrue from implementation of the proposed rule is estimated to be $2.6 million (discounted, in 1987 dollars). Approximately, 3 percent of this total cost estimate would fall on those GA aircraft operators without Mode C transponders in the form of opportunity costs by requiring them to acquire such avionics equipment, including maintenance, one year sooner than they otherwise would under the status quo. The typical individual GA aircraft operator impacted would incur an estimated one-time cost ranging from $86 to $191 (discounted) under the proposed rule. (As a result of the opportunity cost concept, the derivation of these cost estimates are too complex to discuss briefly. Therefore, the reader should refer to the detailed regulatory evaluation, which is contained in the docket, for a full explanation of the method by which these costs estimates were made.)

The potential benefits of the proposed rule would be the lowered likelihood of midair collisions from the conversion of the existing ARSA to a TCA. The number of midair collisions avoided and their respective monetary values cannot be estimated for this proposal independent of the Mode C and TCAS rules, but the FAA believes the risk would be substantially reduced. An FAA analysis prepared for this evaluation, however, has shown that critical near midair collisions occur approximately two-thirds less frequently in a TCA than within an ARSA. The FAA believes that even after the aviation community complies with the Mode C and TCAS rules, locations converting from ARSA's to TCA's would continue to experience reduced critical NMAC's. In addition, the proposed rule would generate improved operational efficiency benefits on the part of FAA air traffic controllers, though they are not considered to be quantifiable in monetary terms.

Clearly, in view of the cost of compliance relative to the significant reduction in the likelihood of midair collisions as well as improved operational efficiency in the Salt Lake City Terminal Area, the FAA firmly believes the proposed rule is cost-beneficial.

The Regulatory Evaluation that has been placed in the docket contains additional detailed information related to the costs and benefits that are expected to accrue from the implementation of this NPRM.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. The RFA requires agencies to review rules which may have "significant economic impact on a substantial number of small entities."

The small entities which could be potentially affected by the implementation of this proposed rule are unscheduled operators of aircraft for hire who own nine or fewer aircraft.

Virtually all of the aircraft operators impacted by this proposed rule would be those who acquire Mode C transponder capability. The FAA believes that all unscheduled aircraft operators (namely, air taxi operators) potentially impacted by this proposed rule already have Mode C transponders due to the fact that such operators fly regularly in or near airports where radar approach control service has been established. Even if some of these operators were to acquire, install, and maintain Mode C transponders, the cost would not have a significant economic impact on a substantial number of them. The annual FAA threshold for significant economic impact is $3,700 (1987 dollars) for a small entity. According to FAA Order 2100.14A (Regulatory Flexibility Criteria and Guidance), the definition of a small entity, in terms of an air taxi operator, is one with nine aircraft owned, but not necessarily operated.

If we were to assume that a particular aircraft operator had nine aircraft without transponders, then the annual one-time cost per impacted aircraft would be approximately $210 (undiscounted, for the purpose of comparability with the figure of $3,700). The total annual one-time cost per small entity would amount to an estimated $1,890. Thus, the annual worst case cost for a small entity would fall far below the FAA's annual threshold of $3,700. Therefore, the FAA believes this proposed rule would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

International Trade Impact Assessment

The proposed rule would neither have an effect on the sale of foreign aviation products or services in the United States, nor would it have an effect on the sale of U.S. products or services in foreign countries. This is because the proposed rule would only potentially impact small GA aircraft operators without Mode C, and not aircraft manufacturers. The average cost of acquiring Mode C capability is estimated to range from $900 (to upgrade from a Mode A transponder) to $2,000 (to acquire a Mode C transponder without having a Mode A transponder). The cost of acquiring Mode C capability is not considered to be high enough to discourage potential buyers of small GA airplanes.

Federalism Implications

The proposed regulation would not have substantial direct effect 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, preparation

of a Federalism assessment is not warranted.

Conclusion

For the reasons discussed under "Regulatory Evaluation," the FAA has determined that this proposed regulation is not a "major rule" under Executive Order 12291. This rulemaking is considered a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). It is certified that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities.

List of Subjects in 14 CFR Part 71

Aviation safety, Terminal control areas and 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.

§ 71.403 [Amended]

2. § 71.403 is amended as follows:

Salt Lake City, UT [New]

Primary Airport: Salt Lake City International Airport (lat. 40°47'13" N., long. 111°58 ' W.) Salt Lake City International Airport Runway 16 ILS (I-MOY) Localizer/DME (LOC/DME) Antenna (lat. 40°46'23" N., long. 111°58'23" W.)

Boundaries. Area A. That airspace extending upward from the surface to and including 10,000 feet MSL beginning at a point where the 13-mile arc of the Salt Lake City International Airport Runway 16 ILS (I-MOY) localizer/distance measuring equipment (LOC/DME) antenna intercepts Interstate 15 (I-15), extending south on I-15 unit intercepting the Salt Lake City International Airport Airport Traffic Area (ATA), extending south along the Salt Lake City International ATA boundary until intercepting I-15, extending south on I-15 until intercepting the 11-mile arc of the I-MOY LOC/DME antenna clockwise until intercepting the Union Pacific railroad tracks, extending southwest on the Union Pacific railroad tracks until intercepting the 13-mile arc of the I-MOY LOC/DME antenna clockwise until the point of beginning, excluding that airspace below 6,000 feet MSL beginning at a point where the 11-mile arc of the I-MOY LOC/DME antenna intercepts the Union Pacific railroad track, extending northeast to a point at lat. 40°44'50" N., long. 112°11'00" W., extending southeast to a point at lat. 40°39'20" N., long. 112°02'30" W., extending east to a point at lat. 40°39'20" N., long. 110°58'10" W., extending south until intercepting the 11-mile arc of the I-MOY LOC/DME antenna, and excluding that airspace below 5,300 feet MSL west of I-15 bounded on the south by Cudahy Lane, on the west by Redwood Road until intercepting the power transmission lines, extending northeast along the power transmission lines until intercepting I-15.

Area B. That airspace extending upward from 7,600 feet MSL to and including 10,000 feet MSL between the 13-mile radius and the 25-mile radius of the I-MOY LOC/DME antenna, excluding that airspace south of the Union Pacific railroad tracks and that airspace beginning at a point where the 25-mile arc intercepts the Ogden Municipal Airport ATA, extending south along the Ogden Municipal Airport ATA and the Hill AFB ATA until intercepting U.S. Highway 89.

Area C. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL beginning at a point where the 11-mile arc of the I-MOY LOC/DME antenna, intercepts the Union Pacific railroad tracks, extending northeast to a point at lat. 40°44'50" N., long. 112°11'00" W., extending southeast to a point at lat. 40°39'20" N., long. 112°02'30" W., extending east to a point at lat. 40°39'20" N., long. 110°58'10" W., extending south until intercepting the 11-mile arc of the I-MOY LOC/DME antenna, counterclockwise until intercepting I-15, extending south on I-15 until intercepting a line at lat. 40°27'30" N., extending west on lat. 40°27'30" N., until a point at lat. 40°27'30" N., long. 112°00'30" W., extending north to a point at lat. 40°35'30" N., long. 112°00'00" W., on the 11-mile arc of the I-MOY LOC/DME antenna clockwise until the point of beginning.

Area D. That airspace extending upward from 7,000 feet MSL to and including 10,000 feet MSL beginning at a point where the 11-mile arc of the I-MOY LOC/DME antenna, intercepts a line at long. 112°09'00" W., bounded on the west by long. 112°09'00" W., on the south by a line at lat. 40°27'30" N., to a point at lat. 40°27'30" N., long. 112°00'30" W., extending north to a point at lat. 40°35'30" N., long. 112°00'00" W., on the 11-mile arc of the I-MOY LOC/DME antenna clockwise to the point of beginning.

Area E. That airspace extending upward from 9,000 feet MSL to and including 10,000 feet MSL beginning at a point where a line at long. 111°45'00" W., intercepts Interstate 84 (I-84), extending south on long. 111°45'00" W., until intercepting lat. 40°31'30" N., extending west until intercepting I-15, extending north along I-15 until intercepting the Salt Lake City International Airport ATA, extending north along the Salt Lake City International Airport ATA boundary until intercepting I-15, extending north along I-15 until intercepting U.S. Highway 89, north along U.S. Highway 89 until intercepting Hill AFB ATA, extending north along Hill AFB ATA boundary until intercepting I-84, extending east along I-84 until the point of beginning.

Area F. That airspace extending upward from 9,000 feet MSL to and including 10,000 feet MSL bounded on the north by a line at lat. 40°27'30" N., on the east by I-15, on the south by lat. 40°23'30" N., on the west by a line at long. 112°09'00" W., to the point of beginning, excluding that airspace contained in Restricted Areas R-6412A and R-6412B when active.

Area G. That airspace extending upward from 7,800 feet MSL to and including 10,000 feet MSL beginning at a point where the 25-mile arc of the I-MOY LOC/DME antenna intercepts the Ogden Municipal Airport ATA counterclockwise along the Ogden Municipal Airport ATA and the Hill AFB ATA boundaries until intercepting the 25-mile arc of the I-MOY LOC/DME antenna to the point of beginning.

§ 71.501 [Amended]

3. § 71.501 is amended as follows:

Salt Lake City International Airport, UT [Removed]

Issued in Washington, DC, on June 19, 1989.

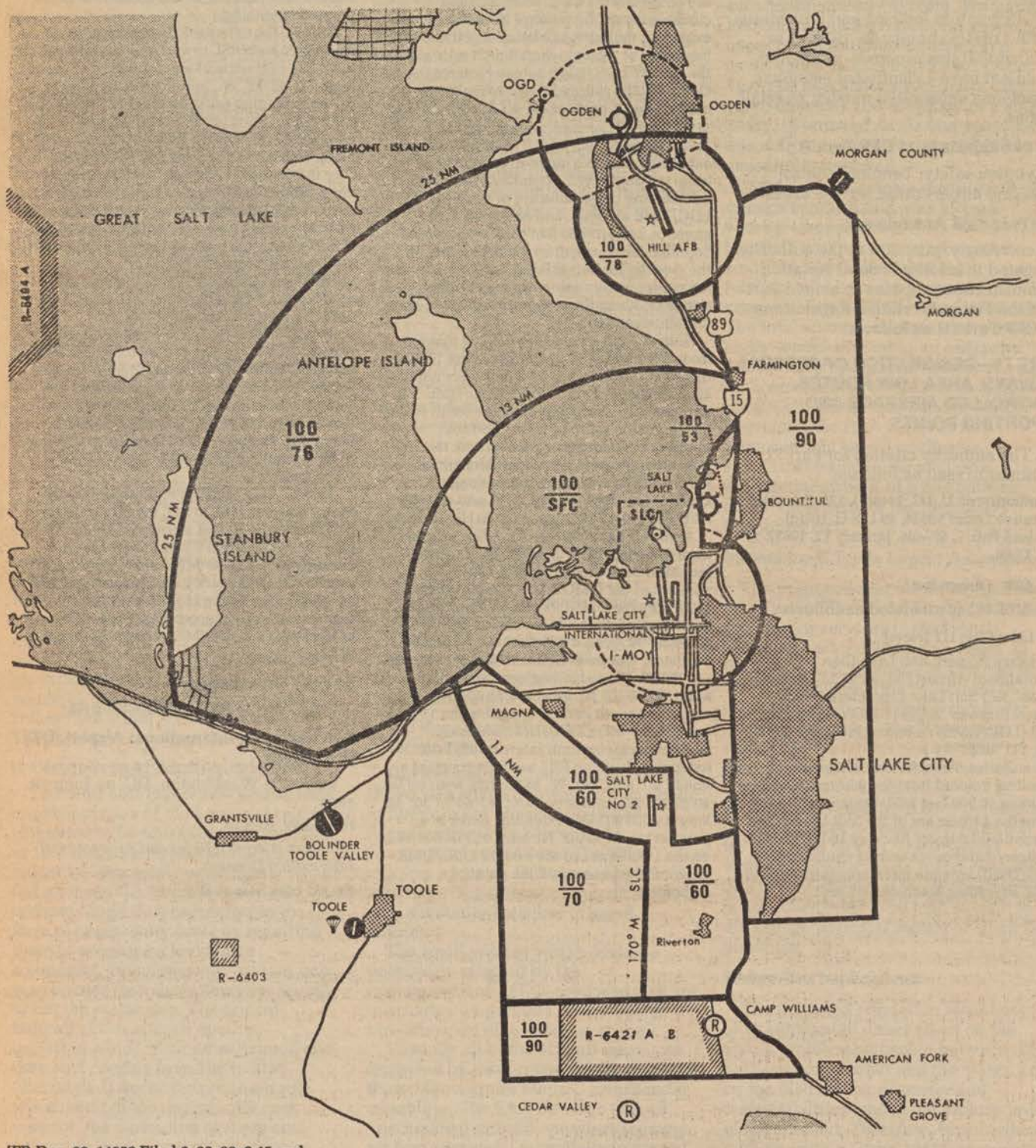
Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

BILLING CODE 4910-13-M

TERMINAL CONTROL AREA
SALT LAKE CITY, UTAH
SALT LAKE CITY INTERNATIONAL AIRPORT

(NOT TO BE USED FOR NAVIGATION)



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federal register

Friday
June 23, 1989

Part VIII

Department of Transportation

Federal Aviation Administration

14 CFR Parts 21, 25, and 121

Location of Passenger Emergency Exits in Transport Category Airplanes; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21, 25, and 121

[Docket No. 25491; Amdts. Nos. 21-65, 25-67, 121-205]

RIN 2120-AC29

Location of Passenger Emergency Exits in Transport Category Airplanes

June 13, 1989.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule establishes a new standard that limits the distance between emergency exits on transport category airplanes. This rule prohibits airplane manufacturers and air carriers from increasing the distance between emergency exits to more than 60 feet. Existing regulations do not limit the distance. This rule is intended to ensure an opportunity for safe passenger evacuation during an emergency.

EFFECTIVE DATE: July 24, 1989.

FOR FURTHER INFORMATION CONTACT: Arthur J. Hayes, Aircraft Engineering Division (AIR-120), Aircraft Certification Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Telephone (202) 267-9937.

SUPPLEMENTARY INFORMATION:

Background

Since 1967, the Federal Aviation Administration (FAA) has regulated the location of emergency exits on airplanes by requiring that an exit be provided for every specified number of passengers, that an exit be located where it would allow the most effective means of passenger evacuation, and that exits be distributed as uniformly as practicable taking into account passenger distribution. (14 CFR 25.807) An underlying assumption has been that a uniform distribution of exits accounting for passenger distribution results in reasonable seat-to-exit and exit-to-exit distances.

However, some recent exit configurations have exit distances that are greater than those envisaged when the exit rule was adopted. Of the new wide-body transports that were being designed when the rule was adopted, the Boeing Model 747 had a maximum distance between exits of 44 feet; the McDonnell Douglas Model DC-10, 47 feet; and the Lockheed Model L-1011, 50 feet. (All figures are rounded off.) Basic narrow-body transport models typically had shorter distances. Derivative configurations of these models show an increase in typical distances. Exit-to-exit distance, originally 50 feet in the L-1011-385-1, increased to nearly 70 feet in a later model, the L-1011-385-3. The Boeing 747 showed an increase from 44 feet in the 747-100, -200, and -300 models to nearly 70 feet in the 747-200 and 747-300 models with the No. 3 exits deactivated. A recent certification request proposed a derivative configuration with a distance substantially greater than 80 feet. The FAA denied this request. These recent cases of exit configuration design indicate that the exit distribution requirement of § 25.807(c) alone is ineffective in preventing increases in escape path distances. While the agency recognizes that exit distance considered alone is not dispositive of the conditions which provide for a safe evacuation, under our current state of safety knowledge, this factor is clearly an important variable. As discussed below, however, the agency considers it preferable that a performance standard for evacuation be employed in the future, so as not to artificially constrain design options. With the specific intent of developing the information necessary to propose such a performance standard to replace (among other factors affecting safe evacuation) this artificial exit distance limitation, the agency will gather the best available safety expertise in a formally chartered advisory committee to consider and report on the best means for achieving that end.

The agency's concern over the significance of escape path distance recently increased in connection with type certification activities for a derivative of the Boeing Model 747 (B-747), necessitating this action in the interim, until better knowledge permitting development of a performance standard becomes available. In September 1984, at the request of the Boeing Company (Boeing), the Seattle Aircraft Certification Office (ACO) approved a modification of the B-747 which would deactivate a pair of over-wing exits and reduce the maximum passenger capacity of the main deck by 110, from 550 to 440. The Seattle ACO approved the modification on the basis that such a modification was within the requirements of the regulations at that time. The FAA received many letters from the public objecting to the deactivation of emergency exits. In response to the public objections, the FAA Administrator asked the Office of Airworthiness (presently the Aircraft Certification Service) for a review of the ACO action. The review, dated March 1, 1985, found that the B-747, as modified, fully met all applicable rules and that no exemptions, waivers, or special conditions were granted or considered. Notwithstanding this conclusion, on June 12, 1985, the FAA Administrator wrote a letter to a number of U.S. air carriers strongly encouraging them to maintain the original number of emergency exits on their passenger-carrying Boeing 747 airplanes, because of safety concerns not addressed by the rule.

On June 24, 25, and 26, 1985, the House Subcommittee on Investigations and Oversight heard testimony from witnesses opposed to exit deactivations and from the FAA Administrator. The Administrator promised the committee a review of all issues raised in the letters received by the FAA and in testimony given before the committee. The review was summarized in a report to the Administrator, dated August 5, 1985. It found that the approval for design modifications to B-747 airplanes was technically valid in accordance with the regulations but that issues raised by the public added new emphasis and perspective to the issue of escape path distances. The report concluded that all of the issues raised by the public questioned the efficacy of the rules rather than the validity of the approval. The report stated that the FAA would hold a Public Technical Conference on emergency evacuation. As a result, an Emergency Evacuation Task Force was formed in Seattle, Washington, in September of 1985. The task force consisted of members of the interested public and was chaired by the FAA. The task force reviewed recent design, maintenance, and operational experience of the new generation of narrow- and wide-body transports. It examined the full range of emergency evacuation topics, including passenger emergency exits, cabin configuration, emergency evacuation demonstrations, evacuation slides, crewmember duties and training, and passenger safety information. Although no consensus was reached by the task force, the task force efforts were helpful to the FAA in its own ongoing efforts to improve emergency evacuations. Unfortunately, the task force did not provide any basis for a performance standard to address the concerns raised by increasing exit distances.

The FAA reviewed the issues surrounding the Boeing approval as well as information grained on modifications of other wide-body transport airplanes, information received from flight attendants who are knowledgeable about emergency evacuation

procedures, and information from the public and other interested persons. As a result, the FAA decided that the rule on number and location of passenger emergency exists were not adequate to maintain the original intent of those rules that exists be located to provide an opportunity for passenger evacuation in an emergency, because aircraft designs had significantly changed in the over 20 years since the rule was written.

The agency's reassessment of the rules in light of recent aircraft designs and events has confirmed the importance of the distance betewen exists and the potential impact of excessive distance on the chances of passenger survival in an emergency. Accordingly, in the absence of a performance standard which provides acceptable safety, the FAA is amending Parts 21, 25, and 121 of the Federal Aviation Regulations (FAR) to prohibit any passenger emergency exist from being located more than 60 feet from any adjacent passenger emergency exist. The FAA has determined that the specification of the distance between exists along with the existing uniform distribution rule is sufficient to provide the appropriate distance between a passenger seat and an emergency exit, though the preferable alternative would be a performance standard. For the purposes of this rule, the distance between exists is measured along a line parallel to the airplane's longitudinal axis for exits on the same deck and on the same side of the fuselage.

This rulemaking action covers only one of many factors affecting cabin evacuation. The FAA considers evacuation within a systems or "holistic" framework, i.e., a number of interrelated factors affect the success of an evacuation. These factors include: cabin attendant training, fuselage attitude, door design, door reliability, chute design and reliability, chute inflation times, aisle design, seat materials, exist low lighting, aisle lighting, crew check lists passenger safety information, cabin configuration, and other factors.

The FAA is addressing these and other related issues by establishing an emergency evacuation advisory committee to develop recommendations for an evacuation performance standard and appropriate further modifications and additions to the agency's existing evacuation regulations. The committee will include representatives of crewmembers, airlines, manufacturers, and other interested organizations. The committee will provide the FAA with recommendations on areas which concern improved specification of emergency evacuation regulations and other new techniques which should enhance cabin evacuation. Specifically, the committee will be tasked to design a performance standard against which safe evacuation capability of existing and new aircraft designs can be measured in order to replace artificial exist distance limitations and other nonperformance oriented design criteria mandated by this and other regulations. This group will be asked to submit recommendations on airplane evacuation standards by July 1, 1991, and to review all relevant cabin evacuation issues that the FAA asks it to consider, as well as issues raised by passengers, the National Transportation Safety Board, and the Congress. The FAA will use the committee's recommendations as a basis for reformulating the agency's evacuation regulations, if warranted by analysis in accordance with Executive Order 12291. While such a reformulation into an evacuation performance standard is hoped to obviate the need for distance limitations established by this final rule, the FAA finds that, in the interim until such performance standards are available, distance limits between emergency exist doors are necessary in the interest of airline passenger safety.

On October 20, 1987, the FAA published Notice of Proposed Rulemaking No. 87–10 (Notice No. 87–10) (52 FR 39190) which proposed to establish new standard limits on transport category airplanes for the distance between any passenger seat and the nearest emergency exit and the distance between exits. On March 2, 1988, the Administrator testified before the House Committee on Public Works and Transportation, Subcommittee on Investigations and Oversight. In that testimony the Administrator stated that, having reviewed the public comments, the FAA planned to issue a final rule to prescribe a new standard to limit the distance between exists. Comments received on the proposals are described and responded to below.

Discussion of Comments

The FAA received 31 comments on the proposals. Approximately two-thirds of the comments are generally supportive of the FAA proposals. These supportive comments are from associations of airline employees, from individual flight attendants and private citizens, and from an association of airline passengers. In addition to these groups, there are favorable comments from the National Transportation Safety Board (NTSB), The Airworthiness Authorities Steering Committee, Transport Canada, and The Civil Aviation Administration of China.

Although about one-third of the commenters oppose the proposals, none of these comments contains either a supportable alternative performance standard or any additional proof that would convince the FAA that the proposals should be withdrawn. These opposing comments come from foreign air carriers, from airline associations, and from airplane manufacturers.

The discussion of comments is divided into the following categories of issues: (1) Common sense support of the agency's approach; (2) retroactive nature of the agency's action; (3) claimed discriminatory and inconsistent nature of the agency's action; (4) offsetting factors; (5) accident and service experience; (6) actual emergency evacuation conditions versus evacuation demonstrations; (7) sixty-foot determination; (8) economic costs; and (9) comments beyond the scope of the proposals.

Common Sense Support of the Agency's Approach

Most of the supporting commenters agree that, given our present state of knowledge regarding safety matters, exit-to-exit distances affect the outcome of emergency evacuations. Throughout the favorable comments, the common sense assumption is presented that a passenger who is close to an emergency exit has a better chance to escape than a person farther away. A British aeronautical engineer states:

> With the considerable test and operational data available to the FAA it is reassuring to read that they now also support my long held opinion, and that of my colleagues, that the escape path distance can have a major effect on the outcome of the evacuation.

The commenters who support the proposals think that the FAA should address the issues of exit-to-exit distance and seat-to-exit distance as well as other cabin improvements (e.g., smoke hoods and location of cabin attendant stations).

The FAA agrees that distance from a passenger to an exit and distance between exits are relevant factors (though not the only important ones) in emergency evacuations and, therefore, is amending its airworthiness requirements to establish a standard limit on distances between exits, in the absence of a preferable performance standard. For reasons discussed under the heading Rule Clarifications, the FAA is not adopting a specific limit on the distance between a passenger seat and the nearest emergency exit. In recent years, the FAA has completed several

rulemaking actions that addressed other safety features that could increase the likelihood of passenger survival in an emergency evacuation. On July 10, 1986, the FAA issued Amendments 25–61 and 121–189 (51 FR 26206) to upgrade fire safety standards for cabin interior materials in transport category airplanes. On May 29, 1987, the FAA issued Amendment 121–194 (52 FR 21472) to establish new carry-on baggage requirements. The Task Force Report on Emergency Evacuation of Transport Airplanes (discussed in the background section of the preamble of Notice No. 87–10) identified additional areas that are under study within the FAA and that could be the subject of future rulemaking. The agency expects that the emergency evacuation advisory committee to be formed will consider all of these data in its development of a recommended performance standard for emergency evacuations.

Retroactive Nature of the Agency's Action

Several commenters state that the FAA is attempting by general rulemaking to disapprove, retroactively, a particular emergency exit design that the FAA admits is legal under existing regulations. Specifically, The Boeing Company describes three ways that this rule would be applied retroactively.

(1) It would apply to applications for supplemental type certificates (STC) or for amendments to type certificates that were submitted to the FAA before October 16, 1987 (§ 25.2).

(2) It would apply to airplanes that already have STC's or amended type certificates but have not yet received standard airworthiness certificates (§ 21.183(f)).

(3) It would prevent airplanes that are already in service from being modified in a way that was legal under the certification rules that applied to those airplanes when they were manufactured (§ 121.310(m)).

Only one commenter specifically criticizes the agency's intention to make §§ 21.183(f) and 121.310(m) applicable as of the date of issuance of the proposals.

Boeing states that the FAA does not have discretion to change the rules in the ways described above. Boeing also states that once the FAA has approved a type design and issued a production certificate the manufacturer is entitled under § 21.183(a) to a standard airworthiness certificate without further showing. Boeing states that the FAA cannot change the automatic nature of § 21.183(a) because it maintains that § 21.183(a) is taken directly from the agency's statutory mandate. Section 603(c) of the Federal Aviation Act of 1958 (Act), 49 U.S.C. 1423(c), provides:

> If the Administrator finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate.

Boeing further states that Congress passed legislation giving the FAA specific authority to issue retroactive regulations relating to aircraft noise and sonic boom which shows that the FAA does not otherwise have the authority to issue retroactive regulations under the Act.

Boeing's description of how the new rule is applied retroactively is correct; however, Boeing and other commenters are incorrect in claiming that the FAA does not have any authority to apply airworthiness certification rules retroactively.

The basic scheme of the type certification regulations is set out in § 21.17. Paragraph (a) of § 21.17 reads as follows:

> (a) Except as provided in § 23.2, § 25.2 and in Part 36 of this chapter, an applicant for a type certificate must show that the aircraft, aircraft engine, or propeller concerned meets—
>
> (1) The applicable requirements of this subchapter that are effective on the date of application for that certificate unless—
>
> (i) Otherwise specified by the Administrator, or
>
> (ii) Compliance with later effective amendments is elected or required under this section, and
>
> (2) Any special conditions prescribed by the Administrator.

Section 21.17(a) has described for many years four methods by which an applicant for a type certificate could be required to comply with regulations that are not the applicable requirements that are effective on the date of application for the type certificate. First, retroactive regulations could be applicable under § 25.2. Second, under § 21.17(a)(1)(i), the applicable regulations could be otherwise specified by the Administrator. Third, under § 21.17(a)(1)(ii), compliance with later effective regulations could be required. Fourth, under § 21.17(a)(2), special conditions could be prescribed by the Administrator.

In addition, airplane manufacturers have always been affected by either special airworthiness requirements of instrument and equipment requirements that have been included in the applicable operating rules (e.g., Subparts J and K of Part 121). Even though an airplane fully met the type certification requirements, an airline could not operate the airplane unless it also met the special airworthiness or instrument and equipment requirements that apply to that airline.

Thus, for many years, the FAA has had the authority to upgrade applicable type certification and airworthiness requirements as needed to ensure that the appropriate level of safety is maintained. This authority to apply rules in a manner that has certain retroactive effects has been exercised by the FAA on many occasions and applies to supplemental type certificates and to amendments to type certificates. The language in section 603(c) of the Act in no way limits the above-described authority since the issuance of an airworthiness certificate becomes automatic only after the Administrator has found full compliance with the type certificate or production certificate, as applicable. (See § 21.183)

Therefore, the fact that the FAA was given specific authority in section 611 of the Act to issue retroactive rules relating to aircraft noise and sonic boom does not lead to Boeing's conclusion. As described above, the authority to promulgate retroactive requirements to address safety issues is consistent with the proper exercise of the agency's safety rulemaking authority, and exists independently from the authority to promulgate standards to address the control and abatement of noise and sonic boom. Therefore, the enactment of section 611 in no way diminishes the authority of the FAA under the Act to adopt the standard described herein.

Claimed Discriminatory and Inconsistent Nature of the Agency's Action

Boeing states that the proposed Part 121 amendment is arbitrary and capricious and discriminates against Boeing because it is specifically targeted at the B–747. Boeing's basic argument is that if safety is the justification for the operating rule, then all airplanes that do not meet the 30-foot/60-foot requirements would have to be barred from future Part 121 operations. According to Boeing, however, § 121.310(m), as proposed, would permit Lockheed Model L–1011–500 (L–1011–500) airplanes that are presently operating under Part 121 to continue to operate under that part even though they do not meet the 30 foot/60-foot requirements while prohibiting operation of comparably modified or newly-manufactured B–747 airplanes. Boeing and other commenters state that the FAA position is inconsistent in the following ways:

(1) A 10-door B–747 would be considered safe for 550 passengers on the main deck while an 8-door B–747 would not be considered safe for 400

passengers or even for substantially lower maximum seating configurations.

(2) L–1010–500 airplanes with emergency exits that are 65.6 feet apart would continue to be legal under Part 121.

(3) Foreign air carriers could continue to operate their previously-modified 8-door B–747's into and out of the United States but could not sell a modified B–747 to a Part 121 certificate holder unless the over-the-wing exits were reactivated.

The Lockheed Corporation (Lockheed) states that the regulatory evaluation prepared for the proposals is inconsistent with the proposed rule language because, while the regulatory evaluation states that the L–1011–500 airplanes would not be impacted by the proposed rule, the language of proposed § 121.310(m) would prevent such airplanes now owned by foreign operators from being sold to U.S. airlines.

KLM Royal Dutch Airlines (KLM) suggests that because the agency's distinctions may not be understandable to the public, airlines like KLM might be forced to reactivate exits so that they would not have internal inconsistencies in their operations.

That airplanes will be flying side by side in air carrier operations even though they neither meet the same requirements nor possess the same characteristics is in no way a new concept. At times the FAA has adopted retrofit rules that apply to all airplanes operating under a particular operating rule, and at other times it has allowed certain airplanes to continue operating until they are retired.

Under this rule there would continue to be inconsistencies in the seat-to-exit ratios of various airplane types. Under the current rules, airlines have chosen to configure their cabin space in various ways and many airplanes do not have as many seats as would be allowed for that airplane under § 25.807; however, this rulemaking addresses exit-to-exit distance as a separate issue from seat-to-exit ratios. The current seat-to-exit ratios in § 25.807 are not changed by this rulemaking. Perhaps the emergency evacuation advisory committee will develop recommendations for a performance standard which accommodates the change implied by this comment.

The statement from the regulatory evaluation referenced in the Lockheed comment did not mean that L–1011–500 airplanes would be excluded from the effect of proposed § 121.310(m). The statement referred to the fact that, since Lockheed is no longer manufacturing the L–1011–500, there would be no direct economic impact on Lockheed. Under new § 121.310(m), no existing foreign-owned airplane (whether a L–1011–500 or a modified B–747 or any other transport category airplane) that exceeds the exit-to-exit limit can be obtained by a U.S. airline to be operated under Part 121.

This rule is intended to "hold the line" on growth of exit distance until an adequate performance standard can be developed. The overall effect of this final rule is threefold:

(1) No operator of U.S.-registered airplanes can modify one of its existing airplanes to exceed the exit-to-exit limit established by this rulemaking under Part 121.

(2) No operator can purchase from a foreign air carrier and operate under Part 121 any existing airplane that exceeds the exit-to-exit limit established by this rulemaking.

(3) No airplane manufactured after October 16, 1987, that exceeds the exit-to-exit limit will receive a U.S. standard airworthiness certificate.

Thus, while this rule contains the above-mentioned effects, this rule does not require any operator of a U.S.-registered airplane to expend any resources to retrofit any airplane that was in its fleet as of October 16, 1987. These effects clearly are associated with no direct costs.

Offsetting Factors

Several commenters state that improvements to emergency exit slide design and maintenance and to emergency exit door maintenance and actual seating configurations are offsetting factors which would allow faster and safer evacuations with fewer exits. This, is fact, might be true and could be a factor to be considered by the emergency evacuation advisory committee in its attempts to develop a suitable performance standard.

Boeing cites specific emergency exit and slide design improvements for the B–747 in the following areas: (1) Reduced inflation time of up to 50 percent; (2) use of higher strength, tear, and puncture-resistant sliding surface materials; (3) improve 25-knot wind performance; (4) an escape slide design with improved load-bearing capacity; and (5) lengthening the No. 2 door escape slide so that it can be usable for a wider range of conditions.

Virtually all of the foreign air carriers state that the FAA failed to consider that the standard seating configuration for the main deck of their B–747's ranged from 322 passengers to 384 passengers, all well below the 440 that would be the maximum under the present rules for an 8-door configuration. British Airways suggests as an alternative to the FAA proposals a 10-percent reduction in the present limit of 440 passengers to 396 for the 8-door configuration.

While the FAA recognizes that there have been improvements in emergency evacuation equipment and maintenance in recent years, in the absence of an accepted and validated performance standard against which to measure these factors and their contribution to evacuation success, these improvements do not offset the need to place a limit on the distance between exits until the performance standard is developed. Furthermore, as one commenter notes, a large proportion of the world fleet is not yet fitted with the inflatable slides which incorporate the latest safety advances. Also, this commenter notes that, despite improvements in emergency evacuation procedures for wide-bodied transports, the time necessary to evacuate these types of airplanes in full-scale demonstrations remains close to the time necessary to evacuate narrow-bodied airplanes.

The FAA is not addressing seat-to-exit ratios in this rulemaking. As discussed previously, this rulemaking is needed to hold the line on maximum exit-to-exit distance to provide the appropriate level of safety until a performance standard can be developed. This requirement will work together with present seat-to-exit ratio requirements, uniform distribution requirements, and improvements in evacuation equipment to increase the likelihood that passengers will survive in emergencies involving fire where evacuation is necessary.

Accident and Service Experience

Boeing and others point to actual evacuations in emergency situations in which 8-door B–747's were evacuated safely. British Airways describes its own experience in two emergency evacuations (Azores, 1985, and Los Angeles, 1987) where 334 and 370 passengers, respectively, plus crewmembers evacuated with only a few minor injuries to passengers.

The examples cited by commenters do not contradict the proposed rule changes. The main objective of the 60-foot exit-to-exit distance requirement is to prevent any further increase in exit-to-exit distances until an adequate performance standard can be developed.

While the evacuation situations described by British Airways are both examples of successful actual emergency evacuations, neither involved crash conditions. The evacuations involved neither fire nor

smoke, and all emergency exits were operable. In accidents studied where some passengers survived and some did not, evidence indicates that proximity to an exit increased the likelihood of survival. (See the following discussion.)

Actual Emergency Evacuation Conditions Versus Evacuation Demonstrations

Positions vary on the question of whether distance to exits is as important as other factors in evacuation. The Association of Flight Attendants (AFA) states that distance to exits is as important as other factors. In support of its position, the AFA provides quotes from two earlier FAA reports. A 1964 report entitled "Human Factors of Emergency Evacuation" state that no passenger should be more than 22 feet from an exit. (AM 65–7, p. 8, Mohler, Swearingen, McFadden, and Garner). A 1970 FAA report entitled "Survival In Emergency Escape From Passenger Aircraft," stated:

> In all three accidents, the distance between initial seat location and the nearest usable exit tended to be greater among fatalities than survivors. This leads to the not unsurprising conclusion that it is better to sit closer to an exit than farther away. (AM–70–16, p. 55, Snow, Carroll, and Allgood)

The AFA also states that testimony of flight attendants who had been in crashes confirms that distance to exit doors is important in escaping.

Many commenters who think that the FAA is overemphasizing distance to exits appear to agree with one commenter who states that the time needed to evacuate airplanes in emergencies is a function of both distance to the nearest emergency exit and the time to evacuate. This commenter suggests that with shorter distances, lines may form and that the piling up or queuing of passengers in emergency evacuations may actually impede the ability to evacuate airplanes because passengers could be more prone to panic if they are lined up and waiting.

Most of the opposing commenters also appear to believe that the FAA is not giving adequate recognition to the numerous emergency evacuation demonstrations that have proven that airplanes, such as models of the B–747 with 8 doors on the main deck, could be evacuated within less than 90 seconds with 50 percent of the exits blocked along with the other simulated emergency conditions required by the rules.

As noted in Notice No. 87–10, the evacuation demonstration required by § 25.803 neither establishes a maximum escape path distance nor demonstrates that escape path distance is not a major factor in actual emergencies. That demonstration is conducted to provide a benchmark against which the FAA can consistently evaluate emergency exit performance with various internal seating and emergency exit configurations. It does not simulate actual post-crash emergency evacuation conditions, nor could it reasonably do so. It is not an acceptable evacuation performance standard.

As explained in Notice No. 87–10, with present designs, excessive escape path distance can be a major impediment to evacuation in a number of situations which service experience has shown might occur during an actual emergency. The typical passenger cabin with a single aisle feeds evacuees to pairs of exits, one exit on each side of the cabin (or dual aisles to dual lane exits in typical wide-body cabins). In an actual emergency evacuation, exits at one end of the cabin might be made unusable by fire, smoke, structural damage, water submersion, landing gear collapse, or other causes, leaving one or more pairs of usable exits in the remainder of the cabin. This is conmmonly the case in a pool fire accident, where escape time differences of only a few seconds can be critical. In this situation, the aisle cannot feed evacuees to a pair of typical floor level exits fast enough to use the full evacuation capability of the exit pair. The flow rate of the aisle is less than that of the exit pair, making the aisle itself the critical impediment which determines the time required for passengers to escape the airplane. Similarly, dual aisles inadequately feed pairs of exits equipped with dual-lane evacuation slides.

In the situation where one exit in a pair of exits is unusable, as in an evacuation demonstration, the aisle is not the critical impediment to evacuation. In this case the aisle can feed more evacuees to the remaining single exit than that exit can handle. This results in passenger queues at exits. The limited flow rate of the single exit is the impediment which determines evacuation time. This is the situation which some commenters contend demonstrates that aisle length has no effect on evacuation time. The FAA acknowledges that in evacuation demonstrations, aisle distance may not be as critical a factor in evacuation time as it is in real accident emergencies where the aisle may be barely passable. The agency expects that these variables will be more appropriately accounted for in a performance standard developed by the emergency evacuation advisory committee.

Sixty-Foot Determination

A number of commenters address the proposed maximum distance between emergency exits. Several commenters who support the proposed maximum distance between exits cite the historical increase in distance between exits as described in Notice No. 87–10. These commenters agree with the FAA position that earlier improvements in crashworthiness safety regulations had not focused on the distance between exits because as a practical matter those distances were all within a range generally agreed to be acceptable. Some of these commenters suggest that while they think a distance of less than 60 feet could be justified, they will accept the agency's proposal of 60 feet.

Virtually all of the commenters who oppose the proposal state that there is no basis for the 60-foot maximum distance requirement. Typical of these commenters is KLM Royal Dutch Airlines' statement that the 60-foot limit between emergency exits was and is an arbitrary figure, not supported by objective evidence or analysis. KLM states that the 60-foot limit was a subjective opinion expressed by airline cabin crew delegations at the 1985 Evacuation Technical Conference in Seattle. KLM and other commenters urge the FAA to consider other factors besides exit distance: factors such as dual aisles versus single aisles and the number of people who have been evacuated within the 90-second limit in demonstrations of emergency evacuation procedures under Part 121.

Several commenters assume that the primary justification for the proposed 60-foot maximum distance is the tests discussed in Notice No. 87–10 that were conducted in the emergency evacuation simulator at the FAA Civil Aeromedical Institute (CAMI). These commenters specifically dispute the statement made in Notice No. 87–10 that the CAMI tests indicate that a reduction in aisle flow by about one-third could be reasonably expected when the floor is inclined because of, for example, gear collapse.

Boeing contends that the FAA selectively used the CAMI data. British Airways states that it disagrees with the conclusions drawn by the FAA on flow rates and has not been able to support it in its reading of the appropriate CAMI report.

As the discussion in Notice No. 87–10 clearly indicated, the justification for the maximum 60-foot distance between exits is not based on specific empirical research (CAMI's or other), success or

failure of evacuation demonstrations, or anecdotal evidence from actual crash evacuations. However, testing, historical data, analysis, and informed engineering judgment lead the FAA to conclude that, in the absence of a preferable but presently unavailable evacuation performance standard, it would not be prudent to allow distances between emergency exits to increase without providing a limit. As Notice No. 87–10 stated, the issue of maximum distance between exits was not addressed in the major crashworthiness regulations in the 1960's because even the new wide-bodied transports then being designed had a maximum exit-to-exit distance ranging from 44 feet to 50 feet. Before Notice No. 87–10 was issued, one designer of a derivative version of an existing airplane proposed exit-to-exit distances substantially exceeding 80 feet. This is not acceptable, for reason of safety, in present designs.

For the FAA to determine that 60 feet is the maximum allowable distance between exits, the FAA does not have to conclude, as Boeing and many other commenters seem to assume, that 65 feet or 75 feet or even 85 feet would never under any circumstance be safe. A survivable crash situation in which upwards of 400 people safely evacuate an airplane with exits more than 60 feet apart is certainly possible. But, as other commenters note, there also have been survivable crashes in which many people died or were injured because some or nearly all of the available exits were unusable. As the FAA has stated on numerous occasions, Part 25 of the FAR contains many requirements for built-in redundance because it would be imprudent to allow otherwise. For instance, three-engine transport category airplanes must be capable of maintaining safe flight with two engines inoperable, not because such flight is desirable but because such capability may be necessary, although rarely, to avoid a catastrophe.

Therefore, the decision to establish a maximum distance of 60 feet between exits is not a decision based on specific provable data. Rather, in the absence of a technically acceptable evacuation performance standard, it is a decision based on a balancing of door distance in the total equation of cabin evacuation, that is, how door distance interrelates with aisle design, exit row lighting, door design, chute inflation time, and other factors that go into the cabin evacuation scenario, given our present understanding of the interrelationship of these variables. The FAA finds that the selection of a maximum 60/foot distance between exits is a prudent and necessary safety decision consistent with its mandate under the Act and in the absence of an acceptable performance standard.

The agency has placed in the public docket (No. 25191) an explanation of its analysis and use of the CAMI tests in arriving at the one-third reduction in flow rate mentioned in Notice No. 87–10. These tests were just one factor in the agency's decision. The primary technical basis for the difference between the one-third reduction and lesser figures mentioned by commenters is the emphasis given to different parameters in the tests.

Economic Costs

Many foreign air carriers and Boeing comment that the agency's regulatory evaluation did not consider potential revenue loss to air carriers because they could not increase their passenger capacity. These commenters state that with 8 emergency exits on the main deck, it would be possible to increase the seating capacity by 6 to 12 seats while maintaining an interior layout consistent with the current layout (a mix of first class, business class, and coach seating; seat pitch and width; and interior service areas such as closets, galleys, and lavatories). Commenters provide a range of estimates of the annual value of these seats to air carriers in additonal passenger revenues.

The loss of potential revenue because an air carrier cannot increase its passenger capacity should not be considered as an impact of this rulemaking. Airlines are currently operating B–747's well below the type certificated maximum seating capacities: 440 with 8 exits and 550 with 10 exits on the main deck. This rulemaking does not prohibit an airline from increasing passenger seating capacity to the maximum allowed. Although allowing deactivation of two of the exit doors could potentially provide air carriers with an opportunity to increase passenger seating capacity without changing the present interior layout, it is not a cost directly related to this rulemaking. It is a cost resulting from air carrier management decisions regarding cabin configuration and passenger service.

Only foreign air carriers and Boeing raised the issue of increasing passenger seating capacity. The Air Transport Association of America (ATA), which represents U.S. air carriers, states in its comments, "Few ATA member airlines are directly affected by the proposed limitations on seat/exit locations; those which are directly affected have, for reasons of their own, elected to restrict their future airplane seat/exit configurations to those which comply with the proposed limits." Consequently, this rulemaking does not have a substantial impact on U.S. air carriers.

The cost figures submitted regarding lost opportunity are inaccurate. For example, both Boeing and Korean Airlines assume that the present passenger load factor would apply to the additonal seats gained by deactivation of the exit doors; however, if the current passenger load factor is about 70 percent on an airplane with 350 seats, the additonal 6–12 seats would be used only when flights were full or nearly full. The additional seats would more accurately have a load factor of about 10 percent. Such an adjustment would significantly reduce the lost opportunity costs of the air carriers.

KLM Royal Dutch Airlines expresses concern that it would be forced to reactivate exit doors in its 8-door B–747's because the public may think the airplanes with 8 doors on the main deck are unsafe. KLM states that reactivating the doors would cost $450,000 per airplane. The FAA is not requiring exit doors to be reactivated as a condition for continued airworthiness. As stated previously, the FAA is prohibiting air carriers and manufacturers from increasing exit-to-exit distances beyond the limitations in this rule because the preferable alternative of a performance standard cannot now be exercised. As a result of this rulemaking, airlines may voluntarily reactivate exit doors in the interest of safety. These costs would be voluntary and, therefore, are not being considered.

The Orient Airlines Association and Korean Airlines state that orders for 8-door B–747's have been placed with Boeing. In anticipation of delivery of these airplanes, the airlines have made plans; to change these plans, as the final rule would require, would involve incurring added costs. The FAA recognizes that inconvenience may be involved for foreign air carriers that had placed orders. However, any such lost opportunity costs are not considered except as they relate to U.S. trade (discussed in the International Trade Impact Assessment).

Boeing submitted cost estimates on fuel costs associated with additional weight and maintenance cost of the equipment for the two exits. These avoided costs were considered in the regulatory evaluation for the proposed rule. The estimated cost impact is $8,300 per B–747 per year operated. This consists of $6,800 in avoided fuel costs and $1,500 in avoided maintenance expenses. Boeing estimates an annual

cost increase of $4,780 per B–747. This consists of fuel costs of $1,080 and maintenance costs of $3,700. In light of these figures, an appropriate range of the potential per airplane annual cost increase of this final rule is from $5,000 to $8,000.

In summary, no additional cost/benefit information, which significantly alters the agency's original assessment of the proposed rule, was submitted in response to Notice No. 87–10.

Comments Beyond the Scope of the Proposals

The following are a number of comments that while relating to the overall issue of emergency evacuation are beyond the scope of this rulemaking:

- One commenter recommends a separate proposal to resolve the shortcomings and controversial aspects of simulated emergency evacuation demonstrations.
- British Airways recommends further evacuation testing to establish supportable, repeatable criteria rather than the subjective opinions expressed in Notice No. 87–10.
- McDonnel Douglas states that the issue is more complex than just distance alone and that the FAA should consider seat pitch, aisle width, door size, and seat density.
- ALPA states that the FAA should correlate distance to size of exit. For example, for less than a Type A exit, the maximum distance between exits should be 50 feet.
- Several commenters suggest that a flight attendant be required at each Type A emergency exit.

As stated earlier, this rulemaking focuses on exit-to-exit distances because an acceptable performance standard has not yet been developed. The FAA may address related issues, such as emergency evacuation demonstrations, cabin configuration, and location of flight attendants in other actions and in the deliberations of the emergency evacuation advisory committee. The recommendation by British Airways to conduct further evacuation testing before establishing criteria would only allow for a continuing increase in exit-to-exit distances. The FAA will continue to conduct research in emergency evacuations and will use such research results to increase the likelihood of passenger survival in emergencies. The FAA will also fully support and aggressively address the recommendations of the emergency evacuation advisory committee regarding proposal and adoption of a regulation implementing an evacuation performance standard.

Rule Clarifications

In addition to minor editorial corrections, the following specific changes have been made to the proposed rule language that appears in Notice No. 87–10.

Section 25.2

The phrase, "involving an increase in distance between any adjacent passenger emergency exits," in proposed § 25.2(b) has been replaced with the words "for an airplane manufactured after October 16, 1987,". This change makes the language of § 25.2 consistent with § 21.183(f) and clarifies the intent that § 25.2(b) applies only to newly-manufactured airplanes.

Sections 25.807(c)(7) and 121.310(m)

One commenter notes that the distance from the furthest upper deck seat (down the staircase) to a main deck exit in the B–747 is greater than 30 feet. This commenter recommends that the distance to the exit on the upper deck should be allowed to meet the rule. Two other commenters emphasize that both distances (seat-to-exit and exit-to-exit) should be measured parallel to an airplane's longitudinal centerline axis.

The intent is for each distance to be measured along a line parallel to an airplane's longitudinal axis for exits on the same deck and on the same side of the fuselage. The wording in the rule has been changed to accommodate these concerns, to clarify that adjacent exits are on the same side of the same deck, and to set a limit on exit-to-exit distance only on the same side of the same deck.

In addition, proposed §§ 25.807(c)(7) and 121.310(m)(1) have been withdrawn because they are redundant with respect to existing requirements. (Proposed § 25.807(c)(8) has been renumbered § 25.807(c)(7) in this final rule.) Section 25.807(c) currently requires that at least one floor level exit per side be located near each end of the cabin. Therefore, for a passenger seat located aft of the aft-most exit or forward of the forward-most exit, the escape path distance will not be excessive.

Regulatory Evaluation Summary

The regulatory evaluation prepared for this rule considers costs and benefits associated with amendments to Parts 21, 25, and 121 to limit passenger emergency escape path distance by establishing a standard that limits the distance any exit may be from an adjacent exit (no more than 60 feet).

The potential impact of this rule falls primarily on U.S. airline operators of B–746 airplanes. Although no B–747 airplane currently in use by U.S. air carriers has an exit-to-exit distance greater than 60 feet, a loss of potential revenues could occur if any U.S. air carrier intended to deactivate two exit doors from B–747 airplanes thereby increasing exit-to-exit distances beyond the standard limit established in this rulemaking.

This rule could have a potential impact on operators of Lockheed Model L–1011–385–3 (L–1011–500) airplanes. These airplanes are no longer in production and those currently in existence in U.S. air carrier service have been excluded from the requirements of this rulemaking. Noncomplying L–1011–500's may not enter Part 121 operations after October 16, 1987. The L–1011–500's owned by foreign operators before October 16, 1987, cannot be used by a Part 121 operator unless they are modified to comply with the exit distance requirements. To modify such an airplane is prohibitively expensive.

After reviewing the comments received on Notice No. 87–10, the FAA has revised its regulatory evaluation of this final rule. No U.S. air carrier indicated any interest in deactivating emergency exits on its existing B–747 airplanes or ordering new airplanes with exits deactivated even if regulations allowed such deactivation. The ATA, which represents U.S. air carriers, stated in its comments, "Few ATA members are directly affected by the proposed limitations on seat/exit locations; those which are directly affected have, for reasons of their own, elected to restrict their future airplane seat/exit locations to those which comply with the proposed limits." Therefore, the FAA concludes that the final rule will not have an effect on the revenues of U.S. air carriers because it incorporates current industry practice into regulation.

There may be some unquantifiable safety or cost effects on firms which produce executive configurations of airline transport category airplanes. Some of these newly-manufactured airplanes may be affected by the final rule. However, since most executive conversions are destined for overseas customers, any such airplanes which did not meet the final rule could be accommodated under the deviation authority of Part 21.

A benefit of the final rule is that it will ensure that the current level of safety of B–747 airplanes used in Part 121 operations is maintained by precluding the deactivation of emergency exits. The rule also will prevent any decrease in safety related to emergency exit distances in future airplane designs when compared to current airplanes by establishing an exit-to-exit distance standard.

Regulatory Flexibility Determination

The Regulatory Flexibility Act (RFA) of 1980 was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. The RFA requires agencies to review rules which may have a significant impact on a substantial number of small entities.

This final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities. This regulation will potentially impact primarily two types of entities: the manufacturer of B–747 airplanes and airline operators whose fleets contain B–747 airplanes.

The FAA size threshold for determination of a small entity for aircraft manufacturers is 75 employees; that is, any aircraft manufacturer with more than 75 employees is considered not to be a small entity. The Boeing Company, manufacturer of the B–747 airplane, is not a small entity.

The FAA size threshold for a determination of a small entity for aircraft operators is 9 owned aircraft; that is, any operator with more than 9 owned aircraft is considered not to be a small entity. The FAA threshold for a substantial number of small entities is one third and at least eleven of the small entities must be impacted. There are less than eleven small entities that own B–747 airplanes.

International Trade Impact Assessment

This rule is not expected to have any measurable impact on international trade. Although some foreign operators could modify their airplanes by deactivating exit doors, such an action would not result in any serious competitive disadvantages for U.S. operators doing business abroad. This assessment is based on the fact that some foreign operators have already deactivated exit doors and this practice is not expected to continue to any great extent because virtually all of the world fleet operators, on average, are flying below their maximum seating capacity. Thus, this rule is expected to have no measurable impact on the trade opportunities for U.S. operators doing business abroad or for foreign operators doing business in the United States.

Federalism Implications

These regulations are issued under the authority of the Federal Aviation Act (Act) of 1958, as amended (49 U.S.C. 1301 et seq.).

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. Thus, in accordance with Executive Order 12612, it is determined that this final rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed in this preamble and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Assessment, the FAA has determined that this regulation is not major under Executive Order 12291. In addition, it is certified that this rule will not have a significant economic impact, positive or negative, or a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This rule is considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A regulatory evaluation of the rule, including a Regulatory Flexibility Determination and Trade Impact Assessment, has been placed in the docket. A copy may be obtained by contacting the person identified under **"FOR FURTHER INFORMATION CONTACT."**

List of Subjects

14 CFR Part 21

Air transportation, Aircraft, Aviation Safety, Safety.

14 CFR Part 25

Air transportation, Aircraft, Aviation safety, Safety.

14 CFR Part 121

Air carriers, Air transportation, Aircraft, Airplanes, Airworthiness directives and standards, Aviation safety, Common carriers, Crashworthiness, Emergency evacuation, Safety, Transportation.

The Rule

Accordingly, the Federal Aviation Administration amends Parts 21, 25, and 121 of the Federal Aviation Regulations (14 CFR Parts 21, 25, and 121) as follows:

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

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

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2); 42 U.S.C. 1857f–10, 4321 et seq., E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

2. By amending § 21.183 by adding a new paragraph (f) to read as follows:

§ 21.183 Issue of standard airworthiness certificates for normal, utility, acrobatic, commuter, and transport category aircraft; manned free balloons; and special classes of aircraft.

* * * * *

(f) *Passenger emergency exit requirements.* Notwithstanding all other provisions of this section, each applicant for issuance of a standard airworthiness certificate for a transport category airplane manufactured after October 16, 1987, must show that the airplane meets the requirements of § 25.807(c)(7) in effect on July 24, 1989. For the purposes of this paragraph, the date of manufacture of an airplane is the date the inspection acceptance records reflect that the airplane is complete and meets the FAA-approved type design data.

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

3. The authority citation for Part 25 continues to read as follows:

Authority: 49 U.S.C. 1344, 1354(a), 1355, 1421, 1423, 1424, 1425, 1428, 1429, 1430; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 49 CFR 1.47(a).

4. By amending § 25.2 by redesignating the introductory text as paragraph (a), redesignating paragraphs (a), (b), (c) and (d) as paragraphs (a)(1), (a)(2), (a)(3) and (a)(4), respectively, and adding a new paragraph (b) to read as follows:

§ 25.2 Special retroactive requirements.

* * * * *

(b) Irrespective of the date of application, each applicant for a supplemental type certificate (or an amendment to a type certificate) for an airplane manufactured after October 16, 1987, must show that the airplane meets the requirements of § 25.807(c)(7) in effect on July 24, 1989.

5. By amending § 25.807 by adding a new paragraph (c)(7) to read as follows:

§ 25.807 Passenger emergency exists.

* * * * *

(c) * * *

(7) For an airplane that is required to have more than one passenger emergency exit for each side of the fuselage, no passenger emergency exit shall be more than 60 feet from any adjacent passenger emergency exit on the same side of the same deck of the fuselage, as measured parallel to the airplane's longitudinal axis between the nearest exit edges.

* * * * *

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

6. The authority citation for Part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421 through 1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 49 CFR 1.47(a).

7. By amending § 121.310 by adding a new paragraph (m) to read as follows:

§ 121.310 Additional emergency equipment.

* * * * *

(m) Except as provided by § 121.627(c) and except for an airplane used in operations under this part on October 16, 1987, and having an emergency exit configuration installed and authorized for operation prior to October 16, 1987, for an airplane that is required to have more than one passenger emergency exit for each side of the fuselage, no passenger emergency exit shall be more than 60 feet from any adjacent passenger emergency exit on the same side of the same deck of the fuselage, as measured parallel to the airplane's longitudinal axis between the nearest exit edges.

Issued in Washington, DC, on June 16, 1989.

Robert E. Whittington,

Acting Administrator.

[FR Doc. 89-14797 Filed 6-22-89; 8:45 am]

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June 23, 1989

Part IX

Department of Transportation

Research and Special Programs Administration

Inconsistency Ruling No. IR-22; City of New York Regulations Governing Transportation of Hazardous Materials; Notice of Decision on Appeal

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. IRA-40A]

Inconsistency Ruling No. IR-22; City of New York Regulations Governing Transportation of Hazardous Materials

AGENCY: Research and Special Programs Administration, DOT.

ACTION: Notice of decision on appeal.

SUMMARY: Inconsistent Ruling No. IR-22 (52 FR 46574; December 8, 1987) is affirmed in response to the appeal of the City of New York. The Inconsistent Ruling determines that certain New York City Regulations concerning transportation of hazardous materials are inconsistent with the Hazardous Materials Transportation Act and are therefore preempted.

EFFECTIVE DATE: June 19, 1989.

FOR FURTHER INFORMATION CONTACT: Mary M. Crouter, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, 400 Seventh Street, SW., Washington, DC 20590. (Tel. 202-366-4400).

SUPPLEMENTARY INFORMATION:

I. Background

A. General Authority and Preemption under the HMTA

Section 112(a) of the Hazardous Materials Transportation Act (HMTA) (49 App. U.S.C. 1811(a)) preempts "* * * any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA]." This express preemption makes it evident that Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any state or local action. The HMTA preempts only those state and local requirements that are "inconsistent."

In the HMTA's Declaration of Policy (section 102) and in the Senate Commerce Committee language reporting out what became section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in section 112(a) "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation" (S. Rep. No. 1192, 93rd Cong., 2d Sess., 37 (1974)). Through its enactment of the HMTA, Congress gave the Department the authority to promulgate uniform national standards. While the HMTA did not totally preclude state of local action in this area, Congress apparently intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the Hazardous Materials Regulations (HMR), issued to implement the HMTA, severely restricts the scope of historically permissible state or local activity.

Although advisory in nature, inconsistency rulings issued by the Office of Hazardous Materials Transportation (OHMT) and appeals to the Administrator of the Research and Special Programs Administration (RSPA) under 49 CFR Part 107 provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a state or political subdivision. If a state or political subdivision requirement is found to be inconsistent, the state or local government may apply to RSPA for a waiver of preemption. 49 App. U.S.C. 1811(b); 49 CFR § 107.215 through 107.225.

In issuing its advisory inconsistency rulings concerning preemption under the HMTA, RSPA is guided by the principles enunciated in Executive Order 12612 entitled "Federalism" (52 FR 41685, October 30, 1987). Section 4(a) of that Executive Order authorizes preemption of state laws only when the statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains an express preemption provision, which RSPA has implemented through regulations and applied in a series of inconsistency rulings beginning in 1978.

Since these proceedings are conducted pursuant to the HMTA, only the question of statutory preemption under the HMTA will be considered. A court might find a non-Federal requirement preempted for other reasons, such as statutory preemption under another Federal statute, preemption under state law, or preemption by the Commerce Clause and the Supremacy Clause of the U.S. Constitution because of an undue burden on interstate commerce. However, RSPA does not make such determinations in its inconsistency ruling process.

RSPA has incorporated into its procedures (49 CFR 107.209(c)) the following criteria for determining whether a state or local requirement is consistent with, and thus not preempted by, the HMTA:

(1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

These criteria are based upon U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

The first criterion, the "dual compliance" test, concerns those non-Federal requirements which are irreconcilable with Federal requirements; that is, compliance with the non-Federal requirement causes the Federal requirement to be violated, or *vice versa*. The second criterion, the "obstacle" test, involves determining whether a state or local requirement is an obstacle to accomplishing and executing the HMTA and the HMR; a requirement which is such an obstacle is inconsistent. Application of this second criterion requires an analysis of the non-Federal requirement in light of the requirements of the HMTA and the HMR, as well as the purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through the OHMT's regulatory program.

B. Chronology

On April 13, 1987, the American Trucking Associations, Inc. and the National Tank Truck Carriers, Inc. (ATA/NTTC) applied for an administrative ruling to determine whether Directives 3-76, 5-63, 6-76, and 7-74 of the City of New York Fire Department's Bureau of Fire Prevention (BFP) are inconsistent with the HMTA and the HMR, and, therefore, preempted under section 112(a) of the HMTA. BFP Directives 6-76 and 7-74 create permit systems that govern the use of tank trucks which transport combustible or flammable mixtures within New York City. BFP Directive 3-76 establishes a City permit system for open and closed body platform trucks transporting flammable and combustible liquids, while Directive 5-63 creates a permit system for the transportation of compressed gases within the City.

On May 18, 1987, OHMT published a public notice and invitation to comment soliciting public comments on the ATA/NTTC application. Detailed comments

were filed by the applicants (together with the National Paint & Coatings Association, Inc.) and by the City of New York (the City). Comments in support of the ATA/NTTC position were filed by the Union Carbide Corporation and the New Jersey Turnpike Authority.

The applicants' request for a similar ruling concerning hazardous materials time, routing, escort, and other restrictions of the City of New York and the Port Authority of New York and New Jersey is the subject of a separate docket (IRA–40B). On May 5, 1988, the Director, OHMT, issued Inconsistency Ruling 23 (IR–23), which was published at 53 FR 16840 on May 11, 1988. The City appealed IR–23 (53 FR 32184, August 23, 1988) and a separate decision addressing that appeal will be issued.

On December 2, 1987, the Director, OHMT, issued Inconsistency Ruling 22 (IR–22), which was published at 52 FR 46574 on December 8, 1987 (correction, 52 FR 49107, December 29, 1987). The Director determined that the City's permitting system for transportation of certain hazardous materials is inconsistent with the HMTA and the HMR and, therefore, preempted. The Director found that the City created its own independent set of cargo containment, equipment and related requirements that overlap extensive HMR requirements, are likely to encourage noncompliance with the HMR, and concern subjects that RSPA has determined are its exclusive province under the HMTA. Furthermore, he found that the City's directives result in serious delays in the transportation of hazardous materials.

For these reasons, the Director determined that BFP Directives 3–76 (except sessions 13 and 16), 6–76 (except section 25), 7–74 (except sections 31 and 32 and subsections 2–2 and 2–3), and 5–63 (except section 7) are inconsistent with the HMTA and the HMR and, therefore, preempted under section 112(a) of the HMTA (49 App. U.S.C. 1811(a)). Sections 13 and 16 of BFP Directive 3–76, section 25 of BFP Directive 6–76, sections 31 and 32 of BFP Directive 7–74, and section 7 of BFP Directive 5–63 were found consistent with the HMTA and the HMR. No opinion was rendered concerning subsections 2–2 and 2–3 of BFP Directive 7–74.

II. The Appeal

On February 2, 1988, the City filed an appeal of IR–22 with the Administrator of RSPA. The City filed a memorandum of law (City Memo.) and two extensive affidavits in support of its appeal, which was contained in its letter of January 27, 1988. One affidavit is that of the City's Assistant Corporation Counsel Grace Goodman, with exhibits consisting of excerpts from transcripts of depositions and other materials from a related court action in the U.S. District Court for the Eastern District of New York, *National Paint & Coatings Assn., Inc.* v. *City of New York*, 84 Civ. 4525 (ERK) (*National Paint* case). The other affidavit is that of Lawrence Lennon, Director of the Transportation Division of the City's Department of Planning, which originally was submitted in opposition to a motion for summary judgment in the *National Paint* case. The City made the following arguments:

(1) There allegedly are factual disputes about the City's regulations which should have been resolved before an inconsinstency ruling was issued, and the City's regulations allegedly meet the "dual compliance" test;

(2) OHMT allegedly erred in interpreting the law governing preemption under the HMTA; and

(3) OHMT allegedly erred in its application of the law to the City's regulations.

On February 24, 1988, RSPA published a public notice and invitation to comment on the appeal (53 FR 5538). In response, comments were submitted by the New Jersey Turnpike Authority, Fruehauf Corporation-Liquid & Bulk Tank Division, National Private Trucking Association, Truck Renting and Leasing Association, and ATA/NTTC, together with the National Paint & Coatings Association, Inc. (NPCA). NPCA also submitted a copy of Plaintiffs' reply brief in the *National Paint* case. Subsequently, rebuttal comments were filed by the City, "Bomar" Tank Discharge Systems, Inc., and D.R. Pesuit & Associates.

III. Decision on Appeal

I am issuing this decision in my capacity as Administrator of RSPA. I have thoroughly considered all of the issues raised in the appeal and the discussions of them in the comments and rebuttal comments. All of the issues being appealed were discussed exhaustively by the Director of OHMT in IR–22; thus I will respond only to the specifdic issues raised on appeal and generally will not reiterate the Ruling's discussions, with all of which I fully concur.

Although all major issues and arguments raised by the City and other commenters are summarized, I have not responded to or commented on many of those which are irrelevant to my decision. My failure to address any issue or argument should not be construed as agreement or disagreement with them.

I will discuss and decide each of the issues raised by the City and described above in Section II.

1. There Allegedly are Factual Disputes About the City's Regulations Which Should Have Been Resolved Before an Inconsistency Ruling Was Issued, and the City's Regulations Allegedly Meet the "Dual Compliance" Test.

a. The City's Arguments

The City stated that, despite its request that OHMT refrain from issuing a determination until the factual record could be developed at trial in the *National Paint* case, OHMT issued IR–22. The City argues that, following the logic of its abstention argument, it did not present to OHMT a point-by-point rebuttal of the applicants' characterizations of the City's directives. However, for purposes of the appeal, the City included a point-by-point refutation of the applicants' version of the facts.

b. Commenters' Arguments

ATA/NTTC argue that OHMT properly decided that its determination concerning the preemptive effect of its regulations was relevant and would be useful in the pending *National Paint* case. Furthermore, ATA/NTTC argue that because IR–22 determined that the areas regulated by the City are the exclusive province of RSPA under the HMTA, the City's factual arguments are irrelevant. ATA/NTTC Comments at 3.

c. Administrator's Decision

A threshold problem with the City's factual arguments is that the City has repeatedly and mistakenly construed OHMT's description (in IR–22) of the applicants' arguments as OHMT's own findings. For example, the City states (City Memo. at 3) that OHMT "is simply wrong" that the issuance of permits "is a matter of unfettered City discretion because no standards are specified therefor." (quoting 52 FR 46578). The statement the City quotes is in Part IV.B., which is captioned "Applicants' Arguments." Furthermore, the introduction to that statement reads, in part, "the following are among the more significant of those provisions * * * which *the applicants allege are inconsistent* with HMR provisions" (emphasis added). 52 FR 46578.

A more fundamental problem with the City's factual and "dual compliance" arguments, however, is that they are irrelevant. The Director of OHMT found the BFP Directives to be inconsistent because "the City has created its own independent set of cargo containment, equipment and related requirements

which overlap the extensive HMR requirements, which are likely to encourage noncompliance with the HMR, and which concern subjects that RSPA has determined are its exclusive province under the HMTA." 52 FR 46583. In short, the Director's decision was based not on the "dual compliance" test but on the "obstacle" test. Even assuming, *arguendo*, that each of the City's requirements, both individually and collectively, passed the "dual compliance" test, that fact would not be sufficient for a finding of consistency if those same requirements do not survive scrutiny under the "obstacle" test. Therefore, in this instance, no purpose would be served by a point-by-point comparison of the City's requirements with the Federal requirements. Furthermore, the City had ample opportunity to submit rebuttal comments in response to commenters' statements, but did not choose to do so. The City's legal argument that the Director failed to correctly apply the tests for inconsistency is discussed below under Sections 2 and 3.

2. OHMT Allegedly Erred in Interpreting the Law Governing Preemption Under the HMTA.

a. OHMT Allegedly Erred in Not Being Guided By the Prior Decision of the Federal District Court That Considered These Same Regulations

(1) *The City's Arguments.* The City argues that OHMT "should have deferred to the opinion of the District Court on those aspects of the law that the Court had already considered in a case dealing with the exact same regulations." The opinion to which the City refers was a decision by the District Court in the *National Paint* case to deny plaintiff's motion for summary judgment which argued that the City's regulations are preempted as a matter of law. The City asserts that the District Court decided Congress did not intend to preempt the fields occupied by the City's regulations; the goal of Congress in enacting the HMTA was not simply uniformity, but safety; and the court must look to the HMTA and the HMR directly, rather than to RSPA's administrative rulings and subsequent pronouncements, to determine the preemptive effect of the Federal regulations.

(2) *Commenters' Arguments.* ATA/NTTC states that the issue of the prior District Court decision "was squarely presented to OHMT in IR–22" and "OHMT properly decided that OHMT's determination concerning the preemptive effect of its regulations was relevant and useful." ATA/NTTC Comments at 7. ATA/NTTC argues that Federal District Judge Sifton "clearly indicated the court's special interest in OHMT's interpretation or determination of the preemptive effect of its regulations." They note that "Judge Sifton did not hold, and could not lawfully have ruled, that OHMT was precluded from making that determination, or that the court would have rejected OHMT's determination had it been issued at the time Judge Sifton ruled." ATA/NTTC Comments at 8. ATA/NTTC further states that OHMT, in IR–22, has now given its views concerning its intent to occupy the field and the resulting preemption of State regulations in the same area. ATA/NTTC argues, therefore, that OHMT correctly interpreted Judge Sifton's opinion. Although Judge Sifton found that plaintiffs had "not made a significant showing that federal regulations were intended to occupy the field," ATA/NTTC argues that—

> OHMT has now clearly and unequivocally indicated what the intent of the regulations is. Further, as to the City's fundamental defense, that federal tank truck regulations are only a minimum standard upon which local governments may in the interest of local safety build additional regulatory structures, Judge Sifton noted that the City's argument was persuasive only because OHMT had not rejected it. The Court stated that if plaintiffs were to establish that OHMT had rejected the argument and concluded that additional requirements could not be imposed, the City's argument would be unpersuasive.

ATA/NTTC Comments at 9.

Finally, ATA/NTTC notes that "the Court in the pending [*National Paint*] case invited the parties seeking to void the City's regulations to file a motion for summary judgment based on the ruling in IR–22." ATA/NTTC Comments at 7.

(3) *Rebuttal Comments.* The City argues that Judge Sifton's decision was correct concerning the lack of categorical preemption as to cargo containment systems under the HMTA and the HMR. The City argues that Judge Sifton's opinion was that the HMR, as to cargo tank requirements, specify that they are minimum requirements and, therefore, regulations shown to promote a higher degree of safety (e.g., the City's regulations) could not be an obstacle.

(4) *Administrator's Decision.* In response to the City's request that OHMT abstain from issuing an inconsistency ruling, the Director, OHMT, stated:

> In light, therefore, of the relevance of OHMT's intent concerning the preemptive effect of its regulations, the existence of the inconsistency ruling process for the issuance of advisory opinions concerning such issues, and the pendency of judicial proceedings in which an inconsistency ruling might be useful, OHMT will address the issues raised by the applicants.

52 FR 46576.

The Director reached this decision after considering Judge Sifton's 1985 memorandum and order denying plaintiffs' motion for summary judgment, and a leading Supreme Court case on preemption which was cited and discussed by Judge Sifton in that memorandum.

The City's characterization of Judge Sifton's 1985 memorandum as having already decided certain issues for purposes of this case is erroneous. An order denying a motion for summary judgment does not "decide" issues in an administrative proceeding. Furthermore, the City's contention that the cargo tank regulations are minimums which the City or any other jurisdiction is free to exceed based on a safety rationale is clearly wrong. RSPA has stated numerous times, in its HMR rulemaking dockets, written interpretations, and inconsistency rulings, that the HMR generally are minimum requirements which *the regulated industry* may exceed so long as the minimum requirements are met. The HMR are not, and have never been, minimum requirements which States or local jurisdictions could unilaterally choose to exceed by imposing additional obligations on the regulated industry. It is my determination that the Director, OHMT, acted properly in issuing IR–22, after considering the arguments of both parties to the litigation. Furthermore, as ATA/NTTC notes, the court in the *National Paint* case requested plaintiffs to file a motion for summary judgment based on IR–22. The District Court evidently considers IR–22 to be relevant and, as the Director stated in IR–22, "it is appropriate that the Federal Court have the benefit of the Agency's views prior to making a final decision concerning the preemption issues." 52 FR 46576.

b. IR–22 Allegedly Is Based On An Erroneous Statement of The Law

(1) *IR–22 allegedly fails to apply the proper tests for inconsistency*—(a) *The City's Arguments.* The City argues that despite OHMT's statement that there is a two-prong test for determining inconsistency, OHMT either ignored or wrongly applied the "dual compliance" prong. The City states that the Supreme Court held, in *Hines* v. *Davidowitz*, *supra*, that "determination of the absence of 'actual conflict' should come before any 'inquiry into congressional design,' because the presence of such

conflict would make the further inquiry unnecessary." The City asserts that in IR–22, OHMT stopped its inquiry at the point of determining that differing regulations exist, and did not inquire as to whether these differences conflict.

(b) *Commenters' Arguments.* ATA/NTTC state that "the legislative history of Section 1811 provides a clear picture of what Congress meant by 'inconsistent' and the degree to which Congress extended to OHMT the responsibility to preempt a field when necessary to accomplish the objectives of the HMR." ATA/NTTC Comments at 11. ATA/NTTC argue that the City's position that an inconsistency ruling "must evaluate *both* whether the City's regulations are an obstacle to achieving the goals of the HMTA *and* whether an actual conflict exists between the HMR and the City's regulations" is "incorrect and reflects a fundamental misunderstanding of preemption law." ATA/NTTC Comments at 13. ATA/NTTC state that the Supreme Court has repeatedly held that state law can be preempted in either of two general ways: (1) Where Congress has evidenced an intent to occupy a given field, or (2) where it is impossible to comply with both state and federal law or the state law stands as an obstacle to accomplishment of the purposes and objectives of Congress. Because the HMTA did not totally preclude state or local action in the field of hazardous materials transportation, ATA/NTTC point out that it is the second test with which OHMT is concerned. ATA/NTTC argue, however, that this second test is clearly set in the alternative, and the Supreme Court has "treated the obstacle and actual conflict tests as separate and independent." ATA/NTTC assert that the City's reliance on *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963) is misplaced, and that "the City is flatly wrong in asserting that prior HMTA cases [citations omitted] require both a 'dual compliance' and obstacle analysis." ATA/NTTC state that in *Florida Avocado Growers* the Court looked at whether an actual conflict existed but "did not hold that a proper preemption inquiry must first concern an 'actual conflict,' or that both 'actual conflict' and 'obstacle' analyses must be undertaken." ATA/NTTC Comments at 14.

In *National Tank Truck Carriers, Inc.* v. *Burke,* 535 F. Supp. 509, 517 (D.R.I. 1982), *aff'd,* 698 F.2d 559 (1st Cir. 1983), according to ATA/NTTC, the "Court held that Rhode Island's curfew requirement did not directly conflict with federal requirements but was 'inconsistent in that it undermines the full purposes of the Act and is preempted.'" ATA/NTTC Comments at 17, quoting 535 F. Supp. at 519. Further, in *Missouri Pacific R.R. Co.* v. *R. Comm'n of Texas,* 671 F. Supp. 466, 480 (W.D. Tex. 1987) [*aff'd on other grounds,* 850 F.2d 264 (5th Cir. 1988), *cert. denied,* 109 S. Ct. 794 (1989)], ATA/NTTC note that the District Court relied solely on the obstacle test in finding certain Texas regulations to be inconsistent with the HMR. The Texas regulations required a caboose on all trains over 2,000 feet in length which transported hazardous materials. ATA/NTTC state that there was no evidence that dual compliance was impossible (because the HMR had no applicable regulation) and OHMT had not issued an inconsistency ruling. Nevertheless, the Court found the Texas regulations inconsistent under the obstacle test. ATA/NTTC therefore argue that OHMT's reliance solely on the obstacle test in IR–22 "was entirely proper and consistent with case law." ATA/NTTC Comments at 18.

(c) *Rebuttal Comments.* The City argues that OHMT exceeded its authority in IR–22 when it expressed an opinion concerning the preemptive effect of its regulations. It argues that OHMT has the authority to express its intent when promulgating regulations or when explicitly refraining from promulgating regulations, but that it "may not now purport to 'interpret' the HMR to say that only 'uniform' standards are not preempted." The City asserts that it does not contend that OHMT can never make valid interpretations of its intention through inconsistency rulings, but that those interpretations "must be based on, and not contradict, the regulations they purport to explain." City Reply Memo. at 7. The City argues that if RSPA has discovered a need for uniformity in the area of cargo containment, it may start a new rulemaking or seek a new statement of intent from Congress. The City asserts RSPA has apparently chosen the latter course because in 1987 it submitted proposed legislation to Congress which included packaging as one of the areas subject to Federal preemption.

(d) *Administrator's Decision.* The City is wrong in contending that OHMT exceeded its authority by interpreting the cargo containment regulations as preempting the City's regulations. In IR–22 the Director stated that Federal regulations in certain areas, including cargo containment, equipment, and related requirements are the exclusive province of the Department of Transportation. RSPA has stated that position in numerous previous inconsistency rulings, and reiterated it in IR–22. Therefore, the Director's decision to apply only the obstacle test was entirely consistent with previous RSPA practice and policy.

Furthermore, the Department's submission of proposed legislation to Congress is not evidence of the need to seek a new statement of intention from Congress. The Purpose of the Department's legislative proposal was to codify in the statute the experience which the Department had gained in administering the HMTA since its passage, thereby reducing the potential for conflict between Federal and non-Federal requirements.

(2) *IR–22 allegedly misinterprets the nature of the dual compliance test.*—(a) *The City's Arguments.* The City contends that OHMT has wrongfully expanded the test by saying that inconsistency is present not only where compliance with the non-Federal requirement would cause the Federal requirement to be violated, but also where compliance with the Federal regulation causes the non-Federal regulation to be violated. The City contends that case law "is quite specific that it is only where compliance with the state law would violate the federal rule, and *not* the other way around, that constitutes actual conflict for preemption purposes." The City cites *Florida Avocado Growers, supra,* and *Jones* v. *Rath Packing Company,* 430 U.S. 519, 540 (1977), as standing for this proposition.

The City further contends that OHMT erred in concurring with the applicants' claim that an actual conflict occurs when the City regulates a subject that the Federal Government does not regulate at all, simply because that subject can be characterized as within a general subject area that is Federally regulated.

(b) *Commenters' Arguments.* ATA/NTTC respond to the City's arguments by stating that the City misinterprets OHMT's use of the phrase "*vice versa*" in its description of the dual compliance test. ATA/NTTC contend that OHMT properly focused on whether the Federal and non-Federal requirements are "irreconcilable."

(c) *Administrator's Decision.* RSPA's understanding of the "dual compliance" test does not conflict with the City's. The "dual compliance" test invalidates those non-Federal requirements that are irreconcilable with Federal requirements because compliance with both is physically impossible. The "dual compliance" test is inapplicable to a situation where the non-Federal requirement is in addition to, or in an

area not covered by, a Federal regulation. Obviously, in such a situation, compliance with both the Federal and non-Federal requirements is possible, and the test for inconsistency thus is whether the non-Federal requirement is an obstacle to the accomplishment of the HMTA and the HMR.

(3) *IR–22 allegedly misinterprets the nature of the obstacle test*—(a) *OHMT allegedly exceeds its authority to define the aim of Congress*—(i) *The City's Arguments.* The City argues that "OHMT wrongly broadened the 'obstacle' test by saying that a local regulation is inconsistent if it appears to obstruct the stated aims, not only of Congress in enacting the law, but also of the administrative agency in interpreting its regulations." City Memo. at 26. The City contends that OHMT has no authority to "bootstrap" its limited authority to issue inconsistency rulings into an assertion that it totally occupies certain subject areas within the broad field of hazardous materials transportation. The City states that the legislative history of the HMTA suggests that Congress did not intend that "cargo containment systems, equipment and related requirements" be preempted. The City argues that Congress adopted the Senate's provision of the Secretary's rulemaking authority, which the City asserts was "softened" from the House version. The House version had stated the Secretary "shall" regulate certain topics, while the enacted provision states that the:

> regulations *may* govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marketing, placarding, and routing * * * of hazardous materials. (Emphasis added)

49 App. U.S.C. 1804(a).

Thus, the City argues, Congress did not prescribe any particular topics that must be regulated by the Secretary, to the exclusion of state or local authorities. The City notes that this list of topics does not include "cargo/containment systems, equipment or related requirements." Furthermore, the City argues, "it is only when the Secretary has actually promulgated regulations with which a local regulation might conflict that preemption could occur." City Memo. at 27.

The City contends that the tank truck regulations found in 49 CFR 178.340 *et seq.* "clearly state * * * that the standards they present are 'minimum requirements.' " The City states that the Federal Motor Carrier Safety Regulations (FMCSR; 49 CFR Parts 390–397) contain explicit statements that they are not intended to preempt more stringent local regulations (§ 393.30) and that additional consistent equipment is permitted (§ 393.2). Therefore, the City argues, because the HMR at 49 CFR 178.340–2(b) reference the "parts and accessories" regulations in the FMCSR, the FMCSR provisions on stringency and consistency must necessarily be applicable to the HMR.

The City takes issue with IR–22's reliance on prior inconsistency rulings to establish exclusive Federal authority over "cargo containment systems" because, according to the City:

> most of the DOT's prior inconsistency rulings have dealt with routing restrictions, not truck design specifications [and] those few that did discuss any specification were dealing with the transportation of radioactive waste, which is subject to an entirely different legislative history than that at issue here.

City Memo. at 29.

The City argues, for example, that IR–2, despite the use of the term "cargo containment systems" in its preamble, did not deal with them, but instead dealt with a permit system, hours of transit, an accessory lock, and other "regulatory features." The City contends that OHMT cannot rely on IR–7 through IR–15 because the hazardous materials at issue in those rulings were exclusively radioactive materials, which OHMT had addressed in a special rulemaking in 1981. The City argues that DOT's exercise of rulemaking authority in the area of radioactive materials does not mean that DOT has also occupied the field of "packaging" of other hazardous materials, and the City does not concede that "packaging" is synonymous with "containment systems."

Finally, the City argues that DOT does not appear sure of its preemption authority over packaging and containers since in 1987 it submitted a legislative proposal to Congress which would amend the HMTA to delineate specific subject areas which are exclusively Federal, including "the design, fabrication, marketing, maintenance, reconditioning, repairing, or testing of a package or container."

(ii) *Commenters' Arguments.* ATA/NTTC argue that OHMT used its statutory authority properly to define the intent of the HMTA. The commenters state that "the Supreme Court has clearly affirmed the concept of a Federal agency defining the scope of the preemptive effect of its own regulations through the exercise of its discretionary rulemaking authority." ATA/NTTC Comments at 21.

ATA/NTTC argue that the purpose of Congress in enacting the HMTA was to create national uniformity, which is why Congress consolidated rulemaking authority in DOT. The commenters also argue that OHMT's preemption authority, whether exercised through inconsistency rulings, rulemaking, or other expression of agency intent, has been fully recognized by the courts. ATA/NTTC specifically reject the City's contention that OHMT's authority is limited to a specific subject area. The commenters contend that OHMT's authority under the HMTA is the same for radioactive and non-radioactive hazardous materials, and cited both decisions in *City of New York* v. *U.S. DOT*, 539 F. Supp. 1237 (S.D.N.Y. 1982) *rev'd other grounds*, 715 F.2d 732 (2nd Cir.), *cert. denied*, 465 U.S. 1055 (1984), as affirming that authority. ATA/NTTC state that in both cases:

> the District Court and the Second Circuit * * * had the opportunity to specifically address the very argument raised here by the City. In those cases, the City argued and the court rejected the proposition that OHMT could determine a City regulation inconsistent and therefore, preempted only after making the specific factual evaluation called for under section 1811(b) for a waiver of preemption. The City also argued and the District Court rejected the notion that DOT lacks the authority to preempt as inconsistent with federal regulations, a non-uniform local regulation that is more stringent and better fosters the goal of local safety than the federal regulations. The District Court held that inconsistency with federal regulations could be based on non-uniformity in an area of regulation where OHMT has determined that uniformity is important to the objectives of the HMTA.

ATA/NTTC Comments at 25–26.

Finally, ATA/NTTC note that IR–22 is supported by the approach taken in the most recent Supreme Court preemption case, *California Coastal Commission* v. *Granite Rock Co.*, 107 S. Ct. 1419 (1987), in which "the Court focused exclusively on the obstacle test" and "looked at the Forest Service's regulations to determine whether the agency intended to occupy the regulatory field and preempt state law." In conclusion, ATA/NTTC assert that "the underlying national objectives of the HMTA, the comprehensiveness of OHMT's prior rulemaking and the prior inconsistency rulings * * * , PROVIDE A FIRM BASIS FOR OHMT in IR–22 to rely exclusively on the obstacle test."

(iii) *Administrator's Decision.* In enacting the HMTA, Congress vested the Secretary of Transportation with authority, delegated to RSPA, to regulate hazardous materials transportation. The legislative history indicates that Congress sought to improve safety through nationally uniform standards, where appropriate, but left to the Secretary's discretion the scope and

extent of regulation. The scope of topics which may be regulated is expressly *not* limited to those enumerated in the HMTA, nor is that enumeration of topics an expression of Congress' intent that Federal regulations on those topics invariably are to preempt non-Federal requirements. RSPA has exercised the discretion delegated to it by regulating numerous areas of hazardous mataerials transportation to the degree it has determined necessary, and interpreted the law and its regulations to determine what role non-Federal entities may play in regulating each area. The City's contention that preemption can only occur when the Secretary has actually promulgated regulations with which a local regulation would conflict is plainly in error. The Secretary is responsible for implementing the HMTA and setting national standards. The absence of a regulation on a particular topic may indicate that non-Federal entities are free to regulate, but it may also mean that the Secretary has determined that no regulation is needed on that topic. Clearly, it is one of the purposes of the inconsistency ruling process to define the limits of permissible non-Federal rulemaking.

Furthermore, whether a non-Federal requirement is an obstacle to the accomplishment of the HMTA is not dependent upon RSPA's intent to occupy a certain subject area. An agency's intent to occupy a given area is only one indication of whether non-Federal entities may regulate in that area. Even in the absence of any Federal intent to occupy a given area, a non-Federal requirement may be found to be an obstacle if it interferes with accomplishing the stated purposes of the statute and implementing regulations.

The City misconstrues the applicability of the FMCSR. IR–22 addressed the preemptive effect of the FMCSR:

> For example, § 178.340–2(b) incorporates by reference the 49 CFR Part 393 requirements relating to parts and accessories applicable to all motor vehicles * * * and makes them applicable to * * * specification cargo tanks used for hazardous materials transportation. The parts and accessories requirements of 49 CFR Part 393, therefore, are HMR provisions and thus are compared with state and local requirements for preemption purposes under both the 'obstacle' and 'dual compliance' tests.
>
> 52 FR 46575.

Thus, those FMCSR provisions which are incorporated by reference into the HMR (except for those incorporated by 49 CFR 177.804) are treated as HMR provisions for the purposes of preemption.

The City's argument disputing IR–22's reliance on prior inconsistency rulings to establish exclusive Federal authority over cargo containment systems is not persuasive. IR–22 quoted at length from IR–2 (44 FR 75566, December 20, 1979) and subsequent IR's to demonstrate that as early as 1979, and consistently since then, "it has been clear that hazardous materials transportation cargo containment systems, packagings, accessories, construction tests, equipment and hazard warning systems are areas of exclusive Federal jurisdiction because of the total occupancy of those fields by the HMR." 52 FR 46580.

The City's argument that RSPA's regulatory authority with respect to radioactive materials is different from its authority with respect to other hazardous materials is specious. The HMTA does not differentiate the Secretary's authority on the basis of the hazardous materials to be regulated, but leaves those decisions to the Secretary's discretion. The Secretary has chosen to regulate the packaging of hazardous materials to such an extent that the Federal role is exclusive. In contrast, the Secretary has promulgated comprehensive routing requirements only with respect to radioactive materials, and, therefore, has not determined, with respect to other hazardous materials, that the Federal role in routing is exclusive. The City simply ignores a 10-year history of inconsistency rulings and expressions of RSPA intent which specifically contradict the City's position. The City's assertion with respect to DOT's legislative proposal is without merit as discussed earlier.

(b) *OHMT allegedly wrongly defines the aim of Congress*—(i) *The City's Arguments.* The City argues that OHMT wrongly defines the intent of Congress as being uniformity of regulation, when in fact the actual aim of Congress is safety. The City states that Judge Sifton's 1985 decision (*supra*) properly disposed of this issue, and that the Conference Report preemption language, rather than the Senate Report language more commonly referred to, should be relied upon. The City notes that the Conference Report "makes a point of coupling the exception provision to the preemption provision, showing that differing and more stringent local laws were not necessarily to be preempted." City Memo. at 34. Moreover, the City notes, the Conference Report apparently did not approve that portion of the Senate Report which stated that varying as well as conflicting regulations would be deemed inconsistent.

(ii) *Commenters' Arguments.* ATA/NTTC assert that the purpose of the HMTA is to improve "the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." ATA/NTTC Comments at 29 (quoting 49 App. U.S.C. 1801). To achieve this purpose, ATA/NTTC state, the HMTA broadly delegates to the Secretary rulemaking authority over "*any safety aspect* of the transportation of hazardous materials which the *Secretary deems* necessary or appropriate." ATA/NTTC Comments at 29 (emphasis added), quoting 49 App. U.S.C. 1804. Commenters assert that in support of this authority, Congress provided explicitly that non-Federal regulations determined to be inconsistent with Federal regulations are preempted. Commenters further note that the First Circuit, in *National Tank Truck Carriers Association* v. *Burke*, 608 F.2d 819, 824 (1979) stated that the purpose of the HMTA "was to secure a general pattern of uniform, national regulations, and thus 'to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation'. Senate Committee on Commerce, Report No. 93–1192, September 30, 1974."

(iii) *Administrator's Decision.* RSPA does not disagree that the goal of the HMTA is to improve hazardous materials transportation safety, but Congress intended that the means of achieving that goal include national standards to be promulgated by DOT in order to reduce the need for State and local regulation. The inconsistency ruling process is intended to determine which state or local requirements are inconsistent with the nationwide Federal standards and, therefore, preempted, as Congress directed in Section 1811(a).

(c) *OHMT allegedly fails to balance the degree of alleged impediment to the national aim against legitimate local safety needs*—(i) *The City's Arguments.* The City asserts that where there is no *per se* preemption, it is necessary to use a balancing test to determine inconsistency by weighing "the City's legitimate safety concerns against whatever degree of uniformity is necessary to achieve the overall Congressional aim of safety." City Memo. at 36.

(ii) *Commenters' Arguments.* ATA/NTTC state that the City is wrong in asserting that inconsistency

determinations should be based on whether the non-Federal regulation is an obstacle to local safety, and adds that "OHMT may consider local safety factors in a separate administrative proceeding under section 1811(b) as a basis to waive preemption." ATA/NTTC Comments at 32. ATA/NTTC argue that once a state or local regulation has been determined to be inconsistent and therefore preempted, the HMTA authorizes the Secretary in a subsequent proceeding to determine whether the state or local regulation nevertheless qualifies for an exemption from preemption.

(iii) *Rebuttal Comments.* The City argues that OHMT erred in not considering the City's safety evidence in an area where Congress has not dictated uniformity and the regulations state that the standards are minimums. The City argues that a safety analysis would obviate the need for an additional administrative proceeding, and that "the waiver proceeding is available to insure that safety is considered even in those cases (such as radioactive transportation routing) where it is clear that Congress intended uniformity as its first line of defense. The existence of two separate proceedings is to cover two separate situations, not to be stages of a single proceeding." City Reply Memo. at 10.

(iv) *Administrator's Decision.* There is no suggestion in the plain language of the HMTA or the inconsistency regulations that the inconsistency ruling process and the waiver of preemption process are intended to apply to two different situations, nor have they been so applied. Consideration of local safety concerns is properly conducted during a waiver of preemption proceeding. As commenters point out, the correct analysis in an inconsistency ruling proceeding is whether a state or local requirement stands as an obstacle to compliance with the Federal regulations, not whether local safety concerns justify a waiver of preemption. Virtually all state and local hazardous materials requirements are prompted by safety concerns, but the focus of preemption analysis is whether state or local requirements are inconsistent with national objectives, not whether local safety concerns should be weighed against national concerns.

3. *OHMT allegedly erred in its application of the law to the facts when it held that the city's regulations are inconsistent with the HMTA and HMR.*

a. The City's Regulations Allegedly Are Not An Obstacle To the Congressional Aim of Safety.

(1) *The City's regulations allegedly cause no significant delays*—(a) *The City's Arguments—Applicants allegedly overstate the amount of downloading caused by the City regulations.* The City contends that its regulations do not cause significant delays and that the applicants' assertions to the contrary, which IR–22 accepted, can be rebutted. The City asserts that the applicants have overstated the amount of "downloading" (i.e., transfer of hazardous materials cargo from a DOT-specification vehicle into a City-specification vehicle) caused by the City's regulations because those regulations apply only to trucks stopping to make local pickups or deliveries. Secondly, the City asserts that the bulk of flammable and combustible liquids transported for local delivery within the City consists of gasoline and fuel oil, which are transported by the industry in an "entire fleet of City-specification trucks" without the need for downloading. Third, the City argues that the applicants have not shown that there is any significant volume of hazardous materials remaining to be downloaded. The City argues that the common practice is for a distant manufacturer to ship to a metropolitan-area storage facility and either have a local trucker deliver from there or have a local customer purchase from the storage depot. Neither of these alternatives involves downloading which would delay shipments in transit, the City contends. The City further contends that there is no "significant increase in risk from the fact that a particular customer's order may be handled twice if it is delivered to a local storage terminal and then reshipped to the customer" because such a practice "is a routine procedure already being done safely every day." City Memo. at 40.

The City's permit system allegedly does not cause hazardous delays in shipment. The City also contends that its permit system does not cause delays because, unlike the permit system in IR–2 and the related *Burke* case, the City's system does not require loaded DOT-specification vehicles to stop at the border to get a permit, thus interrupting and delaying a particular shipment. The City argues that under its system, carriers obtain permits before a truck is loaded for shipment, either by hiring a City-specification truck which already has a permit, or by including some City-specification trucks in their fleets and obtaining the necessary annual permits well in advance of actual shipments.

(b) *Commenters' Arguments—Downloading allegedly causes delay.* ATA/NTTC argue that the City's attempt to minimize the application of its regulations is disingenuous. ATA/NTTC state that the City's argument "implies that industry operates two distinct and separate classifications of vehicles, one for making pickups or deliveries in the City and another for making pickup[s] or deliveries outside the City." ATA/NTTC Comments at 36. ATA/NTTC note that a vehicle being used in interstate commerce may be required to make pickups or deliveries at many locations both within and outside New York City. Futhermore, they note that there are truck terminals in the City where cargo is transferred between trucks in interstate commerce so that even though there is no local pickup or delivery, the City's regulations would apply. ATA/NTTC state that the City's regulations would also prohibit vehicles carrying hazardous materials from making a rest stop, or a stop for food or fuel, or from making pickups or deliveries of non-hazardous materials.

The City regulations also apply, ATA/NTTC argue, to more than just bulk shipments of gasoline and fuel oil, so that the potential for downloading exists for packaged freight as well. ATA/NTTC "completely reject the City's assertion that the bulk transportation of non-gasoline non-fuel oil hazardous chemicals is so minimal that the safety concerns of downloading can be ignored." ATA/NTTC Comments at 37. ATA/NTTC also take issue with the City's contention that metropolitan-area storage depots reduce the need for downloading. They contend that many of the metropolitan depots are actually located in New Jersey, so that shipments from them to the City involve interstate shipments, which DOT, not the City, has been given responsibility to regulate.

ATA/NTTC assert that the City's argument concerning the use of local storage depots clearly shows that the regulations cause delay. Because a single (DOT-specification) vehicle cannot be used to ship directly to a purchaser in the City, they contend, shipments must be downloaded, creating delays and an increase in risk. In addition, ATA/NTTC state that the City's arbitrary tank truck volume limitations means an increase in the number of trips necessary, creating additional delay and risk.

Permits allegedly cause delay. ATA/NTTC argue that whether hazardous materials are downloaded directly to City-specification vehicles or to a

storage depot, significant delays can be caused waiting for a City truck or storage facility to become available. They assert that the "City cannot possibly justify its regulations by arguing that such a delay, involving a vehicle parked on the side of the road outside the City, trying to find an adequate local carrier or adequate storage depot, does not represent the kind of delay the HMTA was designed to prevent." ATA/NTTC Comments at 40. Furthermore, they assert, industry does not maintain different fleets of trucks to serve different cities. If hazardous materials had to be transferred to local vehicles permitted in each city, ATA/NTTC contend, obvious delays in transit would result that are clearly the type of delay the HMTA was designed to prevent.

(c) *Rebuttal Comments.* The City contends that commenters have not submitted any evidentiary material to quantify their claims. Furthermore, the City contends that the great bulk of hazardous materials being transported is short-haul and uses the existing fleet of City-specification trucks. The City admits that in some instances it will be necessary for shippers to use different vehicles to serve New York customers than they use for customers in other cities, but maintains that the City is sufficiently unique in comparison to all other cities that the rationale behind its regulations could scarcely become a precedent for any other place. City Reply Memo. at 16.

(d) *Administrator's Decision.* The Director of OHMT found that an additional reason for the inconsistency of the City directives is "their propensity to cause significant delays of hazardous materials transportation." 52 FR 46583. As the Director stated, previous inconsistency rulings have found that delay of such transportation is incompatible with safe transportation. The City and commenters agree that some downloading will occur but disagree about the extent of such downloading. Clearly, there are delays involved in downloading, and the mere threat of delay has been sufficient for a finding of inconsistency in prior inconsistency rulings, as the Director discussed at length in IR–22. In this case, actual delays in transit are involved in downloading, which exposes neighboring jurisdictions to an increased risk of accidents and spills. The City contends that its regulations do not cause significant delay, but the issue under 49 CFR 177.853 is whether the delay is "unnecessary". Downloading hazardous materials from DOT-specification trucks, which are presumptively safe, into City-specification trucks is unnecessary and causes unnecessary delay in transportation. Similarly, the City's permit requirements cause unnecessary delay, because a carrier using DOT-specification trucks, which are presumptively safe, must obtain City permits at some point prior to transporting hazardous materials to or from the City. The City's burdensome permit application requirements, its unfettered discretion in granting permits, and the time needed to process applications create delays in the transportation of hazardous materials. Although a permit system is not *per se* inconsistent, the delays caused by the City's permit system are unnecessary because the City's permit requirements are inconsistent with the HMTA. The City's argument that a particular shipment need not be delayed, because a carrier can obtain permits well in advance of actual shipments, is specious. The only way a carrier can avoid delays is by complying with the City requirement to use City-specificatioin trucks, which the Director of OHMT determined is an obstacle to compliance with the HMTA and the HMR. The Director has sufficient reason to find that the delays that are and would be caused by the BFP Directives constitute an independent basis for inconsistency with the HMR, and I affirm that finding.

(2) *The City's regulations allegedly do not deter compliance with the HMR.*—(a) *The City's Arguments.* The City argues that the fact that a fleet of trucks exists that meets the City's more stringent requirements does not deter compliance because manufacturers and carriers build and operate dual complying trucks. Even those City-specification trucks that do not meet all HMR requirements, the City argues, are in compliance as long as they operate only within New York State, because the HMTA and HMR apply only to interstate operations. The City states that the HMTA adopted the House version of "commerce" which "explicitly states that the regulations 'did not extend to any such transportation which is solely between points in the same State.'" City Memo. at 42, quoting Conf. Rept. No. 93–1347, reprinted in U.S. Code Congressional and Administrative News at 7688. The City also asserts that DOT has acknowleged that its regulations do not apply to intrastate commerce, because it has proposed to expand application of the HMR (52 FR 24195, June 29, 1987). The City contends that the mere existence of two sets of truck specifications will not lead to non-compliance with the HMR, because manufacturers and carriers are perfectly capable of ordering and using "dually-compliant" vehicles. In fact, the City notes, many carriers regularly customize their orders to meet particular local regulatory needs.

(b) *Commenters' Arguments.* ATA/NTTC contend that the City's only response to the potential for confusion and sole reliance on City regulations is to assert that manufacturers and carriers are perfectly capable of ordering and using "dually-compliant" vehicles. ATA/NTTC argue that this "inadequate response does not change the fact that manufacturers and carriers do not have the extensive resources that would be necessary to conduct the dual technical and regulatory analysis necessary to design, manufacture and maintain a vehicle that fully complies with all HMR requirements, yet can also be permitted by the City Fire Department." ATA/NTTC Comments at 42.

ATA/NTTC assert that the City incorrectly argues that the HMTA only applies to interstate commerce, when in fact the definition of commerce in the HMTA specifically includes transportation which "affects" interstate commerce. Thus, they argue, the HMTA clearly "allows coverage of intrastate commerce or RSPA would not have the legal authority to consider applying its regulations to all forms of intrastate commerce." ATA/NTTC also note that the HMR apply to intrastate movements by interstate carriers and to the intrastate portion of interstate transportation.

ATA/NTTC dismiss the City's argument about customization by noting that the City's regulations go beyond mere customization. As an example, ATA/NTTC state that the City regulations flatly prohibit the use of tractor trailers to deliver flammables, yet a tractor-trailer cannot be converted into a straight truck by customization. Finally, ATA/NTTC note that differences have been the basis for preemption in the past, as in the *Ritter* case, where the court held that "compressed gas container testing requirements were preempted because they differed from federal requirements and therefore stood as an obstacle to the accomplishment of the purpose and objective of Congress." ATA/NTTC Comments at 43.

(c) *Administrator's Decision.* The City is incorrect in asserting that the HMTA applies only to interstate transportation. Section 103 of the HMTA defines "commerce" as trade, traffic, commerce, or transportation between a place in a

State and a place outside such State, or which *affects* such trade, traffic, commerce, or transportation. DOT has chosen to exercise this authority by regulating all transportation by interstate motor carriers, which includes the intrastate portion of any interstate transportation. 49 CFR 171.1. With respect to use of dually-compliant vehicles, RSPA assumes for purposes of this discussion that such vehicles can be built. However, dual compliance is not the issue. The issue is that RSPA has already determined what specifications are necessary for trucks hauling hazardous materials. To the extent the City believes the HMR are inadequate, the City may file a petition for rulemaking under 49 CFR 106.31. Therefore, I affirm the Director's determination that the BFP Directives deter compliance with HMR.

(3) *The City's regulations allegedly promote safety in a densely populated area*— (a) *The City's Arguments.* The City states that OHMT dismissed its argument that New York's population density justifies more stringent regulations by saying that almost any urban area has a population density which is a matter of concern in hazardous materials transportation. The City notes that OHMT's own regulations at 49 CFR 397.9(a) dictate that hazardous materials shipments should avoid densely populated areas, tunnels, and narrow streets or alleys. The City states that its road system and lack of a beltway make it inevitable that hazardous materials shipments travel through neighborhoods where between 10,000 and 50,000 people reside within a half-mile wide band of the highway, in contrast to neighboring counties where the greatest number of persons within a half-mile of the truck route is 10,000. The City asserts that an extra measure of safety in the City "is necessary and appropriate, under the aim of Congress to create a uniform level of safety throughout the nation." City Memo. at 45.

The City contends that OHMT recognized the City's unique situation in IR–2 (44 FR 75569, December 20, 1979), when it "barred certain Rhode Island regulations partly on the ground that its population density did not warrant the kind of special regulation that might be appropriate to a place as densely populated as New York City." City Memo. at 46. The City also contends that its aging and often substandard roads, its combination of subways, bridges, elevated and depressed roadways, traffic congestion, and population density makes fires more difficult to fight and the consequences of an accident potentially more severe than in other localities. All of these factors, the City contends, must be weighed against OHMT's claim that cargo containment systems and equipment require national uniformity.

(b) *Commenters' Arguments.* ATA/NTTC assert that the alleged safety benefits of the City's regulations are relevant only in a subsequent waiver of preemption determination. First, ATA/NTTC argue that "under the HMTA, OHMT, not the New York City Fire Department, has the responsibility for developing regulations to protect the nation, including New York City and its neighbors, adequately against the risks posed by the transportation of hazardous materials." ATA/NTTC Comments at 44–45. Second, they argue that "the HMTA sets up a separate waiver of preemption process in section 1811(b) which gives OHMT * * * authority to determine whether the City's allegedly "unique" circumstances allow for a different regulatory approach." ATA/NTTC Comments at 45.

ATA/NTTC contend that the city's argument has been rejected by the courts (*City of New York* v. *U.S. Department of Transportation*, 539 F. Supp. 1237 at 1254, 715 F.2d 732) and is contrary to the plain wording of the statute. ATA/NTTC point out that the Second Circuit, in *NYC* v. *DOT, supra,*

> concluded that OHMT's authority and responsibility to waive preemption under Section 1811(b) was meant to "ameliorate the sweep of section 112(a) [1811(a)] * * * so that *'in certain exceptional circumstances'* DOT could limit the preemptive force of federal regulations 'to secure more stringent regulations' by local authorities. *Senate Report, supra,* at 38."

ATA/NTTC Comments at 46.

Therefore, ATA/NTTC argue that the waiver of preemption procedures that OHMT has adopted are the proper forum in which to address the city's factual safety arguments.

(c) *Administrator's Decision.* As previously discussed, consideration of the City's safety concerns would be appropriate in a subsequent waiver of preemption proceeding but is not relevant in this proceeding.

(4) *Other Issues and Comments— Driver Certification Requirements.* The City states that RSPA reserved ruling on the driver certification requirements in one of the City's regulations (BFP Directive 7–74, subsections 2–2 and 2–3), but failed to defer ruling on similar requirements in other City regulations (BFP Directive 5–63, section 2, BFP Directive 6–76, section 2, and all of BFP Directive 7–74 section 2). The Director of OHMT found that each of the above sections (entitled "Certificate of Fitness") are inextricably tied to the City's inconsistent permitting requirement and thus are themselves inconsistent, with the exception of subsections 2–2 and 2–3 concerning certificate of fitness requirements. Therefore, the director properly did not defer ruling on those requirements. OHMT has now issued IR–26, 54 FR 16314 (April 21, 1989), concerning the California Department of Motor Vehicles' regulations on training required for highway transportation of hazardous materials. OHMT will publish a notice seeking additional comment on the city's certificate of fitness requirements in light of IR–26.

Other Comments. The New Jersey Turnpike Authority (NJTA) commented that it supported the decision in IR–22 and wished to advise that its position as expressed during the comment period on IRA–40 remains the same.

The Liquid and Bulk Tank Division of Fruehauf Corporation commented that it agreed with DOT's finding in IR–22 that the City's special requirements for tanks are at odds with DOT's requirements and may not be as good.

The Truck Renting and Leasing Association and the National Private Trucking Association both commented that they agree with OHMT's interpretation of the HMTA and urge RSPA to deny the City's appeal of IR–22.

"Bomar" Tank Discharge Systems, Inc. a manufacturer of City-approved truck tanks, submitted rebuttal comments stating that preemption of the City's tank truck directive would increase the risk of transporting gasoline and other hazardous liquids in the City. "Bomar" contends that tank trucks manufactured to City specifications are safer than DOT-specification trucks, and cites engineering analysis, accident statistics, and common sense to support its contention.

D.R. Pesuit & Associates (DRP), consultants on gasoline tank trucks, submitted an analysis comparing DOT tanks with City-approved tanks which it had prepared at the request of "Bomar." DRP concludes that City-approved gasoline tank trucks are safer than DOT-specification trucks, and that, therefore, DOT should not preempt the City regulations.

Administrator's Response. I have considered all the comments and rebuttal comments submitted to the docket and, for the reasons discussed above, have determined that the decision in IR–22 should be affirmed.

IV. Conclusion

For the reasons indicated above and for the reasons set forth in IR–22 itself, I affirm the determination by the Director of the Office of Hazardous Materials Transportation in IR–22 that the City of New York Bureau of Fire Prevention Directives 3–76 (except sections 13 and 16), 6–76 (except section 25), 7–74 (except sections 31 and 32 and subsections 2–2 and 2–3) 5–63 (except section 7) are inconsistent with the HMTA and the HMR and, therefore, are preempted under 49 App. U.S.C. § 1811(a).

This decision on appeal constitutes the final administrative action in this proceeding.

Travis P. Dungan,

Administrator.

Issued in Washington, DC on June 19, 1989.

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Friday
June 23, 1989

Part X

Department of Transportation

Research and Special Programs Administration

Preemption Under the Hazardous Materials Transportation Act; Notice

DEPARTMENT OF TRANSPORTATION

[Notice No. 89-3]

Preemption Under the Hazardous Materials Transportation Act

AGENCY: Research and Special Programs Administration, (RSPA), DOT.

ACTION: Notice.

SUMMARY: This Notice publishes a subject-matter index to court decisions and DOT inconsistency rulings discussing preemption issues under the Hazardous Materials Transportation Act (HMTA) (Pub. L. 93-633, 49 App. U.S.C. 1801 *et seq.*) and the Hazardous Materials Regulations (HMR) (49 CFR Parts 171-179) issued thereunder. It also publishes a table summarizing all of the DOT's inconsistency rulings. This Notice is being published to facilitate better public understanding and awareness of the judicial and administrative precedents concerning preemption under the HMTA. It may be particularly useful to state or local governmental officials considering the regulation or restriction of hazardous materials transportation.

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590 [Tel. (202) 366-4362].

SUPPLEMENTARY INFORMATION: The HMTA at section 112(a) (49 App. U.S.C. 1811(a)) preempts "* * * any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA]." This express preemption provision makes it evident that Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any state or local action. The HMTA preempts only those state and local requirements that are "inconsistent."

In the HMTA's Declaration of Policy (section 102) and in the Senate Commerce Committee language reporting out what became section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in section 112(a) "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation" (S. Rep. 1192, 93rd Cong., 2d Sess., 37 (1974)). Through its enactment of the HMTA, Congress gave the Department the authority to promulgate uniform national standards. While the HMTA did not totally preclude state or local action in this area, Congress intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the HMR, issued to implement the HMTA, severely restricts the scope of historically permissible state or local activity.

DOT has provided an administrative forum, the inconsistency ruling process, for resolution of HMTA preemption issues. Although advisory in nature, inconsistency rulings issued by the Director of DOT's Office of Hazardous Materials Transportation (OHMT) under 49 CFR Part 107 provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a state or political subdivision. Any aggrieved party may appeal an inconsistency ruling to the Administrator of RSPA. If a state or political subdivision requirement is found to be inconsistent, the state or local government may apply to OHMT for a waiver of preemption. 49 App. U.S.C. 1811(b); 49 CFR 107.215-107.225.

Only the question of statutory preemption under the HMTA is considered in DOT's inconsistency rulings. A court might find a non-Federal requirement preempted for other reasons, such as statutory preemption under another Federal statute, preemption under state law, or preemption by the Commerce Clause and the Supremacy Clause of the U.S. Constitution because of an undue burden on interstate commerce. However, OHMT does not make such determinations in an inconsistency ruling proceeding.

OHMT has incorporated into its procedures (49 CFR 107.209(c)) the following criteria for determining whether a state or local requirement is consistent with, and thus not preempted by, the HMTA:

(1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

These criteria are based upon, and supported by, U.S. Supreme Court decisions on preemption. These include *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

The first criterion, the "dual compliance" test, concerns those non-Federal requirements which are irreconcilable with Federal requirements; that is, compliance with the non-Federal requirement causes the Federal requirement to be violated, or *vice versa*. The second criterion, the "obstacle" test, involves determining whether a state or local requirement is an obstacle to executing and accomplishing the purposes of the HMTA and the HMR; a requirement constituting such an obstacle is inconsistent. Application of this second criterion requires an analysis of the non-Federal requirement in light of the requirements of the HMTA and the HMR, as well as the purposes and objectives of Congress in enacting the HMTA and the manner and extent to which these purposes and objectives have been carried out through OHMT's regulatory program.

All of DOT's inconsistency rulings (including all relevant **Federal Register** citations) are summarized in a detailed table accompanying this Notice. Those rulings also are summarized in the index accompanying this Notice. In contrast to DOT's advisory inconsistency rulings, court decisions on HMTA preemption issues are legally binding upon parties to those cases and may constitute binding precedents within the geographical area of each court's jurisdiction. Relevant court opinions, published and unpublished, are summarized in the index accompanying this Notice. Anyone desiring to receive periodic updates of this table and index should contact OHMT's Federal/State and Private Sector Initiatives Division, DHM-50, U.S. DOT, Washington, DC 20590 (202-366-4449).

Issued in Washington, DC on June 19, 1989, under authority delegated in 49 CFR Part 106, Appendix A.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation

Index to Preemption of State and Local Laws and Regulations Under the Hazardous Materials Transportation Act (49 App. U.S.C. 1801 et seq.) (HMTA)

The following is an alphabetized subject matter index of issues arising under the preemption provision (49 App. U.S.C. 1811(a)) of the HMTA. This index summarizes the implementation of the HMTA preemption provision by DOT and the courts.

Abbreviations Used in this Index:

CFR—Code of Federal Regulations
DOT—U.S. Department of Transportation

FR—Federal Register
HM-XXX—Hazardous Materials Regulations Docket of RSPA (e.g., HM-181)
HMR—Hazardous Materials Regulations (49 CFR Parts 171 through 179) issued by DOT under HMTA
HMTA—Hazardous Materials Transportation Act
IR-XX—Inconsistency Ruling issued by DOT (e.g., IR-18)
IR-XX(A)—Decision on Appeal re Inconsistency Ruling IR-XX (e.g., IR-18(A))
IRA-XX—Inconsistency Ruling Application filed with DOT (e.g., IRA-44)
LNG—Liquefied natural gas
LPG—Liquefied petroleum gas
"Nine-pack"—Group of nine inconsistency rulings (*IR-7 through *IR-15) issued by RSPA on 11/27/84 (49 FR 46632 et seq.).
NRC—Nuclear Regulatory Commission
OHMT—Office of Hazardous Materials Transportation, RSPA
RAM—Radioactive materials
RSPA—Research and Special Programs Administration, DOT
An asterisk (*) denotes a case, IR or other provision involving only RAM.
A cross-hatch (#) denotes a case, IR or other provision involving both RAM and other hazardous materials.

Accident/Incident Reporting Requirements

• Requirements for immediate, oral accident/incident reports for emergency response purposes are consistent. IR-2; IR-3; *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd* 698 F.2d 559 (1st Cir. 1983); *49 CFR Part 177, Appendix A (policy).

• Requirements for written accident/incident reports are redundant with Federal requirements and thus inconsistent. IR-2; IR-3; IR-3(A).

• RAM incident reporting requirements are inconsistent because of redundancy and possible conflict with NRC rules incorporated into HMR. *IR-8. That field has been totally occupied by Federal regulation. *IR-8(A).

• RAM transportation accident/incident reporting requirements for other than emergency assistance are inconsistent. *49 CFR Part 177, Appendix A (policy).

Advance Notice—See "Notice Requirements" and "Delays of Transportation"

Approval Requirements (Also see "Permit Requirements")

• Transportation approval requirements identical to Federal are consistent. *IR-14, IR-15.

• Transportation approval requirements different from Federal are inconsistent. *IR-8, *IR-8(A); *IR-10; *IR-11; *IR-12; *IR-13, *IR-15; *IR-15(A); #IR-19; #IR-19(A).

• Transportation approval requirements may not include inconsistent provisions: "A requirement for compliance with an inconsistent provision is itself inconsistent." *IR-8(A), 52 FR 13000 at 13006.

• Unfettered discretion to approve or disapprove transportation is inconsistent. *IR-8(A); *IR-15(A); *IR-18; #IR-20.

• "In light of the virtually total occupation of the field of radioactive materials transportation by the HMTA and the HMR, State or local provisions requiring approval or authorizing conditions to be established for the transportation of radioactive materials (other than compliance with Federal regulations) constitute unauthorized prior restraints on shipments that are presumptively safe based on their compliance with Federal regulations and are inconsistent with the HMTA and the HMR." *IR-15(A), 52 FR 13062 at 13063; quoted and followed, #IR-19.

Bans on Hazardous Materials Transportation—See "Prohibitions of Hazardous Materials Transportation"

Bonding Requirements—See "Insurance or Indemnification Requirements"

Certification Requirements—See "Information/Documentation Requirements", "Packaging Design and Construction Requirements" and "Shipping Paper Requirements"

Communication Requirements

• Requirement that motor vehicles carrying LPG or natural gas use two-way radio communications is consistent. IR-2.

• RAM communications requirements which are different from, or authorized to be different from, Federal requirements are inconsistent. *IR-8; *IR-8(A).

Confidentiality Requirement

• Requirements to keep RAM shipment information confidential which are same as Federal are consistent. *IR-8; *IR-15.

Container Design and Certification Requirements—See "Packaging Design and Construction Requirements"

Curfew—See "Time Restrictions"

Definitions—See "Hazard Class and Hazardous Materials Definitions"

Delays of Transportation (Also see "Routing Requirements" and "Time Restrictions")

• "The manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation." IR-2, 44 FR 75566 at 75571.

• "The mere threat of delay may redirect commercial hazardous materials traffic into other jurisdictions that may not be aware of or prepared for a sudden, possibly permanent, change in traffic patterns." IR-3, 46 FR 18919 at 18921. #IR-20; *IR-21(A).

• Local highway routing requirements for hazardous materials through-traffic not based on complete safety analysis and consultations with all affected jurisdictions are inconsistent with § 177.853(a) of the HMR. IR-3; IR-3(A); IR-23.

• "Since safety risks are 'inherent in the transportation of hazardous materials in commerce' [49 U.S.C. § 1801], an important aspect of transportation safety is that transit time be minimized. This precept has been incorporated in the HMR at 49 CFR § 177.853, which directs highway shipments to proceed without unnecessary delay, and at 49 CFR § 174.14, which directs rail shipments to be expedited within a stated time frame." IR-6, 49 FR 760 at 765; see also IR-16, 50 FR 20872 at 20879; quoted, #IR-19, 52 FR 24404 at 24409.

• Acute delays at State border inevitably resulting from State imposing documentary prerequisites upon non-domiciliaries for transport of hazardous materials render those requirements inconsistent with 49 CFR 177.853.

• State fees for hazardous materials transport not causing unnecessary transportation delays are consistent. *IR-17; *IR-17(A); *IR-27; # *New Hampshire Motor Transport Assn.* v. *Flynn*, 751 F.2d 43 (1st Cir. 1984).

• Time-consuming state permitting process with no definite decision date creates possibility of transportation delay and thus is inconsistent. #IR-19, #IR-19(A); *IR-21; *IR-21(A).

• Two-hour advance approval requirement not shown to serve any purpose causes delay and is inconsistent. #IR-20; *IR-21; *IR-21(A).

• Additional switching, handling and delays of hazardous materials caused by state requirement for caboose on certain trains carrying hazardous materials create obstacle, and requirement is inconsistent. *Missouri Pacific RR Co.* v. *Railroad Commission of Texas*, 671 F. Supp. 466 (W.D. Tex. 1987), *aff'd on other grounds* 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 794 (1989).

• State statute providing three days for a permit issuance decision re each RAM shipment is inconsistent. *IR–21; *IR–21(A). Prohibition on permit applications more than one day prior to scheduled shipment also is inconsistent. *IR–21; *IR–21(A).

• RAM requirements unnecessarily delaying transportation are inconsistent. *IR–8(A), *IR–18; *IR–18(A); *IR–21; *IR–21(A); #IR–26; *49 CFR Part 177, Appendix A (policy).

• City tank truck regulations causing delays for cargo transfers, vehicle permit inspections and obtaining specifications, certifications and affidavits, are inconsistent. IR–22.

• City truck regulations, requiring bulk gases to be transported around City unless no practical alternative route exists and the fire commission authorizes trip, promote safety, do not cause "unnecessary delay" under 49 CFR 177.853(a), and thus are consistent. *City of New York* v. *Ritter Transportation, Inc.*, 515 F. Supp. 663 (S.D. N.Y. 1981), *aff'd National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270 (2d Cir. 1982).

• "While states do have a role in effectuating the safe transportation of radioactive materials, it does not follow that they have unfettered discretion to take actions which have the effect of restricting or delaying transportation being conducted in compliance with Federal law." *IR–8(A), 52 FR 13000 at 13003; quoted #IR–19, 52 FR 24404 at 24409.

Documentation—See "Information/ Documentation Requirements"

Drivers' Licenses—See "Information/ Documentation Requirements" and "Training Requirements"

Effect of Requirements (Also see "Language of Requirements")

• "* * * it is the effect, both actual and potential, not the intent of state or local rules which determines their consistency with the HMTA and HMR." IR–8(A), 52 FR 13000 at 13003.

Emergency Response

• "Although the Federal Government can regulate in order to avert situations where emergency response is necessary, and can aid in local and state planning and preparation, when an accident does occur, response is, of necessity, a local responsibility." IR–2, 44 FR 75565 at 75568.

• Inadequacy of emergency response capabilities cannot provide basis for prohibiting transportation. *IR–18; *IR–18(A). Thus, emergency response-related information requirements cannot be used as a prerequisite to hazardous materials transportation. #IR–19.

Equipment Requirements (Also See "Packaging Design and Construction Requirements")

• Cargo containment-related equipment requirements, including those vesting discretionary approval authority in state or local officials, are inconsistent. IR–2; *IR–8; *IR–8(A); *IR–15; IR–22.

• "In summary, RSPA, OHMT and their predecessor agencies have established in a series of inconsistency rulings issued during the past decade the principle that the HMR provisions concerning hazardous materials transportation cargo containment systems, equipment, accessories and packagings, and the certification, marking, testing and permitting of same, have fully occupied that regulatory field. Those subjects are the exclusive province of the Federal Government. As a result, state or local requirements concerning those subjects detract from and create confusion concerning the Federal requirements, are inconsistent with the HMTA and the HMR, and, therefore, are preempted under section 112(a) of the HMTA. Similarly, these rulings have demonstrated RSPA's position that permitting systems and information or documentation requirements relating to or containing such requirements likewise are inconsistent with the HMTA and the HMR and, therefore, preempted." IR–22, 52 FR 46574 at 46582.

• "Headlights on" requirement is consistent. IR–2; IR–3; *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd* 698 F.2d 559 (1st Cir. 1983).

• State requirement for caboose on certain trains carrying hazardous materials would cause additional switching, handling and delays of hazardous materials and thus is inconsistent. *Missouri Pacific RR Co.* v. *Railroad Commission of Texas, supra.*

• Requirements for additional or special equipment re RAM transportation are inconsistent. *49 CFR Part 177, Appendix A (policy).

• Requirement for illuminated rear bumper signs conflicts with DOT lighting regulations and would divert attention from DOT placards and thus is inconsistent. IR–2.

• Requirement for frangible shank-type lock on tank trailers carrying LNG or LPG is inconsistent since DOT comprehensively regulates cargo tank containment. IR–2.

• "* * * a state or local rule which grants an official discretionary authority to set equipment requirements for carriers engaged in interstate commerce impedes the Congressional purposes of increased safety and regulatory uniformity underlying the HMTA." IR–8(A), 52 FR 13000 at 13003.

• Vehicle equipment requirements which might conflict with those provisions of the Federal Motor Carrier Safety Regulations (FMCSR), 49 CFR Parts 390–377, which are incorporated in the HMR only by 49 CFR 177.804, must only meet the "dual compliance" test, not the "obstacle" test. IR–3; 43 FR 4858 (Feb. 6, 1978); *National Paint & Coatings Assn.* v. *City of New York*, CV–84–4525 (E.D. N.Y. 1985); 52 FR 18668–9 (May 18, 1987); IR–22. However, those FMCSR requirements specifically incorporated into the HMR by other HMR regulations must meet both tests. IR–22.

Escort Requirements

• RAM transportation front and rear escort requirements identical to DOT/ NRC standards are consistent, *IR–14, as are notice requirements facilitating escorts under the DOT/NRC requirements. *IR–17.

• Requirements for additional or special escorts re RAM transportation not required by DOT/NRC regulations are inconsistent, *IR–11; *IR–13; *IR–15(A); *IR–18; *IR–18(A); *IR–21. *49 CFR Part 177, Appendix A (policy).

• Requirements for carriers to delay for escorts re RAM transportation other than those in NRC standards are inconsistent. *IR–15.

• Escort requirements linked to inconsistent equipment requirements are inconsistent. IR–22; IR–23.

Federal Requirements (Also see "Standing")

• Only conflicts with Federal requirements under the HMTA and the HMR are cognizable in inconsistency proceedings (*not* Commerce Clause issues or preemption issus under other Federal statutes or regulations), but OHMT may address these HMTA/HMR conflict issues even if not clearly raised in the application. *IR–17 (A).

• Absence of a Federal regulation addressing the same subject as a challenged state or local requirement is not determinative of the issue of that requirement's consistency. *IR–17(A).

• Requiring compliance with Federal requirements is consistent. IR–3; *IR–7.

• State or local requirements identical to Federal ones are consistent. *IR–8.

• Adequacy of Federal requirements is irrelevant. *IR–8(A).

Fee Requirements

• Reasonable fees to fund consistent activities are consistent. *IR–17; *IR–17(A); *IR–27; # *New Hampshire Motor Transport Assn.* v. *Flynn, supra.*

• Fees which are unreasonably high or are related to inconsistent activities are inconsistent. *IR–11; *IR–13; *IR–15; *IR–18(A); #IR–19; *IR–27; # *New Hampshire Motor Transport Assn.* v. *Flynn, supra.*

• State's $1,000 per cask fee for spent nuclear fuel transportation to fund inspection, enforcement, State escorts and emergency response, not related to inconsistent provisions, and not causing transportation delays or diversions is consistent. *IR–17; *IR–17(A). Similar State RAM shipment fees are consistent. *IR–27.

• State's $25/year or $15/trip fee for hazardous materials transportation to fund transportation and environmental programs and related to a minimal delay licensing system is consistent. *New Hampshire Motor Transit Assn.* v. *Flynn, supra.*

• State's $1,000 per shipment fee for spent nuclear fuel transportation apparently to fund inconsistent state monitoring activities is inconsistent. *IR–15. State's RAM permit fee is inconsistent. *IR–27.

Findings

• Findings regarding hazardous materials transportation are not "requirements" subject to preemption under the HMTA. *IR–18.

Hazard Class and Hazardous Materials Definitions

• Hazard class and hazardous materials definitions differing from those in the HMR are inconsistent because the Federal role is exclusive. *IR–18; *IR–18(A); #IR–19; #IR–19(A); #IR–20; *IR–21; #IR–26; *Missouri Pacific RR Co.* v. *Railroad Commission of Texas, supra.*

• Local hazardous materials definitions and classifications which result in regulating more or different hazardous materials than HMR are obstacles to uniformity in transportation regulation and thus are inconsistent. IR–5; IR–6.

• Application of state requirements to selected DOT hazardous materials can contribute to the overall inconsistency of a series of interrelated regulations. #IR–19.

• "The key to hazardous materials transportation safety is precise communication of risk. The proliferation of differing State and local systems of hazard classification is antithetical to a uniform, comprehensive system of hazardous materials transportation safety regulations." IR–6, 48 FR 760 at 764.

• "State government or political subdivisions may not regulate—let alone prohibit—the transportation of radioactive or other hazardous materials specifically excepted from regulation under the HMTA or the HMR. The determination of what hazardous materials may or may not be regulated in the transportation field is the essence of DOT's exclusive authority to define and classify hazardous materials." #IR–20, 52 FR 24396 at 24401.

• "Radioactive Material" definitions different from HMR definitions are inconsistent. *IR–8; *IR–12; *IR–15; *IR–16; *IR–18; *IR–21. But essentially identifical definitions are consistent. *IR–18.

• "If every jurisdiction were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety." *IR–12, 49 FR 46650 at 46651.

• City definitions of RAM and flammable materials differed from HMTA definitions and thus were preempted and their use enjoined. # *Union Pacific RR Co.* v. *City of Las Vegas*, CV–LV–85–932 HDM (D. Nev. 1986).

Hazard Warning Requirements—See "Placards and Other Hazard Warning Requirements."

Hazardous Substances and Wastes

• Dicta in footnotes indicate that State's hazardous substances transportation regulations appeared to be valid under the HMTA because they regulated only transportation from points in Maryland [but decision overlooked RSPA's 1980 amendment of 49 CFR § 171.1 applying HMR to intrastate transportation of hazardous substances and wastes]. *Browning-Ferris, Inc.* v. *Anne Arundel County*, 292 Md. 136, 438 A.2d 269 at 274 (1981).

Inconsistency Ruling, Necessity for

• Local government need not obtain an RSPA inconsistency ruling before enforcing a local requirement. *National Tank Truck Carriers, Inc.* v. *Burke*, 608 F.2d 819 at 821–2 (1st Cir. 1979); *City of New York* v. *Ritter Transportation, Inc.*, 515 F. Supp. 663 at 668 (S.D. N.Y. 1981); *Seaboard System Railroad, Inc.* v. *Bankester*, 254 Ga. 455, 330 S.E. 2d 700 at 705 (1985). *Contra* (based on doctrine of primary jurisdiction): *Consolidated Rail Corp.* v. *City of Dover*, 450 F. Supp. 966 at 974 (D. Del. 1978).

Incorporation by Reference

• NRC regulations incorporated by reference in HMR provide basis for consistency comparison with state and local requirements. *IR–8(A).

• State and local requirements which incorporate by reference specific superseded Federal regulations are inconsistent. *IR–8; *IR–8(A); *IR–18. However, state and local governments may incorporate by reference specific CFR volumes of the HMR for a reasonable time after their publication, although a later-published HMR rule would control over an inconsistent state or local requirement. #IR–19.

Indemnification Requirements—See "Insurance or Indemnification Requirements."

Information/Documentation Requirements (Also see "Shipping Paper Requirements" and "Notice Requirements.")

• Requirements for information or documentation in excess of Federal requirements create potential delay, constitute an obstacle to execution of the HMTA and the HMR, and thus are inconsistent. IR–2; IR–6; *IR–8; *IR–8(A); *IR–15; *IR–15(A); *IR–18; *IR–18(A); #IR–19; #IR–19(A); *IR–21; #IR–26; *IR–27; **Chem-Nuclear Systems, Inc.* v. *City of Missoula*, CV 80–18–M (D. Mont. 1984). There is no *de minimis* exception to the "obstacle" test because thousands of jurisdictions could impose *de minimis* information requirements. *IR–8(A).

• "In summary, the HMTA and HMR provide sufficient information and documentation requirements for the safe transportation of hazardous materials; state and local requirements in excess of them constitute obstacles to implementation of the HMTA and HMR and thus are inconsistent with them." #IR–19, 52 FR 24404 at 24408.

• Preliminary injunction was granted against City requirements to have decal and carry copy of permit. *American Trucking Assns. Inc.* v. *City of Boston*, Civ. Pet. 81–628–MA (USDC Mass. 1981), CCH Fed. Carrier Cases //82,938.

• Emergency response-related information requirements cannot be used as a prerequisite to hazardous materials transportation. #IR–19.

• "DOT and NRC have determined what information and documentation

requirements are needed for the safe transportation of radioactive materials, and state and local requirements going beyond them create confusion, impose burdens on transporters, are obstacles to the accomplishment of the HMTA's objectives, and thus are inconsistent." *IR–8(A), 52 FR 13000 at 13004; quoted in *IR–27; quoted and applied to non-RAM in #IR–19, 52 FR 24404 at 24408; see also *IR–15(A).

• State may require, as prerequisite to motor vehicle transport of hazardous materials, documentary evidence of hazardous materials training from its own domiciliaries but not from non-domiciliaries—except, on or after April 1, 1992, from non-domiciliaries not having hazardous materials endorsements on their commercial drivers' licenses. #IR–26.

• "No matter what the form, any state or local requirement that asks for an additional piece of paper that supplies the same information as is required to be on the DOT shipping paper would be inconsistent with the requirements contained in the Hazardous Materials Regulations." IR–2, 44 FR 75566 at 75571. Requirements for multiple submissions of same information are inconsistent. *IR–8(A).

• Requirements for RAM transportation route plans or other shipment-specific documentation or information are inconsistent. *IR–21. Also inconsistent are requirements for RAM shipment information on possible alternate routes, proposed means of conveyance, estimated date and time of departure, emergency response or recovery plans, attestations re safety inspections, certification of compliance with laws and regulations (latter being same as required on DOT shipping papers), telephone numbers, inspection reports, state permits, training programs, proof of insurance, and equipment replacement or repair plans. *IR–8(A); *IR–15; *IR–15(A); *IR–27.

• RAM information requirements identical to NRC's are consistent, but requirement for submission to state of NRC approvals and licenses is inconsistent. *IR–8; *IR–8(A); *IR–15; *IR–15(A).

• Mere requirement in permit application of some information required on DOT shipping papers may not require preemption. Dicta in *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd* 698 F.2d 559 (1st Cir. 1983).

Inspection Requirements

• Inspection requirements relating to Federal and consistent requirements are encouraged by RSPA and are consistent. *IR–2; *IR–8; *IR–15; *IR–17; #IR–20; #IR–27.

• Inspection requirements relating to inconsistent requirements are themselves inconsistent. #IR–20; *IR–21; *IR–21(A); #IR–27.

Insurance or Indemnification Requirements

• The absence of a bonding, insurance, or indemnity requirement in the HMR "is a reflection of OHMT's determination that no such requirement is necessary and that any such requirement imposed at the state or local level is inconsistent with the HMR." #IR–25, 54 FR 16308 at 16311. "[N]o such requirement is necessary—particularly because 49 CFR 387.7 and 387.9 already require insurance or surety bonds of between $1,000,000 and $5,000,000 for motor carriers transporting hazardous wastes, hazardous substances and other hazardous materials." *Ibid.*

• RAM transportation indemnification, bonding or insurance requirements differing from Federal requirements are inconsistent. *IR–10; *IR–11; *IR–15; *IR–15(A); *IR–18; *IR–18(A). (See also *IR–13; *IR–14.)

• "The indemnification level established through the HMR, coupled with the indemnification provisions of the Price-Anderson Act (42 U.S.C. 2210), provides the exclusive standard for radioactive materials transportation indemnification. They have totally occupied that field, and any state or local bond, insurance or indemnification requirement not identical to the HMR requirement is an obstacle to the accomplishment of the objectives of the HMTA and the HMR." *IR–15(A), 52 FR 13062 at 13063.

Land Use Restrictions

• Regulations which apply only to transportation activities are not type of non-transportation land use restrictions which might be consistent. #IR–19; see IR–16.

Language of Requirements (Also see "Effect of Requirements")

• Actual language of state and local requirements, rather than later statements of intent, are controlling. *IR–8(A), IR–16, #IR–19(A), unless there is a demonstrated actual practice to the contrary. *IR–17.

Monitoring of Shipments

• Monitoring of hazardous materials shipments by state officials is consistent. *IR–17. However, a carrier cannot be required to stop and wait for state officials assigned to monitor shipments. *IR–15.

Motor Carrier Safety Regulations (MCSR)

• 49 CFR Part 390–397 (MCSR) were not made relevant to HMTA preemption by adoption of 49 CFR 177.804. They are relevant only insofar as specifically incorporated by reference in other HMR provisions. IR–22; IR–23.

Non-Regulatory Actions—See "Statements of Intent to Regulate"

Notice Requirements (Also see "Accident/Incident Reporting Requirements", "Delays of Transportation", and "Information/Documentation Requirements")

• Advance notice requirements generally are inconsistent. IR–6; *IR–8(A); *IR–16.

• "Through its rulemaking process and related studies, DOT has determined what prenotification (including information, documentation and certification) requirements are necessary for the safe transportation of radioactive materials. In the process of analyzing rulemaking comments and studies it has commissioned or examined, DOT has determined what prenotification requirements are not necessary. This field has been totally occupied by the HMR. State and local provisions either authorizing less prenotification or requiring greater prenotification than the HMR, therefore, constitute obstacles to the accomplishment and execution of the objectives of the HMTA and the HMR, are inconsistent, and are preempted." *IR–8(A), 52 FR 13000 at 13005.

• Local requirements for advance notice of hazardous materials transportation have potential to delay and redirect traffic and thus are inconsistent. IR–6.

• Notice requirements re RAM shipment schedule changes identical to NRC regulation are consistent. *IR–8.

• Notice requirements re RAM shipment schedule or changes thereto different from NRC regulations are inconsistent. *IR–14; *IR–15; *IR–16; *IR–18; *IR–18(A); *IR–27; **Chem-Nuclear Systems, Inc.* v. *City of Missoula*, CV 80–18–M (D. Mont. 1984); *49 CFR Part 177, Appendix A (policy).

• "The State's prenotification requirements differ from, and are more burdensome than, the radioactive materials prenotification requirements in §§ 173.22 and 177.825 of the HMR and 10 CFR 71.97 and 73.97 (NRC regulations incorporated by reference in § 173.22 of the HMR). [Its rule] requires more information about more shipments and thereby creates confusion and undermines the likelihood of proper

compliance with the HMR prenotification requirements. Therefore, [it] is inconsistent with the HMR to the extent that it exceeds NRC requirements by requiring greater prenotification concerning non-spent fuel HRCQ radioactive materials shipments." *IR-27, 54 FR 16326 at 16331.

Operations Suspension/Requirements—See "Traffic Controls/Regulations"

Packaging Design and Construction Requirements

• Packaging and cargo containment design, construction, testing, accessories, equipment, certification and permit requirements, including those vesting discretionary authority in state or local officials, are inconsistent. IR-2; *IR-8; *IR-8(A); *IR-18; *IR-18(A); IR-22.

• "State and local governments may not issue requirements that differ from or add to Federal ones with regard to packaging design, construction and equipment for hazardous materials shipments subject to Federal regulations." IR-2, 44 FR 75566 at 75568.

• Hazardous gas container-testing requirements are inconsistent. *National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270 (2nd Cir. 1982).

• RAM container testing and certification requirements are inconsistent. *IR-8; *IR-8(A); *IR-15.

• Requirement for frangible shank-type lock on tank trailers carrying LNG or LPG is inconsistent since DOT comprehensively regulates cargo tank containment. IR-2.

• But plaintiffs failed to demonstrate "obstacle" test violations or to obtain summary judgment enjoining city cargo containment system regulations, including requirement that flammable liquid cargo tanks be constructed of steel, not aluminum. *National Paint & Coatings Assn., Inc.* v. *City of New York*, CV 84-4525 (E.D., N.Y. 1985).

Penalties (Also see "Violations Provisions")

• Penalties (such as fines, imprisonment or civil penalties) for violating consistent state or local rules are consistent unless they are so extreme or arbitrarily applied to reroute or delay shipments; mere differences in amount do not undermine consistency. IR-3; *IR-27.

• Penalties (such as fines, imprisonment or civil penalties) for violating inconsistent state or local rules are themselves inconsistent. *IR-18; *IR-18(A); *IR-27; **Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103 (3rd Cir. 1985).

Permit Requirements (Also see "Approval Requirements")

• Permit *per se* is not inconsistent; its consistency depends upon its requirements. IR-2; IR-3; #IR-20.

• State permitting system which prohibits or requires certain transportation activities depending upon whether a permit has been issued (regardless of whether the activity is in compliance with the HMTA), applies to selected hazardous materials, involves extensive information and documentation requirements and contains considerable discretion as to permit issuance, is inconsistent. "Cumulatively, these factors constitute unauthorized prior restraints on shipments of nonradioactive hazardous materials that are presumptively safe based on their compliance with Federal regulations." #IR-19, 52 FR 24404 at 24407. Affirmed in IR-19(A). *Contra: #Southern Pacific Transportation Co.* v. *Public Service Commission of Nevada*, CV-N-86-444-BRT (D. Nev. 1988) (discussed in *IR-27 at 54 FR 16332).

• Certain over-the phone permits for transportation of hazardous gases are consistent. *National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270 (2nd Cir. 1982).

• Permit requirements for each shipment involving application 4 hours to 2 weeks prior to shipment, carrying of permit on vehicle and "an additional piece of paper that supplies the same information as is required to be on the DOT shipping paper" involve high probability of transportation delay and thus are inconsistent. IR-2.

• Local RAM transportation permit was consistent—prior to DOT's issuance of HM-164 re routing of certain RAM. *IR-1.

• Requirements implementing, inextricably related to, or "fleshing out," inconsistent permitting requirements are themselves inconsistent. *IR-21; *IR-21(A).

• If permit system is consistent, requirements to carry permit and display decal are consistent. IR-3. *But* requirement to display permit decal was held inconsistent. *American Trucking Assns.* v. *City of Boston*, C.A. 81-628-MA (D. Mass. 1981).

• Since HMTA and HMR have almost completely occupied the field of RAM transportation safety, state and local requirements are limited to: (1) Traffic control or restrictions applying to all traffic, (2) designation of preferred routes under 49 CFR 177.825, (3) adoption of Federal or consistent requirements, (4) enforcement of consistent requirements or those for which preemption has been waived, and (5) imposition of reasonable transit fees to finance those enforcement activities and emergency response preparedness. Thus, RAM transportation permits generally are inconsistent. *IR-8; *IR-8(A); *IR-10; *IR-11; *IR-12; *IR-13; *IR-15; *IR-18; *IR-18(A); #IR-19; #IR-19(A); #IR-20; *IR-21; *IR-21(A); *IR-27.

Persons Subject to Requirements

• Definitions of persons subject to state or local requirements which include fewer persons than HMR minimize inconsistency possibilities and are themselves consistent. *IR-18.

Personnel Requirements

• Requirements for additional or special personnel re RAM transportation are inconsistent. *49 CFR Part 177, Appendix A (policy).

Placards and Other Hazard Warning Requirements

• Placards and other hazard warning requirements are inconsistent if they are in addition to or different from Federal placarding requirements. IR-2; IR-3; IR-24; *Kappelmann* v. *Delta Air Lines, Inc.*, 539 F.2d 165 (D.C. Cir. 1976), *cert. denied* 429 U.S. 1061 (1977); *National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270 (2nd Cir. 1982).

• "Hazard warning systems are another area where [OHMT] perceives the Federal role to be exclusive * * *. Additional, different requirements imposed by States or localities detract from the DOT systems and may confuse those to whom the DOT systems are meant to impart information." IR-2, 44 FR 75565 at 75568.

• Requirement for illuminated rear bumper sign conflicts with DOT lighting regulations, would divert attention from DOT placards and thus is inconsistent. IR-2.

• Requirements for additional or different placards re RAM transportation are inconsistent. *49 CFR Part 177, Appendix A (policy).

• Requirements for placards and identification of products are inconsistent. IR-3; *American Trucking Assns.* v. *City of Boston*, C.A. 81-628-MA (D. Mass. 1981).

• Requirement to display permit decal is inconsistent. *American Trucking Assns.* v. *City of Boston*, C.A. 81-628-MA (D. Mass. 1981).

• "It is OHMT's view that the HMR placarding provisions do completely occupy the field and, therefore, preempt all state and local placarding and warning sign requirements for hazardous materials transportation which are not identical to the Federal requirements. This is true with respect

to requirements applying solely to pickups and deliveries, as well as to requirements applying to through-traffic, because all such non-identical requirements create confusion and undermine the uniform system of hazard communication necessary for the safe transportation of hazardous materials. Transportation viewed as being a mere pickup or delivery by one jurisdiction actually may be just the beginning or end of multi-state transportation through numerous local jurisdictions." IR–24, 53 FR 19848 at 19850.

• But plaintiffs, prior to IR–24, failed to obtain summary judgment or make sufficient showing that Federal placarding regulations were intended to occupy field and preempt city hazard warning sign requirements with respect to local deliveries. *National Paint & Coating Assn., Inc.* v. *City of New York*, CV–84–4525 (E.D. N.Y. 1985).

Prenotification Requirements—See "Notice Requirements"

Prohibitions of Hazardous Materials Transportation (Also see "Permit Requirements")

• Prohibitions of hazardous materials transportation generally are inconsistent. IR–3; IR–3(A); IR10; *IR–16; #IR–20.

• Power to ban, rather than to channel or guide, hazardous materials traffic is exclusively Federal. "A unilateral local ban is a negation, rather than an exercise, of local responsibility, since it isolates the local jurisdiction from the risks associated with the commercial life of the nation." IR–3(A) 47 FR 18457 (Apr. 29, 1982).

• Town order requiring railroad to remove its railcars containing vinyl chloride from Town is inconsistent. *Consolidated Rail Corp.* v. *John Hancock*, C.A. 79–0983–MA (D. Mass. 1979).

• City ban on hazardous materials pickups and deliveries by non-city-permitted vehicles is inconsistent. Likewise inconsistent is a City ban on fueling or stopping of hazardous materials through-traffic. IR–23.

• "A State or local government may not resolve the problem by effectively exporting it to another jurisdiction." *"Nine-Pack" Preamble, citing *Kassel* v. *Consolidated Freightways*, 450 U.S. 662 (1981) and IR–3.

• But local prohibition on liquefied gases transportation through city unless no practical alternative route existed is consistent. *National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270 (2d Cir. 1982), *affirming City of New York* v. *Ritter Transportation, Inc.*, 515 F. Supp. 663 (S.D. N.Y. 1981).

• Prohibitions of highway transportation of highway route controlled quantity RAM without providing an alternate route are inconsistent. *49 CFR Part 177, Appendix A (policy).

• Prohibition of RAM and explosives shipments is inconsistent. *IR–16; #IR–20.

• *De facto* prohibitions are inconsistent. *IR–10.

• Prohibition of RAM transportation which RSPA has excepted from HMR requirements is inconsistent. #IR–20.

• Inadequacy of emergency response capabilities cannot provide basis for prohibiting transportation. *IR–18; *IR–18(A).

• To the extent it prohibits rail, air or water transportation of fireworks, State regulation allowing fireworks delivery by motor vehicle is inconsistent and thus is preempted. *South Dakota Dept. of Public Safety ex rel. Melgaard* v. *Haddenham*, 339 N.W.2d 786 (S.D. 1983). But an otherwise consistent requirement is not inconsistent because it applies only to certain modes of transportation. *IR–18.

• County ordinance prohibiting spent fuel or radioactive waste transportation into County for storage on nuclear power plant sites is inconsistent and thus preempted. **Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103 (3rd Cir. 1985).

Radio Requirements—See "Communications Requirements"

• *Railroad-related Requirements*—State or local hazardous materials railroad transportation requirements may be preempted under the Federal Railroad Safety Act, 49 App. U.S.C. 434, without consideration of whether they might be consistent under the HMTA. *CSX Transportation, Inc.* v. *City of Tallahoma*, Civ. 4–87–47 (E.D. Tenn. 1988); *CSX Transportation, Inc.* v. *Public Utilities Commission of Ohio*, C–2–88–1023 (D. Ohio 1988).

Reporting Requirements—See "Accident/Incident Reporting Requirements"

Routing Requirements—(Also See "Delays of Transportation", "Prohibitions of Hazardous Materials Transportation" and "Traffic Controls/Regulations")

• Without adequate safety justification and appropriate coordination with, and concern for safety of people in, adjoining affected jurisdictions, routing restrictions (including time restrictions) are inconsistent—particularly if they result in increased transit times. *IR–1; IR–2; IR–3; IR–3(A); *IR–10; *IR–11; *IR–14; *IR–16; #IR–20; IR–23.

• Local routing restrictions prohibiting transport of liquefied gases through city except to areas for which no practical interstate or major highway alternative route exists are consistent. *National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270 (2nd Cir. 1982), affirming *City of New York* v. *Ritter Transportation, Inc.*, 515 F. Supp. 663 (S.D. N.Y. 1981).

• State preferred route designations for highway route controlled quantity RAM are consistent if in accordance with 49 CFR 177.825(b).

• State routing restrictions re highway route controlled quantity RAM are inconsistent if not:

(1) Established by state routing agency (49 CFR 171.8);

(2) Based on comparative radiological risk assessment process at least as sensitive as that in "DOT Guidelines";

(3) Based on evaluation of radiological risk wherever it may occur and on solicitation and consideration of views from each affected jurisdiction (49 CFR 177.825(b)); and

(4) Ensuring reasonable continuity of routes between jurisdictions. *49 CFR Part 177, Appendix A (policy).

• "* * *the Department, through promulgation of 49 CFR § 177.825, has established a near total occupation of the 'field of routing' * * * requirements relating to the transportation of radioactive materials. Thus, state and local radioactive materials transportation routing * * * requirements other than (1) those identical to Federal requirements or (2) state designated alternate routes under 49 CFR § 177.825(b), are very likely to be inconsistent and thus preempted under section 112(a) of the HMTA." *IR–8(a), 52 FR 13000 at 13003.

• Local routing restrictions re RAM are inconsistent if they prohibit transportation on routes authorized by 49 CFR Part 177 or authorized by a state routing agency consistent with that Part. *IR–18; *IR–18(A); #IR–20.

• Suspension or regulation of spent nuclear fuel shipments on *non*-Interstate highways (not needed for access to or from Interstate or preferred routes) is consistent. *IR–7.

• Routing restrictions on highway route controlled quantity RAM not in accordance with 49 CFR 177.825(b), which authorizes State (not local) designation of certain preferred routes, are inconsistent. *IR–8(A); *IR–16; *IR–18; *IR–18(A); #IR–20; *IR–21; **Jersey Central Power & Light Co.* v. *State of New Jersey*, Civil No. 84–5883 (D. N.J.,

Dec. 27, 1984), *appeal dismissed as moot*, 772 F.2d 35 (3rd Cir. 1985).

• Routing restrictions re non-highway route controlled quantity RAM (required by 49 CFR Part 172 to be placarded) are inconsistent unless identical to 49 CFR 177.825(a). *IR–18; *IR–18(A); *IR–21; *49 CFR Part 177, Appendix A (policy).

• Routing restrictions re radioactive materials not required by 49 CFR Part 172 to be placarded are inconsistent. *49 CFR Part 177, Appendix A (policy).

"* * * Congress' dual purposes in enacting the HMTA were: (1) To protect the Nation against the risks inherent in hazardous materials transportation; and (2) to prevent a patchwork of varying and conflicting State and local regulations. Commissioners' Ordinance No. 0–31–80 impedes both purposes. By delaying hazardous materials shipments and causing traffic to be diverted from established routes, the Ordinance increases exposure to the risks inherent in hazardous materials transportion; and to the extent that the Ordinance results in the diversion of hazardous materials traffic into adjacent jurisdictions, it constitutes a routing requirement adopted without consideration of the safety impacts on other affected jurisdictions. To the extent that the Ordinance creates a precedent for the establishment of independent and uncoordinated local prenotification systems, it contributes to the creation of the regulatory patchwork which Congress intended to preclude." IR–6, 48 FR 760 at 766.

• Routing requirements linked to inconsistent equipment requirements are inconsistent. IR–22; IR–23.

Security Requirements

• Security requirements re RAM transportation are inconsistent if they conflict with NRC's 10 CFR Part 73 physical security requirements or DOT-approved requirements under 49 CFR 173.22(c). *49 CFR Part 177, Appendix A (policy).

Shipping Paper Requirements (Also see "Information/Documentation Requirements")

• Shipping paper requirements generally are inconsistent.

• Requirements for additional or different shipping paper entries re RAM are inconsistent. *49 CFR Part 177, Appendix A (policy).

• Requirement for red or red-bordered shipping papers for intrastate hazardous materials shipments is an obstacle to uniform national system and thus is inconsistent. IR–4.

• Requirements for certification to state of shipment's compliance with law are redundant, constitute obstacles to HMTA, and thus are inconsistent. *IR–8; *IR–15; *IR–21.

Standing

• OHMT applies a broad interpretation of the "person affected" standard for requesting inconsistency rulings, which are intended to resolve HMTA preemption issues expeditiously and inexpensively. *IR–21.

Statements of Intent to Regulate

• State or local statements of intent to regulate are consistent. *IR–12; *IR–15; *IR–18.

• Governor's letter stating intent to take action but not constituting a state requirement does not raise a consistency issue. *IR–9.

State Requirements

• Local requirements for compliance with otherwise consistent state requirements are consistent. IR–3.

Storage

• State prohibition of transportation-related hazardous materials storage without a state permit, at places where, and for times when, HMR allow such storage is inconsistent. #IR–19; #IR–19(A).

• "In summary, the HMR contain a comprehensive series of regulations relating to the storage of hazardous materials incidental to transportation by rail. These regulations authorize or prohibit specific types of hazardous materials storage under specified circumstances. Creation by the PSC of a separate regulatory regime for rail transport-related storage of hazardous materials raises the spectre of widespread confusion. The PSC regulations are so open-ended and discretionary that they authorize the PSC to approve storage prohibited by the HMR or prohibit storage authorized by the HMR." #IR–19, 52 FR 24404 at 24410.

Time Restrictions (Also see "Routing Requirements" and "Delays of Transportation")

• Time restrictions are a subset of routing restrictions. IR–3. Thus, without adequate safety justification and appropriate coordination with adjoining affected jurisdictions, time restrictions except as to in-city pickup and deliveries are inconsistent. IR–3(A); IR–23.

• Statewide prohibition on hazardous materials carriage between 7–9 a.m. and 4–6 p.m. on weekdays resulted in delay and are inconsistent. IR–2; *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd* 698 F.2d 559 (1st Cir. 1983). Also inconsistent is statewide prohibition on RAM transportation other than during non-holiday weekdays from 9 a.m. to 4 p.m. *IR–21.

• Citywide rush-hour curfew (no transport between 6–10 a.m. and 3–7 p.m.) on liquefied gas transportation is consistent. *National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270 (2nd Cir. 1982), affirming *City of New York* v. *Ritter Transportation Co.*, 515 F. Supp. 663 (S.D. N.Y. 1981).

• City prohibition of hazardous materials transportation in downtown area between 6 a.m. and 8 p.m. on weekdays is consistent insofar as it applies to in-city pickups and deliveries. IR–3.

• No decision on consistency of 6–10 a.m. and 3–7 p.m. bridge and tunnel prohibition is possible without information on safety justification, coordination with other jurisdictions, and delays or diversions of hazardous materials. #IR–20.

• Restriction of RAM transportation to May-October period and prohibition of holiday or inclement weather shipments is inconsistent. *IR–14.

• County's assertion of unfettered authority to change dates, routes and times of hazardous materials shipments is inconsistent. *IR–18.

• Time restrictions linked to inconsistent routing requirements are inconsistent. IR–22; IR–23.

• City restriction of hazardous materials through-traffic on weekdays to 10 a.m.–3 p.m. and 7 p.m.–6 a.m. for explosives and "prohibited materials" and to 9 a.m.–4 p.m. and 6 p.m.–7 a.m. for other "hazardous cargo" is inconsistent because not based on adequate safety analysis or preceded by consultations with all affected jurisdictions. IR–23.

Traffic Controls/Regulations (Also see "Routing Requirements")

• So long as reasonably administered on a case-by-case basis, the local authority to restrict or suspend operations when road, weather, traffic or other hazardous conditions or circumstances warrant is consistent. IR–3; *IR–15(A); #IR–20; *American Trucking Assns.* v. *City of Boston*, C.A. 81–628–MA (D. Mass 1981); *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd* 698 F.2d 559 (1st Cir. 1983).

• Local traffic controls are presumed to be valid. #IR–20; IR–23.

• "To the extent that nationwide regulations do not adequately address a particular local safety hazard, State and local governments can regulate narrowly for the purpose of eliminating

or reducing the hazard." IR–2, 44 FR 75565 at 75568.

• Radioactive materials may not be singled out for different types of control than hazardous materials generally, nor may controls conflict with carrier discretion and responsibility provided by the HMR. *IR–15(A).

• Requirement to comply with lawful orders, instructions and directives of authorized bridge personnel is consistent. #IR–20.

• Traffic controls are not prohibited routing rules if they are not based on the nature of the cargo, such as truck routes based on vehicle weight or size—nor are emergency measures. *49 CFR Part 177, Appendix A (policy).

• Local "rules of road" restrictions on vehicles carrying hazardous materials are consistent. Thus, requirements for separation distances between moving or parked vehicles carrying hazardous materials which do not create hazards or unreasonable delays are consistent. IR–3; #IR–20.

• Local provision that carriers must use major city thoroughfares and that otherwise Federal motor carrier safety routing rules (49 CFR 397.9(a)) apply is consistent. IR–3. Likewise consistent is a local regulation requiring hazardous materials through-traffic to avoid congested areas so far as practicable and to use highway exits as close as possible to final destination. IR–23.

• Weight restriction applying only to hazardous materials and their containers, not to entire vehicles and contents, is not a *bona fide* traffic control measure and is inconsistent. #IR–20.

• State order prohibiting railroad cars carrying hazardous materials from being cut off in motion, struck by other cars moving under their own momentum or coupled into with unnecessary force is inconsistent and preempted by the HMTA, HMR, and the Federal Railroad Safety Act. *Atchison, Topeka and Santa Fe Railroad Co.* v. *Illinois Commerce Commission*, 453 F. Supp. 920 (N.D. Ill. 1977).

• Traffic controls linked to inconsistent equipment requirements are inconsistent. IR–22; IR–23.

Training Requirements

• "[S]tate may impose more stringent training requirements [than HMR] on motor carrier operators so long as those requirements do not directly conflict with the HMR requirements and apply only to individuals domiciled in that State and [on or after April 1, 1992] to individuals domiciled in other States who do not have hazardous materials endorsements on their CDL's [commercial drivers' licenses]." #IR–26, 54 FR 16314 at 16322. This principle applies to RAM and other hazardous materials. *Ibid.*

• "* * * the Department, through promulgation of 49 CFR 177.825, has established a near total occupation of the field of training requirements relating to the transportation of radioactive materials. Thus, State and local radioactive materials transportation * * * training requirements other than * * * those identical to Federal requirements * * * are very likely to be inconsistent and thus preempted under section 112(a) of the HMTA." *IR–8(A), 52 FR 13000 at 13003. However, see preceding paragraph.

• State requirement for mountain driving training as prerequisite to RAM transportation is inconsistent. *IR–27.

Tunnel Restrictions

• Except for RAM, State and local regulations regarding the kind, character or quantity of hazardous material permitted to be carried through any urban vehicular tunnel used for mass transportation are consistent. 49 CFR 177.810. But prohibition on RAM transportation through a tunnel is inconsistent. #IR–20.

Violations Provisions (Also see "Penalties")

• Violations provisions (such as criminal or civil sanctions) are consistent with HMTA and HMR if used to enforce consistent provisions. IR–3.

• Violations provisions (such as criminal or civil sanctions) are inconsistent with HMTA and HMR if used to enforce inconsistent provisions. *IR–18; *IR–18(A).

Weight Restrictions—See "Traffic Controls/Regulations"

INCONSISTENCY RULINGS UNDER SECTION 112(A) OF THE HAZARDOUS MATERIALS TRANSPORTATION ACT

Ruling	Filed	Applicant	Subject	Disposition	Summary
IR–1	3/1/77	Associated Universities, Inc..	New York City health code restrictions on radioactive materials (RAM).	Public Notice: 8/15/77 (42 FR 41204); Ruling: IR–1, 4/20/78 (43 FR 16954).	City ordinance effectively banning shipment of radioactive materials in or through city was *consistent* with HMTA or HMR—[prior to issuance of Fed. highway routing rule, HM–164].
IR–2	12/1/78	R.I. Div. of Public Utilities & Carriers.	R.I. restrictions on transportation of bulk flammable gas by highway.	Public Notice: 3/12/79 (44 FR 13617); Ruling: IR–2, 12/20/79 (44 FR 75566); Appeal Filed: 1/21/78; Perfected 6/24/78; Ruling on Appeal: 10/30/80 (45 FR 71881); Upheld: 535 F. Supp. 509 (D.R.I. 1982) and 698 F.2d 559 (1st Cir. 1983).	State regulations re two-way radio communications, immediate notification to State Police of any accident, use of headlights at all times, vehicle inspections and definitions were *consistent*. But requirements re written notification to state agencies of accidents, illuminated rear bumper signs, frangible shank-type locks on trailers, permit requirements for each shipment and prohibitions on travel in rush hours were *inconsistent*. Affirmed on appeal and in court.

INCONSISTENCY RULINGS UNDER SECTION 112(A) OF THE HAZARDOUS MATERIALS TRANSPORTATION ACT—Continued

Ruling	Filed	Applicant	Subject	Disposition	Summary
IR-3	2/5/80	Hazardous Materials Advisory Council (HMAC), Mass. Motor Transport Assn., American Trucking Associations (ATA).	City of Boston regulations on routing, time of day, and other requirements re hazardous materials transportation.	Public Notice: 3/24/80 (45 FR 19110); Ruling: IR-3, 3/26/81 (46 FR 18918); Appeal filed: 7/10/81; Ruling on Appeal: 4/29/82 (47 FR 18457).	City regulations re immediate reporting of accidents to local officials, requiring use of major roads except for pickups and deliveries, assessing penalties for violations of valid local regulations, requiring use of headlights, specifying separation distances between vehicles and vehicle operating requirements, and adopting Federal and State motor carrier safety regulations were *consistent.* But, City regulations re marking vehicles to identify products, requiring vehicle signs re residual materials, requiring written accident reports, restricting travel during a.m. rush hours, and restricting use of certain streets were *inconsistent.* No decision rendered on undefined permit system. On appeal, written accident reports still found *inconsistent,* but routing restrictions inconsistency finding was rescinded with no conclusion as to their validity.
IR-4	7/1/80	National Tank Trucker Carriers, Inc. (NTTC).	Washington State shipping papers requirements.	Public Notice: 11/3/80 (45 FR 72855); Ruling: IR-4, 1/11/82 (47 FR 1231); Appeal filed: 1/28/82; Ruling on Appeal: 8/2/82 (47 FR 33357); Correction: 8/5/82 (47 FR 34074).	State law requiring intrastate shipments of hazardous materials carried by motor vehicles to be accompanied by red or red bordered shipping papers was *inconsistent.*
IR-5	9/26/80 10/10/80 11/3/80	Ritter Transportation, Nat'l LP-Gas Assn.; Propane Corp. of America & 7 other companies.	New York City Fire Dept. regulations re hazardous compressed gases.	Public Notice: 4/6/81 (46 FR 20662); Ruling: IR-5, 11/18/82 (47 FR 51991).	City regulations re gas under pressure, combustible or flammable gas, combustible mixture and inflammable mixture had definitions different from DOT's and thus were *inconsistent.*
IR-6	9/24/80	General Battery Corp.	Covington, Ky. prenotification ordinance.	Public Notice: 8/26/82 (47 FR 37737); Ruling: IR-6, 1/6/83 (48 FR 760).	City ordinance extending scope of hazardous materials regulated and requiring advance notice of rail, barge and truck transport of dangerous and hazardous materials within city was found *inconsistent.*
IR-7	10/8/82	Nuclear Assurance Corp.	Governor of New York Order suspending shipments of spent fuel.	Public Notice: 5/12/83 (48 FR 21496); Correction: 5/26/83 (48 FR 23747); Ruling: IR-7, 11/27/84 (49 FR 46632).	Governor's letter advising company to suspend spent nuclear fuel shipments on 2 non-Interstate highway routes was *consistent* because it required compliance with Federal regulations requiring use of Interstate Highway System.
IR-8	10/13/82	Nuclear Assurance Corp.	Michigan regulations re radioactive materials (RAM) transportation.	Public Notice: 5/12/83 (48 FR 21496); Correction: 5/26/83 (48 FR 23747); Ruling: IR-8, 11/27/84 (49 FR 46637); Appeal Filed: 12/20/84; Ruling on Appeal: 4/20/87 (52 FR 13000); Correction: 6/11/87 (52 FR 22416).	State RAM regulations re confidentiality standards, inspection requirements (relating to valid regulations), incorporation of Federal regulations, and notification of shipment schedule changes (identical to Federal) were *consistent.* But state regulations re RAM definition, application for approval of shipments, application approval criteria (including container testing and certification requirements) different from Federal regulations, written notification of approvals, communications requirements, and notifications of delays and emergency plan implementation were *inconsistent.* Affirmed on appeal.
IR-9	10/14/82	Nuclear Assurance Corp.	Governor of Vermont's letters suspending shipments of spent nuclear fuel.	Public Notice: 5/12/83 (48 FR 21496); Correction: 5/26/83 (48 FR 23747); Ruling: IR-9, 11/27/84 (49 FR 46644).	Governor's letter advising that spent nuclear fuel shipments would not be permitted until Federal agencies established a national policy on them was found not to be state "requirement" and thus was not subject to an inconsistency determination.
IR-10	10/20/82	Nuclear Assurance Corp.	New York State Thruway Authority regulations re RAM transportation.	Public Notice: 5/12/83 (48 FR 21496); Correction: 5/26/83 (48 FR 23747); Ruling: IR-10, 11/27/84 (49 FR 46645); Correction: 3/12/85 (50 FR 9939).	Thruway Authority regulation prohibiting RAM transportation except under its procedures, which generally resulted in approval of low-level RAM shipments and disapproval of shipments of highway route controlled quantities of RAM, was *inconsistent.*
IR-11	12/20/82	DOT (Under 49 CFR § 107.209(b)).	Ogdensburg Bridge and Port Authority regulations re RAM transportation.	Public Notice: 5/12/83 (48 FR 21496); Correction: 5/26/83 (48 FR 23747); Ruling: IR-11, 11/27/84 (49 FR 46647).	Bridge and Port Authority regulations specifying international bridge crossing times; requiring escort, compensation therefor, and evidence of unquantified "proper" insurance, and incorporating county requirements were *inconsistent* as applied to non-highway route controlled RAM quantities. [Bridge was not part of Interstate Highway System.]

INCONSISTENCY RULINGS UNDER SECTION 112(A) OF THE HAZARDOUS MATERIALS TRANSPORTATION ACT—Continued

Ruling	Filed	Applicant	Subject	Disposition	Summary
IR-12	12/20/82	DOT (Under 49 CFR § 107.209(b)).	St. Lawrence County (N.Y.) law re RAM transportation.	Public Notice: 5/12/83 (48 FR 21496); Correction: 5/26/83 (49 FR 23747); Ruling: IR-12, 11/27/84 (49 FR 46650).	County law regulating RAM transport on non-Interstate highways, as it applied to non-highway route controlled quantities of RAM, was *consistent* in its non-regulatory and non-obligatory policy statement, but was *inconsistent* in its permit requirements and hazard class definitions (different from Federal).
IR-13	12/20/82	DOT (Under 49 CFR § 107.209(b)).	Thousand Islands Bridge Authority regulations re hazardous materials (including RAM) transportation.	Public Notice: 5/12/83 (48 FR 21496); Correction: 5/26/83 (49 FR 23747); Ruling: IR-13, 11/27/84 (49 FR 46653).	Bridge authority regulations re permit, fee and escort requirements as applied to vehicle carrying highway route controlled quantities of radioactive materials over Interstate Highway System bridge were *inconsistent*.
IR-14	12/20/82	DOT (Under 49 CFR § 107.209(b)).	Jefferson County (N.Y.) ordinance re RAM highway transportation.	Public Notice: 5/12/83 (48 FR 21496); Correction: 5/26/83 (48 FR 23747); Ruling: IR-14, 11/27/84 (49 FR 46656).	County ordinance regulating transportation of highway route controlled quantities of RAM in area including Interstate highway was *consistent* insofar as it contained front and rear escort requirements identical to NRC standards but was *inconsistent* in requiring 24-hour prenotification, limiting transport to May-October period, and prohibiting holiday and inclement weather shipments.
IR-15	7/19/83	DOT (Under 49 CFR	Vermont regulations re RAM transportation.	Public Notice: 8/4/83 (48 FR 35550); Ruling: IR-15, 11/27/84 (49 FR 46660); Appeal Filed: 12/19/84; Ruling on Appeal: 4/20/87 (52 FR 13062); Correction: 5/15/87 (52 FR 18492).	State regulations re highway, rail and water transport of irradiated reactor fuel and nuclear waste were *consistent* as to statement of intent, information requirements identical to NRC's, confidentiality standards same as Federal, and inspection requirements (as applied to consistent rules); but were *inconsistent* re application to Federally-regulated highway route controlled quantity radioactive materials, submission of application for shipment approval (including identification, fee and container certification requirements), criteria for approvals, written notice of approval by Vermont, notice requirements for schedule changes and delays, and monitoring of shipments by state officials. Affirmed on appeal.
IR-16	2/18/82	Arizona DOT	City of Tucson ordinance re RAM transportation.	Public Notice: 12/12/83 (48 FR 55387); Ruling: IR-16, 5/20/85 (49 FR 20672).	City ordinance establishing different (from Federal) RAM definitions, prohibiting certain transportation within or through city, and requiring prenotification was *inconsistent*.
IR-17	3/21/85	Wisconsin Electric Power Co.	Illinois statutory fee on spent nuclear fuel transportation.	Public Notice: 10/30/85 (50 FR 45186); Ruling: IR-17, 6/9/86 (51 FR 20926); Appeal Filed: 9/3/86; Public Notice: 9/29/86 (51 FR 34527); Correction: 10/8/86 (51 FR 36125); Ruling on Appeal: 9/25/87 (52 FR 36200); Correction: 10/6/87 (52 FR 37399).	State law imposing fee of $1,000 per cask of spent nuclear fuel transported through state used to fund consistent inspection and emergency response programs was *consistent*. Affirmed on appeal.
IR-18	5/5/83	Prince George's County (MD).	Prince George's County (Md.) regulations re RAM transportation.	Public Notice: 10/4/84 (49 FR 39260); Ruling: IR-18, 1/2/87 (52 FR 200); Appeal Filed: 1/20/87; Ruling on Appeal: 7/29/88 (53 FR 28850).	County Regulations re RAM transportation were *consistent* re statement of intent, findings, essentially identical hazardous materials definitions, and narrower applicability than HMTA/HMR; but were *inconsistent* re different hazardous materials definitions, penalties, and permit, advance notice, information, time, routing, escort, and bonding requirements. Affirmed on appeal.
IR-19	10/21/86 11/13/86	Southern Pacific Transportation Company.	Nevada regulations re railroad-related loading, unloading transfer and storage of RAM, explosives and other hazardous materials.	Public Notice: 11/25/86 (51 FR 42808); Ruling: IR-19, 6/30/87 (52 FR 24404); Correction: 8/7/87 (52 FR 29468); Appeal Filed: 7/26/87; Ruling on Appeal: 4/7/88 (53 FR 11600).	State regulations containing burdensome and discretionary permitting system for railroad-related loading, unloading, transfer and storage of hazardous materials were *inconsistent*. Affirmed on appeal.
IR-20	7/21/86	Citizens Against Nuclear Trucking (CANT).	Triborough Bridge and Tunnel Authority regulations re RAM and explosives transportation.	Application Amended: 10/8/86; Public Notice: 10/20/86 (51 FR 37248); Correction: 11/5/86 (51 FR 40294); Ruling: IR-20, 6/30/87 (52 FR 24396); Correction: 8/7/87 (52 FR 29468).	Authority regulations effectively prohibiting transportation of most RAM and explosives through tunnels and across bridges were *inconsistent*. Unfettered discretion to ban transportation was *inconsistent*. But traffic controls, inspections, vehicle separation distances, and requirements to comply with lawful orders were *consistent*.

INCONSISTENCY RULINGS UNDER SECTION 112(A) OF THE HAZARDOUS MATERIALS TRANSPORTATION ACT—Continued

Ruling	Filed	Applicant	Subject	Disposition	Summary
IR-21	7/24/86	Citizens Against Nuclear Trucking (CANT).	Connecticut statute and regulations re RAM transportation.	Public Notice: 9/29/86 (51 FR 34524); Correction: 10/8/86 (51 FR 36125); Ruling: IR-21, 10/2/87 (52 FR 37072); Appeal Filed: 11/2/87; Public Notice: 1/15/88 (53 FR 1089); Ruling on Appeal: 11/11/88 (53 FR 46735).	State statute and regulations re RAM transportation permitting, information, documentation, certification, time restriction, routing, escort requirements and related definition were *inconsistent*. OHMT applies a broad interpretation of the "person affected" standing requirement for inconsistency ruling applications.
IR-22	4/13/87	American Trucking Assns., Inc. & National Tank Truck Carriers, Inc.	New York City Fire Dept. Directives re tank truck carriage of hazardous liquids and gases.	Public Notice: 5/18/87 (52 FR 18668); Ruling: IR-22, 12/8/87 (52 FR 46574); Correction: 12/29/87 (52 FR 49107); Appeal Filed: 2/1/88; Public Notice: 2/24/88 (53 FR 5538).	City regulations re cargo containment systems, equipment and related areas were *inconsistent* because they involved exclusively Federal areas and caused delays. On appeal.
IR-23	4/13/87	American Trucking Assns., Inc. & National Tank Truck Carriers, Inc.	New York City routing and time restrictions.	Public Notice: 5/18/87 (52 FR 18668); Ruling: IR-23, 5/11/88 (53 FR 16840); Appeal Filed: 6/20/88; Public Notice: 8/23/88 (53 FR 32184).	City routing and time restrictions on through-traffic hazardous materials transportation were *inconsistent* because of absence of determination of effect on overall public safety and consultations with other affected jurisdictions. On appeal.
IR-24	9/8/87	McGil Specialized Carriers, Inc..	City of San Antonio, TX regulation re placarding of small quantities of explosives.	Public Notice: 11/6/87 (52 FR 43016); Ruling: IR-24, 5/31/88 (53 FR 19848).	City regulation adopting vague explosives placarding requirement of 1979 Uniform Fire Code was *inconsistent* because placarding is exclusively Federal area and City regulation required placarding where HMR forbid it.
IR-25	5/19/88	City of Maryland Heights, MO.	City of Maryland Heights Ordinance requiring $1,000 bond for each waste-hauling vehicle.	Public Notice: 6/6/88 (53 FR 20736); Ruling: IR-25, 4/21/89 (54 FR 16308); Correction: 5/10/89 (54 FR 20235).	City ordinance requiring a $1,000 bond for highway transportation of hazardous wastes was *inconsistent* insofar as it applied to hazardous materials regulated under the HMTA.
IR-26	10/13/87	California Dept. of Motor Vehicles.	California Administrative Code regulations re training for highway transportation of hazardous materials.	Public Notice: 11/6/87 (52 FR 43830); Extension: 12/29/87 (52 FR 49107); Ruling: IR-26, 4/21/89 (54 FR 16314); Correction: 5/18/89 (54 FR 21526).	State regulations requiring training for operators of motor vehicles carrying hazardous materials generally were *consistent* with respect to domiciliaries of that State but *inconsistent* with respect to non-domiciliaries. However, after April 1, 1992, they would be *consistent* with respect to non-domiciliaries not having a hazardous materials endorsement on their commercial drivers' licenses (CDL's).
IR-27	7/28/88	Department of Energy (DOE).	Colorado regulations re RAM transport.	Public Notice: 8/11/88 (53 FR 30418); Ruling: IR-27, 4/21/89 (54 FR 16326); Correction: 5/9/89 (54 FR 20001).	State regulations concerning permits, training, prenotification, information, documentation, and permit fee requirements for transportation of RAM as well as civil penalty provisions relating to them, were *inconsistent*. But inspection, civil penalty and shipping fee requirements not related to inconsistent State activities were *consistent*.

[FR Doc. 89-14875 Filed 6-22-89; 8:45 am]
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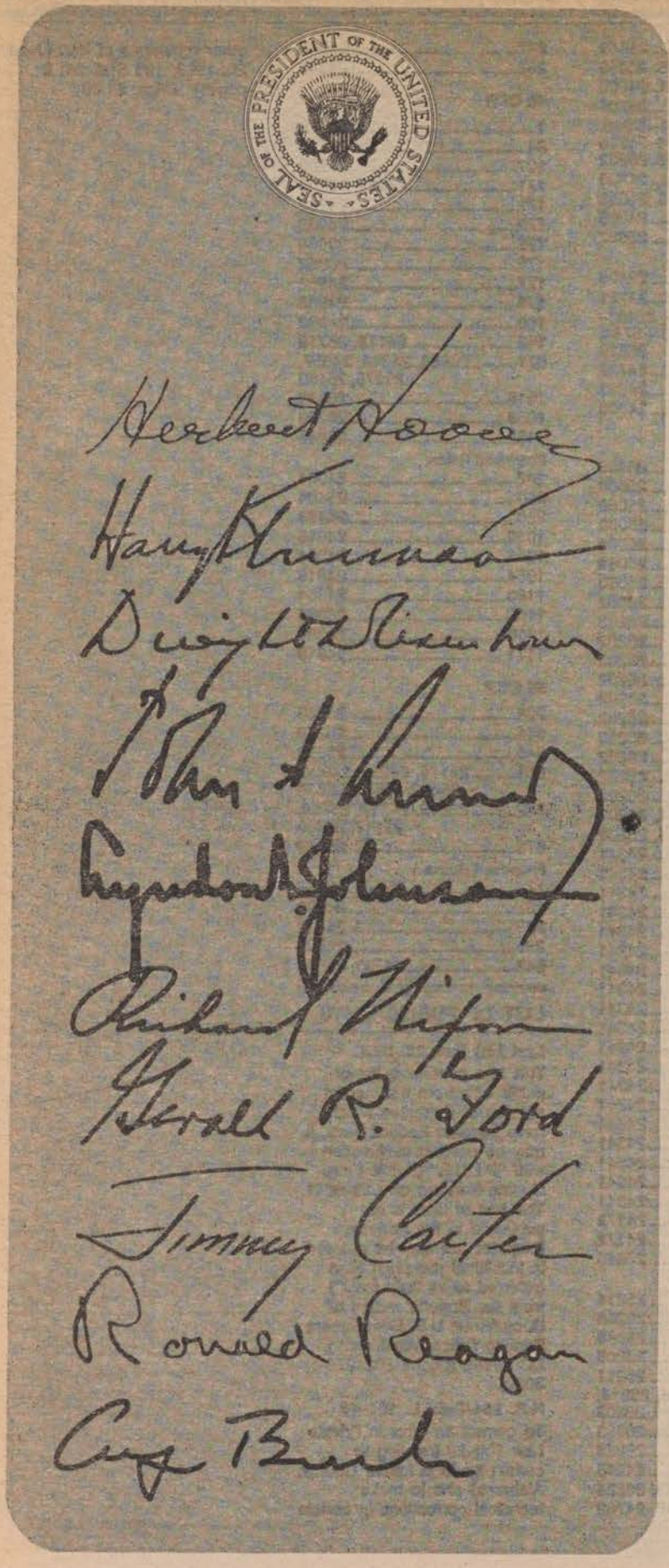
H.R. 964/Pub. L. 101-40

To correct an error in Private Law 100-29 (relating to certain lands in Lamar County, Alabama) and to make technical corrections in certain other provisions of law. (June 20, 1989; 103 Stat. 81; 2 pages) Price: $1.00



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