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Briefing on How To Use the Federal Register
For information on a briefing in Washington, DC, see announcement on the inside cover of this issue.

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THE FEDERAL REGISTER
WHAT IT IS AND HOW TO USE IT

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

WHO: The Office of the Federal Register.

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

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

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

WASHINGTON, DC

WHEN: February 23, at 9:00 a.m.
WHERE: Office of the Federal Register, First Floor Conference Room, 1100 L Street NW., Washington, DC.
RESERVATIONS: 202–523–5240.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 910

[Lemon Reg. 702]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 702 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 265,000 cartons during the period from January 28, 1990, through February 3, 1990. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATES: Regulation 702 (7 CFR part 910) is effective for the period from January 28, 1990, through February 3, 1990.

FOR FURTHER INFORMATION CONTACT: Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 475–3861.

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

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

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

There are approximately 85 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2,500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

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

This regulation is consistent with the California-Arizona lemon marketing policy for 1989–90. The Committee met publicly on January 23, 1990, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended a quantity of lemons deemed advisable to be handled during the specified week. The Committee reports that overall demand for lemons is good.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Arizona, California, Lemons, Marketing agreements.

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

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

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

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

Note: This section will not appear in the Code of Federal Regulations.

2. Section 910.702 is added to read as follows:

§ 910.702 Lemon Regulation 702.

The quantity of lemons grown in California and Arizona which may be handled during the period from January 28, 1990, through February 3, 1990, is established at 265,000 cartons.

Dated: January 24, 1990.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 90–1978 Filed 1–25–90; 8:45 am]
BILLING CODE 3410-02-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

[Attorney General Order No. 1391–90; INS Number: J–89]

8 CFR Parts 208 and 242

Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule clarifies the burden of proof for applicants for refugee status, withholding of deportation and asylum by establishing that an alien fleeing coerced population control policies of forced abortions or sterilization may be considered to have a clear probability (for withholding of deportation) or well-founded fear (for asylum) of persecution on account of political opinion. These humanitarian provisions are necessary in order to provide immediate protection for foreign nationals seeking refugee status, withholding of deportation, or asylum because of their countries' coerced family planning policies. The changes will conform with the President's foreign policy and will provide guidance for adjudication of refugee, withholding of deportation, and asylum claims.

DATES: This interim rule is effective January 29, 1990. Comments must be received on or before February 28, 1990.

ADDRESSES: Written comments should be submitted, in triplicate, to the Director, Policy Directives and Instructions, Immigration and Naturalization Service, Room 2011, 425 I Street, NW., Washington, DC 20536.

FOR FURTHER INFORMATION CONTACT: Patricia A. Cole, Assistant General Counsel, Immigration and Naturalization Service, 425 I St., NW., Room 7048, Washington, DC 20536, (202) 633–2895.

SUPPLEMENTARY INFORMATION: The rule would amend the Immigration and Naturalization Service regulations on burden of proof in withholding of deportation procedures at 8 CFR 242.17(c) and asylum procedures at 8 CFR 208.5. The amended regulations would benefit the public by expanding the classes of aliens eligible for refugee, asylum, or withholding of deportation relief; consolidate into the regulations existing policies and procedures as enunciated by the Attorney General; and make the eligibility requirements easier for the public to understand.

Background

In any application for asylum under section 208(a) or withholding of deportation under section 243(h) of the Immigration and Nationality Act, the applicant bears the evidentiary burdens of proof and persuasion. An alien who is seeking withholding of deportation from any country must show that his or her life or freedom would be threatened in such country on account of one of the five grounds enumerated in the statute. In order to make this showing, the alien must establish a "clear probability" of persecution on account of one of the enumerated grounds. Under the Refugee Act of 1980, Public Law No. 96–212, 94 Stat. 197, once an individual has met the burden of proof, withholding of deportation is mandatory. In this regard, withholding of deportation differs from asylum, which may be denied in the exercise of discretion to aliens who establish statutory eligibility for the relief.

In order to establish eligibility for a grant of asylum, an alien must demonstrate that he or she is a "refugee" within the meaning of section 101(a)(42)(A) of the Act. That definition includes the requirement that an alien demonstrate that he or she is unwilling or unable to return to his country because of persecution or a "well-founded fear" of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

The Courts have formulated definitions of the burdens that an alien has in order to be granted withholding of deportation or asylum. An alien seeking withholding of deportation must prove that it is more likely than not that the alien would be subject to persecution. *INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987). The well-founded fear standard for an asylum applicant requires a showing that a reasonable person in the alien's circumstances would fear persecution. The alien must present specific facts through objective evidence to demonstrate a reasonable possibility of persecution and to prove either past persecution or a showing of good reason to fear future persecution. *Matter of Mogharrabi,* Interim Decision 3050 (BIA 1988).

Amendment

The alien's burden of proof to establish eligibility for asylum contained in 8 CFR 208 is described in general terms. This burden requires that the applicant establish persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Similarly, the alien's burden of proof to establish eligibility for withholding of deportation contained in 8 CFR 242.17(c) requires a showing that the alien would be subject to persecution on the same five enumerated grounds.

These amendments are interpretative rules and general statements of policy for establishing statutory eligibility for asylum or withholding of deportation on the basis of political opinion for aliens who express a fear of coercive population control policies in their homeland. Such aliens can establish a well-founded fear, in the case of an asylum applicant, or a clear probability, in the case of an applicant for withholding, of political persecution if evidence exists that the alien will be persecuted if returned to his or her homeland.

Amended 8 CFR 208.5(b)(1) is a general rule to provide that aliens who express a fear that they will be required to abort a pregnancy or to be sterilized may establish a well-founded fear of political persecution.

Amended 8 CFR 208.5(b)(2) addresses those individuals who have already resisted the population control policy in their country and describes specific circumstances wherein an alien has established eligibility for asylum. An applicant (or applicant's spouse) who has violated the population control policy of his or her homeland by refusing to abort a pregnancy or resisting sterilization may be granted asylum if the applicant has a well-founded fear that the applicant (or applicant's spouse) will be required to abort the pregnancy or to be sterilized or will otherwise be persecuted if the applicant is returned to the homeland.

Amended 8 CFR 242.17(c) provides that a respondent (or respondent's spouse) who establishes that he or she will be required to abort a pregnancy or to be sterilized or who has violated the population control policy of his or her homeland by refusing to abort a pregnancy or resisting sterilization may be granted withholding of deportation if evidence exists that the individual will be required to abort the pregnancy or to be sterilized or will otherwise be persecuted upon return to their homeland.

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule does not have a significant economic impact on a substantial number of small entities. This is not a major rule as defined in section 1(b) of E.O. 12291, nor does this rule have Federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12612.

The Service has determined that notice and public comment regarding this interim final rule are unnecessary under 5 U.S.C. 553(b) (A) and (B). These changes constitute interpretative rules and general statements of policy. Further, there is good cause to waive the requirement of notice and comment. Opportunity for notice and comment is unnecessary because the rules implement an interpretation of the statute that has already been announced by the Attorney General and is being implemented by the Service. The

interpretation will broaden the relief available to aliens and therefore will not harm any third parties. Notice and comment are also contrary to the public interest. The humanitarian goals underlying the Refugee Act will be best served by prompt codification in the rules of the Department's interpretation of the statute. The sooner the regulations are adopted, the sooner aliens will have published rules that will ensure the broadest possible protection of their rights.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Asylum, Deportation, Immigration, Refugees, Reporting and recordkeeping requirements.

8 CFR Part 242

Administrative practice and procedures, Aliens.

Therefore, by virtue of the authority vested in me, including 28 U.S.C 509, 510 and 8 U.S.C. 1101 and 1158, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 208—[AMENDED]

1. The authority citation for part 208 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1158.

2. In § 208.5 all existing text is designated as paragraph (a), a heading is added at the beginning of newly designated paragraph (a), and a new paragraph (b) is added to read as follows:

§ 208.5 Burden of proof.

(a) *Burden generally.* * * *

(b) *Related to coercive family planning policies.* The burden is on the asylum applicant who expresses a fear of persecution upon return to his or her country of nationality or, in the case of a person having no nationality, the country in which such person habitually resided, related to implementation of a country's family planning policy that includes forced abortion or coerced sterilization.

(1) Aliens who have a well-founded fear that they will be required to abort a pregnancy or to be sterilized because of their country's family planning policies may be granted asylum on the ground of persecution on account of political opinion.

(2) An applicant who establishes that the applicant (or applicant's spouse) has refused to abort a pregnancy or to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be required to abort the pregnancy or to be sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum.

PART 242—[AMENDED]

3. The authority citation for part 242 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1251, 1252, 1254, 1362.

4. Section 242.17 is amended by revising paragraph (c) to read as follows:

§ 242.17 Ancillary matters, applications.

* * * * *

(c) *Temporary withholding of deportation.* The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to section 243 (h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion as claimed. Eligibility for withholding of deportation on account of political opinion is established by the respondent who establishes that he or she (or respondent's spouse) will be required to abort a pregnancy or to be sterilized, or who establishes that he or she (or respondent's spouse) has refused to abort a pregnancy or to be sterilized in violation of the implementation of the specified country's family planning policy directives, and that he or she (or respondent's spouse) will be required to abort a pregnancy or to be sterilized or would otherwise be persecuted if returned to such country. The trial attorney may also present evidence or information for the record, and he may submit information not of record to be considered by the special inquiry officer provided that the special inquiry officer or the Board has determined that such information is relevant and is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security. When the special inquiry officer receives such non-record information he shall inform the respondent thereof and shall also inform him whether it concerns conditions generally in a specified country or the respondent himself. Whenever he believes he can do so consistently with safeguarding both the information and its source, the special inquiry officer should state more specifically the general nature of the information in order that the respondent may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that such information is material to the decision.

* * * * *

Dated: January 23, 1990.

Dick Thornburgh,

Attorney General.

[FR Doc. 90-1820 Filed 1-26-90; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

[Reg. No. 4]

RIN 0960-AC62

Federal Old-Age, Survivors, and Disability Insurance Benefits; Continued Payment of Benefits During Appeal

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: These final regulations reflect section 8006 of Public Law 100-647, the Technical and Miscellaneous Revenue Act of 1988. Section 8006 amended section 223(g) of the Social Security Act (the Act) and extended for 1 year the statutory provisions under which an insured worker may elect to have his or her disability insurance benefits under title II of the Act and/or Medicare benefits under title XVIII of the Act

continued pending a reconsideration determination or an administrative law judge hearing decision issued after we have determined that the individual's impairments have ceased, did not exist, or are no longer disabling. Such an individual may also elect to have benefits continued for his or her spouse and children who are receiving benefits on his or her earnings record, if they also elect to have their benefits continued. The 1-year extension is also applicable to persons receiving child's insurance benefits based on disability; persons receiving widow's or widower's benefits based on disability; and persons receiving mother's or father's benefits on the basis of having in their care a person receiving child's insurance benefits based on disability.

EFFECTIVE DATE: January 29, 1990.

FOR FURTHER INFORMATION CONTACT: Lawrence V. Dudar, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (301) 965–1795.

SUPPLEMENTARY INFORMATION: These final rules reflect section 8006 of Public Law 100–647. Prior to this statutory amendment, the continuation of benefit provisions were available if, prior to January 1, 1989, we determined that an individual's impairments, on which we had based our disability determination, or decision, had ceased, did not exist, or were no longer disabling. Section 8006 of Public Law 100–647 extended this date to January 1, 1990. Also under the prior law, continued benefit payments could not be paid for months after June 1989. Section 8006 of Public Law 100–647 extended this date to June 1990. We are amending § 404.1597a of our regulations to reflect these two statutory changes.

Regulatory Procedures

The Department generally follows the notice of proposed rulemaking and public comment procedures specified in the Administrative Procedure Act, 5 U.S.C. 553(b), in the development of its regulations. That Act provides exceptions to its notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(B), good cause exists for waiver of proposed rulemaking and public comment procedures in this regulation because we are only reflecting statutory changes which are not discretionary and do not involve the setting of any policy. Therefore, opportunity for prior public comment is unnecessary and these amendments are being issued as final rules.

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because these regulations will not result in any significant costs or otherwise meet the criteria for a major rule. We estimate the title II program costs for implementing the legislation upon which these rules are based to be $5 million in fiscal year (FY) 1989 and $20 million in FY 1990. These costs are included in the current budget estimates for the title II disability program. The title XVIII program costs are estimated to be $5 million in FY 1989 and $10 million in FY 1990. Therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act

These final regulations impose no recordkeeping or reporting requirements requiring the Office of Management and Budget clearance.

Regulatory Flexibility Act

The Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities because they affect only individuals. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not required.

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

List of Subjects in 20 CFR Part 404

Administrative practice and procedure; Death benefits; Disability benefits; Old-Age, Survivors and Disability Insurance.

Dated: November 7, 1989.

Gwendolyn S. King,

Commissioner of Social Security.

Approved: December 12, 1989.

Louis W. Sullivan,

Secretary of Health and Human Services.

Subpart P of part 404 of chapter III of title 20 of the Code of Federal Regulations is amended to read as follows:

PART 404—[AMENDED]

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

Authority: Secs. 202, 205 (a), (b), and (d) through (h), 216(i), 221 (a) and (i), 222(c), 223, 225, and 1102 of the Social Security Act; 42 U.S.C. 402, 405 (a), (b), and (d) through (h), 416(i), 421 (a) and (i), 422(c), 423, 425, and 1302; Sec. 505(a) of Pub. L. 96–265, 94 Stat. 473, Secs. 2(d)(2), 5, 6, and 15 of Pub. L. 98–460, 98 Stat. 1797, 1801, 1802, and 1808, Sec. 9009 of Pub. L. 100–203, 101 Stat. 1330–293, Sec. 8006 of Pub. L. 100–647, 102 Stat. 3781.

2. Section 404.1597a is amended by revising paragraphs (b)(1), the date in (b)(3)(iii) and the date in (h)(2)(iii) to read as follows:

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

* * * * *

(b) *The provisions of this section are available for a limited time only.* (1) Benefits may be continued under this section only if the determination that your physical or mental impairment(s) has ceased, has never existed, or is no longer disabling is made on or after January 12, 1983 (or before January 12, 1983, and a timely request for reconsideration or a hearing before an administrative law judge is pending on that date), and before January 1, 1990.

(3) * * *

(iii) June 1990. * * *

* * * * *

(h) * * *

(2) * * *

(iii) June 1990. * * *

* * * * *

[FR Doc. 90–1934 Filed 1–26–90; 8:45 am]

BILLING CODE 4190–11–M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 394

[DoD Directive 5145.1]

General Counsel of the Department of Defense

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: The position of General Counsel, Department of Defense (GC, DoD) is authorized under the provisions of section 137 of title 10, United States Code, with responsibilities, functions, and authorities as prescribed by the Secretary of Defense. As indicated in the subject part, the GC, DoD serves as the chief legal officer of the Department of Defense. This part reflects current organizational arrangements within the Department of Defense as they affect the GC, DoD, and properly indicates the responsibilities and functions performed by the General Counsel.

EFFECTIVE DATE: December 15, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. R. Kennedy, Office of the Director for Administration and Management,

Washington, DC 20301–1155, telephone 202–695–4281.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 394

Organization and function (government agencies).

Accordingly, title 32, chapter I, subchapter R, is amended to add part 394 as follows:

PART 394—GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

Sec.
394.1 Purpose.
394.2 Definition.
394.3 Responsibilities and functions.
394.4 Relationships.
394.5 Authorities.

Authority: 10 U.S.C. 137.

§ 394.1 Purpose.

This part:

(a) Implements the provision of title 10, United States Code that establishes the position of General Counsel of the Department of Defense (GC, DoD).

(b) Assigns to the GC, DoD, the responsibilities, functions, relationships, and authorities prescribed herein, pursuant to the authority vested in the Secretary of Defense under title 10, United States Code.

§ 394.2 Definition.

DoD components. The Office of the Secretary of Defense (OSD), the Military Departments, the Joint Chiefs of Staff (JCS), the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, and the DoD Field Activities.

§ 394.3 Responsibilities and functions.

The *General Counsel, Department of Defense* (GC, DoD), is the chief legal officer of the Department of Defense and, as such, shall:

(a) Provide advice to the Secretary and Deputy Secretary of Defense regarding all legal matters and services performed within, or involving, the Department of Defense.

(b) Provide legal advice to OSD organizations and, as appropriate, other DoD Components.

(c) Oversee, as appropriate, legal services performed within the Department of Defense, including determining the adherence by attorneys in the Department of Defense to appropriate professional standards.

(d) Coordinate on appeals from denials of requests under the Freedom of Information Act, as appropriate.

(e) Provide advice on standards of conduct involving personnel of OSD and, as appropriate, other DoD Components.

(f) Develop the DoD Legislative Programs and coordinate DoD positions on legislation and Executive orders.

(g) Provide for the coordination of significant legal issues, including litigation involving the Department of Defense and other matters before the Department of Justice in which the Department of Defense has an interest.

(h) Establish DoD policy on general legal issues, determine the DoD position on specific legal problems, and resolve disagreements within the Department of Defense on such matters.

(i) Perform such functions relating to the DoD security program (including surveillance over DoD personnel security programs in accordance with DoD Directive 5145.3 [1] and DoD Directive 0–5205.7, [2] as the Secretary or Deputy Secretary of Defense may assign.

(j) Act as lead counsel for the Department in all international negotiations conducted by OSD components.

(k) Maintain the central repository for all international agreements coordinated, negotiated, or concluded by DoD personnel.

(l) Serve as the Director, Defense Legal Services Agency (DLSA).

(m) Perform such other duties as the Secretary or Deputy Secretary of Defense may prescribe.

§ 394.4 Relationships.

(a) In the performance of the above responsibilities and functions, the GC, DoD, shall:

(1) Exercise direction, authority, and control over the DLSA, consistent with DoD Directive 5145.4 [3].

(2) Coordinate actions and exchange information with other DoD organizations having collateral or related functions.

(3) Promote coordination, cooperation, and mutual understanding of matters pertaining to assigned functions within the Department of Defense and between the Department of Defense, other Government Agencies, and the public.

(4) Serve on boards, committees, and other groups concerned with matters pertaining to assigned functions and represent the Secretary of Defense on assigned functions outside the Department of Defense, including serving as the representative of the Secretary of Defense to the Department of Justice on all appropriate matters.

(5) Use existing facilities and services, whenever practicable, to achieve maximum efficiency and economy.

(b) All DoD Components shall coordinate with the GC, DoD, on matters related to the functions in § 394.3

§ 394.5 Authorities.

The GC, DoD, is delegated authority to:

(a) Issue DoD Instructions, DoD publications, and one-time directive-type memoranda, consistent with DoD 5025.1–M, [4] that implement policies approved by the Secretary of Defense in the functions assigned to the GC, DoD. Instructions to the Military Departments shall be issued through the Secretaries of those Departments or their designees. Instructions to Unified and Specified Commands shall be issued through the Chairman, Joint Chiefs of Staff (CJCS).

(b) Obtain reports, information, advice, and assistance from other DoD Components, consistent with DoD Directive 7750.5, [5] to carry out assigned functions and responsibilities.

(c) Communicate directly with the heads of the DoD Components. Communications to the Commanders of Unified and Specified Commands shall be coordinated through the CJCS.

(d) Communicate with other Government Agencies, representatives of the legislative branch, and members of the public, as appropriate, in carrying out assigned functions.

Dated: January 24, 1990.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90–1948 Filed 1–26–90; 8:45 am]

BILLING CODE 3810–01–M

Office of the Secretary, DoD

32 CFR Part 395

[DoD Directive 5145.4]

Defense Legal Services Agency

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: The Defense Legal Services Agency (DLSA) is established by the Secretary of Defense under the provisions of section 133 of title 10, United States Code with responsibilities, functions and authorities as prescribed by the Secretary of Defense. This part reflects the inclusion of the Standards of Conduct Office and the Defense

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] For official use only.

[3] See footnote 1 to § 394.3(i).

[4] See footnote 1 to § 394.3(i).

[5] See footnote 1 to § 394.3(i).

Industrial Security Clearance Review Program into DLSA.

EFFECTIVE DATE: December 15, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. R. Kennedy, Office of the Director for Administration and Management, Washington, DC 20301–1155, telephone 202–695–4281.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 395

Organization and function (government agencies).

Accordingly, title 32, chapter I, subchapter R, is amended to add part 395 as follows:

PART 395—DEFENSE LEGAL SERVICES AGENCY

Sec.

Authority: 10 U.S.C. 133.

§ 395.1 Purpose.

This part, pursuant to the authority vested in the Secretary of Defense under title 10, United States Code, updates the Defense Legal Services Agency (DLSA) charter with functions, responsibilities, relationships, and authorities as outlined herein.

§ 395.2 Definition.

DoD Components. The Office of the Secretary of Defense (OSD), the Military Departments, the Joint Chiefs of Staff (JCS), the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, and the DoD Field Activities.

§ 395.3 Organization and management.

(a) The DLSA is established as a separate agency of the Department of Defense under the direction, authority, and control of the General Counsel of the Department of Defense (GC, DoD). It shall consist of a Director and such subordinate organizational elements as are established by the Director within resources assigned by the Secretary of Defense. It shall include the legal staffs assigned to the Defense Agencies and DoD Field Activities.

(b) Budgeting, management of ceiling spaces, personnel services, and other administrative support for DLSA personnel shall be the responsibility of the Defense Agency or Field Activity to which those personnel are assigned.

(c) The GC, DoD, shall serve as the Director, DLSA.

§ 395.4 Functions and responsibilities.

The *Director, Defense Legal Services Agency* (DLSA), shall:

(a) Organize, direct, and manage the DLSA and all resources assigned to the DLSA.

(b) Provide legal advice and services for the Defense Agencies, DoD Field Activities, and other assigned organizations.

(c) Provide technical support and assistance for development of the DoD Legislative Program.

(d) Coordinate DoD positions on legislation and Presidential Executive orders.

(e) Provide a centralized legislative document reference and distribution point for the Department of Defense, and maintain the Department's historical legislative files.

(f) Develop DoD policy for standards of conduct and administer the Standards of Conduct Program for the OSD and other assigned organizations.

(g) Administer the Defense Industrial Security Clearance Review Program.

(h) Perform such other duties as the Secretary or Deputy Secretary of Defense may prescribe.

§ 395.5 Relationships.

(a) In performance of assigned responsibilities and functions, the Director, DLSA, shall:

(1) Coordinate actions and exchange information with other DoD organizations having collateral or related functions.

(2) Promote coordination, cooperation, and mutual understanding of matters pertaining to assigned functions within the Department of Defense and between the Department of Defense, other Government Agencies, and the public.

(3) Serve on boards, committees, and other groups concerned with matters pertaining to assigned functions, and represent the Secretary of Defense on assigned functions outside the Department of Defense.

(4) Use existing facilities and services, whenever practicable, to achieve maximum efficiency and economy.

(5) Provide professional supervision for DLSA attorneys serving in Defense Agencies, DoD Field Activities, and other organizations to which such attorneys are assigned. This includes, in consultation with the DoD Component head concerned, evaluation of their performance and/or other action that may be necessary based on professional performance.

(b) All DoD Components shall coordinate with the Director, DLSA, on matters related to the functions in § 395.4.

§ 395.6 Authorities.

The Director, DLSA, is delegated authority to:

(a) Obtain reports, information, advice, and assistance from other DoD Components, consistent with DoD Directive 7750.5 [1] to carry out assigned functions and responsibilities, as necessary.

(b) Communicate directly with the heads of the DoD Components. Communications to the Commanders of Unified and Specified Commands shall be coordinated through the Chairman, Joint Chiefs of Staff (CJCS).

(c) Communicate with other Government Agencies, representatives of the legislative branch, and members of the public, as appropriate, in carrying out assigned functions.

Appendix to Part 395—Delegations of Authority

Pursuant to the authority vested in the Secretary of Defense, and subject to his direction, authority, and control, and in accordance with DoD policies, Directives, and Instructions, the Director, DLSA, or, in the absence of the Director, the person acting for the Director is hereby delegated authority, as required in the administration and operation of DLSA, to:

1. In accordance with 5 U.S.C. 7532, Executive Order 10450, as amended, and DoD Directive 5200.2: [2]

a. Designate positions as "sensitive";

b. Authorize, in case of an emergency, the appointment to a sensitive position, for a limited period of time, of a person for whom a full field investigation or other appropriate investigation, including the National Agency Check, has not been completed; and

c. Authorize the suspension, but not terminate the service, of an employee in the interest of national security.

2. Authorize and approve overtime work for civilian officers and employees in accordance with subchapter V, chapter 55, title 5, U.S.C., and applicable Civil Service Regulations.

3. Develop, establish, and maintain an active and continuing Records Management Program, pursuant to 44 U.S.C. 3102.

4. Authorize the publication of advertisements, notices, or proposals in newspapers, magazines, or other public periodicals, consistent with 44 U.S.C. 3702.

5. Comply with the policies and procedures prescribed in DoD 5025.1–M.[3]

Dated: January 24, 1990.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90–1954 Filed 1–26–90; 8:45 am]

BILLING CODE 3810–01–M

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] See footnote 1 to § 395.6(a).

[3] See footnote 1 to § 395.6(a)

Department of the Air Force

32 CFR Part 842

RIN 0701-AA19

Administrative Claims

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Final rule.

SUMMARY: The Air Force is revising its regulations which govern the processing of administrative claims for personal injury and property damage both on behalf of and against the government. The passage of legislative amendments to Federal claims statutes, reorganization of responsibilities within the Air Force and changes of Air Force claims policy make necessary a revision of these regulations. The purpose of this notice is to inform the public of these revised claims regulations.

EFFECTIVE DATE: February 28, 1990.

FOR FURTHER INFORMATION CONTACT: Major F. Adams, Claims and Tort Litigation Staff, Office of The Judge Advocate General, Department of the Air Force, Washington, DC 20332-6128, telephone (202) 767-1575.

SUPPLEMENTARY INFORMATION: Because this part implements a higher level directive, it was not published as a proposed rule for public comment. It is published as a final rule for information purposes. The Department of the Air Force has determined this regulation is not a major rule as defined by Executive Order 12291; is not subject to the relevant provisions of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354); and does not contain reporting or recordkeeping requirements under the criteria of the Paperwork Reduction Act of 1980 (Pub. L. 96-511). This part implements DOD Directives 5100.3, 1 November 1988; 5160.10, 24 March 1967 and changes 1 through 4; 5515.2, 18 August 1965; 5515.6, 3 November 1956; 5515.8, 3 June 1987; 5515.9, 15 November 1961; 5515.10, 17 June 1965; and 70945.13, 31 October 1986.

List of Subjects in 32 CFR Part 842

Claims, Law, Foreign claims, Tort claims, Government property.

Accordingly, 32 CFR part 842 is revised to read as follows:

PART 842—ADMINISTRATIVE CLAIMS

Secs.

Authority: Sec. 8013, 100 Stat. 1053, as amended; 10 U.S.C. 8013, except as otherwise noted.

Note: Air Force Regulations are available through the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

This part is derived from Air Force Regulation 112–1, Claims and Tort Litigation.

§ 842.0 Scope.

This part establishes standard policies and procedures for administratively processing claims resulting from Air Force activities and for which the Air Force has assigned responsibility; tells how to present, process, and settle claims.

Subpart A—General Information

§ 842.1 Scope of this subpart.

This subpart explains terms used in this part. It states basic Air Force claims policy and identifies proper claimants.

§ 842.2 Definitions.

(a) *Authorized agent.* Any person or corporation, including a legal representative, empowered to act on a claimant's behalf.

(b) *Civilian personnel.* Civilian employees of the Air Force who are paid from appropriated or nonappropriated funds. They include prisoners of war, interned enemy aliens performing paid labor, and volunteer workers except for claims under the Military Personnel and Civilian Employees' Claims Act.

(c) *Claim.* Any signed written demand made on or by the Air Force for the payment of a sum certain. It does not include any obligations incurred in the regular procurement of services, supplies, equipment, or real estate. An oral demand made under Article 139, Uniform Code of Military Justice (UCMJ) is sufficient.

(d) *Claimant.* An individual, partnership, association, corporation, country, state, territory, or its political subdivisions, and the District of Columbia. The US Government or any of its instrumentalities may be a claimant in admiralty, tort, carrier recovery and hospital recovery claims in favor of the United States.

(e) *Geographic area of claims responsibility.* The base Staff Judge Advocate's (SJA's) jurisdiction for claims. CONUS and Alaska jurisdictional areas are designated by HQ USAF/JACC on maps distributed to the field. HQ PACAF, HQ USAFE, and HQ 9AF SJAs designate these areas within their jurisdictions. DOD assigns areas of single service responsibility to each military department.

(f) *HQ USAF/JACC.* Claims and Tort Litigation Staff, Office of The Judge Advocate General, Headquarters, United States Air Force, Building 5683, Bolling AFB, DC 20332–6128.

(g) *HQ 9AF.* Headquarters Ninth Air Force, Shaw AFB, SC 29152–5002.

(h) *Owner.* A holder of a legal title or an equitable interest in certain property. Specific examples include:

(1) *For real property.* The mortgagor, and the mortgagee if that individual can maintain a cause of action in the local courts involving a tort to that specific property.

(2) *For personal property.* A bailee, lessee, mortgagee and a conditional vendee. A mortgagor, conditional vendor, or someone else other than the owner, who has the title for purposes of security are not owners.

(i) *HQ PACAF.* Headquarters, Pacific Air Forces, Hickam AFB, HI 96853–5001.

(j) *Personal injury.* The term "personal injury" includes both bodily injury and death.

(k) *Property damage.* Damage to, loss of, or destruction of real or personal property.

(l) *Settle.* To consider and pay, or deny a claim in full or in part.

(m) *Single Base General Court-Martial Jurisdiction (GCM).* For claims purposes, a base legal office serving the commander who exercises GCM authority over that base, or that base and other bases.

(n) *Subrogation.* The act of assuming the legal rights of another after paying a claim or debt, for example, an insurance company (subrogee) paying its insured's (subrogor's) claim, thereby assuming the insured's right of recovery.

(o) *HQ USAFE.* Headquarters, United States Air Forces in Europe, Ramstein Air Base, Germany, APO NY 09012–5001.

§ 842.3 Claims authorities.

(a) *Appellate authority.* The individual authorized to review the final decision of a settlement authority upon appeal or reconsideration.

(b) *Settlement authority.* The individual or foreign claims commission authorized to settle a claim upon its initial presentation.

§ 842.4 Where to file a claim.

File a claim at the base legal office of the unit or installation at or nearest to where the accident or incident occurred. If the accident or incident occurred in a foreign country where no Air Force unit is located, file the claim with the Defense Attache (DATT) or Military Assistance Advisory Group (MAAG) personnel authorized to receive claims (DIAM 100–1 and AFR 400–45). In a foreign country where a claimant is unable to obtain adequate assistance in filing a claim, the claimant may contact the nearest Air Force SJA. The SJA then advises HQ USAF/JACC thorugh claims channels of action taken and states why the DATT or MAAG was unable to adequately assist the claimant.

§ 842.5 Claims forms.

Any signed written demand on the Air Force for a sum certain is sufficient to file a claim. The claimant should use these forms when filing a claim:

(a) *Claim processed under the Military Personnel and Civilian Employees' Claims Act.* Use AF Form 180, Claim For Loss of or Damage To

Personal Property Incident To Service, or DD Forms 1842, Claim for Personal Property Against the United States, and 1844, Schedule of Property and Claim Analysis Chart, to file the claim.

(b) *Claim processed under international agreements.* Use any form specified by the host country.

(c) *Any other type claim.* Use SF 95, Claim for Damage, Injury, or Death.

§ 842.6 Signature on the claim form.

The claimant or authorized agent signs the claim form in ink using the first name, middle initial, and last name.

(a) *Claim filed by an individaul.* (1) A married woman signs her name, for example, Mary A. Doe, rather than Mrs. John Doe.

(2) An authorized agent signing for a claimant shows, after the signature, the title or capacity and attaches evidence of authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative; for example, John Doe by Richard Roe, Attorney in Fact. A copy of a current and valid power of attorney, court order, or other legal document is sufficient evidence of the agent's authority.

(b) *Claim with joint interest.* Where a joint ownership or interest in real property exists, all joint owners must sign the claim form. This includes a husband and wife signing a claim if the claim is for property damage. However, only the military member or civilian employee signs the claim form for a claim under the Military Personnel and Civilian Employees' Claims Act.

(c) *Claim filed by a corporation.* (1) A corporate officer signing the form must show title or capacity and affix the corporate seal (if any) to the claim form.

(2) If the person signing the claim is other than the corporate officer they must:

(i) Attach to the claim form a certification by a proper corporate officer that the individual is an agent of the corporation duly authorized to file and settle the claim;

(ii) Affix to the claim form the corporate seal (if any) to the certification.

(d) *Claim filed by a partnership.* A partner must sign the form showing his or her title as partner and list the full name of the partnership.

§ 842.7 Who may file a claim.

(a) *Property damage.* The owner or owners of the property or their authorized agent may file a claim for property damage.

(b) *Personal injury or death.* (1) The injured person or authorized agent may file a claim for personal injury.

(2) The duly appointed guardian of a minor child or any other person legally entitled to do so under applicable local law may file a claim for a minor's personal injury.

(3) The executor or administrator of the decedent's estate or any other person legally entitled to do so under applicable local law may file a claim based on an individual's death.

(c) *Subrogation.* The subrogor (insured) and the subrogee (insurer) may file a claim jointly or individually. Pay a fully subrogated claim only to the subrogee. A joint claim must be asserted in the names of and signed by the real parties in interest. Make payment by sending a joint check to the subrogee, made payable to the subroger and subrogee. If separate claims are filed, make payment by check issued to each claimant to the extent of each undisputed interest.

§ 842.8 Insured claimants.

Insured claimants must make a detailed disclosure of their insurance coverage by stating:

(a) Their name and address.

(b) Kind, amount, and dates of coverage of insurance.

(c) Insurance policy number.

(d) Whether a claim was presented to the insurer and, if so, in what amount.

(e) Whether the insurer paid or is expected to pay the claim.

(f) The amount of any payment made or promised.

§ 842.9 Splitting a claim.

(a) A claim includes all damages accruing to a claimant by reason of an accident or incident. For example, when the same claimant has a claim for property damage and personal injury arising out of the same incident, each claim represents only a part of a single claim or cause of action. Even if local law permits filing a separate claim for property damage and for personal injury, do not settle or pay a separate or split claim without the advance approval of HQ USAF/JACC.

(b) Filing for an advance payment, and subsequently filing a claim, does not constitute splitting a claim.

(c) Process the claim of a subrogor (insured) and subrogee (insurer) for damages arising out of the same incident as a single claim where permitted. If either claim or the combined claim exceeds, or is expected to exceed, settlement limits, send it to the next higher settlement authority. Do not split subrogated claims to avoid settlement limits.

Subpart B—Functions and Responsibilities

§ 842.10 Scope of this subpart.

It sets out the claims organization within the US Air Force and describes the functions and responsibilities of the various claims offices.

§ 842.11 Air Force claims organization.

Air Force claims channels are:

(a) Continental United States (CONUS), Azores, Panama and Iceland:

(1) Headquarters US Air Force (HQ USAF).

(2) SJAs of bases, single base GCM authorities, stations and fixed installations, and commanders responsible for investigation and settlement of claims.

(b) Pacific Air Forces (PACAF) and US Air Forces, Europe (USAFE):

(1) HQ USAF.

(2) SJAs of PACAF and USAFE.

(3) SJAs of organizations exercising GCM authority.

(4) SJAs of bases, stations and fixed installations, and commanders responsible for investigating and settling claims.

(c) US Central Command (CENTCOM):

(1) HQ USAF.

(2) SJA of Headquarters Ninth Air Force (HQ 9AF).

(3) SJAs of bases, stations, and fixed installations, and commanders responsible for investigation and settlement of claims.

(d) Alaskan Air Command (AAC):

(1) HQ USAF.

(2) HQ AAC (for part 6 claims only).

(3) SJAs of bases, single-base General Court-martial authorities, stations and fixed installations, and commanders responsible for investigating and settling claims.

(e) *Maneuver and disaster claims.* Air Force Judge Advocates designated by The Judge Advocate General (TJAG) to process maneuver and disaster claims. Once appointed, judge advocates must process claims through claims channels.

§ 842.12 HQ USAF claims responsibility.

(a) TJAG, through the Claims and Tort Litigation Staff (HQ USAF/JACC): (1) Establishes claims and tort litigation policies and supervises and assists all Air Force claims activities.

(2) Trains claims officers and paralegals.

(3) Settles certain claims.

Note: The authority specifically delegated to the Deputy Judge Advocate General to settle certain claims in no way limits the Deputy's authority to perform the duties of

TJAG when so acting pursuant to 10 U.S.C. 8072.

(4) Monitors tort litigation for and against the United States arising out of Air Force activities.

(b) HQ USAF/JACC. (1) Supervises and inspects claims and tort litigation activities through assistance visits, special audits, and Claims Administrative Management Program (CAMP) reviews.

(2) Implements claims and tort litigation policies, issues instructions, and provides guidance and assistance to subordinate claims offices.

(3) Recommends settlement action on claims and tort litigation to TJAG, the Secretary of the Air Force, and the United States Attorney General.

(4) Maintains liaison with the Department of Defense (DOD), Department of Justice (DOJ), and other government agencies on claims and tort litigation.

(5) Settles certain claims.

(6) Certifies or reports claims to the General Accounting Office (GAO).

(7) Prepares budget estimates for Air Force claims activities.

(8) Monitors the collection, allocation, and expenditure of Air Force claims funds.

(9) Keeps permanent records on all claims and tort litigation for which TJAG is responsible.

(10) Conducts and supervises claims training activities.

§ 842.13 Staff Judge Advocates' responsibility.

(a) *Major Command (MAJCOM).* (1) All MAJCOM SJAs, whether or not exercising claims settlement authority are responsible for the general supervision of claims activities within their commands, including:

(i) Conduct of periodic claims audits.

(ii) Support of claims teams. Members may be detailed from personnel assigned to the command to respond to natural disasters or serious incidents. If resources are not available from within the command, HQ USAF/JACC should be contacted for assistance.

(iii) Apportion claims funds allocated by HQ USAF.

(2) The PACAF, USAFE, and HQ 9AF SJA:

(i) Settles claims.

(ii) At a minimum, through assistance visits and audits, supervises claims activities of those subordinate units and organizations assigned to them for claims purposes.

(iii) Appoints members to foreign claims commissions.

(iv) Monitors international claims.

(v) Establishes and designates geographic areas of claims responsibility within the command, except for DOD designated single-service areas of responsibility.

(b) GCM: (1) The GCM SJA, whether or not he or she exercises claims settlement authority, is responsible for the general supervision of claims activities within the subordinate units.

(2) The GCM SJA exercising settlement authority:

(i) Settles certain claims.

(ii) Supervises directly the claims activities of their subordinate units. This includes at least assistance visits and audits for all but single base GCMs.

(c) *Base SJAs:* (1) Settle certain claims.

(2) Have primary investigative responsibility for incidents giving rise to claims that occur in their geographic area of responsibility.

(3) Notify HQ USAF/JACC through claims channels, if there is a question of which base can best investigate and process a particular claim.

§ 842.14 Claims and assistant claims officers.

(a) *Functions and responsibilities:* (1) The claims officer, under the immediate supervision of the SJA, the commander, or other appointing authority, is responsible for all claims activity of the command, organization, or unit. This includes investigating and reporting accidents, incidents, and claims.

(2) The assistant claims officer performs claims duties under the supervision of the claims officer and in the absence of the claims officer.

(b) *Appointment of claims and assistant claims officers:* (1) The Commander of each Air Force base, station, fixed installation, or separate unit appoints a claims officer in writing.

(2) The SJA appoints assistant claims officers in writing.

(c) *Qualifications of claims officers:* Claims officers are commissioned officers, designated as judge advocates of the Air Force, or civilian attorneys employed by the United States in authorized attorney positions at the office of the SJA.

(d) *Qualifications of assistant claims officers:* The assistant claims officer may be an attorney, a senior noncommissioned officer (E–7 through E–9), or a Department of the Air Force civilian employee (GS–7 or above).

Subpart C—Claims Under Article 139, Uniform Code of Military Justice (UCMJ) (10 U.S.C. 939)

§ 842.15 Scope of this subpart.

It sets out the Air Force procedures for processing Article 139, UCMJ claims.

§ 842.16 Definitions.

(a) *Appointing commander.* The commander exercising special court-martial jurisdiction over the offender is the appointing commander.

(b) *Board of officers.* One to three commissioned officers appointed to investigate a complaint of willful property damage or wrongful taking by Air Force personnel comprise a board of officers.

(c) *Property.* Property is an item that is owned or possessed by an individual or business. Property includes a tangible item such as clothing, household furnishings, motor vehicles, real property, and currency. The term does not include intangible property or items having no independent monetary worth. Items that should not be considered as property for the purpose of this part include a stock, bond, check, check book, credit card, telephone service and cable television services.

(d) *Willful damage.* Damage or destruction caused intentionally, knowingly, and purposely, without justifiable excuse is willful damage.

(e) *Wrongful taking.* Any unauthorized taking or withholding of property with intent to deprive the owner or person in lawful possession either temporarily or permanently.

§ 842.17 Claims payable.

Claims for property willfully damaged or wrongfully taken by Air Force military personnel as a result of riotous, violent, or disorderly conduct. If a claim is payable under this part and also under another part, it may be paid under this part if authorized by HQ USAF/JACC.

§ 842.18 Claims not payable.

Claims that are not payable are:

(a) Claims resulting from simple negligence.

(b) Claims for personal injury or death.

(c) Claims resulting from acts or omissions of Air Force military personnel while acting within the scope of their duty.

(d) Claims of subrogees.

(e) Claims arising from private indebtedness.

(f) Claims for reimbursement for bad checks.

§ 842.19 Limiting provisions.

(a) Submit a complaint within 90 days of the date of the incident unless the appointing commander finds good cause for the delay. Command determination of the absence of good cause is final.

(b) Assessment of damages in excess of $5,000 against an offender's pay for a

single incident requires HQ USAF/JACC approval.

(c) Payment of indirect, remote, or consequential damages is not authorized.

§ 842.20 Filing a claim.

Claimant complains (orally or in writing) to the commander of a military organization or unit of the alleged offending member or members or to the commander of the nearest military installation. However, the complainant need not request a sum certain in writing, before settlement is made.

Subpart D—Personnel Claims (31 U.S.C. 3701, 3721)

§ 842.21 Scope of this subpart.

It explains how to settle and pay claims under the Military Personnel and Civilian Employees' Claims Act for incident to service loss and damage of personal property. These claims are paid according to this subpart even when another subpart may also apply.

§ 842.22 Definitions.

(a) *Act of God.* An act occasioned exclusively by violence of nature, such as flood, earthquake, tornado, typhoon or hurricane, that is unanticipated and over which no one has any control.

(b) *Military installation.* A facility used to serve a military purpose and used or controlled by the Air Force or any other Department of Defense (DOD) element.

(c) *Other authorized places:* (1) Any place authorized, or apparently authorized by the government to receive, hold, or store personal property, such as offices, warehouses, baggage holding areas, hospitals.

(2) Any area on a military installation designated for parking or storing vehicles.

(3) A recreation area or any real estate the Air Force or any other DOD element uses or controls.

(d) *Personal property.* Tangible property an individual owns, including but not limited to household goods, unaccompanied baggage, privately owned vehicles (POV), and mobile homes.

(e) *Quarters:* (1) Housing the government assigns or otherwise provides in kind to the claimant, including substandard housing and trailers, when the claimant pays the government a fixed rental while drawing basic allowance for quarters (BAQ).

(2) Privately owned mobile or manufactured homes parked on base in spaces the government provides.

(3) Transient housing accommodations, wherever located, such as, hotels, motels, guest houses, transient dormitories, or other lodgings the government furnishes or contracts for.

(4) Housing accommodations outside the United States which the claimant occupies according to local policies and procedures which were not assigned by or otherwise provided for by the U.S. Government. Quarters do not include housing occupied by foreign indigenous employees.

(5) Garages, carports, driveways, and parking lots assigned to quarters the government provides for the occupants of the quarters to use.

(6) Street parking:

(i) At quarters.

(ii) In the immediate vicinity of quarters.

(iii) Reserved parking assigned to offbase housing accommodations overseas.

(7) The area immediately adjacent to quarters when used for storage of items not commonly stored in living areas, for example, boats, motorcycles, motorbikes, bicycles, lawn mowers, garden equipment, and outdoor furniture.

(f) *Reconsideration.* The original or a higher settlement authority's review of a prior settlement action.

(g) *Small claim.* A claim for $1,000 or less.

(h) *Unusual Occurrence.* Something not expected to happen in the normal course of events.

§ 842.23 Delegations of authority.

(a) *Settlement authority:* (1) These individuals have been delegated the authority to settle claims payable for $25,000 or less if the claim arose before 31 October 1988, or $40,000 or less if the claim arose on or after 31 October 1988, and to deny claims in any amount:

(i) The Judge Advocate General (TJAG).

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(iv) The Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(2) The SJAs of HQ USAFE, HQ PACAF, HQ AAC, and 9 AF (for claims arising out of HQ CENTCOM) have delegated authority to settle claims payable, and to deny claims filed for $25,000 or less.

(3) The SJAs of single base GCMs and the SJAs of GCMs within PACAF and USAFE have delegated authority to settle claims payable, and to deny claims filed for $15,000 or less.

(4) SJAs of each Air Force Base, station, and fixed installation have been delegated the authority to settle claims payable, and deny claims filed for $10,000 or less.

(b) *Redelegation of authority.* A settlement authority may redelegate the authority, in writing, to a subordinate judge advocate or civilian attorney.

(c) *Reconsideration authority.* A settlement authority has the same authority specified in a above. However, with the exception of TJAG, a settlement authority may not deny a claim on reconsideration that it, or its delegate, had previously denied.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

§ 842.24 Filing a claim.

(a) *How and when to file a claim.* A claim is filed when a federal military agency receives from a claimant or duly authorized agent a properly completed AF Form 180, DD Form 1842 or other written and signed demand for a specified sum of money.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to the expiration of the statute of limitations by submitting a signed amendment. The settlement authority adjudicates and settles or forwards the amended claim as appropriate.

(c) *Separate claims.* The claimant files a separate claim for each incident which caused a loss. For transportation claims, this means a separate claim for each shipment.

§ 842.25 Partial payments.

Upon request of a claimant, a settlement authority may make a partial payment in advance of final settlement when a claimant experiences personal hardship due to extensive property damage or loss. Examples where partial payments are appropriate include fires and sunken transport ships. Partial payments are made in this manner:

(a) If a claim for only part of the loss is submitted and is readily provable, pay it up to the amount of the settlement authority. (The claimant may later amend the claim for the remainder of the loss.) If the total payable amount of the claim exceeds the payment limits of the settlement authority, send it with recommendations through claims channels to the proper settlement authority.

(b) When the total claim is submitted and the amount payable exceeds the settlement authority, pay a partial payment within the limits of settlement authority and send the claim, with recommendations, through claims

channels to the proper settlement authority.

§ 842.26 Statute of limitations.

(a) The claimant must file the claim in writing within 2 years after it accrues. It accrues when the claimant discovered or reasonably should have discovered the full extent of the property damage or loss. For transportation losses, the claim usually accrues on the date of delivery.

(b) To compute the statutory period, the incident date is excluded and the day the claim was filed is included.

(c) Consider a claim filed after the statute has run if both of the following are present:

(1) The United States is at war or in an armed conflict when the claim accrues, or the United States enters a war or armed conflict after the claim accrues. Congress or the President establishes the beginning and end of war or armed conflict. A claimant may not file a claim more than 2 years after the war or armed conflict ends.

(2) Good cause is shown. A claimant may not file a claim more than 2 years after the good cause ceases to exist.

§ 842.27 Who may file a claim.

A claim may be filed by the:

(a) Property owner.

(b) Authorized agent with a power of attorney.

(c) Property owner's survivors, who may file in this order:

(1) Spouse.

(2) Children.

(3) Father or mother, or both.

(4) Brothers or sisters, or both.

§ 842.28 Who are proper claimants.

Proper claimants are:

(a) Active duty Air Force military personnel.

(b) Civilian employees of the Air Force who are paid from appropriated funds.

(c) DOD school teachers and school administrative personnel who are provided logistic and administrative support by an Air Force installation commander.

(d) Air Force Reserve (AFRES) and Air National Guard (ANG) personnel when performing active duty, full-time National Guard duty, or inactive duty training. ANG technicians under 32 U.S.C. 709.

(e) Retired or separated Air Force military personnel who suffer damage or loss resulting from the last storage or movement of personal property, or for claims accruing before retirement or separation.

(f) AFROTC cadets while on active duty for summer training.

(g) United States Air Force Academy cadets.

§ 842.29 Who are not proper claimants.

The following individuals are not proper claimants:

(a) Subrogees and assignees of proper claimants, including insurance companies.

(b) Conditional vendors and lienholders.

(c) Non-Air Force personnel, including American Red Cross personnel, United Services Organization (USO) performers, employees of government contractors, and Civil Air Patrol (CAP) members.

(d) AFROTC cadets who are not on active duty for summer training.

(e) Active duty military personnel and civilian employees of a military service other than the Air Force.

(f) DOD employees who are not assigned to the Air Force.

(g) Army and Air Force Exchange Service (AAFES) employees and other employees whose salaries are paid from nonappropriated funds (see subpart O).

(h) Military personnel of foreign governments.

§ 842.30 General provisions.

Payable claims must be for:

(a) Personal property which is reasonable or useful under the circumstances of military service.

(b) Loss, damage, destruction, confiscation, or forced abandonment which is incident to service.

(c) Losses that are not collectable from any other source, including insurance and carriers.

(d) Property that is owned by the claimants, their immediate families, or borrowed for their use.

(e) Losses occurring without the claimants' negligence.

§ 842.31 Claims payable.

Claims may be paid for:

(a) *Transportation or storage loss:* (1) Pay for property damage or loss incident to:

(i) Transportation under orders, whether it was in the possession of the government, carrier, storage warehouse, or other government contractor. This includes Do-It-Yourself (DITY) moves.

(ii) Travel under orders, including temporary duty (TDY).

(iii) Travel on a space available basis on a military aircraft, vessel, or vehicle.

(2) Pay for property essential to everyday use, if the claimant has replaced the items that he or she reported as missing. Essential items may be paid for even if someone locates the property before the claimant files the claim.

(b) *Losses at quarters and other authorized places*—(1) *In the United States (including U.S. territories and possessions).* Pay for personal property damage or loss, to include food spoilage, which is caused by fire, explosion, theft, vandalism, typhoon, hurricane, unusual occurrences or power outages which last for an extended period of time. The claimant must be free of negligence.

(i) Claims for damage or loss caused by other acts of god are not paid except in those instances where the geographic area has been declared to be a federal disaster area or HQ USAF/JACC has determined that payment is appropriate because the severity of the act of god was truly extraordinary.

(ii) In some areas, extreme weather, such as severe lightning storms, hail, or high winds, occur routinely. Damage claims from these storms are normally not paid. Failure to take reasonable care in protecting property from such known hazards may be negligence. These types of claims would include pitted windshields, dents, chipped paint on vehicles, and lightning damage to television sets, stereos, computer components, video recorders, and other electrical appliances.

(2) *Outside the United States.* Pay for personal property damage or loss, to include food spoilage, which is caused by fire, explosion, theft, vandalism, acts of god, unusual occurrences, or power outages which last for an extended period of time. The claimant must be free of negligence. The SJA must make an affirmative determination that the act of god or unusual occurrence was truly extraordinary.

(c) *Privately owned vehicles (POV).* Pay for damage to or loss of POVs caused by government negligence under subparts F or K. Pay under this subpart for damage or loss incident to:

(1) Theft of POVs or their contents, or vandalism to parked POVs:

(i) Anywhere on a military installation.

(ii) At offbase quarters overseas.

(iii) At other authorized places.

(2) Government shipment:

(i) To or from oversea areas incident to PCS.

(ii) On a space available reimbursable basis.

(iii) As a replacement vehicle under the provisions of the Joint Travel Regulations (JTR).

(3) Authorized use for government duty other than PCS moves. The owner must have specific advance permission of the appropriate supervisor or official. Adequate proof of the permission and of nonavailability of official transportation must be provided prior to paying such claims. Claims arising while the claimant is deviating from the principal route or purpose of the trip should not

be paid, but claims occurring after the claimant returns to the route or purpose should be paid. Travel between quarters and place of duty, including parking, is not authorized use for government duty.

(4) Paint spray, smokestack emission, and other similar operations by the Air Force on a military installation caused by a contractor's negligence. (Process the claim under subparts F or K, if government negligence causes such losses.) If a contractor's operation caused the damage:

(i) Refer the claim first to the contractor for settlement.

(ii) Settle the claim under this subpart if the contractor does not pay it or excessively delays payment, and assert a claim against the contractor.

(d) *Damage to mobile or manufactured homes and contents in shipment.* Pay such claims if there is no evidence of structural or mechanical failure for which the manufacturer is responsible.

(e) *Borrowed property.* Pay for loss or damage to property claimants borrow for their use. Either the borrower or lender, if proper claimants, may file a claim. Do not pay for property borrowed to accommodate the lender, i.e., such as to avoid weight or baggage restrictions in travel.

(f) *Marine or aircraft incident.* Pay claims of crewmembers and passengers who are in duty or leave status at the time of the incident. Payable items include jettisoned baggage, clothing worn at the time of an incident, and reasonable amounts of money, jewelry, and other personal items.

(g) *Combat losses.* Pay for personal property losses, whether or not the United States was involved, due to:

(1) Enemy action.

(2) Action to prevent capture and confiscation.

(3) Combat activities.

(h) *Civil activity losses.* Pay for losses resulting from a claimant's acts to:

(1) Quell a civil disturbance.

(2) Assist during a public disaster.

(3) Save human life.

(4) Save government property.

(i) *Confiscated property.* Pay for losses when:

(1) A foreign government unjustly confiscates property.

(2) An unjust change or application of foreign law forces surrender or abandonmnet of property.

(j) *Clothing and accessories worn on the person.* Pay claims for damage to eyeglasses, hearing aids, and dentures the government did not supply, when the damage results from actions beyond the normal risks associated with daily living and working. Claimants assume the risk of normal wear and tear, and their negligence bars payment of the claim.

(k) *Money losses.* Pay claims for loss of money when the losses are due to theft from quarters, other authorized places, or from the person, if the claimant was required to be in the area and could not avoid the theft by due care. As a general rule, $200.00 is reasonable to have in quarters, and $100.00 is reasonable to have on the person unless:

(1) The money was in a bona fide coin collection.

(2) The claimant can justify possession of the money for a PCS move, extended TDY, vacation, extensive shopping trip, or similar circumstances. The claimant must show a good reason why the money had not been deposited in a bank or converted into travelers checks or a money order.

(3) Local commercial facilities are not available or because US personnel do not generally use such facilities.

§ 842.32 Claims not payable.

A claim is not payable if:

(a) It is not incident to the claimant's service.

(b) The loss or damage is caused in whole or in part by the negligence or wrongful act of the claimant, the claimant's spouse, agent, or employee.

(c) It is a subrogation or assigned claim.

(d) The loss is recovered or recoverable from an insurer or other source. When a loss is recovered or is recoverable:

(1) The amount payable by insurance should be deducted if an insurer denied a claim because a claimant failed to report the loss or to file a timely claim under the policy. The claim should be paid if the settlement authority determines the claimant had good cause for not filing with the insurer, or

(2) The amount which the Air Force cannot recover from a carrier because the claimant failed to give timely notice of loss or damage should be subtracted from the settlement unless the claimant shows good cause for failure to give notice.

(e) It is intangible property including bank books, promissory notes, stock certificates, bonds, baggage checks, insurance policies, checks, money orders, travelers checks and credit cards.

(f) It is government property, including issued clothing items carried on an individual issue supply account. (Clothing not carried on an individual issue supply account which is stolen or clothing lost or damaged in transit may be considered as a payable item when claimed.)

(g) It is enemy property.

(h) It is a loss within the United States at offbase quarters the government did not provide.

(i) It is damage to real property.

(j) It is an appraisal fee, unless the settlement authority requires one to adjudicate the claim. HQ USAF/JACC must authorize payment for an appraisal fee of more than $100.

(k) It is property acquired or shipped for persons other than the claimant or the claimant's immediate family; however, a claim for property acquired for bona fide gifts may be paid.

(l) It is an article held for sale, resale, or used primarily in a private business.

(m) It is an item acquired, possessed, shipped, or stored in violation of any U.S. Armed Force directive or regulation. This includes an automobile for which a member fails to comply with base registration or insurance regulations. A claim must not be paid if one or more of these factors exist:

(1) The loss was the type the regulation or directive intended to prevent.

(2) The violation was willful or in defiance of authority, rather than minor or technical in nature.

(3) The violation either undermined discipline or adversely affected command welfare.

(n) It is an item fraudulently claimed. Deny payment for an item when investigation shows the claimant has intentionally falsified the value, condition, extent of damage, or repair cost of it. The claim file must show clear intent to defraud. A mere mistake is not a fraud.

(o) It is for charges for labor performed by the owner or immediate family member.

(p) It is for financial loss due to changed or cancelled orders.

(q) It is for expenses of enroute repair of a mobile or manufactured home.

(r) It is a loss of use of personal property.

(s) It is an attorney or agent fee.

(t) It is the cost of preparing a claim, other than estimate fees.

(u) It is an inconvenience expense, such as food, lodging, and transportation costs due to delay in delivery of household goods or travel to port to deliver or pick up a vehicle.

(v) It is a loss of, or damage to POV driven during PCS.

(w) It is a personal property insurance premium.

(x) It is a claim for a thesis or other similar papers, except for the cost of materials.

(y) It is damage to, or loss of a rental vehicle which TDY or PCS orders

authorized. These claims may be payable through Accounting and Finance as a travel expense.

(z) It is a cost to relocate a telephone or mobile or manufactured home due to a government ordered quarters move. The member submits such claims to the commander directing the move for payment from other Operation and Maintenance (O&M) funds.

(aa) It is for damage to or loss of property stored at the owner's expense unless the claimant's duty made storage necessary.

(bb) It is for damage to clothing and accessories caused by routine wrinkles.

(cc) It is hit-and-run damage to POVs.

(dd) It is for damage to clothing and accessories caused by contact with office furniture or getting in or out of a government vehicle unless the damage was caused by an unknown defect.

§ 842.33 Reconsideration of a claim.

A claimant may request reconsideration of an initial settlement or denial of a claim. The claimant sends the request in writing, to the settlement authority within a reasonable time following the initial settlement or denial. Sixty days is considered a reasonable time, but the settlement authority may waive the time limit for good cause.

(a) The original settlement authority reviews the reconsideration request. The settlement authority sends the entire claim file with recommendations and supporting rationale to the next higher settlement authority if all relief the claimant requests is not granted.

(b) The decision of the higher settlement authority is the final administrative action on the claim.

§ 842.34 Right of subrogation, indemnity, and contribution.

The Air Force becomes subrogated to the rights of the claimant upon settling a claim. The Air Force has the rights of contribution and indemnity permitted by the law of the situs or under contract. The Air Force does not seek contribution or indemnity from US military personnel or civilian employees whose conduct in scope of employment gave rise to government liability.

§ 842.35 Depreciation and maximum allowances.

The military services have jointly established the "Allowance List-Depreciation Guide" to determine values for most items and to limit payment for some categories of items.

Subpart E—Carrier Recovery Claims

§ 842.36 Scope of this subpart.

This subpart explains how to assert and settle claims against carriers, warehousemen, and contractors for loss and damage to personal property.

§ 842.37 Definitions.

(a) *Bill of lading.* A contract for movement and delivery of goods.

(1) Carriers issue commercial bills of lading.

(2) Transportation officers issue government bills of lading (GBL). GBLs include the terms and conditions of commercial bills of lading with certain exceptions.

(3) The GBL is all of the following:

(i) A receipt for goods tendered to a carrier.

(ii) A contract.

(iii) A document authorizing collection of transportation bills the carrier presents.

(b) *Carrier.* Any moving company, personal property forwarder, or freight forwarder holding a certificate or permit issued by a federal or state regulatory agency or approved by the Department of Defense for international shipments.

(c) *Military Traffic Management Command (MTMC).* The Department of Defense management agency for military traffic, land transportation, and common user ocean terminals. Among other responsibilities, MTMC manages the DOD household goods moving and storage program worldwide. The Army has single service responsibility for MTMC.

(d) *Regional Storage Management Office (RSMO).* The MTMC office responsible for negotiating and administering all storage contracts within a geographical area. The contracting officer of each RSMO makes involuntary collections of nontemporary storage loss and damage claims.

(e) *Net weight.* The weight of the fully-loaded van or shipping crate (gross weight), less the weight of the empty van or shipping crate (tare weight).

(f) *Nontemporary storage (NTS).* All authorized storage not in connection with a GBL. NTS usually exceeds 180 days and normally includes packing and shipping of household goods to the warehouse.

(g) *Storage in transit (SIT).* Storage of a shipment by a carrier at origin, enroute, or at destination. SIT is initially limited to 90 days. The transportation officer may extend it to a maximum of 180 days.

(h) *Tender of service.* A carrier's offer to do business with the Department of Defense, including the terms and conditions of the agreement. The Personal Property Traffic Management Regulation (PPTMR), DOD Regulation 4500.34, Appendix A, contains this agreement.

§ 842.38 Delegations of authority.

(a) *Settlement authority:* (1) These individuals have delegated authority to settle, compromise, suspend, or terminate action on claims for $20,000 or less and to accept full payment on any claim:

(i) The Judge Advocate General.

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(iv) Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(v) The SJAs of HQ PACAF, HQ USAFE, and HQ 9AF (for HQ CENTCOM).

(2) These individuals have delegated authority to settle, compromise, suspend, or terminate action on claims for $15,000 or less and to accept full payment on any claim:

(i) SJAs of GCMs in PACAF and USAFE.

(ii) SJAs of single base GCMs.

(3) SJAs of each Air Force base, station, or fixed installation have delegated authority to settle, compromise, suspend, or terminate action on claims for $10,000 or less and to accept full payment on any claim.

(b) *Redelegation of authority.* An individual with settlement authority may redelegate this authority, in writing, to a subordinate judge advocate or civilian attorney.

(c) *Authority to reduce, withdraw, or restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore settlement authority.

§ 842.39 Statute of limitations.

(a) International commercial air shipments. The government must file suit within 2 years after the delivery date. The period for notifying these carriers of loss or damage is 3 days for luggage, and 7 days for other goods. Setoff is not possible in these cases. Uncollectible claims are sent to HQ USAF/JACC within 6 months from the date of delivery.

(b) *All other CR claims.* The government must file suit within 6 years after the cause of action accrues. It accrues when a responsible US official, service member, or employee knew or reasonably should have known the material facts that caused the claimed loss. The requirement to file a claim within 9 months under commercial bills of lading does not apply to GBLs.

Subpart F—Military Claims Act (10 U.S.C. 2733)

§ 842.40 Scope of this subpart.

This subpart explains how to settle claims made against the United States for property damage, personal injury, or death caused by military personnel or civilian employees of the Air Force acting in the scope of their employment or otherwise incident to the Air Force's noncombat activities.

§ 842.41 Definitions.

(a) *Appeal.* A request by the claimant or claimant's authorized agent to reevaluate the final decision. A request for reconsideration and an appeal are the same for the purposes of this subpart.

(b) *Final denial.* A letter mailed from the settlement authority to the claimant or authorized agent advising the claimant that the Air Force denies the claim.

(c) *Noncombat activity.* Activity, other than combat, war or armed conflict, that is particularly military in character and has little parallel in the civilian community.

§ 842.42 Delegations of authority.

(a) *Settlement authority:* (1) The Secretary of the Air Force has delegated authority to:

(i) Settle claims for $100,000 or less.

(ii) Settle claims for more than $100,000, paying the first $100,000 and reporting the excess to the General Accounting Office for payment.

(iii) Deny a claim in any amount.

(2) The Judge Advocate General has delegated authority to settle claims for $100,000 or less and deny claims in any amount.

(3) The following individuals have delegated authority to settle claims for $25,000 or less and deny claims in any amount:

(i) The Deputy Judge Advocate General.

(ii) The Director of Civil Law.

(iii) The Chief, Deputy Chief and Branch Chiefs, Claims and Tort Litigation Staff.

(4) The SJA of 9AF for CENTCOM, and the SJAs of PACAF and USAFE have delegated authority to settle claims payable or deny claims filed for $25,000 or less.

(5) SJAs of single base GCMs, and GCMs in PACAF and USAFE, and each Air Force base, station, or fixed installation have delegated authority to settle claims payable, or deny claims filed for $15,000 or less.

(b) *Redelegation of authority.* A settlement authority may redelegate his or her authority for claims not exceeding $25,000, to a subordinate judge advocate or civilian attorney in writing.

(c) *Appellate authority.* Upon appeal, a settlement authority has the same authority specified above. However, no appellate authority below the Office of the Secretary of the Air Force may deny an appeal of a claim it had previously denied.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

(e) *Settlement negotiations.* A settlement authority may settle a claim in any sum within its delegated settlement authority, regardless of the amount claimed. Send uncompromised claims in excess of the delegated authority to the level with settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

(f) *Special exceptions.* Do not settle claims for the following without HQ USAF/JACC approval:

(1) Legal malpractice.

(2) On the job personal injury or death of an employee of a government contractor or subcontractor.

(3) Assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by an investigative or law enforcement officer.

(4) On-base animal bite cases.

(5) Personal injury from asbestos or radon.

(6) Claims based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation.

(7) Claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government.

(8) Claims for damage to property of a state, commonwealth, territory, or the District of Columbia caused by ANG personnel engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, or 505 who are assigned to a unit maintained by that state, commonwealth, territory or the District of Columbia.

(9) Claims not payable because payment is not in the best interests of the United States, is contrary to public policy, or is otherwise contrary to the basic intent of the MCA.

(10) Claims presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country.

§ 842.43 Filing a claim.

(a) *How and when filed.* A claim is filed when a federal military agency receives from a claimant or duly authorized agent a properly completed Standard Form 95 or other signed and written demand for money damages in a sum certain. A claim belonging to another agency is promptly transferred to that agency.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to final action. To amend a claim, the claimant or his or her authorized agent must submit a written, signed demand.

§ 842.44 Advance payments.

Subpart Q sets forth procedures for advance payments.

§ 842.45 Statute of limitations.

(a) A claim must be filed in writing within 2 years after it accrues. It accrues when the claimant discovers or reasonably should have discovered the existence of the act that resulted in the claimed loss. The same rules governing accrual pursuant to the Federal Tort Claims Act should be applied with respect to the Military Claims Act.

(b) The statutory time period excludes the day of the incident and includes the day the claim was filed.

(c) Consider claims filed after the statute has run when:

(1) The United States is at war or in an armed conflict when the claim accrues, or

(2) The United States enters a war or armed conflict after the claim accrues, and

(3) Good cause is shown. A claim is barred by the statute of limitations if it is filed more than 2 years after the good cause ceases to exist or the war or armed conflict ends. Congress or the President establishes the beginning and end of war or armed conflict.

§ 842.46 Who may file a claim.

(a) Owners of the property or their authorized agents may file claims for property damage.

(b) Injured persons or their duly authorized agents may file claims for personal injury.

(c) Duly appointed guardians of minor children or any other persons legally entitled to do so under applicable local law may file claims for minors' personal injuries.

(d) Executors or administrators of a decedent's estate or another person legally entitled to do so under applicable local law, may file claims based on:

(1) An individual's death.

(2) A cause of action surviving an individual's death.

(e) Insurers with subrogation rights may file claims for losses paid in full by them. The parties may file claims jointly or individually, to the extent of each party's interest, for losses partially paid by insurers with subrogation rights.

(f) Authorized agents signing claims show their title or legal capacity and present evidence of authority to present the claims.

§ 842.47 Who are proper claimants.

(a) Citizens and inhabitants of the United States.

(b) U.S. military personnel and civilian employees. Note: These personnel are not proper claimants for personal injury or death incident to service.

(c) Persons in foreign countries who are not inhabitants of the foreign country.

(d) States, state agencies, counties, or municipalities, or their political subdivisions.

(e) Prisoners of war or interned enemy aliens.

Note: These individuals are proper claimants for personal property damage but not for personal injury.

(f) Property owners, their representatives, and those with certain legal relationships with the record owner, including mortgagors, mortgagees, trustees, bailees, lessees and conditional vendees.

(g) Subrogees to the extent they have paid for the claim in question.

§ 842.48 Who are not proper claimants.

(a) Governments of foreign nations, their agencies, political subdivisions, or municipalities.

(b) Agencies and departments of the U.S. Government.

(c) Nonappropriated fund instrumentalities.

(d) Subrogees of § 842.48(a), (b), and (c) above.

(e) Inhabitants of foreign countries.

§ 842.49 Claims payable.

(a) Claims arising from negligent or wrongful acts or omissions committed by United States military or civilian personnel while acting in the scope of their employment.

(b) Claims arising from noncombat activities of the United States, whether or not such injuries of damages arose out of the negligent or wrongful acts or omissions by United States military or civilian employees acting within the scope of their employment.

(c) Claims for damage to bailed property under § 842.49(a) or (b) above where all of the following are present:

(1) The United States armed forces assumed the duties of a bailee.

(2) The bailor did not assume the risk of loss by express agreement.

(3) Authorized United States armed forces military or civilian personnel acting in their official capacity properly accepted the property.

(d) Claims for loss or damage to:

(1) Insured or registered mail under § 842.49(a), (b), or (c) while in the possession of the United States armed forces military or civilian personnel.

(2) Minimum fee insured mail, but only if it has an insurance number or requirement for hand-to-hand receipt while in the possession of the United States armed forces military or civilian personnel.

(3) Any mail in the possession of the US Postal Service or a Military Postal Service due to an unlawful or negligent inspection, search, or seizure conducted in an oversea military postal facility, under orders of armed forces personnel.

(e) Claims for property damage of US military personnel under conditions listed in a and b above where the damage occurred on a military installation and is not payable under the Military Personnel and Civilian Employees' Claims Act.

(f) Claims filed by Air Force military or civilian personnel for thier personal liability by settlement or judgment, to include reasonable costs of such litigation, for their common law tortious acts committed within the scope of their employment, if the Air Force military or civilian personnel would otherwise be included within the coverage of the Federal Employees Liability Reform and Tort Compensation Act of 1988, but are not because the acts occurred in a foreign country, or because such personnel were detailed for service with an entity other than a Federal department, agency, or instrumentality.

§ 842.50 Claims not payable.

Exclusions listed in § 842.50 (a) through (l) below are based on the wording of 28 U.S.C. 2680. The remainder are based either on statute or court decisions. The interpretation of these exclusions is a Federal question decided under Federal law. Where State law differs with Federal law, Federal law prevails. A claim is not payable under this subpart if it:

(a) Is based on an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid. Do not deny claims solely on this exception without the prior approval of HQ USAF/JACC.

(b) Is based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the government, whether or not the discretion involved is abused. Do not deny claims solely on this exception without the prior approval of HQ USAF/JACC.

(c) Arises out of the loss, miscarriage, or negligent transmission of letters or postal matter, except those claims payable under § 842.49.

(d) Arises with respect to the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise, or any other law enforcement officer.

(e) Is cognizable under the Suits in Admiralty Act or under the Public Vessels Act.

(f) Arises out of an act or omission of any employee of the government in administering the provisions of the Trading With the Enemy Act.

(g) Is for damages caused by the imposition or establishment of a quarantine by the United States.

(h) Arises out of an assault or battery, unless the assault or battery arises out of the acts or omissions of investigative or law-enforcement officers of the US Government, or arises out of the performance of medical, dental or related health care functions.

(i) Arises out of false imprisonment, false arrest, malicious prosecution or abuse of process, unless such actions were committed by an investigative or law enforcement officer of the United States who is empowered by law to execute searches, seize evidence, or make arrests for violations of federal law.

(j) Arises out of libel, slander, misrepresentation, or deceit.

(k) Arises out of interference with contract rights.

(l) Arises from the fiscal operations of the Department of the Treasury or from the regulation of the monetary system.

(m) Arises out of the combat activities of the military or naval forces, or the Coast Guard, during time of war.

(n) Arises from activities of the Tennessee Valley Authority.

(o) Arises from the activities of the Panama Canal Company.

(p) Arises from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

(q) Is for the personal injury or death of a member of the Armed Forces of the United States, including the Coast Guard, incurred incident to service.

(r) Is for the personal injury or death of a government employee for whom benefits are provided by the FECA.

(s) Is for the personal injury or death of an employee, including nonappropriated fund employees, for whom benefits are provided by the Longshore and Harbor Workers' Compensation Act (LHWCA).

(t) Is for the personal injury or death of any government contractor employee for whom benefits are provided under any worker's compensation law, or under any contract or agreement providing employee benefits through insurance, local law, or custom when the United States pays them either directly or as part of the consideration under the contract. Only HQ USAF/JACC may settle these claims.

(u) Is for taking of property as by technical trespass or overflight of aircraft and of a type contemplated by the Fifth Amendment to the US Constitution, or otherwise constitutes a taking.

(v) Is for damage from or by flood or flood waters at any place.

(w) Is for damage to property or for any death or personal injury occurring directly or indirectly as a result of the exercise or performance of, or failure to exercise or perform, any function or duty by any Federal agency or employee of the government to carry out the provisions of the Federal Civil Defense Act of 1950 during the existence of a civil defense emergency.

(x) Is for patent or copyright infringement.

(y) Is for damage to property of a state, commonwealth, territory, or the District of Columbia caused by ANG personnel engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, or 505 who are assigned to a unit maintained by that state, commonwealth, territory, or the District of Columbia unless the express approval for payment is received from HQ USAF/JACC.

(z) Is for damage to property or for any death or personal injury arising out of the activities of any federal agency or employee of the government in carrying out the provisions of the Federal Disaster Relief Act of 1954.

(aa) Arises from activities that present a political question.

(bb) Results wholly from the negligent, or wrongful act of the claimant or agent.

(cc) Is for reimbursement for medical, hospital, or burial expenses furnished at the expense of the United States.

(dd) Arises from contractual transactions, express or implied, including rental agreements, sales agreements, leases and easements, which are payable or enforceable under such contracts or arise out of irregular procurement and implied contract.

(ee) Arises from private, as distinguished from government, transactions.

(ff) Is based solely on compassionate grounds.

(gg) Is for rent, damage, or other expenses or payments involving the regular acquisition, use, possession, or disposition of real property of interests therein by and for the Air Force.

(hh) Is not in the best interests of the United States, is contrary to public policy, or is otherwise contrary to the basic intent of the MCA; for example, claims by inhabitants of unfriendly foreign countries or by or based on injury or death of individuals considered to be unfriendly to the United States. Claims considered not payable under this paragraph are forwarded, with recommendations for disposition, through claims channels to HQ USAF/JACC.

(ii) Is presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is, and at the time of the incident was, friendly to the United States. A prisoner of war or an interned enemy alien is not excluded as to a claim for damage, loss, or destruction of personal property in the custody of the Government otherwise payable. Claims considered not payable under this paragraph are forwarded with recommendations for disposition, through claims channels, to HQ USAF/JACC.

(jj) Is for personal injury or death of military or civilian personnel of a foreign country, if their personal injury or death was suffered incident to their service.

(kk) Is for damage to or loss of bailed property when the bailor specifically assumes such risk.

(ll) Is for property damage, personal injury, or death occurring in a foreign country to an inhabitant of that country.

(mm) Is for the loss of a rental fee for personal property.

(nn) Arises out of matters which are in litigation against the United States.

(oo) Is payable under any one of the following statutes and implementing regulations:

(1) Federal Tort Claims Act.

(2) Foreign Claims Act.

(3) International Agreements Claims Act.

(4) Air Force Admiralty Claims Act and the Admiralty Extension Act.

(5) National Guard Claims Act.

(6) Military Personnel and Civilian Employees' Claims Act.

§ 842.51 Applicable law.

This paragraph provides the existing law governing liability, measurement of liability and the effects of settlement upon awards.

(a) *Extent of liability.* Where the claim arises is important in determining the extent of liability.

(1) When a claim arises in the United States, the law of the place where the act or omission occurred governs liability. The settlement authority considers the local law on such issues as dangerous instrumentalities, assumption of risk, res ipsa loquitur, last clear chance, discovered peril, and comparative and contributory negligence. Absolute liability is never imposed.

(2) *Claims in foreign countries.* (i) In claims arising in a foreign country, where the claim is for personal injury, death, or damage to or loss of real or personal property caused by an act or omission alleged to be negligent, wrongful, or otherwise involving fault of military personnel or civilian officers or employees of the United States acting within the scope of their employment, liability or the United States is determined according to general principles of tort law common to the majority of American jurisdictions, as evidenced by Federal case law and standard legal publications, except as to the principle of absolute liability.

(ii) The law of the foreign country governing the legal effect of contributory or comparative negligence by the claimant will be applied in determining the relative merits of the claim. In the unusual situation where foreign law governing contributory or comparative negligence does not exist, use traditional rules of contributory negligence. Foreign rules and regulations governing the operation of motor vehicles (rules of the road) are applied to the extent those rules are not specifically superseded or preempted by United States military traffic regulations.

(3) When adjudicating claims based upon negligence, the principle of absolute liability is not applicable, even though otherwise prescribed by applicable local law.

(4) The meaning and construction of the MCA is a Federal question to be determined by Federal law.

(b) *General information:* (1) The measure of daages in claims arising in the United States or its possessions is determined according to the law of the place where the act or omission occurred. The measure of damages in claims arising overseas is determined according to general principles of American tort law.

(2) Apportion damages against the United States in the same manner as they are apportioned in suites against private persons if local law applies comparative negligence.

(3) Do not deduct proceeds from private insurance policies except to the extent allowed by local law. However, proceeds are deducted if the policy was paid for by the United States.

(4) Deduct compensation and benefits from the Department of Veterans Affairs, or monetary value received from any U.S. Government associated source from the damages which may be awarded. Deduct sick and annual leave payments if local law allows.

(5) Do not approve:

(i) Punitive damages.

(ii) Cost of medical or hospital services furnished at U.S. expense.

(iii) Cost of burial expenses paid by the United States.

(c) Settlement by insurer or joint tort-feasor. When settlement is made by an insurer or joint tort-feasor and an additional award is warranted, an award may be made if both of the following are present:

(1) The United States is not protected by the release executed by the claimant.

(2) The total amount received from such source is first deducted.

§ 842.52 Appeal of final denials.

(a) A claimant may appeal the final denial of the claim. The claimant sends the request, in writing, to the settlement authority within a reasonable time following the final denial. Sixty days is considered a reasonable time, but the settlement authority may waive the time limit for good cause.

(b) Upon receipt of the appeal, the original settlement authority reviews the appeal.

(c) Where the settlement authority does not reach a final agreement on an appealed claim, he or she sends the entire claim file to the next higher settlement authority, who is the appellate authority for that claim.

(d) The decision of the appellate authority is the final administrative action on the claim.

§ 842.53 Right of subrogation, indemnity, and contribution.

The Air Force becomes subrogated to the rights of the claimant upon settling a claim. The Air Force has the rights of contribution and indemnity permitted by the law of the situs, or under contract. Do not seek contribution or indemnity from US military personnel or civilian employees whose conduct gave rise to government liability.

§ 842.54 Attorney fees.

In the settlement of any claim pursuant to 10 U.S.C. 2733 and this subpart, attorney fees will not exceed 20 percent of any award provided that when a claim involves payment of an award over $1,000,000, attorney fees on that part of the award exceeding $1,000,000 may be determined by the Secretary of the Air Force. For the purposes of this paragraph, an award is deemed to be the cost to the United States of any trust or structured settlement, and not its future value.

Subpart G—Foreign Claims (10 U.S.C. 2734)

§ 842.55 Scope of this subpart.

This subpart tells how to settle and pay claims against the United States presented by inhabitants of foreign countries for property damage, personal injury, or death caused by military and civilian members of the US Armed Forces in foreign countries.

§ 842.56 Definitions.

(a) *Foreign country.* A national state other than the United States, including any place under jurisdiction of the United States in a foreign country.

(b) *Inhabitant of a foreign country.* A person, corporation, or other business association whose usual place of abode is in a foreign country. The term "inhabitant" has a broader meaning than such terms as "citizen" or "national", but does not include persons who are merely temporarily present in a foreign country. It does not require foreign citizenship or domicile.

(c) *Appointing authority.* An Air Force official authorized to appoint members to foreign claims commissions (FCC).

§ 842.57 Delegations of authority.

(a) *Settlement authority:* (1) The Secretary of the Air Force has the authority to:

(i) Settle claims for payment of $100,000 or less.

(ii) Settle claims for more than $100,000, pay the first $100,000, and report the excess to the General Accounting Office for payment.

(iii) Deny claims in any amount.

(2) The Judge Advocate General has delegated authority to:

(i) Settle claims for payment of $100,000 or less.

(ii) Deny claims in any amount.

(3) The Deputy Judge Advocate General, Director of Civil Law, and the Chief, Deputy Chief and Branch Chiefs, Claims and Tort Litigation Staff are each a foreign claims commission and have delegated authority to:

(i) Settle claims for payment of $50,000 or less.

(ii) Deny a claim in any amount.

(4) The SJAs of PACAF, USAFE, 9AF (for CENTCOM) and AFSPACECOM (for Greenland) are each a foreign claims commission and have delegated authority to approve claims for payment arising within their geographic area of responsibility for $50,000 or less, or deny claims of $50,000 or less.

(5) The SJAs of Numbered Air Forces in PACAF and USAFE, and the SJA of 12AF (for South America) are each a foreign claims commission and have delegated authority to:

(i) Recommend payment in any amount.

(ii) Settle claims for payment of $25,000 or less.

(iii) Deny claims for $50,000 or less.

(6) The SJAs of Lajes AB, Azores, Patrick AFB, FL, Howard AFB, Panama, and each Air Force base, station and fixed installation in PACAF, USAFE, and CENTCOM, are each a foreign claims commission and have delegated authority to:

(i) Recommend payment in any amount.

(ii) Settle claims for payment of $10,000 or less.

(iii) Deny claims for $25,000 or less.

(b) *Authority to activate a FCC.* The Chief, Claims and Tort Litigation Staff has delegated authority to activate a FCC.

(c) *Authority to appoint a FCC.* Once a foreign claims commission is activated, the following individuals have delegated authority to appoint members to it:

(1) The Judge Advocate General.

(2) The Deputy Judge Advocate General.

(3) The Director of Civil Law.

(4) Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(5) The SJAs of PACAF, USAFE, 9AF (for CENTCOM) and AFSPACECOM (for Greenland), within their geographic areas of responsibility.

(d) *Authority to reduce, withdraw, or restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority, in writing, except no one may reduce or withdraw the authority of a FCC to settle claims for $10,000 or less.

(e) *Settlement negotiations.* A settlement authority may settle a claim in any sum within its settlement authority, regardless of the amount claimed. Send uncompromised claims in excess of the delegated authority through claims channels to the level with settlement authority. Unsuccessful

negotiations at one level do not bind higher authority.

§ 842.58 Filing a claim.

(a) *How and when filed.* A claim is filed when a federal agency receives from a claimant or authorized agent a properly completed SF 95 or other signed and written demand for money damages in a sum certain. A claim belonging to another agency is promptly transferred to the appropriate agency.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to final action. An amendment must be in writing and signed by the claimant or authorized agent.

§ 842.59 Advance payments.

Subpart Q outlines procedures for advance payments.

§ 842.60 Statute of limitations.

(a) A claim must be filed in writing within 2 years after it accrues. It accrues when the claimant discovers or reasonably should have discovered the existence of the act that resulted in the claimed loss or injury.

(b) In computing the statutory time period, the day of the incident is excluded and the day the claim was filed is included.

(c) War or armed conflict does not toll the statute of limitations.

§ 842.61 Who may file a claim.

(a) Owners of the property or their authorized agents for property damage.

(b) Injured persons or other authorized agents for personal injury.

(c) Executors or administrators of a decedent's estate, or any other person legally entitled to do so under applicable local law, for an individual's death.

(d) Authorized agents (including the claimant's attorney) must show their title or legal capacity and present evidence of authority to present the claim.

§ 842.62 Who are proper claimants.

Claimants include inhabitants of a foreign country who are:

(a) Foreign nationals.

(b) US nationals, unless they reside there primarily because they are:

(1) Employed directly by the United States.

(2) Employed by a US civilian contractor to further performance of a contract with the United States.

(3) Sponsored by or accompanying someone employed as described in § 842.62(b) (1) or (2) above.

(c) US corporations with a place of business in the country in which the claim arose.

(d) Foreign governments and their political subdivisions, including a municipal and prefectural government.

(e) Foreign companies and business entities.

§ 842.63 Who are not proper claimants.

Persons who are not proper claimants include:

(a) Insurers and other subrogees.

(b) Dependents accompanying US military and US national civilian employees.

(c) Foreign military personnel suffering property damage, personal injury, or death from a joint military mission with the United States or from conduct of a US military member or employee acting in the scope of employment unless an international agreement specifically provides for recovery.

(d) Civilian employees of the United States, including local inhabitants, injured in the scope of their employment.

(e) National governments and their political subdivisions engaging in war or armed conflict with the United States or its allies.

(f) A national or nationally controlled corporation of a country engaging in war or armed conflict with the United States or its allies, unless the FCC or local military commander determines the claimant is friendly with the United States.

§ 842.64 Payment criteria.

The following criteria is considered before determining liability.

(a) The incident causing the damage or injury must occur outside the United States. It must be caused by noncombatant activities of the US Armed Forces or by civilian employees or military members of the Armed Forces.

(b) Negligence is not a prerequisite.

(c) Scope of employment is considered in the following situations.

(1) It is a prerequisite to US responsibility if the employee causing the damage or injury is a local inhabitant, a prisoner of war, or an interned enemy alien. These persons are "employees" within the meaning of the Foreign Claims Act (FCA) only when in the service of the United States. Ordinarily, a slight deviation as to time or place does not constitute a departure from the scope of employment. The purpose of the activity and whether it furthers the general interest of the United States is considered. If the claim arose from the operation or use of a US Armed Forces vehicle or other equipment by such a person, pay it provided local law imposes liability on the owner of the vehicle or other equipment in the circumstances involved.

(2) It is immaterial when the claim arises from the acts or omissions of any US Armed Forces member or employee not listed in § 842.64(c)(1) above. The Act imposes responsibility on the United States when it places a US citizen or non-US citizen employee in a position to cause the injury or damage. If the cause is a criminal act clearly outside the scope of employment, ordinarily pay the claim and consider disciplinary action against the offender.

§ 842.65 Claims not payable.

A claim is not payable when it:

(a) Has been paid or denied by a competent tribunal under the North Atlantic Treaty Organization (NATO), Status of Forces Agreement (SOFA), or any similar SOFA or treaty.

(b) Is purely contractual in nature.

(c) Is for attorney fees, punitive damages, a judgment or interest on a judgment, bail, or court costs.

(d) Accrues from a private contractual relationship between US personnel and third parties about property leases, public utilities, hiring of domestic servants, and debts of any description. This claim is sent for action to the commander of the person concerned (see 32 CFR 818).

(e) Is based solely on compassionate grounds.

Note: A Solatium payment is paid from O&M funds as an investigative expense.

(f) Is a bastardy claim.

(g) Is for patent or copyright infringement.

(h) Is waived under an international agreement.

(i) Is for rent, damage, or other payments involving regular acquisition, possession, and disposition of real property by or for the Air Force.

(j) Is filed by a Communist country or its inhabitants, unless authorized by HQ USAF/JACC.

(k) Is for real property taken by a continuing trespass.

(l) Is for personal injury or death of a person covered by:

(1) The Federal Employees' Compensation Act (5 U.S.C. 8101, *et seq.*).

(2) The Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*).

(3) A US contract or agreement providing employee benefits through insurance, local law, or custom, where the United States pays for them either directly or as part of the consideration under the contract. (See 42 U.S.C. 1651

and 42 U.S.C. 1701.) The Judge Advocate General or Chief, Claims and Tort Litigation Staff, HQ USAF/JACC, may authorize an award where local benefits are not adequate. Local benefits are deducted from any award.

(m) Results from an action by an enemy, or directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for or going to, or returning from a combat mission.

(n) Is based on negligence of a concessionaire or other independent contractor.

(o) Arises out of personal activities of dependents, guests, servants, or pets of members and employees of the US Armed Forces. (This includes situations where local law imposes strict liability or where the head of a household is held vicariously liable for their negligence.)

(p) Is the subject of litigation against the United States or its employees. This restriction does not apply to joint criminal/civil proceedings in a foreign court. Claims settlement may be authorized by HQ USAF/JACC in appropriate cases on request.

(q) Is covered under US admiralty laws, unless authorized by The Judge Advocate General or Chief, Claims and Tort Litigation Staff.

(r) Is one for which a foreign government is responsible under SOFA, treaty, or other agreement. However, HQ USAF/JACC may authorize payment of a claim where the foreign government refuses to recognize its legal responsibilities and the claimant has no other means of compensation.

§ 842.66 Applicable law.

This paragraph provides guidance to determine the applicable law for assessment of liability.

(a) A claim is settled under the law and standards in effect in the country where the incident occurred. In calculating the amount of any lump sum award, the present value of any periodic payment upon which the award is based, is computed, unless the law of the place of occurrence prohibits it.

(b) Contributory negligence committed by the claimant, claimant's agent, or employee is not used as a bar to recovery unless local law or custom requires it. If the comparative negligence doctrine is used, the percentage of negligence of each party is reflected in the apportionment of liability. The amount of damage sustained by both parties is apportioned according to local law.

(c) The following principles of the collateral source doctrine are applied in settling a claim except where local law provides otherwise:

(1) Any sums the claimant recovers from collateral sources, including proceeds of property insurance the claimant paid for are not deducted from the claim except when those sums are from:

(i) The US Government.

(ii) A US military member or employee.

(iii) A Joint tort-feasor.

(iv) An Insurer of §842.66(c)(1)(i), (ii), or (iii), above.

(2) Do not deduct insurance or any other payments where the US military member or employee would have to make reimbursement.

§ 842.67 Reconsideration of final denials.

This paragraph provides the procedures used to reconsider a final denial.

(a) An FCC may reopen, reverse, or reconsider, in whole or in part, any claim it previously decided if the request for reconsideration is received in a reasonable time. Sixty days is considered a reasonable time, but the FCC may waive the time limit for good cause.

(b) An FCC reconsiders the final action on a claim when there is:

(1) New and material evidence concerning the claim.

(2) Obvious error in facts or calculation of the original settlement.

(3) Fraud or collusion in the original submission of the claim.

(c) The FCC must state the reason for reconsideration in its opinion. A court decision is not in itself sufficient basis for reconsidering a claim, but the facts that resulted in the judgment may warrant reconsideration. The amount of a court judgment is not binding on a FCC's determination of damage, but the commission may consider the judgment as evidence of the local law on the subject.

§ 842.68 Right of subrogation, indemnity, and contribution.

The Air Force becomes subrogated to the rights of the claimant upon settling a claim. The Air Force has the rights of indemnity and contribution permitted by the law of the situs or under contract. Contribution or indemnity should not be sought:

(a) From US military personnel or civilian employees whose conduct gave rise to government liability.

(b) Where recovery action would be harmful to international relations.

Subpart H—International Agreement Claims (10 U.S.C. 2734a and 2734b)

§ 842.69 Scope of this subpart.

This subpart governs Air Force actions in investigating, processing, and settling claims under international agreements.

§ 842.70 Definitions.

The following are general definitions. See the relevant international agreement for the specific meaning of a term to use with a specific claim.

(a) *Civilian component.* Civilian personnel accompanying a force of a contracting party, who are employed by that force. Indigenous employees, contractor employees, or members of the American Red Cross are not a part of the civilian component unless specifically included in the agreement.

(b) *Contracting party.* A nation signing the governing agreement.

(c) *Force.* Personnel belonging to the land, sea, or air armed services of one contracting party when in the territory of another contracting party in connection with their official duties.

(d) *Legally responsible.* A term of art providing for settlement of claims under cost sharing international agreements consistent with the law of the receiving State. Often these claims are caused by local inhabitant employees, not part of the civilian component, under a respondeat superior theory.

(e) *Receiving state.* The country where the force or civilian component of another party is located.

(f) *Sending state.* The country sending the force or civilian component to the receiving State.

(g) *Third parties.* Those other than members of the force and civilian component of the sending or receiving States. Dependents, tourists, and other noninhabitants of a foreign country are third parties unless the agreement specifically excludes them.

§ 842.71 Delegations of authority.

(a) *Reimbursement authority.* The following individuals have delegated authority to reimburse or pay a pro rata share of a claim or object to a claim in any amount:

(1) The Secretary of the Air Force.

(2) The Judge Advocate General.

(3) The Deputy Judge Advocate General.

(4) The Chief of Civil Law.

(5) Chief, Deput Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(6) The SJAs and Deputy SJAs of PACAF, USAFE, 5th Air Force, Lajes Field, and 9th Air Force (for CENTCOM).

(b) *Redelegation of authority.* A settlement authority may redelegate his or her authority to a subordinate judge advocate or civilian attorney in writing.

(c) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

§ 842.72 Filing a claim.

(a) *Claims arising in a foreign country.* (1) If a third party claimant tries to file an international agreement claim with Air Force, direct that person to the appropriate receiving State office.

(2) If the Air Force receives a claim, send it to the US sending State office for delivery to the receiving State.

(b) *Claims arising in the United States.* The claimant files tort claims arising from the act or omission of military or civilian personnel of another contracting party at any US military installation. The installation receiving the claim either:

(1) Investigates it if the foreign personnel are assigned there.

(2) Sends it to the installation where the foreign personnel are assigned.

Subpart I—Use of Government Property Claims (10 U.S.C. 2737)

§ 842.73 Scope of this subpart.

This subpart explains how to settle and pay claims against the United States, for property damage, personal injury, or death incident to the use of a government vehicle or any other government property by Air Force military and civilian personnel which are not payable under any other statute.

§ 842.74 Definitions.

(a) *Government installation.* A United States Government facility having fixed boundaries and owned or controlled by the government.

(b) *Vehicle.* Every mechanical device used as a means of transportation on land.

§ 842.75 Delegations of authority.

(a) *Settlement authority.* The following individuals have delegated authority to settle claims for $1,000 or less and deny them in any amount.

(1) The Judge Advocate General.

(2) The Deputy Judge Advocate General.

(3) Director of Civil Law.

(4) Chief, Deputy Chief and Branch Chiefs, Claims and Tort Litigation staff.

(5) SJA of HQ 9AF for CENTCOM, and SJAs of PACAF and USAFE.

(6) SJAs of single base GCMs and GCMs in PACAF and USAFE.

(7) The SJA of each Air Force base, station and fixed installation.

(8) Any other judge advocate designated by The Judge Advocate General.

(b) *Redelegation of authority.* A settlement authority may redelegate it to a subordinate judge advocate or civilian attorney in writing.

(c) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

§ 842.76 Filing a claim.

(a) *How and when filed.* A claim has been filed when a federal agency receives from a claimant or the claimant's duly authorized agent written notification of an incident of property damage, personal injury or death accompanied by a demand for money damages in a sum certain. A claim incorrectly presented to the Air Force will be promptly transferred to the appropriate Federal agency.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to final Air Force action. Amendments will be submitted in writing and signed by the claimant or the claimant's duly authorized agent.

§ 842.77 Statute of limitations.

(a) A claim must be presented in writing within 2 years after it accrues. It accrues at the time the claimant discovers, or in the exercise of reasonable care should have discovered, the existence of the act causing property damage, personal injury or death for which the claim is filed.

(b) In computing time to determine whether the period of limitation has expired, exclude the incident date and include the date the claim was filed.

§ 842.78 Claims payable.

When all of the following are present, payment of a claim in the amount of $1,000 or less is authorized if it:

(a) Is for property damage, personal injury, or death. (Payment for a personal injury or death claim is limited to costs of reasonable medical, hospital, and burial expenses actually incurred and not otherwise furnished or paid by the United States.)

(b) Was caused by a military member or civilian employee of the Air Force, whether acting within or outside the scope of employment.

(c) Arose from the use of a government vehicle at any place or other government property on a government installation, and

(d) Is not payable under any other provision of law except Article 139, UCMJ.

§ 842.79 Claims not payable.

A claim is not payable if it is:

(a) Payable under any other provision of the law.

(b) Caused wholly or partly by a negligent or wrongful act of the claimant, the claimant's agent, or employee.

(c) A subrogated claim.

(d) Recoverable from other sources such as an insurance policy, or recovered from action under Article 139, UCMJ.

§ 842.80 Reconsideration of final denial.

(a) The statute does not provide for appeals. The original settlement authority may, however, reconsider any decision. There is no set format for a reconsideration but it should be submitted in writing within 60 days of the original decision.

(b) The settlement authority may either grant all or any portion of the requested relief without referral to any other office, or forward the entire file with the reasons for the action and recommendations to the next higher claims settlement authority for independent review and final action.

§ 842.81 Settlement agreement.

Do not pay a claim unless the claimant accepts the amount offered in full satisfaction of the claim and signs a settlement agreement to that effect.

Subpart J—Admiralty Claims (10 U.S.C. 9801-9804, 9806; 46 U.S.C. 740)

§ 842.82 Scope of this subpart.

It sets forth the procedure for administrative settlement of admiralty and maritime claims in favor of and against the United States.

§ 842.83 Definitions.

(a) *Admiralty contracts.* A contract covering maritime services or a maritime transaction such as vessel procurement and space for commerical ocean transportation of DOD cargo, mail, and personnel is an admiralty contract.

(b) *General average.* General average is the admiralty rule that when someone's property is thrown overbaord to save a ship, the ship owner and all owners of the cargo must share the loss.

(c) *Maritime torts.* A maritime tort is one committed in navigable waters or on land or in the air where a substantial element of the damage, personal injury, or death occurred in navigable waters. The activity causing the tortious act must bear some significant relationship to traditional maritime activity.

(d) *Vessel.* Every description of watercraft used or usable as a means of

transportation on water is a vessel. (1 U.S.C. 3)

§ 842.84 Delegations of authority.

(a) The following officials have the authority to settle a claim against the Air Force in the amounts provided:

(1) The Secretary of the Air Force has the authority to:

(i) Settle a claim for payment of more than $500,000 and to certify it to Congress for payment.

(ii) Settle and pay a claim for $500,000 or less.

(iii) Deny a claim in any amount.

(2) The following individuals have delegated authority to settle claims for $10,000 or less:

(i) The Judge Advocate General.

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(iv) The Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation staff.

(b) Delegation of settlement authority on claims in favor of the United States.

(1) The Secretary of the Air Force has the authority to settle claims for damage to property under the jurisdiction of the Air Force in an amount not to exceed $500,000, and to settle claims for salvage services performed by the Air Force in any amount.

(2) HQ USAF/JACC refers all claims for damage to property under the jurisdiction of the Air Force for more than $500,000 to the Department of Justice.

(3) The following individuals have delegated authority to settle claims for $10,000 or less:

(i) The Judge Advocate General.

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(iv) The Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

§ 842.85 Reconsidering claims against the United States.

This section provides the policy and procedures to reconsider any maritime claim made against the United States.

(a) The settlement authority may reconsider any claim previously disapproved in whole or in part when either:

(1) The claimant submits new evidence in support of the claim.

(2) There were errors or irregularities in the submission or settlement of the claim.

(b) There is no right of appeal to higher authority under this subpart.

Subpart K—Claims Under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2402, 2671, 2672, 2674–2680)

§ 842.86 Scope of this subpart.

This subpart governs claims against the United States for property damage, personal injury, or death, from the negligent or wrongful act or omission of Air Force military or civilian personnel while acting within the scope of their employment. It also covers similar tort claims generated by Air National Guard (ANG) members performing specified duty under 32 U.S.C. on or after 29 December 1981.

§ 842.87 Definitions.

(a) *Compromise.* An agreed settlement based upon the facts, the law, and the application of the law to the facts.

(b) *Final denial.* A letter the settlement authority mails to the claimant or authorized agent advising him or her that the Air Force denies his or her claim.

(c) *Reconsideration.* A request by the claimant or claimant's authorized agent to reevaluate a final decision. A request for reconsideration and an appeal are the same thing.

(d) *Negligence.* A departure from the conduct expected from a reasonably prudent person under similar circumstances.

(e) *Proximate cause.* The dominant or primary cause involving a natural and continuous sequence unbroken by an effective cause.

§ 842.88 Delegations of authority.

(a) *Settlement authority.* (1) Subject to the prior written, approval of the United States Attorney General or his designee, the following individuals have delegated authority to settle claims in excess of $25,000, to settle claims for $25,000 or less, and to deny a claim in any amount:

(i) The Judge Advocate General.

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(2) Subject to the prior written approval of the United States Attorney General or his designee, the Chief, Claims and Tort Litigation Staff has delegated authority to settle claims in excess of $25,000 up to a limit of $50,000, to settle claims for $25,000 or less; and to deny a claim in any amount.

(3) The Deputy Chief and Branch Chiefs, Claims and Tort Litigation Staff have delegated authority to settle claims for $25,000 or less and deny a claim in any amount.

(4) The SJA of HQ 9AF for CENTCOM, and SJAs of PACAF and USAFE have delegated authority to settle claims payable, and deny claims filed, for $25,000 or less.

(5) The following individuals have delegated authority to settle claims payable, and deny claims filed, for $15,000 or less:

(i) SJAs of single base GCMs.

(ii) SJAs of GCMs in PACAF and USAFE.

(iii) SJAs of each Air Force base, station, or fixed installation.

(b) *Redelegation of authority.* A settlement authority may be redelegated, in writing, to a subordinate judge advocate or civilian attorney.

(c) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

(d) *Settlement negotiations.* A settlement authority may settle a claim filed in any amount for a sum within the delegated authority. Unsettled claims in excess of the delegated authority will be sent to the next highest level with settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

(e) *Special exceptions.* only HQ USAF/JACC may settle claims for:

(1) Legal malpractice.

(2) On the job personal injury or death of an employee of a government contractor or subcontractor.

(3) Assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by an investigative or law enforcement officer.

(4) Animal bites.

(5) Personal injury from asbestos or radon.

§ 842.89 Statute of limitations.

A claim must be presented in writing within 2 years after it accrues.

(a) Federal, not state law, determines the time of accrual. A claim accrues when the claimant discovers or reasonably should have discovered the existence of the act that resulted in the claimed loss.

(b) In computing the statutory time period, the day of the incident is excluded and the day the claim was filed is included.

(c) The Air Force has 6 months to consider a properly filed claim, after which the claimant may file suit. The claimant's right to sue ends 6 months from the date the final denial is mailed.

(d) Litigants may bring third party actions against the United States without first filing a claim. In some instances such actions may start more than 2 years after the claim has accrued.

§ 842.90 Reconsideration of final denials.

(a) A claimant may request a settlement authority who denied a claim to reconsider that claim. If the settlement authority denies the request, the claim file is sent to the next higher claims settlement authority for action.

(b) A request for reconsideration must be filed in writing within 6 months of the final denial and prior to initiation of a suit. A request for reconsideration starts a new 6-month period for the Air Force to consider the claim. The claimant may not sue during that period.

§ 842.91 Settlement agreements.

The claimant must sign a settlement agreement and general release before any payment is made.

Subpart L—Property Damage Tort Claims in Favor of the United States (31 U.S.C. 3701, 3711–3719)

§ 842.92 Scope of this subpart.

This subpart describes how to assert, administer, and collect claims for damage to or loss or destruction of government property through negligence or wrongful act. It does not cover admiralty, hospital recovery, or nonappropriated fund claims.

§ 842.93 Delegations of authority.

(a) *Settlement authority.* (1) The following individuals have delegated authority to settle, compromise, suspend, or terminate action on claims for $20,000 or less and to accept full payment on any claim:

(i) The Judge Advocate General.

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(iv) Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(2) The SJA of HQ 9AF (for CENTCOM), and the SJAs of PACAF and USAFE have delegated authority to settle, compromise, suspend, or terminate action on claims for $15,000 or less and to accept full payment on any claim.

(3) SJAs of GCMs located in PACAF and USAFE and single base GCMs located in CONUS have delegated authority to settle, compromise, suspend, or terminate action on claims for $15,000 or less and to accept full payment on any claim.

(4) SJAs of each Air Force base, station or fixed installation have delegated authority to settle, compromise, suspend, or terminate action on claims for $10,000 or less and to accept full payment on any claim.

(b) *Redelegation of authority.* A settlement authority may redelegate it to a subordinate judge advocate or civilian attorney, in writing.

(c) *Authority to reduce, withdraw, or restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

§ 842.94 Assertable claims.

A claim may be asserted in writing for loss of or damage to government property, against a tort-feasor when:

(a) Damage results from negligence and the claim is for:

(1) More than $100.

(2) Less than $100 but collection costs are small.

(b) The claim is based on a contract and the contracting officer does not intend to assert a claim under the contract. The contracting officer's intention not to assert a claim should be recorded in a memorandum for the record and placed in the claim file.

(c) The claim is for property damage arising from the same incident as a hospital recovery claim. (The two claims should be consolidated and processed under subpart N).

(d) The Tort-feasor or his insurer presents a claim against the government arising from the same incident. (Both claims should be processed together.)

(e) The claim is assertable as a counterclaim under an international agreement. (The claim should be processed under subpart H).

(f) The claim is based on product liability. HQ USAF/JACC approval must be obtained before asserting the claim.

§ 842.95 Non-assertable claims.

A claim is not assertable under this subpart when it is for:

(a) Reimbursement for military or civilian employees for their negligence claims paid by the United States.

(b) Loss of or damage to government property caused by a nonappropriated fund employee acting in the scope of employment, for which a person has accountability and responsibility under the Report of Survey System.

(c) Loss or damage to nonappropriated fund property assertable under other provisions.

(d) Loss or damage caused by an employee of an instrumentality of the government in the absence of statutory authority to reimburse.

(e) Monies recovered against a foreign government or any of its political subdivisions. (HQ USAF/JACC may authorize this claim as an exception to the rule).

§ 842.96 Asserting the claim.

The base SJA asserts the claim against the tort-feasor by mailing, certified mail, return receipt requested, the original and one copy of a "Notice of Claim" that includes the following:

(a) Reference to the statutory right to collect.

(b) A demand for payment or restoration.

(c) A description of damage.

(d) The date and place of incident.

(e) The name, phone number, and office address of claims personnel to contact.

§ 842.97 Referring a claim to the US Attorney or the Department of Justice.

All claims must be authorized for referral by HQ USAF/JACC prior to being sent to either the US Attorney or the Department of Justice. All claims for demands of more than $20,000.00 which are not collected in full by a settlement authority will be referred (with HQ USAF/JACC approval) to DOJ.

§ 842.98 Statute of limitations.

The government must file suit within 3 years after the cause of action accrues. It accrues when a responsible US official knew or reasonably should have known the material facts that resulted in the claimed loss.

§ 842.99 Compromise, termination, and suspension of collection.

This section establishes the guidelines for compromise, termination, or suspension of a claim.

(a) Compromise of a claim is allowable when:

(1) The tort-feasor is unable to pay the full amount within a reasonable time. (A sworn statement showing the debtor's assets and liabilities, income, expenses, and insurance coverage should be obtained and included in the claim file).

(2) The Government is unable to collect a claim in full within a reasonable time even though the enforced collection proceedings are used for collection.

(3) The cost to collect does not justify enforced collection of the full amount.

(4) The government may have difficulty proving its case in court for the full amount claimed.

(b) Compromise is not allowable when there may be fraud, misrepresentation, or violation of antitrust laws. The Department of Justice must authorize compromise of such claims.

(c) Termination of collection is allowable when:

(1) The government is unable to collect the debt after exhausting all collection methods.

(2) The government is unable to locate the tort-feasor.

(3) The cost to collect will exceed recovery.

(4) The claim is legally without merit.

(5) The evidence does not substantiate the claim.

(d) Suspension of collection is allowable when:

(1) The government is unable to locate tort-feasor.

(2) The tort-feasor is presently unable to pay but:

(i) The statute of limitations is tolled or is running anew.

(ii) Future collection may be possible.

Subpart M—Claims Under the National Guard Claims Act (32 U.S.C. 715)

§ 842.100 Scope of this subpart.

This subpart explains how to settle claims against the United States arising out of the noncombat activities of the Air National Guard (ANG), when its members are acting within the scope of their employment and performing duty under 32 U.S.C. Contact HQ USAF/JACC for guidance on any claim for property damage, injury or death by the ANG which accrued prior to 29 December 1981.

§ 842.101 Definitions.

(a) *Appeal.* An appeal is a request by the claimant or claimant's authorized agent to reevaluate the final decision made on a claim. A request for reconsideration is considered as an appeal.

(b) *Air National Guard (ANG).* The federally recognized Air National Guard of each state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

(c) *ANG member.* An ANG member is one who is performing duty under 32 U.S.C., Section 316, 502, 503, 504, or 505 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

(d) *ANG duty status.*—(1) *Active federal service.* ANG members may serve on active Federal duty under 10 U.S.C. to augment the active Air Force under certain circumstances or for certain types of duty or training (e.g., overseas training exercises and ANG alert duty). Duty under 10 U.S.C. does not fall under this subpart.

(2) *Federally funded duty.* ANG members perform specified federally funded duty or training under 32 U.S.C. such as weekend drills, annual training, field exercises, range firing, military schooling, full time unit support, or recruiting duties. Duty under 32 U.S.C. falls under this subpart for noncombat activities.

(3) *State duty.* State duty is duty not authorized by federal law but required by the governor of the state and paid for from state funds. Such duty includes civil emergencies (natural or other disasters), civil disturbances (riots and strikes), and transportation requirements for official state functions, public health, or safety. State duty does not fall under this subpart.

(e) *Compromise.* A compromise is an agreed settlement based upon the facts, the law, and the application of the law to the facts.

(f) *Final denial.* A final denial is a letter from the settlement authority to the claimant or authorized agent advising of the decision to deny the claim.

(g) *Noncombat activity.* Noncombat activity is an act, other than combat, war or armed conflict, which is particularly military in character and has little parallel in the civilian community.

(h) *ANG technicians.* An ANG technician is a Federal employee employed under 32 U.S.C. 709. Tort claims arising out of his or her activity are settled under the Federal Tort Claims Act (FTCA).

§ 842.102 Delegations of authority.

This paragraph outlines the levels of authority authorized to settle claims brought under the National Guard Claims Act (32 U.S.C. 715).

(a) *Settlement authority.* (1) The Secretary of the Air Force has authority to:

(i) Settle a claim for $100,000 or less.

(ii) Settle a claim for more than $100,000, paying the first $100,000 and reporting the excess to the General Accounting Office for payment.

(iii) Deny a claim in any amount.

(2) The Judge Advocate General has delegated authority to settle a claim for $100,000 or less, and deny a claim in any amount.

(3) The following individuals have delegated authority to settle a claim for $25,000 or less, and deny a claim in any amount:

(i) The Deputy Judge Advocate General.

(ii) The Director of Civil Law.

(iii) The Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(4) The SJA of 9AF for CENTCOM and the SJAs of USAFE and PACAF have delegated authority to settle claims payable or deny claims filed for $25,000 or less.

(5) SJAs of single base GCMs, GCMs in PACAF and USAFE and each Air Force base, station or fixed installation have delegated authority to settle claims payable, and deny claims filed, for $15,000 or less.

(b) *Redelegation of authority.* A settlement authority may redelegate up to $25,000 of settlement authority to a subordinate judge advocate or civilian attorney. This redelegation must be in writing and can be for all claims or limited to a single claim.

(c) *Appellate authority.* Upon appeal a settlement authority has the same authority to settle a claim as that specified above. However, no appellate authority below the Office of the Secretary of the Air Force may deny an appeal of a claim it previously denied.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated settlement authority.

(e) *Settlement negotiations.* A settlement authority may settle a claim filed in any amount for a sum within the delegated settlement authority regardless of the amount claimed. Unsettled claims in excess of the delegated settlement authority are sent to the individual with higher settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

(f) *Special exceptions.* No authority below the level of HQ USAF/JACC may settle claims for:

(1) Legal malpractice.

(2) On the job personal injury or death of an employee of a government contractor or subcontractor.

(3) Assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by an investigative or law enforcement officer.

§ 842.103 Filing a claim.

This paragraph explains how to file a claim under the National Guard Claims Act.

(a) *How and when filed.* A claim is filed when a federal military agency receives from a claimant or duly authorized agent a properly completed SF 95 or other written and signed demand for money damages in a sum certain. Claims belonging to another agency are promptly transferred to the correct agency.

(b) *Receipt of claims from State National Guard agencies.* The Office of the State Adjutant General promptly sends claims it receives to the appropriate Air Force claims authority in whose geographic area the incident occurred. The report forwarded to the Air Force includes:

(1) The date, place, and nature of the incident.

(2) The names and organizations of ANG members involved, and the statutory duty status of the ANG members at the time of the incident (include copies of orders, if applicable).

(3) A scope of employment statement from the supervisors of the ANG members involved.

(4) The names of the claimants.

(5) A brief description of any damage to private property, personal injuries, or death.

(c) *Claims investigations.* (1) Upon receipt of a claim:

(i) It is investigated by claims office personnel responsible for the geographic area where the incident causing the claim occurred.

(ii) The investigative report includes a scope of employment statement and a copy of the orders authorizing the performance of duty by the ANG member.

(2) The State Adjutants General designate an official or office as point of contact for Air Force claims personnel and furnish necessary personnel to assist the Air Force investigation, subject to the availability of funds and personnel.

(d) *Amending a claim.* A claimant may amend a claim at any time prior to final action. To amend a claim the claimant or his or her authorized agent must submit a written, signed demand.

§ 842.104 Advance payments.

Subpart Q of this part sets forth procedures for such payments.

§ 842.105 Statute of limitations.

A claim must be filed in writing within 2 years after it accrues.

(a) Federal, not state law, determines the time of accrual. A claim accrues when the claimant discovers or reasonably should have discovered the existence of the act that resulted in the claimed loss.

(b) In computing the statutory time period, the day of the incident is excluded and the day the claim was filed is included.

(c) A claim filed after the statute has run is considered if the United States is at war or in an armed conflict when the claim accrues; or if the United States enters a war or armed conflict after the claim accrues, and good cause is shown. No claimant may file a claim more than 2 years after the good cause ceases to exist or the war or armed conflict ends. Congress or the President establishes the beginning and end of war or armed conflict.

§ 842.106 Who may file a claim.

The following individuals may file a claim under this subpart.

(a) Owners of the property or their authorized agents may file a claim for property damage.

(b) Injured persons or their authorized agents may file a claim for personal injury.

(c) Executors or administrators of a decedent's estate or any other person legally entitled to do so under applicable local law may file a claim based on:

(i) An individual's death.

(ii) A cause of action surviving an individual's death.

(d) Insurers with subrogation rights may file a claim for losses paid in full by them. The parties may file a claim jointly or individually, to the extent of each party's interest, for losses partially paid by insurers with subrogation rights.

(e) Authorized agents signing a claim must show their title or legal capacity and present evidence of such authority to file the claim.

§ 842.107 Who are proper claimants.

Only certain individuals are proper claimants under this subpart. Proper claimants include:

(a) Citizens and inhabitants of the United States.

(b) States or territories and their agencies, unless it is the state of the ANG member who caused the injury or property damage.

(c) Counties, municipalities, or units of local government, unless they are in the state of the ANG member who caused the injury or property damage.

(d) Persons in foreign countries who are not inhabitants of a foreign country.

(e) Property owners, their representatives, and those with certain legal relationships with the record owner, including mortgagors, mortgagees, trustees, bailees, lessees and conditional vendees.

(f) Subrogees, to the extent they have paid the claim.

§ 842.108 Who are not proper claimants.

The following individuals are not proper claimants:

(a) ANG members performing duty under 32 U.S.C. when the personal injury or death claim arises incident to service.

(b) Agencies and departments of the U.S. Government including the District of Columbia government.

(c) Federal nonappropriated fund instrumentalities.

(d) Governments of foreign nations, their agencies, political subdivisions, and municipalities.

(e) The state territory, local government unit, or their agencies, whose ANG member caused the injury or property damage.

(f) Subrogees of all the above.

§ 842.109 Claims payable.

(a) Claims arising from noncombat activities of ANG members performing duty under 32 U.S.C and acting within the scope of their employment, whether or not such injuries or damages arose out of their negligent or wrongful acts or omissions.

(b) Claims are payable if they are for damage to bailed property under § 842.109(a) above where:

(1) The ANG assumed the duties of a bailee.

(2) The bailor did not assume the risk of loss by express agreement.

(3) Authorized ANG members acting in their official capacity properly accepted the property.

(c) Claims are payable if they are for loss or damage to:

(1) Insured or registered mail, under § 842.109 (a) or (b) above while in the possession of the ANG.

(2) Minimum fee insured mail but only if it has an insurance number or requirement for hand-to-hand receipt and was lost or damaged while in the possession of the ANG.

(3) Any mail in the possession of the United States Postal Service or a Military Postal Service due to an unlawful or negligent inspection, search, or seizure in an oversea military postal facility, which was ordered by ANG members.

(d) Claims by ANG personnel are payable for their personal liability by settlement or judgment to include reasonable costs of such litigation, for their common law tortious acts committed on or after 29 December 1981 while performing duty under 32 U.S.C. within the scope of their employment if the ANG personnel would otherwise be included within the coverage of the Federal Employees Liability Reform and Tort Compensation Act of 1988, but are not because the acts occurred in a foreign country, or the ANG individual was detailed for service with an entity other than a Federal department, agency, or instrumentality.

§ 842.110 Claims not payable.

The following are not payable:

(a) Claims payable under any one of the following statutes and implementing regulations:

(1) The Federal Tort Claims Act (FTCA).

(2) The Foreign Claims Act (FCA).

(3) The International Agreements Claims Act.

(4) The Air Force Admiralty Claims Act and the Admiralty Extensions Act.

(5) The Military Claims Act (MCA).

(6) The Military Personnel and Civilian Employees' Claims Act.

(b) Claims from the combat activities of the armed forces during war or armed conflict.

(c) Claims for personal injury or death of ANG members performing duty under 32 U.S.C. incident to their service.

(d) Claims for damage to or loss of bailed property when the bailor specifically assumed such risk.

(e) Claims for personal injury or death of a person covered by:

(1) The Federal Employees' Compensation Act.

(2) The Longshore and Harbor Workers' Compensation Act.

(3) A United States contract or agreement providing employee benefits through insurance, local law, or custom and the United States pays for such benefits either directly or as a part of the consideration under the contract.

(f) Claims for property damage, personal injury or death occurring in a foreign country to an inhabitant of that country.

(g) Claims caused by the negligent or wrongful acts or omissions of members of the District of Columbia ANG.

(h) Claims arising from a private rather than a government transaction.

(i) Claims for patent or copyright infringement.

(j) Claims for damage, use, or other expenses involving the regular acquisition, possession, and disposition of real property by or for the ANG.

(k) Claims for the taking of private real property by a continuing trespass or by a technical trespass such as overflights of aircraft.

(l) Claims for loss of rental fee for personal property.

(m) Claims in litigation against the United States.

(n) Claims for a maritime occurrence covered under U.S. admiralty laws.

(o) Claims for:

(1) Any tax or customs duty.

(2) The detention of any goods or merchandise by any officer of customs, excise, or law enforcement officer.

(p) Claims from an act or omission of any employee of the Government while administering the provisions of the Trading With the Enemy Act.

(q) Claims for damages caused by the United States' imposition or establishment of a quarantine.

(r) Claims for libel, slander, misrepresentation, deceit or interference with contract rights.

(s) Claims that result wholly from the negligent or wrongful act of the claimant or the claimant's agent.

(t) Claims for reimbursement of medical, hospital, or burial expenses furnished at the expense of the United States, any state, the District of Columbia, or Puerto Rico.

(u) Claims for damage from floods or flood waters.

(v) Claims for damages caused by the fiscal operations of the Treasury or by regulation of the monetary system.

(w) Claims caused by the negligent or wrongful acts or omissions of ANG members acting within the scope of their employment, while performing duty under 32 U.S.C., on or after 29 December 1981.

(x) Claims caused by the negligent or wrongful acts or omissions of ANG technicians employed under 32 U.S.C. 709.

§ 842.111 Applicable law.

(a) *Extent of liability.* The following rules apply to determine the extent of liability of a claim.

(1) Claims arising in the United States. The law of the place where the act or omission occurs governs liability. The local law on dangerous instrumentalities, assumption of risk, res ipsa loquitur, last clear chance, discovered peril, and comparative and contributory negligence are considered. Absolute liability is never imposed.

(2) Claims arising in foreign countries. The general principles of tort law common to the majority of American jurisdictions as evidenced by Federal case law and standard legal publications, control liability, except that absolute liability is not imposed. However, the law of the place where the act or omission occurs governs the effect of the claimant's comparative or contributory negligence. Where applicable, rules of the road and similar locally prescribed standards of care are followed to determine fault.

Note: ANG personnel ordered to foreign countries proceed under title 10, U.S.C.; consequently, the National Guard Claims Act would not apply. However, there may be cases where ANG personnel are inadvertently in a foreign country while on title 32, U.S.C. orders.

(b) *Measure of damages.* The following rules apply to the measurement of damages.

(1) Normally, the law of the place where the act or omission occurs is applied. In claims arising in foreign countries, the measure of damages is determined in accordance with general principles of American tort law.

(2) Damages in suits against private persons are apportioned if local law applies comparative negligence.

(3) Proceeds from private insurance policies are not deducted except to the extent the policy was paid by the Government or is allowed by local law.

(4) Compensation and benefits from any U.S. Government associated source are deducted. However, sick and annual leave payments are deducted only if allowed by local law.

(5) The following are not payable:

(i) Punitive damages.

(ii) Cost of medical or hospital services furnished at U.S. expense.

(iii) Cost of burial expenses paid by the United States, any territory or possession, any state, or the District of Columbia.

(c) *Settlement by insurer or joint tort-feasor.* When settlement is made by an insurer or joint tort-feasor and an additional award is warranted, an award is made if:

(1) The United States is not protected by the release executed by the claimant.

(2) The total amount received from such source is first deducted.

§ 842.112 Appeal of final denials.

This paragraph explains the steps to take when a denial is appealed.

(a) A claimant may appeal the final denial of the claim. The claimant sends the request, in writing, to the initial settlement authority within a reasonable time following the final denial. Sixty days is considered a reasonable time, but the time limit may be waived for good cause.

(b) The initial settlement authority reviews the appeal.

(c) Where the settlement authority does not reach a final agreement with the claimant on an appealed claim, the entire claim file is sent to the next higher settlement authority, who is the appellate authority for that claim.

(d) The decision of the appellate authority is the final administrative action on the claim.

§ 842.113 Government's right of subrogation, indemnity, and contribution.

The Air Force becomes subrogated to the rights of the claimant upon settling a claim. The Air Force has the rights of contribution and indemnity permitted by the law of the situs or under contract. Contribution or indemnity is not sought from ANG members whose conduct gave rise to Government liability.

§ 842.114 Attorney fees.

In the settlement of any claim pursuant to 32 U.S.C. 715 and this subpart, attorney fees will not exceed 20 percent of any award. For the purposes of this paragraph, an award is deemed to be the cost to the United States at the time of purchase of a structured settlement, and not its future value.

Subpart N—Hospital Recovery Claims (42 U.S.C. 2651-2653)

§ 842.115 Scope of this subpart.

This subpart explains how the United States asserts and settles claims for costs of medical care, against third parties under the Federal Medical Care Recovery Act (FMCRA) and various other laws.

§ 842.116 Definitions.

This paragraph defines terms which are used within this subpart.

(a) *Base Staff Judge Advocate (SJA).* The SJA of the base providing legal services to the Air Force medical facility which furnished initial medical care to the injured party is responsible for processing the hospital recovery claim. If an Air Force facility did not furnish the initial medical care, the SJA of the Air Force base within the claims jurisdiction of the initial treating facility is responsible for processing the claim.

(b) *Compromise.* A mutually binding agreement where payment is made and accepted in an amount less than the full amount of the claim.

(c) *Injured party.* The person who received medical care for injury or disease as a result of the incident on which the claim is based. The injured party may be represented by a guardian, personal representative, estate, or survivor.

(d) *Medical care.* Includes medical and dental treatment, prostheses, and medical appliances the US furnished or reimbursed other sources for providing.

(e) *Reasonable value of medical care.* Either:

(1) An amount determined by reference to rates set by the Director of the Office of Management and Budget for the value of necessary medical care in US medical facilities.

(2) The actual cost of necessary care from other sources which was reimbursed by the United States.

(f) *Third party.* An individual, partnership, business, corporation (including insurance carriers), which is indebted to the United States for medical care provided to an injured party. (In some cases, a state or foreign government can be the third party.)

(g) *Waiver.* The voluntary relinquishment by the United States of the right to collect for medical care provided to an injured party.

§ 842.117 Delegations of authority.

(a) *Settlement authority:* (1) The following individuals have delegated authority to settle, compromise, or waive claims for $40,000 or less and to accept full payment on any claim:

(i) The Judge Advocate General.

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(iv) Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(2) The SJA of HQ 9AF for CENTCOM, and SJAs of PACAF and USAFE have delegated authority to compromise or waive claims for $30,000 or less and to accept full payment on any claim.

(3) SJAs of single base GCMs, the SJAs of GMCs in PACAF and USAFE, and the SJAs of each Air Force base, station, or fixed installation have delegated authority to compromise or waive claims for $15,000 or less and to accept full payment on any claim.

(b) *Authority to assert a claim.* Each settlement authority has authority to assert a claim in any amount for the reasonable value of medical care.

(c) *Redelegation of authority.* A settlement authority may redelegate to a subordinate judge advocate or civilian attorney, in writing, his or her authority to assert, compromsie, or waive claims.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

(e) *Settlement negotiations.* A settlement authority may settle a claim filed for an amount within the delegated settlement authority. Claims in excess of the delegated authority must be approved by the next higher settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

Note: Telephonic approvals, in the discretion of the higher settlement authority, are authorized.

(f) *Special exceptions.* Only the Department of Justice (DOJ) may approve claims involving:

(1) Compromise or waiver of a claim for more than $40,000.

(2) Settlement previously referred to DOJ.

(3) Settlement where a third party files suit against the US or the injured party arising out of the same incident.

§ 842.118 Assertable claims.

A claim should be asserted when the Air Force has furnished or will furnish medical care in military health care facilities or when the Air Force is responsible for reimbursement to a private care provider and either of the following conditions are met:

(a) Third party liability in tort exists for causing an injury or disease.

(b) Local or foreign law permits the United States to recover or the United States is a third party beneficiary under uninsured motorist coverage, medical pay insurance coverage, worker's compensation, no-fault statutes, or other statutes.

A claim should only be asserted if the base SJA determines it merits assertion. Claims for $150 or less need not be asserted; they should be asserted only if the base SJA or designee determines the collection will not exceed the cost to collect, the third party offers payment and demands a release from the United States before paying damages to the injured party, or the United States asserts a property damage claim under subpart L arising out of the same incident.

§ 842.119 Nonassertable claims.

(a) The following are considered nonassertable claims and should not be asserted:

(1) Claims against any department, agency, or instrumentality of the United States. "Agency or instrumentality" includes any self-insured nonappropriated fund activity whether revenue producing, welfare, or sundry. The term does not include private associations.

(2) Claims for care furnished a veteran by the Department of Veterans Affairs (VA) for service connected disability. However, claims may be asserted for the reasonable value of medical care an Air Force member receives prior to his or her discharge and transfer to the VA facility.

(3) Claims for care furnished a merchant seaman under 42 U.S.C. 249. A claim against the seaman's employer should not be filed.

(b) Claims should not be asserted without HQ USAF/JACC's approval against:

(1) *Government contractors.* In claims in which the United States must reimburse the contractor for a claim according to the terms of the contract, an investigation into the claim is sent to HQ USAF/JACC by the base SJA. The file should contain recommendations regarding assertion and include citations to the specific contract clauses involved.

(2) *Foreign governments.* An investigation is made regarding any claim against foreign governments, their political subdivisions, armed forces members, or civilian employees. The claims files containing the investigation are sent to HQ USAF/JACC along with the base SJA's recommendations regarding assertion.

(3) *US personnel.* Claims are not asserted against members of the uniformed services; employees of the US, its agencies or instrumentalities; or an individual who is a dependent of a service member or employee at the time

of assertion unless liability insurance will pay the claim.

(4) Manufacturers of products in products liability cases.

§ 842.120 Asserting the claim.

When asserting the claim, the base SJA will:

(a) Assert it against the third parties whose liability is based in tort using an SF 96, Notice of Claim. Mail the original and one copy to each of the third parties and a copy to the third parties' insurers, if known.

(b) Assert it against third parties or insurers whose liability is not based in tort using a formal letter written on Air Force stationery. The letter will include the facts and legal basis for liability. Bases for liability could include local foreign law, US status as a third party beneficiary under uninsured or underinsured motorist coverage, workers' compensation laws, and no fault statutes. The specific provision of the injured party's insurance contract should be cited where appropriate.

(c) Mail all copies of the SF 96, or claim notice on Air Force letterhead:

(1) By certified mail with return receipt requested in all claims in which the amount claimed is $5,000.00 or more or in which there is a substantial likelihood that the final amount claimed will be $5,000.00 or more.

(2) By regular or certified mail with return receipt requested at the SJA's discretion in cases in which the final amount claimed is less than $5,000.00, unless there is no response to the initial notice of claim within a reasonable period of time and a second notice of claim is required to be mailed. All second notices of claim and copies will be mailed by certified mail, return receipt requested.

(d) Notify the injured parties promptly in writing that the United States will attempt to recover from the third parties the reasonable value of medical care furnished or to be furnished and that they:

(1) Should seek advice from a legal assistance officer or civilian counsel and furnish the civilian counsel's name to the claims officer.

(2) Must cooperate in the prosecution of all actions of the United States against third parties.

(3) Must furnish a complete statement regarding the facts and circumstances surrounding the incident which caused the injury.

(4) Must not execute a release or settle any claim which exists as a result of the injury without prior notice to the SJA.

(5) Should read the enclosed Privacy Act statement.

§ 842.121 Referring a claim to the US Attorney.

Only HQ USAF/JACC authorizes referral of a claim to the US Attorney. The base SJA ensures review of all claims not later than 2 years after the date of the incident. These unsettled claims are forwarded, with the base SJA's disposition recommendation, to HQ USAF/JACC.

Note: On a case-by-case basis, HQ USAF/JACC will authorize referral of a case to the US Attorney by telephone.

§ 842.122 Statute of limitations.

The United States or the injured party on behalf of the United States must file suit within 3 years after an action accrues. This is usually 3 years after the initial treatment is provided in a federal medical facility or after the initial payment is made by CHAMPUS, whichever is first.

§ 842.123 Recovery rates in government facilities.

The **Federal Register** contains the rates set by the Office of Management and Budget, of which judges take judicial notice. HQ USAF/JACC can provide certified copies of the **Federal Register** upon request. Apply the rates in effect at the time of care to claims.

§ 842.124 Waiver and compromise of United States interest.

Waivers and compromises of government claims can be made. This paragraph lists the basic guidance for each action. (See § 842.117(e) for claims involving waiver and compromise of amounts in excess of settlement authorities' delegated amounts.)

(a) Waiver for the convenience of the government can be made when the tort-feasor:

(1) Cannot be located.

(2) Is judgment proof.

(3) Has refused to pay and the case is too weak for litigation.

(b) Waiver can be made when collection causes undue hardhsip to the injured party. Ordinarily, factors such as the following should be considered:

(1) Permanent disability or disfigurement.

(2) Decreased earning power.

(3) Out of pocket losses.

(4) Financial status of injured party.

(5) Pension rights.

(6) Other government benefits to the injured party.

(7) An offer of settlement from a third party which includes virtually all the thirty party's assets, although the amount is considerably less than the calculation of the injured party's damages.

(c) A compromise can be made upon written request from the injured party or the injured party's legal representative when liability is questionable, the injured party received excessive treatment, or the litigation risks dictate, and either of the following occurs:

(1) The injured party accepts less than the jury verdict expectancy. When this occurs, the Air Force should consider settling its claim in a ratio similar to that which the total sttlement bears to the jury verdict expectancy.

(2) The government's claim is almost as large as, or is larger than, the assets available for settlement.

§ 842.125 Reconsideration of a waiver for undue hardship.

A settlement authority may reconsider its disapproval of a waiver or compromise, when either:

(a) The injured party submits new evidence.

(b) Errors exist in claim submission or settlement.

Subpart O—Nonappropriated Fund Claims

§ 842.126 Scope of this subpart.

This subpart describes how to settle claims for and against the United States for property damage, personal injury, or death arising out of the operation of Nonappropriated Fund Instrumentalities (NAFIs).

§ 842.127 Definitions.

(a) *Army and Air Force Exchange Service (AAFES).* The Army and Air Force Exchange Service is a joint command of the Army and Air Force, under the jurisdiction of the Chiefs of Staff of the Army and Air Force, which provides exchange and motion picture services to authorized patrons.

(b) *Morale, welfare, and recreation (MWR) activities.* Air Force MWR activities are activities operated directly or by contract which provide programs to promote morale and well-being of the Air Force's military and civilian personnel and their dependents. They may be funded wholly with appropriated funds, primarily with nonappropriated funds (NAF), or with a combination of appropriated funds and NAFs.

(c) *Nonappropriated funds.* Nonappropriated funds are funds generated by Department of Defense military and civilian personnel and their dependents and used to augment funds appropriated by the Congress to provide a comprehensive morale-building, welfare, religious, educational, and recreational program, designed to

improve the well-being of military and civilian personnel and their dependents.

(d) *Nonappropriated funds instrumentality.* A nonappropriated fund instrumentality is a Federal government instrumentality established to generate and administer nonappropriated funds for programs and services contributing to the mental and physical well-being of personnel.

§ 842.128 Delegations of authority.

(a) *Settlement authority:* (1) Each individual has the same delegated authority to settle a claim for which NAFs may be liable as that specified for a similar type claim in each subpart of this part. The decision of the settlement authority is binding upon the NAFI.

(2) The Judge Advocate General, in addition, has delegated authority to settle subpart F, G, and J type claims in any amount without referral to the Secretary of the Air Force or the General Accounting Office.

(3) The Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff, in addition, have delegated authority to settle subpart F, G, and J type claims for $100,000 or less without referral to the Secretary of the Air Force or the General Accounting Office.

(b) *Redelegation of authority.* A settlement authority may redelegate settlement authority to a subordinate judge advocate or civilian attorney, in writing.

(c) *Appellate authority.* Upon appeal, a settlement authority has the same authority specified in § 842.128(a). The Judge Advocate General is the final appellate authority on subpart F type claims without right of further appeal to the Secretary of the Air Force. However, no appellate authority below The Judge Advocate General may deny an appeal of a claim it had previously denied.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

(e) *Settlement negotiations.* A settlement authority may settle a claim filed in any amount for a sum within its delegated authority. Send unsettled claims in excess of the delegated authority to the level with settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

§ 842.129 Settlement of claims against NAFIs.

(a) This subpart does not establish legal theories for adjudication of claims. Refer to the appropriate subpart to decide whether a claim is payable (e.g., subpart D for personnel claims; subpart K for tort claims), then use the rules in this subpart to decide the appropriate funds for payment of any approved claim.

(b) Claims arising from property damage to or loss from vehicles or loss of personal items stored in base MWR facilities will be evaluated under the normal rules applied by the appropriate subpart of this part, and paid using the rules in those subparts. Examples include recreational vehicles stored in authorized lots and used cars parked in onbase sales lots. One exception to this rule is the exclusion of personal items stolen from onbase gym lockers (discussed below).

(1) If a NAF fee has been charged in connection with the use of the storage location, a determination must be made on the nature of the fee charged. If the fee does no more than reimburse NAF costs in administering or maintaining the storage location, subpart O of this part applies in addition to other appropriate subparts. If the fee is set to generate a profit for the NAFI involved or if it is collected in accordance with the terms of an agreement, express or implied, under which the NAFI represents that it will provide some degree of security or safeguarding of the property, the claim will be paid with NAF funds.

(2) Normally, theft of items from gym lockers will be paid out of appropriated funds providing there is affirmative evidence of theft. Mysterious loss of property will not be paid and, in no case, will a claim be paid in excess of $250.

§ 842.130 Payment of claims against NAFIs.

Substantiated claims against NAFIs must not be paid solely from appropriated funds. Claims are sent for payment as set out in this subpart. Do not delay paying a claimant because doubt exists whether to use appropriated funds or NAFs. Pay the claim initially from appropriated funds and decide the correct funding source later.

§ 842.131 Tort and tort type claims.

(a) *Claims within the scope of this subpart.* Claims which are within the scope of this subpart are those arising out of the operation of an MWR activity and are caused by:

(1) Civilian employees paid by a NAFI acting in the scope of their employment.

(2) Military personnel or appropriated fund civilian employees performing part-time duties for a NAFI for which a NAFI is paying.

(3) Negligent operation or condition of premises for which a NAFI is responsible.

(4) Members or authorized users of NAFI property. Such claims are subject to this subpart if the individual is a member of an MWR membership association or an authorized user of NAFI property and the use is in accord with applicable rules.

(b) *Claims not within the scope of this subpart.* Claims are not payable within the scope of this subpart if they arise out of the operation of an MWR activity supported by a NAFI and are caused by:

(1) Military personnel or appropriated fund civilian employees performing assigned Air Force duties, even though they benefit a NAFI.

(2) Negligent operation or condition of premises for which a NAFI is not responsible.

§ 842.132 Claims by NAFI employees.

Claims made by NAFI employees should be settled within the guidelines of this paragraph.

(a) *Personal injury in performance of duty and workers' compensation claims.* Claims for injuries arising out of performance of duty and workers' compensation claims are not within the scope of this subpart because the exclusive remedy is one of the following.

(1) Longshore and Harbor Workers' Compensation Act. This Act applies to NAFI civilian employees in the United States, its territories and possessions, and US citizen and resident NAFI civilian employees abroad.

(2) Local benefits for foreign national employees abroad.

(3) Military benefits because the injury is incident to service for offduty military personnel.

(b) *Property loss or damage incident to NAFI employment.* Claims for loss or damage to property incident to NAFI employment are settled under subpart D. Where appropriate, liability is computed, and initial demand is made upon the carrier, warehouse, or insurer, directing them to send further correspondence to the NAFI paying the claim.

§ 842.133 Claims by customers, members, participants, or authorized users.

(a) *Customer complaints.* Do not automatically adjudicate customer complaint claims until a determination is made that a valid claim exists. Complaints and personal property losses suffered by customers of MWR sales or service operations are normally not within the scope of this subpart. Customer complaints may not be claims at all. They may be no more than

expressions of customer dissatisfactions. The activity manager is responsible for adjudicating and satisfying or otherwise disposing of a customer's complaint according to applicable NAFI regulations. Where possible, the activity manager resolves them by reimbursement, repair, or replacement in kind. However, if a complaint involving a claim cannot be satisfactorily settled under those procedures or includes a demand for consequential damage (such as for personal injury or property damage to other than the article purchased or serviced), process it as a tort claim.

(b) *Claims generated by concessionaires.* Most concessionaires must have commercial insurance. Any unresolved claims or complaints against concessionaires or their insurers are sent to the appropriate contracting officers.

§ 842.134 Claims in favor of NAFIs.

(a) *Tort claims.* Use the procedures set forth in subpart J or L, as appropriate.

(b) *Contract claims.* See AFR 176–9 or AFR 147–14, as appropriate.

(c) *Claims involving dishonored checks and debts to NAFIs.* See AFR 176–2 and 176–10 or AFR 147–14, as appropriate.

(d) *Third Party Workers' Compensation Claims.* NAF employees are provided workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. 901, *et seq.*) as extended by the Nonappropriated Fund Instrumentalities Act (5 U.S.C. 8171–8173). For injuries suffered by NAFI employees in the course and scope of their employment where third parties are responsible for the injuries, the employing NAFIs are entitled to recover from the responsible third parties for the compensation and medical benefits paid to the injured employees (33 U.S.C. 933). Third party claims are pursued on behalf of employing NAFIs by the servicing staff judge advocate. A NAFI also has the right of offset against an employee's pay amounts recovered directly by the employee from third parties as provided in the LHWCA.

§ 842.135 Advance payments.

The procedures set out in subpart Q should be used for advance payments. Do not delay paying a claimant because doubt exists whether to use appropriated funds or NAFIs. Pay the claim initially from appropriated claim funds and decide the correct funding source later.

§ 842.136 Claim payments and deposits.

Unless otherwise specified in this subpart, claims for payment (in two copies), collected funds for deposit, and international agreement bills for reimbursement should be sent as follows:

(a) *AAFES:* (1) Employee personnel transportation (PT) claims payable for more than $2,500: HQ AAFES, Comptroller, Insurance Branch, P.O. Box 660202, Dallas TX 75266–0202.

(2) All other claims: The local AAFES manager.

(b) *Civilian base restaurants and civilian welfare NAFIs:* (1) For more than $100: Army and Air Force Civilian Welfare Fund, Washington, DC 20310.

(2) For $100 or less: The local NAFI giving rise to the claim.

(c) *All other NAFIs:* (1) For more than $50: HQ AFMPC/DPMSC1, Randolph AFB TX 78150.

(2) For $50 or less: The local NAFI giving rise to the claim.

(d) *International agreement claims, all NAFIs.* When a receiving state pays a claim under an international agreement, the NAFI involved, upon receipt of an extract copy of the itemized bill, will forward payment of its pro rata share to the sending State office.

Subpart P—Civil Air Patrol Claims (5 U.S.C. 8101(1)(B), 8102(a), 8116(c), 8141; 10 U.S.C. 9441, 9442; 36 U.S.C. 201–208)

§ 842.137 Scope of this subpart.

This subpart explains how to process certain administrative claims:

(a) Against the United States for property damage, personal injury, or death, arising out of Air Force noncombat missions performed by the Civil Air Patrol (CAP), as well as certain other Air Force authorized missions performed by the CAP in support of the Federal government.

(b) In favor of the United States for damage to US Government property caused by CAP members or third parties.

§ 842.138 Definitions.

(a) *Civil Air Patrol (CAP).* A federally chartered, non-profit corporation which was designated by Congress in 1948 as a volunteer civilian auxiliary of the Air Force.

(b) *Air Force noncombat mission.* Although not defined in any statute, an Air Force noncombat mission is any mission for which the Air Force is tasked, by statute, regulation, or higher authority, which does not involve actual combat, combat operations or combat training. The Air Force, in lieu of using Air Force resources, can use the services of the Civil Air Patrol to fulfill these type missions. When performing an Air Force noncombat mission, the Civil Air Patrol is deemed to be an instrumentality of the United States. In order for a mission to be a noncombat mission of the Air Force under this part, it must either:

(1) Have a special Air Force mission order assigned, and, the Air Force must exercise operational control over the mission.

(2) Involve a peacetime mission the Air Force is tasked to perform by higher authority which requires the expenditure of Air Force resources to accomplish, and the Air Force specifically approves the mission as a noncombat mission, and assigns the mission to the Civil Air Patrol to perform.

(c) *CAP members.* CAP members are private citizens who volunteer their time, services, and resources to accomplish CAP objectives and purposes. The two primary categories of members are:

(1) *Cadets.* Youths, 13 years (or having satisfactorily completed the sixth grade) through 17 years of age, who meet such prerequisites as the CAP corporation may establish from time to time. Cadet status may be retained until age 21.

(2) *Seniors.* Adults, 18 years of age or older (there is no maximum age), who meet such prerequisites as the CAP corporation may establish from time to time, and who have not retained cadet status.

(d) *Liaison officers.* Active duty Air Force officers assigned to liaison duty at the national, regional, and wing (state) levels of CAP.

§ 842.139 Delegations of authority.

The appropriate subpart of this part under which the claim is being considered prescribes the authority to settle it.

§ 842.140 Proper claimants.

(a) Anyone suffering property damage, personal injury, or death arising from an Air Force noncombat mission or other specified Air Force authorized mission performed by CAP, who is also a proper claimant under the appropriate subpart of this part.

(b) The United States, for claims arising out of activities of CAP caused by negligent acts or omissions of CAP members or third parties.

§ 842.141 Improper claimants.

CAP members, 18 years of age or older, whose personal injury or death claim is subject to the Federal Employees' Compensation Act, are

improper claimants. FECA is their exclusive remedy.

§ 842.142 Claims payable.

A claim is payable if all of the following are present:

(a) It is for property damage, personal injury, or death.

(b) It is proximately caused by a CAP member.

(c) It arises from an Air Force noncombat mission performed by the CAP, or arises from an authorized mission performed by the CAP for which specific coverage under this subpart is granted by HQ USAF/JACC.

(d) It is otherwise payable because it meets the provisions of an appropriate subpart of this part.

§ 842.143 Claims not payable.

A claim is not payable if it:

(a) Is for use or depreciation of privately owned property, operated by CAP or its members on an Air Force noncombat mission, or other specified Air Force authorized mission.

(b) Is for personal services or expenses incurred by CAP or its members while engaged in an Air Force noncombat mission, or other specified Air Force authorized mission.

(c) Arises out of a CAP incident based solely on government ownership of property on loan to CAP.

(d) Arises from a CAP activity not performed as a noncombat mission of the Air Force or as a specified Air Force authorized mission. These claims are sent to HQ CAP-USAF/JA for referral to CAP's private insurer, with a copy of the transmittal letter to HQ USAF/JACC.

Subpart Q—Advance Payments (10 U.S.C. 2736)

§ 842.144 Scope of this subpart.

It tells how to make an advance payment before a claim is filed or finalized under the Military Claims, Foreign Claims and National Guard Claims Acts.

§ 842.145 Delegation of authority.

(a) The Secretary of the Air Force has authority to make an advance payment of $100,000 or less.

(b) The Judge Advocate General has delegated authority to make an advance payment of $100,000 or less.

(c) The following individuals have delegated authority to make an advance payment of $25,000 or less:

(1) The Deputy Judge Advocate General.

(2) The Director of Civil Law.

(3) The Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(4) SJA of 9AF for CENTCOM, and the SJAs of PACAF and USAFE.

(d) This authority may be redelegated either orally or in writing. Oral redelegations should be confirmed in writing as soon as practical.

§ 842.146 Who may request.

A proper claimant or authorized agent may request an advance payment.

§ 842.147 When authorized.

Make advance payments only where all of the following exist:

(a) The potential claimant could file a valid claim for property damage or personal injury under the Military Claims, Foreign Claims, or National Guard Claims Acts.

(b) The potential claimant has an immediate need amounting to a hardship for food, shelter, medical or burial expenses, or other necessities. In the case of a commercial enterprise, severe financial loss or backruptcy will result if the Air Force does not make an advance payment.

(c) Other resources for such needs are not reasonably available.

(d) The potential claim equals or exceeds the amount of the advance payment.

(e) The recipient signs as advance payment agreement.

§ 842.148 When not authorized.

Do not make an advance payment if the claim is payable under the:

(a) Federal Tort Claims Act.

(b) International Agreement Claims Act.

(c) Military Personnel and Civilian Employees' Claims Act. (Separate regulations issued under the Act provide for partial payments.)

§ 842.149 Separate advance payment claims.

Every person suffering injury or property loss may submit a separate request for an advance payment. For example, where the Air Force destroys a house containing a family of four, each family member may submit a separate request for and receive an advance payment of $100,000 or less.

§ 842.150 Liability for repayment.

The claimant is liable for repayment. Deduct the advance payment from any award or judgment given to a claimant. Reimbursement from the claimant will be sought if the claimant does not file a claim or lawsuit.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 90-1764 Filed 1-26-90; 8:45 am]

BILLING CODE 3910-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[PP7F3510/R1051; FRL-3683-6]

Pesticide Tolerance for Iprodione

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document establishes tolerances for the fungicide iprodione in or on strawberries at 15.0 parts per million (ppm). This regulation to establish the maximum permissible level for residues of iprodione in or on the raw agricultural commodity was requested by Rhone-Poulenc, Inc.

EFFECTIVE DATE: Effective on December 22, 1989.

ADDRESSES: Written objections, identified by the document control number, [PP7F3510/R1051], may be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Susan T. Lewis, Product Manager (PM) 21, Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 227, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-1900.

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the Federal Register of May 13, 1987 (52 FR 18020), which announced that Rhone-Poulenc, Inc., P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, had submitted a pesticide petition (7F3510) proposing to amend 40 CFR 180.399 to establish tolerances for the combined residues of the fungicide iprodione, 3-(3,5-dichlorophenyl)-N-(1-methylethyl)-2,4-dioxo-1-imidazolidinecarboxamide, its isomer [3-(1-methylethyl)-N-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboxamide], and its metabolite [3-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboxamide] in or on strawberries at 15.0 ppm.

There were no comments or requests for referral to an advisory committee received in response to the notice of filing.

The data submitted in the petition and other relevant material have been evaluated. The data considered include:

1. A three-generation rat reproduction study using dosage levels of 0, 250, 500, and 2,000 ppm with a no-observed-effect

level (NOEL) of 500 ppm (25 milligrams/kilogram [mg/kg] body weight [bwt]/day), a reproductive lowest effect level (LEL) of 2,000 ppm (100 mg/kg bwt/day), and a systemic NOEL equal to or greater than 2,000 ppm (100 mg/kg bwt/day);

2. A rabbit developmental toxicity study in which the following doses were administered by gavage: 0, 20, 60, and 200 mg/kg bwt, resulting in a developmental toxicity NOEL equal to or greater than 60 mg/kg bwt, and an LEL of 200 mg/kg bwt.

3. A rat developmental toxicity study in which the following doses were administered by gavage: 0, 40, 90, and 200 mg/kg bwt, with a developmental toxicity NOEL equal to 90 mg/kg/bwt, and an LEL of 200 mg/kg bwt.

4. A 24-month feeding/oncogenicity study in rats using dosage levels of 125, 250, and 1,000 ppm (6.25, 12.5, and 50 mg/kg bwt/day), which showed no oncogenic effects under the conditions of the study;

5. An 18-month oncogenicity study in mice using dosage levels of 200, 500, and 1,250 ppm (28.6, 71.4, and 178.6 mg/kg bwt/day), which showed no oncogenic effects under the conditions of the study.

6. A 1-year dog feeding study using dosage levels of 100, 600, and 3,600 ppm (4.2, 15, and 90 mg/kg bwt/day) with a NOEL of 100 ppm (4.2 mg/kg bwt/day) and an LEL of 600 ppm (15 mg/kg bwt/day).

7. A 90-day feeding study in dogs using dosage levels of 800, 2,400, and 7,200 ppm (20, 60, and 180 mg/kg bwt/day) with a NOEL of 2,400 ppm (60 mg/kg bwt/day) and an LEL of 7,200 ppm (180 mg/kg bwt/day).

Data currently lacking is an appropriate animal metabolism study. The registrant is to be submitting this study to the Agency by the end of 1989.

Based on the NOEL of 4.2 mg/kg bwt/day in the 1-year dog feeding study, and using a hundredfold uncertainty factor, the acceptable daily intake (ADI) for iprodione is calculated to be 0.04 mg/kg bwt/day. The theoretical maximum residue contribution (TMRC) of 0.046728 mg/kg bwt/day was calculated for existing tolerances for the overall U.S. population. The current action will increase the TMRC by 0.000521 mg/kg bwt/day (1 percent of the ADI). This tolerance and previously established tolerances utilize a total of 118 percent of the ADI for the overall U.S. population, assuming that residue levels are at the established tolerances and that 100 percent of the crop is treated.

The Agency believes that actual residues to which the public is likely to be exposed are considerably less than indicated by the TMRC for the following reasons:

1. Not all the planted crop for which a tolerance is established is normally treated with the pesticide.

2. Most treated crops have residue levels which are below the established tolerance level.

To take these factors into account, the Agency used anticipated residues (estimates of actual residues for pesticides found on food at time of consumption), and percent of crop treated for the ADI analysis.

Following this adjustment, the estimate of total exposure from previously established tolerances plus the proposed tolerance is 0.013004 mg/kg bwt/day and utilizes 32.5 percent of the ADI for the overall U.S. population.

There are no regulatory actions pending against the registration of iprodione. The pesticide is useful for the purpose for which the tolerance is sought. The metabolism of iprodione in plants and animals, except for an appropriate toxicology laboratory animal metabolism study as noted above, is adequately understood. An analytical method, gas liquid chromatography using an electron-capture detector, is available in the Pesticide Analytical Manual, Vol. II, for enforcement purposes.

Based on the information cited above, the Agency has determined that the establishment of this tolerance for residues of iprodione will protect the public health. Therefore, the tolerance is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

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

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 22, 1989.

Douglas D. Campt,

Director, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In § 180.399(a), by adding and alphabetically inserting the raw agricultural commodity, to read as follows:

§ 180.399 Iprodione.

(a) * * *

Commodities	Parts per million
* * * * *	
Strawberries	15.0
* * * * *	

* * * * *

[FR Doc. 90-1958 Filed 01-26-90; 8:45 am]

BILLING CODE 6560-50-D

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 6860]

Suspension of Community Eligibility; Connecticut, et al.

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If FEMA receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this

rule, the suspension will be withdrawn by publication in the **Federal Register**.

EFFECTIVE DATE: The third date ("Susp.") listed in the third column.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646–2717, Federal Center Plaza, 500 C Street Southwest, Room 417, Washington, DC 20472.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4022), prohibits flood insurance coverage as authorized under the National Flood Insurance Program (42 U.S.C. 4001–4128) unless an appropriate public body shall have adopted adequate floodplain management measures with effective enforcement measures. The communities listed in this notice no longer meet that statutory requirement for compliance with program regulations (44 CFR part 59 et seq.). Accordingly, the communities will be suspended on the effective date in the fourth column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**. In the interim, if you wish to determine if a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Hazard Boundary Map. The date of the flood map if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Disaster Relief Act of 1974 not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas. (Section 202(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), as amended.) This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column.

The Administrator finds that notice and public procedure under 5. U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. For the same reasons, this final rule may take effect within less than 30 days.

Pursuant to the provision of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, FEMA, hereby certifies that this rule if promulgated will not have a significant economic impact on a substantial number of small entities. As stated in section 2 of the Flood Disaster Protection Act of 1973, the establishment of local floodplain management together with the availability of flood insurance decreases the economic impact of future flood losses to both the particular community and the nation as a whole. This rule in and of itself does not have a significant economic impact. Any economic impact results from the community's decision not to (adopt) (enforce) adequate floodplain management, thus placing itself in noncompliance of the Federal standards required for community participation. In each entry, a complete chronology of effective dates appears for each listed community.

List of Subjects in 44 CFR Part 64

Flood insurance—floodplains.

1. The authority citation for part 64 continues to read as follows:

PART 64—[AMENDED]

Authority: 42 U.S.C. 4001 et seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

§ 64.6 List of Eligible Communities.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Regular Program Conversions.				
Region I				
Connecticut: Chester, town of, Middlesex County	090060	Jan. 12, 1973, Emerg.; July 16, 1980, Reg.; Feb. 2, 1990, Susp.	Feb. 2, 1990	Feb. 2, 1990.
Region III				
Pennsylvania:				
Clifton, township of, Lackawanna County	421751	Apr. 11, 1980, Emerg.; Feb. 2, 1990, Reg.; Feb. 2, 1990, Susp.	do	Do.
Elmhurst, town of, Lackawanna County	421752	July 6, 1979, Emerg.; Feb. 2, 1990, Reg.; Feb. 2, 1990, Susp.	do	Do.
Girardville, borough of, Schuylkill County	420772	Apr. 29, 1975, Emerg.; Feb. 2, 1990, Reg.; Feb. 2, 1990, Susp.	do	Do.
Washington, township of, Schuylkill County	422506	Apr. 4, 1979, Emerg.; Feb. 2, 1990, Reg.; Feb. 2, 1990, Susp.	do	Do.
Weissport, borough of, Carbon County	420256	May 30, 1974, Emerg.; Feb. 2, 1990, Reg.; Feb. 2, 1990, Susp.	do	Do.
West Penn, township of Schuylkill County,	422029	Apr. 3, 1979, Emerg.; Feb. 2, 1990, Reg.; Feb. 2, 1990, Susp.	do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Virginia: Craig County, unincorporated areas	510313	Aug. 12, 1975, Emerg.; Feb. 2, 1990, Reg.; Feb. 2, 1990, Susp.	do	Do.
Region IV				
Georgia: Wayne County, unincorporated areas	130417	Dec. 31, 1975, Emerg.; Sept. 30, 1988, Reg.; Feb. 2, 1990, Susp.	do	Do.
Region VII				
Missouri: Osage County, unincorporated areas	290268	June 20, 1983, Emerg.; Feb. 2, 1990, Reg.; Feb. 2, 1990, Susp.	do	Do.
Region I				
Rhode Island: Cumberland, town of, Providence County.	440016	July 15, 1975, Emerg.; Dec. 16, 1980, Reg.; Feb. 16, 1990, Susp.	Feb. 16, 1990	Feb. 16, 1990.
Region II				
New York: Catskill, town of, Greene County	361116	July 25, 1975, Emerg.; Feb. 16, 1980, Reg.; Feb. 16, 1990, Susp.	do	Do.
Region III				
West Virginia:				
Camden-on-Gauley, town of, Webster County	540205	Aug. 6, 1975, Emerg.; Aug. 24, 1984, Reg.; Feb. 16, 1990, Susp.	do	Do.
Webster County, unincorporated areas	540203	Dec. 2, 1975, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.
Webster Springs, city of, Webster County	540204	May 13, 1975, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.
Region IV				
Georgia:				
Monroe, city of, Walton County	130227	Mar. 26, 1975, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.
Walton County, unincorporated areas	130185	Mar. 22, 1976, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.
Whitfield County, unincorporated areas	130193	Apr. 18, 1974, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.
Mississippi: Jones County, unincorporated areas	280222	Mar. 20, 1975, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.
Region V				
Michigan:				
Lapeer, township of, Lapeer County	260435	Apr. 26, 1982, Emerg.; June 15, 1979, Reg.; Feb. 16, 1990, Susp.	do	Do.
Mayfield, township of, Lapeer County	260436	Aug. 10, 1982, Emerg.; Mar. 10, 1982, Reg.; Feb. 16, 1990, Susp.	do	Do.
Region VI				
Oklahoma: Seminole County, unincorporated areas	400497	Dec. 11, 1984, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.
Texas: Whitney, city of, Hill County	480865	July 20, 1977, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.
Region VIII				
Colorado: Rio Blanco County, unincorporated areas	080288	Nov. 23, 1984, Emerg.; Feb. 16, 1990, Reg.; Feb. 16, 1990, Susp.	do	Do.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension; Rein.—Reinstatement.

Issued: January 17, 1990.

Harold T. Duryee,

Administrator, Federal Insurance Administration.

[FR Doc. 90-1932 Filed 1-26-90; 8:45 am]

BILLING CODE 6718-21-M

44 CFR Part 64

[Docket No. FEMA 6859]

List of Communities Eligible for the Sale of Flood Insurance; New Mexico

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: This rule lists communities participating in the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain floodplain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of property located in the communities listed.

EFFECTIVE DATES: The dates listed in the third column of the table.

ADDRESS: Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program (NFIP) at: Post Office Box 457, Lanham, Maryland 20706, Phone: (800) 638-7418.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646-2717, Federal Center Plaza, 500 C Street SW., Room 417, Washington, DC 20472.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and

administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Since the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for property in the community.

In addition, the Director of the Federal Emergency Management Agency has identified the special flood hazard areas in some of these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the fourth column of the table. In the communities listed where a flood map has been published, Section 102 of the Flood Disaster Protection Act of 1973, as amended, requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the special flood hazard area shown on the map.

The Director finds that the delayed effective dates would be contrary to the public interest. The Director also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

The Catalog of Domestic Assistance Number for this program is 83.100 "Flood Insurance."

Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule, if promulgated will not have a significant economic impact on a substantial number of small entities. This rule provides routine legal notice stating the community's status in the NFIP and imposes no new requirements or regulations on participating communities.

List of Subjects in 44 CFR Part 64

Flood insurance and floodplains.

PART 64—[AMENDED]

1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*, Reorganization Plan No. 3 of 1978, E.O. 12127.

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

In each entry, a complete chronology of effective dates appears for each listed community. The entry reads as follows:

§ 64.6 List of eligible communities.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date
New Eligibles—Emergency Program			
New Mexico: Hidalgo County, Unincorporated Areas	350025	Dec. 19, 1989, Emerg	
North Carolina: Ranlo, Town of, Gaston County	370324		6-27-75
Texas: Farmersville, City of, Collin County	480755	Dec. 29, 1989	
New Eligibles—Regular Program			
Texas: West Keegans Bayou Improvement District, Fort Bend County [1].	481602	Aug. 18, 1986, Emerg.; August 18, 1986, Reg	8-5-86
Reinstatements—Regular Program			
New York:			
Bradford, Town of, Steuben County	361207	Aug. 8, 1977, Emerg.; Sept. 24, 1984, Reg.; Sept. 16, 1988, Susp.; Dec. 5, 1989, Rein.	9-24-84
Alabama, Town of, Genesee County	361067	June 18, 1976, Emerg.; Nov. 18, 1983, Reg.; Sept. 16, 1988, Susp.; Dec. 5, 1989, Rein.	11-18-83
Pennsylvania:			
Pike, Township of, Clearfield County	421190	Dec. 3, 1979, Emerg.; Sept. 15, 1989 Reg.; Sept. 15, 1989, Susp.; Dec. 7, 1989, Rein.	9-15-89
West Buffalo, Township of, Union County	422106	June 4, 1979, Emerg.; Sept. 30, 1987, Reg.; Sept. 30, 1987, Susp.; Dec. 11, 1989, Rein.	9-30-87
Nebraska: Amherst, Village of, Buffalo County	310245	June 4, 1975, Emerg.; Sept. 27, 1985, Reg.; Sept. 6, 1989, Susp.; Dec. 13, 1989, Rein.	9-27-85
Florida: Orchid, Town of, Indian River County	120122	July 24, 1975, Emerg.; May 4, 1980, Reg.; June 19, 1989, Susp.; Dec. 11, 1989, Rein.	5-4-89
Pennsylvania:			
Bristol, Borough of, Bucks County	420183	Sept. 15, 1972, Emerg.; Dec. 18, 1979, Reg.; Aug. 3, 1989, Susp.; Dec. 28, 1989, Rein.	12-18-79
Creekside, Borough of, Indiana County	420499	Sept. 10, 1975, Emerg.; Dec. 5, 1989, Reg.; Dec. 5, 1989, Susp.; Dec. 28, 1989, Rein.	12-5-89
Scalp Level, Borough of, Cambria County	420237	Apr. 19, 1976, Emerg.; Oct. 17, 1986, Reg.; Oct. 17, 1986, Susp.; Aug. 25, 1987, Rein.	10-17-86
Withdrawal—Regular Program			
Texas: Frankston, City of, Anderson County	480003	Feb. 1, 1977, Emerg.; June 1, 1988, Reg.; June 1, 1988, Susp.; July 1, 1988, Rein.; Dec. 13, 1989, Withdrawn.	6-1-88
Regular Program Conversions—Region I			
Maine: Millinocket, Town of, Penobscot County	230111	Dec. 5, 1989, Suspension Withdrawn	12-5-89
Region III			
Pennsylvania:			
Green, Township of, Indiana County	421718	do	12-5-89
Morris, Township of, Clearfield County	421529	do	12-5-89
Petrolia, Borough of, Butler County	420221	do	12-5-89
Walker, Township of, Schuylkill County	422026	do	12-5-89
Weatherly, Borough of, Carbon County	420255	do	12-5-89
Region V			
Illinois: Muddy, Village of, Saline County	170599	do	12-5-89
Wisconsin:			
Shawano, City of, Shawano County	550421	do	12-5-89
Eleva, Village of, Trempealeau County	550441	do	12-5-89

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date
Region X			
Oregon: Lake County, Unincorporated Areas	410115	.....do	12-5-89
Washington: Clallam County, Unincorporated Areas	530021	.....do	12-5-89
Region III			
Pennsylvania: Hyndman, Borough of, Bedford County	420121	Dec. 15, 1989, Suspension Withdrawn	12-15-89
Virginia: Wise County, Unincorporated Areas	510174	.....do	12-15-89
Region IV			
Georgia: Fitzgerald, City of, Ben Hill County	130007	.....do	12-15-89
North Carolina:			
Moore County, Unincorporated Areas	370164	.....do	12-15-89
Pinebluff, Town of, Moore County	370337	.....do	7-17-86
Region V			
Wisconsin: Park Falls, City of, Price County	550344	.....do	12-15-89
Ohio:			
Paulding County, Unincorporated Areas	390777	.....do	12-5-89
Waupaca, City of, Waupaca County	550502	.....do	12-5-89
Region VII			
Kansas:			
Jackson County, Unincorporated Areas	200147	.....do	12-15-89
Parsons, City of, Labette County	200184	.....do	12-15-89
Missouri: Bolivar, City of, Polk County	290299	.....do	12-15-89

[1] Adopted by reference Fort Bend County's FIRM for floodplain management and insurance purposes.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspenson.

Issued: January 12, 1990.

Harold T. Duryee

Administrator, Federal Insurance Administration.

[FR Doc. 90-1933 Filed 1-26-90; 8:45 am]

BILLING CODE 6718-21-M

44 CFR Part 65

Changes in Flood Elevation Determinations; Connecticut et al.

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: Modified base (100-year) flood elevations are finalized for the communities listed below.

These modified elevations will be used in calculating flood insurance premium rates for new buildings and their contents and for second layer coverage on existing buildings and their contents.

DATES: The effective dates for these modified base flood elevations are indicated on the following table and amend the Flood Insurance Rate Map(s) (FIRM) in effect for each listed community prior to this date.

ADDRESSES: The modified base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed on the following table.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Matticks, Chief, Risk Studies Division, Federal Insurance Administration, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-2767.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency gives notice of the final determinations of modified flood elevations for each community listed. These modified elevations have been published in newspaper(s) of local circulation and ninety (90) days have elapsed since that publication. The Administrator has resolved any appeals resulting from this notification.

Numerous changes made in the base (100-year) flood elevations on the FIRMs for each community make it administratively infeasible to publish in this notice all of the changes contained on the maps. However, this rule includes the address of the Chief Executive Officer of the community, where the modified base flood elevation determinations are available for inspection.

The modifications are made pursuant to section 206 of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234) and are in accordance with the National Flood Insurance Act of 1968, as amended (Title XIII of the Housing and Urban Development Act of 1968, (Pub. L. 90-448), 42 U.S.C. 4001-4128, and 44 CFR part 65.

For rating purposes, the revised community number is shown and must be used for all new policies and renewals.

The modified base (100-year) flood elevations are the basis for the floodplain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or to remain qualified for participating in the National Flood Insurance Program.

These modified elevations, together with the floodplain management measures required by 60.3 of the program regulations, are the minimum that are required. They should not be construed to mean that the community must change requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State or regional entities.

These modified base flood elevations shall be used to calculate the appropriate flood insurance premium rates for new buildings and their contents and for second layer coverage on existing buildings and their contents.

The changes in the base flood elevations are in accordance with 44 CFR 65.4.

Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This rule provides routine legal notice of technical amendments made to designated special flood hazard areas on the basis of updated information and imposes no new requirements or

regulations on participating communities.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains.

PART 65—[AMENDED]

1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

§ 65.4 [Amended]

2. Section 65.4 is amended by adding in alphabetical sequence new entries to the table.

State and county	Location	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Connecticut: Fairfield (FEMA Docket No. 6961).	City of Stamford	July 10, 1989 and July 17, 1989, *The Advocate.*	Hon. Thom Serrani, Mayor of the City of Stamford, Fairfield County, 888 Washington Boulevard, P.O. Box 10152, Stamford, Connecticut 06904-2152.	June 23, 1989	090015 C
Iowa: Des Moines (Docket No. FEMA-6967).	City of Burlington	Sept. 21, 1989 and Sept. 28, 1989, *The Hawkeye.*	Hon. Lowell H. Bauer, Mayor, City of Burlington, 400 Washington Street, Burlington, Iowa 52601.	Sept. 7, 1989	190114
Maine: Cumberland (FEMA Docket No. 6961).	Town of Scarborough	July 6, 1989 and July 13, 1989, *The Portland Press-Herald.*	Hon. Carl L. Betterley, Town Manager, Cumberland County, P.O. Box 360, Scarborough, Maine 04074.	June 21, 1989	230052 D
South Carolina: Charleston (Docket No. FEMA-6967).	Unincorporated areas	Sept. 13, 1989 and Sept. 20, 1989, *Charleston News and Courier.*	Hon. Ed Sava, County Administrator, Charleston County, County Office Building, #2 Courthouse Square, Room 401, Charleston, South Carolina 29401.	Aug. 30, 1989	455413
Texas: Denton and Dallas (FEMA Docket No. 6961).	City of Lewisville	June 28, 1989 and July 5, 1989, *Lewisville Daily Leader.*	Hon. Donny Daniel, Mayor of the City of Lewisville, Denton and Dallas Counties, 151 West Church Street, Lewisville, Texas 75067.	June 21, 1989	480195
Texas: Matagorda (FEMA Docket No. 6963).	Unincorporated areas	July 31, 1989 and Aug. 7, 1989, *The Daily Tribune.*	Hon. Burt O'Connell, Matagorda County Judge, P.O. Box 1331, Bay City, Texas 77414-1331.	July 18, 1989	485489

Issued: January 18, 1990.

Harold T. Duryee,

Administrator, Federal Insurance Administration.

[FR Doc. 90-1931 Filed 1-26-90; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 65

[Docket No. FEMA-6980]

Changes in Flood Elevation Determinations, Louisiana et al.

AGENCY: Federal Emergency Management Agency.

ACTION: Interim rule.

SUMMARY: This rule lists those communities where modifications of the base (100-year) flood elevations is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified base (100-year) elevations for new buildings and their contents and for second layer insurance on existing buildings and their contents.

DATES: These modified elevations are currently in effect and amend the Flood Insurance Rate Map (FIRM) in effect prior to this determination.

From the date of the second publication of notice of these changes in a prominent local newspaper, any person has ninety (90) days in which he can request through the community that the Administrator, reconsider the changes. These modified elevations may be changed during the 90-day period.

ADDRESSES: The modified base (100-year) flood elevation determinations are available for inspection at the office of the Chief Executive Officer of the community, listed in the fifth column of the table. Send comments to that address also.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Matticks, Chief, Risk Studies Division, Federal Insurance Administration, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-2767.

SUPPLEMENTARY INFORMATION: The numerous changes made in the base (100-year) flood elevations on the FIRM(s) make it administratively infeasible to publish in this notice all of the modified base (100-year) flood elevations contained on the map. However, this rule includes the address of the Chief Executive Officer of the community where the modified base (100-year) flood elevations determinations are available for inspection.

Any request for reconsideration must be based on knowledge of changed conditions, or new scientific or technical data.

These modifications are made pursuant to section 206 of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234) and are in accordance with the National Flood Insurance Act of 1968, as amended, (title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90-448)), 42 U.S.C. 4001-4128, and 44 CFR part 65.4.

For rating purposes, the revised community number is listed and must be used for all new policies and renewals.

These base (100-year) flood elevations are the basis for the floodplain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program.

These elevations, together with the floodplain management measures required by § 60.3 of the program regulations are the minimum that are required. They should not be construed to mean the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time, enact stricter requirements on its own, or pursuant to policies established by other Federal, State or regional entities.

The changes in the base (100-year) flood elevations listed below are in accordance with 44 CFR 65.4.

Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule if promulgated will not have a significant economic impact on a substantial number of small entities. This rule provides routine legal notice of technical amendments made to designated special flood hazard areas on the basis of updated information and imposes no new requirements or

regulations on participating communities.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains.

PART 65—[AMENDED]

1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

§ 65.4 [Amended]

2. Section 65.4 is amended by adding in alphabetical sequence new entries to the table.

State and county	Location	Date and name of newspaper where notice was published	Chief Executive Officer of Community	Effective date of modification	Community number
Louisiana: Cameron Parish	Unincorporated areas	Jan. 3, 1990 and Jan. 10, 1990, *The Cameron Pilot.*	Hon. Ernest Carol Trahan, President, Cameron Parish Police Jury, P.O. Box 366, Cameron, Louisiana 70631.	Dec. 28, 1989	225194 E
Louisiana: Plaquemines Parish.	Unincorporated areas	Jan. 12, 1990 and Jan. 19, 1990, *Plaquemine Gazette.*	Hon. Luke A. Petrovich, Plaquemines Parish Government, P.O. Box 61, Point-A-La-Hache, Louisiana 70082.	Dec. 15, 1989	220139 B
Minnesota: Isanti	City of Isanti	Dec. 28, 1989 and Jan. 4, 1990, *Isanti County News.*	Hon. William Magruson, City Administrator, City of Isanti, City Hall, County Road #5, First Avenue, Isanti, Minnesota 55040.	Dec. 18, 1989	270199
Texas: Tarrant	City of Arlington	Jan. 4, 1990 and Jan. 11, 1990, *The Arlington News.*	Hon. Richard Greene, Mayor of the City of Arlington, P.O. Box 231, Arlington, Texas 76004-0231.	Dec. 26, 1989	485454 C

Harold T. Duryee,
Administrator, Federal Insurance Administration.

Issued: January 18, 1990.

[FR Doc. 90-1924 Filed 1-26-90; 8:45 am]

BILLING CODE 6718-21-M

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: Modified base (100-year) flood elevations are finalized for the communities listed below.

These modified elevations are the basis for the floodplain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program.

EFFECTIVE DATE: The date of issuance of the Flood Insurance Rate Map (FIRM) showing modified base flood elevations, for the community. This date may be obtained by contacting the office where the maps are available for inspection indicated on the table below:

ADDRESSES: See table below:

FOR FURTHER INFORMATION CONTACT: Mr. John L. Matticks, Chief, Risk Studies Division, Federal Insurance Administration, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-2767.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency gives notice of the final determinations of flood elevation for each community listed. Proposed base flood elevations or proposed modified base flood elevations have been published in the **Federal Register** for each community listed.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Action 1968 (title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90-448)), 42 U.S.C. 4001-4128, and 44 CFR part 67. An opportunity for the community or individuals to appeal the proposed determination to or through the community for a period of ninety (90) days has been provided.

The Agency has developed criteria for floodplain management in flood-prone areas in accordance with 44 CFR part 60. Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies for reasons set out in the proposed rule that the final flood elevation determinations, if promulgated, will not have a significant economic impact on a substantial number of small entities. Also, this rule is not a major rule under terms of Executive Order 12291, so not regulatory analyses have been proposed. It does not involve any collection of information for purposes of The Paperwork Reduction Act.

List of Subjects in 44 CFR Part 67

Flood insurance, Floodplains.

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The modified base flood elevations are finalized in the communities listed below. Elevations at selected locations in each community are shown. Any appeals of the proposed base flood elevations which were received have been resolved by the Agency.

Source of flooding and location	# Depth in feet above ground. *Elevation in feet (NGVD). Modified
ARKANSAS	
Jacksonport (town), Jackson County (FEMA Docket No. 6962)	
White River:	
Ponding area on landward side of White River levee at upstream corporate limits	*222
Ponding area on landward side of White River levee at downstream corporate limits	*222
Maps available for inspection at the Town Hall, Jacksonport, Arkansas.	
Newport (city), Jackson County (FEMA Docket No. 6964)	
Village Creek Outfall Ditch:	
At downstream corporate limits	*223
Approximately 900 feet upstream of Daugherty Street	*227
Maps available for inspection at the City Hall, 120 Walnut, Newport, Arkansas 72112.	
COLORADO	
Boulder (city), Boulder County (FEMA Docket No. 6964)	
Boulder Creek:	
Approximately 400 feet downstream of Arapahoe Avenue	*5,245
Approximately 210 feet downstream of Arapahoe Avenue	*5,247
At Arapahoe Avenue	*5,250
Approximately 600 feet upstream of Arapahoe Avenue	*5,253
Approximately 1,200 feet upstream of Arapahoe Avenue	*5,258
Approximately 700 feet downstream of 30th Street	*5,263

Source of flooding and location	# Depth in feet above ground. ^Elevation in feet (NGVD). Modified
Skunk Creek:	
At the confluence with Bear Canyon Creek	*5,243
Just upstream of Foothills Parkway	*5,243
Just downstream of Colorado Avenue	*5,260
Boulder Creek: (Right Bank Overflow)	
At Foothills Parkway	*5,240
Approximately 2,320 feet upstream of Foothills Parkway	*5,254
Maps are available for review at the Utilities Administrative Office, 1739 Broadway, Suite 306, Boulder, Colorado.	
CONNECTICUT	
Litchfield (town), Litchfield County (FEMA Docket No. 6968)	
Shepaug River:	
Approximately 300 feet downstream of downstream corporate limits	*732
At the Shepaug Reservoir Dam	*777
Maps available for inspection at the Town Office Building, West Street, Litchfield, Connecticut.	
DELAWARE	
New Castle County (unincorporated areas) (FEMA Docket No. 6968)	
Christina River:	
Approximately 300 feet downstream of CONRAIL	*91
Approximately 560 feet upstream of State Route 273	*134
Maps available for inspection at the City County Building, 800 French, Wilmington, Delaware.	
GEORGIA	
Forsyth County (unincorporated areas) (FEMA Docket No. 6968)	
Starr Creek:	
At mouth	*1,063
Just downstream of Holbrook Road	*1,092
Just upstream of Holbrook Road	*1,100
Just downstream of Dam No. 25	*1,102
Thalley Creek:	
At mouth	*1,084
Just downstream of John Burrus Road	*1,089
Just upstream of John Burrus Road	*1,094
Just downstream of Dam No. 11	*1,097
Squattingdown Creek:	
At mouth	*1,104
Just downstream of Dam No. 54	*1,131
Bannister Creek:	
Just upstream of Nicholson Road	*974
Just downstream of Dam No. 4	*1,014
Brewton Creek:	
At mouth	*974
Just downstream of Dam No. 1	*989
Tributary A:	
At mouth	*1,068
Just downstream of Dam No. 26	*1,077
Tributary B:	
At mouth	*1,105
Just downstream of Dam No. 30B	*1,112
Settingdown Creek:	
Just downstream of confluence of Hurricane Creek	*969
About 350 feet downstream of Poole Mill Road	*1,008
Just upstream of Poole Mill Road	*1,032
Just downstream of Dam No. 56	*1,172
Hurricane Creek:	
At mouth	*969
Just downstream of Dam No. 27	*1,045
Yellow Creek:	
At mouth	*1,046
Just downstream of Hurt Bridge Road	*1,047
Just upstream of Hurt Bridge Road	*1,054
Just downstream of Pisgah Road	*1,060
Just upstream of Pisgah Road	*1,066
Just downstream of Watson Road	*1,092
Just upstream of Watson Road	*1,097
About 3,070 feet upstream of confluence of Tributary B	*1,119
Tributary C:	
At mouth	*1,086
Just downstream of Dam No. 16	*1,106
Tributary D:	
At mouth	*1,095
Just downstream of Dam No. 15	*1,103
Tributary E:	
At mouth	*1,098
Just downstream of Dam No. 21	*1,109
Tributary F:	
At mouth	*1,117
Just downstream of Dam No. 10	*1,120
Tributary G:	
At mouth	*1,140
Just downstream of Dam No. 6	*1,142
Tributary H:	
At mouth	*1,148
Just downstream of Dam No. 4	*1,160
Tributary J:	
At mouth	*1,157
Just downstream of Dam No. 59	*1,173
Maps available for inspection at the County Administrator's Office, County Courthouse, Cumming, Georgia.	
KENTUCKY	
Lawrence County (Unincorporated Areas) (FEMA Docket No. 6968)	
Big Sandy River:	
At downstream county boundary	*562
At confluence of Tug Fork and Levisa Fork	*576
Levisa Fork:	
About 1.82 miles downstream of confluence of Griffith Creek	*577
About 1.2 miles upstream of confluence of Lost Creek	*598
Tug Fork:	
At mouth	*576
About 0.30 mile downstream of confluence of Rockcastle Branch	*599
At upstream county boundary	*608
Blaine Creek:	
At mouth	*567
About 6.82 miles upstream of mouth	*568
Maps available for inspection at the County Courthouse Building, 122 South Main Cross, Louisa, Kentucky.	
NEW JERSEY	
Hamilton (Township), Mercer County (FEMA Docket No. 6955)	
Delaware River:	
At downstream corporate limits	*15
At upstream corporate limits	*18
Maps available for inspection at the Hamilton Township Municipal Building, 2090 Greenwood Avenue, Hamilton, New Jersey.	
Spotswood (Borough), Middlesex County (FEMA Docket No. 6964)	
Cedar Brook:	
Approximately 910 feet upstream of CONRAIL	*30
Approximately 380 feet downstream of upstream corporate limits	*34
Maps available for inspection at the Borough Hall, 77 Summerhill Road, Spotswood, New Jersey.	
OKLAHOMA	
McAlester (City), Pittsburg County (FEMA Docket No. 6962)	
Tributary C:	
Approximately 410 feet downstream of Missouri Kansas Texas Railroad	*642
Approximately 500 feet downstream of Pierce Avenue	*669
Maps available for inspection at the City Hall, 1st and Washington, McAlester, Oklahoma.	
TEXAS	
Irving (City), Dallas County (FEMA Docket No. 6957)	
Estelle Creek:	
Upstream side of State Route 183	*485
Downstream side of Northgate Drive	*518
Maps available for inspection at the Department of Public Works, 825 West Irving Boulevard, Irving, Texas.	
Kenedy (City), Karnes County (FEMA Docket No. 6964)	
Escondido Creek:	
At downstream corporate limits	*259
Approximately 1,050 feet upstream of U.S. Route 181	*279
Nichols Creek:	
At confluence with Escondido Creek	*260
At upstream corporate limits and FM 1145	*292
Maps available for inspection at the City Hall, 305 W. Main Street, Kenedy, Texas.	
Plainview (City), Hale County (FEMA Docket No. 6968)	
Playa Fl: North of West Frontage Road approximately 640 feet west of Quincy Street	*3,381
Maps available for inspection at the Municipal Building, 901 Broadway, Plainview, Texas.	
VIRGINIA	
Stafford County (Unincorporated Areas) (FEMA Docket No. 6965)	
Aquia Creek:	
Approximately 1,200 feet downstream of the U.S. Route 1 Bridge	*13
Approximately 750 feet upstream of southbound Interstate 95	*35
Maps available for inspection at the Rowser Building, 1739 Jefferson Davis Highway, Stafford, Virginia.	

Harold T. Duryee,

Administrator, Federal Insurance Administration.

Issued: January 18, 1990.

[FR Doc. 90-1930 Filed 1-26-90; 8:45 am]

BILLING CODE 6718-03-M

Proposed Rules

Federal Register
Vol. 55, No. 19
Monday, January 29, 1990

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.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3717; KY-063]

Approval and Promulgation of Implementation Plans; Approval of Revisions to Kentucky

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA today proposes to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Kentucky for the Air Pollution Control District of Jefferson County (District). The SIP revision would provide for the Alcan Foil Products (Alcan) facility located in Louisville, Kentucky, (Jefferson County) to achieve compliance with the applicable volatile organic compound (VOC) reasonably available control technology (RACT) regulations by averaging or "bubbling" of emissions within the facility. The bubble is consistent with current Agency policy.

The public is invited to submit written comments on this proposed action.

DATES: To be considered, comments must reach us on or before February 28, 1990.

ADDRESSES: Written comments should be addressed to Kay Prince of EPA Region IV's Air Programs Branch (see EPA Region IV address below). Copies of the material submitted by Kentucky may be examined during normal business hours at the following locations.

Region IV Air Programs Branch, Environmental Protection Agency, 345 Courtland Street, Atlanta, Georgia 30365

Division of Air Quality, Natural Resources and Environmental Protection Cabinet, Frankfort Office Part, 18 Reilly Road, Frankfort, Kentucky 40601

Jefferson County Air Pollution Control District, 850 Barrett Avenue, Louisville, Kentucky 40204-1745

FOR FURTHER INFORMATION CONTACT: Kay Prince of the EPA Region IV Air Programs Branch at 404-347-2864 (FTS-257-2864) and at the above address.

SUPPLEMENTARY INFORMATION: Alcan facility located in Louisville contains ten rotogravure printing/coating machines which are capable of performing either coating or rotogravure printing on aluminum foil. Such operations are generally covered by the papercoating and the graphic arts control technology guideline (CTG) documents, respectively. EPA policy mandates, however, that where both coating and printing are performed on the same machine, the graphic arts CTG shall apply. Therefore, each unit was determined to be subject to District Regulations 6.29, "Standard of Performance for Existing Graphic Arts Facilities Using Rotogravure and Flexography." The graphis arts RACT regulation required a 65 percent reduction in VOC emissions for each rotogravure printing line. Water-borne coatings/inks with a volatile portion of at least 75 volumes percent water and 25 volume percent or less organic solvent and high solids coatings/inks (at least 60 percent solids) are exempt from the provisions of Regulation 6.29.

On July 28, 1989, the Commonwealth of Kentucky, through the Natural Resources and Environmental Protection Cabinet, officially submitted a source-specific SIP revision prepared by the District for the Alcan facility. The SIP revision would allow Alcan to average or "bubble" VOC emissions from nine of the ten machines in lieu of achieving compliance with the graphic arts RACT regulation on a line-by-line basis. The tenth machine (Machine #12) is equipped with an incinerator to control emissions in compliance with the 65 percent reduction required by District Regulation 6.29. Because the incinerator was in use prior to the baseline period, no credit can be claimed and, therefore, Machine #12 is not included in the bubble. Specifically, the proposed bubble provided for demonstration of compliance by: (1) Utilizing a daily averaging period with a cap of 452 lbs of VOC per day; (2) taking credit for reductions in emissions due to air recirculation on Machine #16 and complying coatings for which use was begun after the baseline period; (3) using 210.6 tons of purchased emission reduction credits (ERCs) prorated to a daily credit; and (4) limiting the total yearly emissions to 266 tons per year. The baseline emissions and the purchased credit have been prorated over 246 operating days. An operating day is defined as a day when noncomplying coatings are used. Days when only complying coatings are used and VOC emissions are less than 100 lbs are not considered operating days. However, emissions on such days must be accounted for in the yearly emissions total which cannot exceed 266 tons. The limits of the bubble are summarized in the following table:

Sources	Emissions (tons/yr)				Emissions (lbs/day)	
	Actual	Allowable			Allowable	
	Before bubble	Before bubble	After bubble		After bubble	
			w/o credit	w/credit	w/o credit	w/credit
Nine machines	124.6	79.53	55.63	266	452	2164

In November 1982, the Almega Corporation of Bensenville, Illinois conducted testing to determine the control efficiency achieved by recirculation of air through the direct fired oven associated with Machine #16. The test results indicated that a control efficiency of 40 percent was being achieved on Machine #16. Due to

concerns raised by EPA, Alcan has agreed to either assume the control efficiency to be 0 percent or within four months of approval of the bubble to retest to determine the efficiency. A control efficiency of 40 percent will be assumed for compliance calculations until that time. If the retest is performed, the actual efficiency of the device will be used in the calculations once the test results have been accepted by both EPA and the District.

On May 26, 1988, EPA issued a SIP call to the Governor of Kentucky which indicated that Louisville was continuing to violate the National Ambient Air Quality Standard (NAAQS) for ozone. Since the SIP call was issued, Louisville is classified as a nonattainment area lacking an approved attainment demonstration (NALAD). A bubble in a NALAD is approvable only if it meets the following three requirements of December 4, 1986, Emissions Trading Policy Statement (ETPS) (51 FR 43839–40): (i) The baseline must be calculated using the lower of actual, SIP-allowable, or RACT-allowable values for each baseline factor, determined as of the date the source submitted the bubble application to the State; (ii) the bubble must produce a reduction of at least 20 percent in the emissions remaining after application of the baseline specified above; (iii) the state must provide assurances that the proposed trade will be consistent with its efforts to attain the ambient standard.

The Alcan bubble has been determined to be consistent with the ETPS which is current Agency policy. The ETPS requires that all bubbles have emission reductions which are (1) surplus, (2) enforceable, (3) permanent, and (4) quantifiable. The Alcan bubble meets the surplus requirement. Baseline emissions were determined using the lowest of acutal, SIP-allowable or RACT-allowable emissions for each source involved in the bubble, with values for the actual quantity of VOC content of coatings used based on the most recent two-year period. Baseline emissions were thus calculated to be 69.54 tons VOC per year. The bubble limits the annual VOC emissions to 55.63 tons for a reduction of 20 percent. This reduction meets the 20 percent required for bubbles submitted for a source located in an NALAD. Alcan has also purchased a credit of 265.7 tons per year from Federal Paper Board Company. This credit has been reduced by the required 20 percent and by 3.4 tons per year to account for makeup solvent usage. The resulting credit is 210.6 tons per year of VOC emissions. Although Federal Paper Board Company has been shutdown for four years, the emissions were properly banked and have been treated as "in the air" for planning purposes. As required, the credit was reduced by 20 percent because Louisville is now classified as a NALAD. This credit has not been used for any other purpose. Therefore, the credit meets the requirement for being surplus.

The provisions of the bubble described above are incorporated in operating permits issued and enforced by the District. The permits include recordkeeping requirements based on the averaging period over which the bubble operates so that compliance may be easily determined. Because the permits are being made part of the Kentucky SIP, they will be federally enforceable. Therefore, the enforceability requirement is met.

The bubble has been submitted as a source-specific SIP revision to be incorporated in the Jefferson County portion of the Kentucky SIP. Furthermore, Federal Paper Board has been permanently shutdown. Therefore, the reduction is considered to be permanent.

Compliance with the bubble provisions will be determined by calculating the actual emissions every day using a computer program. These calculations will be based on information contained on Production Recored Cards which are maintained for each run. The production cards contain the actual length and width of coating/ink applied, the actual solids laydown and the type of coating/ink used on the run. Actual and allowable emissions before the bubble were calculated using data on actual coating usage and the actual and allowable VOC content of the coatings, respectively. Therefore, the emissions before and after the bubble, as well as the reduction may be readily calculated and thus the bubble meets the criteria for being quantifiable.

The ETPS sets out five assurances the State must make. The State has submitted the following assurances provided by the District:

(1) The most recent emission inventory used for the part D attainment demonstration was in the 1982 ozone state implementation plan for Jefferson County, Kentucky. The emission credit used for the Alcan bubble was included as "in the air" for the purpose of demonstrating attainment, therefore reduction credit cannot have been double counted;

(2) The two-year baseline period has been calculated using the lowest of actual or RACT allowable emissions;

(3) A substantial net reduction of at least twenty percent is produced in the emissions remaining after the application of the baseline;

(4) The ambient progress and planning goals of the District have not been interfered with as this trade mandates further reductions in the Post–87 SIP;

(5) The Post–87 ozone SIP will not be constrained by this revision. The District is making every effort to develop an approvable SIP and intends to adhere to the schedule for its development in a manner consistent with the Phase I mid-year progress report submitted to EPA Region IV on April 17, 1989. Alcan Foil Products will be modeled in a manner analogous to a full phase III demonstration at the time the data base for the Urban Airshed Model is completed. Alcan will be required to make any additional reductions as are needed along with those of other sources or source categories.

For a more detailed discussion, please refer to the Technical Support Document which is available at the Region IV office.

Action: The Alcan bubble is consistent with EPA's ETPS. Therefore, EPA is today proposing to approve this revision to the Jefferson County portion of the Kentucky SIP.

The public is invited to participate in this rulemaking by submitting comments on the proposed action.

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214–2225). On January 6, 1989, the Office of Management and Budget waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical economic and environmental factors and in relation to relevant statutory and regulatory requirements.

Under 5 U.S.C. 605(b), I certify that these revisions will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Incorporation by reference, Intergovenmental relations, Ozone,

Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7642.

Dated: January 10, 1990.

Patrick M. Tobin,

Acting Regional Administrator.

[FR Doc. 90–1956 Filed 1–26–90; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 180

[PP9E3754/P499; FRL–3667–9]

Pesticide Tolerance for Glyphosate

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes that tolerances be established for the combined residues of the herbicide glyphosate and its metabolite in or on the following raw agricultural commodities: breadfruit, canistel, dates, jaboticaba, jackfruit, persimmon, soursop, tamarind, and black sapote and white sapote. The proposed regulation to establish maximum permissible levels for residues of the herbicide in or on the raw agricultural commodities was requested in a petition submitted by the Interregional Research Project No. 4 (IR–4).

DATES: Comments, identified by the document control number, [PP9E3754/P499], must be received on or before February 28, 1990.

ADDRESSES: By mail submit comments to: Public Information Branch, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 246, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 246 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Hoyt L. Jamerson, Emergency Response and Minor Use Section (H7505C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716C, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202, 703–557–2310.

SUPPLEMENTARY INFORMATION: The Interregional Research Project No. 4 (IR–4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, has submitted pesticide petition (PP) 9E3754 to EPA on behalf of Dr. Robert H. Kupelian, National Director, IR–4 Project, and the Agricultural Experiment Stations of Florida, California, Hawaii, and Puerto Rico.

The petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of a tolerance for the combined residues of the herbicide glyphosate(N–(phosphonomethyl)glycine) and its metabolite amino-methylphosphonic acid (AMPA) in or on the raw agricultural commodities breadfruit, canistel, dates, jaboticaba, jackfruit, persimmon, soursop, tamarind, and black sapote and white sapote at 0.2 part per million (ppm).

The data submitted in the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerances are sought. The toxicological data considered in support of the proposed tolerance include:

1. A three-generation rat reproduction study with a no-observed-effect level (NOEL) of 10 milligrams (mg)/kilogram (kg)/day.

2. A chronic feeding/oncogenicity study in rats with a systemic NOEL of 31 mg/kg/day, which was negative for oncogenic potential under the conditions of the study at all feeding levels tested (0, 3, 10, and 31 mg/kg/day). Although the rat study meets the requirement for a chronic feeding study, it does not satisfy guideline requirements for an oncogenicity study. There is no evidence that the highest dose tested (31 mg/kg/day) was a toxic or maximum-tolerated dose (MTD).

3. A 1-year dog feeding study, with a systemic NOEL of 500 mg/kg/day (highest dose tested).

4. A rat teratology study, negative for teratogenic effects at 3,500 mg/kg/day (highest dose tested), with maternal and developmental toxicity NOELs of 1,000 mg/kg/day.

5. A rabbit teratology study, negative for teratogenic effects at 350 mg/kg/day (highest dose tested), with a maternal NOEL of 175 mg/kg/day and a developmental toxicity NOEL of 350 mg/kg/day.

6. Mutagenicity studies as follows: chromosomal aberration *in vitro* (no aberrations in Chinese hamster ovary cells were caused with or without S–9 activation); DNA repair in rat hepatocytes (negative); *in vivo* bone marrow cytogenic in rats (negative); rec-assay with *B. subtilis* (negative up to 2,000 micrograms of test material per disk); reverse mutation with *S. typhimurium* (negative); Ames test with *S. typhimurium* (negative); and a dominant-lethal test in mice (negative).

Additionally, a 2-year oncogenicity study in CD–1 mice has been completed and reviewed by the Agency. Feeding levels in this study were 1,000, 5,000, and 30,000 ppm (equivalent to 150, 750, and 4,500 mg/kg/day, respectively). The NOEL for nonneoplastic chronic effects was established at 5,000 ppm. In this study, glyphosate produced an equivocal oncogenic response, possibly causing a slight increase in the incidence of renal tubular adenomas (a benign tumor of the kidney) in male mice at the highest dose tested (30,000 ppm). Because of the equivocal nature of the oncogenic response in mice and the lack of an acceptable oncogenicity study in rats, the Agency referred the issue to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Science Advisory Panel (SAP) for a Weight-of-the-Evidence recommendation. After reviewing all available evidence, the SAP concluded that the oncogenic potential of glyphosate could not be determined from the available information and recommeded that the mouse and/or rat oncogenicity studies be repeated to clarify unresolved questions. Subsequently, the Agency classified glyphosate as a "Group D Carcinogen" (inadequate evidence of carcinogenicity) and requested a repeat oncogenicity study in rats, due in 1990.

Current Agency policy is to establish tolerances for significant new uses of glyphosate on a case-by-case basis. Tolerances that change the theoretical maximum residue contribution (TMRC) by more than 1 percent are generally considered significant.

The reference dose (ADI), based on the NOEL of 10 mg/kg/day from the rat reproduction study and using a hundredfold uncertainty factor, is calculated to be 0.1 mg/kg of body weight (bw)/day. The TMRC from

existing tolerances is calculated to be 0.00509 mg/kg/day. The calculated increase in the TMRC resulting from the proposed use of glyphosate on breadfruit, dates, persimmon, soursop, and black sapote and white sapote is less than 0.000001 mg/kg body weight/day, a negligible increase. Proposed tolerances for canistel, jaboticaba, jackfruit, and tamarind were not included in the analysis because there are no consumption data for these food items; however, the increase in exposure resulting from these commodities is expected to be negligible. The new TMRC, including new, pending, and established tolerances, is calculated to be 9.95 per cent of the ADI.

There are no anticipated problems associated with secondary residues in meat, milk, poultry, or eggs since the commodities listed are not considered feed items. The nature of the residues is adequately understood, and an adequate analytical method, gas chromatography using a flame photometric detector, is available for enforcement purposes. An analytical enforcement method is currently available in the *Pesticide Analytical Manual* (PAM), Vol. II. There are currently no actions pending against the continued registration of this chemical.

Based on the data and information considered, the Agency concludes that the tolerances proposed would protect the public health. Therefore, it is proposed that the tolerances be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this document in the **Federal Register** that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 9E3754/P499]. All written comments filed in response to this petition will be available in the Public Information Branch, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

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

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 12, 1990.

Anne E. Lindsay,

Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR part 180 be amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. Section 180.364(a) is amended by adding and alphabetically inserting the raw agricultural commodities breadfruit, canistel, dates, jaboticaba, jackfruit, persimmons, soursop, tamarind, and black sapote and white sapote, to read as follows:

§ 180.364 Glyphosate; tolerances for residues.

(a) * * *

Commodities	Parts per million
* * * * *	
Breadfruit	0.2
* * * * *	
Canistel	0.2
* * * * *	
Dates	0.2
* * * * *	
Jaboticaba	0.2
Jackfruit	0.2
* * * * *	
Persimmons	0.2
* * * * *	
Sapote, black	0.2
Sapote, white	0.2
* * * * *	
Soursop	0.2
* * * * *	
Tamarind	0.2
* * * * *	

* * * * *

[FR Doc. 90-1958 Filed 1-26-90; 8:45 am]

BILLING CODE 6560-50-D

40 CFR Parts 180 and 185

[PP 7F3470 and FAP 7H5520/P486; FRL-3707-9]

Pesticide Tolerances for Metalaxyl

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes to establish a tolerance for residues of the fungicide metalaxyl and its metabolites in or on blueberries at 2.0 parts per million (ppm), stonefruit crop group at 1.0 ppm, walnuts at 0.5 ppm, almonds at 0.5 ppm, almond hulls at 10.0 ppm, apricots (dried) at 4.0 ppm, and prunes (dried) at 4.0 ppm. This regulation to establish the maximum permissible levels for residues of metalaxyl in or on the commodities was requested in petitions submitted by Ciba-Geigy Corp.

DATES: Comments, identified by the document control number, [PP 7F3470 and FAP 7H5520/P486], must be received on or before February 28, 1990.

ADDRESSES: By mail, submit written comments to: Public Docket and Freedom of Information Section, Field Operations Division (H7506C), Office of Pesticide Programs, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 246, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703) 557-1900.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 246 at the address given above, from 8 a.m. to 4 p.m., Monday and Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Susan T. Lewis, Product Manager (PM) 21, Registration Division (47505C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Rm. 227, CM No. 2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, 703-557-1900.

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of December 3, 1986 (51 FR 43664), which announced that Ciba-

Geigy Corp., P.O. Box 18300, Greensboro, NC 27419, had submitted a tolerance petition (PP) 7F3470 and food additive petition (FAP) 7H5520 to EPA requesting that the Administrator, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of tolerances for the fungicide metalaxyl [N-(2,6-dimethylphenyl)-N-(methoxyacetyl) alanine methyl ester] and its metabolites containing the 2,6-dimethylaniline moiety, and N-(2-hydroxymethyl-6-methylphenyl)-N-(methoxyacetyl) alanine methyl ester in or on blueberries at 2.0 ppm, stonefruit at 1.0 ppm, walnuts at 0.5 ppm, almonds at 0.5 ppm, almond hulls at 5.0 ppm, apricots (dried) at 4.0 ppm, and prunes at 4.0 ppm resulting from application of the pesticide to the growing crop. Since that time, Ciba-Geigy Corp. has petitioned the Agency to increase almond hulls to 10.0 ppm.

There were no comments received in response to the notice of filing.

The data submitted in support of the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerance is sought. The toxicological data considered in support of the tolerance include the following:

1. A 3–month dietary study in rats with a no-observed-effect level (NOEL) at 12.5 mg/kg body weight/day (250 ppm).

2. A developmental toxicity study in rats with a NOEL of 400 mg/kg body weight (highest dose tested). Metalaxyl was not teratogenic, even in the presence of maternal toxicity.

3. A developmental toxicity study in rabbits with a NOEL of 300 mg/kg body weight (highest dose tested). Metalaxyl was not teratogenic, even in the presence of maternal toxicity.

4. Metalaxyl did not induce gene mutations in bacteria, yeast, and lymphoma cells *in vitro* with or without metabolic activation. The fungicide also caused no structural or numerical chromosomal aberrations in yeast, hamsters (*in vivo* nucleus anomaly assay), or mice (a dominant lethal assay). No DNA damage was observed in bacteria, and no unscheduled DNA synthesis was noted in rat primary hepatocytes or human fibroblasts *in vitro* as the result of exposure to metalaxyl. These results suggest that metalaxyl is not genotoxic.

5. A mouse dominant-lethal study that was negative for mutagenicity.

6. A three-generation rat reproduction study with a NOEL of 62.5 mg/kg body weight/day (1,250 ppm).

7. A 6-month dog feeding study with a NOEL of 6.3 mg/kg/ body weight (250 ppm).

8. A 2-year rat chronic feeding/oncogenic study with no compound-related oncogenic effects under the conditions of the study at dietary levels up to 1,250 ppm. The NOEL is 12.5 mg/kg body weight/day (250 ppm) based upon slight increases in liver weight to body weight ratios at 1,250 ppm.

9. A 2-year mouse oncogenic study with no compound-related oncogenic effects under the conditions of the study at dietary levels up to 1,250 ppm.

Because of concerns raised over some equivocal increases in tumor incidences in the male mouse liver and the male rat adrenal medulla, and the female rat thyroids, the two chronic feeding studies were submitted to Environmental Pathology Laboratories (EPL) for an independent reading of the microscopic slides. The new pathological evaluation by EPL and the original reports of the rat and mouse oncogenicity studies were then both submitted for review to EPA's Carcinogen Assessment Group (CAG). A final review of the oncogenicity studies and related material was performed by the peer review committee of the Toxicology Branch of the Office of Pesticide Programs (OPP).

The four major issues evaluated by CAG and the peer review group included: (1) Parafollicular cell adenomas in the thyroid of female rats, (2) adrenal medullary tumors (pheochromocytomas) in male rats, (3) liver tumors in male mice, and (4) whether the highest dose tested (1,250 ppm) in the rat and mouse oncogenicity studies represented a maximum tolerated dose (MTD).

Regarding thyroid tumors in female rats, the peer review group concluded that the increased incidences of thyroid tumors of treated groups were not compound related. This conclusion was based on the following: (1) There was no progression of benign tumors (adenomas) to malignancy (carcinomas); (2) there was no increase in hyperplastic changes; (3) there was no dose-response relationship; and (4) the two reevaluations of the microscopic slides by the pathologists at EPL and Toxicology Branch in OPP further mitigated any apparent effect observed in the original report.

This issue of a possible treatment-related increase of adrenal medullary gland tumors, namely, pheochromocytomas, in the male rat was also reassessed by both CAG and the peer review committee. Both concluded that the data, especially in view of the reevaluation of the microscopic slides performed by EPL, did not support a compound-related increase of adrenal medullary tumors; the incidences of pheochromocytomas more accurately represented spontaneous variations of a commonly occurring tumor in the aged rat.

The analysis of the significance of the equivocal increase in the incidence of liver tumors in male mice was very similar to that performed for the rat thyroid and adrenal gland tumors. The original pathological reading of the tissue slides reported an elevated incidence of tumors in some treated groups; however, these increases were not evident after a reevaluation of the microscopic slides was performed by an independent pathologist at the EPL and by the reading of a CAG pathologist. The peer review committee concurred that the reevaluation of the slides is reliable and does not show any compound-related increase in the incidence of liver tumors in the mouse.

The issue of whether a maximum tolerated dose (MTD) of metalaxyl was used in the rat and mouse 2–year feeding studies was considered by CAG and the OPP peer review committee. Although increased liver weights and vacuolation of hepatocytes in the rat study and fatty infiltration of the liver in the mouse study indicated treatment-related effects, these weight and histologic changes in the liver suggest that a pharmacologic rather than a toxic response was observed at the highest dose tested (1,250 ppm). The pharmacologic response most often associated with these types of histologic and weight changes in the liver is the induction of the microsomal drug-metabolizing enzymes of the liver. A compound's self induction of these hepatic enzymes, which in turn leads to an acceleration of its own rate of metabolism, is the body's compensatory mechanism for handling excess exposure to a foreign chemical and may not in itself represent a minimal toxic effect.

Nevertheless, the Agency believes that the data from the rat and mouse long-term studies are sufficient to support the conclusion that metalaxyl does not show an oncogenic potential in laboratory animals even though the MTD may not have been tested and has concluded that further testing is not warranted. This conclusion is supported by the following: (1) The doses tested in both the rat and mouse long-term studies were high enough to produce compound-related changes in liver weight and/or histology, probably representing a pharmacologic response; (2) metalaxyl is not structurally related to known oncogens; (3) available

mutagenic evidence indicates no potential genotoxic activity which correlates with the negative oncogenic potential demonstrated in long term testing; (4) under the conditions of the rat and mouse tests no indication of compound-induced oncogenic effects were noted at any of the treatment doses, sexes, or species.

The acceptable daily intake (ADI) based on the 6-month dog feeding study (NOEL of 6.3 mg/kg bwt/day), and using a hundredfold safety factor, is calculated to be 0.063 mg/kg bwt/day. The theoretical maximum residue contribution from previously established tolerances and the tolerances established here is 0.0107 mg/kg bwt/day and utilizes 17.85 percent of the ADI.

The nature of the residue is adequately understood, and adequate analytical methods (capillary N/P GLC) are available for enforcement purposes. Because of the long lead time for establishing these tolerances to publication of the enforcement methodology in the Pesticide Analytical Manual, Vol. II, the analytical methodology is being made available in the interim to anyone interested in pesticide enforcement when requested from: Calvin Furlow, Public Information Branch, Field Operations Division (H7506C), 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 246, CM No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)–557–4432.

The pesticide is considered useful for the purpose for which the tolerances are sought. Existing meat and milk tolerances are adequate to cover any secondary residues from the feed use of metalaxyl in conjunction with the proposed tolerances. Based on the information and data considered, the Agency concludes that the establishment of the tolerances will protect the public health. Therefore, the tolerances are established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this document in the **Federal Register** that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 7F3470 and FAP 7H5520/P486]. All written comments filed in response to this petition will be available in the Public Docket and Freedom of Information Section, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

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

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

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 Parts 180 and 185

Administrative practice and procedures, Agricultural commodities, Food additives, Pesticides and pests, Reporting and recordkeeping requirements

Dated: December 22, 1989.

Douglas D. Campt,

Director, Office of Pesticide Programs.

Therefore, is it proposed that chapter I of title 40 of the Code of Federal Regulations be amended as follows:

PART 180—[AMENDED]

1. In part 180:

a. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

b. Section 180.408(a) is amended in the table therein by adding and alphabetically inserting the following raw agricultural commodities, to read as follows:

§ 180.408 Metalaxyl; tolerances for residues.

(a) * * *

Commodities	Parts per million
* * * * *	
Almonds	0.5
Almonds, hulls	10.0
* * * * *	
Blueberries	2.0
* * * * *	
Stonefruit group	1.0
* * * * *	
Walnuts	0.5
* * * * *	

PART 185—[AMENDED]

2. In part 185:

a. The authority citation for part 185 continues to read as follows:

Authority: 21 U.S.C. 348.

b. In § 185.4000(a), the table therein is amended by adding and alphabetically inserting the commodities apricots (dried) and prunes (dried), to read as follows:

§ 185.4000 Metalaxyl.

(a) * * *

Foods	Parts per million
* * * * *	
Apricots (dried)	4.0
* * * * *	
Prunes (dried)	4.0
* * * * *	

* * * * *

[FR Doc. 90–1959 Filed 1–26–90; 8:45 am]

BILLING CODE 6560–50–D

40 CFR Part 261

[SW-FRL-3717-5]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Re-Opening of Comment Period

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule; re-opening of comment period.

SUMMARY: EPA is re-opening the comment period on a portion of the proposed delisting decision for Bethlehem Steel Corporation, Lackawanna, New York, which appeared in the **Federal Register** on April 7, 1989 (54 FR 14101). One of the public comments received on the proposed rule noted that documentation used to support the proposed health-based level for benzo(a)pyrene was not readily available for public review. This re-opening of the comment period, which pertains only to the proposed health-based level for benzo(a)pyrene, is provided to allow the public an

adequate opportunity to review the documentation used to support the proposed health-based level used for delisting decision-making.

DATE: EPA will accept public comments on the health-based level for benzo(a)pyrene (which was used to support the proposed denial decision) until February 20, 1990. Comments postmarked after the close of the comment period will be stamped "late".

ADDRESSES: Send three copies of your comments to EPA. Two copies should be sent to the Docket Clerk, Office of Solid Waste (OS–305), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. A third copy should be sent to Jim Kent, Variances Section (OS–343), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. All comments must be identified at the top with docket number "F–90–B5DX–FFFFF."

The public docket where the information can be viewed for the proposed rule is located Room M2427, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. The docket is open from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Call (202) 475–9327 for appointments. The public may copy material from any regulatory docket at a cost of $0.15 per page.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free at (800) 424–9436 or at (202) 382–3000. For technical information, contact Linda Cessar, Office of Solid Waste (OS–343), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 475–9828.

SUPPLEMENTARY INFORMATION: On April 7, 1989, EPA proposed to deny a delisting petition submitted by the Bethlehem Steel Corporation (BSC), pursuant to 40 CFR 260.20 and 260.22, to exclude ammonia still lime sludge (EPA Hazardous Waste No. K060) from the lists of hazardous wastes published in 40 CFR 261.31 and 261.32. The petitioned wastes are currently being managed in a 5.4 acre landfill at BSC's Lackawanna, New York facility. The public comment period for this rule closed on May 22, 1989.

Public comments were received from two interested parties; one commenter noted that documentation used to support the proposed health-based level for benzo(a)pyrene was not readily available for public review. The Agency regrets this error, and has since placed the missing documentation into the public docket for this rule. In order to allow the public an adequate opportunity to review the documentation used to support the proposed health-based level for benzo(a)pyrene, the Agency has chosen to re-open the comment period.

As noted above, the public comment period for the proposed rule ended on May 22, 1989. Today's notice re-opens the comment period only with regard to the proposed health-based level for benzo(a)pyrene. Comment on any other aspect of the proposed decision will not be addressed. The Agency will accept comments on the proposed health-based level until February 20, 1990.

Dated: January 17, 1990.

Mary A. Gade,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 90–1854 Filed 1–26–90; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 7

DEPARTMENT OF AGRICULTURE

36 CFR Part 296

TENNESSEE VALLEY AUTHORITY

18 CFR Part 1312

DEPARTMENT OF DEFENSE

32 CFR Part 229

RIN 1024AA51

Protection of Archaeological Resources; Uniform Regulations

AGENCIES: Departments of the Interior, Agriculture, and Defense and Tennessee Valley Authority.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the description of prohibited acts in the final uniform regulations to include attempt to excavate, remove, damage, or otherwise alter or deface archeological resources. Recent amendments to the Archaeological Resources Protection Act of 1979, among other things, prescribe in this addition. The purpose of the proposed rule is to implement this provision of the Act in the final uniform regulations.

DATES: Written comments will be accepted until February 28, 1990.

ADDRESSES: Comments may be mailed to Douglas H. Scovill, Acting Departmental Consulting Archeologist, P.O. Box 37127, Room 4318, 1100 L St. NW., Washington, DC 20013–7127.

FOR FURTHER INFORMATION CONTACT: Douglas H. Scovill, National Park Service, Department of the Interior, Washington, DC, 202–343–1876; Lars Hanslin, Office of the Solicitor, Department of the Interior, Washington, DC, 202–343–7957; Evan I. DeBloois, U.S. Forest Service, Department of Agriculture, Washington, DC, 202–382–9425; Christina Ramsey, Office of the Assistant Secretary for Acquisition and Logistics, Department of Defense, Washington, DC, 202–695–7820; or Maxwell D. Ramsey, Tennessee Valley Authority, Norris, Tennessee, 617–632–1585.

SUPPLEMENTARY INFORMATION:

Background

This proposed rule would amend the regulations which describe prohibited acts in the Archaeological Resources Protection Act of 1979 ("Act"; Pub. L. 96–95, as amended by Pub. L. 100–588; 93 Stat. 721, 102 Stat. 2983; 16 U.S.C. 470 aa–mm). It was prepared by representatives of the Secretaries of the Interior, Agriculture, and Defense, and the Chairman of the Board of the Tennessee Valley Authority, as directed in section 10(a) of the Act.

The first purpose of the Act is to protect irreplaceable archaeological resources on public lands and Indian lands from unauthorized excavation, removal, damage, alteration, or defacement. As enforcement provisions available to Federal land managers, the Act prescribes criminal and civil penalties for unauthorized use of archaeological resources. On November 3, 1988, amendments to the Act were enacted which, among other things, prohibit unauthorized attempts to excavate, remove, damage, alter, or otherwise deface archaeological resources.

Section 7(a)(1) of the Act authorizes Federal land managers to assess civil penalties whenever a person violates a prohibition contained in an applicable regulation or permit issued under the Act. The current uniform regulations (43 CFR part 7; 36 CFR part 296; 32 CFR part 229; and 18 CFR part 1312) incorporate the prohibited acts language of section 6(a) of the Act into the prohibited acts section of the regulations. The proposed rule would revise the prohibited acts section of the uniform regulations to conform to the recent amendments to the Act, thus enabling Federal land managers to assess civil penalties for the attempt to excavate, remove,

damage, alter, or otherwise deface archaeological resources. The proposed rule would thus affect persons who make unauthorized use of archaeological resources or attempt to do so.

Statement of Effects

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). These determinations are based on findings that the rulemaking is directed toward Federal resource management, with no economic impact on the public.

Paperwork Reduction Act

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

List of Subjects

43 CFR Part 7

Administrative practice and procedure, Historic preservation, Indian—lands, Penalties, Public lands.

36 CFR Part 296

Administrative practice and procedure, Historic preservation, Indian—lands, Penalties, Public lands.

18 CFR Part 1312

Administrative practice and procedure, Historic preservation, Indian—lands, Penalties, Public lands.

32 CFR Part 229

Administrative practice and procedure, Historic preservation, Indian—lands, Penalties, Public lands.

Amendment Proposal

The Departments of the Interior, Agriculture, and Defense and the Tennessee Valley Authority are proposing identical amendments to the uniform regulations for protection of archaeological resources and are codifying these amendments in their respective titles of the Code of Federal Regulations. Since the regulations are identical, the text of the amendments is set out only once at the end of this document.

Department of the Interior

43 CFR Part 7

PART 7—PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

1. The authority citation for 43 CFR part 7 is revised to read as follows:

Authority: Pub. L. 96–95, 93 Stat. 721, as amended, 102 Stat. 2983 (16 U.S.C. 470aa–mm)(sec. 10(a).) *Related authority:* Pub. L. 59–209, 34 Stat. 225 (16 U.S.C. 432, 433); Pub. L. 86–523, 74 Stat. 220, 221 (16 U.S.C. 469), as amended, 88 Stat. 174 (1974); Pub. L. 89–665, 80 Stat. 915 (16 U.S.C. 470a–t), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978), 94 Stat. 2987 (1980); Pub. L. 95–341, 92 Stat. 469 (42 U.S.C. 1996).

2. Section 7.4 in 43 CFR part 7 is proposed to be amended by revising paragraph (a) to read as set forth below.

Maryanne Bach,

Acting Assistant Secretary for Fish and Wildlife and Parks.

Department of Agriculture

36 CFR Part 296

PART 296—PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

1. The authority citation for 36 CFR part 296 is revised to read as follows:

Authority: Pub. L. 96–95, 93 Stat. 721, as amended, 102 Stat. 2983 (16 U.S.C. 470aa–mm)(sec. 10(a).) *Related authority:* Pub. L. 59–209, 34 Stat. 225 (16 U.S.C. 432, 433); Pub. L. 86–523, 74 Stat. 220, 221 (16 U.S.C. 469), as amended, 88 Stat. 174 (1974); Pub. L. 89–665, 80 Stat. 915 (16 U.S.C. 470a–t), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978), 94 Stat. 2987 (1980); Pub. L. 95–341, 92 Stat. 469 (42 U.S.C. 1996).

2. Section 296.4 in 36 CFR part 296 is proposed to be amended by revising paragraph (a) to read as set forth below.

John L. Evans,

Acting Assistant Secretary for Natural Resources and Environment.

Tennessee Valley Authority

18 CFR Part 1312

PART 1312—PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

1. The authority citation for 18 CFR part 1312 is revised to read as follows:

Authority: Pub. L. 96–95, 93 Stat. 721, as amended, 102 Stat. 2983 (16 U.S.C. 470aa–mm)(sec. 10(a).) *Related authority:* Pub. L. 59–209, 34 Stat. 225 (16 U.S.C. 432, 433); Pub. L. 86–523, 74 Stat. 220, 221 (16 U.S.C. 469), as amended, 88 Stat. 174 (1974); Pub. L. 89–665, 80 Stat. 915 (16 U.S.C. 470a–t), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978), 94 Stat. 2987 (1980); Pub. L. 95–341, 92 Stat. 469 (42 U.S.C. 1996).

2. Section 1312.4 in 18 CFR part 1312 is proposed to be amended by revising paragraph (a) to read as set forth below.

Marvin T. Runyon,

Chairman, Tennessee Valley Authority.

Department of Defense

32 CFR Part 229

PART 229—PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

1. The authority citation for 32 CFR part 229 is revised to read as follows:

Authority: Pub. L. 96–95, 93 Stat. 721, as amended, 102 Stat. 2983 (16 U.S.C. 470aa–mm)(sec. 10(a).) *Related authority:* Pub. L. 59–209, 34 Stat. 225 (16 U.S.C. 432, 433); Pub. L. 86–523, 74 Stat. 220, 221 (16 U.S.C. 469), as amended, 88 Stat. 174 (1974); Pub. L. 89–665, 80 Stat. 915 (16 U.S.C. 470a–t), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978), 94 Stat. 2987 (1980); Pub. L. 95–341, 92 Stat. 469 (42 U.S.C. 1996).

2. Section 229.4 in 32 CFR part 229 is proposed to be amended by revising paragraph (a) to read as set forth below.

Patricia Means,

OSD Federal Register Liaison Officer, Department of Defense.

§ —.4 Prohibited acts.

(a) No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under § —.8 or exempted by § —.5(b) of this part.

* * * * *

[FR Doc. 90–1910 Filed 1–26–90; 8:45 am]

BILLING CODES 4310–70–M, 3410–11–M, 3810–01–M, 8120–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 67

[Docket No. FEMA–6979]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are solicited on the proposed modified base (100-year) flood elevations listed below for selected locations in the nation. These base (100-year) flood elevations are the basis for the floodplain management measures that the community is required to either

adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program.

DATES: The period for comment will be ninety (90) days following the second publication of the proposed rule in a newspaper of local circulation in each community.

ADDRESSES: See table below.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Matticks, Chief, Risk Studies Division, Federal Insurance Administration, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2767.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency gives notice of the proposed determinations of modified base (100–year) flood elevations for selected locations in the nation, in accordance with section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), 87 Stat. 980, which added section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90–448)), 42 U.S.C. 4001–4128, and 44 CFR 67.4(a).

These elevations, together with the floodplain management measures required by § 60.3 of the program regulations, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements on its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed modified elevations will also be used to calculate the appropriate flood insurance premium rates for new buildings and their contents and for the second layer of insurance on existing buildings and their contents.

Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that the proposed modified flood elevation determinations, if promulgated, will not have a significant economic impact on a substantial number of small entities. A flood elevation determination under Section 1363 forms the basis for new local ordinances, which, if adopted by a local community, will govern future construction within the floodplain area. The local community voluntarily adopts floodplain ordinances in accord with these elevations. Even if ordinances are adopted in compliance with Federal standards, the elevations prescribe how high to build in the floodplain and do not proscribe development. Thus, this action only forms the basis for future local actions. It imposes no new requirements; or in itself it has no economic impact.

List of Subjects in 44 CFR Part 67

Flood insurance, Floodplains.

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

The proposed modified base flood elevations for selected locations are:

PROPOSED MODIFIED BASE FLOOD ELEVATIONS

State	City/town/county	Source of flooding	Location	Depth in feet above ground *Elevation in feet (NGVD)	
				Existing	Modified
California	Placer County, (unincorporated areas).	Truckee River	Distance upstream of Alpine Meadows Road		
			Approximately 50 feet	*6,174	*6,174
			Approximately 150 feet	*6,175	*6,177
			Approximately 420 feet	*6,180	*6,178
			Approximately 580 feet	*6,180	*6,182
			Approximately 685 feet	*6,181	*6,183
			Approximately 790 feet	*6,186	*6,185
			Approximately 950 feet	*6,188	*6,186
			Approximately 1,240 feet	*6,189	*6,189
Maps are available for inspection at the Department of Public Works, 11444 B Avenue, Auburn, California. Send comments to The Honorable Alex Ferreria, Chairman, Placer County Board of Supervisors, 377 Nevada Street, Room 206, Auburn, California 95630.					
North Dakota	City of Center, Oliver County.	Square Butte Creek	Approximately 200 feet downstream of State Highway 25.	*1,965	*1,965
			Approximately 300 feet upstream of State Highway 25.	*1,967	*1,966
			At Center Avenue	*1,968	*1,968
		Tributary 1	Approximately 1,200 feet downstream of State Highway 25.	*1,960	*1,960
			Approximately 850 feet downstream of State Highway 25.	*1,964	*1,970
			Approximately 200 feet upstream of State Highway 25.	*1,978	*1,978
		Tributary 2	At the confluence with Square Butte Creek	*1,960	*1,960
			Approximately 100 feet downstream of State Highway 25.	*1,962	*1,960
			Approximately 600 feet upstream of State Highway 25.	*1,970	*1,970
Maps are available for review at the City Auditor's Office, 312 Lincoln Avenue North, Center, North Dakota. Send comments to The Honorable Dan Wahlman, Mayor, City of Center, P.O. Box 76, Center, North Dakota 58530.					
Pennsylvania	East St. Clair, township, Bedford County.	Bobs Creek	Approximately 0.5 mile downstream of CONRAIL (abandoned).	None	*1,126
			Approximately 0.7 mile upstream of T–575	None	*1,161

PROPOSED MODIFIED BASE FLOOD ELEVATIONS—Continued

State	City/town/county	Source of flooding	Location	Depth in feet above ground *Elevation in feet (NGVD)	
				Existing	Modified
Maps available for inspection at the Township Building, R.D. 1, New Paris, Pennsylvania. Send comments to The Honorable Kenneth Imler, Chairman of the Township of East St. Clair Board of Supervisors, Bedford County, R.D. 1, Osterburg, Pennsylvania 16667.					
Pennsylvania	Upper Moreland, township, Montgomery County.	Pennypack Creek	At Paper Mill Road approximately 450 feet west of Pennypack Creek.	*142	*145
			Downstream side of Interstate Route 276	*200	*199
		Blair Mill Run (formerly Flamingo Creek).	Approximately 750 feet downstream of West Moreland Avenue.	*218	*219
			At private bridge located approximately 300 feet upstream of Monument Avenue.	*230	*231
Maps available for inspection at the Township Manager's Office, 117 Park Avenue, Willow Grove, Pennsylvania. Send comments to The Honorable Brian L. Mook, Manager of the Township of Upper Moreland, Montgomery County, 117 Park Avenue, Willow Grove, Pennsylvania 19090.					
South Dakota	Rapid City, Pennington County.	Lime Creek	Approximately 1,850 feet downstream of Soo San Drive.	*3,321	*3,321
			Approximately 900 feet downstream of Soo San Drive.	*3,327	*3,325
			Approximately 400 feet downstream of Soo San Drive.	*3,333	*3,330
			At Soo San drive	*3,338	*3,338
		Robbinsdale Drain	At Fifth Street Dam	None	*3,334
			At Fox Run Drive Dam	None	*3,400
			At Texas Street Dam	None	*3,374
Maps are available for review at the Public Works Department, 300 Sixth Street, Rapid City, South Dakota. Send comments to The Honorable Keith Carlyle, Mayor, City of Rapid City, 22 Main Street, Rapid City, South Dakota 57701.					
Tennessee	Unincorporated areas of Sullivan County.	Horse Creek	At mouth	*1185	*1186
			Just downstream of Ridge Road	*1210	*1212
			Just upstream of Ridge Road	*1214	*1214
		Kendrick Creek	At mouth	*1206	*1208
			About 530 feet downstream of Rock Springs Road.	*1214	*1214
		Holston River	About .40 mile downstream of CSX railroad	*1174	*1172
			About 790 feet upstream of CSX railroad	*1176	*1174
		North Fork, Holston River	About 900 feet downstream of CSX railroad	*1181	*1180
			About .35 mile upstream of Carters Valley Road.	*1205	*1205
		South Fork, Holston River	About .64 mile downstream of Plant Access Road.	*1193	*1194
			About .80 mile upstream of CSX railroad	*1202	*1204
			About 1.73 miles upstream of CSX railroad	*1206	*1208
		South Fork, Holston River Sluice	About 1.45 miles downstream of Wilcox Drive	*1181	*1182
			About .57 mile upstream of Moreland Drive	*1197	*1198
Maps available for inspection at the Sullivan County Courthouse, Planning and Zoning Department, Blountville, Tennessee. Send comments to The Honorable Keith Westmoreland, County Executive, Sullivan County Courthouse, P.O. Box 509, Blountville, Tennessee 37617.					
Texas	Bellaire (City), Harris County.	Brays Bayou (D100-00-00)	At the upstream side of Southern Pacific Railroad.	*52	*53
			At the downstream side of South Rice Avenue	None	*56
Maps available for inspection at the City Hall, 7008 South Rice Avenue, Bellaire, Texas. Send comments to The Honorable Pat Lilly, Manager of the City of Bellaire, Harris County, 7008 South Rice Avenue, Bellaire, Texas 77401.					
West Virginia	Weirton, city, Brooke and Hancock Counties.	Harmon Creek	Approximately 260 feet upstream of confluence with Ohio River.	None	*672
			At the upstream County boundary	None	*824
		King Creek	Approximately .75 mile upstream of confluence with Ohio River.	*675	*676
			At upstream corporate limits	None	*829
Maps available for inspection at the Office of Community Development, 200 Municipal Plaza, Weirton, West Virginia. Send comments to The Honorable Edwin J. Bowman, Mayor of the City of Weirton, Brooke and Hancock Counties, 200 Municipal Plaza, Weirton, West Virginia 26062.					

Issued: January 18, 1990.

Harold T. Duryee,

Administrator, Federal Insurance Administration.

[FR Doc. 90-1929 Filed 1-26-90; 8:45 am]

BILLING CODE 6718-03-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 15

[General Docket No. 89-626, FCC 89-376]

Cordless Telephone Operation on Off-set Frequencies

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: Proposed rules would allow cordless telephones to operate on frequencies offset from authorized frequencies. Use of offset channels and improved technology would permit two or more radio links within one channel. Thus, spectrum efficiency could be improved.

DATES: Comments are due March 5, 1990. Reply comments are due March 20, 1990.

ADDRESS: Federal Communications Commission; Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Raymond A. LaForge. Office of Engineering and Technology. (202) 653-8117.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making* in General Docket 89-626, FCC 89-376, adopted December 20, 1989, and released January 17, 1990.

Summary of Notice of Proposed Rule Making

1. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

2. On December 10, 1987, the Commission released an *Order* in RM-5320 (2 FCC Rcd 7276) 53 FR 1781, January 22, 1988. The *Order* extended the interim provisions for cordless telephones and made a minor rule modification to permit cordless telephone operation on frequencies removed, or off-set, from those frequencies specified in the Rules. Since implementation of the technical amendments was optional, notice and comment procedures were deemed unnecessary. In response to the *Order* the Electronic Industries Association (EIA) filed a Petition for Partial Reconsideration. The EIA indicated that the technical amendments in the *Order* should be considered by providing notice and comment periods. Thus, in a companion Memorandum, Opinion and Order the rules that permit cordless telephone operation on off-set frequencies are stayed.

3. Since the Commission continues to believe that the use of off-set frequencies could improve spectrum efficiency without adverse affects, amendments in this regard are proposed. Current rules require cordless telephones to operate at the center of a twenty kilohertz band, thereby obstructing manufacturers' ability to improve channel capacities by subdividing existing channels. Allowing manufacturers greater freedom in design could stimulate innovations that may lead to more efficient use of the frequencies available for cordless telephones.

4. The Commission has determined that the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, does not apply to this rule making because if promulgated, it will not have a significant impact on a substantial number of small entities. This proposal may provide marketing opportunities for radio manufacturers, some of which may be small business. Beyond this we do not believe there would be any significant effects on small entities. We invite specific comments on this point by interested parties.

5. This is a non-restricted notice and comment rule making proceeding. *See* § 1.1231 of the Commission's Rules, 47 CFR 1.1231, for rules governing permissible *ex parte* contacts.

6. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR, interested parties may file comments on this proceeding. All relevant comments will be considered by the Commission before final action is taken provided they are filed by the close of the previously cited comment and reply periods. See, "**DATES.**"

Ordering Clauses

7. This action is taken pursuant to 47 U.S.C. 154(i), 301, 302, and 303.

8. *It is ordered* that a copy of this action will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 15

Radio frequency devices, Radio.

PART 15—[AMENDED]

Proposed Rule Changes

1. The authority citation in part 15 continues to read:

Authority: Secs. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, and 307, unless otherwise noted.

2. Section 15.233 is proposed to be amended by revising the section heading and paragraphs (b) and (d) as follows:

§ 15.233 Operation within the bands 46.60-46.98 MHz and 49.66-50.0 MHz.

* * * * *

(b) An intentional radiator used as part of a cordless telephone system shall operate within 10 kHz (neglecting frequency tolerance) of one or more of the following frequency pairs. Operation in which more than one frequency pair is used shall be permitted provided simultaneous transmissions on more than one pair does not occur.

* * * * *

(d) The fundamental emission and modulation products shall be confined to a 20 kHz band. Modulation products outside of a 20 kHz band shall be attenuated at least 26 db below the unmodulated carrier. Harmonics and other emissions outside of a 40 kHz band shall comply with the general field strength limits in § 15.209. The 20 kHz band and the 40 kHz band shall be centered on the frequency listed in paragraph (a) that is nearest to the carrier frequency plus or minus the frequency tolerance at the temperature and voltage used during emission testing. Tests to determine compliance with these requirements shall be performed using an appropriate input signal as prescribed in § 2.989.

* * * * *

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 90-1769 Filed 1-26-90; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 628

[Docket No. 900110-0010]

RIN 0648-AC51

Atlantic Bluefish Fishery

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

ACTION: Proposed rule.

SUMMARY: NOAA issues this proposed rule to implement conservation and management measures as prescribed in the proposed Fishery Management Plan for the Bluefish Fishery (FMP). This rule would (1) require permits for the sale of bluefish, (2) impose a possession limit of ten bluefish for fishermen without a commercial permit, and (3) allow for the imposition of restriction on the commercial fishery, including closure, if certain catch levels are met.

DATE: Comments on the proposed rule must be received on or before March 15, 1990.

ADDRESSES: Comments on the proposed rule, the FMP, or supporting documents should be sent to Mr. Richard Roe, Regional Director, National Marine Fisheries Service, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930-3799. Mark the outside of the envelope "Comments on Bluefish Plan". Comments on the information collection requirement that would be imposed by this rule should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Copies of the FMP, the environmental assessment, and the regulatory impact review are available from John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115 Federal Building, 300 S. New Street, Dover, DE 19901-6790.

FOR FURTHER INFORMATION CONTACT: Jack Terrill, Resource Policy Analyst, 508-281-9252.

SUPPLEMENTARY INFORMATION:

Background

The FMP was prepared by the Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission) in consultation with the New England and South Atlantic Fishery Management Councils. This FMP represents an agreement between the Fishery Management Councils and the Commission to develop jointly a bluefish management plan combining compatible management measures that will be implemented in both state and Federal waters. This cooperative venture represents a new approach for managing interjurisdictional fisheries. A notice of availability for the proposed FMP was published in the **Federal Register**, December 15, 1989 (54 FR 51437). Copies of the FMP are available from the Council upon request at the address given above. The FMP is intended to initiate management of the bluefish (*Pomatomus saltatrix*) fishery pursuant to the Magnuson Fishery Conservation and Management Act (Magnuson Act), as amended, 16 U.S.C. 1801 *et seq.* The management unit is Atlantic bluefish in U.S. waters from the eastern coast of Florida to Maine.

The major goal of the FMP is to conserve the bluefish resource along the Atlantic coast. Five major objectives have been adopted to achieve this goal:

1. Increase understanding of the stock and the fishery;
2. Provide the highest availability of bluefish to U.S. fishermen while maintaining, within limits, traditional uses of bluefish (defined as the commercial fishery not exceeding 20 percent of the total catch);
3. Provide for cooperation among the coastal states, the various regional marine fishery management councils, and federal agencies involved to enhance the management of bluefish from Florida to Maine;
4. Prevent recruitment overfishing; and
5. Reduce the waste in both the commercial and recreational fisheries.

The purpose of the FMP is to address current fishery problems and problems that would occur if the bluefish fishery were to expand significantly or the bluefish resource were to decline. Thus, the FMP is intended to avert potential, as well as correct current, management problems.

Bluefish are extremely important to the recreational fishing industry; bluefish was the predominant species (by weight) harvested on the Atlantic coast by U.S. marine anglers each year from 1979 to 1987. Conversely, blue fish comprise a small percentage of all finfish harvested commercially along the Atlantic coast primarily because the commercial bluefish market is unstable, easily saturated, and characterized by low dockside prices. Expansion of the commercial fishery has been limited both by the lack of sizeable markets and the fact that bluefish spoil rapidly and are generally sold fresh. A significant increase in bluefish demand coupled with the use of advanced processing and freezing technology could increase the commercial harvest and impact historical catch proportions.

Presently, although three states, Maryland, Georgia, and Florida, have minimum size regulations that pertain to the recreational harvest of bluefish, Georgia is the only state that restricts the number of bluefish creeled by anglers. Liberal or nonexistent harvest regulations may allow for overharvest by recreational fishermen and eventual stock decline or even collapse, as witnessed in the South African bluefish fishery. Furthermore, overharvest may lead to increasing conflicts between commercial and recreational bluefish fishermen. Localized conflicts between charter boats and gillnet fishermen in Massachusetts, for example, resulted in the closure of specific areas to gill netting. In addition, encircling gillnets were prohibited in Virginia waters after use of this gear significantly increased the commercial bluefish harvest in Chesapeake Bay in 1982.

Bluefish commercial landings and recreational catch have increased over the last three decades; commercial landings increased from 2.7 to 14.8 million pounds (1224.7 to 6713.2 metric tons) from 1960 to 1987, and the recreational catch doubled during this same period. However, marked fluctuations in abundance historically characterize populations of bluefish in the western North Atlantic.

Data collected by NMFS suggest that the bluefish resource has declined in recent years. For example, although the estimated number of directed recreational fishing trips for bluefish was approximately the same in both 1987 and 1988, preliminary NMFS data indicate that the 1988 East Coast recreational bluefish catch was approximately 16 million fish, down from a reported 33 million in 1987. This would suggest a declining resource.

In addition, a recent stock assessment indicated that bluefish year-class recruitment was highly variable and that three strong year classes have been produced at irregular intervals since 1974; one each in 1977, 1981, and 1984. Low values were recorded in 1986 and 1987, and the 1988 value was the lowest on record. Without the production of a strong year class in 1989, it is probable that the population will continue to decline into the 1990s. If current trends continue, recreational pressure will increase in the near future. Increasing fishing pressure coupled with declining recruitment could lead to serious and sustained stock decline.

Waste of bluefish has been identified by marine scientists and concerned citizens in a number of coastal states. During the public hearing process, a number of people indicated that waste of bluefish has occurred or is a problem in their state. In general, the public

perception that the resource is abundant, coupled with low ex-vessel prices for commercially caught bluefish, has resulted in waste in the bluefish fishery. For example, during May 1988, a large number of dead bluefish was found floating in Chesapeake Bay from the James River to the Rappahannock River. Although several factors were investigated as potential causes, including pollution and disease, the dead fish were attributed to discards from commercial and recreational fishermen.

Comprehensive management strategies for bluefish were non-existent prior to the development of this FMP. Bluefish is a highly migratory species harvested along the Atlantic Coast by a variety of anglers, angling techniques, and commercial gear. Although the stock's extensive migration precludes a single entity from effectively managing the fishery, fishing activities in the Exclusive Economic Zone (EEZ) or in the waters of a few states could seriously impact the stock. The complex problems associated with bluefish stock dynamics and the bluefish fisheries necessitate the cooperative, interjurisdictional approach to management presented in this FMP in the following management measures:

Any person selling a bluefish is considered a commercial fisherman and must have a commerical fishing permit that allows the sale of bluefish. This commercial definition would include all hook-and-line fishermen who sell bluefish, regardless of fishing mode (that is, fishing from shore, man-made structures, private boats, party boats, or charter boats). For states without a permit, a Federal permit is required to sell bluefish.

The Federal costs of implementing an annual permit system for the sale of bluefish shall be charged to permit holders as authorized by section 303(b)(1) of the Magnuson Act. In establishing the annual fee, the Director, Northeast Region, NMFS (Regional Director) will ensure that the fee does not exceed the administrative costs incurred in issuing the permit, as required by section 304(d) of the Magnuson Act. Proper accounting for administrative costs will include labor costs (salary and benefits of permitting officers plus the prorated share of secretarial support and all levels of supervision), computer costs for creating and maintaining permit files (prorated capital costs, time share and expendable supplies), cost of forms and mailers (purchase, preparation, printing and reproduction), and postage costs for application forms and permits.

Anglers are restricted to a possession limit of no more than ten bluefish or the equal of more stringent possession limit of the state of landing, if such a limit exists. On vessels with several passengers, the number of bluefish on the vessel may not exceed ten (or the adjusted limit) times the number of people aboard the vessel, excluding persons with commercial permits and their catch. Those with commercial permits are required to keep their bluefish separated from the pooled catch and in their possession at all times.

Commercial hook-and-line fishermen may take more than the possession limit if they have a commercial permit to sell bluefish. Without a permit, fishermen using hook-and-line gear are restricted to the possession limit.

The Secretary of Commerce (Secretary), upon the recommendation of the Council and the Commission, may adjust the possession limit to between 10 and 15 bluefish per angler. Prior to making the adjustment, the Secretary will publish a notice in the **Federal Register** and accept comments from the public for a period of 15 days. The notice will specify the information used by the Secretary in making the decision to adjust the possession limit. After taking the public comments into consideration, the Secreatry may impose the adjustment through notice in the **Federal Register.**

The commercial fishery, on a coastwide basis, is limited to 20 percent of the total catch (recreational catch plus commercial landings) each year. The decision to implement commercial controls on the bluefish fishery will reply upon data which is reviewed in mid-August of each year and will based on a 2-tiered approach: the first tier employs two separate indices detailed in A and B below.

The first tier:

A. A 3-year moving average of both the commercial landings and total bluefish catch (recreational catch and commercial landings) will be used to derive a time-series projection of the commercial share for the upcoming year. If the projected commercial share is 20 percent or more, then commercial controls will be implemented at the start of the upcoming year. If this percentage is more than 17 percent but less than 20 percent, then policymakers will use the criteria of the second tier to determine whether commercial controls will be implemented.

B. The commercial landings in the total bluefish catch will be calculated for each year and compared to the commercial landings for the previous year. If the change in the commercial landings equals or exceeds 50 percent of the commercial landings for the previous year, then policymakers will use the criteria of the second tier to determine whether commercial controls will be implemented.

The second tier:

If the projected commercial share based on the average catch for the previous 3 years is more than 17 percent but less than 20 percent or the commercial share increased 50 percent or more from the previous year, then the following steps will be used to determine whether controls on the commercial fishery will be implemented for the upcoming year:

1. The most recent calendar year of data will be used to determine what factors led to the increase in the commercial landings.

2. In-season data will then be examined to determine whether the trends exhibited in the previous year are continuing. These data will include commercial landings by state, month, and gear and recreational catch by 2-month periods.

3. If an increasing trend in commercial landings is indicated for the current year, then commercial controls will be implemented the following year. The type of control will be determined from examination of the above data.

If the catch in the commercial fishery is projected to equal or exceed the 20 percent limit during the upcoming year, than a state allocation system will be implemented. This entails the use of landings data from the most recent 10-year period for each state to determine the average percentage of coastwide commercial landings. These percentages will be used to determine the amount of the coastwide quota allocated to each state. Quotas apply to landings in each state regardless of where the bluefish are caught.

In addition, if whole bluefish are processed into fillets at sea, then fillet weight will be converted to whole weight at the state of landing using a 1:2.5 ration (by multiplying fillet weight by 2.5). If whole bluefish are headed and gutted at sea, then the conversion factor is 1:1.5 (by multiplying headed and gutted weight by 1.5).

When all state landing quotas have been taken and the commercial fisheries for Atlantic bluefish have been closed in all Atlantic coastal states, the Regional Director will close the commercial fishery in the EEZ. Individual states are responsible for ensuring that their individual quotas are not exceeded and, as such, may design specific management measures best suited to

their state. Because bluefish are migratory, this method of allocation prevents a single state from harvesting all of the coastwide quota before bluefish are available to other more northern or southern states. States are encouraged to develop regimes that will provide fishing opportunities throughout the season for all bluefish fisheries.

If the increase in commercial landings is attributed to the use of highly efficient gear (purse seines, pair trawls, or runaround gill nets), then the highly efficient gear responsible for the increase in commercial landings will be regulated for the taking of bluefish in EEZ waters. Regulations to be considered include trip limits, area closures or restrictions, and other measures that may be appropriate, including gear prohibition. The proposed allocations and commercial controls will be published in the **Federal Register** with an opportunity for public comment. The Regional Director will implement specific management measures based on a recommendation by the Council and the Commission. The states are encouraged to implement companion regulations to regulate that gear in state waters.

Commercial controls will remain in effect until conditions in either the recreational or commercial fishery warrant a retraction. The Bluefish FMP Review and Monitoring Committee will review landing statistics annually to determine whether commercial controls will be suspended.

Classification.

Section 304(a)(1)(D)(ii) of the Magnuson Act, as amended, requires the Secretary to publish regulations proposed by a Council within 15 days of the receipt of the FMP and proposed regulations. At this time the Secretary has not determined that the FMP these rules would implement is consistent with the national standards, other provisions of the Magnuson Act, and other applicable law. The Secretary, in making this determination, will take into account the information, views, and comments received during the comment period.

The Council prepared an environmental assessment (EA) for the FMP and discussed the impact on the environment as a result of this rule. A copy of the EA may be obtained from the Council (see **ADDRESSES**).

The Under Secretary for Oceans and Atmosphere, NOAA, determined that this proposed rule is not a "major rule" requiring a regulatory impact analysis under Executive Order (E.O.) 12291. This determination is based on the draft regulatory impact review which demonstrates positive net short term and long term economic benefits to the fishery under the proposed management measures.

This proposed rule, if adopted, is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. A copy of this review may be obtained from the Council (see **ADDRESSES**).

The proposed rule is exempt from the procedure of E.O. 12291 under section 8(a)(2) of that order. Deadlines imposed under the Magnuson Act, as amended, require the Secretary to publish this proposed rule within 15 days after its receipt. The proposed rule is being reported to the Director, Office of Management and Budget, with an explanation of why it is not possible to follow the procedures of the order.

The General Counsel of the Department of Commerce certified to the Small Business Administration that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. This certification is based upon the regulatory impact review prepared by the Council that determined that a recreational bag limit of ten fish will impact only 7 percent of the trips of the total successful anglers, regardless of water area. Because approximately 75 percent of the harvest occurs in state waters, the actual impact of the FMP in the EEZ will be significantly less. If the possession limit were adjusted upwards to reflect stock abundance, a 15-fish bag limit would impact fewer than 4 percent of the trips of the successful anglers. A zero-fish bag limit would still leave the fishery open to catch-and-release fishing with its related enjoyment benefits.

The 20 percent limit on commercial harvest is not likely to have an impact because the fishery has been harvesting approximately 12 percent of the total catch. If controls on commercial harvest are imposed because of the growth in the commercial fishery, there would be no negative impacts relative to the current fishery situation. If controls are imposed through a declining recreational share of the harvest, it is likely that state controls in the territorial sea would be significant.

The annual permit for vessels fishing commercially for bluefish is expected to impose an insignificant burden because it would only be imposed for those states without a licensing program, and the cost, if imposed, would not likely exceed $15 per individual. In addition, some fishermen who sell less than 5 times per year may choose not to purchase a permit. Although this could affect as many as 1,154 individuals, the total number actually affected is expected to be considerably less. The impacts are expected to be minor because these individuals are not dependent on this activity for a significant portion of their income and the amount of money involved is expected to be small.

The proposed rule contains a collection-of-information requirement subject to the Paperwork Reduction Act. A request to collect this information will be submitted to the Office of Management and Budget for approval. The requirement is an annual Federal fishery permitting system.

Only four Atlantic coast states (New Hampshire, New Jersey, Virginia, and North Carolina) do not require a permit to sell bluefish at the current time. It is anticipated that these states will implement a permit requirement in compliance with the interstate Bluefish Plan adopted by the ASMFC. A Federal permit will be required only in the event that any of the four states choose not to comply with the majority or during the period before complying state legislation can be implemented. A number of recreational anglers from the above four states would be reclassified as commercial fishermen under the definition in the FMP. These anglers would need a permit to sell bluefish should they wish to continue the practice. An estimate was made from the best available recreational fishing statistics and projections of demand for recreational fishing; an estimated 5,770 trips in the four states would involve the sale of bluefish. To the extent that some individuals take more than one trip per year, the number of affected fishermen would be less. The frequency of fishing by individuals dependent on income from the sale of bluefish would likely be greater than fishing frequency for the average recreational angler. Therefore, it is assumed that persons who would ordinarily sell bluefish less than five times per year would discontinue the practice and would not apply for a permit. If all trips involving the sale of bluefish were made by fishermen taking five trips per year, 1,154 is a maximum estimate of the number of affected individuals. The true number would probably be less, depending on the extent to which hook-and-line fishermen continue to sell bluefish, and the total

number of trips each individual takes. Given the above maximum estimate at five minutes per angler, 96 total burden hours are calculated. Should any of the above four states implement legislation requiring a permit to sell bluefish, Federal burden hours will be reduced accordingly. Comments on these reporting burden estimates or any other aspect of the collection of information, including suggestions for reducing the burdens, may be sent to NMFS and OMB (see **ADDRESSES**).

The Council determined that this rule will be implemented in a manner that is consistent, to the maximum extent practicable, with the approved coastal zone management programs of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Florida. Georgia does not have an approved coastal zone program. For Pennsylvania, the Council determined that this rule will not affect the coastal zone. This determination was submitted for review by the responsible state agencies under Section 307 of the Coastal Zone Management Act on July 7, 1989. As of October 30, 1989, all of the States had concurred with the Council's finding except Rhode Island, Maryland, Virginia, and North Carolina, which did not respond.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

List of Subjects in 50 CFR Part 628

Administrative practice and procedure, Fish, Fisheries, Vessel permits and fees.

Dated: January 24, 1990.

James E. Douglas, Jr.,

Acting Assistant Administrator for Fisheries.

For the reasons set out in the preamble, NOAA proposes to add 50 CFR Part 628 as follows:

PART 628—ATLANTIC BLUEFISH FISHERY

Subpart A—General Provisions

Sec.

Subpart B—Management Measures

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

Subpart A—General Provisions

§ 628.1 Purpose and scope.

The regulations in this part implement the Fishery Management Plan for the Bluefish Fishery, which was prepared and adopted by the Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission in cooperation with the New England and South Atlantic Fishery Management Councils. These regulations govern the conservation and management of Atlantic bluefish in the EEZ.

§ 628.2 Definitions.

In addition to the definitions in the Magnuson Act and in § 620.2 of this chapter, the terms used in this part have the following meanings:

Bluefish means *Pomatomus saltatrix.* Bluefish, for the purposes of this part, refers to bluefish in the Atlantic EEZ from the eastern coast of Florida to Maine.

Charter or party boat means any vessel that carries passengers for hire to engage in fishing.

Commission means the Atlantic States Marine Fisheries Commission.

Committee means the Bluefish FMP Review and Monitoring Committee of the Council.

Council means the Mid-Atlantic Fishery Management Council.

Fishery Management Plan (FMP) means the Fishery Management Plan for the Bluefish Fishery and any amendments thereto.

Fishing trip means a period of time during which fishing is conducted, beginning when the vessel leaves port and ending when the vessel returns to port.

NEFC means the Northeast Fisheries Center, NMFS, Water Street, Woods Hole, MA 02543.

Pair trawl means a net attached to and towed by two vessels.

Person who receives bluefish for commercial purposes means any person (excluding representatives of governmental agencies) engaged in the sale, barter, or trade of bluefish received from a fisherman, or one who transports bluefish from a fisherman.

Purse seine means a floated and weighted net that is drawn closed by means of a draw string threaded through rings attached to the bottom of the net.

Regional Director means the Director, Northeast Region, NMFS, 1 Blackburn Drive, Gloucester, MA 01930, telephone 508–281–9243, or a designee.

Regulated fishery means any fishery of the United States which is regulated under the Magnuson Act.

Runaround gillnet or encircling gillnet means a rectangular net placed upright in the water column in a circular fashion with an opening equal to or less than the length of the net or with an opening greater than the length of the net if the opening is obstructed in any fashion.

Vessel length means that length specified on State registration or U.S. Coast Guard documentation.

§ 628.3 Relation to other laws.

(a) The relation of this part to other laws is set forth in § 620.3 of this chapter and paragraph (b) of this section.

(b) Additional regulations governing fishing for bluefish by foreign vessels in the EEZ are set forth in 50 CFR part 611, subparts A and C.

§ 628.4 Permits and fees.

(a) *General.* (1) Any person selling bluefish harvested in the EEZ must have either a valid permit issued under this part or a valid State of landing permit to sell bluefish.

(2) Any person who applies for a permit under this section, or who uses a valid state permit to sell fish harvested from the EEZ, must agree as a condition of using either permit that his/her bluefish catch and gear (without regard to whether fishing occurs in the EEZ or landward of the EEZ, and without regard to where such bluefish or gear are possessed, taken, or landed) will be subject to all the requirements of this part. All such catch and gear will remain subject to any applicable State or local requirements. If a requirement of this part and a conservation measure required by a state or local law differ, any person issued a permit under this section or using a valid State permit to sell bluefish harvested from the EEZ must comply with the more restrictive requirement.

(b) *Application.* (1) An application for a permit under this part must be signed by the applicant on an appropriate form obtained from the Regional Director and submitted at least 30 days prior to the date on which the applicant desires to have the permit made effective.

(2) An applicant must provide all the following information:

(i) The name, mailing address, including zip code, and telephone number of the applicant;

(ii) The height, weight, hair color, and eye color of an individual applicant;

(iii) If the applicant represents a corporation, the certificate of incorporation;

(iv) Percentage of annual income derived from the sale of bluefish; and

(v) Any other information required by the Regional Director.

(3) Upon receipt of an incomplete or improperly executed application, the Regional Director will notify the applicant of the deficiency in the application. If the applicant fails to correct the deficiency within 21 days following the date of notification, the application will be discarded.

(4) Any change in the information specified in paragraph (b)(2) of this section must be submitted by the applicant in writing to the Regional Director within 15 days of the change.

(c) *Fees.* The Regional Director may charge a fee consistent with the Magnuson Act for the issuance of the federal permit.

(d) *Issuance.* The Regional Director will issue a permit to the applicant no later than 30 days from the receipt of a completed application.

(e) *Duration.* A permit will continue in effect until December 31 of each year unless it is revoked, suspended, or modified under 15 CFR part 904.

(f) *Alteration.* No person may alter, erase, or mutilate any permit. Any permit which has been altered, erased, or mutilated is invalid.

(g) *Replacement.* Replacement permits may be issued by the Regional Director when requested in writing by the applicant, stating the need for replacement and the fishing permit number assigned. An application for a replacement permit will not be considered a new application. The Regional Director may charge a fee consistent with the Magnuson Act for the issuance of the replacement permit.

(h) *Transfer.* Permits issued under this part are not transferable or assignable. A permit will be valid only for the person for which it is issued.

(i) *Display.* A person issued a permit under this section must be able to present the permit for inspection when requested by an authorized officer.

(j) *Suspension and revocation.* Subpart D of 15 CFR part 904 (Civil Procedures) governs the imposition of sanctions against a permit issued under this part.

§ 628.5 Prohibitions.

In addition to the general prohibitions specified in § 620.7 of this chapter, it is unlawful for any person to do any of the following:

(a) Possess in or harvest from the EEZ Atlantic bluefish in excess of the Possession limit specified in § 628.21, unless that person has a permit meeting the requirements of § 628.4(a);

(b) Possess, have custody or control of, ship, receive, barter, trade, transport, offer for sale, sell, purchase, import, or export any bluefish taken, retained, or landed in violation of the Magnuson Act, or any regulation or permit issued under the Magnuson Act;

(c) Fish under a permit meeting the requirements of § 628.4(a) in violation of a notice of restriction published under § 628.22;

(d) Fish in the EEZ under a permit meeting the requirements of § 628.4(a) during a closure under § 628.23;

(e) Fail to report to the Regional Director within 15 days, any change in the information in the application for a permit under § 628.4;

(f) Fail to present any permit meeting the requirements of § 628.4(a) upon request of an authorized officer;

(g) Sell any Atlantic bluefish harvested from the EEZ unless that person has a permit that meets the requirements of § 628.4(a);

(h) Make any false statement, written or oral, to an authorized officer concerning the taking, catching, harvesting, landing, purchase, sale, possession, or transfer of any Atlantic bluefish; or

(i) Violate any other provision of this part, the Magnuson Act, or any regulation or permit issued under the Magnuson Act.

§ 628.6 Facilitation of enforcement.

See § 620.8 of this chapter.

§ 628.7 Penalties.

See § 620.9 of this chapter.

Subpart B—Management Measures

§ 628.20 Fishing year.

The fishing year is from January 1 through December 31.

§ 628.21 Possession limit.

(a) *Possession limit.* (1) No person shall possess more than ten bluefish unless he/she has a permit meeting the requirements of § 628.4(a).

(2) Bluefish caught while in possession of a permit meeting the requirements of § 628.4(a) must be kept separate from the pooled catch and in the possession of the permit holder at all times.

(3) If Atlantic bluefish are filleted into two or more sections, such fillets shall be deemed to be whole Atlantic bluefish using a ratio of 1:2 (two fillets to one whole fish). If Atlantic bluefish are filleted into a single (butterfly) fillet, such fillets shall be deemed to be whole Atlantic bluefish.

(4) Atlantic bulefish harvested from party and charter boats or other vessels carrying more than one person may not be commingled. Compliance with the possession limit will be determined by dividing the number of Atlantic bluefish on board by the number of persons on board, provided, however, that if a person or persons on board are fishing under a permit meeting the requirements of § 628.4(a), his/her catch shall not be counted for determining compliance with the possession limit if it is maintained in the possession of such person(s). If their is a violation of the possession limit on board a vessel carrying more than one person, the violation shall be deemed to have been committed by the owner and/or operator.

(b) *Adjustment of the possession limit.* The Secretary may adjust the possession limit within a range of 0 to 15 Atlantic bluefish based on a recommendation of the Council and Commission. The Secretary will publish a notice of any propose adjustment in the **Federal Register.** The public may comment on the adjustment for 15 days after the date of the publication. After consideration of public comments, the Secretary may publish a notice of any adjustment in the possession limit in the **Federal Register.**

§ 628.22 Catch monitoring, commercial controls, and gear restrictions.

(a) The Committee will review bluefish catch statistics prior to August 15th of each year. This review, combined with considerations based on a 3-year moving average of both the commercial landings and bluefish catch (recreational catch and commercial landings), will be used by the Committee to project the commercial catch for the next fishing year. This projection shall be reported to the Council and the Commission.

(b) The Council and the Commission will review the report of the Committee. If the report indicates that the commercial catch for the next fishing year will equal or exceed 20 percent of the total catch (recreational catch plus commercial landings) of Atlantic bluefish based on the average catch for the previous three years, the Council and Commission will propose the commercial controls to be implemented at the start of the upcoming year. If the report indicates that the commercial catch will be greater than 17 percent but less than 20 percent of the total catch of Atlantic bluefish based on the average catch for the previous three years, or that the projected commercial catch is 50 percent greater than the previous year's commercial catch, the Council and Commission will determine whether commercial controls are necessary. In making such a determination the Council and Commission will consider:

(1) The most recent catch data;

(2) Trends in the fishery; and

(3) Any other relevant factors.

(c) If the catch in the commercial fishery is projected to equal or exceed the 20 percent limit during the upcoming year, then a state allocation system will be implemented. This will entail the use of landings data from the most recent 10-year period for each state, to determine the average percentage of each state's coastwide commercial landings. These percentages will be used to determine the amount of the coastwide quota allocated to each state. Quotas will apply to landings in each state, regardless of where the bluefish were caught.

(d) If whole Atlantic bluefish are processed into fillets at sea, then fillet weight will be converted to whole weight at the state of landing by multiplying fillet weight by 2.5. If whole Atlantic bluefish are headed and gutted at sea, then the conversion is accomplished by multiplying headed/gutted weight by 1.5.

(e) If the Council concludes that the increase in the commercial catch is attributable to the use of purse seines, pair trawls, or encircling (runaround) gillnets, then it will propose restrictions applicable to that gear type. In determining what restrictions are necessary to control the catch of Atlantic bluefish by commercial fishermen using these gear, the Council may consider:

(1) Trip limits;

(2) Area closures;

(3) Banning the use of these gear types; or

(4) Any other measures it deems appropriate.

(f) The Regional Director will review any gear restriction(s) proposed by the Council. If the Regional Director concurs that the proposed gear restrictions are consistent with the goals and objectives of the FMP, the national standards, and other applicable law, the Regional Director will recommend that the Secretary publish a notice of the proposed restriction in the **Federal Register** with a 30-day public comment period. After consideration of public comments, the Secretary may publish a notice in the **Federal Register** specifying the final restriction(s).

(g) The Secretary may rescind a notice of restriction in the **Federal Register** if he finds, based on the advice of the Council through the process set forth in paragraphs (a) and (b) of this section, that the restriction is no longer necessary.

§ 628.23 Closure of fishery.

The Regional Director shall close the commercial fishery for Atlantic bluefish in the EEZ if the commercial fisheries for Atlantic bluefish have been closed in all Atlantic coastal States.

[FR Doc. 90–1960 Filed 1–24–90; 4:05 pm]
BILLING CODE 3510-22-M

Notices

Federal Register
Vol. 55, No. 19
Monday, January 29, 1990

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Agriculture Biotechnology Research Advisory Committee, Research Guidelines Working Group; Ruling

In accordance with the Federal Advisory Committee Act of October 1972 (Pub. L. No. 92–463, 86 Stat. 770–776), the U.S. Department of Agriculture (USDA), Science and Education, announces the following meeting of a working group of the Agriculture Biotechnology Research Advisory Committee.

Name: Research Guidelines Working Group.

Date: February 27–28, 1990.

Time: 9:00 a.m. to approximately 5:00 p.m. on February 27. 9:00 a.m. to approximately 1:00 p.m. on February 28.

Place: U.S. Department of Agriculture, Conference Room 338–C, Aerospace Building, 901 D Street SW. (alternate entrance at 370 L'Enfant Promenade), Washington, DC 20250.

Type of Meeting: This meeting is open to the public. Persons may participate in the meeting as time and space permit.

Comments: The public may file written comments before or after the meeting with the contact person specified below.

Purpose: To review and revise draft USDA guidelines for agricultural research.

Contact Person: Dr. Alvin L. Young, Executive Secretary, Agricultural Biotechnology Research Advisory Committee, U.S. Department of Agriculture, Office of Agricultural Biotechnology, Room 321–A, Administration Building, 14th and Independence Avenue SW., Washington, DC 20250. Telephone (202) 447–9175.

Done at Washington, DC, this 17th day of January, 1990.

Charles E. Hess,

Assistant Secretary, Science and Education.

[FR Doc. 90–1922 Filed 1–26–90; 8:45 am]

BILLING CODE 3410–22–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–003]

Fireplace Mesh Panels From Taiwan; Preliminary Results of Antidumping Duty; Administrative Review

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice of Preliminary Results of Antidumping Duty Administrative Review.

SUMMARY: In response to a request from the petitioner, the Department of Commerce has conducted an administrative review of the antidumping duty order on fireplaces mesh panels from Taiwan. The review covers three manufacturers and/or exporters of this merchandise to the United States and the period June 1, 1988 through May 31, 1989. We preliminarily determine the dumping margin to be 6.40 percent for all three firms. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: January 29, 1990.

FOR FURTHER INFORMATION CONTACT: Arthur N. DuBois or Richard Rimlinger, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–8312/1130.

SUPPLEMENTARY INFORMATION:

Background

On February 8, 1989, the Department of Commerce ("the Department") published in the **Federal Register** (54 FR 6156) the final results of the last administrative review of the antidumping duty order on fireplace mesh panels from Taiwan (47 FR 24616, June 7, 1982). The petitioner requested, in accordance with section 353.22(a) of the Department's new regulations (54 FR 12742, March 28, 1989) (to be codified at 19 CFR 353.22(a)), that we conduct an administrative review for the period June 1, 1988 through May 31, 1989 on four firms. The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

We published a notice of initiation on July 25, 1989 (54 FR 30915), covering four companies, Yeh Sheng Wire Mesh & Screen Co., Ltd., Tah Chung Iron of Superior Quality Co., Ltd., Taipoly Industries Ltd., and Dalvey Products Supply, Ltd. Dalvey Products Supply, Ltd. reported that it has acquired Taipoly Industries Ltd. Therefore, the review covers three manufacturers and/or exporters of Taiwanese fireplace mesh panels and the period June 1, 1988 through May 31, 1989.

Scope of Review

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule ("HTS"), as provided for in section 1201 et seq. of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item number(s).

Imports covered by this review are shipments of fireplace mesh panels. Such panels are defined as pre-cut, flexible mesh panels, both finished and unfinished, which are constructed of interlocking spirals of steel wire and are of the kind used in the manufacture of safety screening for fireplaces. Until January 1, 1989, such merchandise was classifiable under items 642.7800 and 654.0045 of the Tariff Schedules of the United States Annotated ("TSUSA"). This merchandise is currently classifiable under HTS items 7314.49.00 and 7323.99.00. The TSUSA and HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Preliminary Results of Review

Yeh Sheng and Tah Chung failed to respond to our questionnaire. We, therefore, assigned to both companies a rate of 6.40 percent using the best information available ("BIA"). This is the highest of the rates calculated in the fair value investigation, which are the only calculated rates we have in this proceeding.

Dalvey submitted information indicated that all of the subject merchandise it sold to the Unitd States during the review period was purchased from Yeh Sheng. As neither respondent has provided any evidence demonstrating that Yeh Sheng was unaware that the merchandise it sold to

Dalvey was destined for the United States at the time of the sale to Dalvey, we have assigned Yeh Sheng's BIA rate to Dalvey.

Interested parties may submit written comments on these preliminary results within 30 days of the date of publication of this notice and may request disclosure within 5 days of the date of publication of this notice and may request a hearing within 10 days of publication. Any hearing, if requested, will be held as early as convenient for the parties but no later than 44 days after the date of publication, or the first workday thereafter. Pre-hearing briefs from interested parties may be submitted not later than 14 days before the date of the hearing or the first worday thereafter. Rebuttal briefs and rebuttal comments, limited to issues raised in the initial round of comments, may be filed not later than 7 days after submission of the initial round of comments. The Department will publish the final results of this administrative review including the results of this analysis of issues raised in any such written comments or at a hearing.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentage stated above. The Department will issue appraisement instructions on each exporter directly to the Customs Service.

Further, as provided for by section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties based on the above margins will be required for the above firms. For any shipments from the remaining known manufacturers and/or exporters not covered in this review, a cash deposit shall be required at the rates published in the first administrative review (49 FR 28592, July 13, 1984). For any future entries of this merchandise from a new exporter not covered in this or in prior reviews, whose first shipments of this merchandise occurred after May 31, 1988, and which is unrelated to any reviewed firm or any other previously reviewed firm, a cash deposit of 6.40 percent shall be required. These deposit requirements are effective for all shipments of Taiwanese fireplace mesh panels entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.22 of the Department's regulations (54 FR 12742) (to be codified at 19 CFR 353.22).

Dated: January 4, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90-1848 Filed 1-26-90; 8:45 am]

BILLING CODE 3510-DS-M

Auto Parts Advisory Committee; Closed Meeting

AGENCY: International Trade Administration.

DATE AND LOCATION: The meeting will be held on Tuesday, February 13, 1990 from 10:00 a.m. to 4:00 p.m. at the Department of Commerce, Herbert C. Hoover Building, 14th and Constitution, Washington, DC, Room 4830.

SUMMARY: The U.S. Automotive Parts Advisory Committee (the "Committee") advises U.S. Government officials on matters relating to the implementation of the Fair Trade in Auto Parts Act of 1988. The Committee: (1) Reports annually to the Secretary of Commerce on barriers to sales of U.S.-made auto parts and accessories in Japanese markets; (2) assists the Secretary in reporting to the Congress on the progress of sales of U.S.-made auto parts in Japanese markets, including the formation of long-term supplier relationships; (3) reviews and considers data collected on sales of U.S.-made auto parts to Japanese markets; (4) advises the Secretary during consultations with the Government of Japan on these issues; and (5) assists in establishing priorities for the Department's initiatives to increase U.S.-made auto parts sales to Japanese markets, and otherwise provide assistance and direction to the Secretary in carrying out these initiatives. At the initial meeting, committee members will receive briefings on the status of ongoing consultations with the Government of Japan and will discuss specific trade and promotional matters related to U.S.-Japan automotive parts trade policy.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration, with the concurrence of the General Counsel formally determined on June 14, 1989, pursuant to section 10(d) of the Federal Advisory Act, as amended, that the series of meetings or portions of meetings of the Committee and of any subcommittee thereof, dealing with privileged or confidential commercial information may be exempt from the provisions of the act relating to open meeting and public participation therein because these items will be concerned with matters that are within the purview of 5 U.S.C. 552b (c) (4) and (9) (B). A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6628, Main Commerce.

FOR FURTHER INFORMATION CONTACT: Mr. Stuart Keitz, Office of Automotive Industry Affairs, Automotive Affairs and Consumer Goods Sector, Trade Development, Main Commerce, Room 4036, Washington, DC 20230, telephone: (202) 377-0554.

Dated: January 22, 1990.

Henry Misisco,

Acting Deputy Assistant Secretary, Automotive Affairs and Consumer Goods.

[FR Doc. 90-1722 Filed 1-26-90; 8:45 am]

BILLING CODE 3510-DR-M

Applications for Duty-Free Entry of Scientific Instruments

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89-651; 80 Stat 897; 15 CFR 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with § 301.5(a) (3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 A.M. and 5:00 P.M. in Room 2841, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC.

Docket Number: 89-060R. *Applicant:* Women and Infants' Hospital, 101 Dudley Street, Providence, RI 02905. *Instrument:* Automated Image Analysis Microscope, Model Cytoscan RK1. *Manufacturer:* Image Recognition Systems, United Kingdom. Original notice of this resubmitted application was published in the **Federal Register** of February 24, 1989.

Docket Number: 89-077R. *Applicant:* National Institutes of Health, Division of Contracts and Grants, Building 31/1B44, Bethesda, MD 20892. *Instrument:* Positron Emission Tomography Scanner, Model PC2048-15B. *Manufacturer:* Scanditronix AB, Sweden. Original notice of this resubmitted application was published in the **Federal Register** of March 23, 1989.

Docket Number: 89-096R. *Applicant:* University of Nebraska Medical Center, Meyer Children's Rehabilitation Institute, 444 South 44th Street, Omaha, NE 68131. *Instrument:* Automated

Chromosome Analysis System, Model RK2E. *Manufacturer:* Image Recognition Systems, United Kingdom. Original notice of this resubmitted application was published in the **Federal Register** of April 5, 1989.

Docket Number: 89–138R. *Applicant:* New England Deaconess Hospital, Laboratory of Pathology, 185 Pilgrim Road, Boston, MA 02215. *Instrument:* Electron Microscope, Model H–600–3. *Manufacturer:* Hitachi Nissei Sangyo America, Ltd., Japan. *Intended use:* The instrument will be used for the following:

(a) A clinical histochemical and ultrastructural study of Lovostatin myopathy,

(b) A study using light microscopy, electron microscopy and histochemistry to compare the relative efficacy of different dietary pretreatments of rat livers to be used for transplantation,

(c) An ultrastructural and histochemical study of human liver transplants under conditions of different preservation fluids.

The original of this resubmitted application was received by the Commissioner of Customs: April 20, 1989.

Docket Number: 89–208R. *Applicant:* Oklahoma Medical Center, 800 NE. 13th Street, Oklahoma City, OK 73104. *Instrument:* Electron Microscope, Model JEM 1200EX/SEG/DP/DP. *Manufacturer:* JEOL, Ltd., Japan. *Intended use:* The instrument will be used to study the ultrastructure of white blood cells, cells derived from blood vessels, tumor cells, kidney tissues, neuro tissue and cyto skeletal/tissue. The objective of these studies will be to understand the normal ultrastructure of human tissue and experimental animals and to identify changes in tissue associated with various disease processes and distinguishing this from the normal aging process. The original of this resubmitted application was received by the Commission of Customs: August 8, 1989.

Docket Number: 89–287. *Applicant:* Pennsylvania State University, Department of Meteorology, 503 Walker Bldg., University Park, PA 16802. *Instrument:* Copper-Laser-Pumped Dye Laser, Model FL 3001. *Manufacturer:* Lambda Physik, Inc., West Germany. *Intended use:* The instrument will be used with a copper laser as a light source for resonance fluorescence detection of OH and NO_2. HO_2 and NO are detected by chemically converting them to OH and NO_2, respectively. The experiments include measurements from the ground and from NASA aircraft in a variety of environments. The objectives of these experiments are to collect data that can be used to constrain an understanding of atmospheric photochemistry. *Application received by Commissioner of Customs:* December 5, 1989.

Docket Number: 89–288. *Applicant:* National Institute of Standards and Technology, Chemical Kinetics Division 222/A260, Gaithersburg, MD 20899. *Instrument:* Pulsed Dye Laser. *Manufacturer:* Lambda Physik, Inc., West Germany. *Intended use:* Studies of the spectroscopy and kinetics of free radicals involved in semiconductor processing, combustion and environmental chemistry. Specifically, the instrument will be used to multiphoton ionize the chemical species and to develop new ways to detect these difficult to observe species. *Application received by Commission of Customs:* December 7, 1989.

Docket Number: 89–289. *Applicant:* Virginia Polytechnic Institute and State University, Department of Mining and Mineral Engineering, 213 Holden Hall, Blacksburg, VA 24061–0239. *Instrument:* Surface Forces Apparatus, Model MARK 4. *Manufacturer:* Anutech Pty, Ltd., Australia. *Intended use:* The instrument will be used for studies of hydrophobic interactions of coal. Experiments will be conducted to measure the interactions between coal particles and air bubbles and/or between two artificial hydrophobic surfaces. *Application Received by Commissioner of Customs:* December 11, 1989.

Docket Number: 89–290. *Applicant:* CUNY-College of Staten Island, 130 Stuyvesant Place, Room 7–303, Staten Island, NY 10301. *Instrument:* Betz Micromanometer, Model 2500. *Manufacturer:* Van Essen Instruments, The Netherlands. *Intended use:* The instrument will be used to study the aerodynamics and fluid dynamic aspects of flow past an object (like a wing, cone etc.). The aim of this study is to understand the effect of turbulence on the velocity and pressure distribution on objects of interest in mechanical and aerospace engineering. In addition, the instrument will be used for educational purposes in the courses ENS 450—Applied Mechanics Laboratory and ENS 480—Advanced Engineering Design. *Application received by Commissioner of Customs:* December 11, 1989.

Docket Number: 89–291. *Applicant:* University of Kentucky, College of Pharmacy, Rose Street Pharmacy Bldg., Lexington, KY 40536–0082. *Instrument:* Mass Spectrometer, Model CONCEPT 1H. *Manufacturer:* Kratos Analytical, United Kingdom. *Intended Use:* The instrument will be used in a mass spectrometry facility for projects which demand detection, measurement and structure elucidation of biologically important molecules. This includes naturally occurring and synthetic compounds of either a potential or proven pharmacological value. The instrument will also be used for educational purposes in the area of instrumental analysis. *Application Received by Commissioner of Customs:* December 11, 1989.

Docket Number: 89–292. *Applicant:* University of California, Santa Barbara, Department of Geological Sciences, Santa Barbara, CA 93106. *Instrument:* Mass Spectrometer, Model PRISM SERIES II. *Manufacturer:* VG Isotech, United Kingdom. *Intended Use:* The instrument will be used for studies of biological samples (plant cellulose and water in leaves) and geological samples (bones and plants excavated at archaeological sites) to determine how biological processes affect distribution of isotopes in materials. In addition, the instrument will be used in the course Isotope for Paleobiologists to teach students how to do isotope analysis so they can apply isotopes to their own research interest. *Application Received by Commissioner of Customs:* December 12, 1989.

Docket Number: 89–293. *Applicant:* Florida Atlantic University, 500 NW. 20th Street, Boca Raton, FL 33431. *Instrument:* Angular Distribution Electron Spectrometer System, Model ADES 400. *Manufacturer:* VG Instruments, United Kingdom. *Intended Use:* The instrument will be used for studies of a range of single crystal and polycrystalline metals and metallic alloys. In experiments involving auger electron spectroscopy, low energy electron diffraction and x-ray photoelectron spectroscopy will be conducted with the aim of understanding the properties of metals and alloys from a knowledge of their underlying electronic structure. *Application Received by Commissioner of Customs:* December 13, 1989.

Docket Number: 89–294. *Applicant:* Michigan State University, East Lansing, MI 48824–1325. *Instrument:* Controlled Atmosphere Monitoring Computer and CO_2 Analyzer and O_2 Analyzer, Model 906. *Manufacturer:* David Bishop Instrument, Inc., United Kingdom. *Intended Use:* The instrument will be used in monitoring and controlling the concentrations of CO_2 in controlled atmosphere storage facilities. Studies conducted are concerned with the storage life extension of perishable fruits and vegetables. *Application Received by Commissioner of Customs:* December 18, 1989.

Docket Number: 89–295. *Applicant:* Michigan State University, East Lansing, MI 48824–1325. *Instrument:* Dedicated Automated Controlling Computer, Model 900. *Manufacturer:* David Bishop Instrument, Inc., United Kingdom. *Intended Use:* The instrument will be used in monitoring and controlling the concentrations of CO_2 in controlled atmosphere storage facilities. Studies conducted are concerned with the storage life extension of perishable fruits and vegetables. *Application Received by Commissioner of Customs:* December 18, 1989.

Docket Number: 89–296. *Applicant:* University of California, San Diego, Scripps Institution of Oceanography, La Jolla, CA 92093. *Instrument:* Mass Spectrometer, Model VG 336. *Manufacturer:* VG Isotopes, United Kingdom. *Intended Use:* The instrument will be used in the isotopic and elemental chemical analysis of both natural terrestrial and extra-terrestrial samples. The elements analyzed will be isolated from natural waters, igneous and sedimentary rocks and meteorites. In addition, synthesized phases will be analyzed as part of research efforts towards understanding natural isotopic variations. The instrument will also be used by students in a course entitled Solids in Nature which introduces theory and application of experimental techniques in determining the structure and composition of geological materials. *Application Received by Commissioner of Customs:* December 20, 1989.

Docket Number: 89–297. *Applicant:* University of Nebraska-Lincoln, Department of Geology, 214 Bessey Hall, Lincoln, NE 68588–0340. *Instrument:* Mass Spectrometer, Model VG PQ2. *Manufacturer:* VG Elemental, United Kingdom. *Intended Use:* The instrument will be used to determine the concentration of 60 elements in the periodic table. The main objective of the investigations will be the determination of elemental distribution and redistribution in the rock, mineral or water samples. In addition, the instrument will be used in the course Instrumental Analysis of Geological Materials to teach students the principles upon which this and existing instruments are based for the acquisition of data. *Application Received by Commissioner of Customs:* December 20, 1989.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FP Doc. 90–1967 Filed 1–26–90; 8:45 am]

BILLING CODE 3510-DS-M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: DoD FAR Supplement, part 270, Acquisition of Computer Resources; DD Form 1851; and OMB Control Number 0704–0254.

Type of Request: Reinstatement.

Average Burden Hours/Minutes Per Response: 30 minutes.

Frequency of Response: On occasion.

Number of Respondents: 4,962.

Annual Burden Hours: 122,790.

Annual Responses: 1,962.

Needs and Uses: This request concerns information collection requirements related to the Acquisition of Computer resources.

Affected Public: Businesses or other for-profit; Non-profit institutions; and Small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ms. Eyvette R. Flynn.

Written comments and recommendations on the proposed information collection should be sent to Ms. Eyvette R. Flynn at Office of Management and Budget, Desk Officer, room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

Written requests for copies of the information collection proposal may be obtained from Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202–4302.

Dated: January 23, 1990.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 90–1876 Filed 1–26–90; 8:45 am]

BILLING CODE 3810-01-M

Public Information Collection Requirement; Submission to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Family Support Center Information; AF Forms 2800, 2801, 2804 and 2805; and OMB Control Number 0701–0070.

Type of Request: Reinstatement of a previously approved collection for which approval has expired.

Average Burden Hours/Minutes per Response: .1 Hours per response.

Frequency of Response: One response per respondent.

Annual Burden Hours: 15,615.

Annual Responses: 156,150.

Needs and Uses: "Air Force personnel, military dependents" Family Support Centers serve as focal points for assistance programs and activities that help Air Force families. Collection of information is necessary to assist Air Force members and their families to resolve the special problems associated with military life. The forms will help ensure that the needs of persons seeking assistance are met expeditiously and effectively.

Affected Public: Individuals or households.

Frequency: Continuing.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Dr. J. Timothy Sprehe. Written comments and recommendations on the proposed information collection should be sent to Dr. J. Timothy Sprehe at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison. Written request for copies of the information collection proposal should be sent to Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202–4302.

Dated: January 24, 1990.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90–1949 Filed 1–26–90; 8:45 am]

BILLING CODE 3810-01-M

Office of the Secretary

Defense Science Board Task Force on Strategic Sensors; Meeting Cancellation

ACTION: Cancellation of meeting.

SUMMARY: The meeting notice for the Defense Science Board Task Force on Strategic Sensors scheduled for January 4–5 and February 1, 1990 as published in

the **Federal Register** (Vol. 54, No. 248, Page 53358, Thursday, December 28, 1989, FR Doc 89–30145) has been cancelled.

Dated: January 24, 1990.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90–1951 Filed 1–26–90; 8:45 am]

BILLING CODE 3810–01–M

Defense Science Board Task Force on Low Observable Technology; Cancellation of Meeting

ACTION: Cancellation of meeting.

SUMMARY: The meeting notice for the Defense Science Board Task Force on Low Observable Technology scheduled for January 17, 1990 as published in the **Federal Register** (Vol. 54, No. 201, page 42977, Thursday, October 19, 1989, FR Doc. 89–24643) has been cancelled.

Dated: January 24, 1990.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90–1953 Filed 1–26–90; 8:45 am]

BILLING CODE 3810–01–M

Defense Science Board Task Force on Army Subgroup on Low Observable Technologies; Change in Date and Location of Meeting

ACTION: Change in date and location of advisory committee meeting notice.

SUMMARY: The meeting notice of the Defense Science Board Task Force on Army Subgroup on Low Observable Technologies scheduled for January 17, 1990 as published in the **Federal Register** (Vol. 54, No. 223, page 48125, Tuesday, November 21, 1989, FR Doc. 89–27349) was held on January 11, 1990 at Fort Leavenworth, Kansas.

Dated: January 24, 1990.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90–1952 Filed 1–26–90; 8:45 am]

BILLING CODE 3810–01–M

Defense Science Board Task Force on Strategic Sensors; Change in Date and Location of Meeting

ACTION: Change and location of advisory committee meeting notice.

SUMMARY: The meeting notice for the Defense Science Board Task Force on Strategic Sensors scheduled for February 2, 1990 as published in the **Federal Register** (Vol. 54, No. 248, Page 53358, Thursday, December 28, 1989, FR Doc. 89–30145) will be held on February 6, 1990 at DBA Systems Inc., Oakton, Virginia.

Dated: January 24, 1990.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 90–1950 Filed 1–26–90; 8:45 am]

BILLING CODE 3810–01–M

Office of the Secretary of Defense

Retirement Homes Advisory Board; Notice of Meeting

AGENCY: Assistant Secretary of Defense (Force Management and Personnel).

ACTION: Notice of open meeting of the DoD Retirement Homes Advisory Board.

SUMMARY: In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Assistant Secretary of Defense (Force Management and Personnel) announces that the Retirement Homes Advisory Board (Charter date: December 27, 1989), will hold an open meeting at the Naval Home.

DATE AND TIME: February 8, 1990, 0800–1300.

ADDRESS: Naval Home, 1800 Beach Drive, Gulfport, MS 39507.

Purpose: To familarize board members with the operations of the Naval Home.

Agenda: Captain Francis Ferry, USN, Governor, Naval Home, will give the board members an orientation and tour of the Naval Home from 0800 to 1300.

FOR FURTHER INFORMATION CONTACT: LTC K. Deutsch at 202–697–7197.

Dated: January 23, 1990.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 90–1875 Filed 1–26–90; 8:45 am]

BILLING CODE 3810–01–M

DEPARTMENT OF ENERGY

Conduct of Employees; Waiver Pursuant to 18 U.S.C. 207(f)

Section 207(f), title 18, United States Code, authorizes the Secretary of Energy to waive the post-employment restrictions of subsection (a) of section 207, title 18, United States Code, to permit a former employee with outstanding qualifications in a scientific, technological, or other technical discipline to make appearances before or communications to the Department in connection with a particular matter which requires such qualifications, where it has been determined that such a waiver would serve the national interest.

It has been established to my satisfaction that Duane C. Sewell, who was the Department's Assistant Secretary for Defense Programs from August 1978 to January 1981, has a unique combination of outstanding qualifications in the field of applied nuclear physics and extensive experience in management of nuclear weapons and nuclear energy development programs. I am further satisfied that it will serve the national interest to permit him, in his capacity as Associate Director-at-Large of the Lawrence Livermore National Laboratory, to appear before and communicate with employees of the Department of Energy and other Government agencies with respect to the funding, operation, and management of the Lawrence Livermore National Laboratory. I am satisfied that these activities are in a scientific field and require the qualifications stated.

I have, therefore, waived the post-employment prohibitions of subsection (a) of section 207, title 18, United States Code (in consultation with the Director of the Office of Government Ethics), to permit contact by Mr. Sewell with employees of the Department of Energy and other Government agencies with respect to the funding, operations, and management of the Lawrence Livermore National Laboratory.

Dated: January 19, 1990.

Admiral James D. Watkins,

U.S. Navy (Retired), Secretary of Energy.

[FR Doc. 90–1909 Filed 1–26–90; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket Nos. QF88–21–002 et al.]

Altresco Pittsfield, L.P. et al.; Electric rate, Small power production, and Interlocking Directorate filings

Take notice that the following filings have been made with the Commission:

1. Altresco Pittsfield, L.P.

[Docket No. QF88–21–000]

January 12, 1990.

On January 4, 1990, Altresco Pittsfield, L.P. (Applicant) of Suite 1200, 600 South Cherry Street, Denver, Colorado 80222, submitted for filing an application for recertification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been

made that the submittal constitutes a complete filing.

The original application was filed on October 13, 1987, and certification was issued on January 14, 1988 (42 FERC ¶ 62,021 (1988)). The instant recertification is requested due to change in the ownership structure and an increase in the net electric power production capacity from 156 MW to 161.174 MW. The ownership of the facility was transferred from Altresco Pittsfield, Inc. to Altresco Pittsfield, L.P. In all other respects, the facility remains essentially the same as that set forth in the original application.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

2. Indianapolis Power & Light Co.

[Docket No. ER90-30-000]

January 12, 1990.

Take notice that Indianapolis Power & Light Company on January 12, 1990, tendered a second amendment to the filing made October 20, 1989 of Modification No. 8 to the Interconnection Agreement dated December 2, 1968 (the 1968 Agreement) between Indianapolis Power & Light Company (IPL) and Southern Indiana Gas and Electric Company (SIGECO). The 1968 Agreement is designated as Rate Schedule FPC No. 6.

The second amended filing specifically provides that SIGECO will supply the additional energy necessary to compensate for losses in their system resulting from the proposed transmission service. A waiver of the notice requirement is requested to make Modification No. 8 effective as of December 31, 1989.

Copies of the second amended filing were mailed to Southern Indiana Gas and Electric Company, Inc. and to the Indiana Utility Regulatory Commission.

Comment date: January 23, 1990, in accordance with Standard Paragraph E at the end of this notice.

3. AES Harriman Cove, Inc.

[Docket No. QF89-355-001]

January 16, 1990.

On January 5, 1990, AES Harriman Cove, Inc. (Applicant) of 1001 N. 19th Street, Suite 2000, Arlington, Virginia, 22209, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located in Bucksport, Maine. The facility will consist of two (2) circulating fluidized bed boilers and an extraction/condensing steam turbine generator. The thermal output of the facility, in the form of extraction steam, will be sold to the Champion International Corporation for heating and drying in the paper making process. The maximum net electric power production capacity will be 198 megawatts. The primary energy source will be coal. Construction of the facility is projected to begin in April 1991.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

4. Energy Resources and Logistics, Inc.

[Docket No. QF90-64-000]

January 16, 1990.

On January 3, 1990, Energy Resources and Logistics, Inc. (Applicant) of 100 North Charles Street, Baltimore, Maryland 21201, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located in West Deptford, New Jersey. The facility will consist of three (3) boilers, two (2) steam turbine generators and six (6) marine type diesel engines. The useful thermal output will be sold to Seaview Petroleum, Inc. for refining asphalt and heating oil products. The net electric power production capacity will be 177.7 MW. The primary energy source will be bituminous coal and No. 6 Fuel Oil. Construction of the facility will begin in June 1991.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

5. Bonneville Nevada Corp.

[Docket No. QF90-68-000]

January 16, 1990.

On January 8, 1990, Bonneville Nevada Corporation (Applicant) of 257 East 200 South, Suite 800, Salt Lake City, Utah 84111 submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The proposed topping-cycle cogeneration facility will be located adjacent to the PABCO's Gypsum Wallboard Production Plant at East Lake Mead Boulevard, in Las Vegas, Nevada. The facility will consist of three combustion gas turbine-generators, three supplementary fired heat recovery boilers and one condensing/extraction steam turbine generator. The thermal energy recovered from the facility will be used by PABCO in calcining ore and kiln drying of wallboard sheets. The net electric power production capacity of the facility will be 85 MW. The primary source of energy will be natural gas. Installation of the facility will commerce on July 1990.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

6. Montaup Electric Co.

[Docket No. ER90-148-000]

January 17, 1990.

Take notice that on January 9, 1990, Montaup Electric Company (Montaup) filed letter agreements under which Montaup sold capacity and energy from its entitlement in the Potter No. 2 combined cycle generating unit to Public Service Company of New Hampshire (PSNH) and Massachusetts Municipal Wholesale Electric Cooperative (MMWEC).

The sales to PSNH and MMWEC are of 26.7606% and 18.3099% of the net capability of the unit, respectively. Both sales are for the period September 1, 1989-September 30, 1989.

Both PSNH and MMWEC would have had to pay capacity deficiency charges to the New England Power Pool (NEPOOL) but for the purchases of capacity provided for in the enclosed agreements. By paying the negotiated demand charge of $68.00 per kilowatt year for those purchases contained in those agreements plus associated transmission charges and filing fees they met their Capability Responsibility in NEPOOL and paid the same amount that they would have paid to NEPOOL in capacity deficiency charges if they had not made the purchases and were not able to meet their Capability Responsibility.

By selling Potter No. 2 capacity to PSNH and MMWEC Montaup was able to sell temporary surplus capacity. The sales resulted in net energy savings to Montaup's ratepayers.

The sales were not arranged in time to comply with the 60-day notice requirement. Montaup requests that the requirement be waived so that the agreements may become effective according to their terms.

Comment date: January 31, 1990, in accordance with Standard Paragraph E end of this notice.

7. Wisconsin Electric Power Co.

[Docket No. ER90–150–000]

January 17, 1990.

Take notice that Wisconsin Electric Power Company (Wisconsin Electric), on January 9, 1990, tendered for filing an executed Supplement to Exhibit C of the Service Agreement for Transmission Service between Wisconsin Electric and Wisconsin Public Power, Inc. SYSTEM (WPPI). The Supplement sets forth transmission transactions under which Wisconsin Electric will provide transmission service to WPPI. Wisconsin Electric requests an effective date of June 1, 1990.

Copies of the filing have been served on WPPI and the Public Service Commission of Wisconsin.

Comment date: January 31, 1990, in accordance with Standard Paragraph E at the end of this notice.

8. Arizona Public Service Co.

[Docket No. ER90–142–000]

January 17, 1990.

Take notice that on January 8, 1990, Arizona Public Service Company (APS) tendered for filing a Reciprocal Distribution Wheeling Service Agreement and a Reciprocal Emergency Service Agreement between APS and Electrical District No. 2 (ED–2). These agreements are part of an overall Settlement Agreement between APS and ED–2 which resolves disputes over retail service territories in Pinal County, Arizona.

These agreements are proposed to become effective upon the acceptance for filing of these Agreements by the Commission.

Copies of this filing have been served upon ED–2 and the Arizona Corporation Commission.

Comment date: January 31, 1990, in accordance with Standard Paragraph E at the end of this notice.

9. Northeast Utilities Service

[Docket No. ER90–91–000]

January 17, 1990.

Take notice that on January 8, 1990, Northeast Utilities Service Company (NUSCO) tendered for filing supplemental information regarding a proposed rate schedule, a Capacity Exchange Agreement between NUSCO and Boston Edison Company.

NUSCO states that the amendment was filed in response to a request from the Commission for additional information regarding determination of the maximum capacity charge rate. NUSCO has provided such information to the Commission by letter dated January 5, 1990.

NUSCO states that copies of this information have been mailed or delivered to each of the parties.

NUSCO requests that the Commission waive its standard notice periods and filing regulations to the extent necessary to permit the rate schedule to become effective March 7, 1988.

Comment date: January 31, 1990, in accordance with Standard Paragraph E at the end of this notice.

10. Southwestern Public Service

[Docket No. ER90–96–000]

January 17, 1990.

Take notice that Southwestern Public Service Company (Southwestern) on January 11, 1989, tendered for filing amendments to one of the rate schedules originally filed in the above-referenced docket.

The amendments are being made to clarify certain provisions of the new rate schedule pertaining to wholesale full requirements electric power service for Lyntegar Electric Cooperative, Inc. (Lyntegar).

Copies of the amended filing were served upon Lyntegar, Texas-New Mexico Power Company, the Public Utility Commission of Texas, and the New Mexico Public Service Commission.

Comment date: January 31, 1990, in accordance with Standard Paragraph E at the end of this notice.

11. Minnesota Power & Light Co.

[Docket No. ER90–147–000]

January 17, 1990.

Take notice that Minnesota Power & Light Company (MP&L), on January 9, 1990, tendered for filing documents proposing an amendment to a Municipal Service Agreement between MP&L and City of Virginia, Minnesota Department of Public Utilities (Virginia). MP&L states that the amendment will reduce revenues for partial requirements service to Virginia. The amendment also makes certain other modifications of the Agreement.

MP&L respectfully requests waiver of the Commission's notice requirements and any other filing requirements and any other filing requirements in order to allow an effective date of December 1, 1989 as agreed upon by the parties.

Copies of the filing have been served upon City of Virginia Department of Public Utilities and the Minnesota Public Utilities Commission.

Comment date: January 31, 1990, in accordance with Standard Paragraph E at the end of this notice.

12. Arizona Public Service Co.

[Docket No. ER90–141–000]

January 17, 1990.

Take notice that on January 8, 1990, Arizona Public Service Company (APS or Company) tendered for filing proposed changes to reduce the tax charge to 0% in the following FPC/FERC Rate Schedules:

Customer	FPC/FERC rate schedule No.
Salt River Project Agricultural Improvement and Power District	3
Electrical District No. 3	12
Electrical District No. 5	21
Yuma Mesa Irrigation and Drainage District	31
Tucson Electric Power Company	32
Electrical District No. 1	68
Dept. of Water and Power of the City of Los Angeles	78
Southern California Edison Company	80
Plains Elec. Generation and & Trans. Coop., Inc.	82
Tucson Electric Power Company	92
San Diego Gas and Electric Company	93
Arizona Electric Power Cooperative, Inc	87
Public Service Company of New Mexico	102
Southern California Edison Company Revised Inland Power Pool Agreement [1]	103
El Paso Electric Company	110
The City of Farmington	115
Plains Electric Generation and Transmission Cooperative, Inc.	116
Electrical District No. 6	127
Electrical District No. 7	129
Electrical District No. 8	144
Aquila Irrigation District	145
McMullen Valley Water Conservation and Drainage District	146
Tonopah Irrigation District	147
Harquahala Valley Power District	154
Buckeye Water Conservation and Drainage District	159
Department of the Air Force	162
Department of the Navy	166
Maricopa County Municipal Water Conservation District No. 1	169
Town of Wickenburg	170

[1] APS provides interruptible transmission service to the following customers pursuant to the Revised Inland Power Pool Agreement (FERC Rate Schedule No. 104): Arizona Electric Power Coop., Inc.; Basin Electric Power Coop.; City of Colorado Springs; City of Farmington; Colorado—Ute Electric Assn., Inc.; Deseret Generation & Trans. Coop.; El Paso Electric Company; Incorporated County of Los Alamos; Plains Electric Generation & Transmission Cooperative, Inc.; Platte River Power Authority; Public Service Company of Colorado; Public Service Company of New Mexico; Salt River Project Agricultural Improvement and Power District; Texas-New Mexico Power Company; Tri-State Generation & Trans. Assoc., Inc.; Tucson Electric Power Company; Utah Municipal Power Agency; USA-Western Area Power Administration (WAPA), Loveland-Fort Collins Area; USA-WAPA, Salt Lake City Area; USA-WAPA, Boulder City Area; Wyoming Municipal Power Agency.

APS requests that these Rate Schedules be amended to allow for a change in the tax charge component of the rate to reduce the tax charge to 0%.

The proposed base rate levels for these Rate Schedules are unchanged from those currently in effect.

APS requests waiver of 18 CFR 35.11 to allow for an effective date of August 1, 1989 for all affected Rate Schedules except Rate Schedule Nos. 12, 21 and 68. An effective date concurrent with the date of the Commission's final order is requested for these three Rate Schedules.

Copies of this filing have been served upon all affected customers and applicable state regulatory agencies.

Comment date: January 31, 1990, in accordance with standard Paragraph E end of this notice.

13. Central and South West Services

[Docket No. ER90-102-000]

January 17, 1990.

Take notice that Central and South West Services, Inc. (CSW Services), on behalf of the Operating Companies of Central and South West Corporation (CSW), Central Power and Light Company (CPL), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO) and West Texas Utilities Company (WTU), on January 9, 1990 tendered for filing a proposed supplement to its submittal which is the subject of Docket No. ER90-102-000.

Pursuant to the decision in *Central and South West Services, Inc.*, Opinion No. 322, 48 ¶ 61,197 (Aug. 3, 1989) CSW Services submitted, on November 30, 1989, a compliance filing which included, *inter alia*, Schedule K to the CSW Operating Agreement specifying the annual planning reserve criteria used by the CSW Operating Companies. Schedule K specified a planning reserve requirement for CPL of the greater of (1) 15% or (2) the net rated capability of CPL's largest generating unit. The supplemental filing explains the basis for CPL's current planning reserve criterion.

CSW Services requests that the Schedule K become effective the earlier of January 1, 1990 or the date on which the Commission accepts the compliance filing submitted pursuant to Opinion No. 322.

Copies of the supplement filing have been served on the Public Utility Commission of Texas, the Oklahoma Corporation Commission, the Arkansas Public Service Commission and the Louisiana Public Service Commission, the state agencies which regulate retail rates and services of the CSW Operating Companies. Copies of the filing have also been served on the parties to Docket No. ER90-102-000.

Comment date: January 31, 1990, in accordance with standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intevene 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. 90-1652 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. G-3699-001 et al.]

ARCO Oil and Gas Co., Division of Atlantic Richfield Company, et al.; Applications for Termination or Amendment of Certificates [1]

January 22, 1990.

Take notice that each of the Applicants listed herein has filed an application pursuant to Section 7 of the Natural Gas Act for authorization to terminate or amend certificates as described herein, all as more fully described in the respective applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before February 9, 1990, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, and 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

Docket No. and date filed	Applicant	Purchaser and location	Description
G-3699-001, D, Jan. 8, 1990	ARCO Oil and Gas Company, Division of Atlantic Richfield Company, P.O. Box 2819, Dallas, TX 75221.	Tennessee Gas Pipeline Company, Mustang Island Field, Nueces County, Texas.	Assigned 12-1-88 to Bristol Resources 1987-1 Acquisition Program.
G-6355-005, D, Jan. 2, 1990	Conoco Inc., P.O. Box 2197, Houston, TX 77252.	El Paso Natural Gas Company, Arrowhead Field, Lea County, New Mexico.	Assigned 12-1-89 to Lewis Burleson.
G-9765-002, D, Dec. 19, 1989	Exxon Corporation, P.O. Box 2180, Houston, TX 77252-2180.	Natural Gas Pipeline Company of America, Various Leases, Beaver and Texas Counties, Oklahoma.	Assigned 1-1-89 to Valence Operating Company.
CI64-1140-000, D, Dec. 19, 1989	Exxon Corporation	ANR Pipeline Company, Kathryn Kee Unit, Woodward County, Oklahoma.	Assigned 1-1-89 to Valance Operating Company.
CI71-837-001, D, Dec. 8, 1989	Texaco Producing Inc., P.O. Box 52332, Houston, TX 77052-2332.	Florida Gas Transmission Company, Lake Mongoulois Field, St. Martin Parish, Louisiana.	Assigned 1-1-89 to Plains Resources Inc.
CI75-725-001, D, Dec. 19, 1989	Exxon Corporation	Williams Natural Gas Company, Rose Unit and Gardner "A" Unit, Woods County, Oklahoma.	Assigned 1-1-89 to Valance Operating Company.

Docket No. and date filed	Applicant	Purchaser and location	Description
CI79-484-002, D, Oct. 20, 1989.....	Marathon Oil Company, P.O. Box 3128, Houston, TX 77253.	Natural Gas Pipeline Company of America, West Cameron Block 540, Offshore Louisiana and High Island Block A-475, Offshore Texas.	Assigned 7-1-89 to Phillips Petroleum Company.
CI89-17-000 (G-4162), D, Oct. 14, 1989.	Chevron U.S.A. Inc., P.O. Box 3725, Houston, TX 77253-3725.	Arkla Energy Resources, a division of Arkla, Inc., Willow Springs Field, Gregg County, Texas.	Assigned 9-1-88 to CABEC Energy Corp.
CI90-29-000 (CI85-332), D, Dec. 7, 1989.	Sonat Exploration Company, P.O. Box 1513, Houston, TX 77252-1513.	Florida Gas Transmission Company, Vermilion Block 22, Offshore Louisiana.	Assigned 11-1-88 to Conoco Inc. and Energy Development Corporation.
CI90-30-000 (CI86-465), D, Dec. 11, 1989.	Marathon Oil Company	El Paso Natural Gas Company, State "CX" Com #1, Eddy County, New Mexico.	Assigned 1-1-89 to OXY USA Inc.
CI90-32-000 (CI65-525), D, Dec. 12, 1989.	BHP Petroleum Company Inc., 5847 San Felipe, Suite 3600, Houston, TX 77057.	Natural Gas Pipeline Company of America, Indian Basin Field, Eddy County, New Mexico.	Assigned 6-1-89 to Sun Operating Limited Partnership.
CI90-35-000 (CI79-58), D, Jan. 12, 1990.	Chevron U.S.A. Inc	Arkla Energy Resources, a division of Arkla, Inc., Willow Springs Field, Gregg County, Texas.	Assigned 9-1-88 to CABEC Energy Corp.

Filing Code: A—Initial Service; B—Abandonment; C—Amendment to add acreage; D—Assignment of acreage; E—Succession; F—Partial Succession.

[FR Doc. 90-1858 Filed 1-26-90; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. TM90-6-20-003 TM90-7-20-000]

Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

January 23, 1990.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on January 16, 1990, tendered for filing proposed changes in its FERC Gas Tariff, Second Revised Volume No. 1, as set forth in the revised tariff sheets:

Proposed to be effective January 1, 1990

First Revised Sixth Revised Sheed No. 223
First Revised Sixth Revised Sheed No. 224
First Revised Eleventh Revised Sheed No. 324
Second Revised Eleventh Revised Sheed No. 324

Algonquin states that First Revised Sixth Revised Sheet Nos. 223 and 224, First Revised Eleventh Revised Sheet No. 324 and Second Revised Nineteenth Revised Sheet No. 324 are filed to correct the pagination in compliance with the Commission Order filed December 1, 1989. Algonquin also states that the First Revised Nineteenth Revised Sheet No. 214 results in an increase of $.0025 per MMBtu in the Non-FDDQ withdrawal rate.

Algonquin notes that copies of this filing were served upon each of the affected parties and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before January 30, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 90-1861 Filed 1-26-90; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. CI63-195-002 et al.]

Amoco Production Co.; Application

January 22, 1990

Take notice that on December 1, 1989, Amoco Production Company (Amoco) of P. O. Box 800, Denver, Colorado 80201, filed an application pursuant to section 7 of the Natural Gas Act and parts 154 and 157 of the Federal Energy Regulatory Commission's (Commission) regulations thereunder for certificates of public convenience and necessity to continue sales of natural gas previously made by Tenneco Oil Company (Tenneco) and Tenneco's successor TOC-Rocky Mountains Inc. (TOC) under the certificates listed in the Appendix hereto. Amoco also requests that the rate schedules listed in the Appendix hereto be redesignated as those of Amoco, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Amoco states that by (1) assignment dated and effective December 7, 1988, (2) assignment dated April 3, 1989, and effective June 1, 1989, (3) assignment dated April 3, 1989, and effective December 9, 1988, and (4) correction assignment dated June 26, 1989, TOC assigned its interests in the properties committed under the FERC Gas Rate Schedules listed in the Appendix to Amoco. Amoco indicates that TOC obtained its interest in the subject properties by a conveyance dated November 22, 1988, and effective June 30, 1988, and that TOC has an application reflecting its succession to Tenneco pending before the Commission in Docket No. CI63-195-001.

Any person desiring to be heard or to make any protest with reference to said application should on or before February 9, 1990, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Amoco to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

Tenneco Oil Co. FERC gas rate schedule No.	Certificate docket No.	Purchaser
17	CI63-195	El Paso Natural Gas Company.
21	CI63-901	El Paso Natural Gas Company.
26	CI64-984	El Paso Natural Gas Company.
36	CI64-994	El Paso Natural Gas Company.
37	CI65-995	El Paso Natural Gas Company.
38	CI64-996	El Paso Natural Gas Company.
39	CI64-997	El Paso Natural Gas Company.
45	CI64-1003	El Paso Natural Gas Company.
47	CI64-1005	El Paso Natural Gas Company.
50	CI64-1007	El Paso Natural Gas Company.
51	CI64-1008	El Paso Natural Gas Company.
57	CI64-1014	El Paso Natural Gas Company.
69	CI64-1025	El Paso Natural Gas Company.
120	CI62-463	El Paso Natural Gas Company.
121	CI62-557	El Paso Natural Gas Company.
124	CI62-1153	El Paso Natural Gas Company.
126	CI63-282	El Paso Natural Gas Company.
142	G-6306	Sunterra Gas Gathering Company.
144	G-12834	El Paso Natural Gas Company.
151	G-18623	El Paso Natural Gas Company.
152	G-19973	El Paso Natural Gas Company.
153	G-20564	El Paso Natural Gas Company.
157	G-6669	El Paso Natural Gas Company.
158	G-6669	El Paso Natural Gas Company.
159	G-14800	El Paso Natural Gas Company.
161	G-20154	El Paso Natural Gas Company.
172	CI65-506	Northwest Pipeline Corporation.
176	CI65-1159	El Paso Natural Gas Company.
180	CI66-142	Northwest Pipeline Corporation.
196	CI66-429	El Paso Natural Gas Company.
198	CI66-822	Northwest Pipeline Corporation.
203	CI66-1261	El Paso Natural Gas Company.
223	CI68-1038	El Paso Natural Gas Company.
225	CI68-1192	El Paso Natural Gas Company.
228	CI68-1345	El Paso Natural Gas Company.
230	CI69-313	El Paso Natural Gas Company.
257	CI70-48	El Paso Natural Gas Company.
260	CI70-781	El Paso Natural Gas Company.
281	CI73-154	El Paso Natural Gas Company.
282	CI73-196	El Paso Natural Gas Company.
291	CI63-195	Northwest Pipeline Corporation.
292	CI65-1159	Northwest Pipeline Corporation.
304	CI75-643	El Paso Natural Gas Company.
305	CI75-661	El Paso Natural Gas Company.
306	CI75-662	El Paso Natural Gas Company.
307	CI75-704	El Paso Natural Gas Company.
311	CI76-42	El Paso Natural Gas Company.
313	CI76-103	El Paso Natural Gas Company.
330	CI77-745	El Paso Natural Gas Company.
334	CI78-391	El Paso Natural Gas Company.
524	CI84-49	El Paso Natural Gas Company.
526	CI84-676	El Paso Natural Gas Company.
527	CI85-677	El Paso Natural Gas Company.

[FR Doc. 90-1859 Filed 1-26-90; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. TQ89-4-63-003]

Carnegie Natural Gas Co.; Filing

January 23, 1990.

Take notice that Carnegie Natural Gas Company ("Carnegie"), on January 17, 1990, tendered for filing the following proposed revised tariff sheets.

Substitute First Revised Sheet No. 220

Carnegie states that Substitute tariff sheet is being filed at the request of the Commission Staff to change the heading on column 4 of the tariff sheet from "Annual (D-2)" to "(Monthly D-2)". The figures listed in that column reflect monthly D-2 billing determinants, and not annual D-2 billing determinants. Carnegie states that the figures in column 4 of the substitute sheet remain unchanged.

Carnegie states that it has served the filing upon the company jurisdictional customers, applicable state commissions, and other parties that have intervened in this docket.

Any person desiring to protest said filing should file an intervention or protest with the Federal Energy Regulatory Commission 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such interventions or protests should be filed on or before January 30, 1990. 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-1862 Filed 1-26-90; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. TM90-5-32-000]

Colorado Interstate Gas Co.; Compliance Filing

January 23, 1990.

Take notice that Colorado Interstate Gas Company ("CIG"), on January 16, 1990, tendered for filing the following tariff sheets to revise its FERC Gas Tariff, Original Volume No. 1:

Fourth Revised Sheet No. 61G12
Fifth Revised Sheet No. 61G12-B
Substitute Original Sheet No. 61G12-C
Original Sheet No. 61G12-D

CIG states that the above-referenced tariff sheets are being filed in compliance with the Commission's Orders issued in these dockets and that the filing of the first three sheets constitutes a semiannual adjustment filing as defined by CIG's FERC Gas Tariff. Specifically, the first three sheets of the filing reflect adjustments to the take-or-pay Buyout-Buydown Surcharges, interest on unamortized costs, and the related billing options elected by CIG's customers. The fourth sheet reflects new Buyout-Buydown costs incurred by CIG from its former pipeline supplier, Northwest Pipeline Corporation.

CIG states that copies of the filing were served upon all of the parties to these proceedings and affected state commissions as well as all of CIG's firm sales customers.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NW., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before

January 30, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 90-1863 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP89-50-000, CP68-179-013, CP89-555-000, and CP89-556-000]

Florida Gas Transmission Co.; Informal Pretrial Technical Conference

January 23, 1990.

Take notice that an off-the-record technical conference will be convened on February 16, 1990 at 10:00 a.m. at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC in the captioned proceeding. The conference is being convened pursuant to the Presiding Administrative Law Judge's scheduling order of November 9, 1989.

As explained in the Presiding Judge's Order Scheduling Prehearing Conference of May 2, 1989, the technical conference has three purposes: (1) The exchange of definitions of terms, explanations of language and the sources of opinions, to eliminate the need for exploratory cross-examination; (2) the identification and specification of the issues to be litigated; and (3) the assignment to each issue of a jurisdictional rate dollar amount in the opinion of each participant.

Take notice that in accordance with the Presiding Judge's May 2, 1989 order, the informal technical conference is to be attended by all counsel, all witnesses proposed to be offered at the hearing, and officials of participants authorized to make concessions and stipulations. According to the May 2, 1989 order, no counsel or witness failing to attend the conference, unless excused in writing or on the record by the Presiding Judge, will be permitted to appear or testify at the hearing, and the written testimony and exhibits of any such absent witness shall be subject to motions to strike made at the hearing.

For additional information, contact Commission Staff Counsel Donald A. Heydt (202) 357-5248 or John J. Keating (202) 357-5762.

Lois D. Cashell,

Secretary.

[FR Doc. 90-1864 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP89-186-000 and RP90-20-000]

Great Lakes Gas Transmission Co.; Informal Settlement Conference

January 23, 1990.

Take notice that a settlement conference will be convened in this proceeding on February 14, 1990, at 10:00 a.m. at the offices of Federal Energy Regulatory Commission, 810 First Street NE., Washington, DC 20426, for the purpose of exploring the possible settlement of the above-referenced dockets.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information, contact J. Carmen Gastilo, (202) 357-8410 or Russell Mamone, (202) 357-5744.

Lois D. Cashell,

Secretary.

[FR Doc. 90-1865 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RM87-29-000]

Natural Gas Policy Act of 1978; Application for Approval of Alternative Filing Requirement by the State Corporation Commission of the State of Kansas; Receipt of Application for Approval of Alternative Filing Requirement

January 23, 1990.

On December 26, 1989, the State Corporation Commission of the State of Kansas (Kansas) filed, pursuant to section 274.207 of the Commission's regulations[1] and the Commission's March 23, 1988 remand order[2], a second supplemental application[3] to its June 26, 1987 application[4] for approval of an alternative filing requirement which differs from the requirement in § 274.204(e) of the Commission's regulations.[5]

The proposed alternative filing requirement would enable operators to apply for well category determinations under section 103 of the Natural Gas Policy Act of 1978 (NGPA)[6] for additional (infill) wells drilled in existing proration units in the Hugoton Gas Field (Chase Group) in the state of Kansas without repeated submissions of geological and engineering data to show that the additional wells are necessary to effectively and efficiently drain the portion of the reservoir covered by a propration unit which cannot be drained by the existing well.

Kansas proposes to determine the eligibility of infill wells for the NGPA section 103 price on a generic, field-wide basis. Operators would be able to qualify infill wells under NGPA section 103 by filing pertinent information concerning the well, but would not be required to submit the previously required geological or engineering data. Kansas proposes to file with the Commission, on a one-time-only basis, the geological, engineering and other data comprising the record of the infill proceeding which, according to Kansas, demonstrates the need for one additional well per proration unit through the Kansas Hugoton Field.

Kansas conducted proceedings pursuant to the Commission's March 23, 1988 remand order. Based upon the accumulated evidence from these proceedings, Kansas requests that the Commission revive the original and initial supplemental applications, as supplemented by this application, and grant Kansas' request for an alternative filing procedure.

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.[7] All such motions or protests should be filed within 30 days after publication of this notice in the **Federal Register.** Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the

[1] 18 CFR 274.207 (1989).

[2] 42 FERC ¶ 61,352 (1988).

[3] Kansas' initial supplemental application was filed December 28, 1987.

[4] Notice of this filing was issued on July 16, 1987, 52 FR 27,713 (July 23, 1987).

[5] 18 CFR 274.204(e) (1989).

[6] 15 U.S.C. 3313 (1982).

[7] 18 CFR 385.211 and 214 (1989).

Commission and are available for public inspection.

Lois D. Cashell,

Secretary,

[FR Doc. 90-1860 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ID-2144-001]

William S. Lee; Application

January 23, 1990

The filing individual submits the following:

Take notice that on January 18, 1990, William S. Lee filed an application pursuant to section 305(b) of the Federal Power Act to hold the following positions:

Chairman of the Board of Directors, President and Chief Executive Officer—Duke Power Company

Director—Texas Instruments Incorporated

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, 385.214). All such motions or protests should be filed on or before February 5, 1990. 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. 90-1866 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA90-1-27-000]

North Penn Gas Co.; Proposed Changes in FERC Gas Tariff

January 23, 1990

Take notice that North Penn Gas Company (North Penn) on January 17, 1990, tendered for filing Ninety-Seventh Revised Sheet No. PGA-1 to its FERC Gas Tariff First Revised Volume No. 1.

This filing is North Penn's Annual PGA rate filing proposed to become effective March 1, 1990 and is designed to reflect changes in the cost of gas for the period March 1, 1990 through May 31, 1990. The changes in the cost of gas for this period result in an increase of $.32809 per Mcf to the G-1 Rate Schedule.

North Penn has also computed a surcharge credit of $.09174 per Mcf to amortize over twelve months the overrecovered purchased gas costs accumulated in Account 191 during the period November 1, 1988 through October 31, 1989.

North Penn specifically requests waiver of the sixty-day notice requirement for this filing and any other waivers of the Commission's Rules and Regulations as may be deemed necessary in order to permit the proposed tariff sheet to become effective March 1, 1990.

North Penn notes that the instant filing will be subject to Commission action on North Penn's proposal in RP89-237 to terminate its PGA. The Commission accepted the proposal, subject to refund, effective March 15, 1990. (44 FERC ¶ 61,058 (1989)).

North Penn states that copies of the letter of transmittal and all enclosures are being mailed to each of North Penn's jurisdictional customers and state commissions shown on the service list.

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 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before February 12, 1990. 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. 90-1867 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP90-59-001]

Northwest Pipeline Corp.; Proposed Change in FERC Gas Tariff

January 23, 1990

Take notice that on January 16, 1990, Northwest Pipeline Corporation ("Northwest") tendered for filing and acceptance the following tariff sheets.

First Revised Volume No. 1

Thirty-Fifth Revised Sheet No. 10-A

On December 15, 1989 Northwest filed its Annual Report and Cost-of-Service Study to establish a revised Facility Charge and an Amortizing Adjustment relating to Rate Schedule T-1 transportation. The December 15 proposal was prepared in accordance with the provisions of Northwest's December 6, 1989 Amended Compliance Filing (RP-47 *et al*), and in addition was filed in the alternate form to reflect the inclusion of the Commodity SSP surcharge in a manner consistent with Northwest's quarterly SSP update filing of November 30, 1989 in Docket Nos. RP90-50-000 and TM90-4-37-000. The Commission has subsequently accepted both the December 6 filing and the alternate form of the November 30 filing. Therefore Northwest is filing Thirty-Fifth Revised Sheet No. 10-A to incorporate the Commission's action relating to the aforementioned filings.

Northwest requests waiver of the Commission's regulations to permit an effective date of February 1, 1990. Northwest states that a copy of this filing is being mailed to all jurisdictional customers and affected state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE, Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989). All such protests should be filed on or before January 30, 1990. 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-1868 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-47-031]

Northwest Pipeline Corp.; Proposed Change in FERC Gas Tariff

January 22, 1990

Take notice that on January 8, 1990, Northwest Pipeline Corporation ("Northwest") tendered for filing and acceptance the following tariff sheets to be a part of its FERC Gas Tariff, effective December 1, 1989.

Original Volume No. 1-A

Substitute Second Revised Sheet No. 405

Original Volume No. 2

Substitute Original Sheet No. 2–C

Northwest tendered the revised sheets to provide for minimum and maximum rates for liquid processing services, as directed by the Commission in its October 19, 1989 Order and December 20, 1989 Letter Order in the above-referenced docket.

A copy of this filing is being served on all parties of record in this proceeding and on all customers and affected state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington DC 20426, in acordance with §§ 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before January 29, 1990. 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90–1869 Filed 1–26–90; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM90–7–28–003; TM90–8–28–003]

Panhandle Eastern Pipe Line Co.; Compliance Filing

January 23, 1990.

Take notice that Panhandle Eastern Pipe Line Company (Panhandle) on January 17, 1990, tendered for filing the following revised tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

Docket No. TM90–7–28–003

Second Revised First Revised Sheet No. 3–C.10
Second Revised First Revised Sheet No. 3–C.11
Second Revised First Revised Sheet No. 3–C.12

Docket No. TM90–8–28–003

Second Revised First Revised Sheet No. 3–C.13
Second Revised First Revised Sheet No. 3–C.14
Second Revised First Revised Sheet No. 3–C.15

The proposed effective date of these revised tariff sheets is December 1, 1989.

Panhandle states that on October 1, 1989, Panhandle filed revised tariff sheets to reflect revisions to the Order No. 500 take-or-pay direct billing amounts approved by Commission Orders dated November 25, 1988, January 26, 1989, and October 10, 1989, in Docket Nos. RP89–9–000 and RP89–10–000 reflecting the first annual adjustment to carrying charges and monthly TOP fixed surcharges as provided in sections 23 and 24 of Panhandle's FERC Gas Tariff, Original Volume No. 1.

Panhandle states that it is submitting these revised sheets in compliance with the Commission's Letter Order dated December 22, 1989, in Docket Nos. TM90–7–28–000, 001 and 002, and TM90–8–28–000, 001 and 002 to include the first annual adjustment to carrying cost to reflect actual carrying charges for the first year's operation of the TOP Settlement Cost Surcharge mechanism.

Panhandle states that copies of its filing have been served on all parties, affected jurisdictional customers and appropriate state regulatory agencies.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989)). All such protests should be filed on or before January 30, 1990. 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90–1870 Filed 1–26–90; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. TA90–1–9–001 and TQ90–2–9–002]

Tennessee Gas Pipeline Co.; Tariff Change

January 23, 1990

Take notice that January 16, 1990, Tennessee Gas Pipeline Company (Tennessee) tendered for filing the following tariff sheets to be effective January 1, 1990:

Second Revised Volume 1

Item A (Revising Annual PGA):
Substitute Sixteenth Revised Sheet No. 20
Substitute Thirteenth Revised Sheet No. 20A
Second Substitute Twentieth Revised Sheet No. 21
Item B (Revising Out-of-Cycle PGA):
Twenty-First Revised Sheet No. 21

Original Volume No. 2

Item C (Revising Annual PGA):
Second Substitute Sixteenth Revised Sheet No. 5
Second Substitute Fifteenth Revised Sheet No. 6
Item D (Revising Out-of-Cycle PGA):
Seventeenth Revised Sheet No. 5
Sixteenth Revised Sheet No. 6

The purpose of this filing is to reflect the allocation of Canadian demand costs between Tennessee's demand and commodity rates as required by Opinion Nos. 256 and 256–A. Tennessee has allocated these costs between demand and commodity by applying a Modified Fixed Variable (MFV) factor derived from the costs underlying Tennessee's last approved rates, and is filing revisions to its Annual PGA tariff sheets filed November 1, 1989 in Docket No. TA90–1–9 to be effective January 1, 1990.

On December 26, 1989, Tennessee filed an Out-of-Cycle PGA in Docket No. TQ9–2–9 to be effective January 1, 1990. In order to conform the tariff sheets filed in the Out-of-Cycle PGA to the revisions being made herein, Tennessee is also filing the tariff sheets listed in Items B and D to be effective January 1, 1990. Tennessee requests that these sheets be put into effect in lieu of those listed in Items A and C if the Commission accepts Tenessee's Out-of-Cycle PGA.

Tennessee states that copies of the filing have been mailed to all of its customers and affected state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989). All such protests should be filed on or before January 30, 1990. Protests with be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90–1872 Filed 1–26–90; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. RP88-191-018 and RP90-48-001]

Tennessee Gas Pipeline Co.

January 22, 1990.

Take notice that on January 16, 1990, Tennessee Gas Pipeline Company (Tennessee) filed the following tariff sheets to Second Revised Volume No. 1 of its FERC Gas Tariff to comply with the Commission's December 29, 1989 order in the captioned proceedings.

Substitute Third Revised Sheet Nos. 40, 42 and 44
Second Substitute Third Revised Sheet Nos. 41 and 43
Substitute Third Revised Sheet Nos. 245A

Tennessee states that it is filing Substitute Third Revised Sheet No. 245A, to be effective November 30, 1989, to establish a "sunset" date of December 31, 1990 for the recovery of its take or pay buyout or buydown costs, in accord with Order No. 500-H. The tariff sheet further provides that this sunset date will not be effective with respect to take or pay costs in litigation as of March 31, 1989. Tennessee states that it reserves the right to modify this tariff sheet and the sunset date provisions to reflect the outcome of any further regulatory or judicial order affecting Tennessee's recovery of take or pay costs.

Tennessee states that it is filing the other revised tariff sheets in order to correct certain calculation errors in its November 30, 1989 filing. Tennessee has submitted revised workpapers describing the correction. Tennessee requests that the Commission grant an effective date of January 1, 1990 for these replacement tariff sheets.

Pursuant to Ordering Paragraph (C) of the Commission's December 29, 1989 order, Tennessee states that it is also filing an explanation of how it reconciled the estimate of take or pay costs included in its May 31, 1989 filing with costs actually incurred as of November 30, 1989.

Tennessee requests that the Commission grant any waivers it deems necessary for the acceptance of this filing.

Tennessee states that copies of the filing have been mailed to all parties in this proceeding, affected customers and affected state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before January 29, 1990. 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-1871 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM90-3-18-000]

Texas Gas Transmission Corp.; Tariff Filing

January 22, 1990

Take notice that on January 16, 1990, Texas Gas Transmission Corporation (Texas Gas) tendered for filing the following revised tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

Third Revised Sheet No. 14D
Third Revised Sheet No. 14E
Third Revised Sheet No. 14F
Third Revised Sheet No. 14G

Texas Gas states that this filing is made to reflect the allocation of Tennessee Gas Pipeline Company's revised take-or-pay demand surcharge during the six-month amortization period January 1 through June 30, 1990, to Texas Gas's downstream customers. The filing complies with a September 7, 1988, order in this docket which allows Texas Gas to track any modifications which the Commission may approve and reflects a one-month billing to recover all the take-or-pay charges from Tennessee over the six-month period, which Texas Gas elected to pay in a lump sum. Texas Gas reserves the right to revise the filing as necessary to reflect any modifications made by the Commission or as required by any appellate court. The proposed effective date of the tariff sheets listed above is February 1, 1990.

Copies of this filing have been served upon Texas Gas's jurisdictional and nonjurisdictional sales customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 2.11 and 2.14 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before January 29, 1990. 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. 90-1873 Filed 1-26-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM90-4-30-003]

Trunkline Gas Co.; Compliance Filing

January 23, 1990

Take notice that Trunkline Gas Company (Trunkline) on January 17, 1990, tendered for filing the following revised tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

Second Revised First Revised Sheet No. 3-A.7
Second Revised First Revised Sheet No. 3-A.8

The proposed effective date of these revised tariff sheets is December 1, 1989.

Trunkline states that on October 31, 1989 Trunkline filed revised tariff sheets to reflect revisions to the Order No. 500 take-or-pay direct billing amounts approved by Commission Orders dated November 25, 1988, January 31, 1989 and May 10, 1989 in Docket No. RP89-11-000 reflecting the first annual adjustment to carrying charges and monthly TOP fixed Surcharges as provided in Section 21.4 Trunkline's FERC Gas Tariff, Original Volume No. 1.

Trunkline states that it is submitting these revised sheets in compliance with the Commission's Letter Order dated December 22, 1989 in Docket Nos. TM90-4-30-000, 001 and 002 to include the first annual adjustment to carrying cost to reflect actual carrying charges for the first years' operation of the TOP Settlement Cost Surcharge mechanism.

Trunkline states that copies of its filing have been served on all parties, affected jurisdictional customers and appropriate state regulatory agencies.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989)). All such protests should be filed on or before January 30, 1990. 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90–1874 Filed 1–26–90; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–3716–9]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice:

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before February 28, 1990.

FOR FURTHER INFORMATION CONTACT: Sandy Farmer at EPA, (202) 382–2740.

SUPPLEMENTARY INFORMATION:

Office of Pesticides and Toxic Substances

Title: Notice of Pesticide Registration to Meet a Special Local Need (EPA ICR #0595.04; OMB #2070–0055). This ICR requests renewal of the existing clearance.

Abstract: Under section 24(c) of the Federal Insecticide, Fungicide, Rodenticide Act, states and territories must notify EPA of any decision to add a new use to a pesticide registration. To inform EPA of such decisions and the rationales, states and territories submit to the EPA an "Application for/ Notification of State Registration of a Pesticide to Meet a Special Local Need" form. The EPA reviews the information on this form to determine whether these decisions comply with federal environmental, health, and safety laws.

Burden Statement: The public reporting burden for this collection of information is estimated to average 2.5 hours per response. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Respondents: States and territories
Estimated No. of Respondents: 52
Estimated Total Annual Burden on Respondents: 1188 hours
Frequency of Collection: On occasion

Send comments regarding the burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM–223), 401 M Street, SW., Washington, DC 20460
and
Tim Hunt, Office of Management and Budget, Paperwork Reduction Project (2070–0057), Washington, DC 20503, Telephone: (202) 395–3084.

Dated: January 11, 1990.

Paul Lapsley,

Director, Information and Regulatory Systems Division.

[FR Doc. 90–1857 Filed 1–26–90; 8:45 am]

BILLING CODE 6560-50

[FRL–3717–1]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before February 28, 1990.

FOR FURTHER INFORMATION CONTACT: Sandy Farmer at EPA, (202) 382–2740.

SUPPLEMENTARY INFORMATION:

Office of Pesticides and Toxic Substances

Title: National Home and Garden Pesticide Use Survey (EPA ICR #0607.01). This ICR requests clearance for a new information collection.

Abstract: EPA's National Home and Garden Pesticide Use Survey will collect information on the use of pesticide products from two thousand households across the contiguous United States. They survey will include questions on the pesticides used and pests treated, the frequency of use, and the method of application, storage, and disposal. The Agency will use the survey results to estimate consumer exposures to pesticide chemicals and to assess the risks from pesticide use. Exposure and risk information will, in turn, help the Agency in its special reviews of pesticide registrations and in developing regulations.

Burden Statement: The public reporting burden for this collection of information is estimated to average 50 minutes per response. This estimate includes the time for listening and responding to survey questions.

Respondents: Householders
Estimated No. of Respondents: 2000
Estimated Total Annual Burden on Respondents: 1667 hours
Frequency of Collection: One-time

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM–223), 401 M Street, SW., Washington, DC 20460
and
Tim Hunt, Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place, NW., Washington, DC 20503, Telephone: (202) 395–3084

Dated: January 16, 1990.

David Schwarz,

Acting Director, Information and Regulatory Systems Division.

[FR Doc. 90–1856 Filed 1–26–90; 8:45 am]

BILLING CODE 1-29-M

[FRL–3717–6]

Edmond's Salvage Yard Site; Notice of Proposed Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement.

SUMMARY: Under section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Environmental Protection Agency (EPA) has agreed to settle claims for response costs at Edmonds Salvage Yard Site, Dixie County, Florida with Commercial Metals Company and Florida Power and Light. EPA will consider public comments on the proposed settlement for thirty days. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from:

Ms. Carolyn McCall, Site Investigation and Support Branch, Waste Management Division, U.S. EPA, Region IV, 345 Courtland St., NE., Atlanta, GA 30365, 404–347–5059.

Written comments may be submitted to the person above by 30 days from date of publication.

Dated: December 29, 1989.

Patrick M. Tobin,

Director, Waste Management Division.

[FR Doc. 90–1855 Filed 1–26–90; 8:45 am]

BILLING CODE 6560–50–M

FARM CREDIT ADMINISTRATION

Order Appointing Receiver of the Farm Credit Corporation of America

ACTION: Notice.

SUMMARY: Pursuant to the provisions of § 4.12(a) of the Farm Credit Act of 1971, as amended (1971 Act), 12 U.S.C. 2183(a) and 12 CFR 611.1170, the Farm Credit Administration (FCA) Board hereby appoints James C. Larson (Receiver), an individual with a business address of P.O. Box 923, San Andreas, California 95249, as Receiver of the Farm Credit Corporation of America, P.O. Box 5130, Denver, Colorado 80217 (Corporation) effective close of business January 31, 1990. The FCA Board takes this action following the receipt of a request to appoint a receiver for the Farm Credit Corporation of America by the Corporation's Board of Directors, which resolved on December 6, 1989 to voluntarily liquidate after the consummation of transfers of certain assets and liabilities of the Corporation, such resolution being approved by the shareholders on December 11, 1989 in accordance with the bylaws of the Corporation. The Receiver shall take possession of all remaining assets of the Corporation, wind up its business operations, liquidate its remaining property and assets, pay its creditors, and distribute the remaining proceeds to its stockholders in accordance with the 1971 Act, FCA regulations, the FCA Receivership Manual, and this Order and any amendment hereto. The Receiver shall also be guided by the Corporation's Plan of Liquidation as approved by the FCA Board on January 19, 1990. James C. Larson is authorized to sign any and all documents as Receiver and may delegate his signatory authority, with appropriate administrative controls, to any employee of the Corporation-in-receivership as he deems appropriate.

Dated: January 23, 1990.

Jeffrey P. Katz,

Acting Secretary, Farm Credit Administration Board.

[FR Doc. 90–1878 Filed 1–26–90; 8:45 am]

BILLING CODE 6705–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)

Agency Information Collection Submitted to the Office of Management and Budget for Clearance (OMB)

The FEMA has submitted to the OMB the following information collection package for clearance in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

TYPE: Extension of 3067–0148.

TITLE: Consultation with Local Officials to Assure Compliance with Sections 110 and 206 of the Flood Disaster Protection Act of 1973.

ABSTRACT: This program involves the collection of data from local officials at the initiation of a National Flood Insurance Program flood insurance study or restudy and during the statutory appeals period conducted at the end of such study or restudy for purposes of assuring that the study or restudy and associated flood risk mapping are scientifically and technically correct.

Type of Respondents: State or local Governments

Estimate of Total Annual Reporting & Recordkeeping Burden: 6,116

Number of Respondents: 846

Estimated Average burden hours per response: 7.23

Frequency of response: On occasion

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley, (202) 646–2624, 500 C St., SW., Washington, DC 20472.

Direct comments regarding the burden estimate or any aspect of this information collection, including suggestions for reducing this burden, to the FEMA Clearance Officer at the above address; and to Gary Waxman, (202) 395–7231, Office of Management and Budget, 3235 NEOB, Washington, DC 20503 within 2 weeks of this notice.

Dated: January 16, 1990.

Wesley C. Moore,

Director, Office of Administrative Support.

[FR Doc. 90–1935 Filed 1–26–90; 8:45 am]

BILLING CODE 6718–01–M

[FEMA–850–DR]

Texas; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Texas (FEMA–850–DR), dated January 9, 1990, and related determinations.

DATE: January 18, 1990.

FOR FURTHER INFORMATION CONTACT: Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646–3614.

Notice: The notice of a major disaster for the State of Texas, dated January 9, 1990, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of January 9, 1990:

The counties of Dimmit, Kinney, Maverick, Uvalde, and Zavala for Disaster Unemployment Assistance only.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Grant C. Peterson,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 90–1925 Filed 1–26–90; 8:45 am]

BILLING CODE 6718–07–M

Washington, Major Disaster and Related Determinations

[FEMA–852–DR]

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Washington (FEMA–852–DR), dated January 18, 1990, and related determinations.

DATED: January 18, 1990.

FOR FURTHER INFORMATION CONTACT: Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646–3614.

Notice: Notice is hereby given that, in a letter dated January 18, 1990, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*, Pub. L. 93–288, as amended by Pub. L. 100–707), as follows:

I have determined that the damage in certain areas of the State of Washington, resulting from severe storms and flooding beginning on January 6, 1990, is of sufficient severity and magnitude to warrant a major disaster declaration under Public Law 93–288 as amended by Public Law 100–707. I, therefore, declare that such a major disaster exists in the State of Washington.

In order to provide Federal assistance, you are hereby authorized to allocate from funds, available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under Public Law 93–288, as amended by Public Law 100–707, for Public Assistance will be limited to 75 percent of the total eligible costs.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authorization vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Joan F. Hodgins of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Washington to have been affected adversely by this declared major disaster:

Lewis County for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Robert H. Morris,

Acting Director, Federal Emergency Management Agency.

[FR Doc. 90–1926 Filed 1–26–90; 8:45 am]

BILLING CODE 6718–02–M

Florida; Major Disaster and Related Determinations

[FEMA–851–DR]

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Florida (FEMA–851–DR), dated January 15, 1990, and related determinations.

DATE: January 15, 1990.

FOR FURTHER INFORMATION CONTACT: Patricia S. Bowman, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646–2661.

NOTICE: Notice is hereby given that, in a letter dated January 15, 1990, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*, Pub. L. 93–288, as amended by Pub. L. 100–707), as follows:

I have determined that the damage in certain areas of the State of Florida, resulting from a severe freeze which occurred on December 23–25, 1989, is of sufficient severity and magnitude to warrant a major disaster declaration under Public Law 93–288, as amended by Public Law 100–707. I, therefore, declare that such a major disaster exists in the State of Florida.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Disaster Unemployment Assistance in the designated areas. The length of the benefit period shall be determined by the Regional Director of the Federal Emergency Management Agency, but in no case will benefits continue longer than 26 weeks from the date of declaration.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Thomas P. Credle of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Florida to have been adversely by this declared major disaster:

The counties of Broward, Collier, Dade, Hendry, Lee, Monroe, and Palm Beach for Disaster Unemployment Assistance only.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Robert H. Morris,

Acting Director, Federal Emergency Management Agency.

[FR Doc. 90–1927 Filed 1–26–90; 8:45 am]

BILLING CODE 6718–02–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10220. 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.: 224–200316.

Title: Philadelphia Port Corporation/Portside Refrigerated Services, Inc. Terminal Agreement.

Parties:

Philadelphia Port Corporation (PPC)

Portside Refrigerated Services, Inc. (Portside).

Synopsis: The Agreement provides for PPC to grant Portside a license to occupy a portion of the Packer Avenue Refrigerated Warehouse (PARW) until the filing with the Commission of a lease for the PARW or the prior termination of the license. As consideration for granting the license, Portside agrees to pay PPC a special license fee of $5,000.00 upon execution of the Agreement as well as a monthly license fee of $5,000 commencing with the execution of the Agreement and each month thereafter.

Agreement No.: 224–200315.

Title: Indiana Port Commission/Beta Steel Corporation Terminal Agreement.

Parties:

Indiana Port Commission (Port)

Beta Street Corporation (Beta).

Synopsis: The Agreement provides for the twenty-year lease of certain property at Burns International Harbor to be used for the operation of a mini-mill and electric furnace steel processing facility. Beta will pay standard wharfage and dockage charges under the port's tariff and rental rates specified in the Agreement.

By order of the Federal Maritime Commission.

Dated: January 23, 1990.

Joseph C. Polking,

Secretary.

[FR Doc. 90–1842 Filed 1–29–90; 8:45 am]

BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of 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.: 212–010320–020

Title: Brazil/U.S. Gulf Ports Agreement

Parties:

Companhia de Navegacao Lloyd Brasileiro

Companhia Maritima Nacional

American Transport Lines, Inc.

Empresa Lineas Maritimas Argentinas S.A.

A. Bottacchi S.A. de Navegacion C.F.I.I.

Synopsis: The proposed amendment reinstates Victoria as a required Brazilian port of call, extends the special carrying adjustment for certain commodities and the special deduction for Wheels for Automobiles, and modifies the pool payment forfeiture provision. It also clarifies the application of the Agreement as it relates to cargo moving under intermodal tariffs.

By Order of the Federal Maritime Commission.

Dated: January 23, 1990.

Joseph C. Polking,

Secretary.

[FR Doc. 90–1879 Filed 1–26–90; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL TRADE COMMISSION

[File No. 862 3073]

Nature's Way Products, Inc., et al.; Proposed Consent Agreement with Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, the Springville, Utah distributors and advertisers of Cantrol from making any claims without adequate substantiation concerning whether certain nutritional supplements affect yeast conditions and that a consumer can self-diagnose yeast conditions. It also would prohibit any unsubstantiated claims that the six ingredients of the supplements affect any disease. The consent agreement would require respondents to pay $30,000 to the National Institutes of Health to support research in candidiasis or the effects of yeast organisms on health.

DATE: Comments must be received on or before March 30, 1990.

ADDRESS: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robert C. Cheek, FTC/S–4002, Washington, DC 20580. (202) 326–3045.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

The Federal Trade Commission having initiated an investigation of certain acts and practices of Nature's Way Products, Inc., a corporation, Murdock International Corporation, a corporation, and Kenneth Murdock, individually and as an officer of said corporations, hereinafter sometimes referred to as proposed respondents, and it now appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated.

It is hereby agreed that by an between Nature's Way Products, Inc., and Murdock International Corporation, by their duly authorized officers, and Kenneth Murdock, individually and as an officer of said corporations, and their attorney, and counsel for the Federal Trade Commission that:

(1) Proposed respondent Nature's Way Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona with its office and principal place of business located at 10 Mountain Springs Parkway, Springville, Utah 84663.

(2) Proposed respondent Murdock International Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona with its office and principal place of business located at 10 Mountain Springs Parkway, Springville, Utah 84663.

(3) Proposed respondent Kenneth Murdock is President of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, and his address is the same as that of the corporate respondents.

(4) Proposed respondents admit all the jurisdictional facts set forth in the draft complaint here attached.

(5) Proposed respondents waive:

(a) any procedural steps;

(b) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

(d) any claim under the Equal Access To Justice Act.

(6) This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

(7) This agreement is for settlement purposes only and does not constitute and admission by proposed respondents that the law has been violated as alleged in the draft complaint here attached.

(8) The agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant

to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents: (1) issue its complaint corresponding in form and substance with the draft complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding; and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to-order to proposed respondents' address as stated in this agreement shall constitute service. Proposed respondents waive any rights they may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

(9) Proposed respondents have read the proposed complaint and order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Order—

I

It Is Ordered, That respondents Nature's Way Products, Inc., a corporation, its successors and assigns, and its officers; Murdock International Corporation, a corporation, its successors and assigns, and its officers; Kenneth Murdock, individually and as an officer of the said corporations; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any dietary, food, or nutritional supplement, including "Cantrol," in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication:

A. Contrary to fact, that a consumer can use any test to self-diagnose and intestinal yeast condition, problem or infection.

B. Concerning such product's ability to cure, treat, prevent, or reduce the risk of developing *candida albicans* or a yeast condition, problem or infection, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this Order, "competent and reliable scientific evidence" shall mean those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

II

It Is Further Ordered, That respondents Nature's Way Products, Inc., a corporation, its successors and assigns, and its officers; Murdock International Corporation, a corporation, its successors and assigns, and its officers; Kenneth Murdock, individually and as an officer of the said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any dietary, food, or nutritional supplement, including Cantrol, that contains any or all of the ingredients acidophilus, Evening Primrose Oil, Pau D'Arco, linseed oil, caprylic acid, or vitamin E, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning such product's ability to cure, treat, prevent or reduce the risk of developing any disease, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this Order, "disease" shall mean an illness or sickness.

III

It Is Further Ordered, That respondents shall pay, in lieu of redress, the sum of $30,000 to the National Institutes of Health. The funds shall be designated for the support of research or fellowships relating to products for the cure, prevention, or treatment of candidiasis, which may include vulvovaginal candidiasis, or relating to the effects of Candida albicans or other yeast organisms on health. In the event the National Institutes of Health do not accept any or all of such funds, such remaining funds shall be paid to the United States Treasury. All funds shall be paid by respondents within sixty (60) days of the date of service of this Order.

IV

It Is Further Ordered, That for three (3) years after the last date of dissemination of the representation, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondents in disseminating any representation covered by this Order; and

2. All test reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question any representation that is covered by this Order.

V

It Iis Further Ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries or other change in the corporations which may affect compliance obligations arising out of this Order.

VI

It Is Further Ordered, That respondents shall forthwith distribute a copy of this Order to each of their operating divisions and to all distributors of products manufactured or marketed by respondents.

VII

It Is Further Ordered, That respondents shall, within sixty (60) days after service of this Order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

Analysis of proposed consent order to aid public comment

The Federal Trade Commission has accepted subject to final approval an agreement containing a consent order from Nature's Way Products, Inc., Murdock International Corporation, and Kenneth Murdock ("respondents").

The consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will decide whether it should withdraw from the agreement and take other appropriate action, or

make final the order contained in the agreement.

This matter concerns advertisements about Cantrol, a supplement sold by Nature's Way Products.

The Commission's complaint in this matter charges that respondents in connection with their ads for Cantrol have violated the Federal Trade Commission Act by making deceptive claims. According to the complaint, respondents' ads represented that comsumption of Cantrol controls adverse effects on health commonly caused by excessive levels of yeast (Candida albicans) in the intestines and that consumption of Cantrol controls yeast (Candida albicans) infection in the vagina. The complaint alleges that respondents did not have a reasonable basis for making such representations and that, therefore, the claims were false and misleading. The complaint also alleges that respondents falsely claimed that a test set forth in certain of respondents' ads for Cantrol showed whether a person is likely to have a yeast infection.

The consent order contains provisions designed to prevent respondents from engaging in similar allegedly unlawful acts in the future. It also provides for respondents to pay funds for research concerning health effects of yeast.

Part I of the order prohibits respondents from making any claims without adequate substantiation that a supplement affects yeast. It also prohibits any contrary to fact claims that a consumer can self-diagnose yeast conditions.

Part II of the order covers claims concerning supplements that contain any or all of six ingredients: acidophilus, Evening Primrose Oil, vitamin E, linseed oil, caprylic acid, and Pau d'Arco. It prohibits any unsubstantiated claims that such supplements affect disease.

Part III requires respondents to pay, in lieu of redress, $30,000 to the National Institutes of Health. These funds shall be designated to be used for research or fellowships relating to products for the cure, prevention, or treatment of yeast or the effect of yeast on health.

Part IV requires respondents to keep records concerning claims covered by this order.

Part V requires respondents to notify the Commission of any change in status that might affect enforcement of the order.

Part VI requires respondents to distribute a copy of the order to distributors.

Part VII requires respondents to file a compliance report.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order, or to modify in any way their terms.

Donald S. Clark,

Secretary.

Dissenting Statement of Commissioner Andrew J. Strenio, Jr. Nature's Way Products, Inc.

FTC staff and management skillfully have amassed ample evidence to provide the Commission with "reason to believe" that a law violation occured in the marketing of "Cantrol" (a nutritional supplement). In addition, some of the product claims raised potentially serious health issues. Unfortunately, however, the proposed consent would secure only relatively narrow injunctive relief. Further, the $30,000 monetary payment consists of but a tiny fraction of the amount consumers paid for Cantrol while the challenged claims were being made. Since the prima facie case is so strong and involves public health considerations, the Commission should not seattle for so little. Accordingly, I respectfully dissent from the majority's decision to accept the proposed consent for comment.

In my view, at a minimum, Part II of the proposed consent (one of the injunctive relief provisions) should cover all of respondent's dietary, food, or nutritional supplements rather than be limited to just products composed of any of the six primary ingredients contained in Cantrol. Such an approach would be consistent with the relief obtained by the Commission in *PharmTech*, 103 F.T.C. 448 (1984) and *General Nutrition Corp.*, Dkt. No. 9175 (order entered Feb. 2, 1989).

As to the $30,000 payment to the National Institutes of Health ("NIH"), NIH no doubt could put those funds to good use in promoting research relating to the treatment or prevention of yeast conditions or infections. Still, that $30,000 payment looks paltry alongside an estimated $3,000,000 in revenues for respondents from the sale of Cantrol during the period that the challenged ads ran. Since Cantrol apparently has a retail price approximately double the wholesale price, it would follow that consumer spending for Cantrol purchases during the time in question was roughly $6,000,000. Thus, although the $30,000 figure might have been tolerable if taken together with sweetened injunctive relief, the public ought not be forced to swallow it here.

[FR Doc. 90-1963 Filed 1-26-90; 8:45 am]

BILLING CODE 6750-01-M

GENERAL SERVICES ADMINISTRATION

Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Acquisition of Office Space in Northern Virginia for Use by the Department of the Navy

Pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 as implemented by the Council on Environmental Quality regulations (40 CFR parts 1500–1508), the General Services Administration (GSA) announces its intent to prepare an Environmental Impact Statement (EIS) for the acquisition of up to 3.25 million occupiable square feet of office space, with associated parking for about 20,000 employees, in northern Virginia for use by the Department of the Navy. Acquisition of this office space will allow the Navy to consolidate its offices, which are scattered in 20 leased buildings in northern Virginia, into one location.

The Navy will act as a cooperating agency during preparation of the EIS pursuant to 40 CFR 1501.6.

Six alternatives are currently identified for evaluation in the EIS:

1. No Action—No change in current pattern of office space usage by the Navy.

2. Crystal City—This site consists of 4 sub-alternatives: (a) Hayes Street site and Eads Street site, (b) Hayes Street site, Eads Street site, former Twin Bridges Marriott Hotel site and North Tract site, (c) Hayes Street site, Eads Street site and a portion of the existing Crystal City complex, and (d) portions of the existing Crystal City complex only. The 16 acre Hayes Street site, is bounded by Hayes Street to the west, 15th Street to the south, Fern Street to the east and 12th Street to the north. The 26.4 acre Eads Street site is bounded by 15th Street to the south, Army Navy Drive to the north, Eads Street to the east, and Fern Street to the west. The 7 acre former Twin Bridges Marriott Hotel site is located on Old Jefferson Davis Highway at the intersection of Boundary Drive. The 8.5 acre North Tract site is located along the east side of Jefferson Davis Highway and is bounded to the north by the railroad siding adjacent to the former Twin Bridges Marriott Hotel and an Exxon Gas Station, to the east by the Richmond, Fredericksburg and Potomac Railroad (RF&P) mainline right-of-way, and to the west by Old Jefferson Davis Highway.

3. Seminary Road—This 55 acre site is bounded by I–395 to the east, Seminary

Road to the north, and North Beauregard Street to the west.

4. Van Dorn Street—This 32.6 acre site is bounded to the north by the creek abutting the Southern Railroad yard, to the east by the proposed intersection of Clearmont Drive and Eisenhower Avenue, and to the south by Eisenhower Avenue.

5. Eisenhower Avenue—This 18.8 acre site is bounded by Stovall Street to the west, Mill Road to the north and east, and Eisenhower Avenue to the south.

6. Port Potomac—This 27.6 acre site is bounded by Crystal City to the north, South Glebe Road extension to the south, RF&P railroad mainline right-of-way to the east, and Jefferson Davis Highway and Crystal Drive to the west.

Potential environmental impacts resulting from the proposed action include short-term impacts during construction (noise, dust), and long term changes in traffic, socio-economic effects and visual impacts.

The consulting firm of Leo A. Daly has been retained to prepare the Draft and Final Environmental Impact Statements.

GSA will initiate a scoping process for the purpose of determining the scope of issues to be addressed and for identifying the significant issues related to this proposed action. A public scoping meeting will be held on February 20, 1990, starting at 7 pm in the auditorium of the Lee Center located at 1108 Jefferson Street, Alexandria, Virginia, and on February 22, 1990, starting at 7 pm at the Aurora Hills Recreation Center located at 735 South 18th Street, Arlington, Virginia.

A short formal presentation will precede the request for public comments. GSA representatives will be available at this meeting to receive comments from the public regarding issues of concern. It is important that Federal, State and county agencies, and interested individuals and groups take this opportunity to identify environmental concerns that should be addressed during the preparation of the EIS. In the interest of available time, each speaker will be asked to limit their oral comments to five (5) minutes.

Agencies and the general public are also invited and encouraged to provide written comment in addition to, or in lieu of, oral comments at the public meeting. To be most helpful, scoping comments should clearly describe specific issues or topics which the commentor believes the EIS should address. Written statements and/or questions regarding the scoping process should be mailed no later than March 10, 1990, to Ms. Debbie Connors (Code WQG, telephone (202) 472-1334), National Capitol Region, General Services Administration, 7th & D Streets SW., Washington, DC 20407.

Dated: January 22, 1990.

Linda L. Eastman,

Director, Facilities Planning Staff.

[FR Doc. 90-1969 Filed 1-26-90; 8:45 am]

BILLING CODE 6820-23-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Statement of Organization, Functions, and Delegations of Authority; Assistant Secretary for Management and Budget

Part A, of the Office of the Secretary of the Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services is being amended as follows: Chapter AM, "HHS Management and Budget Office," as last amended at 54 FR 3140, 1/23/89; and Chapter AMS "Office of Management and Acquisition," as last amended at 53 FR 39145, 10/5/88. These Chapters are being amended to delete departmentwide emergency preparedness functions, which have been transferred to the Assistant Secretary for Health. Emergency preparedness functions for the Office of the Secretary remain with the Assistant Secretary for Management and Budget. The changes are as follows:

I. AM.20 *Functions* Delete part B. in its entirety and replace with the following:

B. The Office of Management and Acquisition [AME] provides Departmentwide policy leadership and advises senior HHS officials on management issues related to reorganizations, delegations of authority, postal management, real property, space management, and occupational safety and health; administers reports clearance, records management, equal employment opportunity, telecommunications, and space management and emergency preparedness programs for the Office of the Secretary; manages and operates the HHS Fitness Center; provides administrative and facilities management services to HHS components in the Southwest Washington, DC area complex which include mail, property management, supplies, facilities maintenance, physical security, reprographics, and other office services; provides Departmental leadership in the areas of procurement, discretionary grants, and logistics through policy development, oversight and training; manages the Department's Small and Disadvantaged Business Utilization Program; and awards and administers contracts in support of the Office of the Secretary.

§ AMS.00 Mission. The Office of Management and Acquisition.

Delete:

In the first sentence "emergency preparedness."

Add:

In the third sentence after "Plans and administers" "emergency preparedness,".

§ AMS.20 C. Office of Management and Operations.

Delete.

In the second sentence delete "and emergency preparedness". IV. Section AMS.20, C2, *Division of Special Programs Coordination.* Delete in its entirety and replace with the following:

2. Division of Special Programs Coordination

a. Establishes, maintains and promulgates HHS policy for the Departmental physical security programs. Provides oversight of OPDIV performance for this function and provides technical assistance on a Departmentwide basis as required.

b. Establishes, maintains and promulgates HHS policy for the Departmental environmental affairs program. Provides oversight of OPDIV performance for this function and provides technical assistance on a Departmentwide basis as required.

c. Establishes, maintains and promulgates HHS policy for the Departmental historic preservation program. Provides oversight of OPDIV performance for this function and provides technical assistance on a Departmentalwide basis as required.

d. Establishes, maintains and promulgates HHS policy for the Departmental employee safety and occupational health program. Provides oversight of OPDIV performance for this function and provides technical assistance on a Departmentalwide basis as required.

e. Prepares initial guidance to the Operating Divisions on technical and facilities aspects of the HHS annual RENT budget. Provides oversight of OPDIV performance for this function and provides technical assistance on a Departmentalwide basis as required. Coordinates preparation among OPDIVs for facilities and space aspects, and collaborates with the Office of Budget on final Departmentwide RENT budget, consistent with OMB and GSA guidance.

f. Provides necessary leadership and coordination activities for emergency preparedness matters internal to the elements of the Office of the Secretary.

g. Is responsible for the establishment, maintenance and promulgation of HHS policy for the HHS real property program. Establishes guidelines and procedures to effectively monitor the real property owned or leased by HHS.

h. Establishes guidelines to monitor the utilization of all space assigned to the Department by GSA.

i. Establishes information and reporting standards for all above listed programs. Collects, assembles and analyzes required information for mandated reports to Congress, OMB, GSA and other Federal agencies.

Dated: January 8, 1990.

Louis W. Sullivan, M.D.,

Secretary.

[FR Doc. 90-1846 Filed 1-26-90; 8:45 am]

BILLING CODE 4110-60-M

Health Resources and Services Administration

National Practitioner Data Bank Conferences

The Health Resources and Services Administration announces that the National Practitioner Data Bank (the Data Bank) will be conducting conferences during the months of February and March 1990 to assist entities and individuals who are responsible for reporting to and querying the Data Bank. The Data Bank is scheduled to open in April 1990. The exact date of the opening will be announced in the **Federal Register** at a later date.

The Data Bank is authorized by the Health Care Quality Improvement Act of 1986, Title IV of Public Law 99-660, as amended (42 U.S.C. 11101 *et seq.*). Final regulations at 45 CFR part 60, published in the **Federal Register** on October 17, 1989, set forth the criteria and procedures for information to be collected in and released from the Data Bank. These regulations govern the reporting and release of information concerning:

(1) Payments made for the benefit of physicians, dentists, and other health care practitioners as a result of medical malpractice actions and claims; and, (2) certain adverse actions taken regarding the licenses, clinical privileges, and membership in professional societies of physicians and dentists.

The conferences are to provide guidance for entities and individuals in meeting their responsibilities to report to our query the Data Bank, including the preparation of reporting and querying forms. The agenda will include an overview of the Data Bank's operations and an orientation to the reporting and querying forms and instructions. Each conference will be targeted to a specific audience required to report to or query the Data Bank (e.g., medical malpractice insurers, State Medical boards). Interested parties should register for the appropriate conference. Attendees should be those individuals who are responsible for the actual reporting to and querying of the Data Bank.

The conferences directed at specific groups will be held as follows:

- Conference for Medical Malpractice Insurers:
  February 5, 1990
  Sheraton New Orleans Hotel, 500 Canal Street, New Orleans, Louisiana 70130, Telephone: (504) 525-2500

This conference is designed for those individuals and entities who will be required to file reports on medical malpractice payments. This includes staff of medical malpractice insurance companies and self-insured entities and self-insured persons. Staff from associations representing these groups are also invited to attend.

- Conference for State Medical Boards:
  February 26
  Sheraton Phoenix Hotel, 111 North Central Avenue, Phoenix, Arizona 85001, Telephone: (602) 257-1525

This conference is designed for staff of State Medical Boards who will be required to file reports on licensure disciplinary actions and who may query the Data Bank. Staff from associations representing these groups are also invited to attend.

- Conferences for Southern Regional Hospitals and Other Health Care Entities:
  March 6
  March 7
  Atlanta Hilton and Towers, 255 Courtland Street, NE., Atlanta, Georgia 30043, Telephone: (404) 659-2000
- Conferences for Mid-Western Regional Hospitals and Other Health Care Entities:
  March 14
  March 15
  Sheraton St. Louis at Convention Plaza, 910 North Seventh Street, St. Louis, Missouri 63101, Telephone: (314) 231-5100
- Conferences for Eastern Regional Hospitals and Other Health Care Entities:
  March 19
  March 29
  Grand Hyatt Washington at Washington Center, 1000 H Street, NW., Washington, DC 20001, Telephone: (202) 582-1234
- Conference for Western Regional Hospitals and Other Health Care Entities:
  March 21
  March 22
  Hyatt Regency Los Angeles at Broadway Plaza, 711 South Hope Street, Los Angeles, California 90017, Telephone: (213) 683-1234

These regional conferences are designed for staff of hospitals and other health care entities (e.g., HMOs and medical and dental group practices) who will be required to file reports on adverse actions on clinical privileges and to query the Data Bank. For scheduling purposes, hospitals and other health care entities should, to the extent possible, have staff attend the conference designed for their specific region. To facilitate serving a larger number of attendees, the conferences will be held for two days. Attendees should register to attend for one day only.

- Conference for State Dental Boards:
  March 27
  American Dental Association Auditorium, 211 East Chicago Avenue, Chicago, Illinois 60611, Telephone: (312) 440-7464

This conference is designed for staff of State Dental Boards who will be required to file reports on licensure disciplinary actions and who may query the Data Bank. Staff from associations representing these groups are also invited to attend.

- Conference for Professional Societies:
  March (date not available)
  Washington, DC

This conference is designed for staff of medical and dental professional societies at the national and State level who will be required to file reports on adverse actions on membership in professional societies and who may query the Data Bank. Staff from associations representing these groups are also invited to attend.

Additional conferences will be scheduled as needed and announced in the **Federal Register.**

Registration is on a first-come, first-served basis.

Expenses incurred by the attendees will not be supported by the Federal Government. Attendance at any conference is volunatary.

To register for one of the conferences or to obtain additional information please contact: John E. Hansan, Ph.D., Project Director, National Practitioner Data Bank, Unisys Corporation, 8301 Greensboro Drive, Suite 1100, McLean, Virginia 22102, Telephone: (703) 448-6770.

Dated: January 23, 1990.

John H. Kelso,

Acting Administrator.

[FR Doc. 90–1915 Filed 1–26–90; 8:45 am]

BILLING CODE 4160–15–M

National Institutes of Health

Meeting of the General Clinical Research Centers Committee

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the General Clinical Research Centers (GCRC) Committee, Division of Research Resources (DRR), February 14–15, 1990, at the Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

The meeting will be open to the public on February 14 from 8:30 a.m. to 10 a.m. during which time there will be comments by the Acting Director, DRR; and an update on the General Clinical Research Centers Program by Dr. Judith L. Vaitukaitis, Director, GCRC Program, DRR. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S. Code and sec. 10(d) of Public Law 92–463, the meeting will be closed to the public on February 14 from 10 a.m. to 6 p.m., and on February 15 from 8 a.m. to 4 p.m., for the review, discussion, and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property, such as patentable material, and personal information concerning individuals associated with the applications, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Mr. Michael Fluharty, Public Affairs Specialist, DRR, NIH, Westwood Building, room 10A15, 5333 Westbard Avenue, Bethesda, Maryland 20892, (301) 496–5545, will provide a summary of the meeting, and a roster of the committee members upon request. Dr. Bela J. Gulyas, Executive Secretary, General Clinical Research Centers Committee, (301) 402–0627, will furnish information on the agenda upon request.

(Catalog of Federal Domestic Assistance Program No. 13.333, Clinical Research, National Institutes of Health).

Dated: January 12, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90–1936 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

National Institutes of Health, National Institute of Arthritis and Musculoskeletal and Skin Diseases

Notice of Meeting; National Arthritis and Musculoskeletal and Skin Diseases Advisory Council

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the National Arthritis and Musculoskeletal and Skin Diseases Advisory Council to provide advice to the National Institute of Arthritis and Musculoskeletal and Skin Diseases on February 15 and 16, 1990, Conference room 10, building 31, National Institutes of Health, Bethesda, Maryland.

The meeting will be open to the public February 15 from 8:30 a.m. to 12 noon to discuss administrative details relating to Council business and special reports. Attendance by the public will be limited to space available.

The meeting of the Advisory Council will be closed to the public on February 15 from 1 p.m. to recess and again on February 16 from 8:30 a.m. to adjournment at approximately 12 noon in accordance with provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, for the review, discussion and evaluation of individual grant applications. These deliberations could reveal confidential trade secrets or commercial property, such as patentable materials, and personal information concerning individuals associated with the applications, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Further information concerning the Council meeting may be obtained from Dr. Michael Lockshin, Executive Secretary, National Arthritis and Musculoskeletal and Skin Diseases Advisory Council, NIAMS, Westwood Bldg., room 403, Bethesda, Maryland 20892, (301) 496–7495.

A summary of the meeting and roster of the members may be obtained from the Committee Management Office, NIAMS, building 31, rm. 4C32, National Institutes of Health, Bethesda, Maryland 20892, (301) 496–0803.

(Catalog of Federal Domestic Assistance Program No. 13.846, Arthritis, Bone and Skin Diseases, National Institutes of Health)

Dated: January 12, 1990.

Betty J. Beveridge,

NIH Committee Management Officer.

[FR Doc. 90–1937 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

National Cancer Institute; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors, Division of Cancer Etiology on March 1–2, 1990. The meeting will be held in building 31, C Wing, conference room 10, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892.

This meeting will be open to the public from 1 p.m. to recess on March 1 and from 9 a.m. to adjournment on March 2 for discussion and review of the Division budget and review of concepts for grants and contracts. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in section 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public from 9 a.m. to approximately 12 Noon on March 1 for the review, discussion and evaluation of individual programs and projects conducted by the Division of Cancer Etiology. These programs, projects, and discussions could reveal personal information concerning individuals associated with the programs and projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Mrs. Winifred Lumsden, Committee Management Officer, National Cancer Institute, building 31, room 10A06, National Institutes of Health, Bethesda, Maryland 20892 (301/496–5708) will provide summaries of the meeting and rosters of committee members, upon request.

Dr. David McB. Howell, Executive Secretary of the Board of Scientific Counselors, Division of Cancer Etiology, National Cancer Institute, building 31, room 11A06, National Institutes of Health, Bethesda, Maryland 20892 (301/496–6927) will furnish substantive program information.

Dated: January 12, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90–1941 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

National Heart, Lung, and Blood Institute; Notice of Meeting of Research Manpower Review Committee

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Research Manpower Review Committee, National Heart, Lung, and Blood Insitute, National Institutes of Health,

on March 4–6, 1990, at the Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.

This meeting will be open to the public on March 4, from 8 p.m. to approximately 9:30 p.m. to discuss administrative details and to hear reports concerning the current status of the National Heart, Lung, and Blood Institute. Attendance by the public is limited to space available.

In accordance with the provisions set forth in section 552b(c)(4) and 552(c)(6), title 5, U.S.C, and section 10(d) of Public Law 92–463, the meeting will be closed to the public on March 5, from approximately 8 a.m. until adjournment on March 6, for the review, discussion, and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Terry Bellicha, Chief, Communications and Public Information Branch, National Heart, Lung, and Blood Institute, building 31, room 4A21, National Institutes of Health, Bethesda, Maryland, 20892, (301) 496–4236, will provide a summary of the meeting and a roster of the Committee members.

Dr. Kathryn Ballard, Executive Secretary, NHLBI, Westwood Building, room 550, Bethesda, Maryland 20892, (301) 496–7361, will furnish substantive program information.

(Catalog of Federal Domestic Assistance Program Nos. 13.837, Heart and Vascular Diseases Research; 13.838, Lung Diseases Research; and 13.839, Blood Diseases and Resources Research, National Insitutes of Health.)

Dated: January 12, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90–1938 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

National Heart, Lung, and Blood Institute; Notice of Meeting

Notice is hereby given of the meeting of the National Cholesterol Education Program Coordinating Committee, sponsored by the National Heart, Lung, and Blood Institute on Tuesday, February 27, 1990, from 9 a.m. to 3:00 p.m., at the Holiday Inn, 8120 Wisconsin Avenue, Bethesda, Maryland, (301) 652–2000.

The entire meeting is open to the public. The Coordinating Committee is meeting to define the priorities, activities, and needs of the participating groups in the National Cholesterol Education Program. Attendance by the public will be limited to space available.

For the agenda, list of participants, and meeting summary, contact: Dr. James I. Cleeman, Coordinator, National Cholesterol Education Program, Office of Prevention, Education and Control, National Heart, Lung, and Blood Institute, National Institutes of Health, C–200, Bethesda, Maryland 20892, (301) 496–0554.

Dated: January 22, 1990.

William F. Raub, Ph.D.,

Acting Director, NIH.

[FR Doc. 90–1939 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Environmental Health Sciences; Notice of Meeting of Board of Scientific Counselors, NIEHS

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors, NIEHS, February 26–27, 1990, in Building 101 Conference Room, South Campus, NIEHS, Research Triangle Park, North Carolina.

This meeting will be open to the public 9 a.m. to 12 noon on February 26, for the purpose of presenting an overview of the organization and conduct of research in the Laboratory of Molecular Biophysics. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in section 552b(c)(6) of title 5 U.S. Code and section 10(d) of Public Law 92–463, the meeting will be closed to the public on February 26 from approximately 1 p.m. to recess and on February 27 from 9 a.m. to adjournment, for the evaluation of the programs of the Laboratory of Molecular Biophysics, including consideration of personnel qualifications and performance, the competence of individual investigators, and similar items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Executive Secretary, Dr. John McLachlan, Scientific Director, Division of Intramural Research, NIEHS, Research Triangle Park, N.C. 27709, telephone (919) 541–3205, FTS 629–3205 will furnish summaries of the meeting, rosters of committee members and substantive program information.

Dated: January 12, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90–1940 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Allergy and Infectious Diseases; Notice of Meeting of Epidemiology and Technology Transfer Subcommittee of the Acquired Immunodeficiency Syndrome Research Review Committee

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Epidemiology and Technology Transfer Subcommittee of the Acquired Immunodeficiency Syndrome Research Review Committee, National Institute of Allergy and Infectious Diseases, on February 28 through March 2, 1990 at the Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, Maryland 20814.

The meeting will be open to the public from 8:30 a.m. to 9 a.m. on February 28 to discuss administrative details relating to committee business and for program review. Attendance by the public will be limited to space available. In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public for the review, discussion, and evaluation of individual grant applications and contract proposals from 9 a.m. until recess on February 28, from 8:30 a.m. until recess on March 1, and from 8:30 a.m. until adjournment on March 2. These applications, proposals, and discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Patricia Randall, Office of Research Reporting and Public Responses, National Institute of Allergy and Infectious Diseases, building 31, room 7A32, National Institutes of Health, Bethesda, Maryland 20892, telephone (301–496–5717), will provide a summary of the meeting and a roster of the committee members upon request.

Dr. Manuel Torres-Anjel, Executive Secretary, Acquired Immunodeficiency Syndrome Research Review Committee, NIAID, NIH, Westwood Building, room 3A10, Bethesda, Maryland 20892, telephone (301–496–0818), will provide substantive program information.

(Catalog of Federal Domestic Assistance Nos. 13.855, Pharmacological Sciences; 13.856, Microbiology and Infectious Diseases Research, National Institutes of Health.)

Dated: January 18, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90-1943 Filed 1-26-90; 8:45 am]

BILLING CODE 4140-01-M

National Institute of Allergy and Infectious, Diseases; Notice of Meeting of Basic Sciences II Subcommittee of the Acquired Immunodeficiency Syndrome Research Review Committee

Pursuant to Public Law 92-463, notice is hereby given of the meeting of the Basic Sciences II Subcommittee of the Acquired Immunodeficiency Syndrome Research Review Committee, National Institute of Allergy and Infectious Diseases, on February 28 through March 2, 1990, at the Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Bethesda, Maryland 20815.

The meeting will be open to the public from 8 a.m. to 8:30 a.m. on February 28 to discuss administrative details relating to committee business and for program review. Attendance by the public will be limited to space available. In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and Section 10(d) of Public Law 92-463, the meeting will be closed to the public for the review, discussion, and evaluation of individual grant applications and contract proposals from 8:30 a.m. until recess on February 28, from 8 a.m. until recess on March 1, and from 8 a.m. until adjournment on March 2. These applications, proposals, and discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Patricia Randall, Office of Research Reporting and Public Response, National Institute of Allergy and Infectious Diseases, building 31, room 7A32, National Institutes of Health, Bethesda, Maryland 20892, telephone (301-496-5717), will provide a summary of the meeting and a roster of the committee members upon request.

Dr. Allen Stoolmiller, Executive Secretary, Basic Sciences II Subcommittee of the Acquired Immunodeficiency Syndrome Research Review Committee, NIAID, NIH, Westwood Building, room 3A11, Bethesda, Maryland 20892, telephone (301-496-7042), will provide substantive program information.

(Catalog of Federal Domestic Assistance Program Nos., 13.855, Pharmacological Sciences; 13.856, Microbiology and Infectious Diseases Research, National Institutes of Health.)

Dated: January 18, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90-1944 Filed 1-26-90; 8:45 am]

BILLING CODE 4140-01-M

National Institute of Allergy and Infectious Diseases; Notice of Meeting of Basic Sciences I Subcommittee of Acquired Immunodeficiency Syndrome Research Review Committee

Pursuant to Public Law 92-463, notice is hereby given of the meeting of the Basic Sciences I Subcommittee of the Acquired Immunodeficiency Syndrome Research Review Committee, National Institute of Allergy and Infectious Diseases, on February 28 through March 2, 1990, at the Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Bethesda, Maryland 20815.

The meeting will be open to the public from 8 to 8:30 a.m. on February 28 to discuss administrative details relating to committee business and for program review. Attendance by the public will be limited to space available. In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92-463, the meeting will be closed to the public for the review, discussion, and evaluation of individual grant applications and contract proposals from 8:30 a.m. until recess on February 28, from 8 a.m. until recess on March 1, and from 8 a.m. until adjournment on March 2. These applications, proposals, and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Patricia Randall, Office of Research Reporting and Public Response, National Institute of Allergy and Infectious Diseases, building 31, room 7A32, National Institutes of Health, Bethesda, Maryland 20892, telephone (301-496-5717), will provide a summary of the meeting and a roster of the committee members upon request.

Dr. Peter R. Jackson, Executive Secretary, Basic Sciences I Subcommittee, of the Acquired Immunodeficiency Syndrome Research Review Committee, NIAID, NIH, Westwood Building, room 3A06, Bethesda, Maryland 20892, telephone (301-496-0123), will provide substantive program information.

(Catalog of Federal Domestic Assistance Program Nos. 13.855, Pharmacological Sciences; 13.856, Microbiology and Infectious Diseases Research, National Institutes of Health.)

Dated: January 18, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90-1945 Filed 1-26-90; 8:45 am]

BILLING CODE 4140-01-M

National Institute of Allergy and Infectious Diseases; Notice of Meeting of Clinical Applications, Prevention and Treatment Subcommittee of the Acquired Immunodeficiency Syndrome Research Review Committee

Pursuant to Public Law 92-463, notice is hereby given of the meeting of the Clinical Applications, Prevention and Treatment Subcommittee of the Acquired Immunodeficiency Syndrome Research Review Committee, National Institute of Allergy and Infectious Diseases, on February 26-28, 1990, at the Bethesda Holiday Inn, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.

The meeting will be open to the public from 8:30 a.m. to 9:30 a.m. on February 26 to discuss administrative details relating to committee business and for program review. Attendance by the public will be limited to space available. In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92-463, the meeting will be closed to the public for the review, discussion, and evaluation of individual grant applications and contract proposals from 9:30 a.m. until recess on February 26, from 8:30 a.m. until recess on February 27, and from 8:30 a.m. until adjournment on February 28. These applications, proposals, and discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Patricia Randall, Office of Research Reporting and Public Response, National Institute of Allergy and Infectious Diseases, building 31, room 7A32, National Institutes of Health, Bethesda, Maryland 20892, telephone (301-496-5717), will provide a summary of the meeting and a roster of the committee members upon request.

Dr. Sally A. Mulhern, Executive Secretary, Acquired Immunodeficiency Syndrome Research Review Committee, NIAID, NIH, Westwood Building, room 3A07, Bethesda, Maryland 20892, telephone (301–496–2550), will provide substantive program information.

(Catalog of Federal Domestic Assistance Program Nos. 13.855, Pharmacological Sciences; 13.856, Microbiology and Infectious Diseases Research, National Institutes of Health.)

Dated: January 18, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90–1947 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Allergy and Infectious Diseases; Notice of Meetings

Pursuant to Public Law 92–463, notice is hereby given of meetings of the Allergy, Immunology, and Transplantation Research Committee, National Institute of Allergy and Infectious Diseases.

These meetings will be open to the public to discuss administrative details or other issues relating to committee activities as indicated in the notices. Attendance by the public will be limited to space available.

These meetings will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, for the review, discussion, and evaluation of individual grant applications and contract proposals. These applications, proposals, and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Particia Randall, Office of Research Reporting and Public Response, National Institute of Allergy and Infectious Diseases, building 31, room 7A32, National Institutes of Health, Bethesda, Maryland 20892, telephone (301–496–5717), will provide a summary of the meeting and a roster of the committee members upon request. Other information pertaining to the meetings can be obtained from the Executive Secretary indicated.

NAME OF COMMITTEE: Allergy and Clinical Immunology Subcommittee Allergy, Immunology, Transplantation Research Committee.

EXECUTIVE SECRETARY: Dr. Kamal K. Mittal, Allergy, Immunology, and Transplantation, Research Committee, National Institute of Allergy and Infectious Diseases, National Institutes of Health, Westwood Building, room 3A06, 5333 Westbard Avenue, Bethesda, MD 20892, (301–496–3528).

DATE OF MEETING: February 22, 1990.

PLACE OF MEETING: National Institutes of Health, Building 31C, conference room 9, 9000 Rockville Pike, Bethesda, MD 20892.

OPEN: February 22, 8:30 a.m.–9 a.m.

AGENDA: To discuss administrative details relating to committee business and for program review.

CLOSED: February 22, 9 a.m. to adjournment.

CLOSURE REASON: To review grant applications and/or To review contract proposals.

NAME OF COMMITTEE: Transplantation Biology and Immunology Subcommittee Allergy, Immunology, and Transplantation Research Committee.

EXECUTIVE SECRETARY: Dr. Kamal K. Mittal, Allergy, Immunology, and Transplantation, Research Committee, National Institute of Allergy and Infectious Diseases, National Institutes of Health, Westwood Building, room 3A06, 5333 Westbard Avenue, Bethesda, MD 20892, (301–496–3528).

DATE OF MEETING: March 1, 1990.

PLACE OF MEETING: National Institutes of Health, Building 31C, conference room 9, 9000 Rockville Pike, Bethesda, MD 20892.

OPEN: March 1, 8:30 a.m.–9 a.m.

AGENDA: To discuss administrative details relating to committee business and for program review.

CLOSED: March 1, 9 a.m. to adjournment.

CLOSURE REASON: To review grant applications and/or To review contract proposals.

(Catalog of Federal Domestic Assistance Program Nos. 13.855, Pharmacological Sciences; 13.856, Microbiology and Infectious Diseases Research, National Institutes of Health.)

Dated: January 18, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90–1946 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

National Library of Medicine; Notice of Meeting of the Biomedical Library Review Committee

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Biomedical Library Review Committee on March 7–8, 1990, convening each day at 8:30 a.m. in the Board Room of the National Library of Medicine, building 38, 8600 Rockville Pike, Bethesda, Maryland.

The meeting on March 7 will be open to the public from 8:30 to approximately 11 a.m. for the discussion of administrative reports and program developments. Attendance by the public will be limited to space available.

In accordance with provisions set forth in Sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C., and Section 10(d) of Public Law 92–463, the meeting on March 7 will be closed to the public for the review, discussion, and evaluation of individual grant applications from approximately 11 a.m. to 5 p.m., and on March 8, from 8:30 a.m. to adjournment. These applications and the discussion could reveal confidential trade secrets or commercial property, such as patentable material, and personal information concerning individuals associated with the applications, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Dr. Roger W. Dahlen, Executive Secretary of the Committee, and Chief, Biomedical Information Support Branch, Extramural Programs, National Library of Medicine, 8600 Rockville Pike, Bethesda, Maryland 20894, telephone number: 301–496–4221, will provide summaries of the meeting, rosters of the committee members, and other information pertaining to the meeting.

(Catalog of Federal Domestic Assistance Program No. 13.879—Medical Library Assistance, National Institutes of Health.)

Dated: January 18, 1990.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 90–1942 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01–M

Public Health Service

National Toxicology Program; Availability of Technical Report on Toxicology and Carcinognesis Studies of Hexachloroethane

The HHS' National Toxicology Program announces the availability of the NTP Technical Report on toxicology and carcinogenesis studies of hexachloroethane, used in organic synthesis as a retarding agent in fermentation, as a camphor substitute in nitrocellulose, in pyrotechnics and

smoke devices, in explosives, and as a solvent.

Toxicology and carcinogenesis studies were conducted by administering doses of 0, 10, or 20 mg/kg hexachloroethane in corn oil by gavage 5 days per week for 103 weeks, to groups of 50 male rats. Groups of 50 female rats were administered 0, 80, or 160 mg/kg on the same schedule.

Under the conditions of these 2-year gavage studies, there was clear evidence of carcinogenic activity of hexachloroethane for male F344/N rats, based on the increased incidences of renal neoplasms. The marginally increased incidences of pheochromocytomas of the adrenal gland may have been related to hexachloroethane administration to male rats. There was no evidence of carcinogenic activity of hexachloroethane for female F334/N rats administered 80 or 160 mg/kg by gavage for 103 weeks.

The severity of nephropathy and incidences of linear mineralization of the renal papillae and hyperplasia of the transitional epithelium of the renal pelvis were increased in dosed male rats. The incidences and severity of nephropathy were increased in dosed female rats.

The study scientist for these studies is Dr. William C. Eastin, Jr. Questions or comments about the conduct of this Technical Report should be directed to Dr. Eastin at P.O. Box 12233, Research Triangle Park, NC 27709 or telephone (919) 541–7941.

Copies of Toxicology and Carcinogenesis Studies of Hexachloroethane in F344/N Rats (Gavage Studies) (TR 361) are available without charge from the NTP Public Information Office, MD B2–04, P.O. Box 12233, Research Triangle Park, NC 27709 or telephone (919) 541–3991; FTS: 629–3991.

The NTP uses five categories of evidence of carcinogenic activity to summarize the strength of the evidence observed in each experiment: two categories for positive results ("clear evidence" and "some evidence"); one category for uncertain findings ("equivocal evidence"); one category for no observable effects ("no evidence"); and one category for experiments that because of major flaws cannot be evaluated ("inadequate study").

Dated: January 23, 1990.

[FR Doc. 90–1935 Filed 1–26–90; 8:45 am]

BILLING CODE 4140–01

Office of the Assistant Secretary for Health; Statement of Organization, Functions and Delegations of Authority

Part H, Public Health Service (PHS) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (42 FR 61318, December 2, 1977, as most recently amended at 54 FR 11081, March 16, 1989) is amended to reflect changes in the responsibilities of the Office of Emergency Preparedness within the Office of the Assistant Secretary for Health.

Office of the Assistant Secretary for Health

Under Chapter HA, Office of the Assistant Secretary for Health, Section HA–20, Functions, Office of Emergency Preparedness (HAP), delete the statement and insert the following:

Office of Emergency Preparedness (HAP). The Office (1) Serves as the principal advisor to the ASH to: (a) Develop national plans and programs and take actions necessary to assure that headquarters and regional organizations for the Department of Health and Human Services (DHHS) will be able to perform their essential functions and continue as a viable part of the Department during any national emergency, and will be able to respond to major disasters; (b) direct, coordinate, and monitor the performance of the heads of the Department of Health and Human Services (DHHS) Operating Divisions (OPDIVS) and Staff Divisions (STAFFDIVS) and the Regional Directors in carrying out the emergency preparedness responsibilities assigned to them; and (c) prepare national emergency plans and develop preparedness programs covering functions and responsibilities which must necessarily be centralized for the Department; (2) provides staff support to the ASH in the accomplishment of emergency preparedness responsibilities assigned by Presidential Executive Order No. 12656, as amended, the National Security Act of 1947, as amended; Defense Production Act of 1950, as amended; Federal Civil Defense Act of 1950, as amended; and the Disaster Relief Act of 1974, as amended; (3) provides central emergency preparedness policy guidance, coordination, and assistance to the heads of the DHHS OPDIVS and STAFFDIVS, heads of PHS agencies, to Regional Directors, and to Regional Health Administrators and monitors their performance and emergency readiness status; (4) works closely with the Federal Emergency Management Agency and other Federal departments and agencies to develop plans and maintain operational readiness required for timely and effective DHHS/PHS response to Federal, State and local government requests for assistance following major disasters; (5) develop DHHS/PHS policies and programs and coordinates PHS planning and response activities related to other types of emergencies, including resource shortages, civil disturbances, mass immigration emergencies and other actual or imminent crises; (6) maintains DHHS/PHS liaison and working relationships with the Federal Emergency Management Agency and with other Federal departments and agencies; and (7) maintains DHHS/PHS central files of classified emergency plans and other mobilization documents.

Dated: January 17, 1990.

James O. Mason, M.D., Dr. P.H.,

Assistant Secretary for Health.

[FR Doc. 90–1847 Filed 1–26–90; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–030–4352–09; Designation Order NM–036–90–31]

Closure of Public Lands in New Mexico

AGENCY: Bureau of Land Mangement, Interior.

ACTION: Notice of seasonal road closure and firearm restrictions.

SUMMARY: Notice is hereby given relating to the seasonal closure of a road located in T. 16 S., R. 21 W., sections 10, 15, 22, in Grant County, New Mexico. No discharge of firearms will be allowed in the area known as Apache Box located in T. 16 S., R. 21 W., section 10, in Grant County, New Mexico. Authorized permittees are exempt from the seasonal road closure.

EFFECTIVE DATE: These restrictions are in effect from February 1 through August 15 of each year beginning in 1990.

ADDRESS: Bureau of Land Management, Mimbres Resource Area, 1800 Marquess, Las Cruces, New Mexico, 88005.

FOR FURTHER INFORMATION CONTACT: William Merhege, Wildlife Biologist, Mimbres Resource Area at (505) 525–8228.

Dated: January 20, 1990.

H. James Fox,

District Manager.

[FR Doc. 90–1906 Filed 1–26–90; 8:45 am]

BILLING CODE 4310–FB–M

[CO-070-09-4320-12-2410]

Grand Junction District Grazing Advisory Board Meeting

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice of meeting of Grand Junction District Grazing Advisory Board.

SUMMARY: Notice is hereby given that a meeting of the Grand Junction District Grazing Advisory Board will be held on Thursday, March 8, 1990. The meeting will convene in the third floor conference room at the Bureau of Land Management Office, 764 Horizon Drive, Grand Junction, Colorado at 9 a.m.

SUPPLEMENTARY INFORMATION: The agenda for the meeting will include: (1) Introductions; (2) Minutes of the previous meeting; (3) Glenwood Springs Resource Area Rangeland Program Summary Update and associated grazing agreements/decisions; (4) Glenwood Springs Resource Area presentation of livestock wildlife conflicts, (5) Nomination and election of next Grazing Advisory Board (6) Proposed process if drought continues through 1990; (7) Status of current project work; (8) Range Betterment Fund project proposals; (9) Advisory Board project proposals; (10) Public presentations; and (11) Arrangements for the next meeting.

The meeting is open to the public. Interested persons may make oral statements to the Board between 3 and 3:30 p.m. or file written statements for the Board's consideration. Anyone wising to make an oral statement must notify the District Manager, Bureau of Land Mangement, 764 Horizon Drive, Grand Junction, Colorado 81506 by March 6, 1990. Depending on the number of persons wishing to make oral statements, a per person time limit may be established by the District Manager.

Minutes of the Board Meeting will be maintained in the District Office and be available for public inspection and reproduction (during regular business hours) after thirty (30) days following the meeting.

Further information on the meeting may be obtained at the above address, or by calling (303) 243-6552.

Burce Conrad,

District Manager.

[FR Doc. 90-1905 Filed 1-26-90; 8:45 am]

BILLING CODE 4310-84-M

[ID-010-00-4320-02]

Meeting

AGENCY: Boise District, Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Boise District Grazing Advisory Board will meet February 28, to discuss Proposed expenditure of Grazing Advisory Board (7121) funds. There will also be an update of the proposed expansion of the Saylor Creek Bombing Range. A public comment period will be held from 2 p.m. to 3 p.m.

DATES: The meeting will begin at 9 a.m. on Wednesday, February 28. It will be held in the district office conference room.

ADDRESSES: The Boise District Office is located at 3948 Development Avenue, Boise, Idaho 83705.

FOR FURTHER INFORMATION CONTACT: Fred Schley, Boise BLM District 208-334-1582.

Thomas M. Woodward,

Acting District Manager.

[FR Doc. 90-1812 Filed 1-26-90; 8:45 am]

BILLING CODE 4310-GG

[MT-930-00-4212-13; NDM 60360]

Conveyance and Order Providing for Opening of Public Land in Dunn County; North Dakota

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This order will open lands reconveyed to the United States in an exchange under the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 et seq (FLPMA), to the operation of the public land laws. No minerals were acquired or transferred in the exchange. The notice also informs the public and interested state and local governmental officials of the issuance of the conveyance document.

The land that was acquired in the exchange is adjacent to the Little Missouri River. Additional river frontage, wildlife habitat, and recreational opportunities were added to the public lands through this exchange, and the public interest was well served.

EFFECTIVE DATE: March 21, 1990.

FOR FURTHER INFORMATION CONTACT: James Binando, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406-255-2935.

SUPPLEMENTARY INFORMATION:

1. Notice is hereby given that pursuant to Sec. 206 of FLPMA, the following described lands were transferred to Hazel Jorgenson and Clarence Jorgenson:

Fifth Principal Meridian, North Dakota

T. 148 N., R 97 W.,
Sec. 6, SW¼SE¼;
Sec. 9, lot 2; and
Sec. 19, lot 4, SE¼SW¼, SW¼SE¼.
T. 148 N., R 99 W.,
Sec. 13, SW¼NW¼.
aggregating 224.15 acres.

2. In exchange for the above selected land, the United States acquired the following described surface estate from the Jorgensons:

Fifth Principal Meridian, North Dakota

T. 148 N., R 97 W.,
Sec. 3, S½Sw¼;
Sec. 4, lot 9; and
Sec. 10, lots 1 and 2.
containing 155.90 acres, more or less.

3. The values of the Federal public land were appraised at $9,500 each.

4. At 9 a.m. on March 21, 1990, the lands described in paragraph 2 above that were conveyed to the United States will be opened to the operation of the public land laws generally, subject to valid existing rights and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on March 21, 1990, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

Dated: January 19, 1990.

James Binando,

Acting Deputy State Director, Division of Lands and Renewable Resources.

[FR Doc. 90-1766 Filed 1-26-90; 8:45 am]

BILLING CODE 4310-DN-M

[ID-943-90-4212-11; IDI-3724]

Termination of Recreation and Public Purposes Classification; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Classification termination.

SUMMARY: This order terminates a Bureau of Land Management classification affecting 125.93 acres of public land near Idaho Falls, Idaho. After termination of the classification, the underlying lands will immediately become subject to the operation of the public land laws generally and the mining laws, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law.

EFFECTIVE DATE: January 29, 1990.

FOR FURTHER INFORMATION CONTACT: Sally Carpenter, BLM, Idaho State Office, 3380 Americana Terrace, Boise, Idaho 83706, 208-334-1720.

By virtue of the authority vested in the Secretary of the Interior by the Recreation and Public Purposes Act of

June 14, 1926, as amended; 43 U.S.C. 869, 869–4; it is ordered as follows:

1. Pursuant to the regulations in 43 CFR 2091.7–1(b)(1) and the authority delegated to me by BLM Manual Section 1203 (48 F.R. 85), the classification decision of May 3, 1971, which classified 125.93 acres of public land as suitable for recreation and public purposes under the Act of June 14, 1926, as amended; 43 U.S.C. 869, 869–4; under serial number IDI–3724, is hereby revoked. The lands are described as follows:

Boise Meridian

T. 2 N., R. 36 E.,
Sec. 12, lot 4 and W½SE¼.

The area described contains 125.93 acres in Bonneville County.

2. At 9:00 a.m. on January 29, 1990, the lands will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on January 29, 1990, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 9 a.m. on January 29, 1990, the lands will be opened to location and entry under the United States mining laws. Appropriation of any of the lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: January 18, 1990.

Delmar D. Vail,

State Director.

[FR Doc. 90–1901 Filed 1–26–90; 8:45 am]

BILLING CODE 4310–66–M

[ES–940–00–4730–12; ES–041952, Group 25]

Missouri; Notice of Filing of Plat of Dependent Resurvey

January 23, 1990.

1. The plat of the dependent resurvey of the north, south and west boundaries, and the subdivisional lines of Township 33 North, Range 3 West, Fifth Principal Meridian, Missouri, will be officially filed in the Eastern States Office, Alexandria, Virginia at 7:30 a.m., on March 9, 1990.

2. The dependent resurvey was made at the request of the United States Forest Service.

3. All inquiries or protests concerning the technical aspects of the dependent resurvey must be sent to the Deputy State Director for Cadastral Survey, Eastern States Office, Bureau of Land Management, 350 South Pickett Street, Alexandria, Virginia 22304, prior to 7:30 a.m., March 9, 1990.

4. Copies of the plat will be made available upon request and prepayment of the reproduction fee of $4.00 per copy.

Stephen G. Kopach,

Deputy State Director for Cadastral Survey.

[FR Doc. 90–1913 Filed 1–26–90; 8:45 am]

BILLING CODE 4310–GJ–M

[MT–930–00–4214–11; MTM–034538, MTM–049429, MTM–060295, MTM–1188]

Proposed Continuation of Withdrawals; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Forest Service, Department of Agriculture, proposes that the withdrawal of 121.45 acres of National Forest System lands withdrawn for recreation areas and an administrative site continue for an additional 20 years. The lands will remain closed to surface entry and mining, but have been and would remain open to mineral leasing.

DATES: Comments should be received on or before April 30, 1990.

FOR FURTHER INFORMATION CONTACT: James Binando, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406–255–2935.

The U.S. Forest Service proposes that the existing withdrawals of National Forest System lands made by Public Land Order Nos. 2850, 2931, 3403, and 4459 be continued for a period of 20 years pursuant to Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714. The lands are described as follows:

Principal Meridian

Kootenai National Forest

(MTM–034538—PLO 2850)

North Dickey Lake Recreation Area

T. 34 N., R. 25 W.,
Sec. 9, lot 2.

West Bull Lake Recreation Area

T. 28 N., R. 33 W.,
Sec. 4, lots 1 and 5.

(MTM–049429—PLO 2931)

Murphy Lake Administrative Site

T. 34 N., R. 25 W.,
Sec. 6, E½NE¼SE¼.

(MTM–1188—PLO 4459)

Bad Medicine Recreation Area

T. 28 N., R. 33 W.,
Sec. 4, lot 4.

(MTM–060295—PLO 3403)

Dorr Skeels Recreation Area

T. 29 N., R. 33 W.,
Sec. 20, lot 1.

The areas described aggregate 151.91 acres of Lincoln County.

The withdrawal is essential for protection of the recreation areas and an administrative site involved. The withdrawal closed the lands to surface entry and mining, but not to mineral leasing. No change in the segregative effect or use of the lands is proposed by this action.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments in connection with the proposed withdrawal continuations may present their views in writing to the Chief, Branch of Land Resources, at the address listed above.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources. A report will also be prepared for consideration by the Secretary of the Interior, the President, and Congress, who will determine whether or not the withdrawal will be continued and, if so, for how long. The final determination on the continuation of the withdrawal will be published in the **Federal Register.** The existing withdrawal will continue until such final determination is made.

Dated: January 18, 1990.

James Binando,

Acting Deputy State Director, Division of Lands and Renewable Resources.

[FR Doc. 90–1765 Filed 1–26–90; 8:45 am]

BILLING CODE 4310–DN–M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

Public Information Collection Requirements Submitted to OMB for Review

The Agency for International Development (A.I.D.) submitted the following public information collection requirements to OMB for review and

clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Comments regarding these information collections should be addressed to the OMB reviewer listed at the end of the entry no later than ten days after publication. Comments may also be addressed to, and copies of the submissions obtained from the Reports Management Officer, John H. Elgin, (703) 875–1608, IRM/PE, room 1100B, SA–14, Washington, DC 20523.

Date Submitted: January 18, 1990.

Submitting Agency: Agency for International Development.

OMB Number: 0412–0020.

Form Number: AID 1450–4.

Type of Submission: Renewal.

Title: Supplier's Certificate and Agreement with AID for Project Commodities/Invoice and Contract Abstract.

Purpose: When AID is not a party to a contract which it finances, it must monitor those contracts to assure adherence to AID requirements. This information collection item enables AID to keep records of commodity expenditures for program management purposes and required reports. It also allows AID to measure the extent of small and minority business participation in the commodity program. Respondents are identified as Suppliers of commodities who must submit data per each transaction. The total annual collective burden on respondents is estimated at $16,000. These costs are projected from such items as personnel, recordkeeping, reporting, and overhead costs.

Reviewer: Donald Arbuckle (202) 395–7340, Office of Management and Budget, room 3201, New Executive Office Building, Washington, DC 20503.

Dated: January 11, 1990.

Wayne H. Van Vechten,

Planning and Evaluation Division.

[FR Doc. 90–1900 Filed 1–26–90; 8:45 am]

BILLING CODE 6116–01–M

Meeting

Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given of the A.I.D. Microenterprise Advisory Committee public meeting on February 16, 1990 in room 1107, Department of State. The Committee will review the present guidelines for the implementation of the Agency for International Development's microenterprise program in light of the Agency's microenterprise 1989 and 1990 stocktaking exercises and the operational experience of the organizations that the Committee Members represent. Subcommittee members will be working on February 15 to prepare the draft recommendations that will be fully vetted at the February 16 public meeting.

The February 16 public meeting will begin at 9 a.m. and adjourn at 5 p.m. The meeting is open to the public. Any interested persons may attend, file written statements with the Committee before or after the meeting, or present oral statements in accordance with procedures established by the Committee and the extent the time available for the meeting permits. To ensure pre-security clearance through State Department at the C Street entrance, persons planning to attend must notify A.I.D. by February 12.

Dr. Micahel Farbman, Chief, Employment and Enterprise Development Division, Office of Rural and Institutional Development, Bureau for Science and Technology, is designated as the A.I.D. representative at the meeting. Dr. Ross E. Bigelow, of the same Division, may be deputized to act for Dr. Farbman during part or all of this meeting. Those who plan to attend the February 16 meeting or who wish more specific information concerning this meeting, please contact Dr. Bigelow, at 703–875–4408.

Dated: January 10, 1990.

Michael Farbman,

Federal Representative, A.I.D. Microenterprise Advisory Committee.

[FR Doc. 90–1899 Filed 1–26–90; 8:45 am]

BILLING CODE 6116–01–M

Advisory Committee on Voluntary Foreign Aid; Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of a meeting on the Advisory Committee on Voluntary Foreign Aid (ACVFA) on Tuesday and Wednesday, March 13–14, 1990. The topic to be discussed is how changing global environmental concerns influence international development.

Date: March 13–14, 1990.

Time:

Tuesday, March 13, 1990, 9 a.m.–5:30 p.m.

Wednesday, March 14, 9 a.m.–11:30 a.m.

Place: The National Press Club, 14th and F Streets, NW., Washington, DC 20045.

The meeting is free and open to the public. However, Notification by March 5, 1990 through the advisory committee headquarters is required.

Persons wishing to attend the meeting must call Melissa Nuwaysir, (703) 875–4473, or write, not later than March 5, 1990 to: The Advisory Committee on Voluntary Foreign Aid, Room 310, SA–8, Agency for International Development, Washington, DC 20523.

Dated: January 12, 1990.

Sally H. Montgomery,

Deputy Assistant Administrator, Private and Voluntary Cooperation, Food for Peace and Voluntary Assistance.

[FR Doc. 90–1898 Filed 1–26–90; 8:45 am]

BILLING CODE 6116–01–M

Joint Committee on Agricultural Research and Development (JCARD) of the Board for International Food and Agricultural Development; Meeting

Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given of the twenty-fourth meeting of the Joint Committee on Agricultural Research Development (JCARD) of the Board for International Food and Agricultural Development (BIFAD) on February 16, 1990.

The purpose of the Meeting is to begin implementation of the BIFAD's mandate to JCARD on its role. The mandate asks JCARD to look at ways to increase and make more effective use of the Science and Technology available in universities for development assistance in research and technology transfer. New and more collaborative methods of utilizing the expertise of universities should take into account the increased sophistication of developing countries and their changing needs. JCARD is expected to give guidance to BIFAD and the Agency in planning new and strengthening existing collaborative research activities in sustainable agriculture, resource management, and other environmental issues.

JCARD will meet from 9 a.m. to 5 p.m. on February 16. The meeting will be held in Room 1205 New State Building, 2201 C Street, Washington, DC. The meeting is open to the public. Any interested person may attend, may file written statements with the Committee before or after the meeting, or may present oral statements in accordance with procedures established by the Committee, and to the extent the time available for the meeting permits.

Mr. William Fred Johnson, BIFAD Support Staff, is the designated A.I.D. Advisory Committee Representative at the meeting. It is suggested that those desiring further information write to him in care of the Agency for International

Development, BIFAD Support Staff, Washington, DC 20523–0059 or telephone him at (202) 647–8532.

Dated: January 23, 1990.

William F. Johnson,

A.I.D. Advisory Committee Representative, Joint Committee on Agricultural Research and Development, Board for International Food and Agricultural Development.

[FR Doc. 90–1881 Filed 1–26–90; 8:45 am]

BILLING CODE 6116–01–M

INTERSTATE COMMERCE COMMISSION

[Ex Parte No. 388 (Sub-No. 20)]

Notice; Intrastate Rail Rate Authority—New Hampshire

AGENCY: Interstate Commerce Commission.

ACTION: Notice of revocation of certification.

SUMMARY: Upon request, the Commission revokes the certification of the State of New Hampshire and assumes jurisdiction over intrastate rail transportation in New Hampshire.

DATE: The revocation will be effective on February 28, 1990.

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: January 22, 1990.

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

Noreta R. McGee,

Secretary.

[FR Doc. 90–1965 Filed 1–26–90; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 31545]

Clyde S. and Saundra Forbes and CSF Acquisition, Inc.—Control Exemption—Lamoille Valley Railroad Co. and Twin State Railroad Corp.

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Interstate Commerce Commission exempts from the prior approval requirements of 49 U.S.C. 11343, *et seq.*, the acquisition of control by Clyde S. and Saundra Forbes and CSF Acquisition, Inc., of the Lamoille Valley Railroad Company and the Twin State Railroad Corporation, subject to the conditions for the protection of employees in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

DATES: This exemption will be effective on February 1, 1990. Petitions for reconsideration must be filed by February 21, 1990.

ADDRESSES: Send Pleadings referring to Finance Docket No. 31545 to:

(1) Interstate Commerce Commission, Office of the Secretary, Case Control Branch, Washington, DC 20423.
(2) John D. Heffner, Gerst, Heffner, Carpenter & Podgorsky, 1700 K Street, N.W., Suite 1107, Washington, DC 20006

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 obtain a copy of the full decision, write to, call, or pickup in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. (DC Metropolitan area). [Assistance for the hearing impaired is available through TDD services (202) 275–1721].

Decided: January 22, 1990.

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

Noreta R. McGee,

Secretary.

[FR Doc. 90–1966 Filed 1–26–90; 8:45 am]

BILLING CODE 7035–01–M

[Docket No. AB–6 (Sub-No. 316X)]

Exemption; Burlington Northern Railroad Co.; Abandonment Exemption in Benton County, MN

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 0.25–mile line of railroad between mileposts 1.75 and 2.00, in St. Cloud, Benton County, MN.

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 compliant 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 March 7, 1990 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking statements under 49 CFR 1152.29 must be filed by February 15, 1990.[3] Petitions for reconsideration or requests for public use conditions under 49 CFR 1152.28 must be filed by February 26, 1990, 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: Sarah J. Whitley, Burlington Northern Railroad Company, 3800 Continental Plaza, 777 Main Street, Fort Worth, TX 76102.

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 February 9, 1990.

[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). 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.

[2] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

[3] The Commission will accept a late-filed trail use statement so long as it retains jurisdiction to do so.

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, 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 imposed, where appropriate, in a subsequent decision.

Decided: January 22, 1990.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 90–1815 Filed 1–26–90; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Extension of Public Comment Period on Proposed Consent Decree

In accordance with Section 122 of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9622 and Departmental policy, 28 CFR 50.7, notice was published in the **Federal Register** on December 28, 1989, that a complaint was filed on December 18, 1989, in *United States* v. *E.I. du Pont de Nemours and Company,* Civil Action No. 89–175–D–1, in the United States District Court for the Southern District of Iowa. Simultaneously, a consent decree between the United States, E.I. du Pont de Nemours and Company, and Lewis and Lynn Todtz was lodged with the court. The prior notice stated that public comments on the proposed consent decree would be received for a period of thirty (30) days from the date of publication of the notice. In response to a request submitted on behalf of a citizen, the public comment period on the proposed consent decree is being extended until February 28, 1990.

Accordingly, the Department of Justice will receive comments relating to the proposed consent decree until February 28, 1990. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *E.I. du Pont de Nemours and Company, Inc.* (S.D. Iowa.), DOJ Reference No. 90–11–2–385.

The proposed Decree may be examined at the office of the United States Attorney for the Southern District of Iowa, 115 U.S. Courthouse, East 1st & Walnut Streets, Des Moines, Iowa 50309 (contact: Robert Dopf (504) 389–0443); at the Region 7 Office of Regional Counsel, Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66101 (contact: Gerhardt Braeckel (913) 236–2808); and at the Environmental Enforcement Section, Land and Natural Resources Division of the United States Department of Justice, Room 1515, 10th and Pennsylvania Avenue NW., Washington, DC 20530. In requesting copies, please enclose a check in the amount of $5.00 (10 cents per page reproduction charge) payable to the Treasurer of the United States.

Richard B. Stewart,

Assistant Attorney General Land and Natural Resources Division.

[FR Doc. 90–1968 Filed 1–26–90; 8:45 am]

BILLING CODE 1–29–M

Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Department of Justice policy, 28 CFR 50.7, notice is hereby given that a consent decree in *United States* v. *Town of Manchester, Connecticut* (D. Conn. No. H–90–3 (AHN)), was lodged with the United States District Court for the District of Connecticut, on January 3, 1990.

The proposed consent decree concerns alleged violations of the Clean Water Act, 33 U.S.C. 1311, as a result of the discharge of fill material onto portions of property located in Manchester, Connecticut, which are alleged to constitute "waters of the United States." The consent decree requires the Town of Manchester to pay $300,000.00 to the United States Treasury. The consent decree also requires that the Town of Manchester restore a portion of the affected areas.

The U.S. Attorney's Office will receive written comments relating to the consent decree until 30 days from publication. Comments should be addressed to Leslie C. Ohta, Esq., Assistant United States Attorney, District of Connecticut, 141 Church Street, P.O Box 1824, New Haven, Connecticut, 06508 and should refer to *United States* v. *Town of Manchester, Connecticut,* (Civil No. H–90–3 (AHN), (D. Conn.)).

The complaint and consent decree in this case may be examined at the Clerk's Office, United States District Court, 450 Main Street, Hartford, Connecticut 06103.

Leslie C. Ohta,

Assistant U.S. Attorney, P.O. Box 1824, New Haven, CT 06508, Telephone: (202) 773–2108.

[FR Doc. 90–1903 Filed 1–26–90; 8:45 am]

BILLING CODE 4410–01–M

[AAG/A ORDER NO. 37–90]

Privacy Act of 1974 as Amended by the Computer Matching and Privacy Protection Act of 1988

This notice is published in the **Federal Register** in accordance with the requirements of 5 U.S.C. 552a(e)(12). The Immigration and Naturalization Service (INS), Department of Justice (the source agency), proposes to participate in a computer matching program with the Massachusetts Department of Employment and Training (MA–DET) (the recipient agency). The matching program entitled "Systematic Alien Verification for Entitlements (SAVE)" will permit MA–DET to confirm the immigration status of alien applicants for, or recipients of, unemployment insurance benefits as required by section 121 of the Immigration and Reform Control Act (IRCA) of 1986 (Pub. L. 99–603).

Section 121(c) of IRCA amends section 1137 of the Social Security Act and requires agencies which administer the Federal benefit programs designated within IRCA to use the INS verification system to determine eligibility. Accordingly, through the use of user identification codes and passwords, authorized persons from MA–DET may electronically access the data base of an Immigration and Naturalization Service Privacy Act system of records entitled "Alien Status Verification Index, JUSTICE/INS–009." From its automated records system, MA–DET may enter electronically into the INS data base the alien registration number of the applicant or recipient. This action will initiate a search of the INS data base for a corresponding alien registration number. Where such number is located, MA–DET will receive electronically from the INS data base the following data upon which to determine eligibility: alien registration number; last name; first name; date of birth; country of birth; social security number (if available); date of entry; immigration status data; and employment eligibility data. In accordance with 5 U.S.C. 552a(p), MA–DET will provide the alien applicant or recipient with 30 days notice and an opportunity to contest any adverse finding before final action is taken against that alien because of ineligible immigration status as established through the computer match.

Matching activity will be effective 30 days after publication in the **Federal Register** and will continue for a period of 18 months from the effective date unless extended by the Data Integrity Board of the Department of Justice.

The matching agreement and the required report have been provided to the Office of Management and Budget and the Congress in accordance with 5 U.S.C. 552a(o)(2)(A) and (r). Inquiries may be addressed to Patricia E. Neely, Staff Assistant, Facilities and Administrative Services Staff, Justice Management Division, Department of Justice, room 529, 633 Indiana Avenue NW., Washington, DC 20530.

Dated: January 12, 1990.

Harry H. Flickinger,

Assistant Attorney General for Administration.

[FR Doc. 90-1904 Filed 1-26-90; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application Number D-7551]

Amendments to Prohibited Transaction Exemption (PTE) 78-19 Involving Insurance Company Pooled Separate Accounts

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Adoption of amendments to PTE 78-19, and redesignation of the exemption as PTE 90-1.

SUMMARY: This document amends PET 78-19, a class exemption that permits insurance company pooled separate accounts, in which employee benefit plans have an interest, to engage in certain transactions, provided specified conditions are met. The amendments affect, among others, participants, beneficiaries and fiduciaries of plans that invest in pooled separate accounts, insurance companies, and other persons engaging in the described transactions.

EFFECTIVE DATE: The amendments to section I(a) of PTE 78-19 are effective as of July 1, 1988. The amendment to section II(a)(3) is effective as of January 1, 1975.

FOR FURTHER INFORMATION CONTACT: Paul Kelty of the Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, (202) 523-8194 (this is not a toll-free number); or Cynthia Hawkins of the Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 523-9592 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On July 26, 1989, notice was published in the **Federal Register** (54 FR 31092) of the pendency before the Department of proposed amendments to PTE 78-19 (43 FR 59915, December 22, 1978).[1] PTE 78-19 provides an exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1986 (the Code) by reason of certain provisions of section 4975(c)(1) of the Code.

The amendments to PTE 78-19 adopted by this notice were requested in an exemption application dated March 3, 1988, on behalf of the Prudential Insurance Company of America, the Equitable Life Assurance Society of the United States, John Hancock Mutual Life Insurance Company, Connecticut General Life Insurance Company, the Mutual Life Insurance Company of New York and the Principal Financial Group (the Applicants). The exemption application was submitted pursuant to section 408(a) of ERISA nad section 4975(c)(2) of the Code [2] and in accordance with ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

Information collection requirements contained in PTE 78-19 have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB number 1210-0054 approved for use through February 28, 1990.

The notice of pendency gave interested persons an opportunity to comment on the proposal. Public comments were received pursuant to the provisions of section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1.

For the sake of convenience, the entire text of PTE 78-19, as amended, has been reprinted with this notice. The Department has redesignated the exemption as PTE 90-1.

1. Description of the Exemption

PTE 78-19 consists of four parts. Section I(a), the exemption's basic provision, permits an insurance company pooled separate account to engage in transactions, which otherwise might be prohibited by sections 406 and 407(a) of ERISA and section 4975(c)(1) of the Code, with persons who are parties in interest with respect to an employee benefit plan investing in the account. The plan's participation in the account, under section I(a), may not exceed 5 percent of the total assets in the pooled separate account.

Under section II(a) of PTE 78-19, a party in interest with respect to a plan is permitted in certain cases to furnish goods to an insurance company pooled separate account in which the plan has an interest exceeding the section I limitation. Section II(a) also allows both the leasing of real property and the incidental furnishing of goods by a pooled separate account to a party in interest. Section II(a) contains a condition that the amount involved in the furnishing of goods or leasing of real property in any calendar year does not exceed the greater of $25,000 or .025 percent of the fair market value of the assets of the pooled separate account.

Three amendments to PTE 78-19 are granted pursuant to this notice: (1) The percentage limitation in section I(a)(1) of PTE 78-19 is increased from 5 to 10 percent; (2) the percentage limitation in section II(a)(3) is increased from .025 percent to .5 percent; and (3) relief is included for investments by insurance company pooled separate accounts in short-term obligations issued by parties in interest.

The Department notes that all the relevant conditions contained in PTE 78-19, with the exception of those modified by these amendments, still must be met under the amended class exemption. These conditions, among others, include a requirement that the party in interest is not the insurance company (or an affiliate) which holds the plan assets in its pooled separate account or any other separate account of the insurance company. In addition, the terms of the transaction must be at least as favorable to the pooled separate account as those obtainable in an arm's-length transaction with an unrelated party, and the insurance company must maintain certain records for a period of six years from the date of the transaction.

2. Discussion of Comments Received

The Department received two letters commenting on the proposed amendments to PTE 78-19. The American Council of Life Insurance (ACLI), a trade association for the life insurance industry, expressed strong support for all three of the proposed amendments. The ACLI represents that, as of the end of 1988, member companies had over $113 billion of separate account pension assets under management.

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[1] On August 3, 1989, due to typesetting errors, certain corrections of the July 26 publication were published in the **Federal Register** (54 FR 32024).

[2] Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), transferred the authority of the Secretary of the Treasury to issue exemptions of this type to the Secretary of Labor.

In the discussion of the exemption, references to sections 406 and 408 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

The ACLI represents that each of the proposed amendments to the class exemption will facilitate the ability of insurance companies to discharge their pooled separate account management responsibilities in a manner so as to obtain optimal performance commensurate with investment risk. The ACLI also believes the amendments to be consistent with the objectives of PTE 78–19.

The American Bankers Association (ABA) also sumbitted a comment letter concerning the proposed amendments. The ABA is a national trade association representing banks of all sizes, types and locations. Nearly 4,000 banks offer fiduciary services to employee benefit plans and others, according to the ABA, and over 500 banks operate more than 2,000 collective investment funds for employee benefit plans.

The ABA generally supports the granting of the proposed amendments so long as the Department provides comparable exemptive relief for all competing investment vehicles. In particular, the ABA believes that, if the percentage limitation for plans participating in pooled separate accounts of insurance companies is increased from 5 to 10 percent, concurrent relief should be granted to others similarly situated. For this reason, the ABA urges that the 5 percent limitation for plan participation contained in PTE 80–51, the class exemption for bank collective investment funds (45 49709, July 25, 1980), should be increased to 10 percent. In this regard, the Department notes that consideration of an amendment to PTE 80–51 is beyond the scope of this proceeding. However, the Department wishes to take the opportunity to state that the commentator may wish to consider filing an exemption application for comparable class relief under section 408(a) of ERISA.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of ERISA, the Department makes the following determinations:

(i) The amendments set forth herein are administratively feasible,

(ii) They are in the interests of plans and of their participants and beneficiaries, and

(iii) They are protective of the rights of the participants and beneficiaries of plans;

(3) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The amendments are supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Futhermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Exemption

Accordingly, PTE 78–19 is amended under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with ERISA Procedure 75–1 (40 FR 18471, April 28, 1975).

Section I—Basic Exemption

Effective January 1, 1975, the restrictions of sections 406(a) 406(b)(2) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A), (B), (C), or (D) of the Code, shall not apply to transactions described below if the applicable conditions set forth in section III are met.

(a) *General exemption.* Any transaction between a party in interest with respect to a plan and an insurance company pooled separate account in which the plan has an interest, or any acquisition or holding by the pooled separate account of employer securities or employer real property, if the party in interest is not the insuance company which holds the plan assets in its pooled separate account, any other separate account of the insurance company, or any affiliate of the insurance company, and if, at the time of the transaction, acquisition or holding, either.

(1) The assets of the plan (together with the assets of any other plans maintained by the same employer or employee organization) in the pooled separate account do not exceed—

(i) 10 percent of the total of all assets in the pooled separate account, if the transaction occurs prior to February 20, 1979;

(ii) 5 percent of the total of all assets in the pooled separate account, if the transacton occurs on or after February 20, 1979, and on or before June 30, 1988; or

(iii) 10 percent of the total of all assets in the pooled separate account, if the transaction occurs on or after July 1, 1988, or

(2) On or after July 1, 1988, the pooled separate account is a specialized account that has a policy of investing, and invests, substantially all of its assets in short-term obligations (having a stated maturity date of one year or less or having a maturity date of one year or less from the date of acquisition by such specialized account), including but not necessarily limited to—

(i) Corporate or governmental obligations or related repurchase agreements;

(ii) Certificates of deposit;

(iii) Bankers acceptances; or

(iv) Variable amount notes of borrowers of prime credit.

(b) *Multiple employer plans exemption.* Any transaction between an employer (or an affiliate of an employer) of employees covered by a multiple employer plan and an insurance company pooled separate account in which the plan has an interest, or any acquisition or holding by the pooled separate account of employer securities or employer real property, if at the time of the transaction, acquisition or holding—

(1) In the case of a transaction occurring prior to February 20, 1979, the employer is not a substantial employer with respect to the plan (within the meaning of section 4001(a)(2) of the Act); or

(2) In the case of a transaction occurring on or after February 20, 1979,

(i) The assets of the multiple employer plan in the pooled separate account do not exceed 10 percent of the total assets in the pooled separate account, and the employer is not a substantial employer with respect to the plan (within the meaning of section 4001(a)(2) of the Act), or

(ii) The assets of the multiple employer plan in the pooled separate account exceed 10 percent of the total assets in the pooled separate account, but the employer is not a substantial employer and would not be a substantial employer with respect to the plan within the meaning of section 4001(a)(2) of the Act if "5 percent" were

substituted for "10 percent" in that definition.

(c) *Excess holdings exemption for employee benefit plans.* Any acquisition or holding of qualifying employer securities or qualifying employer real property by a plan (other than through a pooled separate account) if—

(1) The acquisition or holding contravenes the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of the Act solely by reason of being aggregated with employer securities or employer real property held by an insurance company pooled separate account in which the plan has an interest, and

(2) The requirements of either paragraph (a) or paragraph (b) of this section are met.

(d) *Employer securities and employer real property.*

(1) Except as provided in subsection 2 of this paragraph, any acquisition, sale or holding of employer securities and any acquisition, sale, holding or lease of employer real property by the insurance company pooled separate account in which a plan has an interest and which does not meet the requirements of paragraphs (a) or (b) of this section, if no commission is paid to the insurance company or to the employer or any affiliate of the employer in connection with the acquisition or sale of employer securities or the acquisition, sale or lease of employer real property, and—

(i) In the case of employer real property—

(a) Each parcel of employer real property and the improvements thereon held by the pooled separate account are suitable (or adaptable without excessive cost) for use by different tenants, and

(b) The property of the pooled separate account, which is leased or held for lease to others, in the aggregate, is dispersed geographically.

(ii) In the case of employer securities—

(a) The employer security is (1) stock, or (2) a bond, debenture, note, certificate, or other evidence of indebtedness (the security described in (2) is hereinafter referred to as an "obligation"), and

(b) The insurance company in whose pooled separate account the security is held is not an affiliate of the issuer of the security and, if the security is an obligation of the issuer, either

(c) The pooled separate account already owns the obligation at the time the plan acquires an interest in the separate account and interests in the pooled separate account are offered and redeemed in accordance with valuation procedures of the pooled separate account applied on a uniform or consistent basis, or

(d) Immediately after acquisition of the obligation: (1) not more than 25 percent of the aggregate amount of obligations issued in the issue and outstanding at the time of acquisition is held by such plan, and (2) in the case of an obligation which is a restricted security within the meaning of Rule 144 under the Securities Act of 1933, at least 50 percent of the aggregate amount referred to in (1) is held by persons independent of the issuer. The insurance company, its affiliates and any separate account of the insurance company shall be considered persons independent of the issuer if the insurance company is not an affiliate of the issuer.

(2) Provided that, in the case of a plan which is not an eligible individual account plan (as defined in section 407(d)(3) of the Act), immediately after such acquisition the aggregate fair market value of employer securities and employer real property owned by the plan does not exceed 10 percent of the fair market value of the assets of the plan.

(3) For the purposes of the exemption contained in subsection (1) of this paragraph (d), the term "employer securities" shall include securities issued by, and the term "employer real property" shall include real property leased to, a person who is a party in interest with respect to a plan (which has an interest in the separate account) by reason of a relationship to the employer described in section 3(14) (E), (G), (H), or (I) of the Act.

Section II—Specific Exemptions

Effective January 1, 1975, the restrictions of sections 406(a)(1) (A), (B), (C), and (D), and 406(b) (1) and (2) of the Act and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A), (B), (C), (D), or (E) of the Code shall not apply to the transactions described below provided that the conditions of section III are met.

(a) *Certain leases and goods.* The furnishing of goods to an insurance company pooled separate account by a party in interest with respect to the plan, which plan has an interest in the pooled separate account, or the leasing of real property of the pooled separate account to a party in interest and the incidental furnishing of goods to the party in interest by the insurance company separate account, if—

(1) In the case of goods, they are furnished to or by the pooled separate account in connection with the real property investments of the pooled separate account;

(2) The party in interest is not the insurance company, any other pooled separate account of the insurance company, or an affiliate of the insurance company; and

(3) The amount involved in the furnishing of goods or leasing of real property in any calendar year (including the amount under any other lease or arrangement for the furnishing of goods in connection with the real property investments of the pooled separate account with the same party in interest, or any affiliate thereof) does not exceed the greater of $25,000 or .5 percent of the fair market value of the assets of the pooled separate account on the most recent valuation date of the account prior to the transaction.

(b) *Transactions with persons who are parties in interest to the plan solely by virtue of being certain service providers or certain affiliates of service providers.* Any transaction between an insurance company pooled separate account and a person who is a party in interest with respect to a plan, which plan has an interest in the pooled separate account, if—

(1) The person is a party in interest including a fiduciary by reason of providing services to the plan, or by reason of a relationship to a service provider described in section 3(14) (F), (G), (H), or (I) of the Act, and the person exercises no discretionary authority, control, responsibility, or influence with respect to the investment of plan assets in the pooled separate account and has no discretionary authority, control, responsibility, or influence with respect to the management or disposition of the plan assets held in the pooled separate account; and

(2) The person is not an affiliate of the insurance company.

(c) *Management of real property.* Any services provided to an insurance company pooled separate account (in which a plan has an interest) by the insurance company or its affiliate in connection with the management of the real property investments of the pooled separate account, if the compensation paid to the insurance company or its affiliate for the services does not exceed the cost of the services to the insurance company or its affiliate.

(d) *Transactions involving places of public accommodation.* The furnishing of services, facilities and any goods incidental to such services and facilities by a place of public accommodation owned by an insurance company pooled separate account, to a party in interest with respect to a plan, which plan has an interest in the pooled separate account, if the services, facilities and incidental goods are furnished on a comparable basis to the general public.

Section III—General Conditions

(a) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent of the insurance company, the terms of the transaction are not less favorable to the pooled separate account than the terms generally available in arm's-length transactions between unrelated parties.

(b) The insurance company maintains for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (c) of this section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the insurance company, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest shall be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (c) below.

(c) (1) Except as provided in subsection 2 of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (b) of this section are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(ii) Any fiduciary of a plan who has authority to acquire or dispose of the interests of the plan in the separate account, or any duly authorized employee or representative of such fiduciary,

(iii) Any contributing employer to any plan which has an interest in the pooled separate account or any duly authorized employee or representative of that employer,

(iv) Any participant or beneficiary of any plan which has an interest in the pooled separate account or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (ii) through (iv) of this paragraph shall be authorized to examine an insurance company's trade secrets or commercial or financial information which is privileged or confidential.

Section IV—Definitions and General Rules

For purposes of sections I through III above,

(a) The term "multiple employer plan" means an employee plan which satisfies at least the requirements of section 3(37)(A) (i), (ii) and (v) of the Act and section 414(f) (1)(A), (B), and (E) of the Code.

(b) An "affiliate" of a person includes—

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee (including, in the case of an insurance company, an insurance agent thereof, whether or not the agent is a common law employee of the insurance company), or relative of, or partner in, any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or sister.

(e) *General.* (i) The time as of which any transaction, acquisition, or holding occurs for purposes of this exemption is the date upon which the transaction is entered into (or the acquisition is made) and the holding commences. Thus, for purposes of this exemption, if any transaction is entered into, or an acquisition is made, on or after January 1, 1975, or a renewal which requires the consent of the insurance company occurs on or after January 1, 1975, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, or at the time the acquisition is made, the requirements will continue to be satisfied thereafter with respect to the transaction or acquisition and the exemption shall apply thereafter to the continued holding of the securities or property so acquired. This exemption also applies to any transaction or acquisition entered into, or holding commencing, prior to January 1, 1975, if either the requirements of this exemption would have been satisfied on the date the transaction was entered into or acquisition was made (or on which the holding commenced), or the requirements would have been satisfied on January 1, 1975, if the transaction had been entered into, acquisition was made, or if the holding had commenced, on January 1, 1975. Notwithstanding the foregoing, this exemption shall cease to apply to a holding exempt by virtue of section I(a) above at such time as the interest of the plan in the pooled separate account exceeds the percentage interest limitation of section I(a), if the excess results solely from an increase in the amount of consideration allocated to the pooled separate account by the plan.

(ii) Each plan shall be considered to own the same fractional share of each asset (or portion thereof) in the pooled separate account as its fractional share of total assets in the pooled separate account on the most recent preceding valuation date of the account.

Signed at Washington, DC, this 23rd day of January 1990.

Alan D. Lebowitz,

Deputy Assistant Secretary for Program Operations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 90–1963 Filed 1–26–90; 8:45 am]

BILLING CODE 4510–29–M

[Application No. D–7974 et al.]

Proposed Exemptions; Biological Science Textbooks, Inc. Employees Profit Sharing plan, et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Pendency, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state the reasons for the writer's interest in the pending exemption.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exeption and Determinations,

room N–5671, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC 20210. Attention: Application No. stated in each Notice of Pendency. The applications for exemption and the comments received will be available for the public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, room N–5507, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the act and/of section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of pendency are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Biological Science Textbooks, Inc. Employees Profit Sharing Plan and Trust (the Plan) Located in Old Tappan, New Jersey

Application No. D–7974

Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the past and continuing loans made by the Plan to: 1) Gerald J. Tortora and Mrs. Geraldine C. Tortora, trustees of the Plan and parties in interest with respect to the Plan (Loan 1); and 2) Lynne M. Borghesi and James J. Borghesi, the daughter and son-in-law of Mr. Tortora, and parties in interest with respect to the Plan (Loan 2; collectively, the Loans), provided the terms of the Loans have been and will remain at least as favorable to the Plan as those obtainable in an arms-length transaction with an unrelated party.[1]

EFFECTIVE DATES: This proposed exemption if granted will be effective January 1, 1988 with respect to Loan 1 and August 7, 1986 with respect to Loan 2.

SUMMARY OF FACTS AND REPRESENTATIONS

1. The Plan, established on March 1, 1982, is a profit sharing plan and trust, which as of December 31, 1987, had $475,778 in total assets. The trustees of the Plan are Mr. and Mrs. Tortora. Mr. Tortora is also the sole participant of the Plan and the sole stockholder of the Biological Science Textbooks, Inc. (the Employer), a New Jersey corporation which is also the Plan sponsor. The Employer is engaged in the business of writing college textbooks.

2. On September 3, 1986, the Plan granted a $50,000 fifteen year second mortgage, Loan 1, to Mr. and Mrs. Tortora. Loan 1 is payable with an annual interest rate of 13% in equal monthly installments of principal and interest at $632.62, commencing October 1, 1986 and concluding September 1, 2001. Loan 1 is secured by a recorded second mortgage on their private residence (Property 1) which on January 1, 1988 had a fair market value of $1,100,000 according to William J. Doka, an independent, qualified appraiser with the Erickson Appraisal Company. The first mortgage loan in the amount of $125,000, also secured by Property 1, was entered into by Mr. and Mrs. Tortora with an unrelated bank on September 11, 1984. The Applicant represents that Loan 1 was made in accordance with the conditions contained in statutory exemption section 408(b)(1) of the Act and that to date all appropriate monthly payments have been made when due. For the calendar year beginning January 1, 1988, however, the Employer elected to be treated as a subchapter "S" corporation under section 1371 of the Internal Revenue Code of 1986.[2] As a result, Mr. Tortora became an owner-employee under section 408(d) of the Act and from the point of the Employer's election of subchapter "S" status, Loan 1 became a prohibited transaction under section 406 of the Act.

3. On August 7, 1986, the Plan also made a $50,000 thirty year first mortgage, Loan 2, to Mr. and Mrs. Borghesi, the son-in-law and daughter of Mr. Tortora. Loan 2 is payable with an annual interest rate of 9.5% in equal monthly payments of principal and interest at $420.43 and concludes on September 1, 2016. Loan 2 is secured by a recorded first mortgage on their private residence (Property 2), which was purchased on August 7, 1986 for $151,920 from an unrelated real estate developer.

4. An appraisal of Property 1 was prepared on April 14, 1989 by Kenneth Steimle and William J. Doka, independent and qualified appraisers with the Erickson Appraisal Company. Mr. Steimle and Mr. Doka used the comparable sales method and estimated the fair market value of Property 1 to be $1,025,000. An appraisal of Property 2, dated April 17, 1989, was also prepared by Kenneth Steimle and by William J. Doka. Mr. Steimle and Mr. Doka used the comparable sales method and estimated the fair market value of Property 2 to be $181,000.

5. The applicant represents that the Loans were and continue to be desirable investments for the Plan and that the Loans involve less than 25% of the Plan's total assets. Mr. Tortora represents that he was advised by the Citizens First National Bank of New Jersey (the Bank) at the time when Loan 1 became prohibited, that the prevailing rate for a second mortgage loan secured by real property was 13%. The Bank also advised Mr. Tortora at the time when Loan 2 was entered into, that the prevailing rate for a first mortgage loan secured by real property was 9.5%. The applicant has also submitted two letters from the Bank's officials concerning the Loans. In this regard, the Bank represented that it would have entered into Loan 1 with Mr. and Mrs. Tortora and Loan 2 with Mr. and Mrs. Borghesi at the time of their making under the same terms and conditions as those provided by the Loans.

[1] Because Mr. Tortora is the only participant in the Plan and the employer is wholly owned by Mr. Tortora there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3–3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

[2] Although a loan between a plan and a party in interest may meet the statutory exemption under section 408(b)(1) of ERISA when entered into, if the party in interest later becomes an owner-employee pursuant to section 408(d), it is consistent with the purpose of section 408(d) to then treat the loan as a prohibited transaction, for which no relief is available under section 408(b)(1).

6. The applicant represents that the Loans are in the best interest and protective of the Plan. Specifically, both of the documents evidencing the Loans for Property 1 and Property 2 contain hazard, fire and other insurance provisions, which specify that following any loss to either of the Properties by reason of the insured events, any insurance proceeds shall be paid to the Plan, as the lender, to the extent needed to cover the outstanding balances on the Loans. The applicant also maintains that the Loans are and have been adequately secured with real property and that all payments on the Loans were and will continue to be made on a monthly basis.

7. The applicant represents that it did not realize that Loan 1 was prohibited at the time the Employer became a subchapter "S" corporation or that Loan 2 was prohibited at the time of its making. In December of 1988 counsel for the Plans determined that the Loans constituted prohibited transactions. The applicant thereafter submitted a request for exemption in March of 1989.

8. In summary, the applicant represents that the transactions satisfy and will continue to satisfy the criteria of section 4975(c)(2) of the Code because:

(A) The respective interest rates of 13% and 9.5% for Loan 1 and Loan 2 were the prevailing rates at the time;

(B) The Bank would have entered into Loan 1 and Loan 2 at the time of their making;

(C) The Loans are adequately secured with real property;

(D) The applicant represents that the mortgages were recorded at the time the transactions were made;

(E) The Loans involve less then 25% of the Plan's total assets;

(F) Upon discovering that the Loans constituted prohibited transactions, the applicant submitted a timely request for exemption; and

(G) Mr. Tortora as sole participant of the Plan desires that the Loans continue as Plan investments.

Notice to Interested Persons

Because Mr. Tortora is the only person to be affected by the proposed transaction, it has been determined that it is not necessary to distribute this notice of proposed exemption to interested persons. Comments and requests for a public hearing are due 30 days from the date of publication of this notice in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department, telephone (202) 523–8194. (This is not a toll-free number.)

National Bank for Cooperatives (NBC) Located in Denver, Colorado

Exemption Application No. D–8092

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to certain transactions, described in the Summary of Facts and Representations herein, between cooperative banks of the Farm Credit System, including NBC (collectively, the Cooperative Banks) and certain employee benefit plans (the Plans), involving pass-through certificates (the Certificates) which represent undivided interests in certain trusts (the Trusts) serviced by the Cooperative Banks. The exemption, if granted, will be effective provided that:

A. the decision by a Plan to engage in the transactions is made by a fiduciary of the Plan which is independent of the Cooperative Banks and the trustee of the Trusts; and

B. the terms of each such transaction are no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties.

EFFECTIVE DATES: If granted, this exemption will be effective as of September 15, 1987.

Summary of Facts and Representations

1. The transactions for which exemptive relief is requested primarily involve the acquisition of the Certificates by the Plans from a Cooperative Bank or the acquisition and/or holding of debt instruments of the Cooperative Banks by the Plans in situations where a Cooperative Bank would be considered a party in interest with respect to the Plans. A Cooperative Bank may become a party in interest under the Act as a result of providing services to a Trust established at the direction of a Cooperative Bank where the assets of the Trust are considered to be "plan assets" as a result of the Plans or other benefit plan investors, in the aggregate, acquiring significant equity interests (i.e., 25 percent or more) in the trust in the form of the Certificates.[3] The Certificates represent undivided fractional interests in a private note which is held by the Trust.

2. NBC is a federally-chartered bank within the Farm Credit System (the System), which was established under § 3.20 of the Farm Credit Act of 1971, as amended (the Farm Credit Act, 12 USC 2001, *et seq.*). The System is a network of the Cooperative Banks, which are specifically organized to provide loans to farmers and cooperatives (the Cooperatives) relating to rural utilities, agricultural marketing and other services involving farming and farm-related businesses.

The System consists of twelve Farm Credit Districts (the Districts) covering the continental United States and Alaska, Hawaii and Puerto Rico. As originally organized by the Farm Credit Act, each district was served by one federal land bank, one federal intermediate credit bank and one Cooperative Bank. A thirteenth Cooperative Bank, the Central Bank for Cooperatives (CBC) in Denver, Colorado, participated with the Cooperative Banks in loans which exceeded the limits of the districts. The System is regulated by the Farm Credit Administration, and independent regulatory agency of the United States.

The Cooperative Banks do not accept deposits. However, the Cooperative Banks are authorized to obtain funding for their operations through the issuance of debt to the public. In the ordinary course of business, the Cooperative Banks raise operating funds through their fiscal agent, the Federal Farm Credit Banks Funding Corporation (the Funding Corporation). The Funding Corporation issues debt (System Debt) to the public for which NBC and all other Cooperative Banks are jointly and severally liable. System Debt is issued in the form of book-entry Federal Farm Credit Banks Consoldiated Systemwide Notes, which are discount notes with maturities from 5 to 365 days, and Federal Farm Credit Banks Consolidated Systemwide Bonds, which are bonds with terms of 6 months, 9 months and longer. These System Debt securities are offered publicly. The Funding Corporation does not sell directly to the public, but uses a nationwide selling group of investment dealers and dealer banks. There is an active secondary market in System Debt. NBC represents that System Debt securities are lawful investments for all fiduciary and trust funds under the jurisdiction of the United States and are legible as collateral for government deposits and for advances by Federal Reserve Banks to depository institutions under Section

[3] See 29 CFR 2510.3–101.

13 of the Federal Reserve Act. National banks and state member banks of the Federal Reserve System may purchase and sell System Debt securities in their open market operations and may invest in them without being subject to the limitations generally applicable to dealing in, underwriting and purchasing investment securities for their own account. NBC represents that System Debt securities are legal investments for banks, trust companies, savings banks and trust funds in various states, subject to applicable state regulations and restrictions.

Effective January 1, 1989, 10 Cooperative Banks merged with CBC to form NBC pursuant to a reorganization of the system under the Agricultural Credit Act of 1987. NBC continues to provide the same services to the non-merging Cooperative Banks, the St. Paul Bank for Cooperatives and the Springfield Bank for Cooperatives which were provided by CBC to Cooperative Banks before the reorganization. The non-merging Cooperative Banks and NBC make loans to agricultural, aquatic and rural utility cooperatives engaged in international trade, supplementing the loan programs of the Rural Electrification Administration of the U.S. Department of Agriculture (REA). As of January 1, 1989, NBC has outstanding loans of $9,039 million and additional unadvanced loan commitments of $9,414 million. As of January 1, 1989, NBC also had outstanding letters of credit totaling $426 million.

3. Since enactment of the Rural Electrification Act of 1936 (the REA Act), REA has financed the construction and operation of electric generating plants, transmission facilities and distribution systems in order to provide electricity to persons in rural areas who are without central station service. REA obtains a mortgage on all its borrowers' assets (the REA Mortgage) and generally exercises a high degree of financial and technical supervision of their operations.

During the 1970s, the expanding power requirements of rural consumers in many areas throughout the country resulted in the construction by the Cooperatives of many new generating plants and transmission facilities. To satisfy the major capital requirements for these projects, Congress passed legislation requiring the Federal Financing Bank of the United States Treasury (the FFB) to make long-term loans (the FFB Loans), at interest rates of one-eighth of 1 percent above FFB's own borrowing costs, to the Cooperatives, with repayment guaranteed by REA.

Most FFB Loans were made in the late 1970's and early 1980's at rates ranging up to approximately fifteen percent. NBC represents that under current market conditions the FFB Loans could be made at considerably lower rates which would result in significant savings for the Cooperatives.

4. In June of 1986 Congress passed legislation permitting rural electric utilities to take advantage of the reductions in interest rates prepaying their high-interest FFB Loans, without any prepayment penalty or fees, through the issuance of REA-guaranteed debt to private lenders. REA has adopted regulations (the Regulations) implementing the 1986 legislation, including certain 1988 amendments. NBC represents that the Regulations prevent the Cooperatives from directly issuing debt carrying the full faith and credit obligation of the United States and that the regulations in effect interpose an entity between the refinancing Cooperative and the debt-purchasing public.

5. NBC represents that a program (the Program) has been developed by the Cooperative Banks, in conjunction with Smith Barney, Harris Upham and Company and Manufacturers Hanover Trust Company, under which a Cooperative Bank makes loans to qualifying Cooperatives to prepay all or a part of their FFB Loans in accordance with the Regulations at competitive rates. NBC represents that REA has approved the Program as complying with the Regulations.

Under the Program, one or more Trusts are established for each Cooperative or a group of Cooperatives intending to prepay FFB Loans. The trustee of each Trust (the Trustee) is a commercial bank having capital and surplus of at least $50,000,000. A Cooperative Bank makes a private loan (the Private Loan) to the Cooperative, the proceeds of which are immediately used to prepay the Cooperative's FFB Loans being refinanced. The Cooperative Bank directs the Cooperative to issue notes (the Private Notes), evidencing all or a portion of the Private Loan, to a Trust, which issues to such Cooperative Bank the Certificates representing the entire beneficial interest in the Trust. The Cooperative Bank qualifies the trust agreements under the Trust Indenture Act of 1939. While the Cooperative Bank holds the Certificates, the Private Note bears interest at a variable rate reflecting the Bank's cost of funding the Private Loan. The Cooperative Bank then resells these Certificates, either contemporaneously with the making of the Private Loan or some time thereafter, in private placements or to the public in firm commitment underwritings, at which time the rates on the associated Private Note are reset to equal the fixed rate on the Certificates, increased by an amount equal to the servicing fee and expense reimbursement referred to below. The Certificate rate is fixed at the lowest rate acceptable to the marketplace that permits the Certificates to be resold at par. The Cooperative Bank resells the Certificates promptly, unless they can not be sold bearing rates within the prescribed interest rate ceiling. Scheduled payments on the Private Notes will at all times be sufficient to satisfy the scheduled payments on the Certificates plus any servicing fees or other expenses payable by the Trust.

NBC represents that in order to insure that the Cooperatives derive significant benefits from the refinancing of FFB Loans, the Regulations require that the interest rate on the Private Notes always be not greater than a cap determined on the basis of the weighted average interest rate borne by the FFB Loans that were repaid at the time of repayment. The Cooperative Bank assumes the risks associated with interest rate fluctuations which benefit the Cooperative and REA.

Each Trust's sole investment activity consists of receiving the Private Note and issuing the Certificates on the date of its formation and thereafter collecting payments on the Note. The assets of each Trust consist of a REA-guaranteed Private Note evidencing a Private Loan. In order to obtain the best rates by matching maturities to particular market segments, separate Certificates having sequential maturities are offered through separate Trusts (i.e., one Trust would receive a Private Note payable by the Cooperative in installments in years 1–5, a second would receive a Private Note payable by that Cooperative in years 6–10, etc.). The Trustee is not authorized to modify the right to receive payments on the Certificates or to take any action that would reduce the principal amount or interest rate on the Private Note without the consent of the Certificate holders. No Trust can issue any security other than a single class of Certificates or hold securities other than the Private Note. Except for the incidental temporary investment pending distribution to Certificate holders of payments received on its Private Note, described below, no Trust can engage in any investment activity following its formation. A default with respect to one Private Note does not permit acceleration by the holder of any other Private Note. The Trust can not acquire

any assets in substitution for the Private Note or sell the Private Note, except in connection with the repayment of the Certificates in full and the termination of the Trust.

6. REA endorses on each Private Note a guarantee (the REA Guarantee) of the timely payment of principal and interest on such Private Note. The REA Act provides that the REA Guarantee is a full faith and credit obligation of the United States. REA is required to pay the Trust the amount of any principal and interest not paid when due on a Private Note within five business days of notice from the Cooperative Bank servicing such Private Note of such default. Although the REA Mortgage will secure the Private Note, all rights under the REA Mortgage with respect to the Private Note will be held by REA and will not inure to the benefit of a Cooperative Bank, the Trust, or any holder of Certificates.

7. A Cooperative Bank contracts with REA and each Trust to service the Private Loan, thereby establishing an agency relationship with the Trustee and becoming the servicer (the Servicer Bank) with respect to the Trust in a manner complying with the REA Act and the applicable regulations described in the terms of the trust agreement establishing and governing each Trust (the Trust Agreement).

Under the Trust Agreement, the Trustee appoints the Servicer Bank as its attorney-in-fact to commence and prosecute any claims to enforce or collect on each Private Note and REA Guarantee. However, the Servicer Bank as such attorney-in-fact may not rescind, cancel, release, waive, or reschedule the right to collect the unpaid balance on any Private Note from the Cooperative or REA. If a court holds that the Servicer Bank is not entitled or able to enforce a Private Note or REA Guarantee, the Trustee, on behalf of the Trust, is obligated to take such steps as the Servicer Bank deems necessary to enforce such Private Note or REA Guarantee.

In administering, servicing, and enforcing a Private Note or REA Guarantee according to the terms of a Trust Agreement, the Servicer Bank is obligated to exercise such of the rights and powers vested in it by the Trust Agreement. Prior to a default in payment on a Private Note, the Servicer Bank is obligated to perform only those duties that are specifically set forth in the related Trust Agreement. The Servicer Bank has no liability for any error of judgment made in good faith by it unless it has proved that the Servicer Bank was negligent in performing its duties under the related Trust Agreement, or with respect to any action it takes or omits to take in good faith in accordance with a direction received by it from the Trustee or holders of 51 percent or more of the Certificates of the related Trust.

In addition to enforcing the Trustee's rights under the Private Note and the REA Guarantee held by a Trust, the Servicer Bank is obligated to fulfill a number of administrative and notice functions under the Trust Agreement. For example, the Servicer Bank is obligated to deliver a notice to each Cooperative and the Trustee for such Trust specifying the date any payment is due on the Private Note held by such Trust and the amount of such payment. In addition, the Servicer Bank is responsible for notification of REA of any default in the payment of interest and principal on the Private Note held by a Trust, and the Servicer Bank is obligated to submit to REA a report setting forth the Servicer Bank's view as to the reasons for the default, how long is expects the Cooperative to be in default, and what corrective action the Cooperative states it is taking to cure such default. The Servicer Bank is also obligated to notify REA of any known violations or defaults or conditions of which the Servicer is aware which might lead to a default or violation by the Cooperative under the Loan Agreement, the Loan Guarantee Agreement, the REA Mortgage, or a Private Note. The Servicer Bank is obligated to notify REA of any optional redemption of the Note held by a Trust and to calculate the amount payable on such Note and the related Certificates pursuant to any redemption or purchase of such Private Note. Payments on the Private Note are made directly to the Trustee and not to a Servicer Bank. The Servicer Bank will prepare for distribution by the Trustee to Certificate holders regular semiannual reports concerning distributions on the Certificates and its fees, as well as tax information required by Certificate holders. No less often than annually, an independent public accountant will audit the books and records of each Trust. Upon completion, copies of the auditor's reports will be provided to the Trustee.

The Servicer Bank may not resign except upon a determination that the performance of its duties under the related Trust Agreement is no longer permissible under applicable law or if the Servicer Bank is not paid any amount due it as compensation under the Trust Agreement within five business days. No such resignation will be effective until the earlier of ninety days or the date upon which the Trustee or a successor Servicer Bank will have assumed the responsibilities and obligations of the Servicer Bank. If no Servicer Bank is appointed by the effective date of the resignation, the Trustee will automatically become the successor Trust servicer as of such date. Furthermore, the Servicer Bank may be removed by action of the holders of 51 percent or more of the Certificates of the related Trust or the Trustee following certain defaults or events of bankruptcy relating to the Servicer Bank. The insolvency of the Trustee or the Servicer Bank does not affect the Certificate holders' rights, because the Servicer Bank does not hold any Trust assets and assets held in a fiduciary capacity by the Trustee should not be subject to claims of the Trustee's general creditors.

Under the Trust Agreement, any entity into which the Servicer Bank may be merged or consolidated will be the successor of the Servicer Bank thereunder.

8. The Servicer Bank is compensated out of payments on the Private Note in excess of the scheduled payments to be distributed to Certificate holders. NBC estimates that its regular servicing fee, from which the Servicer Bank pays the Trustee's fees and expenses, will total not more than approximately one-tenth of 1 percent per annum of the principal amount of the Private Note. The fees payable to the Servicer Bank for each interest payment period are determined as a fixed percentage of the principal amount of the Private Note outstanding as of such interest payment period. Accordingly, the amounts actually paid by the Cooperatives as a servicing fee will decrease as principal is amortized. At the request of the Cooperative, the Servicer Bank may pay the costs incurred in connection with the reoffering of Certificates if such payment is reimbursed either directly by the Cooperative or by the Trust. To the extent these amounts are received from the Trust, the Cooperative would be obligated to pay amounts equal to such costs as additional interest (guaranteed by REA) on the Private Note (subject to certain limitations, so that such reimbursement will not reduce distributions to Certificate holders.

9. A Cooperative Bank may resell the Certificates, either in private placements pursuant to section 4(2) of, or in underwritten public offerings registered under the Securities Act of 1933, or possibly in distributions exempt from registration because they will come to rest outside the United States. NBC expects that the Certificates issued by each Trust will receive the highest investment grade rating ("AAA" or "Aaa") from at least two nationally recognized statistical rating

organizations not affiliated with the Cooperative Banks or the Trusts.

10. Each Certificate will represent a fractional undivided interest in a Trust. The Certificates will be issued in denominations of $1,000 or multiples thereof, and will not be divisible into Certificates with original amounts below $1,000. The Certificates will be transferable and may be listed on a national securities exchange. Payments on the Certificates will represent the pass-throughs of payments received by the Trustee on the Private Note held by the Trust. Interest on both the Private Note and the Certificates will be payable semiannually, and principal payments on both the Private Note and the Certificates will be payable annually for the period during which the Private Note and the Certificates amortize.

The Certificates can be prepaid at any time the Private Note is prepaid. The Private Notes are prepayable at the Cooperative's option in whole, but not in part, generally after a no-call period, at premiums declining each year until such premiums equal zero. Although the payment of principal, interest, and premium, in the event a Cooperative elects to prepay the Private Note, will not be covered by the REA Guarantee, the Cooperative will be required to accompany its notice of prepayment with a cash deposit equal to the amounts that will be due on the Private Note at the time of prepayment, thus assuring that funds will be available at that time.

With the exception of the prepayment referred to above, all payments on the Certificates have back-to-back Private Note obligations which are supported by the full faith and credit of the United States. If the Cooperative defaults in making its payments or in its other obligations to REA, REA has the option either to pay under the REA Guarantee principal and interest as they fall due on the Private Note, to proceed against the Cooperative and to assume the Cooperative's obligations under the Private Note, or, if the Cooperative could at that time make an optional prepayment of the Private Note, to optionally prepay or purchase the Private Note at the same premium as would then be applicable to a prepayment by the Cooperative. The Trustee, or the Servicer Bank as its agent, will enforce payments due on the Private Note and the REA Guarantee. However, a specified percentage of Certificate holders may direct the time, method, and place of conducting any remedy available to the Trustee or the Servicer Bank. The Trustee may not resign until the Trust is liquidated and the proceeds distributed to Certificate holders unless a successor Trustee has been designated and has accepted such trusteeship.

11. Scheduled distributions on the Certificates will be made approximately 11 days after the corresponding payment on the Private Note. NBC represents that this interval will allow time for the Servicer Bank to notify REA if there is a default by the Cooperative in making a payment on the Private Note and allows five business days for REA to make a payment under the guarantee. As a consequence, if the Cooperative defaults, the full faith and credit guarantee payment will fall due before the scheduled payment on the Certificates. NBC represents that if a Cooperative elects to prepay a Private Note, distributions on the Certificates will be made only after advance receipt of the amounts to be prepaid, thus permitting notice of the resulting distribution to be given to Certificate holders.

During the periods between receipt of Private Note payments and distribution to Certificate holders, such payments received by the Trust are invested at the direction of the Servicer Bank in (i) obligations issued by the United States (and supported by its full faith and credit), or (ii) repurchase agreements with respect to such obligations, over-collateralized on a basis that will not result in a reduction in the ratings of the Certificates. All such investments must mature before the next scheduled distribution date on the Certificates. The obligations collateralizing the repurchase agreements in question are marked to market on a daily basis and kept in the possession of the Trustee or in its control through book-entry, unless the rating agencies should indicate that this is not necessary to maintain the Certificates' rating and the Securities and Exchange Commission or its staff has indicated it will not object to other arrangements. Assuming all amounts then due on the Private Notes have been paid in full, any yield on these investments will be returned to the Cooperative, or to REA to the extent of any unreimbursed payments on the REA Guarantee.

12. *Discussion of Prohibited Transactions:* The Department's regulations defining "plan assets" (29 CFR 2510.3–101) provide that if a plan acquires an equity interest in an entity that is not an operating company, such as the Certificates in a Trust, the plan will be required to treat the underlying assets of the entity as assets of the plan, if the class of equity interests in questions are not (i) held by 100 or more investors independent of the issuer and of each other, (ii) freely transferable and (iii) sold as a part of an offering pursuant to an effective registration statement under the Securities Act, and then timely registered under section 12(b) or 12(g) of the Securities Exchange Act of 1934. The applicant represents that although there are no restrictions imposed on the transfer of the Certificates and NBC will cause the registration requirements to be satisfied, NBC anticipates that one or more series of the Certificates will be held by fewer than 100 independent investors at the conclusion of the initial offering.

The applicant states that a Plan's assets will be deemed to include assets of a Trust if employee benefit plan investors in the aggregate acquire Certificates representing a greater than 25 percent interest in a Trust.[4] NBC represents that it is possible that more than 25 percent of the interests in one series of Certificates may be held by the Plans.

If the assets of a Trust are deemed to be "plan assets", the activities of the Cooperative Bank with respect to a Trust may be regarded as services being performed for the participating Plans, which would cause such Cooperative Bank to be a "service provider" and a party in interest to the Plans investing in the Trust. NBC represents that the Cooperative Bank with respect to a Trust acts solely as an agent of the Trustee and does not have any authority or control which would make it a fiduciary with respect to a Trust. Thus, NBC states that it is solely the possible existence of such "service provider" status which gives rise to the potential prohibited transactions, described as follows, for which an exemption is requested:

(A) The applicant states that a Plan may acquire interests in more than one Trust. Since separate Trusts will be established with respect both to borrowings by different Cooperatives and borrowings of different maturities by the same Cooperative, it is possible that a Plan interested in the Certificates will acquire interests in multiple Trusts. In such event, the party in interest status assumed by a Cooperative Bank with respect to an investing Plan as a result of the Plan's first investment in an interest in a Trust might cause the acquisition by the Plan of an interest in a second Trust to violate the provisions of the Act. Such a transaction could occur if the Plan were to acquire a Certificate directly from a Cooperative Bank. However, the applicant states that

[4] See DOL Reg. § 2510.3–101(f).

it is anticipated that the Certificates will be placed through a firm commitment underwriting.

(B) In addition to the acquisition of Certificates, a Plan may acquire or already hold System Debt, described above in paragraph 2. The applicant represents that all the System Debt securities are offered on the same terms and conditions to all investors, including the Plans. The applicant states that if a Plan were to acquire Certificates at any time during which the Plan held System Debt, and such acquisition of the Certificates resulted in a Cooperative Bank becoming a party in interest with respect to the Plan as a service provider to the Trust which issued the Certificates, then the holding by the Plan of such System Debt would become a prohibited extention of credit in violation of the Act. Likewise, if a Cooperative Bank were to become a party in interest with respect to a Plan as a service provider and if the Plan subsequently acquired System Debt, then such acquisition by the Plan of System Debt would become a prohibited extension of credit in violation of the Act.

NBC states that no Cooperative Bank will have any relationship to, or influence over the investment decisions made by, a Plan either to acquire System Debt or to acquire a Certificatee under a Trust. The decisions of the Plans to participate in the Trust, through the purchase of the Certificates, will be made by Plan fiduciaries independent of the Cooperative Banks and the Trustee.

(C) Finally, NBC states that the Servicer Bank with respect to a Trust is obligated to defend and indemnify the Trust and its Certificateholders against any and all costs, expenses, losses, damages, claims and liabilities, including reasonable fees and expenses of counsel and expenses of litigation, arising with respect to any action taken by the Servicer Bank, except to the extent such charges may be attributable to the Trustee's negligence or bad faith. The applicant states that if the Servicer Bank is considered to be a party in interest with respect to Plan Certificateholders, such Servicer Bank's indemnification of the Certificateholders against certain potential taxes and expenses may be deemed to be a guarantee which results in a prohibited extension of credit between the Service Bank and the Plan under the Act.

13. *Retroactive exemptive relief:* The applicant requests exemption relief, proposed herein, primarily for transactions relating to Trusts which may be established from time to time under trust agreement between a Cooperative Bank, a Cooperative and a Trustee. However, the applicant also requests that the exemption proposed herein provide relief for transactions (the Initial Transactions) already entered into prior to application for the exemption. The Initial Transactions arise under 20 existing trusts established with respect to Ariziona Electric Power Cooperative, Big Rivers Electric Cooperative and Cajun Electric Power Cooperative, Inc., all of which are Cooperatives which have received REA approval of applications to prepay FFB Loans, borrowed funds on an interim basis from Cooperative Banks and issued Private Notes to Trusts (the Initital Trusts). NBC states that Certificates representing ownership interests in the Initial Trusts in the aggregate face amount of $1.315 billion have been sold in firm commitment underwritings and that actual delivery of such Certificates to investors or their agents has occurred since September 15, 1987. NBC represents that the Initial Transactions occurred in accordance with the terms and conditions of the Proposed Exemption described herein.

14. In summary, the applicant represents that the subject transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (a) The decision of the Plans to purchase the Certificates was and will be made in all cases by a Plan fiduciary which is independent of the Cooperative Banks and the Trustee; (b) The Certificates are priced at market rates and will in all cases receive the highest investment grade rating from at least two nationally recognized statistical rating organizations; (c) The payments of principal and interest on the Private Notes held by the Trusts are guaranteed by REA; and (d) The Certificates are sold to the Plans with full disclosure to the independent fiduciaries for the Plans of the fees and expenses to be recovered by the Servicer Bank and the Trustee from the Trust, which in all cases come only out of payments made on the Private Notes by the Cooperatives.

FOR FURTHER INFORMATION CONTACT: Ronald Willett of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

Watkins Master Trust (the Trust) Located in Atlanta, Georgia

Exemption Application No. D–8078

PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective September 20, 1989, to (1) the lease by the Trust of space in a certain commercial office building located in Atlanta, Georgia (the Building) to Wilwat Properties, Inc. (Wilwat), a party in interest with respect to employee benefit plans participating in the Trust (the Plans); and (2) the proposed potential purchase of the Building by Wilwat from the Trust pursuant to provisions in such lease; provided that all terms of such transactions are no less favorable to the Trust than those which the Trust could obtain in an arm's-length transaction with an unrelated party.

EFFECTIVE DATE: This exemption, if granted, will be effective as of September 20, 1989.

SUMMARY OF FACTS AND REPRESENTATIONS

1. The Trust is a master trust established in 1984 to hold, manage and administer assets of the Plans, which are six defined contribution pension plans sponsored by Watkins Associated Industries, Inc. (Watkins) and five other plan sponsors (the Affiliates) which are corporate affiliates and subsidiaries of Watkins. The Plans are identified as follows:

(1) Watkins Associated Industries, Inc. Profit Sharing Plan;

(2) Tampa Maid Sea Products, Inc. Profit Sharing Plan;

(3) Watkins Motor Lines, Inc. Profit Sharing Plan;

(4) Highway Transport, Inc. Profit Sharing Plan;

(5) Land Span, Inc. Profit Sharing Plan; and

(6) Southern Concrete Construction Company, Inc. Profit Sharing Plan.

Watkins is a Florida corporation engaged in diverse service and manufacturing enterprises with its principal place of business in Atlanta, Georgia. The trustee of the Trust is the Trust Company Bank (the Trustee), a state-chartered bank organized under Georgia law with its principal place of business in Atlanta, Georgia. Watkins represents itself and its Affiliates to be independent of and unrelated to the Trustee. Investment decisions on behalf of the Trust are made jointly by the Trustee and an investment committee (the Committee) consisting of officers of Watkins. As of December 31, 1988 the Trust held total assets of $9,502,936.

2. Among the assets of the Trust is the Building, a commerical office building of approximately 9,700 net square feet situated on a parcel of commercially-zoned real property (the Land) designated as 1940 Monroe Drive in Atlanta, Georgia. The Land is owned by a party unrelated to the Trust and is leased and utilized by the Trust as the site of the Building under a long-term ground lease (the Ground Lease) wherein the Trust, as the Ground Lease tenant, owns the lessee's interests (the Tenancy), which the Trustee represents to be an "estate for years" under Georgia law. As executed originally, the Ground Lease would expire in 2019, but it was amended in 1960 to expire December 31, 2058.

The Tenancy was contributed to a predecessor plan of one of the Affiliates' plans in 1961 by the predecessor plan's sponsor, a subsidiary of Watkins. The Tenancy was transferred to the Trust in 1984 as part of a merger into the Trust of all assets of the Affiliates' plans. The Building was constructed on the Land after execution of the Ground Lease and remains the property of the owner of the Tenancy by virtue of provisions in the Ground Lease specifying that improvements placed upon the Land will remain the property of the lessee.

In 1981, these subsidiaries of Watkins commenced leasing and occupying the Building. Wilwat Properties, Inc. (Wilwat), Provident Security Life Insurance Company and Waco Fire and Casualty Insurance Company (collectively, the Subsidiaries) executed three separate leases with the Trust (the Initial Leases), effective July 1, 1981, under which the Subsidiaries shared space in and rental of the Building. Watkins represents that the Initial Leases are exempt from the prohibited transactions provisions of the Act and the Code by virtue of an individual administrative exemption previously granted by the Department as Prohibited Tansaction Exemption 83–27 (PTE 83–27, 48 FR 8613, March 1, 1983). The interests of the Trust for all purposes with respect to the Initial Leases are represented by the Trustee.

Two of the Initial Leases expired on June 30, 1989 and one expired on June 14, 1989. In response to proposals made by Wilwat, the Fiduciary approved the holding over of the Subsidiaries in the Building beyond the expiration dates of the Initial Leases in expectation of new contractual arrangements between the Trust and the Subsidiaries with respect to the Building. Accordingly, Wilwat and the Trustee executed a new lease agreement (the New Lease), effective June 14, 1989, which provides for the Subsidiaries' continued leasing of the Building from the Trust. In the interests of administrative ease and convenience, the Subsidiaries' interests as lessees in the Building have been consolidated and are represented by Wilwat in the New Lease, under which Wilwat is the sole named lessee. An exemption is requested to permit the Trust's lease of the Building to the Subsidiaries under the New Lease with Wilwat as described herein.

3. The Trust's interests under the New Lease are represented for all purposes by the Trustee. The New Lease is a triple net lease under which Wilwat is obligated for all expenses of utilities, maintenance and repair and all taxes relating to the Building. The New Lease commenced with an initial term of four years and six months, effective June 15, 1989, and is renewable for up to three additional terms of five years each with the consent of the Trustee.

The New Lease requires monthly rental payments of no less than the Building's fair market rental value. Initial rent through June 30, 1991 was orginally set at $51,000 per year, payable in monthly installments of $4,250, representing the fair market rental value of the Building as of June 15, 1989 according to John Booth, MAI (Booth), an independent professional real estate appraiser in Atlanta, Georgia, However, Booth's calculation of the Building's fair market rental value included a vacancy and collection allowance of five percent, consituting a deduction of $5,789 from the Building's potential gross income on which Booth based the fair market rental analysis. Wilwat represents that this allowance deduction will be disregarded for purposes of rental determinations under the New Lease and that the initial rental has been recalculated accordingly. As a result, the intial rental under the New Lease is $56,835.00 per year, or $4,736.00 per month. On September 20, 1989 it was agreed that Wilwat will pay the Plan for the difference between the rental actually paid since June 15, 1989 pursuant to Booth's appraisal and the recalculated initial rental, including payment of interest thereon at a rate determined by the Trustee to be appropriate. Wilwat further represents that within sixty days of the final grant of the exemption proposed herein, if granted, Wilwat will pay any applicable excise taxes resulting from the application of section 4975 of the Code by virtue of such rental payment deficiencies.

Under the New Lease the rent will be adjusted on July 1, 1993 and again on July 1 every three years thereafter for the duration of the New Lease under any extenions to reflect the then-current fair market rental value of the Building as determined by a qualified professional real estate appraiser approved by the Trustee. In no event, however, will the rent as so adjusted be less than the initial rent under the New Lease.

The New Lease requires Wilwat to indemnify and hold harmless the Trust against any and all claims arising from the use of the Building and to obtain and maintain in force a policy of full public liability coverage for personal injury and property damage. Wilwat is also required to obtain and maintain a policy of all risk casualty replacement loss insurance in an amount of no less than the Building's full insurable value.

Wilwat is required under the New Lease to obtain the Trustee's approval of any proposed improvements to or alterations of the Building and any such improvements are to remain the property of Wilwat. The New Lease includes provisions addressing the right of the Trustee to cancel the New Lease in the event of Wilwat's defaults of payment or performance under the New Lease and in case of Wilwat's bankruptcy.

4. The New Lease also includes a provision (the Option) granting Wilwat a limited right to purchase the Building from the Trust and an exemption is requested to permit Wilwat's potential purchase of the Building pursuant to the Option as described herein.

The Option provides that Wilwat may propose a purchase of the Building from the Trust any time during the final six months of the initial term or of any renewal term. Any purchase of the Building by Wilwat under the Option will require the approval of the Trustee and will require a cash purchase price of the greater of the fair market value of the Building as of the sale date or the Trust's total investment in the Building. The Trustee represents that it will approve a sale of the Building to Wilwat under the Option only upon a specific determination that such sale is in the best interests and protective of the Trust. In any sale under the Option Wilwat will pay all costs and expenses related to such transaction.

5. The Trustee represents that it has determined that the Subsidiaries' continued lease of the Building from the Trust under the New Lease between Wilwat and the Trust will be in the best interests of the participants and beneficiaries of the Plans. The Trustee states that the Lease will provide the Trust with an appropriately high annual yield competitive with any other investments which might be made or

with any other possible return on the Building. The Trustee represents that the fair market value of the Building was $470,000 as of December 31, 1988, constituting approximately 4.95 percent of Trust assets at that time. The Trustee agrees to continue monitoring the lease arrangements on behalf of the Trust, to inspect the Building annually and to assure that the Building remains adequately insured and that taxes and rents are collected timely. The Trustee represents that it will pursue appropriate enforcement measures on behalf of the Trust with respect to the Trust's rights under the New Lease.

6. In summary, the applicant represents that the subject transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The interests of the Trust under the New Lease, including any renewal terms thereof, are represented by the Trustee, an independent fiduciary which has determined the New Lease to be in the best interests of the Plans; (2) The New Lease provides the Trust a net return on the Building of no less than its fair market rental value as determined by a qualified independent appraiser; (3) The New Lease requires Wilwat to fully insure the Trust's interests in the Building; and, (4) Any purchase of the Building by Wilwat under the Option will be for cash in an amount no less than the Building's fair market value and will require the Trustee's approval.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Willett of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

Edward J. Brenner, P.C. Defined Benefit Pension Plan (the Plan) Located in Punta Gorda, Florida

[Exemption Application No. D–8111]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the code, shall not apply to the transfers (the Transfers) of certain securities (the Securities) from Edward J. Brenner, P.C., the Plan sponsor (Plan Sponsor), to the Plan, and to the sale (the Sale) of a GNMA-guaranteed certificate (the GNMA) by the Plan Sponsor to the Plan, provided that the Transfers and Sale to the Plan were at the fair market of the Securities and GNMA as of the dates of the transaction.

EFFECTIVE DATE: March 23, 1988.

Summary of Facts and Representations

1. The Plan is a defined benefit plan which was sponsored by Edward J. Brenner, P.C., a Virginia professional corporation (the Corporation) whose president and sole stockholder at all times during the Corporation's existence was Edward J. Brenner (Mr. Brenner), a resident of Punta Gorda, Florida. The Corporation was engaged in the practice of patent law and consulting. The Plan was adopted in April 1984, and was amended and restated in February 1986. Edward J. Brenner was and is the Plan's sole participant and the Plan's sole trustee. As of December 31, 1988, the Plan had total assets of $568,312.[5]

2. Effective December 31, 1988, the Corporation was dissolved and its assets distributed to Mr. Brenner, who continued the legal and consulting business of the Corporation as a sole proprietorship. Because of the Corporation's dissolution, the Plan was taken over effective January 1, 1989 by the proprietorship pursuant to an amendment to the Plan which provided, *inter alia*, that Mr. Brenner would assume the obligations of the Plan.

3. Prior to its dissolution, the Corporation held certain publicly traded securities in its own name. Mr. Brenner, acting as sole director and stockholder of the Corporation, caused the Corporation to transfer these securities to the Plan as part of the Corporation's 1988 contribution to the Plan in order to meet the Plan's minimum funding requirement for that year. On March 23, 1988, 200 shares of Niagara Mohawk Power Corporation stock valued at $2,675; 300 shares of Pacific Gas and Electric Company stock valued at $4,762.50; 1,025 shares of Duff & Phelps Selected Utility stock valued at $8,840; and 200 shares of Illinois Power $4.12 Preferred G stock valued at $8,250 were so transferred. These securities, listed and traded on the New York Stock Exchange (NYSE), were valued at their closing prices on the NYSE on the date of transfer. Also on March 23, 1988, 757 shares of Keystone Custodian Fund B2 were transferred, valued at $14,005 under "Mutual Fund Quotations" in the Wall Street Journal on the date of transfer. In addition, a Zero Coupon Treasury Bond valued at $1,172, based on the sales price quote published by Merrill, Lynch, Pierce, Fenner & Smith (MLPF&S) on the date of transfer, was transferred on March 23, 1988. Finally, on May 27, 1988, a $10,000 certificate of deposit (the CD) at 11¾ percent issued by Household Savings Association was transferred. The CD was valued at $10,424, based on its sales price quote published by MLPF&S on the date of transfer.

4. In addition to the above described contributions, the Corporation sold a 9½ percent GNMA (original base value of $23,975.09) to the Plan on May 26, 1988 for $19,535.46 in cash, the then current fair market value of the GNMA, based on the sales price established and published for such securities by MLPF&S on the date of the Sale. The Transfers and Sale to the Plan represent an amount under 254 percent of Plan assets.

5. The applicant represents that he did not become aware that the above described transactions were prohibited transactions under the Act until April 1989, when the Plan's actuary, Paul Abbott & Company, received the information necessary for preparing the Plan's annual report filing for the 1988 plan year. Upon becoming aware of the violation, the applicant promptly retained counsel fo seek exemptive relief, and applied for an administrative exemption for the above described transactions.

6. The applicant represents that the Transfers of securities described above were to meet part of the minimum funding requirement for the Plan for 1988. The Transfers permitted the Plan to acquire the securities without a reduction in the amount of the contributions due to payment of brokerage commissions which otherwise would have been incurred by the Plan. The applicant also represents that no commissions were paid by the Plan in connection with the Sale of the GNMA to the Plan. Mr. Brenner, the sole participant in the Plan, determined the transactions to be in the best interest of the Plan, and acted in good faith, believing that the Transfers and Sale were not prohibited. Finally, the applicant states that the Plan incurred no loss as a result of the Transfers and Sales.

7. In summary, the applicant represents that the transactions satisfy the criteria of section 4975(c)(2) of the Code because: (a) The Plan was able to satisfy its minimum funding requirement for 1988 by the Transfers; (b) The Plan bore no expenses with respect to the Sale and Transfers; (c) the values of the securities were determined by reference to an objective third party source, *i.e.*,

[5] Since Edward J. Brenner was the sole Plan participant at the time when the transactions occurred, there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3–3(b). However, there is jurisdiction under Title II pursuant to section 4975 of the Code.

the closing quotation on the dates of the transactions in the *Wall Street Journal* or by sales prices quoted by MLPF&S on the date of the transactions; (d) Mr. Brenner, the only person affected by the transactions, determined them to be in the best interest of the Plan; (e) the transactions represent an amount under 25 percent of the Plan's assets; (f) Mr. Brener acted in good faith, believing that the transactions were not prohibited; (g) Mr. Brenner promptly retained counsel in order to apply for exemptive relief; and (h) the Plan suffered no loss as a result of the transactions.

Notice to Interested Persons: Because Mr. Brenner was the sole stockholder of the Plan sponsor prior to its dissolution, and was the only person affected by the transaction, it has been determined that there is no need to distribute the notice of pendency to interested persons. Comments and requests for a hearing must be received by the Department within 30 days of the date of publication of this notice of proposed exemption.

FOR FURTHER INFORMATION CONTACT: Joseph L. Roberts III of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

United Company Profit-Sharing and Retirement Plan (the Plan) Located in Bristol, Virginia

[Application No. D–8146]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406(a), (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the Plan's proposed series of loans (the Loans) on a revolving basis for a term of five years to United Company (the Employer), the Plan' sponsor and, as such, a party in interest with respect to the Plan; provided that the terms and conditions of the Loans are at least similar to those obtainable by the Plan in an arm's-length transaction with an unrelated party; and further provided that the aggregate balance of all outstanding Loans at any one time not exceed twenty-five (25%) of the fair market value of the Plan's assets.

TEMPORARY NATURE OF EXEMPTION: The proposed exemption is temporary and, if granted, will expire five years from the date the exemption is granted. Subsequent to the expiration of the exemption, the Plan may continue to hold, until repayment, a Loan originated during the proposed five year exemption period; provided that such Loan not have a term longer than one year.

Summary of Facts and Representations

1. The Plan is a defined contribution plan established in 1976. As of June 30, 1988, the Plan had 823 participants. The Plan held net assets totalling $21,093,286 as of December 31, 1988. The trustee (the Trustee) of the Plan is the Flat Top National Bank of Bluefield, West Virginia. Investment recommendations for the Plan are made by an Investment Committee composed of Plan participants and are then forwarded to the Trustee.

2. The Employer is a Virginia corporation whose subsidiaries are engaged in mining, oil and gas, real estate, hotels, investment services and related ventures. The Employer and its subsidiaries employ more than 1,300 persons in Virginia, West Virginia, Texas and Kentucky.

3. The Employer now seeks an exemption to permit the Plan to enter into the series of Loans to the Employer on a revolving basis for a term of five (5) years. The aggregate balance of all outstanding Loans at any one time will not exceed 25% of the fair market value of the Plan's assets. Each Loan will provide for equal monthly installments of principal and interest. A Loan of thirty (30) days or less will provide for repayment of principal and interest at the end of the Loan period. The interest rate for a Loan for less than one (1) year will be the rate for highgrade unsecured commercial paper sold through dealers by major corporations as published, on the date of the Loan, in the Wall Street Journal. The interest rate for a Loan greater than one (1) year will be no less than ½% above the prime rate published in the Wall Street Journal on the date of the Loan. The collateral securing each Loan will be a perfected security interest in accounts receivable (the Accounts Receivable) of the Employer arising from coal sales.

4. Price Waterhouse (PW), a firm of accountants, audited the Accounts Receivable on March 21, 1989. PW has represented that it is an independent auditor and that it performed its audit in accordance with generally accepted accounting standards. PW determined that, as of December 31, 1988, the Accounts Receivable were valued at $42,637,000.

5. In its capacity as independent fiduciary, the Trustee has reviewed various documents relating to the Loan and to the financial condition of the Employer. Those documents include, *inter alia*, the Loan agreement and note, the schedule of the Accounts Receivable, and the audited financial statements of the Employer. In addition, the Trustee has reviewed the documents establishing the Plan, the current financial statements of the Plan, and the current allocation of the Plan's assets.

The Trustee has represented that it does not control, is not controlled by, and is not under common control with the Employer and is not otherwise affiliated with the Employer; no shareholder of the Employer has any ownership interest in the Trustee, nor does any shareholder of the Employer hold a position as director or senior management official of the Trustee. The Employer does have certain banking relationships with the Trustee, but such relationships account for a *de minimis* percentage of the Trustee's annual revenue. In 1988, revenue from the Employer constituted less than one percent of the Trustee's revenue from all sources. It is represented, thus, that the Trustee will be independent of the Employer with respect to this matter and that the Employer will not be in a position, by virtue of any past or existing business relationship, to influence the actions or decisions of the Trustee in connection with the Loan arrangements.

6. The Trustee is willing and intends to be the Trustee of the Plan for the duration of the Loans. The Trustee will review the terms and conditions of the Loans and the financial condition of the Employer prior to making each disbursement under the Loan agreement. The Trustee will not make disbursements unless it finds them to be appropriate and in the interest of Plan participants and beneficiaries. The Trustee represents that no term or condition of any Loan will be inconsistent with the terms and conditions described herein.

The Trustee further represents that at no time while any Loan is outstanding will the value of the collateral securing the Loan be less than two hundred percent (200 percent) of the aggregate balance of all outstanding loans from the Plan to the Employer. In addition, the Trustee is empowered to call upon the Employer to provide additional collateral to secure any Loan in the event the value of the collateral securing a Loan falls below two hundred percent (200 percent) of the aggregate balance of all outstanding Loans from the Plan to the Employer. Moreover, in the event the Employer defaults on any Loan, the Trustee is empowered to execute and levy on the collateral securing the Loan.

The Employer will execute any and all documentation needed to evidence and perfect the Plan's security interest in the collateral securing any Loan and the Trustee will ensure that appropriate documentation is recorded to perfect the Plan's security interest.

7. No Loan will be made unless the Trustee determines that its projected investment rate of return to the Plan is equal to or greater than similar investments bearing similar risks.

8. The Trustee has concluded that the terms of the Loans are consistent with those customarily found in commercial loan arrangements and are no less favorable to the Plan than the Plan might obtain in a loan to an unrelated party involving similar maturities, terms, amounts, and conditions. In particular, the Trustee has determined that it is commercially reasonable in its geographic area to use a rate of interest of prime rate plus no less than one-half percent for a loan of one year or longer. Moreover, the Trustee has found it commercially reasonable to use a rate of interest other than prime on a Loan for less than one (1) year because the Trustee believes that an index other than prime rate is a more accurate benchmark for such a time period.

Furthermore, considering the other investments of the Plan as well as the terms and conditions of the Loans, the Trustee has determined that the Loans would be an appropriate investment for the Plan and would be in the interest of the Plan's participants and beneficiaries. The Trustee has made this determination in light of the prudence and diversification requirements of section 404(a) of the Act.

9. In summary, the applicant represents that the proposed transaction meets the statutory criteria for an exemption under section 408(a) of the Act because: (a) The Plan's independent fiduciary has reviewed the terms and conditions of the proposed series of Loans and has determined that the Loans are in the interest of the Plan's participants and beneficiaries; (b) said independent fiduciary will review and approve each Loan prior to making disbursement; (c) the Loans will at all times be secured by collateral which will be valued at not less than 200% of the aggregate balance of all outstanding Loans from the Plan to the Employer; (d) the aggregate balance of all outstanding Loans will not exceed 25% of the fair market value of the Plan's assets; and (e) the proposed exemption will be of a temporary nature not to exceed five years.

FOR FURTHER INFORMATION CONTACT: Mrs. B S Scott of the Department, telephone (202) 523–8883. (This is not a toll-free number.)

Internal Medicine Associates Medical Group of San Diego, Inc. Pension Plan (the Pension Plan) and Internal Medicine Associates Medical Group of San Diego, Inc. Profit Sharing Plan (the Profit Sharing Plan; collectively, the Plans) Located in San Diego, CA

[Application No. D–8169]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the proposed loan (the Loan) by the Plans of $200,000 to LKR Associates (the Partnership), a party in interest with respect to the Plans, provided the terms of the Loan are as least as favorable to the Plans as those obtainable in an arm's length transaction with an unrelated party.

Summary of Facts and Representations

1. The Plans consist of this Pension Plan and the Profit Sharing Plan. Each Plan is sponsored by the Internal Medicine Associates Medical Group of San Diego, Inc. (the Employer), a professional corporation engaged in the practice of medicine in medical offices (the Property) located at 3244–3246 and 3260 Third Avenue, San Diego, California. The assets of the Plans are commingled for investment purposes. As of December 31, 1988, the Plans had total assets having a fair market value of $3,379,039. The Pension Plan has a 40 percent interest in the assets and the Profit Sharing Plan has a 60 precent interest.

2. The Plans share common participants. As of December 31, 1988, there were 24 participants in the Plans. The trustee (the Trustee) of the Plans is San Diego Trust and Savinsg Bank of San Diego, California. Investment decisions for the Plans are made by Donald G. Landale, M.D., F.A.C.P.; Stewart Dadmun, M.D., F.A.C.P.; David Joseph Shaw, M.D., F.A.C.P., F.A.C.C., and Paul R. Speckart (Dr. Speckart), M.D. F.A.C.P. These physicians are the sole shareholders, directors and officers of the Employer.

3. The Partnership, which is also located on the premises comprising the Property, was formed under the laws of the State of California for the purposes of owning and managing real and personal property. The Partnership presently leases the Property in which the Employer conducts its medical practice, certain laboratory facilities contained therein and medical equipment to the Employer for $6,100 per month. The individual partners (the Partners) who comprise the Partnership are the physician shareholders, directors and officers of the Employer.

4. The Partnership proposes to renovate the laboratory facilities that are located on the Property it leases to the Employer. To finance the costs of such renovation, the Partnership wishes to borrow $200,000 from the Plans. The Loan amount will be allocated between the Plans such that the amount borrowed will not exceed 25 percent of the assets attributable to each individual Plan. Accordingly, the Partnership requests an administrative exemption from the Department.

5. The proposed Loan will be evidenced by a promissory note. The Loan will carry an interest rate of 12½ percent per annum and require monthly payments of principal and interest in the amount of $2,927 over a ten year period. The promissory note permits prepayment of the loan at any time without penalty.

6. As security for the Loan, the Partnership will give the Plan a first deed of trust on the Property including an assignment of all rents it receives therefrom. The deed to the Property will be duly recorded on behalf of the Plans to reflect the Plans' security interest in the collateral. In addition, the Partnership will insure the Property against casualty loss and designate the Plans as the loss payees of such insurance. At all times throughout the duration of the Loan, the Property will have a fair market value of at least 150 percent of the outstanding principal balance of the Loan. If, however, the value of the Property ever falls below this level, the Trustee, which will serve as the independent fiduciary for the Plans with respect to the Loan, will require that the Partnership pledge additional collateral to maintain the 150 percent collateral to loan ratio. Further, if any Partnership property is sold or otherwise transferred, the Trustee can elect to have the proceeds applied first to repayment of the Loan or it may accelerate repayment of such Loan.

7. The Property which will secure the Loan was appraised initially by Mr. E. Alan Comstock (Mr. Comstock), M.A.I., S.R.P.A., an appraiser consultant associated with Comstock Appraisal

Company, Inc. of San Diego, California. In an appraisal report dated April 24, 1989, Mr. Comstock placed the fair market value of the Property at $1,125,000 as of April 17, 1989. Because of a pre-existing physician-patient relationship between Mr. Comstock and Dr. Speckart, a principal of the Employer and a Partner in the Partnership, the Partnership had Mr. Comstock's appraisal findings reviewed by another appraiser. Ms. Beatrice E. Roberts (Ms. Roberts), M.A.I., S.R.P.A., an independent appraiser affiliated with the real estate appraisal firm of Roberts and Roberts of San Diego, California, agreed to serve as a review appraiser. In an appraisal report dated December 4, 1989, Ms. Roberts states that she physically inspected the subject Property on November 22, 1989, reviewed Mr. Comstock's appraisal report for consistency with established appraisal standards, and reviewed certain supplemental data emphasizing the fair market value and marketability of the Property. Based upon these reviews, Ms. Roberts represented that she concurs with Mr. Comstock's determinations of the fair market value of the Property.

8. By letter dated October 5, 1989, La Jolla Bank and Trust Company (the Bank) of San Diego, California, a third party lending institution, represents that it would make a loan on the same terms to the Partnership. Based upon the value of the Property securing the Loan and the cash flow status of the Partnership, the Bank states that the Loan would be adequately secured in the event of a default. The Bank also asserts that the rate of interest for the proposed Loan represents fair market value for the type of risk assumed. Moreover, the Bank states that because the Property is not currently financed or used as collateral only strengthens the fairness of the terms of the proposed Loan including the interest rate.

9. As stated above, the Trustee has agreed to serve as the independent fiduciary for the Plans with respect to the proposed Loan. The Trustee represents that it has been the trustee of the Plans for several years and that it has administered numerous plans in compliance with the Act and the Code. As such, the Trustee represents that it has extensive fiduciary experience as well as extensive experience in administering the Act as a fiduciary on behalf of employee benefit plans. The Trustee also acknowledges that it understands its duties, responsibilities and liabilities in serving as a fiduciary and it agrees to discharge its duties under the Act and in compliance with the Plans' documents.

The Trustee states that although it is not affiliated with the Employer and its principals, it maintains a commercial relationship with these persons. However, the Trustee explains that deposits and loans of the Employer and its principals constitute less than 1 percent of the Trustee's total deposits and loans. As of December 31, 1988, the Trustee states that it had total deposits and loans of $1.256 billion and $653 million, respectively.

The Trustee represents that the proposed Loan is in the best interests of the Plans and protective of the participants and beneficiaries of the Plans because the Loan proceeds will be used to improve the in-house laboratory facilities that are located on the Property thereby adding value to the Property securing such Loan. In addition, the Trustee states that the Loan will provide the Plans with a 12½ percent return which is a higher yield than the Plans would experience in the present investment market while adding to the diversification of the Plans' assets. Finally, in concluding that the proposed Loan will be an appropriate investment for the Plans' investment portfolio, the Trustee represents that it has considered the Plans' liquidity needs and diversification requirements. In this regard, the Trustee states that it believes the proposed Loan will not materially affect the liquidity needs of the Plans and it will add to the Plans' investment yield and to the diversification of the Plans' assets.

As the independent fiduciary the Trustee will monitor the terms of the proposed Loan to ensure the Loan is in compliance with the terms of the promissory note and the deed of trust. The Trustee will also take all actions that are necessary and proper to safeguard the interests of the Plans and their participants and beneficiaries.

9. In summary, it is represented that the proposed Loan will satisfy the statutory criteria for an exemption under section 408(a) of the Act because: (a) The Trustee, which will monitor and enforce the proposed Loan on behalf of the Plans as the independent fiduciary, has determined that the Loan is in the best interests of the Plans and their participants and beneficiaries; (b) the Loan is secured by a first deed of trust on the Property and an assignment of rents attributed thereto; (c) the Property, which has been appraised by both an appraiser and an independent review appraiser, has a fair market value that is greatly in excess of 150 percent of the outstanding balance of the Loan; (d) the Trustee will ensure that the Property remains at least equal to 150 percent of the outstanding principal balance of the Loan; and (e) the terms of the proposed Loan, including the interest rate, represent no less than fair market value terms.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

Infomax Profit Sharing Plan (the Plan) Located in Des Moines, Iowa

[Application No. D–8242]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(a) and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 (c) (1) (A) through (E) of the Code shall not apply for a period of five years from the date of an exemption grant to (1) the purchase by the Plan of certain leases of equipment (the Lease) from Infomax Office Systems, Inc. of Des Moines (the Employer); (2) the agreement by the Employer to indemnify the Plan against any loss relating to the Leases and also to repurchase any Leases that are in default in accordance with paragraph (C) below; and (3) the purchase by the Employer of the equipment subject to a Lease at the termination of such Lease pursuant to the purchase price option contained in the Lease; provided that the following conditions are met:

A. Any sale of Leases to the Plan will be on terms at least as favorable to the Plan as an arm's length transaction with an unrelated third party would be.

B. The acquisition of a lease from the Employer shall not cause the Plan to hold immediately following the acquisition: (i) more than 25 percent of the current value [as that term is defined in section 3(26) of the Act] of Plan assets in Leases sold by the Employer; or (ii) more than 5 percent of Plan assets (as defined above) in Leases of any one lesee.

C. Upon default by the lessee on any payment due under a Lease, the Employer guarantees in writing the immediate payment of all remaining rental payments and all other amounts due and owing under the Lease. A Lease shall be deemed to be in default for purposes of this section, if a payment due under the terms and conditions of

the Lease is past due for 30 days; or in the event the lessee shall become insolvent, commit an act of bankruptcy, make an assignment for the benefit of creditors or a liquidating agent, offer a composition or extension to creditors, make a bulk sale; or in the event any proceeding, suit or action at law, in equity or under any of the provisions of the Bankruptcy Act or of amendments thereto for reorganization, composition, extension, arrangements, receivership, liquidation, or dissolution shall be begun by or against the lessee; or in the event of the appointment under any jurisdiction at law or in equity of any receiver or any property of the lessee; or in the event the condition of affairs of the lessee shall so change as to, in the opinion of the Trustee or other appropriate Plan fiduciaries, impair its security or increase its credit risk.

D. The Plan receives adequate security for the property underlying the Lease. For purposes of this exemption, the term adequate security means that the property is secured by a perfected security interest in the property leased, so that, if there is a default on the Lease, and the security is foreclosed upon, or otherwise disposed of, the value and liquidity of the security is such that it may reasonably be anticipated that the Plan will experience no loss.

E. Insurance against loss or damage to the leased property from fire or other hazards will be procured and maintained by the lessee and the proceeds from such insurance will be assigned to the Plan.

F. The Plan shall maintain for the duration of any Lease which is sold to the Plan pursuant to this exemption, records necessary to determine whether the conditions of this exemption have been met. The records referred to above must be unconditionally available at their customary location for examination, for purposes reasonably related to protecting rights under the Plan, during normal business hours by the Internal Revenue Service, the Department of Labor, Plan participants, any employer organization any of whose members are covered by the Plan, or any duly authorized employee or representative of the above described persons.

Summary of Facts and Representations

1. The Plan is a defined contribution plan with 36 participants. As of December 31, 1988, the Plan had assets of $522,140.98. The trustee is Norwest Bank Des Moines, N.A. (the Bank) located in Des Moines, Iowa.

2. The Employer is in the business of selling and leasing duplicating equipment, high speed typewriters and word processing equipment. The Employer prior to the effective date of the Act, sold a number of leases of duplicating equipment and high speed typewriters to the Plan. On September 21, 1979, the Department granted Exemption 79–50 (44 FR 54790) to permit the Plan to invest up to 50 percent of Plan assets in such Leases, with the condition that no more than 10 percent of Plan assets be invested in the Leases of any one customer. On January 23, 1985, the Department again granted an exemption, Exemption 85–15 (50 FR 3044) to permit the Plan to invest up to 50 percent of Plan assets in such Leases, with the condition that no more than 10 percent of Plan assets be invested in the Leases of any one customer. The applicant seeks an additional five years exemption for the Plan to purchase Leases from the Employer. The Leases involve equipment which is leased to third parties. The Leases vary in length from twelve to thirty-six months, depending on the cost of the equipment, and will be sold to the Plan for cash. The Plan purchased eight Leases under Exemption 79–50 and nine leases under Exemption 85–15 for which the Bank represents that the PLan has complied with the percentage limitations thereunder. The Bank further represents that there have been no defaults on the Leases purchased by the Plan. The applicant represents that over the past 5 years, the Leases, which are completely net to the Plan, have averaged a 13.841 percent net rate of return.

3. The purchase price of a Lease will be based upon the retail price of the equipment being leased. In addition, no commissions will be paid by the Plan to anyone as a result of the sales of Leases to the Plan. The rental for the Leases purchased by the Plan will be comparable to what the Plan could obtain in a direct transaction with an unrelated third party and will be calculated by the same method used to calculate the rental for the Employer's leases. Title to the equipment passed to the Plan upon the purchase of any Lease.

4. In addition to the fact that the Plan will acquire and hold title to the equipment under each Lease, such equipment also will be secured by a perfected security interest which will name the Plan as the secured party. If the security would be foreclosed upon, in the event of default, the value and liquidity of the security will be such that it may reasonably be anticipated that loss of principal or interest will not result.

5. The Plan will assume the position of lessor with the attendant rights and obligations under the terms of the Leases. However, the Employer will be liable under the warranty clauses of that agreement and all warranty work will be performed by the Employer at no charge to the Plan. Furthermore, if a default would occur, the Plan would have full recourse against the Employer and the Employer has agreed to repurchase any Lease defaulted upon at the purchase option price, pursuant to the terms of the lease, and also to indemnify the Plan for any loss suffered.

6. The Bank will serve as an independent fiduciary on behalf of the Plan with respect to the proposed transactions. The Bank represents that neither the Employer nor the principal of the Employer own stock in Banks of Norwest Corporation, the parent of the Bank, or do any of the shareholders or officers of the Employer sit on the board of directors of the Bank or its parent corporation. The deposits of the Employer and the principal of the Employer in the aggregate total less than 1 percent of the total deposits of the Bank. The Bank's loans to the Employer and to the principal of the Employer in the aggregate total less than 1 percent of the total loans of the Bank. The Bank further represents that so long as it serves as trustee of the Plan, the Bank will not engage in the purchase of Leases from the Employer except on behalf of the Plan. The Bank will not purchase any Employer leases for its own account.

7. The Bank represents that it will approve all purchases of Leases and will determine that each purchase is a fair market value transaction. The Bank further represents that it will make an individual determination prior to the purchase of each Lease that the purchase is appropriate and suitable for the Plan. In addition, the Bank represents that it will monitor the terms of the Leases and take whatever action is necessary to enforce the rights of the Plan.

8. At the end of the initial lease term, the lessee has three options, with the following consequences to the Plan: (a) The customer may renew the Lease with the Plan's rights and obligations remaining the same as during the initial term; (b) the customer may purchase the equipment at the purchase option price, in which case the Plan would receive the proceeds; and (c) the customer may choose not to renew the Lease or purchase the equipment, in which case the Employer would purchase the equipment from the Plan at the purchase option price.

9. In summary, the applicant represents that the proposed sales of the Leases by the Employer to the Plan meet

the requirements of section 408 (a) of the Act, because: (a) The sales will be limited to a five year period and will be limited to 25 percent of Plan assets with the condition that no more than 5 percent of plan assets be invested in the Leases of any one customer; (b) the decision to purchase a Lease will be made by the Bank acting as independent fiduciary on behalf of the Plan; (c) perfected security interests will be filed on the equipment; and (d) the Employer will guarantee the payment of the Leases upon the lessee's default or termination of the Lease.

FOR FURTHER INFORMATION CONTACT: Mr. C. E. Beaver of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

Your Family Dentists, P.A. Profit Sharing and Retirement Plan (the Plan) Located in Forked River, New Jersey

(Application No. D–8234)

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406(a), (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) and (E) of the Code, shall not apply to the proposed sale (the Sale) by the Plan to Wilbert Veit, Jr., D.M.D. (Dr. Veit), a party in interest with respect to the Plan, of a collectible (the Collectible); provided that the Sale price be the greater of either: a) The Plan's aggregate cost of acquisition and holding of the Collectible; or b) the appraised fair market value of the Collectible as of the date of the Sale; and further provided that the other terms and conditions of the Sale are similar to those which the Plan might obtain in an arm's-length transaction with an unrelated party.

Summary of Facts and Representations

1. The Plan is a defined contribution plan with three participants and assets totalling $213,105.49 as of October 24, 1989. The trustees of the Plan are Dr. Veit and Hildegard Veit. Dr. Veit is the sole shareholder of Your Family Dentists, P.A., the Plan sponsor.

2. The Collectible consists of a one carat diamond (the Diamond), which the Plan purchased for a price of $15,700 on July 30, 1980 from Gemstone Trading Corporation (GTC) of New York City. The Applicants have represented that GTCV is an unrelated party.[6] The Plan has held the Diamond in a safe deposit box registered in the name of the Plan. The cost of such safe deposit box is $15. per annum. In addition, the Plan has expended periodic appraisal costs of $75 per appraisal in connection with the holding of the Diamond.

3. The Applicants have requested an exemption which will permit the Plan to sell the Diamond to Dr. Veit for cash in the amount equal to the greater of either: a) The Plan's aggregate cost of acquisition and holding the Diamond; or b) the appraised fair market value of the Diamond as of the date of the Sale. The Applicants represent that the Plan will pay no commissions, fees or other expenses in connection with the proposed Sale.

4. The Diamond was appraised on June 9, 1989 by Blase DeNatale (the Appraiser) of Family Jewelers in Forked River, New Jersey. The Applicants have represented that the Appraiser is an unrelated party. The Appraiser determined that as of June 9, 1989, the Diamond had a fair market value of $9,600.

5. Kendrick Mercer Company (KMC) in Santa Barbara, California has reviewed the proposed Sale by its report dated June 23, 1989. KMC has represented that it has more than one thousand clients nationwide and provides financial, practice management, investment and pension advice. KMC furthr represented that the fees derived from the Plan sponsor and Dr. Veit constitute less than 1/1000 of KMC's gross income.

KMC has determined that the proposed Sale is in the best interest of the Plan and its participants. KMC has opined that the proposed Sale does not violate sections 401, 404 and 415 of the Code. KMC has represented that maintaining the Diamond as a Plan asset presents the following hardships: (a) Special provision must be made for the safeguarding of the Diamond; (b) such safeguarding is costly to the Plan; (c) additional Plan administration costs are required for the appraisal of the Diamond; (d) the Diamond has decreased in value and is a poorly performing Plan asset; and (e) the Diamond is not readily marketable so that the Sale would provide additional liquidity for the Plan.

6. In summary, the applicant represents that the proposed transaction meets the criteria of section 408(a) of the Act because: (a) The proposed Sale will be a one-time transaction; (b) The proposed Sale will be consummated for cash; (c) The proposed Sale price will be the greater of either: i) the Plan's cost of acquisition and holding the Diamond; or ii) the appraised fair market value of the Diamond as of the date of the Sale; and (d) An independent review has determined that the proposed transaction is appropriate for and in the best interest of the Plan.

Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the Plan either paying less than or receiving more than fair market value such excess may be considered to be a contribution by the sponsoring employer to the plan and therefore must be examined under applicable provisions of the Internal Revenue Code, including section 401(a)(4), 404 and 415.

FOR FURTHER INFORMATION CONTACT: Mrs. B. S. Scott of the Department, telephone (202) 523–8883. (This is not a toll free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or the other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of the participants and beneficiaries of the plan; and

(3) The proposed exemptions, if granted, will be supplemental to, and

[6] It is represented that, at the time of the acquisition of the Diamond in 1980, the provisions of section 408(m) of the Code were met.

not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that which application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 24th day of January, 1990.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 90-1964 Filed 1-26-90; 8:45 am]

BILLING CODE 4510-29-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (90-09)]

NASA Advisory Council Exploration Task Force; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council Exploration Task Force.

DATES: March 6, 1990, 8:30 a.m. to 4:30 p.m.; and March 7, 1990, 8 a.m. to 3:30 p.m..

ADDRESSES: National Aeronautics and Space Administration, Lyndon B. Johnson Space Center, Building 1, Director's Conference Room, Houston, TX 77058.

FOR FURTHER INFORMATION CONTACT: Ms. Charlotte G. Kea, Code 2, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-9182.

SUPPLEMENTARY INFORMATION: the NASA Advisory Council Exploration Task Force was established to provide strategy guidelines for a comprehensive program of human exploration of the solar system; and report to the Council the results of its study. The Task Force is chaired by Robert M. Adams and is composed of nine members.

The meeting will be open to the public up to the seating capacity of the room, which is approximately 50 persons including Task Force members and other participants.

Type of Meeting: Open.

Agenda:

March 6, 1990

8:30 a.m.—Introductory Remarks.
8:30 a.m.—New Office of Aeronautics, Exploration, and Technology Program Status.
10:30 a.m.—Discussion of Draft Benefits Statement.
1 p.m.—Helium 3 Study Commercial Aspects.
3 p.m.—Neptune Encounter.
4:30 p.m.—Adjourn.

March 7, 1990

8 a.m.—Introductory Remarks.
8:30 a.m.—Budget Overview.
9 a.m.—Group Discussion.
1 p.m.—Facilities Tour.
3:30 p.m.—Adjourn.

Dated: January 23, 1990.

John W. Gaff,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 90-1920 Filed 1-26-90; 8:45 am]

BILLING CODE 7510-01-M

[Notice (90-10)]

NASA Advisory Council (NAC), Exploration Science Working Group (EXSWG); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Exploration Science Working Group.

EFFECTIVE DATES: February 13, 1990, 9 a.m. to 5:15 p.m., February 14, 1990, 9 a.m. to 5 p.m., and February 15, 1990, 9 a.m. to 12 Noon.

ADDRESS: Lunar and Planetary Institute, Hess Room, 3303 NASA Road 1, Houston, TX 77058.

FOR FURTHER INFORMATION CONTACT: Dr. Don Rea, Jet Propulsion Laboratory, 600 Maryland Avenue SW., Washington, DC 20024 (202/863-2824).

SUPPLEMENTARY INFORMATION: The Exploration Science Working Group reports to the Space Science and Applications Advisory Committee (SSAAC) and consults with and advises the NASA Office of Space Science and Applications (OSSA) on identifying and addressing science issues associated with human exploration missions to the Moon and Mars. The Group will meet to develop objectives for 1990, receive reports from NASA divisions, Space Studies Board, and the Space Council. The group is chaired by Dr. David C. Black and is composed of 20 members. The meeting will be open to the public up to the capacity of the room (approximately 30 people including the members of the Group).

Type of Meeting: Open.

Agenda:

Wednesday, February 13

9 a.m.—Welcoming Remarks.
9:15 a.m.—View from the Office of Aeronautics and Space Technology and the Office of Exploration.
10:30 a.m.—View from the Office of Space Science and Applications.
11:30 a.m.—View from the Space Studies Board.
1:30 p.m.—View from the Space Council.
2 p.m.—Review of Options.
3:30 p.m.—Comments on the Report of the 90-Day Study on Human Exploration of the Moon and Mars.
4:30 p.m.—Report on the Lunar Astronomy Workshop.
5:15 p.m.—Adjourn.

Thursday, February 14

9 a.m.—Life Sciences and the Human Exploration Initiative (HEI).
10:30 a.m.—Development and Discussion of EXSWG Objectives for Calendar Year 1990.
1:30 p.m.—Continue Future Planning Discussion.
3:15 p.m.—Working Group Discussions.
5 p.m.—Adjourn.

Friday, February 15

9 a.m.—Report from Working Groups.
10:30 a.m.—Summary and Action Items.
12 Noon—Adjourn.

Dated: January 23, 1990.

John W. Gaff,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 90-1921 Filed 1-26-90; 8:45 am]

BILLING CODE 7510-01-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Notice of Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Dance Advisory Panel (Dance Film/Video Section) to the National Council on the

Arts will be held on February 13–14, 1990 from 9 a.m.–9 p.m. and on February 15 from 9 a.m.–5 p.m. in room 414 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on February 15, 1990, from 2 p.m.–5 p.m. The topic for discussion will be policy issues.

The remaining portions of this meeting on February 13–14, 1990, from 9 a.m.–9 p.m. and on February 15 from 9 a.m.–2 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the Federal Register of February 13, 1980, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TTY 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5433.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 90–1955 Filed 1–26–90; 8:45 am]

BILLING CODE 7537–01–M

Performance Review Board

AGENCY: National Endowment for the Humanities.

ACTION: Notice.

SUMMARY: This notice announces membership in the National Endowment for the Humanities' Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Timothy G. Connelly, Director of Personnel, National Endowment for the Humanities, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

SUPPLEMENTARY INFORMATION: Pursuant to 5 U.S.C. 4314(c) the National Endowment for the Humanities (NEH) hereby revises the notice of membership published in the **Federal Register** on August 18, 1989.

The members of the Performance Review Board are: (1) Thomas Kingston, Assistant Chairman for Operations—Board Chairman; (2) Donald Gibson, Director, Division of General Programs (3) Guinevere Griest, Director of Fellowships and Seminars; (4) Marguerite Sullivan, Communications Policy Director; and Rex O. Arney, General Counsel now comprise the full Board Resources and Performance Review Board until December 31, 1990. Appointments of all former Board members are hereby rescinded, and the following individuals are appointed as the full membership of the new combined SES Executive Resources and Performance Review Board.

Lynne Cheney,

Chairperson.

[FR Doc. 90–1911 Filed 1–26–90; 8:45 am]

BILLING CODE 7536–01–M

NATIONAL SCIENCE FOUNDATION

Committee Management; Notice of Establishment

The Deputy Director of the National Science Foundation has determined that the establishment of the Advisory Review Panel for Conservation and Restoration Biology is necessary and in the public interest in connection with the performance of duties imposed upon the Director, National Science Foundation (NSF), and other applicable law. This determination follows consultation with the Committee Management Secretariat, General Services Administration.

Name of the Committee: Advisory Review Panel for Conservation and Restoration Biology.

Purpose: To provide advice on the merit of proposals submitted to NSF seeking financial support for research in conservation and restoration biology. Additionally, the panel may provide general advice to NFS Programs within the Biological, Behavoral, and Social Sciences Directorate that support research in conservation and restoration biology.

Balanced Membership Plan: Suggestions for panel membership will come from NSF science directorates, from eligible institutions and their associates, and from others interested in the fields of conservation and restoration biology. In seeking balanced membership NSF will consider individual qualifications, fields of expertise, and institutional affiliations (e.g., small, medium, or large, public and private, graduate and undergraduate, and minority institutions) including individuals from underrepresented groups and different geographic areas.

Responsible NSF Official: James L. Edwards, Acting Division Director, Division of Biotic Systems and Resources or Joann P. Roskoski, Program Manager, Special Projects, Biotic Systems and Resources, (202) 357–7332.

Dated: January 24, 1990.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 90–1883 Filed 1–26–90; 8:45 am]

BILLING CODE 7555–01–M

Advisory Panel for Conservation and Restoration Biology; Meeting

The National Science Foundation announces the following meeting:

Name: Advisory Panel for Conservation and Restoration Biology.

Date and time: February 12–14, 1990—8:30 a.m.–5 p.m. each day.

Place: Room 540 on February 12th and 14th; Room 543 on February 13th; National Science Foundation, 1800 G Street NW., Washington, DC 20550.

Type of meeting: Closed.

Contact person: Dr. Joann P. Roskoski, Program Manager, Special Projects, (202) 357–7332, Room 215, National Science Foundation, Washington, DC 20550.

Purpose of meeting: To provide advice and recommendations concerning support for research in conservation and restoration biology.

Agenda: Review and evaluation of research proposals and projects as part of the selection process of awards.

Reason for closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are within exemptions (4) and (6) of 5 U.S.C. 552b(c), Government in the Sunshine Act.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 90–1882 Filed 1–26–90; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Documents Containing Reporting or Recordkeeping Requirements; Office of Management and Budget Review

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the Office of Management and Budget review of information collection.

SUMMARY: The Nuclear Regulatory Commission (NRC) has recently submitted to the Office of Management and Budget (OMB) for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

1. Type of submission, new, revision, or extension: Extension.

2. The title of the information collection: NRC Form 241—Report of Proposed Activities in Non-Agreement States

3. The form number if applicable: NRC Form 241

4. How often the collection is required: The forms are submitted only as the specified uses occur.

5. Who will be required or asked to report: Any Agreement State licensee who engages in activities (use of radioactive byproduct material) in non-Agreement States under the general license in 10 CFR 150.20.

6. An estimate of the number of responses: 200

7. An estimate of the total number of hours needed to complete the requirement or request: 50 (15 minutes per response).

8. An indication of whether section 3504(h), Public Law 96–511 applies: Not applicable.

9. *Abstract:* NRC Form 241 is required to be filed with NRC by any Agreement State licensee who engages in activities (use of radioactive byproduct material) under the general license in 10 CFR 150.20. This notification permits NRC to schedule inspections of the activities to determine whether the activities are being conducted in accordance with requirements for protection of the public health and safety.

Copies of the submittal may be inspected or obtained for a fee from the NRC Public Document Room, 2120 L Street NW., Washington, DC.

Comments and questions may be directed by mail to the OMB reviewer: Nicolas B. Garcia, Paperwork Reduction Project (3150–0013), Office of Management and Budget, Washington, DC 20503.

Comments may also be communicated by telephone at (202) 395–3084.

The NRC Clearance officer is Brenda Jo. Shelton, (301) 492–8132.

Dated at Bethesda, Maryland, this 16th day of January 1990.

For the Nuclear Regulatory Commission.

Joyce A. Amenta,

Designated Senior Official for Information Resources Management.

[FR Doc. 90–1919 Filed 1–26–90; 8:45 am]

BILLING CODE 7590–01–M

POSTAL SERVICE

Proposed Changes to International Priority Airmail Service

AGENCY: Postal Service.

ACTION: Notice of Proposed International Rate Change.

SUMMARY: In an effort to be more responsive to the needs of the marketplace, the Postal Service proposes to expand its International Priority Airmail Service to enable mailers to select either a presort or non-presort option. Currently, mailers are required to meet certain presort mailing requirements as defined in the International Mail Manual 280. The non-presort service will waive the sortation requirements for mailers choosing this option in exchange for paying a higher price. The Postal Service proposes a rate for non-presorted mail of $8.50 a pound. The rate for presorted mail will increase slightly to $7.00 per pound.

DATE: Comments must be received on or before February 28, 1990.

ADDRESSES: Written comments should be directed to the General Manager, Rate Development Division, Office of Rates, Rates and Classification Department, U.S. Postal Service, Washington, DC 20260–5350. Copies of all written comments will be available for public inspection and photocopying between 9 a.m. and 4 p.m., Monday through Friday, in room 1140, 475 L'Enfant Plaza West, SW., Washington, DC 20260–5350.

FOR FURTHER INFORMATION CONTACT: Duane Redic [202] 268–2677.

SUPPLEMENTARY INFORMATION: International Priority Airmail (IPA) service is faster than regular international airmail service. It is available to bulk mailers of country destination sorted LC and AO mail from 47 designated metropolitan service areas to all countries, except Canada. In order to qualify for the service, a mailer must send a minimum of 200 pieces or 10 pounds of any combination of LC and AO mail matter. Items do not have to be the same size and weight to qualify. The rate for this service is currently $6.80 cents a pound.

Some mailers have indicated that while they are generally satisfied with International Priority Airmail Service, greater use of the service is often inhibited by having to meet the sortation requirement. In order to be responsive to the needs of the marketplace, the Postal Service proposes to provide both a presort and non-presort option to prospective mailers. As expected, mailers who presort will pay less because of the operational cost savings to the Postal Service resulting from handling mail already presorted to destination country. Non-presorted mail costs more to handle, and the proposed price reflects the increased operational costs to the Postal Service. The proposed presort rate is $7.00 per pound. The non-presort rate is $8.50 per pound.

Mailers who take advantage of the non-presort category should be aware that the additional time required to process non-presorted mail may result in some instances in slightly slower service than that provided for presorted IPA mail.

With the exception of the waiver of the presort requirements for the non-presort option and the new rates, the mailing regulations as set forth in the International Mail Manual 280 still apply.

The International Mail Manual is incorporated by reference in the Code of Federal Regulations, 39 CFR 20.1. Changes to the manual and Publication 507 (International Priority Airmail Guidelines) concerning the proposed new category will be made in due course.

Accordingly, although 39 U.S.C. 407 does not require advance notice and the opportunity for submission of comments on changes in international rates and the Postal Service is exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C. 553] regarding proposed rulemaking by 39 U.S.C. 410 (a), the Postal Service invites interested persons to submit comments on the proposed changes for International Priority Airmail.

Fred Eggleston,

Assistant General Counsel, Legislative Division.

INTERNATIONAL PRIORITY AIRMAIL

	Presort service	Non-presort service
Pound rate	[1] $7.00	$8.50

[1] Current rate is $6.80.

[FR Doc. 90–1914 Filed 1–26–90; 8:45 am]

BILLING CODE 7710–12–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Reports, Forms, and Recordkeeping Requirements; Submittals to OMB on January 19, 1990

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

ACTION: Notice.

SUMMARY: This notice lists those forms, reports, and recordkeeping requirements imposed upon the public which were transmitted by the Department of Transportation on January 19, 1990, to the Office of Management and Budget (OMB) for its approval in accordance with the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35).

FOR FURTHER INFORMATION CONTACT: John Chandler, Annette Wilson, or Cordelia Shepherd, Information Requirements Division, M–34, Office of the Secretary of Transportation, 400 Seventh Street SW., Washington, DC 20590, telephone, (202) 366–4735, or Gary Waxman or Edward Clarke, Office of Management and Budget, New Executive Office Building, room 3228, Washington, DC 20503, (202) 395–7340.

SUPPLEMENTARY INFORMATION:

Background

Section 3507 of Title 44 of the United States Code, as adopted by the Paperwork Reduction Act of 1980, requires that agencies prepare a notice for publication in the **Federal Register**, listing those information collection requests submitted to the Office of Management and Budget (OMB) for initial, approval, or for renewal under that Act. OMB reviews and approves agency submittals in accordance with criteria set forth in that Act. In carrying out its responsibilities, OMB also considers public comments on the proposed forms, reporting and recordkeeping requirements. OMB approval of an information collection requirement must be renewed at least once every three years.

Information Availability and Comments

Copies of the DOT information collection requests submitted to OMB may be obtained from the DOT officials listed in the "For Further Information Contact" paragraph set forth above. Comments on the requests should be forwarded, as quickly as possible, directly to the OMB officials listed in the "For Further Information Contact" paragraph set forth above. If you anticipate submitting substantive comments, but find that more than 10 days from the date of publication are needed to prepare them, please notify the OMB officials of your intent immediately.

Items Submitted for Review by OMB

The following information collection requests were submitted to OMB on January 19, 1990.

DOT No.: 3297.
OMB No.: 2127–0050.
Administration: National Highway Traffic Safety Administration.
Title: 49 CFR part 574, Tire Identification and Recordkeeping.
Need for Information: Manufacturers can directly notify first purchasers of new tires in case of tire recall.
Proposed Use of Information: This regulation requires the tire manufacturers to collect and record the names and addresses of the first purchasers of new tires, so that the manufacturers can directly notify those persons if the tires are recalled.
Frequency: On occasion.
Burden Estimate: 747,500 hours.
Respondents: Business and small businesses.
Form(s): None.
Average Burden Hours Per Respondent: .75 minutes.

DOT No.: 3298.
OMB No.: New.
Administration: Federal Aviation Administration.
Title: 1990 Rotorcraft Activity Survey.
Need for Information: The information is needed to provide data on rotorcraft activity for better operational statistics.
Proposed Use of Information: The information collected will be used in the following ways: Flight hours will be used to calculate accident rates, to compare safety over time, and compare safety performance among different aircraft types. Flight hours will also be used to assess the impact of rotorcraft on the National Airspace System. The hours flown data will also be used in assessing the service difficulties occurring on various aircraft makes and models. Lifetime airframe hours are used in aircraft fatigue studies for determining mean time failures and establishing aircraft maintenance cycles. The state in which aircraft are based is used to determine the geographical dispersion of the fleet and to estimate activity by state. Activity by state is also required to support the FAA, and state and local governments for airport master planning.
Frequency: This is a one-time survey.
Burden Estimate: 3333.
Respondents: Rotocraft owners and operators.
Form(s): 1800–XX.
Average Burden Hours Per Respondent: 20 minutes.

DOT No.: 3299.
OMB No.: 2125–0534.
Administration: Federal Highway Administration.
Title: Application for Bridges on Dam Projects.
Need for Information: To meet Federal Highway Administration requirements contained in 23 CFR 630 subpart H.
Proposed Use of Information: For the Federal Highway Administration to ensure that bridges across Federal Dams are built in conformance with current highway and safety standards, and that construction employs the most economical construction alternative.
Frequency: On occasion.
Total Estimated Burden: 50 hours.
Respondents: State and local governments.
Form(s): None.
Average Burden Hours Per Response: 50 hours.

DOT No.: 3300.
OMB No.: 2125–0027.
Administration: Federal Highway Administration.
Title: Speed Monitoring Program Procedural Manual (Annual and Quarterly Vehicular Speed Data Reporting Requirements).
Need for Information: For each State to annually certify the speed limit enforcement that must include a figure for the percent of vehicles exceeding 55 miles per hour.
Proposed Use of Information: For the FHWA to judge the effectiveness of the State's enforcement program.
Frequency: Quarterly/annually.
Total Estimated Burden: 49,470 hours.
Respondents: State highway agencies.
Form(s): None.
Average Burden Hours Per Respondent: 194 hours.

DOT No: 3301.
OMB No: 2125–0502
Administration: Federal Highway Administration.
Title: Single Audit Requirements.
Need for Information: For FHWA to ensure that State highway agencies are in compliance with Federal requirements under the Single Audit Act of 1984.
Proposed Use of Information: For FHWA to support or deny State

highway agencies reimbursement claims.
Frequency: Annually.
Total Estimated Burden: 65 hours.
Respondents: State highway agencies.
Form(s): Questionaire.
Average Burden Hours Per Respondent: 12 minutes.

DOT No: 3302.
OMB No: 2120–0518.
Administration: Federal Aviation Administration.
Title: Special Federal Aviation Regulation—Special Flight Authorization for Noise Restricted Aircraft.
Need for Information: The information is needed by the FAA to issue special flight authorizations to allow Stage 1 aircraft to operate within the United States for the purpose of being huskitted or scrapped to obtain spare parts for U.S. military aircraft.
Proposed Use of Information: This information will be used by the FAA to issue special flight authorization for operations of Stage 1 aircraft at U.S. airports.
Frequency: On occasion.
Burden Estimated: 75 hours.
Respondents: Businesses.
Form(s): None.
Average Burden Hours Per Respondent: 1 hour and 30 minutes.

DOT No: 3303.
OMB No: 2120–0020.
Administration: Federal Aviation Administration.
Title: Maintenance, Preventive Maintenance, Rebuilding and Alteration FRA 43 FAA Form 337.
Need for Information: FAR 43 prescribes rules governing maintenance, rebuilding and alteration of aircraft, and aircraft components is performed by qualified persons and at proper intervals.
Proposed Use of Information: The FAA will use the information to ensure that the maintenance, rebuilding and alteration of aircraft, and aircraft components is performed by qualified persons and at proper intervals.
Frequency: On occasion.
Burden Estimate: 6,015,887 hours annually.
Respondents: Individuals and businesses.
Form(s): FAA Form 337.
Average Burden Hours Per Respondent: 30 minutes.

DOT No: 3304
OMB No: 2106–0018
Administration: Department of Transportation.
Title: Reporting and Information requirements Under the U.S. Canada Nonscheduled Air Services Agreement.
Need for Information: Required pursuant to the U.S. Canada Nonscheduled Air Services Agreement (CAB Order 82–8–132).
Frequency: Monthly.
Burden Estimate: 285.
Respondents: Canadian and U.S. airlines.
Form(s): None.
Average Burden Hours Per Respondent: 16½ minutes.

DOT No: 3305.
OMB No: New.
Administration: Urban Mass Transportation Administration.
Title: Bus Testing Requirements.
Need for Information: The information is needed to provide performance information on new bus models.
Proposed Use of Information: The information will be used by transit agencies in their lease and purchase decisions regarding new bus models.
Frequency: On occasion.
Burden Estimate: 120 hours.
Respondents: Business or other for-profit organizations.
Form(s): None.
Average Burden Hours Per Respondent: 6 hours.

DOT No: 3306
OMB No: 2115–0078.
Administration: U.S. Coast Guard.
Title: Operations Manual and Amendments.
Need for Information: This information collection requirement is needed to ensure that proper procedures are established and documented for transferring oil and other hazardous materials.
Proposed Use of Information: The information is used to ensure that adequate pollution prevention measures are in place. Once the manual is approved, it becomes a guide for the persons-in-charge of transfer operations.
Frequency: On occasion.
Burden Estimate: 14,586.
Respondents: Owners/operators of marine bulk oil or hazardous materials facilities.
Form(s): None.
Average Burden Hours Per Respondent: 21.4 hours per reporting and 5 minutes per recordkeeping burden.

DOT No: 3307
OMB No: 2115–0506.
Administration: U.S. Coast Guard.
Title: Declaration of Inspection.
Need for Information: This information collection requirement is needed to ensure compliance with 33 USC 1221, 2225 and 46 USC 3703. It provides a method for ensuring that specified procedures are followed and certain conditions are maintained which prevent pollution of U.S. waters or damage to vessels and facilities.
Proposed Use of Information: Coast Guard uses this information to help prevent oil and hazardous materials spills, and to prevent damage to a facility or vessel. It is further used to determine culpability in spill and accident investigations.
Frequency: On occasion.
Burden Estimate: 60,800.
Respondents: Owners/operators of marine bulk oil or hazardous materials facility or vessel.
Form(s): None.
Average Burden Hours Per Respondent: 7 hours and 36 minutes.

DOT No: 3308.
OMB No: 2138–0017.
Administration: Research and Special Programs Administration.
Title: Passenger Origin and Destination Survey Report.
Need for Information: DOT needs a data base which shows the true origin and destination of air travelers.
Proposed Use of Information: The O & D data base is used in administering DOT's international air transportation program, analyzing fitness cases, administering airport programs.
Frequency: Quarterly.
Total Estimated Burden: 29016.
Respondents: Large certificated route air carriers.
Form(s): RSPA Form 2787.
Average Burden Hours Per Respondent: 234 hours.

DOT No: 3309.
OMB No: 2127–0535.
Administration: National Highway Traffic Safety Administration.
Title: Production Reporting System for Automatic Occupant Restraint Compliance (49 CFR part 585).
Need for Information: This standard specifies performance requirements for the protections of vehicle occupants in crashes.
Proposed Use of Information: FMVSS No. 208 requires motor vehicle manufacturers to comply with a 2 year phase-in schedule introducing air bags or other automatic restraints to light trucks and multipurpose passenger vehicles.
Frequency: Annually for 2 years.
Burden Estimate: 828.
Respondents: Manufacturers.
Form(s): None.
Average Burden Hours Per Respondent: 24 hours.

DOT No: 3310
OMB No: 2120–0067.
Administration: Federal Aviation Administration.

Title: Air Taxi and Commercial Operator Airport Activity Survey.
Need for Information: The enplanement data collected from air taxi and commercial operators are required for the calculation of air carrier airport sponsor apportionments as specified by the Airport and Airway Improvement Act of 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100–223).
Proposed Use of Information: The data collected on FAA Form 1800–31 will be used as an input source in determining whether an airport is eligible for funds and for calculating air carrier airport sponsor apportionments.
Frequency: Annually.
Burden Estimate: 2,002 total hours annually.
Respondents: Air taxi/commercial operators which are subject to the passenger transportation tax.
Form(s): FAA Form 1800–31.
Average Burden Hours Per Respondent: 1 hour and 18 minutes.

DOT No: 3311.
OMB No: 2127–0510.
Administration: National Highway Traffic Safety Administration.
Title: Consolidated Vehicle Identification Number Requirements and Federal Motor Vehicle Theft Prevention Standard (49 CFR 517.115, and parts 541, 565, and 567).
Need for Information: To identify motor vehicles manufactured/not manufactured in the USA that are registered within a state.
Proposed Use of Information: These standards specify physical requirements for the VIN, its installation, format, and content to simplify information retrieval, and increase the efficiency of recall campaigns. Manufacturers are required to label trucks and multipurpose passenger vehicles to identify those vehicles equipped with automatic occupant crash protection during the two-year "phase-in" period.
Frequency: On occasion.
Burden Estimate: 376,592 hours.
Respondents: Manufacturers.
Form(s): None.
Average Burden Hours Per Respondent: 2 minutes.

DOT No: 3312.
OMB No: 2105–0517.
Administration: Office of the Secretary.
Title: Transportation Acquisition Regulation (TAR).
Need for Information: To allow DOT to establish contracts and monitor contractor compliance.
Proposed Use of Information: Same as need.
Frequency: On occasion.
Burden Estimate: 84,110
Respondents: 5,170.
Form(s): TAR.
Average Burden Hours Per Respondent: 16 hours and 16 minutes.

Issued in Washington, DC on January 19, 1990.

Richard B. Chapman,

Acting Director of Information, Resource Management.

[FR Doc. 90–1838 Filed 1–26–90; 8:45 am]

BILLING CODE 4910–62

Coast Guard

[CGD 90–004]

Meeting of the Subcommittee on Marine Occupational Safety and Health, Chemical Transportation Advisory Committee

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: Notice is given here of a meeting of the Subcommittee on Marine Occupational Safety and Health of the Chemical Transportation Advisory Committee (CTAC). The meeting will be held on Wednesday and Thursday, February 14 and 15, 1990, in room 6246, U.S. Department of Transportation, Nassif Building, 400 7th Street SW., Washington, DC. The meeting is scheduled to begin at 9 a.m. and end by 3:30 p.m. on both days. The subject of the meeting will be development of recommendations to the Coast Guard for comprehensive industrial hygiene programs for marine hazardous chemical workers.

During the Wednesday session, the Subcommittee will meet briefly before dividing into working groups (recognition and evaluation of maritime hazards; control of exposures; training; and program audits and surveys). The purpose of the working groups sessions will be to review and propose modifications to the draft recommendations developed during the October 1989 meeting. On Thursday the Subcommittee will reconvene to consider the proposed changes developed by the working groups.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Joseph Ocken, U.S. Coast Guard Headquarters (G–MTH–1), 2100 Second Street SW., Washington, DC 20593, (202) 267–1577.

Dated: January 22, 1990.

M. J. Schiro,

Captain, U.S. Coast Guard, Acting Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 90–1851 Filed 1–26–90; 8:45 am]

BILLING CODE 4910–14–M

[CGD 90–003]

Lower Mississippi River Waterway Safety Advisory Committee; VTS Subcommittee Meetings

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. app. I) notice is hereby given of two meetings of the VTS Subcommittee of the Lower Mississippi River Waterway Safety Advisory Committee. The first meeting will be held on Thursday, February 22, 1990 at the Crescent River Port Pilots' Office, 409 Belle Chasse Highway South, Belle Chasse, Louisiana. The meeting is scheduled to begin at 9 a.m. A second meeting will be held on Thursday, March 8, 1990 at the same time and place. The agenda for the meeting on February 22, 1990 consists of the following items:

1. Call to order.
2. Renaming of the Aids to Navigation Subcommittee to VTS Subcommittee.
3. Recommendations for the New Orleans Vessel Traffic Service.
4. Adjournment.

The agenda for the meeting on March 8, 1990 consists of the following items:

1. Call to order.
2. Discussion of previous recommendations.
3. Adjournment.

Attendance to both meetings is open to the public. Members of the public may present written or oral statements at the meetings.

Additional information may be obtained from Commander Gary A. Bird, USCG, Executive Secretary, Lower Mississippi River Waterway Safety Advisory Committee, c/o Commander, Eighth Coast Guard District (oan), Room 1209, Hale Boggs Federal Building, 501 Magazine Street, New Orleans, LA 70130–3396, telephone number (504) 589–3074.

Dated: January 17, 1990.

W.F. Merlin,

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

[FR Doc. 90–1850 Filed 1–26–90; 8:45 am]

BILLING CODE 4910–14–M

Federal Railroad Administration

[RSGM–88–29]

Public Hearing—Herzog Contracting Corporation

The Herzog Contracting Corporation (Herzog) has petitioned the Federal Railroad Administration (FRA) seeking a permanent waiver of compliance from certain provisions of the Safety Glazing

Standards (49 CFR part 223) for its mobile railcar mover equipment, including the Switchmaster Model 10,000 and Trackmobile Model 95TM. Herzog is a railroad construction company contracted by various railroads, including CSX Transportation, for maintenance-of-way projects. This proceeding is identified as FRA Waiver Petition Docket Number RSGM–88–29.

After examining the petitioner's proposal and the available facts, the FRA has determined that a public hearing is necessary before a final decision is made in this petition.

A public hearing, which was set for 10 a.m. on December 12, 1989, was postponed at the request of the petitioner.

Accordingly, a public hearing has been reset for 10 a.m. on February 27, 1990, in room 4234 of the Nassif Building located at 400 7th Street SW., in Washington, DC.

The hearing will be an informal one and will be conducted in accordance with Rule 25 of the FRA Rules of Practice (49 CFR section 211.25), by a representative designated by the FRA.

The hearing will be a nonadversary proceeding; therefore, there will be no cross-examination of persons presenting statements, although limited questions will be permitted. The FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make brief rebuttal statements will be given the opportunity to do so in the same order in which they made their initial statements. Additional procedures, if necessary for the conduct of the hearing, will be announced at the hearing.

Issued in Washington, DC, on January 18, 1990.

J.W. Walsh,

Associate Administrator for Safety.

[FR Doc. 90–1839 Filed 1–26–90; 8:45 am]

BILLING CODE 4910–06–M

[General Docket Number H–89–1]

National Railroad Passenger Corp.

The National Railroad Passenger Corporation (Amtrak) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance with the requirements of 49 CFR § 213.57(b). Amtrak seeks the waiver to operate a test train on Track 3 of the Northeast Corridor between County Interlocking, at milepost 32.8, and milepost 54. This track segment is part of Amtrak's main track between Philadelphia and New York and is an element of the railroad's New York Division in New Jersey.

The stated purpose of the test is to collect data that will be used in a stability analysis of certain of the petitioner's equipment—Horizon and cab control cars—when operated at test speeds of up to 130 mph. Certain parameters of vehicle response will be quantified during the test runs through the use of appropriate instrumentation mounted in various vehicles of the test train consist. Revenue passenger trains consisting of AEM–7 electric locomotives and Amfleet-type cars are currently authorized to operate over the described section of track at 125 mph.

FRA is seeking information and comments of all interested parties on the subject of this test. FRA will take these comments into account in considering this petition. All interested parties are invited to participate in this proceeding through written submissions. FRA does not anticipate scheduling an opportunity for oral comment because the facts do not appear to warrant it. An opportunity to present oral comments will be provided, however, if the party submits a written request for hearing that demonstrates that his or her position cannot be properly represented by written statements.

All written communications concerning this test should reference "FRA General Docket No. H–89–1" and should be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, FRA, 400 7th Street SW., Washington, DC 20590.

Comments recieved by March 14, 1990, will be considered in this proceeding and in evaluating any future tests of a similar nature. All comments received will be available for examination by interested persons at any time during regular working hours (9 a.m.–5 p.m.) in Room 8201, Nassif Building, 400 7th Street SW., Washington, DC 20590.

Issued in Washington, DC on January 18, 1990.

J.W. Walsh,

Associate Administrator for Safety.

[FR Doc. 90 Filed 1–26–90; 8:45 am]

BILLING CODE 4910–06–M

Petition for a Waiver of Compliance

In accordance with 49 CFR 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance with a requirement of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provision involved, and the nature of the relief being requested.

National Railroad Passenger Corporation

Waiver Petition Docket Number LI–89–9

The National Railroad Passenger Corporation (Amtrak) requests a waiver of compliance with a provision of the Locomotive Safety Standards (49 CFR part 229) for VIA Rail Canada, Incorporated (VIA Rail), locomotives used in a joint passenger train operation between Toronto, Ontario, Canada, and Chicago, Illinois.

Amtrak is seeking a waiver of compliance for VIA Rail locomotives from the provision of § 229.131 which requires that, "Except for MU locomotives, each locomotive shall be equipped with operable sanders that will deposit sand on each rail in front of the first power operated wheel set in the direction of movement."

On September 22, 1989, the Canadian Minister of Transport granted VIA Rail an exemption from section 28 of the Canadian Railway Motive Power Equipment Regulations General Order 0–21. Section 28 states that, "Suitable sanding apparatus shall be located on all self propelled motive power equipment and on other units of rolling stock capable of both heading and controlling train operation and shall be securely fastened and arranged to deliver the sand on the rails in front of the wheel contact." The exemption was granted on the grounds that "[t]ests conducted by VIA Rail have demonstrated that the use of sand does not appreciably effect emergency train stopping distances * * *."

Amtrak stated that VIA Rail will remove all the sanding equipment from its locomotives. Also, there is a continuing need to use the VIA Rail locomotives in the Amtrak—VIA Rail service between Toronto and Chicago because of restraints on Amtrak's equipment. Amtrak is seeking this waiver to permit it to use VIA Rail locomotives in the United States without sanders required by § 229.131.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with this proceeding since the facts do not appear to warrant a hearing. If any intersted party desires an opportunity for oral comment, they should notify FRA, before the end of the comment period and specify the basis for their request.

All communications concerning this proceeding should identify the appropriate docket number (e.g., Waiver Petition Docket Number LI–89–9) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif building, 400 Seventh Street SW., Washington, DC 20590. Communications received before March 14, 1990 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning this proceeding are available for examination during regular business hours (9 a.m.–5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street SW., Washington, DC 20590.

Issued in Washington, DC January 18, 1990.

J.W. Walsh,

Associate Administrator for Safety.

[FR Doc. 90–1841 Filed 1–26–90; 8:45 am]

BILLING CODE 4910–06–M

Maritime Administration

[Docket No. M–012]

Identification of American Market Capacity for Marine Hull Insurance

On June 2, 1988, the Maritime Administration (MARAD) published in the **Federal Register** a final rule to govern the placement of marine hull insurance on subsidized and Title XI program vessels (53 FR 23112). The rule was effective July 20, 1988. Section 249.9 of the rule requires that the American market be given an opportunity to compete for the placement of marine hull insurance on each vessel. If less than 50% of the placement is made in the American market, the owner or broker must certify that 50% or 75% of the American market (measured in terms of capacity) were offered the risk.

This procedure requires MARAD to identify all qualified American underwriters and their respective capacities, and to make such information available to vessel owners and brokers. MARAD published an initial notice soliciting this information in the **Federal Register** on August 2, 1988, and the information received was compiled and published in the **Federal Register** on November 16, 1988. The purpose of this notice is to up-date such information from American underwriters and distribute it to owners and brokers.

All underwriters licensed to do business in a state, and having at least a B Security rating as published in the latest edition of A.M. Best's Insurance Reports, and who wish to be included in MARAD's list of American market capacity must advise MARAD of their per risk capacity to write marine hull insurance. They must state separately, per risk capacity for blue water and non blue water vessels. In addition, if there are any other capacity limits which only apply to certain types of vessel/rigs, such limits must also be stated separately.

For purposes of determining American market capacity, the American Hull Syndicate and its member companies are to be treated separately, provided they remain able to write independently. Therefore, MARAD expects that the Syndicate members will individually submit their capacity to write independently.

Responses to this notice must be sent to the Secretary, Maritime Administration, Room 7300, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Responses must be received by close of business on March 15, 1990.

Dated: January 22, 1990.

James E. Saari,

Secretary, Maritime Administration.

[FR Doc. 90–1844 Filed 1–26–90; 8:45 am]

BILLING CODE 4910–81–M

National Highway Traffic Safety Administration

[Docket No. IP 89–10; Notice 2]

Goodyear Tire & Rubber Co.; Receipt of Petition for Determination of Inconsequential Noncompliance

This notice grants the petition by the Goodyear Tire & Rubber Company (Goodyear), of Akron, Ohio, to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) for apparent noncompliance with 49 CFR 571.109, Federal Motor Vehicle Safety Standard No. 109, "New Pneumatic Tires". The basis of the petition was that the noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of the petition was published on November 20, 1989, and an opportunity afforded for comment (54 FR 480054).

Paragraph S4.3.5 of Federal Motor Vehicle Safety Standard No. 109, requires the maximum inflation pressure to be molded into or onto both sidewalls, in letters and numerals not less than ½ inch high. During the period September 1987 through October 1989, Goodyear manufactured and shipped 280,000 T105/70D14 Convenience Spare tires that do not comply with FMVSS No. 109. These tires were marked with the correct information but the lettering height was .394 inch (10mm) instead of the required ½ inch. Goodyear supports its petition with the following:

(1) The lettering is legible and prominent and while it is .10 less in height than the required minimum for this particular information, it is still five times larger than the .078 inch minimum height for other information required to be labelled on the sidewall of tires.

(2) The stamping was correct except for its size, and the stamping has no effect on the tire performance or safety.

One comment was received on the petition, from Robert Rylberg, who identified himself as an "Overburdened Taxpayer". Mr. Rylberg had no substantive remarks but commented that "The money, time, and effort utilized by our government to investigate, publish, and decide on .1 inch of height of lettering for maximum PSI on a tire, is an affront to the hardworking TAXPAYERS of this nation".

The process underlying Mr. Rylberg's objection originated in an act of Congress in 1974. It represents a balancing of the safety interests of the consumer, and the economic interests of the manufacturer. Before 1974, the obligation of a manufacturer to notify consumers and to remedy vehicles and equipment items that failed to comply with a Federal motor vehicle safety standard or contained a defect relating to motor vehicle safety was unclear. Under the revisions adopted by Congress that year, the obligations to notify and remedy were made more definite, with the safety benefits accruing to the public. However, responding to the concern of the manufacturers that they might be forced to notify and remedy in every instance of a noncompliance or defect, at times when the noncompliances involved minor failures such as labeling, Congress provided a procedure by which manufacturers could petition NHSTA for relief from the obligation to notify and remedy, upon a finding by NHSTA that the noncompliance was inconsequential as it relates to motor vehicle safety.

In the intervening 15 years the agency has both granted and denied inconsequentiality petitions. It has tended to grant those regarding labeling, and to deny those concerning performance. In the present instance, in the absence of the procedure, Goodyear would have to notify and remedy in some manner a labeling noncompliance occurring on the sidewall of a tire. The intent of Congress was realized by the

process that affords Goodyear the opportunity to inform the agency of the noncompliance and to submit a petition for relief, supported by appropriate arguments. The agency, in accordance with statutory and regulatory requirements, published a notice informing the public of the noncompliance, and affording an opportunity to comment on Goodyear's arguments. NHTSA then proceeded to a consideration of these arguments and has determined the appropriate disposition of the petition, as set forth below, in a notice that represents the final stage of the statutory process.

In this case, the information provided by the labeling is the maximum inflation pressure of the tire. Because of the safety importance of not exceeding the maximum pressure, it is required to be provided in a size that is "five times larger", to use Goodyear's phrase, than the other information on the sidewall. Therefore, the agency has discounted Goodyear's argument comparing relative sizes. Since the information is correctly stated, the focus of attention is whether the failure to meet the height by .1 inch affects the legibility of the information in a manner that has a consequential effect upon safety. The agency has concluded that it does not. Although the information provided by lettering that complies in size with the standard's requirements will be legible at a greater distance from the tire, the undersized lettering should be clearly legible within a distance of four feet from the tire. The eye of a person inflating the tire may well be closer than this when inflation pressure is applied to the tire.

For the reasons stated above, the agency hereby finds that petitioner has met its burden of persuasion that the noncompliance herein described is inconsequential as it relates to motor vehicle safety, and its petition is hereby granted. (15 U.S.C. 1417); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8).

Issued: January 23, 1990.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 90-1849 Filed 1-26-90; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[No. 90-161]

Order of Suspension of Trading

Date: January 22, 1990.

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Order of suspension of trading.

SUMMARY: The Office of Thrift Supervision ("Office") announced, pursuant to section 12(k) of the Securities Exchange Act of 1934 ("1934 Act"), the temporary suspension of all trading in the securities of Centrust Bank, A State Savings Bank, Miami, Florida ("Centrust"), a state-chartered savings association, with its principal executive offices located at One Centrust Financial Center, Miami, Florida, for the five day trading-day period commencing at 9 a.m. (EST) on January 23, 1990 and terminating at midnight (EST) on January 29, 1990. CenTrust's securities are traded on the American Stock Exchange and the Midwest Stock Exchange.

EFFECTIVE DATE: January 22, 1990.

SUPPLEMENTARY INFORMATION: The suspension of trading, which occurred after the January 16, 1990 filing of CenTrust's Annual Report on Form 10-K for the fiscal year ended September 30, 1989 ("1989 Form 10-K"), was ordered because of the Office's grave concerns regarding CenTrust's continuing failure to provide full, fair and accurate disclosure in its 1934 Act reports. Specifically, despite repeated directives by the Office that CenTrust correct its accounting treatment of certain activities, report significant losses, properly characterize its current financial condition and continued economic viability, disclose the magnitude of the disputes between the Office and CenTrust and disclose the impact on CenTrust and on its shareholders of complying with the Office's directives, CenTrust has consistently refused to provide this material information to its shareholders and to the public trading market. As a result of these failures, the Office believes it is in the public interest to suspend trading in the securities of CenTrust, for the protection of investors.

The 1989 Form 10-K does not presently contain the required three full years of audited financial statements. Further, CenTrust continues to present its financial statements in a manner inconsistent with generally accepted accounting principles ("GAAP"), thereby failing to recognize losses that cumulatively would eliminate its reported shareholders' equity. For instance, CenTrust continues to characterize the bulk of its portfolio of below investment grade corporate debt securities as "commercial loans" rather than as securities; it improperly characterizes certain securities that are actively traded as securities held for investment; it improperly and without documentation or actions sufficient to justify such a presentation, carries both types of securities on its books at cost, thereby failing to realize significant losses, all in contravention of GAAP. These deficiencies are clearly material. If properly reported, CenTrust would be insolvent. CenTrust also continues to publicly obfuscate its true financial condition, failing to apprise its shareholders of the dimensions of these issues and their impact on shareholders and on the association. As a result of all of the foregoing, CenTrust's 1934 Act reports, including the 1989 Form 10-K are materially deficient, false and misleading.

The Office cautions broker-dealers, shareholders and prospective purchasers that they should carefully consider the foregoing information along with all other currently available information and any information subsequently issued by CenTrust. Furthermore, brokers and dealers should be alert to the fact that, pursuant to Rule 15c2-11 under the 1934 Act, at the termination of the trading suspension, no quotation may be entered unless and until they have strictly complied with all of the provisions of such rule. If any broker or dealer is uncertain as to what is required by Rule 15c2-11, he should refrain from entering quotations relating to the securities in question until such time as he has familiarized himself with such rule and is certain that all of its provisions have been met.

By the Office of Thrift Supervision.

M. Danny Wall,

Director.

[FR Doc. 90-1880 Filed 1-26-90; 8:45 am]

BILLING CODE 6720-01-M

DEPARTMENT OF VETERANS AFFAIRS

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information: (1) The agency responsible for sponsoring the information collection; (2) the title of the information collection; (3) the Department form number(s), if applicable; (4) a description of the need and its use; (5) frequency of the information collection, if applicable; (6)

who will be required or asked to respond; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to complete the information collection; and (9) an indication of whether section 3504(h) of Public Law 96–511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Veterans Benefits Administration, (203C), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420 (202) 233–2744.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW, Washington, DC 20503, (202) 395–7316. Please do not send applications for benefits to the above addresses.

DATES: Comments on the information collection should be directed to the OMB Desk Officer February 28, 1990.

By direction of the Secretary.

Frank E. Lalley,

Director, Office of Information Management and Statistics.

Extension

1. Veterans Benefits Administration
2. Notice of Past Due Payment
3. VA Form 29–389e
4. The form is used by veterans as a temporary measure to restore continuous protection until a final decision is made on their application for benefits. The information on the form is required by law (38 CFR 6.79 & 8.23)
5. On occasion
6. Individuals and households
7. 1,936 responses
8. ¼ hour
9. Not applicable.

[FR Doc. 90–1889 Filed 1–26–90; 8:45 am]

BILLING CODE 8320–01–M

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The agency responsible for sponsoring the information collection; (2) the title of the information collection; (3) the Department form number(s), if applicable; (4) a description of the need and its use; (5) frequency of the information collection, if applicable; (6) who will be required or asked to respond; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to complete the information collection; and (9) an indication of whether section 3504(h) of Public Law 96–511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Veterans Benefits Administration, (203C), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233–2744.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW, Washington, DC 20503, (202) 395–7316. Please do not send applications for benefits to the above addressees.

DATES: Comments on the information collection should be directed to the OMB Desk Officer February 28, 1990.

By direction of the Secretary.

Frank E. Lalley,

Director, Office of Information Management and Statistics.

Extension

1. Veterans Benefits Administration
2. Loan Service Report
3. VA Form 26–6808
4. The use of this form will allow VA to service delinquent guaranteed and insured home loans, loans sold under 38 CFR 36.4600, and portfolio loans to determine whether relief measures can be extended to assist the obligor in retaining the property as provided for in 38 U.S.C. 1820(a)(2) and 1832
5. On occasion
6. Individuals and households
7. 78,000 responses
8. 25 minutes
9. Not applicable.

[FR Doc. 90–1890 Filed 1–26–90; 8:45 am]

BILLING CODE 8320–01–M

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information: (1) The agency responsible for sponsoring the information collection; (2) the title of the information collection; (3) the Department form number(s), if applicable; (4) a description of the need and its use; (5) frequency of the information collection, if applicable; (6) who will be required or asked to respond; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to complete the information collection; and (9) an indication of whether section 3504(h) of Public Law 96–511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Veterans Benefits Administration, (203C), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420 (202) 233–2744.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW, Washington, DC 20503, (202) 395–7316. Please do not send applications for benefits to the above addresses.

DATE: Comments on the information collection should be directed to the OMB Desk Officer by February 28, 1990.

By direction of the Secretary.

Frank E. Lalley,

Director, Office of Information Management and Statistics.

Revision

1. Veterans Benefits Administration
2. Supplemental Disability Report
3. VA Form Letter 29–30A
4. The form letter is used by the insured to supply information required to process a claim for disability benefits. The form letter is used to determine the individual's eligibility benefits (38 U.S.C. 712, 715, 742 and 748)
5. On occasion
6. Individuals and households
7. 6,570 responses
8. 1/12 hour
9. Not applicable.

[FR Doc. 90–1891 Filed 1–26–90; 8:45 am]

BILLING CODE 8320–01–M

Summary of Legal Interpretation of the General Counsel-Precedent Opinion 19–89, Applicability of Statutory Limitation on Attorneys' Fees at 38 U.S.C. 3404 and 3405 to Administrative Debt-Collection Matters

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of a legal interpretation issued by the Department's General Counsel involving veterans' benefits under laws adminstereed by VA. This interpretation is consisdered precedential by VA and will be followed by VA officials and employees in future claim matters. It is being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue-applicability of statutory limitations on attorneys' fees at 38 U.S.C. 3404 and 3405 to administrative debt-collection matters.

EFFECTIVE DATE: December 12, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Jay D. Farris, Chief, Law Library (026H), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 233–6442.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel which must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

A summary of the General Counsel's opinion designated O.G.C. Prec. 19–89, Applicability of Statutory Limitation on Attorneys' Fees at 38 U.S.C. 3404 and 3405 to Administrative Debt-Collection Matters.

Held: The amendments to 38 U.S.C. 3404 and 3405 made by the Veterans' Judicial Review Act, Public Law No. 100–687, 104, 102 Stat. 4105, 4108 (1988), while changing the nature of the limitation on attorneys' fees, do not affect the scope of the fee limitation's applicability. Both in its original and amended form, the fee limitation applies to agents and attorneys practicing before the Department of Veterans Affairs (VA) in administrative proceedings relating to veterans' benefits. These proceedings include administrative debt-collection proceedings and proceedings involving requests for waiver of indebtedness. The fee limitation does not, however, apply to proceedings outside VA's benefit-adjudication process, such as VA's efforts to determine and enforce its contractual rights arising out of its loan-guaranty program, to set off debts against Federal payments other than VA-benefit payments, or to collect debts through referral to other Federal agencies or to credit reporting agencies.

Dated: January 17, 1990.

Raoul L. Carroll,

General Counsel.

[FR Doc. 90–1897 Filed 1–27–90; 8:45 am]

BILLING CODE 8320–01–M

Summary of Legal Interpretation of the General Counsel-Precedent Opinion 18–89, Entitlement to Burial Benefits Following Change in Law—Public Law No. 95–202; Public Law No. 100–321

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of a legal interpretation issued by the Department's General Counsel involving veterans' benefits under laws administered by VA. This interpretation is considered precedential by VA and will be followed by VA officials and employees in future claim matters. It is being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue-entitlement to burial benefits.

EFFECTIVE DATE: October 6, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Jay D. Farris, Chief, Law Library (026H), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 233–6442.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel which must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

A summary of the General Counsel's opinion designated O.G.C. Prec. 18–89, Entitlement to Burial Benefits Following Change in Law—Public Law No. 95–202; Public Law No. 100–321.

HELD: (a) Public Law No. 95–202, under which the American Merchant Marine in Oceangoing Service was recognized by the Secretary of Defense as having performed active service for purposes of VA benefits, provides that no benefits shall be paid as a result of its enactment for any period prior to the date of enactment, i.e., November 23, 1977. Burial benefits under chapter 23, title 38 U.S. Code, including burial and plot allowance, reimbursement for non-government headstones and markers, and reimbursement for the cost of transportation for burial in a national cemetery, may not be paid based on burials which occurred prior to that date. However, such benefits may generally be paid for burials occurring on or after that date without regard to the date of the Secretary of Defense's determination of recognition or the date of issuance of a discharge by the Department of Defense. Reimbursement for the cost of a non-government headstone or marker pursuant to 38 U.S.C. 906(d) is subject to the further limitation that burial must have occurred on or after October 18, 1978, the effective date of the statutory authority for such reimbursement. Payment of the increased non-service-connected burial and funeral benefit of $300, authorized by Public Law No. 95–479 (38 U.S.C. 902(a) and 903(a)(1), is authorized only for burials occurring on or after October 1, 1978. Claims under 38

U.S.C. 907 for burial and funeral expenses for service-connected death are subject to the increased maximum rate of reimbursement of $1,100 provided under Public Law No. 95–479 only if burial occurred on or after October 1, 1978, and to the increased maximum rate of $1,500 provided under Public Law No. 100–322 only if burial occurred on or after April 1, 1988.

(b) Public Law No. 100–321 added a new subsection (c) to 38 U.S.C. 312, providing presumptions of service connection for certain diseases incurred by certain veterans who may have been exposed to ionizing radiation in service. Burial benefits for service-connected death, payable under 38 U.S.C. 907 are not available where burial occurred prior to May 1, 1988, the effective date of Public Law No. 100–321.

Dated: January 17, 1990.

Raoul L. Carroll,

General Counsel.

[FR Doc. 90–1896 Filed 1–26–90; 8:45 am]

BILLING CODE 8320–01–M

Summary of Legal Interpretation of the General Counsel-Precedent Opinion 17–89, Treatment of Gambling Losses Under the Improved-Pension Program

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of a legal interpretation issued by the Department's General Counsel involving veterans' benefits under laws administered by VA. This interpretation is considered precedential by VA and will be followed by VA officials and employees in future claim matters. It is being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue-treatment of gambling losses under the improved-pension program.

EFFECTIVE DATE: September 29, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Jay D. Farris, Chief, Law Library (026H), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 233–6442.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel which must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

A summary of the General Counsel's opinion designated O.G.C. Prec. 17–89, Treatment of Gambling Losses Under the Improved-Pension Program.

HELD: Under 38 U.S.C. 503(a) and implementing regulations at 38 CFR 3.271(a), payments of any kind from any source are counted as income for improved-pension purposes unless otherwise excluded. As a general rule, gains from gambling must be considered as income. However, in determining gambling income for pension-computation purposes, gambling losses may be deducted from gambling winnings under 38 CFR 3.271(c), which allows certain forms of income to be reduced by losses incurred in generating that income.

Dated: January 17, 1990.

Raoul L. Carroll,

General Counsel.

[FR Doc. 90–1895 Filed 1–26–90; 8:45 am]

BILLING CODE 8320–01–M

Summary of Legal Interpretation of the General Counsel-Precedent Opinion 15–89, Effective Date for Improved-Pension Purposes Based on Change in Income

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of a legal interpretation issued by the Department's General Counsel involving veterans' benefits under laws administered by VA. This interpretation is considered precedential by VA and will be followed by VA officials and employees in future claim matters. It is being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue-effective date for improved-pension purposes based on change income.

EFFECTIVE DATE: September 15, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Jay D. Farris, Chief, Law Library (026H), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 233–6442.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel which must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

A summary of the General Counsel's opinion designated O.G.C. Prec. 15–89, Effective Date for Improved-Pension Purposes Based on change in Income is as follows:

HELD: For purposes of the improved-pension program, under 38 U.S.C. 3012(b)(4)(A), the effective date of a reduction or discontinuance by reason of a change in income is the last day of the month in which the change occurred. *See also* 38 CFR 3.273(c) (nonrecurring income added to annual rate of income for 12-month period commencing on effective date on which such income is countable), 3.660(a)(2) (reduction or discontinuance required by increase in income effective at end of month in which increase occurred). Regardless of whether excess income is deemed "nonrecurring" or "contingent", any necessary adjustment or termination to benefits based upon receipt of such income should be made as of the last day of the month in which the income was received and should not be made retroactive to an earlier date. Lump-sum payments of insurance proceeds may be considered nonrecurring income. Life insurance proceeds, dividend and

interest income, and earnings should be treated consistently to the extent they are nonrecurring or unanticipated and should be counted from the last day of the month of their receipt for improved-pension purposes.

Dated: January 17, 1990.

Raoul L. Carroll,

General Counsel.

[FR Doc. 90-1893 Filed 1-26-90; 8:45 am]

BILLING CODE 8320-01-M

Summary of Legal Interpretation of the General Counsel-Precedent Opinion 14-89, Applicability of Radiation-Risk Presumption to Personnel on Active Duty for Training

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of a legal interpretation issued by the Department's General Counsel involving veterans' benefits under laws administered by VA. This interpretation is considered precedential by VA and will be followed by VA officials and employees in future claim matters. It is being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue—Radiation-Risk Presumption to Personnel on Active Duty for Training.

EFFECTIVE DATE: August 29, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Jay D. Farris, Chief, Law Library (026H), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233-6442.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel which must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

A summary of the General Counsel's opinion designated O.G.C. Prec. 14-89, Applicability of Radiation-Risk Presumption to Personnel on Active Duty for Training is as follows:

HELD: In order to qualify for presumptive service connection under the provisions of 38 U.S.C. 312(c), a radiation-exposed veteran must have been serving on "active duty" at the time of participation in a radiation-risk activity. Therefore, those nuclear test participants who were on active duty for training at the time of such participation are not entitled to the presumption created by that subsection.

Dated: January 17, 1990.

Raoul L. Carroll,

General Counsel.

[FR Doc. 90-1892 Filed 1-26-90; 8:45 am]

BILLING CODE 8320-01-M

Summary of Legal Interpretation of the General Council-Precedent Opinion 16-89, Application of 38 CFR 3.951 and Entitlement to Special Monthly Compensation

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of a legal interpretation issued by the Department's General Counsel involving veterans' benefits under laws administered by VA. This interpretation is considered precedential by VA and will be followed by VA officials and employees in future claim matters. It is being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue-application of 38 CFR 3.951 and entitlement to special monthly compensation.

EFFECTIVE DATE: September 29, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Jay D. Farris, Chief, Law Library (026H), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233-6442.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel which must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

A summary of the General Counsel's opinion designated O.G.C. Prec. 16-89, Application of 38 CFR 3.951 and Entitlement to Special Monthly Compensation.

HELD: In determining the veteran's eligibility for special monthly compensation benefits pursuant to 38 U.S.C. 314(s), the protected, erroneous rating of 50%, as opposed to the accurate 10% rating, must be used in calculating the total percentage of disability required to establish eligibility, as neither the protection statute 38 U.S.C. 110 nor the statute authorizing special monthly compensation, 38 U.S.C. 314, offers any exception for, or discretion in, disregarding protected, erroneous ratings in favor of the actual level of disability.

Dated: January 17, 1990.

Raoul L. Carroll,

General Counsel.

[FR Doc. 90-1894 Filed 1-26-90; 8:45 am]

BILLING CODE 8320-01-M

Advisory Committee for Health Research Policy; Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463 as amended by Pub. L. 94-409), VA (Department of Veterans Affairs) gives notice that a meeting of the Advisory Committee for Health Research Policy will be held at the Vista International Hotel, 1400 M Street NW., Washington, DC on February 28 and March 1, 1990, beginning at 8 a.m. each day. The purpose of this meeting is to plan for an evaluation of the current VA research program and recommend ways to strengthen VA research.

The meeting will be open to the public and a brief period is set aside at the end of the meeting for public comment and

questions. Those persons with extensive questions or statements must submit them in writing to the VA official named below at least 3 days before the meeting.

Persons wishing additional information regarding the meeting or who wish to submit written statements may contact Dr. Prakash Grover, Chief, HSR&D Special Projects Office (641/152), VA Medical Center, Perry Point, MD Telephone (301) 956–5450.

Dated: January 16, 1990.

By direction of the Secretary:

Laurence M. Christman,

Executive Assistant.

[FR Doc. 90–1888 Filed 1–26–90; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 55, No. 19
Monday, January 29, 1990

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).

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Special Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(2)), of the change in the special meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The special meeting of the Board of January 9, 1990 which was recessed will reconvene at the offices of the Farm Credit Administration in McLean, Virginia, on January 26, 1990, from 2:00 p.m. until such time as the Board may conclude its business.

FOR FURTHER INFORMATION CONTACT: Jeffrey P. Katz, Acting Secretary to the Farm Credit Administration Board, (703) 883–4003, TDD (703) 883–4444.

ADDRESS: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: The Board convened a special meeting on January 9, 1990, the agenda of which was published on January 8, 1990 at 55 FR 693. The Board recessed the meeting on January 9, 1990 subject to the call of the Chairman. This is public notice regarding the reconvening of the January 9, 1990 meeting. Parts of the meeting will be closed to the public pursuant to exemptions prescribed in 5 U.S.C. 552b(c)(9) as previously published.

Dated: January 24, 1990.

Jeffrey P. Katz,

Acting Secretary, Farm Credit Administration Board.

[FR Doc. 90–2084 Filed 1–25–90; 1:45 pm]

BILLING CODE 6705-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 2:04 p.m. on Tuesday, January 23, 1990, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider the following matters:

Administrative enforcement proceedings.

Matters relating to the possible closing of certain insured banks.

Recommendation regarding the Corporation's assistance agreement with an insured bank.

Memorandum regarding the Corporation's corporate activities.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Director Robert L. Clarke (Comptroller of the Currency), concurred in by Director M. Danny Wall (Director of the Office of Thrift Supervision) and Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street NW., Washington, D.C.

Dated: January 24, 1990.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 90–2026 Filed 1–24–90; 4:50 am]

BILLING CODE 6714-01-M

RESOLUTION TRUST CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that on Tuesday, January 23, 1990, at 2:33 p.m., the Board of Directors of the Resolution Trust Corporation met in closed session to consider certain matters relating to the resolution of six thrift institutions.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Director Robert L. Clarke (Comptroller of the Currency), concurred in by Director M. Danny Wall, (Director of the Office of Thrift Supervision), and Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(8), (c)(9)(A)(ii) and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(8), (c)(9)(A)(ii) and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 550–17th Street, NW., Washington, DC.

Dated: January 24, 1990.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 90–2025 Filed 1–24–90; 4:50 pm]

BILLING CODE 6714-01-M

federal register

Monday
January 29, 1990

Part II

Department of Transportation

Federal Highway Administration

Motor Carrier Safety Enforcement Cases; Notice of Final Orders

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Final Orders in Motor Carrier Safety Enforcement Cases

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of final orders.

SUMMARY: This document gives notice of the Final Orders served from 1986 through the present time concerning motor carrier and hazardous materials proceedings conducted pursuant to 49 CFR part 386. The Orders include both those issued by the Associate Administrator and those issued by Administrative Law Judges and adopted by the Associate Administrator.

FOR FURTHER INFORMATION CONTACT: Mr. David C. Oliver, Motor Carrier and Highway Safety Law Division (202) 366–1356; or Mr. Michael J. Laska, Legislation and Regulations Division (202) 366–1383, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: The following Final Orders are being published:

Name	Docket No.
Strong Trucking (Ashbell & Mary Strong, d/b/a).	R3–88–061
Stanford & Inge, Inc	R3–89–211
J & K Transport, Inc	R3–88–087
Mylet Trucking (Raymond M. Mylet, d/b/a.	R3–89–104
Princeton Homes Corp	R3–89–105
W.P. Ballard & Co	R3–89–14
Alan Party Rental, Inc	89–186
Service Bus Co., Inc	RI–89–05
Woodbury Horse Transportation, Inc. (ALJ).	RI–88–01
Amador Stage Lines, Inc	R9–89–13
Entertainment Transportation	R9–89–12
Continental Tank Lines, Ltd	R3–89–059
Drotzmann, Inc	R10–89–11
John Steven Johnson	R9–89–058
Mid-America Express	R7–89–010
James B. Degen, d/b/a Degen Trucking Company.	R9–89–09
Easton Transportation & Milling and Vaughn Carter.	RI–89–75
American Bulk Transport Co., Inc	R7–89–08
Ronnie Booker	R9–89–09
Bluestone Paving, Inc	R3–89–056
Industrial Paper Tube, Inc	RI–89–43
Kingsway Lumber Carriers, Inc	RI–89–97
Kimberly United Freightways, Inc	R3–88–05
"Smokin" Joe Frazier & Sons	R3–88–024
Four Seasons Bus Service	R3–88–032
Woodbury Horse (ALJ Decision)	R1–88–01
Yankee Trails	RI–89–07
Continental Petroleum & Energy Co	R3–89–066
Corco Chemical Corporation	R3–88–106
Burlington Food Services Co	RI–89–20
Sonneveldt Company, Inc	R5–88–39
Compaction Systems Corp. of L.I	RI–89–06
Emerson Perrine d/b/a Perrine Oils	R3–88–035
Alfred Phillip Coleman	R7–88–61
Service Bus Co., Inc	RI–89–05
Empire Gas Co., Inc	RI–87–87
Dean Kirsch	R9–89–49
Rodgers Johnson/J and J Bus Service.	R3–89–02
Ram Express Co	R3–88–051
Singer Interstate Carriers, Inc. and James Vincent Aldi.	RI–89–03
Matt Petroleum Corp	RI–89–01
Northeast Express, Inc	R3–88–019
Cliff Hall & Company	R6–88–25
Albert Thorn d/b/a Albert Thorn Trucking.	R6–88–44
Transformer Services, Inc	88–34
Tom Barton Trucking, Inc	R6–87–48
Woodbury Horse Transportation	RI–88–01
Roy A. Leiphart Trucking, Inc	R3–87–15
Empire Gas	RI–87–87
Colorado-Denver Delivery, Inc	R6–88–017
Wayne Gleghorn Trucking, Inc	R6–85–72
Monte G. Jaqua	8F–86–006–138
Jopalin Transport Enterprises, Inc	RI–88–106
Burman Wesley Ball	R6–88–1
Tulley Trucking, Inc	R9–87–08
Great Plains Coca Cola Bottling Company.	R6–88–32
National Tour Bus Service, Inc	R6–87–28
Jeffrey Tyson	R3–87–28
F & S Electric Motor & Transformer Co.	R3–85–14
Magnetics Trucking, Inc	R3–87–18
Chemport Chemicals, Inc	R6–87–46
Jose Carrasco, Dale Jones and Harvey Jones d/b/a The Feed Store Leasing.	R6–87–33
Abbey's Transportation Service, Inc	88–19
Hudson Valley Bus Co., Inc	85–138FR
Brewer Transport, Co., Inc	R6–85–139
Tex-Air Gas Co	R6–87–32
Crosland Trucking, Ltd	86–45MCS
Tulley Trucking	R9–87–08
Shea Horse Transportation, Inc	87–7FR
Apollo Sales, Inc	R9–87–28
Burman Wesley Ball	R6–88–1
Luck Trucking, Inc	85–50H
Chase Vehicle Transfer, Inc	R9–87–10
Continental Carrier Corp	R9–87–06
R & R Trucking, Inc	R3–86–42
Garfield Container Transport, Inc	87–81
Gibbons Trucking	R9–86–15
Alfa Express Co., Inc	RI–86–45G
Exchange Transportation Co	RI–87–70
North East Express, Inc	85–113FR
Jet Air, Inc	86–88FR
New England Courier	86–98H
Pilot Petroleum Transport, Inc	86–7FR
L. D'Avignon Trucking	RI–87–90
Royal Harvest Foods	86–441
Gene Yennetta	R6–86–107
Fulton Packing Co., Inc	RI–86–60
Earnest Johnson, Jr	R6–85–150
Eight Drivers (United Transports, Inc.).	R6–85–99
MWR, Inc	R3–86–87
Real Ice Cream Distributors, Inc	86–13
Knudsen Trucking, Inc	5F–85–044–098
Grane Transportation Lines, Ltd	5A–84–041–081 and 5A–84–064–080
Shorty's Heavy Duty Wrecker Service, Inc.	5D–86–017–086
Fulton Packing Co., Inc. (ALJ Deicision).	RI–86–60
V.F. Lanasa, Inc	R3–86–50
Bluestone Paving, Inc	R3–86–43
Eight Drivers, Inc. (ALJ)	R6–85–84 thru 92
Lee Downey	76–8D
Holmes Bus Service, Inc	R3–86–22
Curtis, Inc	R6–86–010
Grandy Vallien	R6–86–77
Plastic Distributing Corp	RI–86–61
Alan B. Robbins d/b/a Robbins Trailer Service.	RI–84–50
Transport Quebec-U.S. Inc	RI–87–24
C & L Trucking, Inc	R6–85–175
Hannon Transportation Services, Inc	RI–86–66
Chief Transport Company	R6–86–17
Albert J. Matsco	R6–85–125
Edward D. Derr	R6–84–4
All American Transport Corp	OA–85–038–164
Steven Freight Service Co., Inc	85–14
John C. McNease	OA–85–020–165
B.W. Brown Trucking Co., Inc	RI–84–45
National Paper Stock Co	RI–85–18
Smiles Fuel Co., Inc	RI–85–23
Western Insert Express, Inc	OA–86–011–165
Billy Joe Amburn Trucking, Inc	R6–85–167
Edward M. McClain	R6–85–110
John L. Clark	6L–85–037–103
Chief Transport Co	R6–86–17

Issued on January 12, 1990.

T.D. Larson,

Administrator.

Strong Trucking (Ashbell & Mary Strong, d/b/a)

[Docket No. R3–88–061]

Order

This matter comes before me upon request of the Regional Director, Region 3, Office of Motor Carrier Safety, for a Final Order finding the facts to be as alleged in a Notice of Claim dated July 5, 1988, and imposing a penalty of $1,000.

The Petitioner alleges that Respondent has three violations of the financial responsibility regulations, to wit, operating a vehicle without the required level of insurance on three occasions. The Respondent apparently has responded by stating that the company did not have the money for insurance premiums.

It appears that little or no contact has been made with Respondent since August of 1988. I have several questions which I would like answered before issuance of a Final Order in this matter.

1. Is Respondent still in business? If so, does the Respondent now have the required insurance? If not, what purpose will be served by pursuing this matter at this time?

2. If Respondent is still in business and operating without the required level of insurance, why has the continued operation gone without challenge?

The Regional Director is directed to reconsider this case and determine if a financial penalty will correct this violation in view of the Respondent's

claim of financial inability to comply, or whether some stronger action is needed. It may be that this is, in fact, a financially marginal operation which should not be allowed to operate in continued violation of the law and regulations.

Therefore, it is ordered, That the Regional Director shall review this case and answer the questions above. The review should be completed within 45 days and the Motion for a Final Order should either be amended to reflect the considerations revealed by the review, or withdrawn.

Dated: November 24, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Stanford & Inge, Inc.

[Docket No. R3-89-211]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 25, 1989.

Having reviewed the Motion and supporting documents appended thereto, I find that no valid request for a hearing has been made. I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That Respondent is directed to satisfy the penalty assessment by paying to the Regional Director the full amount of $4,200 within 30 days of the date of this Order.

Dated: November 21, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

J & K Transport, Inc.

[Docket No. R3-88-087]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated February 8, 1989.

Having reviewed the Motion and supporting documents appended thereto, I find that no valid request for a hearing has been made. I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That Respondent is directed to satisfy the penalty assessment by paying to the Regional Director the full amount of $8,000 within 30 days of the date of this Order.

Dated: November 21, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Mylet Trucking (Raymond M. Mylet, d/b/a)

[Docket No. R3-89-104]

Final Order

On September 11, 1989, I issued an Order denying Respondent's request for a hearing in this matter, and holding Petitioner's Motion for a Final Order in abeyance pending the receipt of additional information. That information, concerning both the circumstances of the violation and the financial condition of the Respondent has now been received.

It is inconceivable to me that Respondent would operate a vehicle placed out of service for these violations. Such action is a flagrant contravention of the applicable regulations and of common sense. The Federal Motor Carrier Safety Regulations (FMCSRs) have been promulgated with the intent of protecting the safety of the traveling public, and indeed, the operators of commercial vehicles themselves.

The Federal government hears much clamor from the industry over our zeal in enforcing the so-called paperwork violations. This matter does not involve such a violation. Here we have a life-threatening mechanical failure to comply.

The additional information submitted by Petitioner substantiates the very real possibility of catastrophic failure which could have resulted from the continued operation of this vehicle. We are not dealing with a relatively simple matter here or even of driving the vehicle a 2 or 3 mile distance. The penalty is substantial.

Respondent presents information substantiating his claim that a fine of the magnitude asked will have an impact on his future operations. It is unfortunate that this is the case. However, Respondent's information does also substantiate that he will be in a position to continue operations notwithstanding the penalty.

Taking into account the size of Respondent's operations and financial status, Petitioner has amended his request and seeks a penalty of $7,500. Respondent, in his reply, takes exception to the original Order issued in this matter denying him a hearing. The violation has occurred. The violation is substantial and could have endangered human life. It shocks my professional conscience that this vehicle was placed in operation, with these defects, following an Out-of-Service Order.

Therefore, it is ordered, That Respondent's request for a hearing is once again denied. After reviewing the financial and other information submitted in this matter, Petitioner's amended request is hereby granted and Respondent is directed to pay within 30 days to the Regional Director the amount of $7,500, as requested. Respondent is further cautioned as to the extraordinary danger in which he placed the public and he is directed to instruct his driver(s) that no vehicle ever placed out of service is to be operated until proper repairs have been completed as required.

Dated: November 15, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

W.P. Ballard & Co. of Washington, D.C.

[Docket No. R3-89-14 (Formerly R3-88-066)]

Order Granting Motion for Hearing, in Part, and Final Order, in Part

This matter comes become me upon a Motion in Opposition to a Hearing and Motion for Final Order filed by the Regional Director, Region 3. Respondent has requested a hearing on the allegations contained in a Notice of Claim dated August 15, 1988. These allegations were of numerous violations of the Federal Motor Carrier Safety and Hazardous Materials Regulations.

Respondent's request for a hearing raises a number of issues, including financial hardship, administrative res judicata, new management, misplaced fault and current compliance. None of these claims constitutes a statement of material factual issues in dispute sufficient to grant a hearing. Although they appear relevant to the determination of a penalty, there is nothing in the record to reverse or alter the assessment of the Regional Director in this matter. It appears clear that a substantially higher penalty could have been levied, however, in consideration of many of the very items raised by Respondent, there was an obvious mitigation.

With respect to the alleged violation of 49 CFR 177.823(a), failure to properly mark or placard a transport vehicle containing hazardous materials, for which an assessed penalty of $2,000 has been levied, respondent indicates a

readiness to present expert testimony that the truck was properly placarded. This constitutes a material factual issue in dispute—whether the vehicle was properly placarded, as respondent contends, or not, as petitioner alleges.

Therefore, it is ordered, That Respondent's request for a hearing is granted on the issue of compliance with 49 CFR 177.823(a). The Petitioner's motion for a Final Order is granted with respect to all other charges. Respondent is directed to pay to the Regional Director $6,200 within 30 days of the date of this Order.

To determine the placarding violation, in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: October 23, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Alan Party Rental, Inc.

[Docket No. 89-186]

Final Order

This matter comes before me upon motion in opposition to request for a hearing and for a final order from the Regional Director, Office of Motor Carrier Safety, Region 1.

Respondent denies each allegation of violation of the Fedreal Motor Carrier Safety Regulations (FMCSRs) charged in a Notice of Claim dated August 23, 1989. Respondent further challenges the jurisdiction of the Agency to enforce the regulations against so-called private carriers.

The regulations governing the hearing process require some statement of specificity setting forth any material factual issues in dispute. Respondent has not so done. Rather, Respondent levies a jurisdictional challenge which as a matter of law is not entitled to a hearing.

Nevertheless, Respondent's challenge is without foundation. Respondent clearly acknowledges that its operation crosses State lines in furtherance of a business purpose.

The FMCSRs were originally promulgated by the Interstate Commerce Commission (ICC) pursuant to the Motor Carrier Act of 1935 (now codified in part at 49 U.S.C. 3102 (1982 & Supp. III (1985)). This authority to regulate motor carrier safety was transferred to the Secretary of Transportation with the establishment of the Department of Transportation (DOT). These regulations have since been reissued by the DOT under the authority of the Motor Carrier Safety Act of 1984, 49 U.S.C. APP. 2505 (Supp. III 1985).

Under the Motor Carrier Act of 1935, a person who transports property across a State line in a motor vehicle in the furtherance of a commercial enterprise is considered to be a "motor private carrier" (see 49 U.S.C. 10102(16)), and is subject to the safety regulations issued by the DOT (49 U.S.C. 3102(b)(2)). Both the ICC and the DOT have long considered the operation of motor vehicles transporting supplies to provide services, or otherwise in the furtherance of a commercial enterprise, to be private carriage subject to the regulations. See, e.g., 42 FR 60,078, 60,080 (1977); and *Harshman* versus *Well Service, Inc.*, 248 F. Supp. 953 (W.D. Pa. 1964), aff'd, 355 F.2d 206 (3rd Cir. 1965).

The law in this area is well-settled and the authority to regulate the safety of operations of these vehicles is established. In fact, Congressional concern is further underscored in the provisions of the Motor Carrier Safety Act of 1984 which defines an employer who must comply with the regulations issued thereunder as "any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it. . . ."

Therefore, it is ordered, That Respondent's request for a hearing is denied and Petitioner's request for a Final Order finding the facts to be as alleged and imposing a civil penalty is hereby granted. The Respondent shall pay to the Regional Director within 30 days of the date of this Order $3,000.

Dated: October 23, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Service Bus Company, Inc.

[Docket No. RI-89-05; Motor Carrier Safety—FHWA]

Decision of Administrative Law Judge Burton S. Kolko

Complainant Assistant Regional Counsel, Federal Highway Administration (FHWA), charged Respondent Service Bus Company, Inc., a motor carrier, with thirty violations of the Federal Motor Carrier Safety Regulations, 49 CFR part 350 *et seq.*, which are issued under the authority of 49 U.S.C. 3102. The Government's Notice of Claim initiating this proceeding, dated October 3, 1988, cited four counts of failing to maintain driver qualification files for drivers employed, as required by 49 CFR 391.51; twenty-one counts of failing to require drivers to make and submit a record of duty status under 49 CFR 395.8(a); and five counts of requiring or permitting part-time drivers to operate without obtaining from the driver a signed statement regarding duty hours for the previous seven days (49 CFR 395.8(j)(2)). Pursuant to 49 U.S.C. 521(b), FHWA seeks the maximum civil penalty assessment of $500 per count for a total assessment of $15,000.

Respondent denied the charges and requested a hearing. I was appointed to preside over the action under 49 CFR 386.54. The hearing was held on May 30, 1989 in New York City, and the parties filed briefs on June 26, 1989. After careful consideration, I find the violations as charged and assess a civil penalty of $15,000.

The Notice of Claim arose from an investigation undertaken by FHWA Safety Investigator Donald Moruzzi. Moruzzi first appeared at Respondent's principal place of business in Yonkers, N.Y. on July 20, 1988 and asked to see certain records required to be maintained by interstate motor carriers under federal law. He specifically sought drivers' logs, dispatch sheets, and charter contracts. The President of Service Bus, Salvatore DiPaolo, told him that the company no longer operated in interstate transportation and therefore was not subject to federal requirements (Tr. 22–23). He explained that Service Bus no longer kept such records because it had no need (Tr. 23). Investigator Moruzzi returned the following day and repeated his request. DiPaolo then produced charter contracts involving local transportation but no other documents. He again stated that he no longer kept drivers' logs or dispatach sheets, but this time added that some records might be found at another location used by Service Bus (Tr. 24). Moruzzi was then directed to dispatch Arnold Jeffries at the second location. Jeffries, who had begun work at the carrier about a week earlier (Tr. 70–71, 73), told Moruzzi that the records and files at the second location were "in a bad disarray" and that nothing could be found (Tr. 73–74).

Shortly thereafter Investigator Moruzzi obtained proof that, contrary to DiPaolo's representations, Service Bus had indeed operated in interstate transportation during relevant time periods. Atlantic City casino records confirmed that Service Bus operated on many occasions between Yonkers, New York and Atlantic City, New Jersey (Tr.

25, 27, 33, 36–37). Confronted with this proof, DiPaolo produced various driver qualification files and records of duty status (drivers' logs) (Tr. 25–26).

A driver qualification file for a regularly employed driver must include a medical examiner's certificate of his physical qualification to drive a motor vehicle; an annual review of his driving record; a copy of his driver's license or certification of road test; an inquiry into the driver's driving and employment records during the previous three years; and the driver's application for employment (49 CFR 391.51; Tr. 27–28). The driver's record of duty status, formerly known as a driver's log, requires a driver to report his duty status for every 24-hour period on a grid divided into four descriptions: (1) Off duty; (2) Sleeper berth; (3) Driving; and (4) On-duty not driving. A regular driver would submit one for each day of the month (See 49 CFR 395.8; Tr. 29–30). Intermittent drivers (as defined in the regulations) must submit a statement showing the total duty time during the previous seven days and the time at which the driver was last released from duty prior to the current assignment (49 CFR 395.8(j)(2); Tr. 30).

Upon reviewing the proffered records of Service Bus, Moruzzi discovered that driver qualification files for four drivers were missing.[1] The company also lacked record-of-duty status files and seven-day statements for various dates between March 7 and July 18, 1988. Moruzzi drew up a checklist of his findings which DiPaolo signed (Exh. 5; Tr. 26, 58).

DiPaolo offered various reasons for the state of his records. He testified that the required records had in fact been maintained by Service Bus, but that a former employee charged with maintaining them had left the company in May 1988 coincident with their disappearance (Tr. 43, 58–59, 62). He also claimed that the files may have been located in another office (Tr. 63). DiPaolo also stated that one of the drivers cited for lacking any driver qualification files, Louis Gomez, had actually rented a bus from Service Bus and was therefore not an employee subject to FHWA requirements (Tr. 45–46, 54, 65–66).[2] Additionally, DiPaolo claimed that he required drivers to turn in their logs or else forfeit their pay (Tr. 44–45), implying that it was unlikely that drivers would fail to turn in their records of duty status. This account was confirmed by one of his drivers (Tr. 89–90, 93–94). In sum, DiPaolo maintains that he was in full compliance with all requirements cited by Complainant at all times.[3]

I find the violations as charged. Mr. DiPaolo signed the checklist confirming the findings of Investigator Moruzzi which are the subject of this action. He thereby acknowledged that Moruzzi's findings, with the exception of the status of Gomez, were correct. I need go no further in determing whether the alleged violations which were not contested occurred.

DiPaolo's claims in mitigation of these findings were vague and unsubstantiated, and I do not credit them. He stated that the files may have been stolen, but never offered to show Inspector Moruzzi a police record of such theft (Tr. 36). Nor did he explain why a former employee would make off with these files. Furthermore, while it was also suggested that the files may have been located at a place other than Service Bus' headquarters, dispatcher Jeffries indicated that the records at the second location (assuming they were pertinent) were in disarry and effectively unavailable. The regulations in any event generally required records to be maintained at the motor carrier's "principal place of business" (49 CFR 391.51(f)).

Finally, DiPaolo's claim that Louis Gomez was a lessee rather than an employee driver strains credibility. No written lease was executed between Gomez and Service Bus; the company carried the insurance; and the company paid for the gas without reimbursement (Tr. 65–66). Those circumstances are not consistent with a rental agreement. In keeping with the overwhelming weight of the evidence, I find that Gomez was a driver employed by Service Bus and consequently also find the violations alleged with respect to him.[4]

My decision is also grounded in the fact that I have accorded greater weight to the evidence offered by Inspector Moruzzi than to that offered by Mr. DiPaolo. While I see no reason to question Moruzzi's findings and testimony, DiPaolo's credibility suffered by his initial claim that Service Bus made no interstate trips. Only when confronted with written evidence to the contrary did he acknowledge that that claim was untrue. He later stated that the reason he had told Moruzzi that he no longer operated interstate was because he was too "busy" to know where all his buses traveled (Tr. 47; see also Tr. 49). But that claim is of dubious believability in view of the 32 Atlantic City trips undertaken by Service Bus' fleet of only 7–11 buses between March and July 1988 (Exh. 5; Tr. 21, 48). Moreover, DiPaolo acknowledged that some of his drivers operated exclusively to and from Atlantic City (Tr. 60). Against this background, DiPaolo's credibility in this action cannot be accorded the same weight as Moruzzi's.

Under 49 U.S.C. § 521(b), Service Bus is liable for a civil penalty not to exceed $500 for each violation. The determination of the amount of any civil penalty is based on:

> the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history or prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require. In each case, the assessment shall be calculated to induce further compliance.

49 U.S.C. 521(b)(2)(c). The agency seeks the maximum penalty of $500 per violation. It stated that its determinations take into account the carrier's past record and ability to pay (Tr. 40–41).

Service Bus has been the subject of four previous safety audits since 1979. The 1979 audit cited 52 violations (Exh. 2; Tr. 13–14); a 1980 audit listed 51 (Exh. 3; Tr. 15–16).[5] No sanctions were sought

[1] A fifth driver alleged to have no qualification file, Joseph Monaco, was not named in the complaint. DiPaolo stated that he was not a driver but a company mechanic.

[2] DiPaolo conditioned his signing of Moruzzi's checklist by this claim. See Exh. 5, p. 2,

[3] Tr. 52–56. Respondent also states in support of his case that on September 13, 1988 he was found in compliance with applicable regulations of the State of New York (Tr. 56, 60, 72, 74–75, 84). This claim, however, is irrelevant to the matter before me. No showing was made regarding the New York requirements, the nature and extent of the inspection there made, or the standards utilized in arriving at that result. Indeed, the New York inspection makes reference to the compliance of the company's *school* buses, another operation and not the subject of this action (Tr. 9–10, 79–80). Moreover, even if New York's program and enforcement standards were identical to FHWA's, the State's September 13 findings have no probative value for the findings made at FHWA's earlier July 20–August 5 inspection. Indeed, I rejected Respondent's proffer of two exhibits reflecting New York State's findings and permitted these documents to accompany the record only as an offer of proof. See Tr. 74–83.

[4] The Notice of Claim alleges that Service Bus did not maintain for Gomez a driver qualification file (violation #4) and failed to require him to make and submit a record of duty status for a July 10, 1988 Yonkers-Atlantic City trip (violation #23). See Notice of Claim dated October 3, 1988.

[5] The 1979 safety audit cited the following violations (the number found follows in parentheses): failure to maintain driver qualification files (two); requiring or permitting drivers to drive more than ten hours (two); failure to require drivers to prepare appropriate daily log (forty); failure to require a driver to forward each day the original of his log (seven); and failure to retain vehicle condition reports (one). The 1980 audit cited a failure to maintain driver qualification files (three); missing items from driver qualification files (four); permitting driver to drive more than ten hours (three); permitting driver to drive after having been

Continued

on these two occasions. Rather, written recommendations were made to the carrier which essentially set out a program for ensuring compliance. In each case the agency report containing these recommendations was delivered to and signed by Salvatore DiPaolo as President of Service Bus (Tr.14, 16). As a result of a third audit conducted in December 1982, the agency issued a Notice of Claim against Respondent on June 15, 1983 citing eight counts of failing to retain on file driver's daily logs. The claim resulted in a civil penalty assessment of $4,000 (Exhs. 4, 6; Tr. 16–21).

I agree with the recommendation of agency counsel and hereby set a penalty of $15,000 for the violations. I do not arrive at this figure casually. Service Bus has been cited on three previous occasions for the same or similar problems. The responsible company officials have not changed during this period. Service Bus has been more than suitabily apprised of the need to comply. The record shows that it has failed in its responsibilities.

These are not mere record-keeping violations. They affect the safety of the traveling public. Failure to adhere to them undermines the integrity of the Congressionally-mandated enforcement program, public confidence in motor carrier safety, and ultimately the safety of motor carriers themselves. The Motor Carrier Safety Regulations are not to be lightly regarded.

The statute requires that the penalty be calculated "to induce further compliance". Against the background I have described, I believe the maximum assessment is the only penalty which will fulfill the statutory goal. Additionally, there has been no showing that the carrier lacks the ability to pay.

Service Bus Company, Inc. is hereby ordered to pay a civil penalty in amount of $15,000 for violating Federal Motor Carrier Safety Regulations 49 CFR 391.51, 395.8(a), and 395.8(j).

This decision is issued pursuant to 49 CFR 386.61. This decision becomes the final decision of the Associate Administrator 45 days after it is served unless petition or motion for review is filed under 49 CFR 386.62.

on duty 15 hours (six); failure to require driver to make a daily log (ten); failure to require driver to prepare an appropriate daily log (twenty-five). See Tr. 13–16.

Dated: October 6, 1989.

Burton S. Kolko,

Administrative Law Judge.

Woodbury Horse Transportation, Inc.

[Docket No. RI–88–01 Formerly RI–88–69]

Order

This matter comes before me upon request of the Respondent (Appellant) for review of the Order of the Administrative Law Judge. The Regional Director opposes that motion.

On June 13, 1989, Administrative Law Judge Ronnie A. Yoder issued on Order entering summary judgment against Respondent. The Judge entered that Order based upon Respondent's deemed admissions and failure to comply with all discovery requests and the Judge's Order, as well as failure to answer the Motion for Summary Judgment.

Respondent (Appellant) contends that he did in fact file a reponse to the Judge's Order of April 26, 1989, with respect to the Interrogatories and Admisssions. In addition, Respondent (Appellant) contends that he was denied the opportunity to contest the Motion for Summary Judgment because such Motion was never received.

The Regional Director has submitted argument and evidence supporting service by Certified Mail.

The Judge in this matter is most familiar with the facts and circumstances surrounding his finding that Respondent failed to reply to the requests for admissions, interrogatories and production of documents. I find it unbelievable that Respondent would request a hearing for the sole purpose of rebutting the allegations of the Regional Director and then fail to answer the bell when given the opportunity. If the facts are found on review to be as originally indicated in the Judge's Order, such behavior by Respondent is unconscionable.

This entire matter is additionally complicated by the bizarre circumstances and protestations surrounding the Motion for Summary Judgment. As a layperson, I cannot assert with certainty that the name on the Certified Mail Receipt is the same as the affidavit produced by Respondent claiming that it was not received at the firm, however, even to the untrained eye, the writing of the name "Sandra" does appear indentical on both.

I am remanding this case to the Judge so that he may review the facts and arguments surrounding the decision to find that the Respondent did not comply procedurally with the rules on the Request for Admissions and Interrogatories, and more importantly to provide a complete review over the circumstances surrounding the failure to respond to the Motion for the Summary Judgment. Should the Judge determine that his original findings are correct and that Respondent did, in fact, receive and have ample opportunity to reply to the Motion for Summary Judgment, I would welcome his recommendation on possible disciplinary action.

Therefore, it is ordered, That this matter is remanded to the Administrative Law Judge for additional proceedings in this matter as set forth above. The Judge is authorized to perform those duties specified in 49 CFR 386.54(b)(1985).

Dated: September 25, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Amador Stage Lines, Inc.

[Docket No. R9–89–13 Formerly R9–89–60]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a hearing and Opposition thereto and Motion for Final Order by the Regional Director, Office of Motor Carrier Safety, Region 9 (Petitioner). The Petitioner has alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs), 11 counts of violating 49 CFR § 395.3(b). These alleged violations and an assessed penalty of $9,900 were called to Respondent's attention in a Notice of Claim letter dated July 24, 1989.

Respondent replied to that letter on August 2, 1989, and requested a hearing. Respondent answers that the alleged violations were the result of "an inadvertent administrative problem", and also argues that the proposed penalty is punitive and excessive in nature. Respondent also contends that the past compliance history of the company is exemplary.

Petitioner has objected to the request for a hearing, contending that Respondent's answer failed to meet the test of material factual issues in dispute.

Respondent, through Counsel, objects to the Motion for A Final Order and now requests dismissal of the claim. Respondent raises a number of procedural contentions concerning the sufficiency of the Notice of Claim. These contentions are without merit. The Notice is clear with respect to the number of violations, notwithstanding a typographical error in one paragraph. No prejudice to Respondent appears by the appearance of one (11) in describing

the number of counts, as that information appears clearly noticed in the prior paragraph.

Also, the Notice clearly fulfills the regulatory requirements. It provides sufficient notice of options available to Respondent and when considered with the procedural regulations attached to the Notice more than sufficiently informs the Respondent of the gravity of these charges and the need for careful and quick response.

With respect to the sufficiency of the response, I find that there are material factual issues in dispute here. Before discussing this issue, however, I would make the observation that the proposed penalty, if these violations are proved is not excessive. In fact, if anything, this matter may be a prime example of a case ineffectively prosecuted.

Petitioner alleges that its review and documented violation establish a pattern of safety violations. Yet only eleven (11) violations of some 64, which are claimed to have been discovered in the safety review, have been documented. The record before me also provides an indication of a prior information filed by the United States Attorney and an Order in that matter for violations by Respondent in 1984. The record also contains information on other enforcement contacts between the Agency and Respondent.

A pattern of safety violations, if established, carries a maximum penalty of $10,000. It appears from the record that if a pattern exists here, a case might also be made for substantial health and safety violations. The transportation of passengers is a public trust. Repetitive violation of the regulations will not be countenanced. That, however, is a discussion for another forum.

What is before me at this time is an allegation that there are 11 documented violations of the FMCSRs and that these violations, either alone, or in conjunction with past actions taken against Respondent, establish the existence of a pattern of safety violations. Respondent appears to contend that these violations, even if proven, are the result of an isolated human error, to wit, "the failure of the dispatcher to properly keep track of the hours as prescribed in his job description." I find this answer sufficiently meets the requirements of the regulations to call this matter for hearing.

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a)(1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b)(1985).

Dated: September 22, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Entertainment Transportation

[Docket No. R9-89-12 (Formerly R9-89-23)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a hearing and Motion for Final Order and opposition to the respondent's request filed by the Regional Director, Office of Motor Carrier Safety, Region 9. The Respondent was sent a Notice of Claim dated February 15, 1989, which alleged 5 violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and assessed a penalty of $2,000.

Respondent answered by letter of February 24, 1989, disputing the allegations and requesting a hearing. Petitioner dropped one of the counts after reviewing the answer. Petitioner now seeks a Final Order assessing a penalty of $1600.

With respect to the first alleged violation, 49 CFR 395.3(b), petitioner alleges that records of duty status indicate that the driver continued driving after reaching his 70th hour in 8 consecutive days. Respondent answers that the driver incorrectly filled out his logs and that there was no violation. Obviously, there are material factual issues in dispute here.

With respect to the second alleged violation, another § 395.3(b) driving in excess charge, respondent answers that the logs were incorrectly filled out and misdated. Again, there appears to be a dispute over material factual issues.

With respect to the third allegation, a violation of 49 CFR 395.8(e), respondent answers that the driver was driving on a local trip after having turned in his paperwork from his previous trip. Respondent's answer is not sufficient on this point and Petitioner's motion is granted with respect to this count.

The fourth allegation has been withdrawn.

With respect to the fifth allegation, respondent is alleged to have not kept records as required, a violation of 49 CFR 395.8(k)(1). Respondent answers that all records have been kept and are available. There is a material factual issue in dispute here.

Therefore, it is ordered, That Respondent's request for a hearing is granted with respect to Counts 1, 2 and 5 in the Notice of Claim. Petitioner's Motion is granted with respect to Count 3 in the aforesaid Notice. Respondent is directed to pay the amount of $500 to the Regional Director within 30 days of the date of this Order.

In accordance with 49 CFR 386.54(a)(1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Officer in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b)(1985).

Dated: September 21, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Continental Tank Lines, Ltd.

[Docket No. R3-89-059]

Denial of Motion for Reconsideration

This is the second request for reconsideration in this matter. Apparently, respondent remains unclear as to the requirements of the regulations, the status of the violations for which an assessment was made in this case, and the reasoning underlying the previous reduction in the assessment.

The violations alleged are supported by the record. Respondent itself acknowledges that the required driver daily duty status were not kept. The penalty assessment was reduced as an incentive to induce the respondent to begin proper compliance procedures. It would be unusual for a carrier not to request waiver of the penalty. Congress, on the other hand, wants even higher penalties. The transportation of hazardous materials, by its very nature, demands a higher order of diligence both on the part of the carriers and this Agency. I have again reviewed the file in this matter and find no persuasive evidence upon which to justify a complete waiver of the penalty.

Therefore, it is ordered, That Respondent's second motion for reconsideration is denied.

Dated: September 21, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Drotzmann, Inc.

[Docket No. R10-89-11 (Formerly R10-89-39)]

Order Appointing Administrative Law Judge

This matter comes before me as a result of a request by Respondent for a hearing to determine whether the facts

are as alleged in a Notice of Claim dated May 17, 1989, which imposed a civil penalty of $15,000 for violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Respondent argues that the amount of the fine is excessive. In addition, Respondent argues that it does not require or permit its drivers to violate the FMCSRs and that vigorous action is taken to ensure compliance, including termination.

Petitioner has requested that Respondent's request be denied. Petitioner raises three issues: 1. Is the amount of the civil fine a material factual issue requiring an administrative hearing; 2. Is Respondent's denial of two specific counts grounds for a hearing; and 3. Does Respondent's denial that it required or permitted its drivers to violate the regulation raise a material factual issue in dispute requiring a hearing?

Petitioner then addresses each of these issues at length. With respect to Issue 1, whether the amount of the fine constitutes a material factual issue in dispute, I agree with the Petitioner that it does not. Nevertheless, Petitioner cites numerous previous Orders in a way which could be construed to restrict my ability to alter the amount of a penalty assessed. Such is not the case. Although, I have not sent any matter to hearing on this ground, I have made the determination in numerous matters to change the penalty assessed. Further, when a matter is sent to an Administrative Law Judge for determination of factual issues, the Judge is free to recommend a penalty modification based on the findings made in the case, *In the Matter of Empire Gas, R1–87–87 (Feb. 24, 1989).*

Petitioner next addresses Respondent's contention with respect to violations of 49 CFR 395.3(a)(3) by way of explaining that Respondent appears to have misinterpreted the exception in that regulation. I agree. Respondent's request for a hearing on this issue is denied.

Finally, Petitioner addresses Respondent's claim that it does not require or permit violations of the regulations by arguing that previous audits and violations coupled with imputed knowledge as set forth in many cases governing regulated industries is sufficient to constitute a basis for denial. Under ordinary circumstances I would agree with the Petitioner. A base denial that violating behavior is required or permitted is not sufficient to constitute grounds for a hearing. Nor do we hold that the "knowing and willful" standard of criminal violations controls here. However, Respondent does provide indications of taking substantial efforts to prevent these violations, including driver education, the assignment of specific personnel to address these matters and termination. Respondent argues that a number of the drivers involved in these alleged violations have been terminated.

It is my belief that the introduction of these facts in this matter meets the test of material factual issues in dispute. The imposition of substantial penalties is a serious matter. Likewise, violations of these regulations is a serious matter.

Therefore, it is ordered, That, in accordance with 49 CFR 386.54(a)(1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b)(1985), and to determine whether the Respondent required or permitted drivers, within the scope of the applicable regulations to violate the FMCSRs, and whether this violation, if established, constitutes a pattern of violation within the meaning of those regulations.

Dated: September 20, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

John Steven Johnson

[Docket No. R9–89–058]

Final Order

In the matter of John Steven Johnson, in his individual capacity as President of Steve Johnson and Sons Trucking, Inc., and Steve Johnson & Sons Trucking Inc., a corporation.

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 9, for a Final Order finding the facts to be as alleged in a Notice of Claim dated June 2, 1989, and imposing a civil penalty in the amount of $19,700.

Respondent, through Counsel, opposes the Motion for Final Order, contends that the original response to the Notice of Claim unequivocally puts into issue by denial the factual contentions of the Notice, and suggests that "more efforts at a settlement of this matter should now be made so the expense and inconvenience of a protracted proceeding can be avoided."

This Order will grant the Motion for a Final Order submitted by the Petitioner and reject as spurious all filings made by Respondent. The Federal Motor Carrier Safety Regulations (FMCSRs) are not an Operetta by Gilbert & Sullivan. They are regulations issued in accordance with statutes promulgated by the Congress to protect the lives and property of the citizens of the United States. Violations thereof, whether deliberate or unwitting, are subject to civil and criminal penalties.

Knowledge of and conformity to the laws and regulations are imputed to those operating in the commercial environment of today's motor carrier industry.

The Notice of Claim details a number of alleged violations. That Notice sets forth various options and scenarios to Respondent. Copies of the procedural regulations are included therewith. The Notice and the regulations set forth plainly and precisely the requirements necessary to secure a hearing, a settlement conference or a payment procedure. There is no mystery in these documents.

Respondent chose to reply as a layperson in a bizarre and questionable manner to serious allegations levied by the Government. Respondent entered into and apparently concluded an agreement with the Government. At the Eleventh Hour, Respondent now reneges, hires Counsel and attempts to prolong this matter.

Nowhere in Respondent's letter of June 8, 1989 do I find a request for a hearing. Nowhere in that letter do I find a statement of material factual issues in dispute upon which a hearing might be called. The letter is querulous and admits of certain violations, disclaims all responsibility for others regardless of the law, and denies knowing violation of another violation, notwithstanding past encounters with enforcement personnel of this Agency.

Respondent's Motion in Opposition raises no germane objections, i.e., Petitioner did not object to the sufficiency of Respondent's original response; failure to inform respondent of the inadequacy of the response prior to entering settlement negotiations; and failure to reveal the specifics of the Settlement Agreement, to wit, that such Agreement was not binding on the Administration. There is absolutely no merit to these claims.

Therefore, it is ordered, That Petitioner's request for a Final Order finding the facts to be as alleged in a Notice of Claim issued on June 2, 1989, is granted. A penalty in the amount of $19,700 is due and payable to the Regional Director, Region 9, within 30 days of the date of this Order. All Respondent's requests and motions, setting forth no cognizable claim for relief are denied.

Dated: September 20, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Mid-America Express, Inc.

[Docket No. R7-89-010 (Formerly R7-89-062)]

Order Appointing Administrative Law Judge

This matter comes before me as a result of a Notice of Claim dated July 24, 1989, alleging violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Respondent has requested a hearing with respect to certain of these alleged violations: respondent denies that there are violations as alleged for 49 CFR 395.3(a)(1) pertaining to drivers Alton W. Bruns (March 12, 1989) and Robert F. Stephenson (March 30, 1989) and for 49 CFR 395.3(b) pertaining to drivers Mark A. Trail (February 13, 1989), Richard Greene (February 14, 1989) and (March 12, 1989), Alton W. Bruns (February 25, 1989) and Harold R. Christiansen (March 15, 1989).

The Regional Director, Office of Motor Carrier Safety, Region 7, acknowledges that there are material factual issues in dispute with respect to the above drivers. At the same time, the Director requests a Final Order finding the remaining violations to be as alleged. The assessed civil penalty for these violations amounts to $4,600.

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

The Motion for Final Order on those issues without factual issues in dispute is granted and Respondent is directed to pay to the Regional Director the sum of $4,600 within 30 days of the date of this Order.

Dated: September 1, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

James B. Degen dba Degen Trucking Company

[Docket No. R9-89-09 (Formerly R9-88-40)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a hearing on the allegations set forth in a Notice of Claim dated August 29, 1988. There are 3 alleged violations set forth in that Notice: (1) 49 CFR 391.51 (Gary Kelly)—failure to maintain a complete driver qualification file (absent medical examiner's certificate); (2) 49 CFR 391.51 (George Bartell)—failure to maintain a complete driver qualification file (absent list or certificate relating to violations of motor vehicle laws and ordinances); and (3) 49 CFR 395.3 (Gary Kelly)—driving after having been on duty 60 hours in seven consecutive days.

The Regional Director, Office of Motor Carrier Safety, Region 9, moves for a Final Order finding the facts to be as alleged in Counts 1 and 2 of the Notice of Claim. Count 3 has been dropped. The total amount assessed and subject of this Order is $800.

In his Motion, the Regional Director avers that there is substantial evidence indicating that the violations of the two counts exist as alleged. Such evidence consists of a Driver Qualification Checklist signed by the owner of the company, an Affidavit signed by the Safety Investigator who initiated this matter, and an admission in Respondent's letter of September 17, 1988, in response to the Notice of Claim.

In his letter of September 17, 1988, requesting a hearing, Respondent states that the file in question, that of driver Gary Kelly, does contain "a copy of a current medical certificate, dated August 17, 1987, prior to a medical certificate dated November 17, 1985 * * *" Also in that letter, Respondent does admit that the required information was missing from the file of driver George Bartell. Respondent states that this was due to an oversight but was corrected within 30 days. Respondent requests consideration for timely compliance.

With respect to the alleged violation for driver (Lease Operator) George Bartell the admission in the letter of September 17, 1988, removes any question of material factual issues in dispute. It is assumed that the Regional Director has taken into account all considerations, including quick action to bring about compliance, in assessing a penalty. In the absence of extraordinary circumstances indicating a need to reduce the penalty, such a motion will not be readily granted. I find no such circumstances present here.

With respect to the alleged violation for driver, Gary Kelly, there is an issue in dispute. Although Respondent signed the Checklist in the file, that does not for my purposes constitute dispositive proof of the allegation, particularly in light of the claim put forth in the latter requesting the hearing that the alleged missing document is in the file (and purportedly was in the file at the time of the investigation).

Therefore, it is ordered, That Respondent's request for a hearing is granted in part with respect to the allegations of a violation of § 391.51 for driver Gary Kelly and denied with respect to the allegation of violation of § 391.51 for George Bartell. The Regional Director's motion for a Final Order is similarly granted in part with respect to George Bartell and denied with respect to Gary Kelly. Respondent is directed to pay the amount of $400 for the violation of 49 CFR 391.51 (George Bartell) to the Regional Director within 30 days of the date of this Order.

Also, in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Officer in determining whether the Driver Qualification file of driver Gary Kelly was incomplete as alleged in the Notice of Claim dated August 29, 1988. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: September 1, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Easton Transportation and Milling and Vaughn Carter

[Docket No. RI-89-75]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region, 1, for a Final Order finding the facts to be as alleged in a Notice of Claim dated April 21, 1989, and ordering Easton Transportation and Milling and Vaughn Carter to pay a civil penalty of $10,000 and $1,000 respectively.

Having reviewed the Motion and these supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety regulations. I also find the Easton Transportation and Milling and Vaughn Carter were duly served with a copy of the Notice of Claim and have failed to reply as required by 49 CFR 386.14(b).

Therefore, it is ordered, That Easton Transportation and Milling and Vaughn Carter pay to the Regional Director the full amount of the assessed civil penalty of $10,000 and $1,000, respectively

within 30 days of the date of this Order; *It is further ordered,* That the Notice of Claim issued against Vaughn Carter is hereby amended to delete any reference to 49 CFR 390.13 and aiding and abetting and Mr. Carter is cited for directly violating section 49 CFR 391.11 and 391.45.

Dated: August 16, 1989.

Richard P. Landis,

Associated Administrator for Motor Carriers.

American Bulk Transport Co., Inc.

[Docket No. R7-89-08 (Formerly R7-88-58)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a Hearing and denial of alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). The alleged violations were set forth in a Notice of Claim dated October 26, 1988.

The alleged violations involved a number of sections of the FMCSRs, including 49 CFR 391.51(a), failing to maintain a driver qualification file for each driver; § 395.3(a)(1), requiring or permitting a driver to drive more than 10 hours following 8 consecutive hours off duty; § 395.8(k), failing to retain driver's record of duty status at carrier's principal place of business; and, § 396.11, failing to require driver to prepare driver vehicle inspection reports. Multiple violations are alleged for each of these sections and the penalty assessed includes an alleged serious pattern of safety violations for § 395.3(a)(1).

Respondent denies the alleged violations. Specifically, Respondent states that its policy is to maintain a driver qualification file for each of its drivers at its principal place of business (§ 391.51(a)); that the drivers alleged to have violated § 395.3(a)(1) are a husband and wife team who are responsible drivers who in the past have complied with the regulations, and that it is not the carrier's policy to violate this section; that it is Respondent's policy to retain drivers' records of duty status at its principal place of business (§ 395.8(k); and that the vehicle inspection report is completed by the drivers on the back of the drivers' daily log (§ 396.11).

There are obvious factual issues in dispute in this matter and Respondent has stated them with sufficient particularity upon which to call this matter for hearing. The obvious factual disputes are stated in the preceding paragraph. In addition, it appears that Respondent wishes to contest the allegation that if there are violations of § 395.3(a)(1), they constitute a serious pattern of safety violations.

Therefore it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: August 11, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Ronnie Booker

[Docket No. R9-89-09]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region Nine, for a Final Order finding the facts to be as alleged in a Notice of Claim dated January 24, 1989, and in opposition to a request from Respondent for a hearing.

Having reviewed the Motion and the supporting documents appended thereto, I find that Respondent's request does not meet the requirements of the regulations. I further find the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Commerical Motor Vehicle Safety Act and the Motor Carrier Safety Act, Respondent was duly served with a copy of the Notice of Claim and has failed to reply as required by 49 CFR 386.14(b).

Therefore it is ordered, That Respondent's request for a hearing is denied and that Respondent, Ronnie Booker, is ordered to pay the full amount of the assessed penalty of $700 within 30 days of the date of this Order. Payment shall be made to the Regional Director.

Dated: August 1, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Bluestone Paving, Inc.

[Docket No. R3-89-096]

Final Order

This matter comes before me upon the request of Respondent for a hearing and opposition thereto and Motion for A Final Order from the Regional Director, Region 3.

Having reviewed the motion and the supporting documents, including the Notice of Claim of May 22, 1989, the response from Respondent's attorney of June 1, 1989, and the letter of June 6, 1989, from Regional Counsel to Respondent's attorney concerning the requirements of the regulations, I find that Respondent has not complied with the requirements set forth in the regulations applicable to the request of a hearing. I also find the evidence supports the charges and specifications contained in the notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Respondent's request for a hearing is denied and that the Regional Director's Motion for Final Order is granted. Bluestone Paving, Inc., is ordered to pay the full amount of the assessed penalty of $11,000 within 30 days of the date of this Order. Payment shall be made to the Regional Director.

Dated: July 31, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Industrial Paper Tube, Inc.

[Docket No. RI-89-43]

Final Order

This matter comes before me as a result of a Notice of Claim, dated June 21, 1989, alleging violations of the Federal Motor Carrier Safety Regulations (FMCSRs). On July 3, 1989, Respondent by letter replied and requested a hearing. In that letter, Respondent offers vague, generalized excuses for the violations. An offer of $25 is made in settlement.

The Regional Director has submitted a Motion in Opposition to the Request for a Hearing and for Final Order. That Motion characterizes the Notice of Claim as the result of a follow-up audit conducted in 1989 (original audit in 1988). The Motion relies on a failure of the Respondent to show any material factual issues in dispute.

I agree with the Regional Director. Respondent's letter of July 3 fails to comply with the requirements of the regulations, much as the Respondent's alleged violations fail to comply with the regulations. The offer of $25 is wholly inadequate. The claim that no knowledge of the violations or their consequences is present is belied by the fact of the earlier audit.

Therefore, it is ordered, That the Respondent's request for a hearing is denied and that the Regional Director's Motion for a Final Order is granted. Respondent, Industrial Paper Tube, Inc., is ordered to pay the full amount of $3,600 assessed in the Notice of Claim

within 30 days of the date of this Order. Payment shall be made to the Regional Director.

Dated: July 31, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Kingsway Lumber Carriers, Inc.

[Docket No. RI-89-97]

Final Order

This matter comes before me upon Motion of the Regional Director in Opposition to Hearing and for a Final Order. Respondent was informed by Notice of Claim dated May 10, 1989, of alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). His reply indicated a wish to contest the claim.

The regulations require a statement as to material factual issues in dispute. Respondent's request is totally devoid of any such specificity.

At the same time, the Motion of the Director, and the supporting documents appended thereto offer convincing evidence supporting the charges and specifications alleged in the Notice of Claim.

Therefore, it is ordered, That Respondent's request for a hearing is denied and that the Regional Director's Motion for a Final Order is granted. Respondent, Kingsway Lumber Carriers, Inc., is ordered to pay the full amount assessed of $10,500 within 30 days of the date of this Order. Payment shall be made to the Regional Director.

Dated: July 31, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Kimberly United Freightways, Inc.

[Docket No. R3-88-05]

Final Order

On March 27, 1989, I issued a Final Order in this matter finding the charges and specifications to be as alleged in a Notice of Claim issued on August 16, 1988. The full assessed penalty of $9,500 was ordered due and payable within 30 days of the date of that Final Order.

As the Federal Highway Administration was unable to obtain service of the Order, Counsel for the Regional Director has requested reissuance thereof.

Therefore, it is ordered, That Kimberly United Freightways, Inc., pay the full amount of the assessed penalty of $9,500 within 60 days of the date of this Order. Payment shall be made to the Regional Director, Region 3.

Dated: July 26, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

"Smokin" Joe Frazier & Sons

[Docket No. R3-88-024; OMCS No. 3S-87-059-024]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated March 1, 1988, and in Opposition to an Oral Hearing.

Having reviewed the Motion and the supporting documents appended thereto, I find that no valid request for a Hearing was ever made. Further, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Minimum Financial Responsibility Regulations.

Therefore, it is ordered, That in the absence of any material factual issues in dispute, no hearing is necessary in this matter. Respondent is directed to satisfy a penalty assessment of $3,000 payable within 30 days of the date of this Order.

Dated: July 11, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Four Seasons Bus Service

[Docket No. R3-88-032; OMCS No. 3U-88-002-050]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated March 31, 1988, and in Opposition to an Oral Hearing.

Having reviewed the Motion and the supporting documents appended thereto, I find that no valid request for a Hearing was ever made. Further, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Minimum Financial Responsibility Regulations.

Therefore, it is ordered, That in the absence of any material factual issues in dispute, no hearing is necessary in this matter. Respondent is directed to satisfy a penalty assessment of $3,000 payable within 30 days of the date of this Order.

Dated: July 11, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Woodbury Horse Transportation, Inc.

[FHWA Docket No. R1-88-1 Motor Carrier Safety]

Order of Administrative Law Judge

By motion dated May 16, 1989, the Regional Director moves for summary judgment. As grounds for that motion the Regional Director asserts that Respondent failed to respond to the request for admissions served February 17, 1989, that pursuant to 49 CFR 386.44(a)(2) those requests were thereby deemed admitted, that Respondent has failed to comply with the Regional Director's request for interrogatories and production of documents, or the Judge's order dated April 26, 1989 directing the filing of such answers and documents, and that the answers filed were not attested as required by the FHWA Rules and the Federal Rules of Civil Procedures.[1]

Respondent has filed no answer to the Regional Director's motion within the seven-day period permitted by the Rules.[2] Respondent did belatedly on May 8, 1989, file answers to interrogatories and to the request for admissions. That filing did not attempt to provide good cause for Respondent's failure to file an answer to the Request for Admissions within the time prescribed by the Rules.

Those Rules provide that each request for admission is deemed admitted unless a written answer is filed within 15 days after service (49 CFR 386.44(a)(2)) and

[1] The Regional Director cites no support for this assertion, and the Rules do not require such attestation or incorporate such a requirement from the Federal Rules. 49 CFR 386.44. Cf. 49 CFR 386.43(c)(4), 386.56(c). Accordingly, we give no weight to Regional Counsel's assertion in this regard.

[2] 49 CFR 386.35(c). By letter dated June 1, 1989, a secretary in the law firm representing Respondent asked for a copy of the summary judgment motion and a ten-day period in which to answer that motion. That letter indicated that the attorneys for Respondent have been aware of the motion since at least May 24, 1989. They have nevertheless filed no answer, no request for a copy of the motion, and no motion for extension of time. The secretary's letter does not state that the motion was not served or received, does not purport to show good cause for the extension, for failure to file an answer or comply with the Judge's prior Order, or to emanate from the attorneys or be authorized or directed by them. Moreover, even if authorized by or submitted on behalf of the attorneys, we do not consider such a letter from an attorney's secretary to the Judge received twelve days after a motion for summary judgment is known to be pending to be an appropriate or timely request for an extension of time, to be an appropriate pleading in appropriate form, or to show good cause for relief.

that "any matter admitted is conclusively established" unless the judge permits withdrawal or amendment (49 CFR 386.44(b)). Respondent has made no effort to justify the failure to make a timely response. Accordingly, as indicated by the Rules the admissions requested are deemed to be conclusively established.

On the basis of those admissions we find and conclude that:

1. Exhibit 1 attached to Regional Counsel's request for admissions is a true and accurate copy of the driver's daily logs for September 15 and 16, 1987 for driver Shawn Mertens.
2. Exhibit 2 is a true and accurate copy of driver's daily logs for September 22 and 23, 1987 for driver Wayne Oke.
3. Exhibit 3 is a true and accurate copy of driver's daily logs for driver Kevin Keilly for October 8 and 9, 1987.
4. Exhibit 4 is a true and accurate copy of driver's daily logs for driver Kevin Keilly for October 15 and 16, 1987.
5. Exhibit 5 is a true and accurate copy of driver's daily logs for driver Craig Coffin for October 21 and 22, 1987.
6. Exhibit 6 is a true and accurate copy of driver's daily logs for driver Craig Coffin for December 1 and 2, 1987.
7. Exhibit 7 is a true and accurate copy of driver's daily logs for driver Kevin Keilly for September 16 through 23, 1987.
8. Exhibit 8 is a true and accurate copy of driver's daily logs for driver Keith Craig for October 2 through 9, 1987.
9. Exhibit 9 is a true and accurate copy of driver's daily logs for driver Kevin Keilly for October 3 through 10, 1987.
10. Exhibit 10 is a true and accurate copy of driver's daily logs for driver Craig Coffin for November 8 and 15, 1987.
11. On September 16, 1987, Shawn Mertens drove 14½ hours without having 8 consecutive hours off-duty.
12. On September 23, 1987, Wayne Oke drove 20 hours without having 8 consecutive hours off-duty.
13. On October 9, 1987, Kevin Keilly drove 12½ hours without having 8 consecutive hours off-duty.
14. On October 16, 1987 Kevin Keilly drove 16½ hours without having 8 consecutive hours off-duty.
15. On October 21 and 22, 1987, Craig Coffin drove 12½ hours without having 8 consecutive hours off-duty.
16. On December 2, 1987, Craig Coffin drove 13 hours without having 8 consecutive hours off-duty.
17. From September 16, 1987, to September 23, 1987, Kevin Keilly drove 39 hours after being on duty 70 hours in 8 consecutive days.
18. From October 2, 1987, to October 9, 1987, Keith Craig drove 11½ hours after being on duty 70 hours in 8 consecutive days.
19. From October 3, 1987, to October 10, 1987, Kevin Keilly drove 28 hours after being on duty 70 hours in 8 consecutive days.
20. From November 8, 1987, to November 15, 1987, Craig Coffin drove 17 hours after being on duty 70 hours in 8 consecutive days.
21. Drivers Shawn Mertens, Wayne Oke, Kevin Keilly, Craig Coffin and Keith Craig are employees and drive for Woodbury Horse Transportation, Inc.
22. The trips shown in exhibits 1 through 10 (drivers daily logs) involve travel in interstate commerce.
23. Woodbury Horse Transportation, Inc. is subject to the Federal Motor Carrier Safety Regulations, 49 C.F.R. part 383 *et seq.*

On the basis of Respondent's admissions and failure to comply with the discover requests and the Judge's Order and to answer the subject motion, we conclude that summary judgment may appropriately be entered against Respondent.

The Notice of Claim dated April 7, 1988, alleged six violations of 49 CFR 395.3(a), which involved requiring or permitting drivers to drive more than 10 hours, and four violations of 49 CFR 395.3(b), which involved requiring or permitting drivers to drive after having been on duty more than 70 hours in eight consecutive days. The facts established by the request for admissions, which are deemed admitted and conclusively established under the FHWA Rules, substantially establish the violations and Respondent's liability. Admissions one (1) through twenty-three (23) show that Respondent's drivers exceeded the hours of service requirements as set forth in the Notice of Claim and thus violated 49 CFR 395.3(a) and 49 CFR 395.3(b).

Respondent also ignored the initial request for production of documents including current drivers' daily logs. The documents were sought by Regional Counsel to establish a continuous and current pattern of non-compliance and show that any disciplinary program of the Respondent, if one exists, is mere "lip service." Respondent's failure to submit the documents raises an inference that violations would be established if the requested documents were producted.

Respondent's answer dated August 18, 1988, p. 3, asserts affirmatively that the violations do not warrant a fine of $1000 in view of Respondent's "past history, which does not, in any way, indicate a pattern of serious safety violations, and its financial status, which can be described as hardship, at best." Respondent has, however, waived its opportunity to present those defenses by its failure to comply with the Regional Counsel's production requests and the Judge's Order directed to those issues.

Regional Counsel submits and we agree that the Judge's authority under the Administrative Procedure Act and the Federal Highway Administration's Rules enables the entry of summary judgment. Section 7(b) of the Administrative Procedure Act, 5 U.S.C. 556(c), provides:

> Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.[3]

The FHWA Rules provide:

> (b) Power and duties. Except as provided in paragraph (c) of this section, [4] *the administrative law judge has power to take any action and to make all needful rules and regulations to govern the conduct of the proceedings to ensure a fair and impartial hearing, and to avoid delay in the disposition of the proceedings.* His/her power include the following:
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> * * * * *
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> (6) To consider and rule upon all procedural and other motions, except motions which, under this part, are made directly to the Associate Administrator.
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> * * * * *
>
> (8) To make and file decisions; and
>
> (9) To take any other action authorized by these rules and permitted by law. 49 CFR 386.54 (emphasis added).

The Administrative Procedure Act and the FHWA Rules give the Judge broad authority to control the hearing, nothing in the Rules proscribes the entry of such an order, and the Judge is empowered to enter orders not inconsistent with those rules.[5]

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[3] The Attorney General's Manual on the Administrative Procedure Act (1947), p. 74, points out that the "quoted language automatically vests in hearing officers [now administrative law judges] the enumerated powers" and that "an agency is without power to withhold such powers from its hearing officers." Accord *Tourist Enterprises Corp. "ORBIS,"* CAB Docket 27914, Recommended Decision, dated September 23, 1977, p. 11, n.9, *adopted*, Order 78-5-17, p. 2. See also Attorney General's Opinion dated January 18, 1977, p.7.

[4] There is no paragraph (c) in § 386.54.

[5] Compare *Rodgers Johnson/J and J Bus Service*, FHWA Docket No. R3-89-02, Order dated May 4,

Continued

We conclude that summary judgment in favor of the Regional Director can and should be entered. Accordingly, It is ordered that:

1. The Regional Director's motion is granted.
2. Summary judgment is entered against Respondent Woodbury Horse Transportation, Inc., in the amount of $10,000 based upon the pleadings, the record and the findings and conclusions herein.

Dated: June 13, 1989.

Ronnie A. Yoder,

Administrative Law Judge.

Yankee Trails Inc.

[Docket No. RI-89-07 (Formerly RI-89-30)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a Hearing and denial of alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). The alleged violations were documented in a Notice of Claim dated March 8, 1989, from the Office of Motor Carrier Safety, Region 1; the violations alleged involved two instances of failing to report accidents (49 CFR 394.9), and 15 instances of requiring or permitting false entries upon record of duty status (49 CFR 395.8).

With respect to the § 394.9 violations, Respondent denies that the accidents in question were reportable accidents under the regulations, denies that it failed to make a report within 30 days, and alleges that all required reports were filed within the prescribed time.

With respect to the § 395.8 violations, Respondent denies the violations, alleges that reasonable measures were taken to require driver compliance and claims application of certain exemptions. In paragraph 13 of its filing, Respondent claims exemptions under 49 CFR 398.8(1). In paragraph 14 of its filing, Respondent alleges that any violation of § 398.8 arose from application of the exemptions of § 398.5(1). As there are no claimed violations arising under § 398, it must be assumed that all defenses and allegations referred to in paragraphs 13 and 14 involve 49 CFR 395.8(1), in particular, the 100 air-mile radius driver exemption.

There are obvious factual issues in dispute in this matter and the Respondent has stated them with sufficient particularity upon which to call this matter for hearing.

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: May 11, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Continental Petroleum & Energy Co.

[Docket No. R3-89-066]

Final Order

This matter comes before me upon request of the Respondent for a hearing and of the Director, Office of Motor Carrier Safety, Region 3, through Counsel in opposition thereto and seeking a Final Order.

A Notice of Claim was issued on March 14, 1989, alleging 15 violations of the Federal Motor Carrier Safety Regulations (FMCSRs), 49 CFR 391.51(a), failure to properly maintain driver qualification files. In an apparently related case, *In the Matter of Continental Tank Lines, Ltd.*, Docket No. R3-89-059, similar allegations were made. In that matter, we held that each driver qualification file deficiency would be a violation and not the number of trips documented. The reasoning underlying this finding was the small, localized nature of the operation and the apparent willingness of the Respondent to quickly remedy the deficiencies. In each of these matters, the violations were alleged as a result of an initial audit.

This Order will follow the Order issued in *Continental Tank Lines, Ltd.* Deficiencies have been documented in the files of three drivers, thus three violations have been substantiated. No reason appears to have been advanced by Respondent compelling a hearing.

Therefore, it is ordered, That the request for a hearing is denied and that the motion for a Final Order is hereby granted except as modified above. The Respondent is ordered to pay the sum of $900 assessed for three violations at $300 per violation within 30 days of the date of this Order.

Dated: April 19, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Corco Chemical Corporation

[Docket No. R3-88-106]

Final Order

This matter comes before me upon motion for a Final Order submitted by the Regional Director, Office of Motor Carrier Safety, Region 3, through Counsel. The requested Order would impose a penalty of $7,500 for a total of 10 alleged violations of Part 387 of the Federal Motor Carrier Safety Regulations (FMCSRs), specifically 49 CFR 387.7(d), failing to maintain proof of financial responsibility at its principal office.

Respondent was notified of the alleged violations by Notice of Claim dated December 28, 1988. That Notice states: "As a result of a safety review of your company's operation, ten (10) violations of the minimum levels of financial responsibility for motor carriers were documented." These 10 alleged violations all involved the failure to have a properly completed MCS-90 on file at the principal place of business.

Respondent contends that it had the required level of insurance at the time of the alleged violations and produced an MCS-90 as proof thereof. As the Form is not in the submitted file we can only assume that such has been produced. Respondent asked in a letter of January 5, 1989, whether it was being fined for not having the proper coverage or for failure to have the updated form. This inquiry is relevant to any final determination in this matter.

Section § 387.7(a) provides that no motor carrier may operate a motor vehicle without having obtained the required minimum levels of financial responsibility. Subsection (d) requires that proof of that coverage be maintained at the carrier's principal

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1989. On December 8, 1988, the Administrator of the Federal Aviation Administration issued a decision in *Western Airlines* (FAA Docket 85-108), *et al.*, which stated, *inter alia*, that under the Administrative Procedure Act "ALJs lack the authority to modify or add to the procedures provided in published agency regulations, even if the modifications or additions do not actually conflict with specific provisions of the agency's rules." (p. 6.) The decision cites no precedent or other authority for that statement, and the uniform precedent at the Civil Aeronautics Board and theretofore at the Department of Transportation had been that the Judge can adopt any procedures for the conduct of the proceeding consistent with statute, the rules, and considerations of due process and agency policy and precedent. Decisions of the FAA Administrator are not binding in non-FAA proceedings, and the decision of the Administrator in *Western, et al.*, should be limited to its facts and should not be applied in this proceeding. See *Continental Airlines*, FAA Dockets CP89SO0016, *et al.*, Order dated May 4, 1989, p. 4, n. 6; *Robert O. Nay*, DOT Docket 45663, Orders dated February 15 and March 8, 1989. Moreover, as noted above, the FHWA rules specifically permit the Judge to "take any action and to make all needful rules and regulations to govern the conduct of the proceedings to ensure a fair and impartial hearing, and to avoid delay in the disposition of the proceedings."

place of business. A violation of (a) would occur each time a vehicle was operated in commerce without the required insurance. A violation of (d) occurs when the failure to maintain proof of insurance on file is discovered. Although the record in the present matter does not reveal the date of or number of inspections underlying the allegations, it must be presumed that one visit and inspection took place.

I find that Respondent was duly served with a Notice of Claim and that proof of the required levels of financial responsibility was not on file on the date of the audit.

The issue of level of assessment is one that is usually left to the Discretion of the Regional Director. However, in this case, a previous Final Order, *In the Matter of North East Express, Inc.*, Docket No. 85–113FR, has a bearing.

We have established that one violation only has occurred here: failure to maintain the required Form at the principal place of business. Respondent has shown that the required levels of insurance were in effect and avers that it was a clerical failure on the part of its insurance carrier to update Respondent's file which caused this violation. This violation was quickly corrected (Form MCS–90 provided to Director within 10 days) and no apparent harm or threat to transportation was created by this violation.

Thus, under the finding in *North East Express, Inc.*, we have established that Respondent did have the required levels of insurance, but failed to produce proof of its existence at the time of the audit. The relative seriousness of such a technical violation appears to be minimal. I conclude, therefore, that the violation was committed but that the penalty based on the circumstances is too high.

Therefore, it is ordered, That the Motion for A Final Order in the amount of $7,500 is denied and that Respondent pay $750 within 30 days of the date of this Order.

Dated: April 14, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Burlington Food Services Co.

[Docket No. RI–89–20]

Final Order

This matter comes before me on motion of the Office of the Regional Counsel, Region 1, for a Final Order finding the facts be as alleged in a Notice of Claim dated February 21, 1989.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs). I also find that *Burlington Food Services Co.* has failed to settle the outstanding claim.

Therefore, it is ordered, That *Burlington Food Services Co.* pay the full amount of the assessed civil penalty of $7,000 within 30 days of the date of this order.

Dated: April 14, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Sonneveldt Company, Inc.

[Docket No. R5–88–39; Case No. 5C–88–053–248]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 5 for a Final Order finding the facts to be as alleged in a Notice of Claim dated June 14, 1988, and ordering *Sonneveldt Company, Inc.*, to pay the civil penalty of $5,650 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that *Sonneveldt Company, Inc.*, was duly served with a copy of the Notice of Claim and has failed to settle the outstanding claim.

Therefore, it is ordered, That *Sonneveldt Company, Inc.*, pay the full amount of the assessed civil penalty of $5,650 within 30 days of the date of this Order.

Dated: April 12, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Compaction Systems Corporation

[Docket No. RI–89–06 (Formerly RI–88–154)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a hearing. Counsel for the Director, Office of Motor Carrier Safety, Region 1, conceded that issues of fact have been raised.

Respondent has been cited for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs) by Notice of Claim dated November 17, 1988. The Notice alleges multiple violations of 49 CFR 395.3, requiring or permitting drivers to drive more than 10 hours.

Respondent has denied these violations. A variety of reasons have been advanced, including confusion as a result of new operations, not aware of traffic conditions, involved runs not being operationally defective, and estimated mileages. Respondent's reply of January 31, 1989 references such statements as "C.S.C. was in negotiations with our Local 813 during the time period for a start-up operation . . ." and also references the adverse driving conditions exception to the rule in question.

In determining the facts in this case, the hearing officer is not to place any weight on the possibility of union difficulties. Although start-up difficulties may be taken into account in assessing a penalty for violation, they have no bearing on the fact of that violation. Finally, adverse conditions as described in the regulation are clear on their face. Normal traffic delays of the type encountered in any metropolitan area are not adverse driving conditions within the meaning of the regulation.

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a)(1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b)(1985).

Dated: April 12, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Emerson Perrine

[Docket No. R3–88–035; OMCS No. 3J–87–043–181]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, through his attorney, for a Final Order finding the facts to be as alleged in a Notice of Claim issued on May 2, 1988, and to impose a penalty of $12,300.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained therein relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Emerson Perrine d/b/a Perrine Oils pay the full amount of the assessed penalty of

$12,300 within 30 days of the date of this Order.

Dated: March 1, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Alfred Phillip Coleman

[Docket No. R7-88-61; Case No. 7M-88-043-211]

Final Order

This matter comes before me on Motion of the Director, Office of Motor Carrier Safety for Region 7, through Counsel, in Opposition to a Request for Hearing by Respondent and for a Final Order finding the facts to be as alleged and imposing a penalty of $250.00.

Respondent, in his request for a hearing, did not comport with the form or substance of the underlying regulations, 49 CFR 386.14. Although failure to comply with the rigorous procedural form would not in all cases be disqualifying, the essential underlying basis for granting a hearing is the establishment of material factual issues in dispute. Respondent basis his request for a hearing on the provisions of a National Master Freight Agreement (Central States Area Over the Road Motor Freight Supplemental Agreement).

Respondent argues that this agreement places the duty of notification of medical examination upon the employer. Whether this is factually true is irrelevant for the violation charged in this matter. Respondent is responsible for compliance with the regulations allegedly violated in this matter. Disputes involving the scope of employment contracts are not properly brought in this forum.

Respondent offers no other information which would establish any factual issues in dispute. In fact, the record before me would indicate that Respondent knew of his violation. Having reviewed the Request for a Hearing, the Motion in Opposition and the Motion for a Final Order, I find that the evidence does not indicate any material factual issue in dispute, supports the charges and specifications contained in the notice of Claim relating to the violations of the Federal Motor Carrier Safety Regulations, and that Respondent was duly served with a copy of the Notice of Claim.

Therefore, it is ordered, That Alfred Phillip Coleman pay the full amount of the assessed civil penalty of $250.00 within 30 days of the date of this Order.

Dated: March 1, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Service Bus Company

[Docket No. RI-89-05 (RI-88-137)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a hearing. Counsel for the Director, Region 1, indicates he admonished Respondent of the necessity to comply with the procedural and substantive requirements of 49 CFR 386.14, and offers no objection to the request for a hearing.

Respondent was sent a copy of a Notice of Claim dated October 3, 1988, which set forth multiple violations of 49 CFR 391.51, 395.8(a), and 395.8(j). A penalty of $500.00 for each of 30 violations was imposed, totaling $15,000.

On January 31, 1989, Respondent, through Counsel, requests a hearing and replies to the Notice of Claim by general denial of the alleged violations. The regulation governing the replies and requests for a hearing specifically require a listing of all material factual issues believed to be in dispute. A general denial will not ordinarily suffice to comply with the regulatory requirements and would ordinarily result in denial of the request. However, the record in this matter indicates a previous filing by Respondent, dated October 17, 1988, in which it is stated that (Respondent) "maintained his records had been burglarized and most of the records stolen with other things taken from the trailer." Respondent does not deny that the records in question were not available on the date of the audit. There appear then to be material factual issues present here as to (1) whether such records had in fact been kept as required, (2) whether such records had been maintained in Respondent's trailer, and (3) whether there had been a burglary resulting in the loss of the records. Respondents will be provided an opportunity to establish each of the above to disprove the allegations in the Notice of Claim.

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appiont an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: March 3, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Empire Gas Co., Inc.

[Docket No. R1-87-87]

Final Order

On October 13, 1987, the undersigned issued an Order appointing an Administrative Law Judge (ALJ) to conduct a hearing in this matter. At issue is a proposed civil penalty assessment of $16,000 requested in a Notice of Claim filed on May 20, 1987, for alleged violations of the Minimum Financial Responsibility Regulations. Respondent contested the claim on the basis of unavailability of the requisite insurance in the Commonwealth of Puerto Rico at the time of the violation.

The ALJ issued his Initial Decision on November 16, 1988. That Decision is based upon numerous filings made by both parties, an Oral Hearing lasting two days and a review of the Transcript of the Hearing. The difficulty of these proceedings and the diligent effort of the ALJ in this matter is duly noted and appreciated.

The major findings of the ALJ can be categorized as (1) Respondent has violated the law and regulations by transporting liquified compressed gas without having in effect the required insurance; (2) that at the time of the violations insurance was not available to Respondent, however, insurance later became available and from the time of availability Respondent was not entitled to transport liquified compressed gas without insurance; and (3) the amount of the penalty should be assessed at $4,000 for the initial violation, with additional penalties imposed for failure to obtain insurance by a staggered schedule of dates.

Both Respondent and Petitioner have submitted timely Petitions for Review. Petitioner objects to the initial decision on the basis that Respondent was not required to and did not meet the burden of establishing the unavailability of insurance, that insurance was available and that Petitioner is entitled to the entire assessment claimed in the Notice of Claim.

Respondent objects to the imposition of any penalty for operations when insurance was unavailable, to the finding that insurance became available in March/April, 1988 through Puerto Rico Automobile Assigned Risk Plan (ARP), and to the imposition of an increasing penalty schedule based upon timely compliance.

The ALJ's Initial Decision provides ample discussion of the unavailability of insurance to Empire and like companies, upon the date of the alleged violations. This finding is supported in the record. Although no insurance companies appeared to provide evidence, the record indicates a hostile atmosphere in the Commonwealth during 1987/1988 which impacted upon the ability of hazardous materials carriers and particularly those who transport liquified compressed gas to obtain requisite insurance. This finding has not been rebutted by the presence of information that some carriers under some circumstances may have obtained such insurance. In fact, the ALJ has taken into account the various reasons underlying such disparities.

At the same time, it stands uncontroverted on the record that the alleged operations did take place in violation of the law. It is certain that Congress had no intent to allow operations in violation of the law by carriers with unsafe operations. It is also certain that Congress did intend these penalty provisions to be implemented in a stringent manner. Operations without the requisite levels of insurance by a carrier who has been denied insurance because of dangerous equipment or an unsatisfactory safety record would be inexcusable and subject to the maximum penalties of the law. Such does not appear to be the case here. The ALJ concludes based on the record that there is no evidence to indicate whether the condition of the equipment was a factor in Respondent's inability to secure insurance, neither was there evidence that Respondent's loss experience or safety record was a factor.

All these factors are to be taken into account in assessing a penalty once a violation has been established. It has been the policy of the undersigned to rely on the Regional Directors to establish the penalty assessment in reliance upon their familiarity with the circumstances of the carrier and the alleged violations. On occasion, I have established the penalty where additional facts which have come forth necessitate some modification. This matter presents the first instance where an ALJ is recommending a penalty assessment based upon a complete record. I appreciate the ALJ's efforts in recommending a penalty which would be equitable and at the same time bring about that very compliance which we desire in this program.

Respondent in his Petition for Reconsideration challenges the availability of insurance through the ARP. Respondent has also submitted evidence of the proper insurance through the filing of an Endorsement dated September 2, 1988. It serves no purpose to impose the penalty schedule recommended by the ALJ in light of the present compliance of Respondent.

Therefore, it is ordered, That Respondent, Empire Gas, did transport liquified compressed gas by commercial motor vehicle in Puerto Rico without the requisite level of insurance as alleged in the Notice of Claim issued May 20, 1987.

That at the time of the violations such coverage was unavailable to Empire. The reasons for such unavailability are many. However, the record establishes that in large part such unavailability may well have been for reasons beyond Empire's control.

That in assessing the amount of the penalty, justice and the circumstances surrounding the violation require an assessment of $4,000 as recommended by the ALJ. However, no penalty will be assessed for violations occurring beyond those alleged in the Notice of Claim.

All motions and requests in this matter to the extent not granted herein are denied.

Dated: February 24, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Dean R. Kirsch, dba Kirsch Enterprises

[Docket No. R9-88-49]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region 9, for a Final Order finding the facts to be as alleged in a Notice of Claim dated October 25, 1988, and ordering Kirsch Enterprises to pay a civil penalty of $5,400.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Kirsch Enterprises was duly served with a copy of the Notice of Claim and has failed to reply as required by 49 CFR 386.14(b).

Therefore, it is ordered, That Dean R. Kirsch, dba Kirsch Enterprises, pay the full amount of the assessed civil penalty of $5,400 within 30 days of the date of this Order.

Dated: February 19, 1989.

Richard P. Landis,

Associate Administrator for Administration.

Rodgers Johnson/J and J Bus Service

[Docket No. R3-89-02 (R3-87-76)]

Withdrawal of Final Order and Appointment of Administrative Law Judge

On October 20, 1988, a Final Order was issued finding the Respondent to be in violation and ordering the payment of the assessed penalty.

On December 5, 1988, Respondent, through Counsel, filed a Motion for Reconsideration. Respondent asserts through further affidavit that he was not operating as a motor carrier in contravention of the regulations.

On January 20, 1989, the Regional Director, Region 3, through Counsel, filed a Motion in Opposition to Respondent's Motion for Reconsideration. This Motion is accompanied by a signed statement from a Mr. Melvin Andrew Myles, attesting that he never had authority to, nor operated commuter services and that he leased buses to Mr. Johnson. In addition, Counsel has also included a Maryland State Police Traffic Safety Report indicating a possible bus operation by J&J Bus Service, Inc.

Although I cannot agree with Respondent's Counsel that his client's Affidavit "ineluctibly establishes that Rodgers Johnson was not conducting operations as a motor carrier * * *", particularly in light of Mr. Myles signed statement, I am as a rule not disposed to making a finding on the basis of signed statements alone. Nevertheless sworn statements must be presumed to have been made in truth or at the least in the belief in the truthfulness of the statement.

Mr. Johnson's amplified affidavit constitutes sufficient basis to allow him to rebut the Petitioner's information. It does constitute a material factual issue on which there is an obvious dispute.

Therefore, it is ordered, That the Final Order of October 20 is set aside until an Administrative Law Judge can sort out the facts in this matter. In accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: February 10, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

RAM Express Co.

[Docket No. R3-88-051]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated June 2, 1988, and ordering RAM Express Co. to pay a civil penalty of $7,350.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that RAM Express Co. was duly served with a copy of the Notice of Claim and has failed to reply as required by 49 CFR 386.14(b).

Therefore, it is ordered, That RAM Express Co. pay the full amount of the assessed civil penalty of $7,350 within 30 days of the date of this Order.

Dated: February 10, 1989.
Richard P. Landis,
Associate Administrator for Administration.

Singer Interstate Carriers, Inc. and James Vincent Aldi

[Docket No. R1-89-03]

Order Consolidating Matters and Appointing Administrative Law Judge

These matters come before me upon request of the Respondents. Counsel for the Director, Region 1, agrees that Respondents have raised issues of fact.

Respondents have been cited for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Respondent Singer was notified of the alleged violations by Notice of Claim dated December 22, 1988. The alleged violations included 49 CFR 391.11 (using a physically unqualified driver); § 391.45 (using a driver without a medical examination); § 391.51 (failing to maintain a complete driver qualification file); and § 395.8 (record of duty status). Respondent denies either the allegations raised in the notice or denies that there has been any violation of the regulations.

Respondent Aldi has been cited for alleged violations of 49 CFR § 391.45 and has been notified thereof by Notice of Claim dated December 22, 1988. Respondent denies these allegations. Respondent denies he was responsible for the use of false medical certificates and denies knowledge or consent in such use, if established.

These matters have arisen out of the same investigation and involve in part identical violations.

Therefore, it is ordered, That these matters be consolidated for hearing and in accordance with 49 C.F.R. § 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation as the Presiding Judge in these matters. The Judge appointed is authorized to perform those duties specified in 49 C.F.R. § 386.54(b) (1995).

Dated: February 9, 1989.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Matt Petroleum Corp.

[Docket No. R1-89-01]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a hearing. Counsel for the Director, Office of Motor Carrier Safety, Region 1, concedes that issues of fact have been raised.

Respondent has been cited for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs) by Notice of Claim dated April 7, 1988. The Notice alleges one violation of 49 CFR 391.45, using a driver not physically reexamined each 24 months, and 5 violations of 49 CFR 395.3, requiring or permitting a driver to drive after having been on-duty more than 60 hours in 7 consecutive days.

Respondent has denied these violations. For the violation of § 391.45, it is averred that the medical examination did take place, but the results were misplaced. For the violations of § 395.3, it is averred that the logs have been incorrectly maintained.

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: January 25, 1989.
John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Northeast Express, Inc.

[Docket No. R3-88-019; BMCS No. 3N-87-022-350]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, through his Attorney, for a Final Order finding the facts to be as alleged in the Notice of Claim and assessing a total penalty of $8,800. The Notice, dated February 19, 1988, alleges 3 instances in which the Respondent failed to make timely reports of accidents (49 CFR 394.9(a)) and 19 instances in which drivers were required or permitted to make false entries upon records of duty status (49 CFR 395.8(e)).

Respondent denies the allegations, does not request a hearing, has discussed these matters with the regional staff, and has indicated that additional information would be forthcoming. As of the date of this Order no additional information has been received.

With respect to the alleged reporting of accident violations, Respondent indicates that the reports were filed, albeit not timely. There is no indication in the record that such dilatory filing was international or the result of anything but confusion arising out of normal business practices. In view of the maintenance of adequate insurance coverage and remedial efforts to ensure that this does not recur no penalty will be assessed for these three violations.

With respect to the record-keeping violations, Respondent's claims are without merit. The institution of steps to abate such violations and to ensure that they do not recur is laudable. These efforts have been taken into account in assessing a penalty. The Motion of the Regional Director is granted and a penalty of $400 for each violation is granted.

Therefore, it is ordered, That the Motion for a Final Order finding Respondent to be in violation as alleged is hereby denied in part with respect to the reporting of accidents and granted in part with respect to the recordkeeping violations. Respondent is Ordered to pay the amount of $400 for each of the 19 violations of 49 CFR 395.8(e), for a total of $7,600 within 30 days of the date of this Order.

Dated: January 18, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Cliff Hall & Company

[Docket No. R6-88-25; OMCS No. 6H-87-132-113]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, through the attorney, for a Final Order finding the facts to be as alleged in a Notice of Claim issued on July 14, 1988, and to impose a penalty of $8,000.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained therein relating to violations of the Minimum Financial Responsibility Regulations.

Therefore, it is ordered, That Cliff Hall & Company pay the full amount of the assessed penalty of $8,000 within 30 days of the date of this Order.

Dated: December 29, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Albert Thorn dba Albert Thorn Trucking

[Docket No. R6-88-44; OMCS No. 6S-88-049-113]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, through his attorney, for a Final Order finding the facts to be as alleged in the Notice of Claim issued on August 23, 1988, and to impose a penalty of $7,500.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained therein relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Albert Thorn dba Albert Thorn Trucking pay the full amount of the assessed penalty of $7,500 within 30 days of the date of this Order.

Dated: December 29, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Transformer Services, Inc.

[Docket No. 88-34]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for dismissal of the claim or such other relief as warranted including mitigation or exemption from the requirements of the regulations in question.

Counsel for the Director, Office of Motor Carrier Safety, Region 1, concedes that an issue of fact has been raised.

Respondent has been cited for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs) by Notice of Claim dated January 12, 1988. That Notices alleges that 18 violations of 49 CFR 395.3 (a) and (b), requiring or permitting drivers to drive in excess of allowable times, have been documented. A penalty of $18,000 has been levied. The amount of the penalty has been determined on the basis that these alleged violations constitute a pattern of violation.

Respondent contends that it is an electric service company and that the majority of its time is spent on the job performing equipment repair and maintenance. It is the emergency response nature of its business which apparently constitutes the basis for its request for exemption. There is no basis in the law for such an exemption and therefore, this request is denied. Respondent is subject to the requirements of the law and regulations.

Respondent contends that its Due Process rights have been violated in that the written notice failed to fix a reasonable time for the abatement of the violation and to suggest actions which might be taken in order to abate the violation. In addition it is contended that the compliance review was deficient for failure to give written notice with reasonable particularity of the violations cited in the Notice of Claim. Had this been Respondent's first audit, some credence might be given this allegation. However, Respondent has been audited several times in the past, the same violations had been discovered, and Respondent was informed of the necessity to conform to the regulations. The law does not specifically require that abatement opportunity precede the imposition of a fine; rather the statutory language appears to contemplate a simultaneous procedure. Any claim Respondent has in this regard fails in light of its prior knowledge of the regulations and previously documented violations.

However, Respondent does raise specific factual issues in dispute and I am therefore appointing an Administrative Law Judge to determine the following:

1. Did Respondent require or permit its drivers to drive or otherwise violate the regulations in question as alleged in the Notice of Claim?

2. If proved, do the violations constitute a pattern of violation?

3. Is there sufficient proof of the presence of adverse driving conditions or emergency conditions to mitigate the alleged violations?

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: December 12, 1988.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Tom Barton Trucking, Inc.

[Docket No. R6-87-48; OMCS No. 6P-87-075-256]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, for a Final Order finding the facts to be as alleged in a Notice of Claim dated December 10, 1987, and in Opposition to an Oral Hearing.

Having reviewed the Motion and the supporting documents appended thereto, I find that no valid request for a Hearing was ever made. Further, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Minimum Financial Responsibility Regulations.

Therefore, it is ordered, That in the absence of any material factual issues in dispute, no hearing is necessary in this matter. Respondent is directed to satisfy a penalty assessment of $4,000 payable within 30 days of the date of this Order.

Dated: December 2, 1988.
John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Woodbury Horse Transportation, Inc.

[Docket No. 88-69]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a formal, trial-type hearing. Respondent received a Notice of Claim dated April 7, 1988, detailing a number of alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and alleging that such violations constitute a serious pattern of safety violations resulting in an increased level of penalty assessment. Respondent has denied each violation and has denied that, if proven, these violations constitute a pattern, contending that each is an isolated incident.

The Regional Director, Region 1, opposes the Request for a Hearing on the basis that Respondent's request does not present any material factual issues in dispute. The Regional Director has requested a Final Order finding Respondent in violation.

Attached to the Motion as Exhibit A is the Notice of Claim. Following is a document entitled Safety Compliance Review. This Review indicates that for the violations cited over 500 records were checked. The Notice of Claim alleges 10 violations.

On its face, Respondent's denial and claim that even if proved such violations are isolated instances constitutes a material factual issue in dispute. At hearing, the following issues are to be decided:

1. Did Respondent require or permit its drivers to drive in excess of the number of hours required under 49 CFR 395.3 (a) and (b)?

2. Are the violations alleged in the Notice of Claim, if proved, sufficient to establish a pattern of violation?

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: December 1, 1988.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Roy A. Leiphart Trucking, Inc.

[Docket No. R3-87-15; BMCS No. 3G-86-019-039]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, through his attorney, for a Final Order finding the facts to be as alleged in a Notice of Claim issued on March 24, 1987, and to impose a penalty of $16,500.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained therein relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Roy A. Leiphart Trucking, Inc., pay the full amount of the assessed penalty of $16,500 within 30 days of the date of this Order.

Dated: December 1, 1988.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Empire Gas Co., Inc.

[Docket No. RI-87-87; Motor Carrier Safety—FHWA]

Initial Decision of Chief Administrative Law Judge William A. Kane, Jr.

Served Upon:

Luis Fernandez Ramirez, G.P.O. Box 700, San Juan, Puerto Rico 00936-0700, Attorney for Empire Gas Company, Inc.

Kenneth Dymond, Assistant Regional Counsel, Region 1, Federal Highway Administration, Leo O'Brien Federal Building, Clinton Avenue & North Pearl Streets, Albany, NY 12207.

Found:

(1) That the operation of commercial vehicles between points in Puerto Rico by Empire Gas Company on four occasions in February 1987 transporting liquified compressed gas (propane) without having in effect the required minimum level of financial responsibility of $5 million violated the Motor Carrier Safety Act of 1982 and the Federal Highway Administration's regulations (49 CFR 387.7(a)).

(2) That at the time of the violations and until the establishment of the Puerto Rico Automobile Assigned Risk Plan (ARP), in March-April 1988, $5 million of coverage was not available to Empire but that from that point until the record was closed in this case in July 1988 it was available and Empire was not entitled to transport liquified compressed gas without such insurance.

(3) That in assessing the amount of penalty, justice and the circumstances surrounding the violation required the assessment of (a) a penalty of $4,000 for operating without the required insurance between establishment of ARP and the closing of the record in this case, and (b) and additional penalty of $4,000 for each three-week period after service of this Initial Decision for which Empire fails to obtain the required insurance from ARP or another source until the total reaches $16,000.

This Initial Decision shall become the final decision of the Associate Administrator for Motor Carriers 45 days after it is served unless a petition or Motion for Review is filed under 49 CFR 386.62. Such petition or motion must be accompanied by exceptions and briefs. Reply Briefs shall be filed within 30 days after service of the appeal brief.

Initial Decision of Chief Administrative Law Judge William A. Kane, Jr.

Introduction

This proceeding was initiated by a Notice of Claim filed on May 20, 1987, by Counsel for the Director of Region 1, Office of Motor Carrier Safety, Federal Highway Administration, in Albany, New York, charging Empire Gas Company, Inc., of San Juan, Puerto Rico (Empire or respondent), with violations of the minimum financial responsibility regulations applicable to carriers of liquified compressed gas. The Notice charged that the respondent operated a commercial motor vehicle on four occasions in February 1987 between Guayama and four other points in Puerto Rico without having in effect the required minimum level of financial responsibility; i.e., $5 million required under 49 CFR 387.7(a) and 49 U.S.C. 10927 note (1982). The Notice of Claim proposed assessment of a civil penalty of $4,000 for each trip or a total of $16,000. In a reply filed on June 4, 1987, the respondent contested the claim contending that insurance coverage in the amount of $5 million is not available in the Commonwealth of Puerto Rico, and requesting an oral evidentiary hearing in Puerto Rico.

In an order dated four months later on October 13, 1987, the Associate Administrator for Motor Carriers of the Federal Highway Administration granted the respondent's request for a hearing stating that the requirement for certain minimum levels for assurance is congressionally mandated, and that it is

the responsibility of the carrier to comply with this mandate. He stated, however, that the contention of impossibility of compliance due to circumstances beyond the control of the carrier must be taken into account in assessing the degree of culpability. The Associate Administrator stated further that information submitted by the respondent indicates a threshold level of good faith effort to comply and that there is sufficient indication of factual issues in dispute in this matter, to wit, whether the insurance required is available in the Commonwealth, to call this matter for hearing.

The undersigned Administrative Law Judge was assigned to the proceeding by Notice of October 15, 1987. The trial of the matter has been governed by the Rules of Practice for Motor Carrier Safety Proceedings, 49 CFR part 386.

Telephone conferences were held by the judge on November 10, 1987, January 13, 1988, and February 18, 1988. Exhibits were exchanged from time to time pursuant to schedules adopted in such conferences.

The docket of the proceeding contains a letter from the Assistant Counsel for Motor Carrier and Highway Safety Law, FHWA in Washington, D.C., urging grant of the respondent's request to hold the hearing in Puerto Rico to facilitate the presentation of witness testimony on the matter of availability of insurance in the required amount. The FHWA letter stated that the collection of a full and documented record in this matter is significant and important to FHWA, as it may constitute the basis for a change in the legislation requiring $5 million of liability insurance depending on the findings of the Administrative Law Judge.

In light of the stated importance of this matter to FHWA, the judge stated in a November 17, 1987 order setting the case for hearing that in addition to holding the hearing in Puerto Rico petitions for leave to intervene in the proceeding under 49 CFR 386.17 would be liberally granted. To facilitate the filing of petitions to intervene by interested parties, copies of the November 17, 1987 Order setting the case for hearing were furnished to the Commissioner of Insurance of the Commonwealth of Puerto Rico, the Public Service Commission of the Commonwealth of Puerto Rico, the Commonwealth Highway Authority, and the information office of the Federal Highway Administration. The latter office was orally requested by the judge to disseminate copies of the Order setting the case for hearing as widely as practicable. The record remained open to receive petitions to intervene for four months until March 15, 1988.

A petition to intervene was received on March 14, 1988, from Progasco, Inc., a competitor of Empire Gas, in the sale and transportation of liquified compressed gas in Puerto Rico. Such petition was granted at the hearing. In addition, Juan Antonio Garcia, the Commissioner of Insurance, Commonwealth of Puerto Rico, appeared at the hearing and testified on the matter of availability of insurance in the amounts required by the law and the FHWA regulations. The hearing was held at the Federal Courthouse, Old San Juan, Puerto Rico, on March 23–24, 1988. Nine witnesses testified. Briefs were filed by Regional Counsel on June 6, 1988; by the intervenor Progasco, Inc., on June 17, 1988; and by the respondent Empire Gas Company on June 27, 1988. A number of post-hearing exhibits were submitted pursuant to agreement and order at the hearing. Such exhibits were marked by the judge and received into the record by order dated October 24, 1988. The matter is now ready for decision.[1]

Positions of the Parties

Regional Counsel contends that the violation of 49 CFR 387.7(a) and the act have been established by the evidence and conceded by the respondent. Insofar as determining the culpability of Empire for the violations, he argues that $5 million of liability insurance is available and obtainable in Puerto Rico. As evidence of this he contends that at least four or six motor carriers which transport liquified compressed gas in Puerto Rico have been able to obtain the required coverage in some instances at great cost. Regional Counsel contends that Empire has the burden of proving that insurance companies will not issue polices in the amount required and that Empire has failed to produce evidence proving that fact. He contends that Empire's history of attempts and failure to obtain the coverage demonstrate hardship but do not excuse the violation. He argues that the purpose of the $5 million insurance requirement in the law is to encourage motor carriers to engage in practices and procedures that enhance safety by making the insurance unobtainable by unsafe carriers. In this connection, Regional Counsel describes as "telling" the fact that random roadside inspections of five Empire trucks by the Puerto Rico Public Service Commission between April 1987 and March 1988 has resulted in two of the trucks being ordered out of service on the spot. Regional Counsel also contends that it is unfair and unjust for Empire to operate without the insurance while other carriers in Puerto Rico have obtained it. He argues that no relief from the insurance requirement is permissible by law, that a $16,000 penalty for the four violations by Empire is reasonable and that this amount will not affect Empire's ability to continue to do business.

Respondent, Empire Gas Company, concedes that it operated the four trips in February 1987 without the required level of insurance. Empire contends that the record of its cancellations and extended efforts to obtain $5 million of insurance demonstrate that this coverage was not available at the time of the violation or subsequently to companies in Puerto Rico such as Empire a substantial portion of whose business is the transportation of propane. Empire contends that of the companies which have the required insurance only a small portion of their business is transporting propane. It contends that Progasco, its competitor, obtained a policy of insurance in the required amount only through an offshore Bermuda subsidiary of its large parent company Enron Liquid Fuels, Inc., of Houston, Texas. It claims that the offshore insurance company has no authority to do business in Puerto Rico and that such company may not have the capital necessary to respond to insurance claims. As a result, respondent argues that Progasco has no effective insurer but is basically self-insured. Respondent argues that the establishment of the Puerto Rico Automobile Assigned Risk Plan to cover hazardous materials transporters on the initiative of the Commissioner of Insurance is evidence that the insurance has been unavailable in Puerto Rico.

While it does not contend that obtaining the insurance will be impossible in the future, Empire argues that it has been impossible for the past two years. Since compliance was impossible for that period, it argues that no penalty should be imposed for the violations.

Progasco, Inc., the intervening competitor of Empire contends in its post-hearing brief that it has obtained the required $5 million coverage and that Empire could do the same. It argues that the coverage which it holds from

[1] On May 25, 1988, DOT Administrative Law Judge Burton S. Kolko granted a joint motion by Regional Counsel for the 6th Region and the respondent *In the Matter of Tex-Air Gas Company, Inc., FHWA, Docket R6–87–32* to stay the proceedings in that case pending issuance of the Initial Decision in this case. That proceeding involves the availability of $5 million of liability insurance to a motor carrier in Texas. Copies of this Initial Decision will be served on the parties to that proceeding.

Gulf Company, Ltd., is valid. Progasco contends that 49 CFR 387.11 requires only that it have insurance with a company authorized in any state of the United States and that Gulf is authorized in all the states in which Gulf's parent, Enron, does business. Additionally, Progasco cites various other policies of its own and of a company which hauls its tank-trailers as additional evidence that it holds the required insurance.

The Violations by Empire

The record shows clearly that Empire Gas Company violated the Motor Carrier Safety Act of 1982 (49 U.S.C. 10927) (1982) and the Safety Regulations of the Federal Highway Administration (49 CFR 387.7(a)). Under the Act and Part 387 of the regulations, no motor carrier may operate a motor vehicle in private carriage in intrastate commerce transporting liquified compressed gas in a tank with a capacity in excess of 3,500 water gallons in a vehicle with a gross vehicle weight rating of 10,000 pounds or more after January 1, 1985, unless it has in effect public liability insurance in the amount of $5 million. Proof of such insurance is required to be maintained at the carrier's principal place of business, and shall consist *inter alia* of an endorsement of the policy in the form prescribed in section 387.15 designated as Form MCS–90.

On February 12, 1987, Patrick Miano, a safety investigator for the Office of Motor Carrier Safety of the Federal Highway Administration, conducted an investigation at the principal place of business of the Empire Gas Company in Rio Piedras, near San Juan, Puerto Rico. He found evidence that on February 3, 4, 7, and 9, 1987, Empire Gas Company took delivery in its trucks of between 9,761 and 11,250 gallons of a product described in invoices as "butane, liquified petroleum gas, flammable gas, UN1075" from Phillips Puerto Rico Corp., Inc., in Guayama, Puerto Rico, and transported such material to destinations in four other cities in Puerto Rico (Regional Counsel Exs. D, E, F, and G). The product constituted liquified compressed gas within the meaning of the regulation.[2] Respondent did not have in effect at the time liability insurance in the amount of $5 million. Ketty G. Marrero, Treasurer of Empire Gas, stated in a written memorandum to Mr. Miano dated February 12, 1987 (Regional Counsel Ex. I), that he believed the company had insurance in the amount of only $1 million. However, the only evidence of insurance in effect at the respondent's principal place of business at the time of the inspection was a policy issued by Corporation Insular de Seguros of San Juan, Puerto Rico, covering the company's liability for the period June 30, 1986 to June 30, 1987, in the amount of $200,000 for each accident. Attached to the policy was a copy of MCS–90 in the form prescribed by the regulations (49 CFR 387.15) (Regional Counsel Ex. H). While there was no evidence on the subject, it is clear that the trucks in which the material was transported had gross vehicle weight ratings of over 10,000 pounds. At the time of the transportation they were being operated in private intrastate commerce within the meaning of those terms in the law and the regulation. The statute and regulation apply to motor carriers in Puerto Rico.[3]

No party to the proceeding disputes any of the foregoing facts. It is concluded on the basis thereof that the transportation performed by Empire Gas constituted a violation of the Act and the regulations.

Assessment of the Penalty

As indicated above, the October 13, 1987 Order of the Associate Administrator for Motor Carriers setting this matter down for hearing took note of the fact that the respondent is contending that $5 million of liability insurance is not available in Puerto Rico and that compliance with the law is therefore beyond the carrier's control. The Associate Administrator directed that this contention be taken into account in assessing respondent's "degree of culpability." There is a minor threshold problem with this instruction.

As a logical matter, the proper measure of "culpability" in this enforcement proceeding should be the availability of insurance at the time the violations occurred, that is, February 1987 rather than at various later points in time. However, it is not considered that the Associate Administrator intended this proceeding to focus solely on February 1987. In his order which was issued on October 13, 1987, eight months after the violations, he expressed interest in whether the required insurance "is" available in Puerto Rico. Moreover, in light of the effect which he expected this proceeding to have on the need for legislation, it is clear the Associate Administrator's interest extended to the availability of insurance in Puerto Rico not only in February 1987 but up to the latest period for which evidence could be gathered in the proceeding. Additionally, of course, it is commonplace for an agency to take account for subsequent actions by a respondent to determine the level of penalty for a prior violation. Finally, it is clear from the positions and type of evidence presented by all the parties that they effectively concur in using the availability of insurance to Empire and Empire's attempts to obtain it during and subsequent to the violations as a means of assessing the level of penalty.[4]

For the foregoing reasons, rather than confine this case to "culpability" (in February 1987) as the sole measure of the penalty to be assessed the test will be expanded to embrace all the criteria specified in the Motor Carrier Safety Act for assessing the penalty including "such other matters as justice may require." [5]

Empire's Characteristics and Insurance Experience

The best way in this proceeding to evaluate Empire's contentions that $5 million of liability insurance is not available in Puerto Rico is to analyze Empire's characteristics and experience in attempting to obtain such insurance and to compare that with the characteristics and experience of other Puerto Rican carriers of the same

[2] The parties frequently referred to the contents of the trucks which is generally a mixture of propane and butane as "liquified petroleum gas" and more frequently as "LPG." Liquified compressed gas to which the regulation applies, is a broader term embracing not only those products but also such gases as oxygen, hydrogen, chlorine, etc., which unlike propane are not petroleum derivatives. The $5 million insurance requirement in the regulation applies to all liquified compressed gases.

[3] The amendment of the Motor Carrier Act imposing the $5 million insurance requirement expressly includes the Commonwealth of Puerto Rico in the definition of a state (49 APP. U.S.C. 10927) (note) (West Suppl. 1982) section g(4). The transportation in the proceeding is between points in Puerto Rico and therefore constitutes intrastate transportation. Memorandum of Regional Counsel in this proceeding dated February 11, 1988.

[4] Empire's present posture with regard to compliance with the law gives it little standing to protest hardly any method of determining the amount of penalty. Only four violations are charged. However, Mr. Miano, FHWA's inspector, testified that at time of his recommendation to his superiors regarding a penalty to be imposed on Empire (which was some time after February 3–9, 1987) he knew that Empire was continuing to operate without $5 million of liability insurance. He testified further that to the best of his knowledge Empire was still operating without $5 million insurance at the time of his testimony in the hearing in this case on March 23, 1988 (Tr. 96–97). Empire is fortunate therefore to have been charged so far with only the four violations in February 1987.

[5] Under the amendments to the Motor Carrier Safety Act, in determining the amount of any penalty for violations, the Secretary of Transportation is required to take into account the "nature, circumstances, extent, and gravity of the violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and *such other matters as justice may require.*" (Emphasis added.) 49 U.S.C. 10927(e)(1) (note) (1982).

commodity in obtaining such insurance. Empire's characteristics and record will be analyzed first.

Empire Gas Company, Inc., has its principal place of business in Rio Piedras, a location near San Juan, Puerto Rico. It is engaged in the business of purchasing liquified compressed gas consisting mainly of propane mixed with some butane (referred to hereinafter as "propane" or "LPG") from at least one supplier of this product, the Phillips Puerto Rico Core, Inc., located in Guayama, a point in south central Puerto Rico (Exs. D, E, F, G).[6] Empire which has approximately 25 percent of the wholesale market for propane in Puerto Rico transports the propane in its tanker trucks to various independent retail installers throughout the island. They resell and deliver the propane in trucks or station wagons in 50 and 100 pound cylinders to their individual consumers. There are very few gas pipelines in Puerto Rico and a large part of the population relies on this distribution system for the delivery of propane for cooking and other purposes (Tr. 488–489). The President and Chief Executive Officer of Empire is Ramon Gonzalez Cordero who runs the operation from San Juan (Tr. 497). Mr. Cordero attended the hearing but in view of the anxiety of the parties to end the hearing his testimony was received by stipulation. The company has been in business for 21 years since 1967 (Tr. 497).

The respondent was permitted to withhold financial data including its gross revenues on proprietary grounds. It was allowed to restrict its testimony to the facts that an annual premium of $46,000 for the required insurance would be a minor expense for the company (Tr. 495) and that a penalty of $16,000 in this proceeding (the amount requested by Regional Counsel) would not adversely affect the company's ability to continue to do business within the meaning of the applicable statute 49 U.S.C. 10927 (e)(1). (*Supra* note 5.)

There is no evidence that Empire encountered any difficulty obtaining public liability insurance prior to January 1, 1985, when the Federally-required level for carriers of propane and other liquified compressed gas rose to $5 million. In March or April 1984 when Diego Vidal Gonzalez (then employed by Marsh and McLennan Insurance Agency in Puerto Rico) became the broker for Empire Gas (Tr. 418), he placed a policy, effective June 30, 1984, with El Fenix de Puerto Rico (El Fenix) on behalf of Empire Gas (Empire Ex. 2). That policy which had a primary limit of $1 million was in effect on January 1, 1985, when the required Federal limit rose to $5 million (Tr. 425). That policy expired on June 30, 1985. For the period June 30, 1985 to June 30, 1986, El Fenix cut Empire's coverage to only $200,000 (Empire Ex. 4) advising Empire that El Fenix had lost the reinsurance treaty which permitted it to place part of the risk with other companies (Tr. 422–423). El Fenix did not renew the $200,000 policy when it expired on June 30, 1986 (Tr. 425). To increase its coverage, Empire in November 1985 placed a policy with General Accident Insurance Company of Puerto Rico covering its liability between $200,000 and $500,000. This policy expired by its terms on June 30, 1986, and General Accident declined to renew (Empire Exs. 7 and 10).

Going back to December 8, 1984—shortly before the liability limits rose to $5 million—Mr. Diego Vidal Gonzalez, then still with Marsh and McLennan agency, placed a policy on behalf of Empire with Insurance Company of North America (INA) (Empire Ex. 3). This was an umbrella policy providing $4 million of excess coverage in addition to the $1 million of primary coverage which was still being provided by El Fenix at the time (*supra*). The $4 million umbrella coverage was evidenced by a standard MCS–90 endorsement in the form prescribed in § 387.15 of the regulations (Empire Ex. 3). The INA umbrella policy expired on December 8, 1985, and by endorsement Number 5 thereof INA extended the $4 million umbrella coverage through July 24, 1986 (Tr. 420 and Empire Ex. 6).

In the winter of 1985–86, Empire had in effect a policy with El Fenix with liability up to $200,000 which was expiring on June 30, 1986. It had a policy with General Accident Insurance with coverage from $200,000 to $500,000 which expired June 30, 1986. It had the renewed policy with INA with coverage from $1 million to $5 million. This left a liability gap in the winter 1985–86 period between the $500,000 and $1 million levels. To fill that gap, Empire secured a policy from INA effective July 24, 1985, which by its terms expired July 24, 1986 (Empire Ex. 5). As a result of the foregoing, in the winter of 1985–86 Empire had four separate policies in effect in order to reach the required $5 million coverage. By June 30, 1986, all four of these policies had either expired or been cancelled (Empire Exs. 8, 9, 10; Tr. 425).

Upon cancellation and termination of the above policies, Mr. Vidal, then no longer employed by the Marsh and McLennon agency, obtained a policy for Empire from Corporacion Insular de Sequros (Insular) initially in the amount of only $200,000 for the period June 30, 1986 through June 30, 1987 (Empire Ex. 11). This was the only Empire policy in effect at the time of the unlawful operations in February 1987 for which Empire is charged in this case. Mr. Vidal succeeded in persuading Insular to raise Empire's coverage to $500,000 for the period June 30, 1987 through June 30, 1988 (Tr. 446–447). Insular provided the $500,000 coverage for this period as a result of reinsurance that it was able to obtain in Germany (Tr. 426). At Mr. Vidal's insistence, Insular issued a standard form MCS–90 endorsement to the policy on March 22, 1988, the day before the hearing in this case (Tr. 448, Empire Ex. 66). The MCS–90, of course, showed a liability limitation of only $500,000 instead of the required $5 million. Mr. Vidal testified that the cost of the $500,000 policy was $136,000 per year (Tr. 445 and 474). The policy had no deductible provision (Tr. 447 and 474). Other than that, there was no evidence or testimony to explain why it cost $136,000 per year for a policy with a $500,000 limit.[7]

Empire's Efforts to Obtain the Required Insurance

The record shows that Empire Gas Company, Inc., through at least two agencies, Vidal and Rodriguez, Inc., and Eastern America Insurance Agency made a number of unsuccessful attempts to obtain insurance in the amount of $5 million after that limit became compulsory on January 1, 1985. The recorded attempts began on October 2, 1985, and continued through at least December 17, 1987. The evidence of these attempts is set forth in 41 separate Empire exhibits (Empire Exs. 16–57).

Empire has compiled a post-hearing chart which is intended to comply with instruction by the judge at the hearing that it prepare such a chart summarizing the evidence of its requests for and denials of insurance (Empire Ex. 69). According to the chart, between October 1985 and December 1987 Empire through its insurance brokers made 81 separate approaches to 33 different agencies or insurance companies in an effort to obtain the required insurance. Most of the claimed requests and denials are

[6] The record does not show what other enterprises Empire Gas Company, its owner, and any affiliates are engaged in. However, as of June 30, 1985, in addition to tractors and trailers suitable for the transportation of large quantities of propane gas, Empire had liability insurance on 48 other vehicles (Empire Ex. 1).

[7] The record in this case was closed as of July 22, 1988, and there is no evidence of Empire's insurance coverage after June 30, 1988, or at the time of this Initial Decision.

evidenced by correspondence which Empire placed in the record. However, 18 of the claimed requests and denials alleged to have been made in April/May 1986 (Empire Ex. 25) and 19 others claimed for May/June 1987 (Empire Ex. 42) are evidenced only by checkoff lists prepared by Empire's insurance agents. Whatever may have been the actual number of requests and denials, it is clear from the evidence that Empire through its agents persisted in its efforts over a period of more than two years to obtain the required insurance. The chart (Empire Ex. 69) shows, for example, that American International Insurance Company of Puerto Rico was approached for insurance on behalf of Empire five times: once in 1985, twice in 1986, and twice in 1987. In the case of seven other insurance companies, the chart shows that Empire's representatives made four approaches to each company in an effort to obtain the required insurance. The foregoing evidence shows clearly that the failure by Empire Gas to obtain $5 million of insurance has not been due to lack of solicitation by its agents Vidal and Rodriquez and Eastern America Insurance Agency.

Reasons for Unavailability of Insurance to Empire

One difficulty with this proceeding is that the insurance companies themselves who make the decisions whether to provide the required insurance have not been requested to appear or provide evidence or testimony, nor have they done so. There is no first hand evidence therefore from the primary source as to reasons the insurers have been unwilling to provide $5 million of liability insurance to Empire. It is necessary therefore to attempt to ascertain the reasons from other sources and this is done below:

1. One explanation for Empire's inability to obtain insurance at the required level is a general climate of fear of exposure to catastrophic risks which appears to have developed among insurers in early 1986 as a result of what they perceived to be an increasing level to personal injury awards by the courts. As evidence that a nationwide crisis in insurance availability existed in 1986, Empire placed in evidence a cover story from *Time* Magazine for March 24, 1986, titled "Sorry, Your Policy is Cancelled" (Empire Ex. 24, Tr. 424). Empire contends also that the reinsurance treaties of the insurers doing business in Puerto Rico in recent times contained exclusions barring coverage of wholesale and retail gas operations (Empire Ex. 50). Regional Counsel contends, however, that the ability of certain other trucking companies to obtain the insurance shows clearly that there is no such exclusion in the reinsurance treaties (Brief 13).

In early 1986 insurers which formerly had been willing to reinsure risks for Puerto Rican motor carriers transporting liquified petroleum gas up to $5 million appear to have begun to avoid such risks. Empire's chart of its requests and denials *supra* (Ex. 69) shows as reasons for denial such factors as: "unavailability of adequate reinsurance," "no market (primary or excess) interested in LPG dealers," "recent events are adverse to this type of risk (May 1986)," "does not intend to subscribe risks involving transportation of hazardous products," "no knowledge of insurance companies (in New York) underwriting this type of risk," "decided not to cover liquified gas products risk on either primary or excess insurance," and "company (Empire) did not meet their current underwriting guidelines" (Empire Ex. 69).

Mr. Vidal, Empire's agent, testified that a change of philosophy occurred in the insurance industry in 1986. He said that as a result of that change, Insurance Company of North America (INA), which formerly insured Empire, had sent somebody to Puerto Rico from Miami to "clean up the portfolio." Mr. Vidal testified that it was generally known throughout the insurance industry that this type of insurance (for motor carriers of LPG) was a "hard market." He said that the insurers were experiencing problems in covering it and that while the crisis in availability had developed earlier in the States the problem had lagged about six months in reaching Puerto Rico (Tr. 424).

A further strong indication that Puerto Rico faced a real crisis in availability of insurance to motor carriers of hazardous materials in 1986–1987 is contained in the unanimous August 1987 report on the transportation of hazardous materials by the 14-member tri-partisan Transportation and Public Works Committee of the Senate of Puerto Rico (Empire Ex. 67, Tr. 433 *et seq.*). The high points of the report which is in Spanish were deftly translated from the witness stand at the judge's request by Empire's witness, Mr. Vidal (Tr. 453–457).[8]

Citing testimony by the insurance commissioner, the report finds that coverage in the amounts required by federal law were not available in Puerto Rico and that insurers were notifying transporters of hazardous materials that their policies would not be renewed. The report said that the insurers did not have the capacity in terms of capital and surplus or the backing of world reinsurers to assume this type of liability. The report, which was issued in August 1987, said that the reinsurance market for this type of risk was closed due to its catastrophic nature (Tr. 455). The report estimated that between 1,000 and 2,000 units of transport of LPG in Puerto Rico were adversely affected. The report appeared to state at one point that the degree of responsibility that insurers are required by law to assume reduced the number of willing insurers.[9] The report suggested that one solution to the problem would be to create a syndicate of insurance companies to provide the required coverage.

The general climate of aversion by insurers to high risks was undoubtedly exacerbated insofar as motor carriers of LPG were concerned by an accident in Puerto Rico in May 1986. The accident involved Liquilux Corporation, another transporter of liquified compressed gas in Puerto Rico (Tr. 423). On May 16, 1986, that company's trailer tank truck carrying 12,250 gallons of butane gas overturned and exploded in a ball of flame on a highway in Rio Piedras, Puerto Rico. The tank trailer had become disconnected from the tractor and overturned. Eleven passengers in a small public vehicle traveling behind the truck were injured. Several of them were severely burned and one of the victims died two weeks later in the hospital of his injuries. According to press reports, fire fighters fought for five hours to control the resulting blaze. The catastrophe received broad publicity including sensational pictures in the press (Progasco Exs. 5 through 7). A suit for $3.7 million was filed by survivors of the victim who died (Progasco Ex. 7). The fact that Empire transports propane in similar vehicles could not have escaped the attention of insurers.

2. A factor which arguably could have affected the availability of insurance to Empire is the requirement in the law, the regulation and the standard MCS–90 endorsement for the insurer to assume liability up to $5 million for

[8] A copy of the document (Empire Ex. 67) was furnished to the reporter at the hearing to be placed in the docket of the proceeding at the Federal Highway Administration.

[9] As translated literally by Mr. Vidal from the witness stand, the report says in pertinent part, "the problem has its roots locally" and that "safety rules and maintenance rules decidedly had [their] effect in increasing the exposure to risk that the insurer assumes. In—while giving coverage to any of these transporting units by increasing this exposure on top of the normal rules the availability of insurers and reinsurers is reduced that will be willing to assume the risk." (Tr. 459.)

"environmental restoration." Under the required endorsement:

> Environmental restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release, or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage or potential for damage to human health, the natural environment, fish, shellfish, and wildlife.

The testimony on the impact of this requirement on insurance availability is conflicting. Mr. Miano, the FHWA safety inspector in Puerto Rico, testified that to his knowledge the requirement had not been a bar to companies obtaining $5 million insurance in Puerto Rico (Tr. 94). However, Mr. Vidal, Empire's insurance agent, testified (Tr. 477) that pollution and contamination became an issue after the incident involving Union Carbide at Bhopal in India involving poison gas escaping into the atmosphere. He testified that many insurance companies were hit by the resulting claims and afterward eliminated or tried to curb the pollution coverage. Finally, he said the insurers excluded such coverage completely. Mr. Vidal said that some of the companies from whom he had attempted to obtain insurance for Empire had referred specifically to the requirement in MCS–90 that they restore the environment (Tr. 477).

3. There is no evidence to indicate whether the condition of Empire's equipment for the transportation of propane or its maintenance facilities and safety procedures were a factor in the denial of insurance.[10] The evidence shows that as of March 1988 Empire had 16 units involved in the transportation of propane. These included 5 Autocar tractors ages 1–10 years, 1 Kenwood tractor aged 10 years, one Brockway tractor age 11 years, 2 GMC trucks age 1 and 2 years, and 7 tank trailers. The oldest of the tank trailers is 27 years old, a 1961 model. Another is 24 years old, the remainder are 19, 16, 15, and 11 years old (Empire Ex. 62A, Tr. 468). There was no testimony as to whether tractors or propane tank trailers of this age are any more hazardous in the view of insurers than newer tractors.

4. Neither is there evidence whether Empire's loss experience or safety record have been factors in denial of the insurance. In stipulated testimony, Mr. Gonzalez, President of Empire, claimed that his company had an excellent safety record and that the cancellation of his insurance was not due to any safety consideration. He asserts that throughout its 21-year existence Empire has not had a single major accident or an accident involving any fatalities. He said that there have been minor incidents but that this number has been normal because of the safety precautions he has taken to avoid accidents. There was no testimony or evidence as to the nature or extent of such precautions (Tr. 497).[11] Mr. Vidal, Empire's agent, testified that the reason INA cancelled its insurance with Empire in April and May 1986 was not related to any "negative inspections" of Empire nor to any adverse experience Empire had had. He said Empire did not have a bad insurance rating.

There is some documentary evidence but no clarifying testimony as to Empire's insurance loss experience for the nearly three-year period between June 30, 1984 and March 31, 1987. (Empire's ARP Application of April 15, 1988, Ex. 62A.) The insured losses paid by Empire's insurer totaled $87,038.50 for the period June 30, 1984 to June 30, 1985. This included single losses of $11,931, $20,000, and $21,500. Reported losses for the period June 30, 1985 through June 30, 1986, totaled $24,051. The largest single losses were two of approximately $4,000 each. Empire's total insurance losses between June 30, 1986, and March 31, 1987, were $21,468. This included a single loss of $19,700 on October 2, 1986. The record contains no loss data from March 1987 to the time the record was closed in this case in July 1988. There was no testimony or evidence as to whether the losses were for personal injury, property damage, or other forms of damage. Nor was there any evidence whether losses in these amounts would be considered high or low by prospective insurers.

There was some evidence on Empire's safety record but it is basically inconclusive as to possible reasons for the carrier's inability to obtain the required level of insurance. The evidence consists of copies of Notices of Violations of the Federal Safety Regulations issued after random roadside inspections by the Public Service Commission of Puerto Rico between February 3, 1987, and March 8, 1988 (Empire Ex. 62A). There were three of such Notices of Violation. On February 3, 1987, an Empire vehicle carrying propane was ordered out of service after an inspection for defective brakes and inoperable directional lights on the tractor and trailer. On April 21, 1987, an Empire truck carrying propane was cited but not ordered out of service by the Public Service Commission for inoperable stop lights. On July 7, 1987, an Empire truck was ordered out of service for an air leak in the brakes on the front left turning wheel of the tractor and for an inoperable gage that failed to alert the driver to the low pressure in the brake system. The same unit was also found to have inoperable rear directional lights and inoperable low beam headlights. There is no evidence as to whether these constituted a large or small number of violations compared to other similar companies, whether the companies that denied the insurance were aware of such violations and, if so, whether they considered three violations as a basis for refusing $5 million of liability insurance to Empire.

There is some testimony that insurers do look closely at the equipment and safety record of a carrier when deciding whether to issue the insurance. Mr. Miano testified that he had checked orally with several insurance companies in Puerto Rico to ask whether they would issue policies in the amount of $5 million for hazardous materials and under what conditions. He said, without identifying specific companies, that he got, basically, the same general answer from the companies. Those that said they provide such coverage do provide it for people that they have knowledge of, people that they have checked out, that they know to operate safe equipment, and who have a low accident ratio (Tr. 49).

5. There is some evidence and testimony that commercial motor vehicles operating on the roads of Puerto Rico are in generally poor mechanical condition compared to the rest of the country. There is no evidence, however, whether this affected Empire's ability to obtain the required insurance. In a memorandum dated February 18, 1988, Patrick B. Miano, FHWA Inspector in Puerto Rico, transmitted to the Director Office of Motor Carrier Safety in Albany, New York, a report of random roadside inspections by the Puerto Rico Public Safety Commission during October, November, and December 1987. The report covered 62 vehicles of hazardous materials transporters and 268 vehicles of other truck operators. Of this total of 330 roadside inspections, 290 vehicles had out-of-service violations. The violations consisted mainly of defective brakes, lighting and tires. Mr. Miano's report to

[10] Empire's application to the Puerto Rico Automobile Assigned Risk Plan in April 1988 was required to include data on its internal measures to prevent or limit losses and data on vehicle maintenance procedures. This material was not included in the copy of such application filed in this proceeding (Empire Ex. 62A).

[11] *Id.*

Albany showed that with regard to Level 1 random roadside inspections, which are the most thorough and detailed, of 32 hazardous materials vehicles inspected during the three-month period 29 or 91 percent were declared out of service. This means the mechanical defects for these vehicles were considered so serious that to allow the vehicle to continue on the road would be too dangerous and the driver was not permitted to proceed further until the defects were repaired (Tr. 36). The 29 hazardous materials vehicles declared out of service had a total of 55 out-of-service violations and 81 other violations. Of 169 operators of vehicles not carrying hazardous materials, 132 or 78 percent were found to have a total of 469 out-of-service violations and 1,163 other violations. Mr. Miano testified that these percentages of out-of-service violations are much higher than the 30 percent average for the nation as a whole. Mr. Miano testified that in his professional opinion the commercial motor vehicles operating on the roads of Puerto Rico are not in good repair mechanically (Tr. 37).

6. It is argued by Empire that one reason it has been unable to obtain the required insurance is that unlike some other propane carriers which may have obtained insurance, the largest proportion of its business is the transportation of propane. In that connection, Mr. Vidal, Empire's agent, testified that when liquified compressed gas is handled as an incidental operation to a company's other primary business, it may be able to obtain the insurance (Tr. 458).

The record is unclear as to how much of Empire's business consists of the transportation of propane. The invoices for the four violations charged (Regional Counsel Exs. C, D, E, F, G) show the carrier was transporting propane at the time and there was testimony that it has 25 percent of the wholesale market for propane in Puerto Rico. There is no evidence that it does any retailing of the gas.

There is substantial evidence, however, that Empire Gas does operate vehicles which are not involved in the transportation of propane. Empire's fleet schedule as shown on a policy in effect with El Fenix de Puerto Rico from June 30, 1985 to June 30, 1986, lists 68 vehicles of all types only approximately 16 of which have been identified for use in transportation bulk quantities of propane (Empire Ex. 4). In a letter to the Commissioner of Insurance dated July 15, 1988 (Empire Ex. 7), Empire complained that the insurers in the Puerto Rico ARP were insisting on charging a 40 percent premium on "all our vehicles," including "those vehicles that do not transport LPG." The number of Empire's vehicles engaged in activities other than the transport of LPG in bulk may therefore be as high as 50.

Mr. Miano's inspection of Empire shed no light on the percent of the carrier's business devoted to the transportation of propane in bulk. He testified that in his inspections of carriers he did not inquire as to the relative percentage of the company's total volume which is hazardous materials compared to other materials transported. He said it is not necessary for him to get into that and that examination of shipping papers and the MCS-90 endorsements are all the proof that is necessary to determine compliance with the financial responsibility requirements of the Act and regulations (Tr. 44). Mr. Miano testified further that in his inquires to insurance companies about the availability of insurance he did not specifically address the matter of the percentage of the company's business that constituted transportation of liquified compressed gas (Tr. 50).

7. The record does not show the extent to which the price of insurance entered into Empire's inability to obtain it prior to the establishment of the Assigned Risk Plan in March 1988. Empire argues that the insurance had been impossible to obtain (i.e., at any price) for the two years between June 30, 1986 and June 30, 1988.[12] Mr. Vidal testified that he had considered that a $300,000 annual premium would be a bargain for $5 million of insurance for Empire in 1987. He stated at the hearing, however, that he considered that $85,200 (2 × $42,600) per year would be an excessive amount (Tr. 481). In April 1988 Empire offered to pay only $42,600 for insurance on its 16 vehicles involved in bulk transportation of propane under the Puerto Rico Automobile Assigned Risk Plan (Tr. 479). Empire is currently paying $136,000 per year for a policy containing only a $500,000 limit (Tr. 445 and 474). There is no evidence as to what effect Empire's desire for a primary insurance policy with a zero deductible is having on the cost of any insurance it might obtain.

8. It is possible to conclude from the record that various other factors not clearly identified have affected Empire's ability to obtain $5 million of insurance. One could have been Empire's choice of agents. Mr. Vidal, formerly associated with the Marsh and McLennon agency and more recently a partner in another competing agency, may not have been the person best equipped to secure insurance in the required amount. While there was no testimony on the subject, it does not appear to the undersigned that the most rational way to obtain insurance commitments at the high levels required by the present law is the broad-based type of mailing in which Mr. Vidal engaged. It would seem that a sophisticated insurance broker would have established relationships within the insurance community which would enable him to communicate and negotiate with insurers on a more familiar and possibly more effective basis. It could reasonably be concluded that the broad-based mailing by Mr. Vidal evidenced by Empire Exhibits 16–57 was designed more to make a record of denials for a proceeding such as this than to obtain the required insurance. It seems clear from the evidence also that Mr. Vidal and Empire played a leading role in persuading the Commissioner of Insurance to pressure insurers into committing themselves to the Puerto Rico Automobile Assigned Risk Plan. Resentment over confrontational tactics of that type could have had an impact on the willingness of the insurance industry to provide the insurance to Mr. Vidal or Empire. It is noted also that Liquilux, another carrier of propane which Progasco's exhibits showed to be involved in the spectacular crash and fire in 1986, was a client of Mr. Vidal (Tr. 484). This might have exacerbated the fears of insurers against underwriting another Vidal client such as Empire.

Finally, it must be recognized that the incentive for Empire to meet the price demanded by an insurer has been minimal so long as the opportunity for a hearing in this enforcement case has remained. The length of time which this proceeding has unfortunately taken, and the small amount of penalty requested by Regional Counsel have undoubtedly diminished the incentive for Empire to meet the prices at which the insurers are willing to provide coverage. It has to be recognized, as Empire must, that so long as this proceeding is underway Empire is not being burdened with the expense of premiums for $5 million of insurance.

Availability of $5 million of Insurance to Other Propane Truckers in Puerto Rico

The best way to evaluate Empire's contention that it has been unable to obtain the required insurance is to look at the experience of other carriers in

[12] Empire appears to modify that view in some manner on brief. It states there that "very few business matters can be labeled as difficult over all periods of time (past, present, and future), and we cannot say it is impossible to comply in the future" (Br. pp. 58–59).

Puerto Rico in obtaining it. The record contains a good deal of evidence and testimony on that subject. Regional Counsel claims on page 7 of his brief that six carriers domiciled in Puerto Rico have $5 million of liability insurance. He contended at that point based on the knowledge and investigation of FHWA Investigator Patrick Miano that six companies: (1) Juan E. Hernandez, (2) Equipos de Borinquen, Inc., (3) Tropigas de Puerto Rico, (4) Fraticelli Trucking Company, (5) Cooperativa Camineros, and (6) Progasco, Inc., are engaged in the transportation of liquified compressed gas in Puerto Rico have $5 million of liability insurance. Later in his brief (p. 14), Regional Counsel argues only that "at least four" companies have the insurance.[13] An analysis of the nature of the operations and the amount of insurance held by each of these companies is necessary to evaluate Regional Counsel's claim.

Juan E. Hernandez

Mr. Miano cited this company as evidence that Empire could obtain the insurance. The record contains little on Hernandez Trucking Company. It is located in Arecibo, Puerto Rico. It hauls a variety of materials although Mr. Miano was not able to testify what they were (Tr. 102). Mr. Miano said he saw in his inspection of the company's principal place of business that their files contained an MCS–90 endorsement but he did not make a copy of the endorsement (Tr. 47). Regional Counsel was requested by the judge at the hearing to furnish an MCS–90 for the record in this proceeding if he had one (Tr. 104). No such form has been received. In view of the dearth of information on the operations of Hernandez Trucking Company, the absence of an MCS–90 in the record, and the fact that it is listed on page 7 but not on page 14 of Regional Counsel's brief as a holder of $5 million insurance it is concluded that this company's experience has no probative value as to the availability of $5 million of insurance to Empire Gas Company.

Equipos de Borinquen, Inc.

Mr. Miano cited this company as evidence that Empire could obtain the insurance. Mr. Ernesto Villanova, General Manager of Equipos de Borinquen, Inc. (Borinquen), appeared as a witness on behalf of the Regional Counsel (Tr. 111). He testified that the company had $5 million of insurance from American International Insurance Company of Puerto Rico. Subsequent to the hearing Seguros Mongil, Inc., the agent of Borinquen in San Juan, Puerto Rico, pursuant to agreement at the hearing, transmitted a copy of the policy of Borinquen to the undersigned and presumably placed a copy in the record Regional (Counsel Ex. L). The policy contains primary insurance of $1 million and an umbrella policy with a limit of $4 million which is evidenced by an MCS–90 endorsement dated March 25, 1987.

The policy of Borinquen has no probative value to this case in terms of the availability of $5 million of insurance to Empire Gas Company. To begin with, Borinquen's witness testified that the company transports about 30 different kinds of products including dry cargo products, refrigerated cargo, waste material, and hazardous material including various corrosives and oxidizers (Tr. 111). The hazardous materials are only 2 or 3 percent of the products he carries (Tr. 122). He stated expressly, however, that the company transports no liquified compressed gas (Tr. 111). He testified also that the company has no clients for that material. The company has 37 tractors but none of them tow any trailers that carry liquified compressed gas (Tr. 123).

In addition to the foregoing, the scope of Borinquen's coverage is most doubtful. Its policy contains a standard form MCS–90 endorsement dated February 21, 1985 (Ex. L). However, the policy contains another endorsement dated February 21, 1986, reading as follows:

LPG explosives-gasoline

It is hereby understood and agreed that this policy does not provide coverage for liability resulting from the transportation of any flammable or explosive material including but not limited to: liquified petroleum gas, LPG, compressed gas, gasoline, explosives.

The record does not explain the relationship between this exclusionary endorsement and the form MCS–90 of February 21, 1985.

In light of the fact that Borinquen transports no liquified compressed gas at all, and that its policy specifically excludes liability for any such materials, Borinquen's experience fails to show that Empire Gas Company could have obtained $5 million of insurance. To the contrary, the February 21, 1986 endorsement gives support to Empire's contention that insurers were unwilling at that time to underwrite such liability.

Eduardo Fraticelli Trucking Company

Fraticelli Trucking Company is located in Ponce, Puerto Rico. Regional Counsel presented Eduardo Fraticelli, General Manager of Fraticelli Trucking Company, who testified that the company has 23 tractors owned or leased. Either six or ten of these are used to tow trailers which belong to other persons all of whom use such trailers to ship hazardous materials (Tr. 192). The policy for the period November 1987 to November 1988 which Mr. Fraticelli has with Royal Insurance Company was in Mr. Fraticelli's possession at the time of his testimony but was not placed in evidence by any party (Tr. 193, 195, 199–202, 268–269). The policy was stated also to have the basic liability of $1 million and an excess of $4 million. The policy was stated to have been obtained through Continental Insurance Agency from Royal Insurance Company of Puerto Rico at an annual cost of either $60,000 (Tr. 219), $120,000 (Tr. 222), or $125,000 (Tr. 186). Mr. Fraticelli stated that the premium was calculated on the basis of 25 percent attributable to liability of the truck tractor and 25 percent more for the trailer it is pulling at any particular time.

There was uncertainty as to coverage of the Fraticelli policy. It was stated to contain a provision that the above coverage applies to bodily injury or property damage caused by sudden and accidental discharge or release of the liquids or gases but not if a Fraticelli employee "voluntarily contaminates the ambience by opening a valve." This provision was discussed at the hearing but the record was left unclear whether as a legal matter the liability required under MCS–90 would be met by a policy containing such a provision (Tr. 196–198). Mr. Fraticelli said that his policy covered trailers towed by his tractors regardless of who owned the trailers (Tr. 188). He did not know whether the persons who owned the trailers also had policies covering their (the trailer owners') liability (Tr. 188).

Mr. Fraticelli recited the difficulties he has experienced in obtaining the required level of insurance. He said that at the time of the hearing in March 1988 he had been with his present insurer, Royal Insurance Company, for only one year. He said that he had had $5 million of coverage up until mid-1986 when American International Insurance Company cancelled both his basic $1 million policy and his $4 million excess policy (Tr. 189). He said he then went to the Office of the Commissioner of Insurance of Puerto Rico, Mr. Garcia and with Mr. Garcia's help was able to get $1 million of coverage for the second half of 1986. At the end of 1986, Mr. Fraticelli testified that he was able to obtain the full $5 million coverage, $1 million with Insular de Seguros, and the

[13] Regional Counsel dropped Juan E. Hernandez and Equipos de Borinquen, Inc., without explanation between page 7 and page 14 of his brief.

excess with American International. He said, however, that the premium was ten times what he was paying before. He said that prior to 1984 his insurance premium of $6,000 for umbrella coverage was only 3 percent of his sales. In 1986 the premiums went up to 20 percent of his sales and are now back to 10 percent (i.e., either $60,000, $120,000 or $125,000 *supra*).

While Fraticelli may indeed have $5 million of coverage and even an MCS–90 endorsement in the required amount, for a number of reasons Fraticelli's experience does not prove that Empire was able to obtain $5 million of insurance for the coverage of propane.

Mr. Fraticelli said that around the period September 1986 his insurance policy excluded coverage for LPG but that at his request about that time the exclusion was eliminated. Mr. Fraticelli testified further that about 25 percent of the materials his company transports are hazardous materials or hazardous substances. (The distinction is his.) He said that only about 10 percent of his dollar volume is liquified compressed gas, which can include oxygen, nitrogen or hydrogen, etc., as well as LPG (propane and butane). However, he does no currently carry any LGP at all, either propane or butane or any mixture thereof. His only trip in the recent past for the carriage of LPG was in November 1987 about the time of issuance of the present policy by Royal Insurance Company (Tr. 217). That company gave him permission to operate one trip and since then he has not transported any LGP (Tr. 221). Therefore, despite whatever nominal insurance coverage Fraticelli may have, it is concluded here that there is now a tacit understanding between Fraticelli and Royal Insurance Company that Fraticelli's tractors will not be utilized to transport any LPG while the insurance is in effect (Tr. 218). This conclusion is warranted from the witness' testimony that when he last renewed the policy the Royal Insurance Company sent an inspector to his facility and the inspector recommended him favorably (Tr. 220–221). It is quite clear that a knowledgeable insurance inspector would be able to determine quite quickly that a motor carrier had no plans to transport LPG and that the insurer could safely issue a policy covering its liability for $5 million for the transportation of a commodity that he carrier had no intention of transporting. Additional uncertainty flows from the exclusion of voluntary actions of employees *supra*. No weight is given therefore to Fraticelli's experience in determining whether Empire could obtain the insurance.

Tropigas de Puerto Rico, Inc.

Tropigas de Puerto Rico, Inc. (Tropigas) located in Cagus, Puerto Rico, has 15 trucks, 15 tractors, and 8 hazardous materials cargo tank trailers. It had gross revenues of $13 million in calendar year 1986 (Regional Counsel Ex. K). No witness from the company appeared. Mr. Miano, FHWA's inspector, testified that he had personally inspected Tropigas. While he did not find an MCS–90 policy endorsement on the premises when he visited, it was sent to him later and a copy was received into the record of this proceeding showing the full $5 million coverage (Tr. 55, 103, and 104; Ex. K). The MCS–90 was issued on July 17, 1987, by CIGNA International Company for the period April 1, 1987 through April 1, 1988. There is no data on how much Tropigas is paying for the insurance.

While Exhibit K shows the carrier's principal cargo as "propane," the record is somewhat thin as to the full scope of Tropigas' propane operations. Mr. Miano testified that an entry in his review of Tropigas' safety compliance on June 24, 1987, showed that the carrier was heavily engaged in transporting propane. While Mr. Miano agreed to submit a specific breakdown of the various materials transported by Tropigas as a post-hearing exhibit if he had that information (Tr. 102, 104) no such data has been received.

Empire Gas does not dispute that Tropigas has an MCS–90 in effect for the full $5 million and that a substantial proportion of its business is the transportation of propane. Empire contends only that "CIGNA Insurance Company which insured Tropigas had to obtain 100 percent of the reinsurance via CIGNA in Atlanta." Empire explains that the "stateside" operation of CIGNA is collecting the premiums in the continental United States. Empire does not indicate what it considers wrong with this result, or why any insurer it might obtain to provide this required coverage should not be allowed to do the same thing.

While the evidence is sketchy, such evidence as there is appears to suggest that Tropigas is substantially engaged in propane transportation in Puerto Rico and that it does have the required level of insurance. Why it has such coverage, and Empire has not been able to obtain it, cannot be determined on this record.

Cooperative de Camioneros de Transporte de Carga

Regional Counsel relies heavily on the experience of this company (hereinafter Camioneros) as evidence that the required insurance has been available to Empire. Camioneros is located in Santurce, Puerto Rico. It has 110 tractors. Five of these tractors are assigned to the transportation of propane and used to haul seven or eight trailers which belong to Progasco, Inc., a major wholesaler of propane, Empire's major competitor and an intervenor in this case (Tr. 130).[14] About 7 percent of Camioneros' $10 million of revenue is derived from hauling Progasco's propane trailers (Tr. 130). Mr. Modesto Lopez, General Manager of Camioneros, testified for Regional Counsel at the hearing (Tr. 124).

Mr. Miano, FHWA's inspector, did not visit Camioneros himself (Tr. 54) but testified that an audit of the company by his predecessor (at a date not specified) found them to have the necessary coverage (Tr. 47). A copy of Camioneros' current policy for the period November 7, 1987 to November 7, 1988, was placed in the record by the intervenor Progasco (Progasco Ex. 2; Tr. 268). The policy is with the Royal Insurance Company of Puerto Rico, Inc.[15] It contains two MCS–90 endorsements by Royal dated October 30, 1987, one in the amount of $1 million per accident and a second in the amount of $5 million per accident.[16]

Endorsement No. 20 to this policy contains a provision listing 35 companies as additional insureds while Camioneros is rendering services to them in any vehicle covered under the policy. No. 17 on the list of such companies is Progasco, Inc. Further specific evidence that Camioneros' policy was intended to cover Progasco's trailers is contained in Endorsement of No. 3 to the Camioneros' policy which specifically identifies the $21,000 premium and the $5 million liability limit of the policy as applicable to Camioneros' tractors when hauling seven trailers belonging to Progasco (Tr. 470).

There was testimony that Camioneros paid $18,000 per year for insurance on the 6 tractors all but one of which were devoted to the transportation of LPG for Progasco (Tr. 130). This expense of $3,000 per tractor for the five tractors hauling Progasco trailers is billed back

[14] A sixth Camioneros tractor is assigned to another company known as the Association Distruidoras de Gas. The record does not show whether this company also distributes propane (Tr. 130).

[15] This is the company which Mr. Vidal testified earlier had turned Empire down for an insurance policy on November 6, 1987 (Empire Ex. 50).

[16] The Camioneros policy was brought to the hearing on the second day by Mr. Labore an official of Marsh and McLennan, Progasco's insurance agency in Puerto Rico (Tr. 268).

to Progasco which reimburses Camioneros for that expense. Camioneros' witness testified that his company has regularly hauled Progasco's trailers for the past 4 or 5 years. He said that before that Progasco had a couple of tractors of its own (Tr. 131). However, when Camioneros offered its services to Progasco at a quotation Progasco found to be favorable, Progasco sold its trucks to Camioneros which continued as a contractor for Progasco (Tr. 132). Camioneros' witness confirmed that Camioneros' policy *supra* covered Progasco's trailers while they were being handled by Camioneros' tractors (Tr. 140–141). However, he did not know whether this resulted in a reduction of Progasco's insurance costs (Tr. 132).

The record is clear, however, that at the time of the hearing at least five of Camioneros' 110 tractors were involved in the transportation of propane for Progasco. The record is clear too that Camioneros has an MCS–90 endorsement in its policy in the amount of required $5 million by the Royal Insurance Company. The question presented is how Camioneros could do this, and do it at a cost of $3,000 per vehicle while Empire claims to be unable to obtain the required insurance at any cost. Two factors appear to be at work—the low percentage of Camioneros' trucking business constituting propane transportation (5 tractors out of 110 trucks) but more importantly, the close relationship with Progasco.

Mr. Vidal, Empire's insurance agent, testified that he had spoken to Royal Insurance Company about the fact that Camioneros had obtained a $5 million policy. He said he had been advised by Mr. Victor R. Rios, Vice President of Royal Insurance Company, that Camioneros had been granted a policy because its transportation of LPG was merely incidental to the transportation of other substances, that in relation to the total it was only 10 percent of Camioneros' transportation and that it had not therefore been automatically excluded from the Royal Insurance's "automatic reinsurance treaty." (Tr. 470.) Empire insists that this is the main reason other companies have been able to obtain the insurance.

A second and probably larger reason for Camioneros' success in getting insurance is the fact that any liability losses it may experience hauling propane are somehow to be shared by Progasco and the array of companies discussed below which Progasco claims insure its operations. Progasco has elected to use Camioneros to haul its tractors and it has assumed Camioneros' insurance expense of $3,000 for each of the five tractors assigned to the Progasco work. The effects of this relationship are not clear. It is concluded, however, that there is a relationship and that such relationship has contributed to Camioneros' ability to obtain the required insurance and to obtain it at the extraordinarily low rate of $3,000 per tractor.

It is further concluded that since the validity of Progasco's coverage is suspect for the various reasons set forth below, Camioneros' interrelated coverage is also suspect. It is concluded, therefore, that Camioneros' experience does not provide clear proof that $5 million of insurance was available to Empire Gas Company.

Progasco Inc.

Progasco, Inc., the intervenor, and Empire's primary competitor, is a wholly-owned subsidiary of the Propane Corporation which is a wholly-owned subsidiary of the Enron Liquid Fuels Corporation (Enron), a multi-billion dollar corporation headquartered in Houston, Texas (Tr. 299–321). The Propane Corporation imports and stores the propane and while Progasco has some storage facilities it is primarily involved in the delivery of the gas to retailers. Progasco presented evidence and one witness, Randall B. Jones, Safety Administrator, of Enron. Progasco has 6 or 7 tank trailers all of which are hauled by Camioneros *supra*. In addition, Progasco has between 9 and 12 "bobtail trucks" which are single units, not trailers, but which also hold over 3,500 liquid gallons and have a gross vehicle weight of over 10,000 and which are therefore required to have $5 million of liability insurance (Tr. 331–333). Progasco contends that it has the required insurance, that it is available in Puerto Rico, and that Empire should be required to have it.

The testimony and evidence on Progasco's insurance was lengthy, complex, and confusing. The company is claiming applicability of several different and overlapping sources of coverage. First, Progasco offered in evidence (Progasco Ex. 1) and MCS–90 endorsement in the full amount of $5 million to a policy with Aetna Casualty & Surety Company effective June 1, 1987 and expiring June 1, 1988 (Tr. 321).[17] The policy was issued at Hartford, Connecticut, and names "Enron (Progasco, Inc.) of Puerto Rico" as the insured. There was no Aetna policy in evidence, only the MCS–90 endorsement. There was testimony that this policy is the main casualty policy of the Enron Corporation, Progasco's parent, and that it provides up to $5 million for all of those operating companies of Enron that elect to be covered under it (Tr. 345).

The Aetna policy is a "retrospectively rated program" in which Aetna pays the claim on behalf of the insured but thereafter bills the insured for the full amount of the claim. As indicated, the individual operating companies of Enron can elect *not* to be covered by the Aetna/Enron policy. In the weeks before the hearing in this case, Progasco set in motion efforts to exercise this election and obtain alternate insurance. Literally on the eve of the hearing Progasco was still negotiating with other companies to obtain alternative insurance. The testimony regarding typewriter drafts of policies reflecting their efforts filled much of the second day of hearing. Progasco claims that the results of these efforts has been to reduce its cost for $5 million of insurance from $300,000 to $240,000 per year (Tr. 345). At the same time, however, that Progasco asserts that it has obtained this alternate insurance, it continues to argue that the Aetna/Enron policy also remains in effect in some unexplained form of "excess coverage" supplementing or backing up the alternative policies and arrangements discussed below. Progasco claims this "excess coverage" despite the fact that Progasco opted out of the Aetna/Enron policy.

Progasco's Exhibit 4 and Empire's Exhibit 63 are the evidence of Progasco's first claimed alternative insurance policy. Progasco cites these two documents as evidence of primary coverage up to $1 million with a $150,000 deductible. Progasco Exhibit 4 is a two-page document signed by a representative of CIGNA Insurance Company on February 2, 1988, undertaking to provide the primary coverage for one year from that date.[18] Empire's Exhibit 63 is a draft of the CIGNA policy prepared by CIGNA but not yet accepted by Progasco at the time of the hearing (Tr. 16). It was placed as evidence not by Progasco but by Empire

[17] The Aetna policy was an umbrella policy. Progasco's primary insurance at the time was provided by the General Accident Company of Puerto Rico. Progasco's witness Jones testified that this was a $1 million policy with a $250,000 deductible and that it expired on February 2, 1988, the date of inception of the CIGNA policy discussed below (Empire Ex. 63; Tr. 382).

[18] "CIGNA" is the recently adopted acronym for the consolidation of operations of Insurance Company of North America (INA) located in Philadelphia and Connecticut General Insurance Company (CG). Some documents in this case confusingly still carry only the "INA" label.

who subpoenaed it from CIGNA's office in San Juan.

The exhaustive testimony regarding the draft CIGNA/Progasco primary insurance policy disclosed (1) that its coverage was up to $1 million with a $150,000 deductible (Tr. 276–277 and 347), (2) that the annual premium was $165,000 for coverage of 18 commercial trailers and 33 assorted autos, pick-ups and vans (Tr. 368), (3) that the draft itself was dated March 23, 1988, the first day of hearing in this case, (4) that the policy was issued through the Houston office of CIGNA where Enron is located instead of the CIGNA office in Puerto Rico where this policy was required by local law to be written, with a 100 percent reinsurance agreement with the Houston office of CIGNA (Tr. 283), (5) that Progasco itself had received CIGNA's draft policy only on the first day of the hearing, had not yet examined it and that draft policy was not legally applicable to Progasco (Tr. 265), and (6) that the draft policy did not contain an MCS–90 endorsement because the Houston office of CIGNA had not yet authorized inclusion of that endorsement (Tr. 289–290).

Despite the amount of testimony, the record does not show conclusively that CIGNA/Progasco draft policy for $1 million ever went into effect. Mr. Randall Jones, the Enron officer representing Progasco, at the hearing stated firmly that the draft produced at the hearing by Empire was not legally valid or applicable to Progasco. Mr. Jones testified, however, that he had an oral agreement with CIGNA prior to the inception date of the policy (Tr. 320) and that Progasco did have a $1 million policy in effect with CIGNA (Tr. 315). There has been nothing subsequent to the hearing to demonstrate that the draft policy in Empire Exhibit 63 has ever become effective or that an MCS–90 endorsement for $1 million has been furnished to Progasco by CIGNA. Progasco's pre-trial brief is silent on the matter. The status of Progasco's $1 million primary insurance policy is therefore uncertain at best.

As evidence of the second part of its elected alternative to the Aetna insurance policy *supra* to cover its excess liability between $1 million and $5 million, Progasco placed in the record a single-page "Certificate of Insurance" dated March 13, 1988 (Progasco Exhibit 3). The certificate issued by an agency in Houston declares that "Gulf Company, Ltd." (Gulf), is affording Progasco excess liability insurance in the amount of $4 million until May 22, 1988. There is no other documentary evidence regarding this policy. Progasco's witness Jones testified that the cost of the policy to Progasco was between $20,000 and $30,000 per year but that he was unaware of the total cost of the policy to Enron (Tr. 359–360, 368). There is no form MCS–90 in the record endorsed by Gulf.

There was much testimony in an effort to identify Gulf Company, Ltd. Mr. Jones, the Enron official responsible for the insurance of subsidiaries such as Progasco, stated that he negotiated for the Gulf policy through the Marsh and McLennon agency in Houston. He said he had had no communication whatsoever with Gulf and that he had been provided with the Gulf Certificate (Progasco Ex. 3) by Enron's Corporate Risk Management officials. He said he had never had any contact or conversation with Gulf's officers and that he had not been to Gulf's office (Tr. 361) which he said was located in Bermuda. He did not know where Gulf was legally domiciled although he believed it too was in Bermuda (Tr. 354). He said that Gulf had no officers or offices in the United States. Mr. Jones had no information as to the company's capitalization.[19] The Enron Corporation is the owner of Gulf (Tr. 354) and Enron is Gulf's "only and exclusive client" (Tr. 355–356, 363). Gulf provides the excess insurance for virtually every company Enron operates in the United States regardless of the type of business (Tr. 374). There was no testimony or evidence as to whether Gulf is listed in Best's rating of insurance companies.

Mr. Jones asserts that Gulf is authorized to do business in any state of the United States that Enron operates business in, and that Enron operates in the majority of the states on the United States. He stated, however, that is was his understanding that business dealings between Gulf and Enron cannot be discussed or conducted within the continental United States (Tr. 361).

There was substantial testimony challenging the authority of Gulf to issue the $4 million policy described in the certificate. Mr. Juan Antonio Garcia, Commissioner of Insurance of the Commonwealth of Puerto Rico, testified at the hearing (Tr. 151) and reaffirmed in a post-hearing affidavit (Empire Ex. 70) that Gulf is not at present and has never been authorized by the Office of the Commissioner of Insurance of Puerto Rico to transact or solicit insurance business in Puerto Rico in any capacity. Mr. Garcia further testified that Gulf is violating Puerto Rican law if it is writing insurance in Puerto Rico without the proper authorization from his office. Mr. Garcia testified that a policy covering a risk in Puerto Rico must be countersigned by a resident agent in Puerto Rico (Tr. 156). He conceded, however, that a company issuing a policy unlawfully would still be liable in a suit in Puerto Rico on an illegally issued policy. He said that the illegality will not protect the insurer from honoring the coverage which he has issued (Tr. 156).

In addition to the Aetna policy and the foregoing CIGNA and Gulf policies, Progasco also relies for its statutory coverage on the liability insurance policies held by Cooperativia Camioneros the large trucking company whose tractors haul Progasco's tanker-trailers. *Supra* pp. 36–39. (Progasco cannot of course rely on Camioneros' policy for coverage of Progasco's own bob-tailed or single body tanker trucks that carry propane and also require $5 million of insurance.)

Mr. Jones testified that when Progasco's trailers are being towed by Camioneros' tractors and there is an accident, Camioneros' policy and the MCS–90 endorsement included therein (endorsement 12A of that policy) covers the liability. He testified that the $1 million CIGNA and $4 million Gulf policy coverage become in effect "excess" of Camioneros' policy with Royal Insurance Company during the time that Camioneros is hauling Progasco's trailers. Mr. Jones claimed that if for some reason Camioneros' Royal Insurance policy were held not to be valid for Progasco the CIGNA and Gulf policies would then become primary (Tr. 340). He said that it would then be a legal issue whether Camioneros's Royal Insurance policy would have to pay first or whether Progasco's CIGNA/Gulf policies would pay first and that this would depend on the contractual arrangements between Progasco and Camioneros. He said that for all intents and purposes Camioneros' policies are the primary policies for both Camioneros and Progasco when Camioneros is hauling Progasco's trailers (Tr. 340–345). He contended that this arrangement satisfies Progasco's public liability responsibility under the Motor Carrier Safety Act of 1980 (Tr. 340).

The problems presented by the above three alleged grounds of coverage by Progasco are numerous. Viewing them separately and collectively it is concluded that Progasco has failed to show that it has a valid insurance structure in effect which meets the requirements of the Motor Carrier Safety

[19] Mr. Jones conjectured that Gulf reinsured part of the $4 million Progasco risk in the British and Norwegian markets but he conceded that this was only conjecture (Tr. 370–371).

Act, as amended, or the implementing regulations of the Federal Highway Administration. There are at least seven grounds for this conclusion:

1. The Aetna policy is not sufficient evidence that Progasco has the required insurance. To begin with, it is not clear whether the MCS–90 endorsement to that policy was still effective when the record was closed in this case (Progasco Ex. 1). The endorsement expired by its terms on June 1, 1988 (Tr. 321). Mr. Jones, Progasco's witness, testified that he did not know what was going to happen after that date in terms of whether the Aetna policy of $1 million would continue (Tr. 375–376). Moreover, even if the Aetna policy is still effective for other parts of Enron, it is clear that Progasco opted out of the policy for its primary liability up to $1 million. It seems very likely also in light of its express desire to lower its costs by switching to Gulf Company, Ltd., for its excess coverage, that Progasco no longer enjoys an MCS–90 endorsement by Aetna for $5 million and it is so found. It is noted in this connection that Progasco is Enron's only motor carrier engaged in the transportation of propane, and if Progasco has switched to Gulf there is no further reason for Enron to pay Aetna for an MCS–90 endorsement.

2. The evidence that Progasco's primary insurance policy of $1 million with CIGNA is effective leaves much to be desired. While a certificate showing coverage from February 2, 1988 to February 2, 1989, was placed in evidence (Progasco Ex. 4) the showing that a full policy including an MCS–90 endorsement had actually been implemented between Progasco and CIGNA was completely absent at the hearing on March 23–24, 1988. The only evidence in the case is therefore a draft policy without an MCS–90 endorsement which Progasco had not yet accepted. While Mr. Jones of Enron asserts that ratification is only a technical problem, the record contains no signed policy. But even if the policy is in effect with the proper endorsement, it provides only $1 million of coverage and does not prove that Progasco has the required insurance.

3. Progasco's reliance on Gulf for the $4 million of excess coverage is particularly troublesome for a number of reasons. To begin with, it does not appear to meet the requirements of 49 CFR 387.11(c) of the regulations. That provision states that to issue a policy an insurance company must be:

> Legally authorized to issue such policies * * * in any state of the United States and eligible as an excess or surplus lines insurer in any state in which business is written, and is willing to designate a person upon whom process * * * may be served in any proceeding at law or equity brought in any state in which the motor carrier operates.

The implications of this provision are not briefed in any useful manner by any party to this proceeding. The only testimony on the subject was by Mr. Jones (for Progasco) (Tr. 325 and 326) in which he claimed that Gulf does not transact any business in Puerto Rico and is therefore not in violation of Puerto Rican insurance law. He claims, however, without further explanation that the Gulf policy is valid in every state in which Enron operates. Insurance companies' jurisdictions are not set by where their owners or clients operate.

The first requirement of § 387.11(c) *supra* is that the insurance company be legally authorized to issue policies in any state of the United States. There is no showing that any state of the United States has granted the Gulf Company any such legal authority. Neither is there any evidence that Gulf has been found eligible by any state to issue an "excess lines" policy which is the second requirement. The mere assertion by Mr. Jones, without more, that a Gulf policy is valid in every state where Enron operates is not enough.

The final requirement of § 387.11(c) is the designation by the insurance company of a person upon whom process can be served in any state in which the motor carrier operates.[20] There is no evidence that Gulf Company, Ltd., has designated a person to receive process in any state of the United States. There is no tangible evidence that Gulf has designated an agent for service in Puerto Rico. Gulf is, therefore, not a company authorized under 49 CFR 387.11(c) to issue excess insurance to Progasco, Inc.

4. There is no MCS–90 endorsement in the record naming Gulf as provider of excess insurance up to $5 million, and it is found that none existed at the time the record was closed in this proceeding.

5. A further problem arises from the fact that Gulf Company, Ltd., is a wholly-owned subsidiary of Enron Liquid Fuels Company, Ltd. Since Progasco is also a wholly-owned subsidiary of Enron, Progasco is in effect self-insured. FHWA regulations permit self-insurance but only under certain circumstances. A motor carrier may self-insure if it has:

> A written decision, order, or authorization of the Interstate Commerce Commission authorizing the motor carrier to self-insure under section 1043.5 of this title, provided the motor carrier maintains a satisfactory safety rating as determined by the Bureau of Motor Carrier Safety under Part 385 of this Title. 49 CFR 387.7(d)(3).

No party addressed this matter either at the hearing or on brief and it is concluded that in the absence of some evidence of a written decision from the Interstate Commerce Commission (or its successor agency in this function) authorizing Enron or its subsidiary, Progasco, to self-insure the Gulf Certificate of Insurance does not comply with the regulation.

6. The last basis on which Progasco relies for its assertion that it meets the $5 million insurance requirement is that if Progasco's Aetna and CIGNA/Gulf coverages are not legally valid (Tr. 340) then the policies held by Camioneros with Royal Insurance Company will somehow come into play and cover Progasco's liability for its tractors while they are being hauled by Camioneros' tractors. There are at least three things wrong with this. There is no evidence of a contract between Camioneros and Progasco or between their insurers establishing such an arrangement. Camioneros' policy with Royal would have no applicability to Progasco's own bob-tailed trucks transporting over 3,500 liquid gallons of propane since Camioneros' tractors do not haul them. Finally, there is no provision in Part 387 for a motor carrier to rely on somebody else's policy to meet its insurance obligations under the act.

In summary, therefore, whether Progasco has $5 million of insurance is at best unclear. The company relies vaguely on a variety of policies which may or may not apply and depends primarily on a bare certificate of insurance with a phantom offshore subsidiary in Bermuda whose bona fides is not established in this proceeding. Progasco's experience therefore constitutes no evidence that $5 million of liability insurance has been available to Empire Gas Company at any time relevant to this proceeding.

The Puerto Rico Automobile Assigned Risk Plan

The Puerto Rico Automobile Assigned Risk Plan (ARP) was promulgated in early 1988 by Mr. Garcia, the Commissioner of Insurance in response to the suggestion in the Puerto Rican Senate Committee report in August 1987, *supra* pp. 17–18. Mr. Garcia said that he issued a circular letter to the insurance companies doing business in Puerto Rico (which is not on evidence). He stated that the letter practically required them

[20] The unfortunate language in the regulation referring only to a "willingness" to designate a person for service will be disregarded as a drafting aberration.

to form a syndicate or association to provide the necessary limits. He said he told them that either they would form an association voluntarily or he would exercise his authority to form one himself (Tr. 147). He said that the companies had responded and that a voluntary association had been formed as of March 1, 1988, to provide the necessary limits for motor carriers. Mr. Garcia stated that applications for insurance had been received but that no policies had been issued by the association at the time of his testimony at the hearing on March 23, 1988. Mr. Garcia stated that while his Commission is expected to be in better position than before to solve the insurance problem (Tr. 148), ARP will not guarantee that every LPG trucker will get a policy. He said that they must comply with Federal regulations regarding safety and if they do not, they will not obtain coverage from the Association. He stated that under the manual and rules which the insurance carriers of the association had filed with his office, they could impose the normal "manual rates" applicable to regular risks plus a surcharge of 40 percent (Tr. 149).

On or about April 15, 1988, Empire Gas Company completed the filing of an application with ARP for insurance to cover its liability for the seven tractors, six GMC trucks and seven tank trailers which it operates. In response to directions by the Administrative Law Judge at the hearing (Tr. 468), Empire filed in this proceeding copies of the documents which it had been required to submit with its application to ARP. The documents were submitted into this record under date of May 6, 1988, and received in evidence by Order dated June 28, 1988 (Empire, Ex. 62A). Included were charts showing the company's loss experience with other insurance companies, reports of random roadside inspections by the Public Service Commission, and letters evidencing several recent denials of coverage by insurance companies. Omitted by Empire from Exhibit 62A was evidence which ARP required as to internal measures taken to limit or prevent losses and data on vehicle maintenance procedures. Included with Empire's application was a check payable to ARP for $42,640, the amount that Empire calculated the insurance should cost for the 16 vehicles for which it requested insurance ($2,665 times 16).

There is no evidence as to the nature of consideration given by ARP to Empire's application. Empire states in its Exhibit 62A (pp. 4–5) that on April 19, 1988, ARP refunded Empire's $42,640 without issuing a policy and without explanation. In a letter to Mr. Garcia, Commissioner of Insurance, dated July 15, 1988, Mr. Ramon Gonzalez Cordero, President of Empire stated that he had been surprised to learn from his insurance brokers Vidal and Rodriquez, Inc., that ARP was insisting that all of Empire's vehicles had to be included in the policy to be issued (Empire Ex. 71). Empire's president stated that he had strenuously objected to this requirement since they had no problem with regard to the coverage of the vehicles which do not transport LPG and which do not have to comply with the $5 million insurance level. He argued that Empire should not be required to pay a surcharge of 40 percent on the insurance for said vehicles. In the letter the President of Empire called on the Commissioner of Insurance to exert "affirmative and energetic pressures" on the insurance companies to proceed to furnish the $5 million of insurance to Empire without imposing the surcharge on Empire's other vehicles.

The record does not show precisely how many and what other types of vehicles Empire operates and upon which the ARP insurers want to impose a 40 percent surcharge. There is evidence, however, that it may be as high as 50 vehicles of various types, *supra* p. 25. The surcharge could therefore be a substantial amount. However, with the creation of the Automobile Assigned Risk Plan, the application by Empire for coverage and the failure of ARP to furnish such coverage at a price Empire is willing to pay, the entire situation has been changed. The issue of availability of $5 million of liability insurance to Empire has now been resolved. The insurance is available. From the moment that Empire's $42,640 check was returned, the issue became solely one of price. The record does not show the amount that ARP wants Empire to pay. However, even if it is four times the $42,640 Empire has proffered it would be within the $300,000 range that Empire witness Vidal once considered a bargain, *supra* p. 26. It is concluded here that from the time Empire's $42,640 check was returned and it had the opportunity to meet the price that ARP required for the insurance, it was unreasonable for Empire to transport propane in Puerto Rico without $5 million of liability insurance.

Conclusion and Penalty

As indicated earlier, *supra* pp. 6–8, it is clear that Empire Gas Company committed the four violations of the law and regulation by the four trips it performed in February 1987 without the required insurance. Regional Counsel has requested a penalty of $4,000 for each violation, or a total of $16,000.

The Motor Carrier Safety Act, as amended, specifies that in determining the amount of a penalty for violations, the Secretary of Transportation shall take into account the "nature, circumstances, extent, and gravity of the violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." Taking into account the circumstances surrounding Empire's failure to have the required insurance at the time of the violations in the February 1987 and "such other matters as justice may require" it is concluded herein that in determining the amount of penalty for the violations in February 1987 full consideration will be given to all of the prior and subsequent attempts by Empire to obtain the required insurance. In particular, and most importantly, consideration will be given to actions by Empire to obtain the insurance after the Puerto Rico Automobile Assigned Risk Plan was established.

In determining the penalty to be imposed full consideration will also be given to all of the facts of record regarding the efforts and experience of other Puerto Rico motor carriers with regard to obtaining the required insurance. As set forth at great length above after careful scrutiny, only one company (Tropigas) appears to have the required insurance with a bona fide insurer and to also be engaged significantly in the transportation of propane. This one instance in the face of all the other facts of record is insufficient to demonstrate that the insurance was available to Empire.

It is determined herein that some of the factors preventing Empire from obtaining insurance prior to the establishment of ARP flowed from the character of Empire as a company. While some, but not all of these factors were in Empire's power to change, most were not. It is concluded therefore that as a practical matter Empire Gas Company was unable to obtain the required insurance at the time of the four violations and for a period thereafter. However, once ARP was established, the insurance was available to Empire. It was then no longer entitled to operate without the insurance. Empire nevertheless continued to do so while protesting the price. Assessment of the penalty should take account of the fact that from the time Empire declined to meet ARP's price up until the time the record in this case was closed, the company was operating without the

required insurance. Its failure to obtain the insurance during this period will be considered as a matter of "justice" under the act in assessing the penalty for the four February 1987 violations.

It is concluded that the amount of the penalty determined in the above manner should be one fourth of the $16,000 requested by Regional Counsel or $4,000. In addition, and also on the basis of justice, for each three-week period subsequent to the date of service of this Initial Decision that Empire fails to provide conclusive evidence in the record of this proceeding that it has obtained $5 million of insurance from ARP or another source, the penalty against the company for the four violations in 1987 shall be increased by an additional $4,000 until such penalty reaches the total penalty of $16,000 originally requested by Regional Counsel in its Notice of Claim.

On the basis of all of the foregoing it is found and concluded that:

1. Empire Gas Company was in violation of the financial responsibility requirements of the Federal Motor Carrier Safety Act of 1982, as amended, and the implementing regulations of the Federal Highway Administration (49 CFR 387.7(a)) by failing to have in effect the required minimum level of financial responsibility of $5 million when operating a commercial motor vehicle between points in Puerto Rico on four occasions in February 1987 transporting liquified compressed gas consisting of a mixture of butane and propane in amounts exceeding 3,500 water gallons per shipment.

2. That in determining the penalty for the violations, consideration should be given to the fact that, as a practical matter the insurance in the required amount was not available to Empire at the time of the violations and did not become available until the Puerto Rico Automobile Assigned Risk Plan was established.

3. The penalty for the four violations taking into account the circumstances surrounding such violations and such other matters as justice requires, is $4,000 in light of the respondent's failure to obtain such insurance from the time it became available from the Puerto Rico Automobile Assigned Risk Plan in March/April 1988 until the record was closed in this proceeding on July 22, 1988. The penalty is increased by $4,000 for each three-week period commencing with the date of service of this decision for which the respondent fails to provide conclusive evidence in the docket of this proceeding that it has obtained $5 million of insurance from the Puerto Rico Automobile Assigned Risk Plan or other source.

4. All motions and requests in this proceeding to the extent not granted herein are denied.

5. Copies of this Initial Decision are hereby filed in the Docket and served on all parties to the proceeding. In the Matter of Tex-Air Gas Company, Inc., Motor Carrier Safety Docket No. R6-87-32, a proceeding which is subject to an order of stay pending resolution of this case served by Administrative Law Judge Burton S. Kolko on May 25, 1988.

William A. Kane, Jr.,
Administrative Law Judge.

Colorado-Denver Delivery, Inc.

[Docket No. R6-88-017]

Final Order

This matter comes before me upon Motion for a Final Order submitted by the Office of Motor Carrier Safety, Denver, through Counsel. Petitioner has submitted a Motion, Arguments in Support thereof and Documentary Evidence. This information contains an answer provided by Respondent to the initial Notice of Claim.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained therein relating to violations of the safety regulations. In view of past audits, it is obvious that Respondent has placed little emphasis on compliance. This pattern of activity will no longer be tolerated. In addition to the penalty imposed by this Order, Respondent is cautioned that it must immediately implement all necessary remedial steps to abate violating activities. The Office of Motor Carrier Safety, Region 8, is directed to closely monitor the activities of Respondent. Respondent must show evidence of significant abatement within the 6-month period following the date of this Order to forestall additional enforcement action.

Therefore, it is ordered, That Respondent pay the full amount of the assessed penalty of $18,500 within 30 days of the date of this Order and shall commence immediately and show by significant evidence to the Director, Office of Motor Carrier Safety, Region 8, abatement of this pattern of violation within 6 months of the date of this Order.

Dated: November 16, 1988.

John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Wayne Gleghorn Trucking, Inc.

[Docket No. R6-85-72]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated June 25, 1985, and ordering Wayne Gleghorn Trucking, Inc. to pay the civil penalty of $10,000 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Wayne Gleghorn Trucking, Inc. was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement negotiations.

Therefore, it is ordered, That Wayne Gleghorn Trucking, Inc. pay the full amount of the assessed civil penalty of $10,000, within 30 days of the date of this Order.

Dated: October 28, 1988.

Richard P. Landis,
Associate Administrator for Motor Carriers.

Monte G. Jaqua

[Docket No. 8F-86-006-138]

Final Order

This matter comes before me upon request of the Regional Director, Region 8, through his attorney, for a Final Order finding the facts to be as alleged and to impose a penalty of $750.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained therein relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Respondent pay the full amount of the assessed penalty of $750 within 30 days of the date of this Order.

Dated: October 4, 1988.

Richard P. Landis,
Associate Administrator for Motor Carriers.

Jopalin Transport Enterprises, Inc.

[Docket No. RI-88-106]

Final Order

This matter comes before me on Respondent's request for a formal hearing and opposition thereto and Motion for a Final Order by the Director for Motor Carrier Safety, Region 1, by his attorney.

At issue in this matter is a determination of carrier's operations and application of the lighweight vehicle (less than 10,000 pounds) exemption to the financial responsibility provisions of the law. The record indicates that carrier's operations utilize qualifying vehicles to pick up parcels at Kennedy Airport for transhipment to its terminal, where shipments are broken down into smaller vehicles for transport out of State.

The law regarding the inerstate nature of shipments is settled on this point. As Counsel points out, intention governs the nature of the shipment. Through passage, temporary interruption during a through passage, or ultimate destination must prevail, regardless of a change in vehicles. The record in this matter supports the finding of the Regional Director that the shipments involved are interstate in nature and that the use of smaller vehicles for part of the trip is insufficient to activate the lightweight vehicle exemption.

Nevertheless, the amount of the penalty in this matter appears excessive. Although the penalty provisions for this violation are severe, the ultimate purpose of the sanction is to bring about immediate abatement of the violation and encourage compliance. Being mindful of the burdens placed on smaller businesses by these provisions, it is not our intention to disrupt operations. Although it is with reluctance that we interfere with the determination of the Regional Director in assessing penalties, respondent in this case appears to satisfy a basic requisite for relief.

Therefore, it is ordered, That Respondent's request for a formal hearing is denied and the Regional Director's Motion for a Final Order is granted, but modified in that Respondent is directed to satisfy a penalty assessment of $1500, payable within 30 days of this Order, or upon schedule entered into and agreed upon by the Regional Director.

Dated: September 28, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Burman Wesley Ball

[Docket No. R6-88-1]

Order Returning Case for Clarification and Reconsideration

This matter comes before me upon request of the Respondent for a formal hearing and a denial of charges set forth in a Notice of Claim letter issued on January 14, 1988, by the Office of Motor Carrier Safety, Region 6. That Office, through Counsel, has filed a Motion in Opposition to Respondent's request and for a Final Order.

Neither Motion is being granted at this time. At issue in this matter appears to be an application of an Interpretation of the Federal Motor Carrier Safety Regulations, published in 42 FR 60078 (11-23-77). The Interpretation in question concerns hours of service and treatment of meal stops and other routine stops in Driver Daily Logs.

Respondent allegedly lists time in which he is not driving as Off-Duty. According to Company Policy such a listing is incorrect. The Region 6 Office is applying the Interpretation in such a manner as to enforce Company Policy.

The Interpretation states within its four corners its purpose as preventing unsafe operation of vehicles by fatigued drivers. En route stops which may serve to lessen a driver's fatigue are given special treatment because such stops are a good thing. The ten minute reference in the Interpretation is placed there to serve as a minimum guide and not a maximum, mechanical or arbitrary determinant of safety.

There is no indication in the record that Respondent is continuing to drive while listing in his log such time as Off-Duty. There is no indication in the record that Respondent is not in actuality relieving fatigue, as provided for in the Interpretation. In the absence of such indications reliance upon the Company Policy appears inappropriate. Disputes between drivers and company policies should be resolved in other forums.

The concern of the Federal Highway Administration should be with the safety of operations. At the least the letter of July 27, 1987, from Officer-in-Charge Carkin to Respondent, documenting an agreement between the FHWA and Company to, in effect, enforce Company policy is unusual.

Therefore, it is ordered, That Respondent's Request for a hearing in this matter is being held in abeyance until the Office of Motor Carrier Safety, Region 6, reconsiders the facts presented in its Motion for Final Order, and either supplements the record to further document the allegations in the Notice of Claim or withdraws its Motion.

Dated: September 16, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Tulley Trucking, Inc.

[MCS No. 9F-87-005-111; Docket No. R9-87-08]

Order to Modify

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region Nine, for a Motion to Modify the Final Order issued February 8, 1988, against Tulley Trucking, Inc., requiring it to pay a civil penalty in the amount of $8,000.

Having reviewed the Motion and the supporting documents appended thereto, I find that there is sufficient credible evidence, including official records from the carrier's insurance agent and insurance carrier, to establish that Tulley Trucking, Inc., did not violate 49 CFR 387.7(a)—operating a motor vehicle without having in effect the required minimum level of financial responsibility.

Therefore, it is ordered, That the Final Order issued February 8, 1988, be modified and that Tulley Trucking, Inc., pay a civil penalty in the amount of $1,500, receipt of which was acknowledged.

Dated: September 16, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Great Plains Coca Cola Bottling Company

[Docket R6-88-23]

Final Order

This matter comes before me upon request of Respondent for a formal hearing to contest a Notice of Claim issued May 27, 1988. The Office of Motor Carrier Safety, Region 6, has opposed this request and seeks an Order finding that no material factual issues in dispute exist and that the penalty stated in the Notice of Claim be made final.

Having reviewed the motion, the opposition and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the

Federal Motor Carrier Safety Regulations.

Respondent has failed to identify any material factual issues in dispute; in fact, there is no denial that the violations did occur. Respondent seeks to introduce evidence of current compliance. Such information is helpful, but is to be included in all settlement proposals discussed with the Region 6 Office of Motor Carrier Safety.

Therefore, it is ordered, That Respondent's request for a formal hearing in this matter is denied. Respondent is ordered to pay the full amount of the assessed penalty of $5,000 within 30 days of the date of this Order.

Dated: August 3, 1988.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

National Tour Bus Service, Inc.

[Docket No. R6-87-28]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, for a Final Order finding the facts to be as alleged and to impose a penalty of $20,000.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Minimum Financial Responsibility Regulations.

Therefore, it is ordered, That Respondent pay the full amount of the assessed penalty of $20,000 within 30 days of the date of this Order.

Dated: July 29, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Jeffrey Tyson

[Docket No. R3-87-28]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged and to impose a penalty of $1,000.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Respondent pay the full amount of the assessed penalty of $1,000 within 30 days of the date of this Order.

Dated: June 17, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

F&S Electric Motor & Transformer Co.

[Docket No. R3-85-14]

Final Order

This matter comes before me on the motion of the Regional Director, Office of Motor Carrier Safety, Region 3, to find the facts to be as alleged and to assess a penalty of $3,000.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Respondent pay the amount of $3,000 agreed upon in settlement of this claim within 30 days of the date of this Order.

Dated: June 17, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Magnetics Trucking, Inc.

[Docket No. R3-87-18]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged and to impose a penalty of $9,200.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Respondent pay the full amount of the assessed penalty of $9,200 within 30 days of the date of this Order.

Dated: June 17, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Chemport Chemicals, Inc.

[Docket No. R6-87-46]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, for a Final Order finding the facts to be as alleged and to impose a penalty of $22,000.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Respondent pay the full amount of the assessed penalty of $22,000 within 30 days of the date of this Order.

Dated: June 17, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Jose Carrasco, Dale Jones, and Harvey Jones dba the Feed Store Leasing

[Docket No. R6-87-33]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region 6, in Opposition to Respondent's Request for Oral Hearing and To Find That No Material Factual Issues Exist for processing in this matter.

Having reviewed the Motion, Request for Hearing and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That Respondent pay the full amount of the assessed penalty of $8,000 within 30 days of the date of this Order.

Dated: June 17, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Abbey's Transportation Service, Inc.

[Docket No. 88-19]

Final order

This matter comes before me upon request of the Respondent for an oral hearing. Respondent received a Notice of Claim dated December 2, 1987, detailing several violations of 49 CFR 387.31 of the Federal Motor Carrier Safety Regulations (FMCSRs). In its response, Abbey's Transportation Services, Inc., through its Attorney, denied all alleged violations on the basis of the exemption provided in 49 CFR 387.27 of the FMCSRs.

Responsent advances as his material factual issue in dispute whether Abbey's is subject to or exempt from the provisions of § 387.31 by reason of § 387.27 and the Bus Regulatory Reform Act of 1982. Such, however, is

insufficient to meet the requisites of 40 CFR 386.14, in that the scope of the exemption in and of itself is not a material factual issue.

The Notice of Claim presents ample basis to find that the Respondent in fact operates passenger carrying vehicles in interstate commerce. To qualify for an exemption under § 387.27, Respondent must show that it is (a) transporting school children or teachers to or from school; (b) a taxicab service having seating capacity of less than 7 passengers and not operated on a regular route or between specified points; or (c) carrying less than 16 individuals in a single daily round trip commute to and from work.

Clearly, Respondent does not qualify under (a). With respect to (b), the exhibits provided establish the use of vehicles with a seating capacity in excess of 7 passengers, operated between specified points, to wit, Newark Airport and various hotels. With respect to (c), the exhibits establish that this service does not involve a daily round trip commute to and from work.

In the absence of any evidence to indicate that the vehicles in use had a seating capacity of less than 7 passengers and irregular route or unspecified point operation, there is no basis upon which to appoint an Administrative Law Judge.

Therefore, it is ordered, That Respondent's request for hearing before an Administrative Law Judge is hereby denied. Respondent is also ordered to pay the full assessed total of $30,000 for the 6 violations included in the Notice of Claim and to provide the requisite proof of compliance with the minimum financial responsibility regulations within 30 days of the date of this Order.

Dated: April 28, 1988.

John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Hudson Valley Bus Co., Inc.

[Docket No. 85-138 FR; Case No. NY-85-142-017]

Final Decision and Order

This matter comes before me upon Motion for Final Order dated January 6, 1988, and submitted by the Director of the Office of Motor Carrier Safety Field Operations in accordance with the provisions of 49 CFR 386.35 (1987). The Director moves for a Final Order finding the facts in this case to be as alleged in a Notice of Claim, dated November 26, 1985, and requiring Hudson Valley Bus Co. Inc., of Peekskill, New York, hereinafter referred to as the respondent, to pay a total penalty of $1,000, for failing to maintain proof of the required financial responsibility at its principal place of business.

Respondent, through its attorney, submitted an Affirmation in Opposition to the Motion for Final Order, dated January 14, 1988, in which it is alleged that the carrier had at its place of business, a certificate of insurance for an aggregate amount of $5 million, the statutory amount required under the authority of the Interstate Commerce Commission. Respondent states that it should not be penalized to the extent of $1,000, when it had evidence of insurance at its place of business.

In a Rebuttal to Respondent's Affirmation, dated January 28, 1988, the Director states that this case involves a violation of 49 CFR 387.31(d) (1987) for failure to maintain at the principal place of business proof of financial responsibility, by either a form MCS-90B endorsement, or a form MCS-82B surety bond. The Director alleges that the respondent had ample knowledge of this requirement and that the certificate of insurance found at the respondent's place of business does not satisfy the requirements of § 387.31(d). As discussed herein, the Director's views are supported by the evidence in the record and the applicable regulations.

Having reviewed the pleadings and the information in the record of this case, I find that the respondent failed to request a hearing in its reply to the Notice of Claim or notify an intent to submit evidence without a formal hearing, as required pursuant to 49 CFR 386.14(b) (1987). Accordingly, this Final Decision and Order is issued based on the evidence and arguments submitted, in accordance with 49 CFR 386.16(a) (1987).

The Notice of Claim charged the respondent with violating one of the financial responsibility requirements established in the Federal Motor Carrier Safety Regulations, 49 CFR 387.1-387.41 (1987), specifically, failing to maintain proof of the requirement financial responsibility at the motor carrier's principal place of business in accordance with 49 CFR 387.31(d) (1987).

The violation was discovered during a safety management audit and investigation conducted on June 17 and 18, 1985, at the respondent's principal office in Peekskill, New York. The safety investigator's safety compliance report, included in the record indicates that during the audit the respondent failed to produce adequate proof of the required financial responsibility. The audit report shows that the respondent is a for-hire motor carrier of passengers operating in interstate commerce. For example, on May 17, 1985, the respondent transported 33 passengers from Pleasantville, New York, to Cherry Hill, New Jersey, in a company bus (#409) operated by Albert Franco. The report also shows that on June 20, 1985, a copy of Form MCS-32B (Safety Management Audit Report) was given to respondent's President, Mr. Ernest Knippenberg. The respondent was requested in this form to submit a copy of a valid form MCS-90B within 10 working days.

On June 20, 1985, Mr. Knippenberg wrote to Mr. John Whalan, Director of the Regional Office of Motor Carrier Safety in Albany, New York, stating that the MCS-90 Endorsement form was being sent to the respondent's office and that four coaches, including #409, were covered by the current liability insurance which had a limit of $5 million. On July 10, 1985, Mr. Nicholas R. Walsh, the Officer-in-Charge for Motor Carrier Safety in Albany, New York, sent to the respondent a certified letter, directing the carrier to correct the deficiencies in financial responsibility coverage noted in the safety management audit report. The letter requested respondent to a copy of the required endorsement (MCS-90B) or surety bond (MCS-82B) within 10 working days. The letter warned the respondent that continued operation without appropriate insurance coverage could result in enforcement action. The return receipt to this letter was signed, but no response was received.

In the Notice of Claim, the Director initially assessed a total civil penalty of $1,000 for the violation. The Director gave notice to the respondent of the regulatory requirements applicable to a reply to the Notice of Claim and of the opportunity to request a formal hearing. In addition, the respondent was advised that the Director's attorney could be contacted to discuss the terms of payment or settlement of the claim.

In a letter dated January 6, 1986, the respondent, through its attorney, replied to the Notice of Claim and alleged that it had always maintained in effect liability insurance as required by the Interstate Commerce Commission. Respondent alleged that it had an insurance policy in the amount of $5 million in effect since December 31, 1984, and had arranged for its insurance company to send a copy of the appropriate form to its office. Respondent further stated that it was unaware of the requirement that it maintain evidence of this insurance at its principal place of business, and that immediately after being notified of this requirement, it had obtained and filed in its office a copy of Form B.M.C. 91X (Certificate of Insurance). Respondent

enclosed with its reply a copy of the form, issued by Robert J. McRell Assoc., Inc., of Plainfield, New Jersey, on June 19, 1985. This document certifies that Pacific Employees Insurance Company of Philadelphia, Pennsylvania, issued insurance to the respondent, effective from December 31, 1984, which provides coverage for the security limits required under 49 CFR 1043.2(b)(1), and that said insurance company would not be liable for amounts in excess of $5 million CSL for each accident.

By telephone conversation of August 7, 1987, the respondent requested copies of the correspondence in this case. Copies of said correspondence were sent to the respondent by letter dated August 13, 1987. During telephone conversations of August 27, October 1, and October 8, 1987, the parties discussed the possible settlement of the case. The Director made an offer of settlement to the respondent by letter dated November 10, 1987. The letter requested that the respondent reply by November 20, 1987, and warned that a motion for final order would be filed if no reply was received.

The respondent's attorney replied to the offer of settlement by letter dated December 3, 1987, and stated that his client was unwilling to sign the settlement agreement. The attorney claimed that the respondent had met the statutory requirements in that it had in effect liability insurance filed with the Interstate Commerce Commission. No further communication between the parties can be derived from the record.

The main issue in dispute in this case involves a question of legal interpretation. Respondent alleges that the certificate of insurance, Form B.M.C. 91X, is sufficient evidence of compliance with the statutory insurance requirements. The Director, on the other hand, claims that only a form MCS–90B endorsement, or a form MCS–82B surety bond, would satisfy the proof of insurance requirement in 49 CFR 387.31(d) (1987). A careful review of the applicable regulatory requirements shows that the Director is correct.

First, it must be noted that the violation involved in this case is not failing to have in effect the required minimum levels of financial responsibility, but rather, failing to maintain the required proof of financial responsibility at the principal place of business. The regulatory provision violated by the respondent, 49 CFR 387.31(d) (1987), states that the proof of financial responsibility to be maintained at the motor carrier's principal place of business is to consist of "(1) 'Endorsement(s) for Motor Carriers of Passengers Policies of Insurance for Public Liability Under Section 18 of the Bus Regulatory Reform Act of 1982' (Form MCS–90B) issued by an insurer(s); or (2) A 'Motor Carriers of Passengers Surety Bond for Public Liability Under Section 18 of the Bus Regulatory Reform Act of 1982 (Form MCS–82B) issued by a surety." In addition, section 387.39 specifies that the endorsement for insurance policies and surety bonds must be in the form prescribed by the Federal Highway Administration and approved by the Office of Management and Budget. The section includes illustrations of both forms.

It is clear that the form that the respondent possessed at its place of business (Form B.M.C. 91X) did not satisfy these requirements. The possession of the above described forms for endorsements and surety bonds as proof of financial responsibility has been required by regulation since 1983, and has been subject to enforcement since July 1984. See Final Rule, Minimum Levels of Financial Responsibility for Motor Carriers of Passengers, 48 FR 52,679 (1983); Amendment to Final Rule, Minimum Levels of Financial Responsibility for Motor Carriers of Passengers, 49 FR 22,325 (1984).

Moreover, the Interstate Commerce Commission regulations that require the use of Form B.M.C. 91X by motor carriers, 49 CFR 1043.1–.11 (1987), specifically provide in § 1043.7(a)(4) that when the required security limits "involve coverage also required by the Department of Transportation a 'Form MCS Endorsement' prescribed by the Department of Transportation such as, and including, the 'Form MCS–90' endorsement, is required." Section 1043(a)(5) establishes a similar requirement with respect to surety bonds and Form MCS–82.

I find that the violation cited in the Notice of Claim has been fully documented in the record by substantial proof, specifically, the safety compliance and audit report, the driver's record of duty status, the charter contract, the payroll records and other correspondence therein. This documentary evidence clearly establishes that respondent, a for-hire motor carrier of passengers operating in interstate commerce, failed to maintain at its principal offices adequate proof of financial responsibility, in violation of 49 CFR 387.31(d) (1987).

A person found to have knowingly committed the violation charged shall be liable to the United States for a civil penalty of up to $10,000. However, 49 CFR 387.41 (1987), in implementing section 18(e)(1) of the Bus Regulatory Reform Act of 1982, Pub. L. No. 97–261, 96 Stat. 1102 (1982), requires that in determining the amount of the civil penalty to be assessed, the Director take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require. Accordingly, the level of assessment of the civil penalty to be imposed is left to the discretion of the Director. The proper exercise of such discretion is not to be disturbed at this stage in the absence of clear evidence to the contrary.

Although no prior enforcement cases have been initiated against the respondent, the record shows that the carrier was the subject of a previous safety management audit conducted on April 9 and 10, 1984. At that time, the respondent was advised of the failure to maintain at the principal place of business proof of the required financial responsibility. Respondent was also made aware of the requirements of the Federal Motor Carrier Safety Regulations, was informed of the discovery of possible instances of non-compliance with those requirements, and was advised of measures to take to prevent similar occurrences in the future.

In its Affirmation in Opposition to the Director's Motion, the respondent claims that in view of the fact that it maintained proper insurance and had evidence of insurance at its place of business, it should not be penalized to the extent of $1,000. The records shows that the respondent indeed had the proper level of insurance, but nevertheless, did not maintain the proper endorsement form at its principal place of business. The respondent seems to question the determination by the Director of the gravity of this violation in assessing the penalty in this case. While the failure by the respondent to maintain the required endorsement form is indeed a violation of the regulations as charged, its relative seriousness or gravity, in view of the facts in this case, is certainly minimal.

I conclude, therefore, that the violation charged was committed by the respondent, but that the penalty assessed, based on the circumstances revealed in the record, is excessive. No evidence has been introduced to show that the payment of the penalty assessed herein would affect the respondent's ability to do business, nor does the record show that such adverse consequence would result.

Respondent must understand that the purpose of the imposition of penalties in these proceedings is to promote compliance with our safety regulations. The law seeks compliance to protect the safety of the public. Respondent should be cautioned by these proceedings. Similar violations in the future will result in the imposition of substantial penalties.

Therefore, it is ordered, That respondent pay a civil penalty of $500 within 30 days of the date of this order. The above penalty shall be satisfied by certified check made payable to the Federal Highway Administration, and shall be delivered to the Office of Chief Counsel (HCC–20), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

In Washington, District of Columbia, this 31st day of March, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Brewer Transport Co., Inc.

[Docket No. R6–85–139]

Final Order

This matter comes before me on the Motion of the Office of Motor Carrier Safety, Region 6, pursuant to 49 CFR 386.13(d) (1985), for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 25, 1985, and ordering Brewer Transport Co., Inc., to pay a civil penalty of $6,000.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations.

Respondent apparently does not contest the violations. In its behalf, it contends that all operating problems have been clarified and that such violations will not occur in the future. At the same time, Respondent contends financial inability to pay the claim, but submits no financial data in support of this contention. The generalized statements offered indicate that sufficient time has elapsed to either renew settlement discussions or to provide an indication of the company's operating status.

Therefore, it is ordered, That Brewer Transport Co., Inc., submit detailed financial data in support of its claimed inability to pay the claim or to pay the full amount of the assessed civil penalty of $6,000 within 30 days of the date of this Order. Financial data should be submitted to the Office of Motor Carrier Safety, Region 6.

Dated: March 29, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Tex-Air Gas Co., Inc.

[Docket No. R6–87–32]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for dismissal of the claim without further proceedings or in the alternative a formal hearing. Respondent received a Notice of Claim dated July 24, 1987, detailing alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). The alleged violations all involved the operation of a commercial motor vehicle without having in effect the required minimum level of financial responsibility, as required by 49 CFR 387.7(a). In its response, Respondent contends that such coverage was unavailable to carriers in the State of Texas at the time of the alleged violations.

The Office of Motor Carrier Safety, Region 6, has opposed the Respondent's request. Counsel argues that Respondent has admitted operating without the requisite insurance and has not provided a statement of material factual issues in dispute. Although we recognize that the requirement for certain minimum levels of insurance is a congressionally mandated requirement, and that it is the responsibility of the carriers to comply with this mandate, the contention of impossibility of compliance due to circumstances beyond the control of the carrier must be taken into account in assessing the degree of culpability.

The information submitted by the Respondent, although not presumptively conclusive on the issue of availability, does indicate a threshold level of good faith effort to comply. There is, therefore, sufficient indication of material factual issues in dispute in this matter, to wit, whether the insurance required was available in the State of Texas at the time of these violations, to call this matter for hearing.

At the same time, the regulations require that Respondent come forth with a properly executed Form MCS–90 (Proof of Coverage). It appears that Respondent has not yet done so. Notwithstanding the technical nature of this violation, the Regional Office is supported in its claim for a penalty assessment on these counts. Respondent should immediately produce the required document or address its failure to do so at hearing.

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: March 18, 1988.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Crosland Trucking, Ltd.

[Docket No. 86–45MCS; Case No. NY–86–009–014]

Final Order

This matter comes before me upon Revised Motion for Final Order from the Director, Office of Motor Carrier Safety Field Operations, hereinafter referred to as the Director, dated July 20, 1987, and submitted in accordance with the provisions of 49 CFR 386.1 et seq. (1987). The Director had filed a Motion for Final Order, dated May 6, 1987, initially requesting a final order in this case. The Revised Motion requests a final order finding the facts in this case to be as alleged in the notice of claim letter, dated April 11, 1986, and requiring Crosland Trucking, Ltd., of Candiac, Quebec, Canada, hereinafter referred to as the Respondent, to pay a total penalty of $2,500.

I have reviewed the information and pleadings included in the Director's Revised Motion for Final Order and the attachments thereto, together with other information in the record. The record shows that no opposition to the Director's motions has been filed nor have further communications taken place. Respondent also failed to request a hearing in its reply to the notice of claim letter or notify an intent to submit evidence without a formal hearing, as required pursuant to 49 CFR 386.14(b) (1987). Accordingly, this final order is issued based on the evidence and arguments submitted, in accordance with 49 CFR 386.16(a) (1987).

The notice of claim letter cited the Respondent with two violations of the Federal Motor Carrier Safety Regulations. The violations involved two counts of failing to maintain a motor vehicle in a safe and proper operating condition, as required pursuant to 49 CFR 393.1 et seq. (1987), specifically, failing to equip a motor vehicle with: (a) adequate brake linings (§ 393.47), and, (b) operative brakes (§ 393.48). The violations were discovered during an

investigation and vehicle inspection conducted on November 20, 1985, subsequent to an accident involving a tractor-trailer operated by one of Respondent's drivers, Mr. Richard A. Gosse. Mr. Gosse died as a result of the accident. The accident occurred in Stuyvesant, New York, on November 15, 1985. The record shows that on the day of the accident Respondent's vehicle was transporting property (crushed cars) from Hyde Park, New York, to Montreal, Quebec, Canada.

In the notice of claim letter the Director initially assessed a total civil penalty of $10,000 for the two violations. The Director gave notice to the Respondent of the regulatory requirements applicable to a reply to the notice of claim and of the opportunity to request a formal hearing. In addition, Respondent was advised that the Director's attorney could be contacted to discuss the terms of payment or settlement of the claim.

In a letter dated April 13, 1986, Respondent replied to the notice of claim letter and denied the allegations made therein. Respondent alleged that the accident in this case was not caused by equipment violations or malfunction, that the investigation conducted on November 20, 1985 was not complete, and that it failed to prove that the equipment was the cause of the accident. Respondent failed to request a hearing or submit evidence in support of these allegations.

By letter dated March 5, 1986, the attorney for the Director warned Respondent that a motion for final order would be filed in this case. On April 6, 1986, Respondent's officials asserted, during a telephone conversation with the attorney for the Director, that the wheel drum in the trailer involved in this case was new, but defective, and that it cracked after the driver was on the road. Respondent added that the manufacturer admitted that the wheel drum was defective and replaced it free of charge. In his Revised Motion for Final Order, the Director describes that as a result of this discussion, consultations with a mechanical engineer, and review of the evidence, a decision was made to drop from the notice of claim letter count (a) (inadequate brake linings) and part of count (b) (inoperative brake due to a cracked wheel drum). The only standing violation was that part of count (b) dealing with inoperative brakes in axles 2–5 of the vehicle. These brakes were found to be at a level beyond the required readjustment limit.

On April 17, 1987, the Director's attorney placed a telephone call to Respondent's officials to advise them that the claim had been modified as described above and that the total assessment was reduced to $2,500. Discussions of possible settlement of the claim were conducted but no agreement was reached. No further communications have taken place.

I find that the violation cited in that part of count (b) regarding failing to equip the vehicle with operative brakes, due to the brakes in axles 2–5 of the vehicle being beyond the readjustment limit, has been fully documented in the record by substantial proof, particularly, the safety investigator's accident investigation report, trip and shipping records, Canadian Customs Cargo Control document, and the shipper's (George Moore Truck and Equipment Corp.) letter of December 18, 1985. These documents provide documentary evidence that on November 15, 1985, one of Respondent's vehicles, operated by Mr. Richard A. Gosse and loaded with crushed cars, was enroute from Hyde Park, New York to Montreal, Quebec, Canada, and before reaching its destination, was involved in the accident described above.

The record also shows that the investigation and vehicle inspection conducted on November 20, 1985, revealed that the six brakes on axles 2–5 of Respondent's vehicle were beyond readjustment limits, that is, these brakes were at a point where readjustment was required under U.S. Department of Transportation standards. It must be noted that Respondent has failed to submit evidence controverting the results of this inspection or substantiating the allegations in his reply to the notice of claim letter that the investigation was not complete.

Further evidence in support of this violation is included with the Director's revised motion, in the form of an affidavit. In the affidavit, Mr. Britell, a Mechanical Engineer knowledgeable in vehicle maintenance and the Department of Transportation standards, states that having reviewed the evidence for count (b) in this case, six of the eight brake axles in the Respondent's vehicle had rods that traveled beyond readjustment limits and four were at an inoperable level. Mr. Britell further states that based on the Department of Transportation's criteria for placing a vehicle out of service, the Respondent's vehicle would have been placed out of service on a road inspection, as more than 20 percent of its brakes were considered defective. In addition to Mr. Britell's statement, it must be noted that the Department's criteria would also place a vehicle out of service if the brake chamber push-rods on 50 percent or more of the brakes on the vehicle or combination are at or beyond readjustment limits. Certainly, the Respondent's vehicle would have also qualified under this criteria.

49 U.S.C. app. 521(b)(2)(C) (1987) requires that in determining the amount of the civil penalty to be assessed, we take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require. We have no reason to question the Director's consideration of the above factors in assessing the penalty in this case. The Director's Revised Motion describes how consideration was given to Respondent's allegations that the wheel drums were manufactured defectively and thus, the claim was revised and the penalty reduced.

The circumstances in this case involve a serious accident in which the Respondent's driver lost his life. Failure to equip a commercial motor vehicle with operative brakes is the type of violation that seriously imperils traffic safety. The regulatory provisions involved herein do not require a finding that the accident resulted from Respondent's failure to equip the vehicle with operative brakes. However, it is without question that such failure can subject Respondent's drivers to dangerous accidents and seriously affect the safety of the general public. This type of violation is to be prevented in the future and therefore, the statute cited above requires that the assessment of the penalty be calculated to induce further compliance. Respondent must understand that the purpose of the imposition of penalties in these proceedings is to create an atmosphere of compliance with our safety regulations and to provide a deterrent against continued and future violations.

Although no prior enforcement cases have been initiated against Respondent, the record shows that the carrier has been the subject of previous safety management audits and driver-vehicle compliance inspections. During these instances the carrier was made aware of the requirements of the Federal Motor Carrier Safety Regulations applicable to its operations, was informed of the discovery of possible non-compliance with those requirements, and was advised of measures to take to prevent similar occurrences in the future.

No evidence that the payment of the penalty assessed would affect Respondent's ability to do business has been introduced, nor the record show

that such adverse consequence would result. As discussed above, the law seeks compliance to protect the safety of the public. Respondent should be cautioned by these proceedings. Continued violations in the future will result in the imposition of maximum penalties.

Therefore, it is ordered, That Respondent, Crosland Trucking, Ltd., pay a civil penalty of $2,500.00 within 30 days of the date of this order. The above penalty shall be satisfied by certified check made payable to the Federal Highway Administration, and shall be delivered to the Office of Chief Counsel (HCC–20), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

In Washington, District of Columbia, this 10th day of March, 1988.

John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Tulley Trucking, Inc.

[Docket No. R9–87–08; MCS No. 9F–87–005–111]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region Nine, for a Final Order finding the facts to be as alleged in a Notice of Claim dated May 29, 1987, and ordering Tulley Trucking, Inc., (Richard C. Eidson, President) to pay a civil penalty of $8,000.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Tulley Trucking, Inc., was duly served with a copy of the Notice of Claim and has failed to respond as required by 49 CFR 386.14(b).

Therefore, it is ordered That Tulley Trucking, Inc., pay the full amount of the assessed civil penalty of $8,000 within 30 days of the date of this Order.

Dated: February 8, 1988.

John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Shea Horse Transportation, Inc.

[Docket No. 87–7FR; BMCS Case No. 4N–86–004–069]

Final Order

This matter comes before me upon Motion for Final Order from the Director, Office of Motor Carrier Safety Field Operations, hereinafter referred to as the Director, dated September 2, 1987, and submitted in accordance with the provisions of 49 CFR 386.1 et seq. (1987). The Director requests a final order finding the facts in this case to be as alleged in the notice of claim letter, dated May 14, 1987, and requiring Shea Horse Transportation, Inc., of Simpsonville, Kentucky, hereinafter referred to as the Respondent, to pay the total penalty of $2,000 assessed therein.

Having reviewed the record in this case and the information and pleadings included in the Director's Motion for Final Order, I find that Respondent has failed to submit a reply to the Director's notice of claim letter, as required pursuant to 49 CFR 386.14 (1986). Further, I find that the violation cited in said notice of claim letter is supported by substantial evidence in the record. In accordance with 49 CFR 386.14(e) (1987), if the Respondent fails to reply within the time prescribed in such section the Director's notice of claim letter becomes this agency's final order in the proceeding, 25 days after the claim letter is served. Accordingly, the Director's Motion for Final Order is granted. The Director's notice of claim letter, dated May 14, 1987, is incorporated into this order.

Therefore, it is ordered, That Respondent, Shea Horse Transportation, Inc., pay, within 30 days of this order, a civil penalty of $2,000.00 by delivering a certified check for said amount, made payable to the Federal Highway Administration, to the Office of Chief Counsel (HCC–20), Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590.

In Washington, District of Columbia, this 28 day of January, 1988.

John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Apollo Sales, Inc.

[Docket No. R9–87–28; MCS No. 9A–87–001–216]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region Nine, for a Final Order finding the facts to be as alleged in a Notice of Claim dated July 29, 1987, and ordering Apollo Sales, Inc., to pay a civil penalty of $2,000.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charge and specification contained in the Notice of Claim relating to the violation of the Federal Motor Carrier Safety Regulations. I also find that Apollo Sales, Inc., was duly served with a copy of the Notice of Claim and has failed to respond properly as required by 49 CFR 386.14(b).

Therefore, it is ordered, That Apollo Sales, Inc., pay the full amount of the assessed civil penalty of $2,000 within 30 days of the date of this Order.

Dated: January 28, 1988.

John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Burman Wesley Ball

[Docket No. R6–88–1; OMCS No. 60–87–030–320]

Final Order

This matter comes before me by a Response from Counsel for the Director, Office of Motor Carrier Safety, Region 6, to an Order dated September 16, 1988, Returning the Case for Clarification and Reconsideration. Counsel reiterates the desire of the Region for issuance of a Final Order finding the facts to be as alleged in the January 14, 1988, Notice of Claim.

I am unable to accede to that request. In my earlier Order, I requested additional documentary information providing the allegations. Reliance on the Interpretation (42 FR 60078, 11/23/77) is not sufficient under the facts of this case to issue the Order requested.

This finding does not abrogate that interpretation. The intent of the interpretation is to reduce fatigued driving. The illustrative use of 10 minutes as *a minimum standard* neither establishes a hard and fast rule for fatigue determinations nor authorizes the Office of Motor Carrier Safety to enforce company policy. Where a driver violates company policy, the company may, as it has in this case, take proper disciplinary action. However, before we impose a civil penalty we have an obligation to prove all allegations. There is no independent material in this record which establishes that Mr. Ball was not, in the context of the interpretation, engaged in "an enroute stop * * * to lessen a driver's fatigue."

This finding has no applicability beyond the facts and record presented in this case and therefore will not result in the dire economic consequences forecast by Counsel.

Therefore, it is ordered, That the request for a Final Order finding the facts to be as alleged and to impose a civil penalty is hereby denied.

Dated: January 25, 1988.
John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Luck Trucking, Inc.

[Docket No. 85-50H]

Final Order

This matter comes before me upon Revised Motion for Final Order from the Director, Office of Motor Carrier Safety Field Operations, hereinafter referred to as the Director, dated July 2, 1987, and submitted in accordance with the provisions of 49 CFR 386.1 et seq. (1987). The Director requests a final order finding the facts in this case as alleged in the claim letter, dated April 24, 1985, and requiring Luck Trucking, Inc., of Wolcott, Indiana, hereinafter referred to as the Respondent, to pay the total penalty of $7,000 assessed therein.

The Director in the Motion for Final Order, dated February 19, 1987, had initially requested a final order in this case. By Decision issued on June 12, 1987, the Director's motion was denied because two discrepancies in the record precluded a finding that the facts in this case were as alleged in the claim letter. The Decision granted leave to the Director to file again, after correcting the discrepancies noted therein.

I have reviewed the information and pleadings included in the Director's Revised Motion for Final Order and the attachments thereto, together with other information in the record. On the basis of this review, I find that the Director has corrected the noted discrepancies and has adequately described the efforts undertaken to attempt the informal disposition of this matter. Further, the Director has ascertained that the Respondent carrier is still in business and the record shows that no opposition to the Director's motions have been filed nor further communications taken place. Accordingly, I find the facts to be as alleged in the claim letter, dated April 24, 1985.

In the claim letter the Director cited the Respondent with seven violations of the Federal Motor Carrier Safety Regulations and the Hazardous Materials Regulations, specifically failure to preserve driver's records of duty status for hazardous materials trips for six months, as required pursuant to 49 CFR 177.804 and 395.8(k). The violations were discovered during a complaint investigation and safety management audit conducted at the Respondent's offices in Wolcott, Indiana, during September 5–7, 1984. The Director assessed a total civil penalty of $7,000 for the seven violations and advised the Respondent of the regulatory requirements applicable to a reply to the claim letter and of the opportunity to request a formal hearing. In addition, Respondent was advised that if he wished he could contact the Director's attorney to discuss the terms of payment or settlement of the claim.

By letter dated May 11, 1985, Respondent replied to the claim letter, admitting error in recordkeeping requirements with respect to the violations cited by the Director. Respondent alleged that no knowing violation of the regulations occurred, but rather, through ignorance, the wrong record destruction schedule was maintained. The reply letter also stated that a person knowledgeable in the area of recordkeeping had been hired since that time, an action which showed Respondent's willingness to comply with the regulations. Finally, Respondent expressed its wish to discuss the civil penalty claimed.

By letter dated July 2, 1985, the Director wrote to Respondent stating that in view of the information presented in the reply to the claim letter, as well as Respondent's past history, a $5,000 settlement offer would be considered. A settlement agreement to that effect was enclosed with the letter. Respondent responded to the Director's proposed settlement offer by letter postmarked July 30, 1985. In this letter Respondent stated that the $5,000 settlement offer seemed more than the infractions warranted, and asked the Director to respond.

On August 12, 1985, the attorney for the Director discussed potential settlement during a telephone conversation with representatives of the Respondent. Respondent's representatives refused to suggest any settlement amount and asserted that no fine should be assessed, as measures had been taken to prevent the type of violations cited. By certified letter, return receipt requested, dated August 14, 1985, the attorney for the Director warned the Respondent that the Director intended to file a motion on or about August 30, seeking a final order assessing the total penalty claimed ($7,000). The letter advised Respondent that if further discussions were desired before the motion for final order was filed, the attorney could be contacted at her office. Respondent failed to respond to this letter or file any answer to the Director's subsequent motions for final order.

Having reviewed the Director's Revised Motion and the attachments thereto, I find that the violations have been fully documented in the record by the safety investigator's case report, shipping papers, carrier's invoices and statements of admission provided by the Respondent. These documents constitute substantial proof that the Respondent's drivers completed the seven interstate trips cited in the claim letter, and that Respondent failed to preserve the required driver's records of duty status of hazardous materials trips for six months.

Specifically, the shipping papers and invoices in the record provide documentary evidence that the cited trips, which involved the transportation of substantial amounts of the regulated hazardous material anhydrous ammonia (nonflammable gas, UN 1005), were carried out by Respondent's drivers. The record also shows that the safety audit of Respondent's records conducted during September 5–7, 1984, revealed that driver's records of duty status for the cited trips were not preserved for the required period of six months.

Evidence of the failure to preserve such records is further provided by two written statements made by Respondent's President, Mr. David E. Whitaker. The first statement was made by Mr. Whitaker on September 7, 1984, during the safety management audit that discovered the cited violations. In this statement, Mr. Whitaker admitted that Respondent did not preserve the driver's records of duty status for a total of 26 trips made by its drivers in April, May, and June of 1984, which involved the transportation of hazardous materials. The seven interstate trips cited in the claim letter are included in the 26 trips listed in said statement.

The second statement provided by Mr. Whitaker was made in the Respondent's reply, dated May 11, 1985, to the claim letter. In this reply Respondent again admits to the cited violations, although an allegation of clerical error is made. Respondent alleges that "it was not the intent to knowingly commit the infraction, but rather through ignorance, [it] maintained the wrong record destruction schedule."

Respondent's allegation of clerical error due to lack of knowledge of the regulations' requirement is not a valid defense against the violations cited in the claim letter. In cases involving violations of the Hazardous Materials Regulations promulgated by this Department, lack of knowledge of the regulations is not a valid defense. See *United States* v. *International Minerals and Chemical Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971). In *International Minerals*, a case which involved violations of Federal regulations regarding the safe transportation of corrosive liquids, the

United States Supreme Court held that ignorance of the law, whether it be a statute or a duly promulgated and published regulation, is no defense. The Supreme Court declined to attribute to Congress the inaccurate view that the statute in question required proof of knowledge of the law. The Supreme Court held that "where dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.*, at 565, 91 S.Ct., at 1701. See also *United States* v. *Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 256; *United States* v. *Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604.

Accordingly, to prove the violation of the Hazardous Materials Regulations involved in this case the Director is not required to prove knowledge by the Respondent of the specific regulatory requirement or specific intent to violate such requirement. Rather, the Director must prove that Respondent had knowledge that its driver undertook a trip that involved the transportation of hazardous materials and that the required driver's record of duty status was not preserved for 6 months.[1] As described above, the record now contains substantial evidence which supports the Director's determination that Respondent knowingly violated the Hazardous Materials Regulations, specifically 49 CFR 177.804 and 395.8(k).

49 U.S.C. App. 1809(a)(1) requires that in determining the amount of the civil penalty to be assessed, we "take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." Consequently, Respondent's allegations of erroneous interpretation of applicable regulations and the measures instituted to prevent similar violations in the future, although not a valid defense against the violations, are to be considered as part of this determination of the amount of the civil penalty to be assessed.

The Director alleges in its revised motion that the Respondent's response alleging lack of knowing violation due to clerical error "has been taken into account in the penalty assessment." The Director's statement is of concern, as Respondent makes the allegation in question in its reply to the claim letter where the penalty is assessed. Notwithstanding this apparent inconsistency, the record does show that the safety investigator noted in its audit report that Respondent's officers claimed to have misinterpreted the requirements applicable to driver's record retention. The Director must have considered such allegations as part of his review of the audit report prior to the issuance of the notice of claim.

Although no prior enforcement cases have been initiated against Respondent, the carrier was the subject of a previous safety management audit conducted on July 9, 1982. At that time the carrier was notified by the safety investigator that violations of hours-of-service regulations had been discovered and was advised of measures to take to prevent similar occurrences in the future. Thus, Respondent was made aware of the requirements of the Motor Carrier Safety and Hazardous Materials Regulations applicable to its operations, and how to avoid future violations. Notwithstanding this opportunity, the subsequent audit which resulted in the current enforcement action again revealed violations of the hours-of-service regulatory requirements. It is not until after this subsequent audit that Respondent adopts the measures discussed above to prevent similar future violations.

The hours-of-service requirements included as part of the Motor Carrier Safety and Hazardous Materials Regulations are not to be regarded as simple paperwork exercises. These requirements have been included as a safeguard against motor carrier accidents resulting from driver fatigue. Compliance with these requirements ensures that commercial drivers are adequately rested before operating their vehicles. Respondent must understand that compliance with such requirements is of extreme importance in motor carrier operations which involve the transportation of hazardous materials, because an accident involving such dangerous cargo can have grave consequences for the public at large.

Respondent must also understand that the purpose of the penalties in these cases is to create an atmosphere of compliance and to provide a deterrent against continued and future violations. As such, penalties cannot be dismissed simply because measures have been adopted to prevent similar violations in the future. Although there is ample evidence in the record to support the Director's request for total amount of the penalty assessed in this case, I am unable to do so because of the circumstances involved, the lack of prior formal enforcement actions against Respondent, and the corrective measures taken by Respondent to prevent future violations. The record shows that respondent had gross revenues in excess of $2.5 million in 1983, and was still operating in 1987. No evidence that payment of the penalty requested would affect Respondent's ability to do business has been introduced, nor the record show that such adverse consequence would result. As discussed above, the law seeks compliance to protect the safety of the public. Respondent should be cautioned by these proceedings. Continued violations in the future will result in the imposition of maximum penalties.

Therefore, it is ordered, That Respondent, Luck Trucking, Inc., pay a civil penalty of $6,000.00 by delivering a certified check for said amount, made payable to the Federal Highway Administration, to the Office of Chief Counsel (HCC–20), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

In Washington, District of Columbia, this 27th day of January, 1988.

John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

[1] For recent decisions involving other violations that do not require knowledge of specific statutory or regulatory requirements see: *United States v. Elsayed*, 801 F.2d 856 (1986); *United States v. One Hundred Twenty-two Thousand Forty-three Dollars*; 792 F.2d 1470 (1986); *United States v. Neil*, 735 F.2d 785 (1984); and *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (1984).

Chase Vehicle Transfer, Inc.

[Docket No. R9–87–10; MCS No. 9G–87–007–332]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region Nine, for a Final Order finding the facts to be as alleged in a Notice of Claim dated June 9, 1987, and ordering Chase Vehicle Transfer, Inc., to pay a civil penalty of $7,600.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations for the Federal Motor Carrier Safety Regulations. I also find that Chase Vehicle Transfer, Inc., was duly served with a copy of the Notice of Claim and has failed to respond.

Therefore, it is ordered, That Chase Vehicle Transfer, Inc. pay the full amount of the assessed civil penalty of $7,600 within 30 days of the date of this Order.

Dated: December 7, 1987.
John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Continental Carrier Corp.

[Docket No. R9-87-06; MCS No. 9D-87-001-090]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region Nine, for a Final Order finding the facts to be as alleged in a Notice of Claim dated May 28, 1987, and ordering Continental Carrier Corporation to pay a civil penalty of $5,200.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations for the Federal Motor Carrier Safety Regulations. I also find that Continental Carrier Corporation was duly served with a copy of the Notice of Claim and has failed to respond.

Therefore, it is ordered, That Continental Carrier Corporation pay the full amount of the assessed civil penalty of $5,200 within 30 days of the date of this Order.

Dated: November 18, 1987.
John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

R & R Trucking, Inc.

[Docket No. R3-86-42; BMCS No. 3B-82-031-035]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated July 31, 1986, and ordering R & R Trucking, Inc., to pay a civil penalty of $6,000.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations for the Federal Motor Carrier Safety Regulations.

Therefore, it is ordered, That R & R Trucking, Inc., pay the full amount of the assessed civil penalty of $6,000 within 30 days of the date of the Order.

Dated: November 18, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Garfield Container Transport, Inc.

[Docket No. 87-81]

Final Order

This matter comes before me upon request from Respondent for a formal hearing. The Regional Director for Region 1 opposes the granting of a hearing on the basis that no material factual issues have been identified. The Regional Director requests a Final Order directing respondent to pay an assessment of $150,000 for violations of an alleged 15 counts cited in a Notice of Claim, dated May 11, 1987.

Respondent's request for a hearing is hereby denied, as no material factual issues in dispute have been identified. The Regional Director's request for an order directing the payment of $150,000 is also denied.

The alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs) include transportation of radioactive materials. As pointed out by the Regional Director in his submission, such transport demands the highest standard of care. Failure to comply with the necessary regulations for whatever reason, be it ignorance of the requirements of careless operations, is inexcusable.

The alleged violation of 49 CFR 387.7(b), operating a motor vehicle without having in effect minimum levels of financial responsibility takes on particular importance when the commodity transported is radioactive or nuclear material. Respondent fails to satisfy the standard required. In admitting this violation, Respondent attempts to mitigate by introducing evidence of a much lesser amount of coverage. The assessment of $10,000 for this violation is warranted.

The alleged violations of 49 CFR 387.7(f), failing to have on board a motor vehicle a legible copy of proof of financial responsibility, constitute violations of a different magnitude. Alleged counts 2 through 11 apparently do not involve the transportation of hazardous materials. Respondents contends that all drivers are furnished with copies of the requisite forms and are introduced to carry such documents. Respondents must take further action to ensure that the required documents are carried in the vehicles. Failure to do so in the future will result in additional assessments. However, I find Respondent's arguments sufficient to mitigate these violations and these counts are hereby dropped without assessment.

The alleged violations of 49 CFR 177.804 and 395.8, failing to retain on file at carrier's place of business drivers' records of duty status, involve two trips cross-border and interstate. Respondent has provided the records after the fact and contends that such records are routinely maintained but often filed late. The violation has been proven, however, mitigation is present. Therefore, a penalty of $1,000 each for these 2 violations will be assessed.

The alleged violation of 49 CFR 177.823(a), using a motor vehicle containing a hazardous material that is not properly marked or placarded has been admitted. A penalty of $10,000 will be assessed for this violation.

The alleged violation of 49 CFR 177.825(d)(3), failing to have on board a motor vehicle transporting Highway Route Controlled Radioactive Materials, a written route plan for such transportation has been admitted. Respondent attempts to mitigate by presenting evidence that a document entitled "SPECIAL DELIVERY INSTRUCTIONS" identified permitted stops for the vehicle. Such is wholly unacceptable. A penalty of $10,000 will be assessed for this violation.

The alleged violation of 49 CFR 177.825(c), using a driver to transport Highway Route Controlled Radioactive Materials who has not received training within the two previous years, involves a serious violation. Respondent submits exhibits purporting to constitute proof of requisite training. Although there is conflicting evidence present in the file on this issue, Respondent's submission is sufficient to meet this allegation and therefore this count is dismissed.

Therefore, it is ordered, That Respondent's request for a hearing is hereby denied and that Garfield Container Transport, Inc., is ordered to pay an assessment of $32,000 as set forth above, within 30 days of the date of this order.

Dated: October 19, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Gibbons Trucking

[Docket No. R9-86-15; MCS No. 9F-86-009-090]

Final Order

This matter comes before me on the Motion of the Regional Director, Office of Motor Carrier Safety, Region Nine, for a Final Order finding the facts to be as alleged in a Notice of Claim dated

December 23, 1986, and ordering Gibbons Trucking to pay a civil penalty of $3,350.

Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim relating to violations for the Federal Motor Carrier Safety Regulations. I also find that Gibbons Trucking was duly served with a copy of the Notice of Claim and has failed to respond.

Therefore, it is ordered, That Gibbons Trucking (John E. Gibbons, President) pay the full amount of the assessed civil penalty of $3,350 within 30 days of the date of this Order.

Dated: September 10, 1987.

John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Alfa Express Co., Inc.

[Docket No. RI-86-65G]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a formal, trial type hearing. Respondent received a Notice of Claim dated November 14, 1986, detailing a number of alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). In its response, Respondent denied all alleged violations with the exception of one admission with the claim that the regulation in question was complied with substantially.

The Regional Director does not contest the existence of material factual issues in dispute and joins in the request for the appointment of an Administrative Law Judge.

Specific material factual issues in dispute are:

1. Did Respondent have sufficient proof of financial responsibility at its principal place of business to constitute substantial compliance with § 387.7(d)?
2. Did Respondent maintain all required records in driver files referenced in the Notice of Claim (paragraphs 2 through 6)?
3. Did Respondent comply with § 394.7 by filing an accident report?
4. Did Respondent require or permit its drivers to drive in excess of the number of hours required by § 395.3?
5. Did Respondent require its drivers to prepare and submit records including daily reports?

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a)(1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b)(1985)

Dated: August 26, 1987.

John F. Grimm for Richard P. Landis,
Associate Administrator for Motor Carriers.

Exchange Transportation Co.

[Docket No. RI-87-70]

Final Order

This matter comes before me upon request for a hearing filed by respondent. The Regional Director has filed a Motion in Opposition to that request and has requested that a Final Order be issued assessing the full amount of the claim.

Respondent's sole basis in requesting a hearing is that he was not informed by the Safety Investigator that he was required to maintain certain records. The record does not provide any indication that he was materially misinformed on any count. Knowledge of the regulations and applicable requirements is a responsibility imposed by law upon respondent. Failure to inform oneself of the applicable requirements does not constitute material factual issues in dispute.

The circumstances surrounding the assessment arising from an audit are taken into account by the Regional Director. The size of a business, previous experience with audits, past violations and other matters form the basis for the assessment and any negotiating posture taken during informal settlement conferences. I find that the record indicates Exchange Transportation was afforded and availed itself of all opportunities under the regulations. There is no basis in the record to indicate that I should modify the amount of the assessment.

Therefore, it is ordered, That the request of Exchange Transportation Co. for a hearing is denied and the request for a Final Order by the Regional Director is granted. Exchange Transportation Co. is ordered to pay the full amount of the assessment of $5,200 within 30 days of the date of this Order.

Dated: August 26, 1987.

John F. Grimm for Richard P. Landis,
Associate Administrator for Motor Carriers.

North East Express, Inc.

[Docket No. 85-113FR]

Final Order

This matter comes before me on motion of the Director, Office of Motor Carrier Safety Field Operations (formerly Director, Bureau of Motor Carrier Safety, and hereinafter the Director), dated March 27, 1987, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated September 30, 1985, and amended July 22, 1986, ordering the respondent, North East Express, Inc., to pay the full amount of the civil penalty of $4,000 assessed therein.

The violation charged in the Notice of Claim occurred on or about December 3, 1984, and was that respondent operated a motor vehicle carrying mineral wool batts and rolls in commerce without having proof of the required minimum level of financial responsibility at its principal place of business. The violation was apparently witnessed by an agent of the government, and admitted by respondent in its reply. Consequently, I am able to find the facts to be as alleged in the Notice of Claim.

I also find that respondent was duly served with the Notice of Claim and the amended Notice of Claim, and in fact, filed a response on August 5, 1986. Respondent also replied to this motion on April 9, 1987.

In its reply to the amended Notice of Claim, the respondent requested a hearing on the grounds that the Director, in making an assessment of the civil forfeiture to be claimed, failed to take into consideration the nature and gravity of the offense and the circumstances surrounding the offense. Since the reply admits the only factual issue comprising the violation charged, the request for a hearing is hereby denied. The issue of the level of assessment is one that is usually left to the discretion of the Director, and in the absence of clear evidence to the contrary, proper exercise of that discretion is assumed, and the assessment will not be disturbed.

The maximum penalty for the offense charged is $10,000, but Section 387.17 of the Federal Motor Carrier Safety Regulations requires the Director, in determining the amount of the penalty, to "take into account the nature, circumstances, extent, the gravity of the violation committed and, with respect to

the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to continue to do business, and such other matters as justice may require."

In the original Notice of Claim, it is noted that in assessing the penalty of $4,000, consideration was given to the "seriousness of your violation, your past history, your financial status and other factors (not mentioned)." The original Notice also contains an allegation that the respondent's insurance policy revealed a limit of $500,000 for each accident. The limit was required to be raised to $750,000, effective January 1, 1985. For reasons that remain unexplained, that allegation was deleted from the amended Notice of Claim at the request of the respondent. It was replaced by the allegation that respondent did not have the required proof (Form MCS–90 or MCS–82) at its principal place of business at the time of the identified shipment.

In its reply, respondent notes that only one offense was charged, i.e. that respondent simply did not have the required form present or able to be found at its place of business; that the violation was not willful, that no harm or threat to transportation was created by this violation; and that the violation was quickly corrected. In its Answer to Motion for Final Order, the respondent amplifies the circumstances of the violation, and claims: that the proof of insurance was merely misplaced, apparently by a careless employee; that respondent was insured at the time (no amount mentioned); and that respondent now maintains the required MCS–90 at its terminal offices. A copy of the MCS–90 was attached. I note that the copy provided is unsigned, reflects liability coverage in the amount of $750,000, but shows an effective date of November 21, 1986. The Director has provided nothing in the record to refute any of the claims by the respondent. I further note, however, that verification of the existence of insurance coverage at a particular time is a relatively simple matter, and why it was not done conclusively either by the carrier or by the Director remains a mystery.

I conclude from the evidence, or lack thereof, that respondent, in fact, had some insurance coverage in effect but failed to produce proof of its existence at the time it was demanded. While this is indeed a violation of the regulations as charged, its relative seriousness of the matter, as presented, is certainly minimal. Moreover, the Director notes in the motion that no prior cases have been prosecuted against the carrier, not is any mention made of any past history of the carrier.

I conclude, therefore, that the violation was, in fact, committed, but that the penalty assessed, based on the circumstances revealed in the record, is too high.

Accordingly, it is ordered that the respondent pay a civil penalty of $500 by delivering a certified check in that amount, made payable to the Federal Highway Administration, to the Office of the Chief Counsel, HCC–20, Federal Highway Administration, Washington, DC 20590.

Dated: Washington, DC. July 21, 1987.
Richard P. Landis.
Associate Administrator for Motor Carriers.

Jet Air, Inc.

[Docket No. 86–88FR]

Final Order

This matter comes before me on motion of the Director, Office of Motor Carrier Safety Field Operations (formerly Director, Bureau of Motor Carrier Safety, and hereinafter the Director), dated July 16, 1986, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated May 6, 1986, ordering the respondent, Jet Air, Inc., to pay the full amount of the civil penalty of $5,000 assessed therein.

The violations charged in the Notice of Claim occurred in the period from September 1985 to January 1986, and were that, on at least five occasions, respondent operated a motor vehicle carrying aviation fuel, a combustible liquid, in commerce without having the required minimum level of financial responsibility in effect. The violations were well documented in the appendices to this motion, and admitted by respondent in its reply. Consequently, I am able to find the facts to be as alleged in the Notice of Claim.

I also find that respondent was duly served with the Notice of Claim, and in fact, filed a response on May 19, 1986. Respondent has apparently not replied to this motion.

The respondent has not requested a hearing, but did enter into negotiations over the amount of the assessment claimed. Those negotiations failed to bring about an agreement. The issue of the level of assessment is one that is usually left to the discretion of the Director, and in the absence of clear evidence to the contrary, proper exercise of that discretion is assumed, and the assessment will not be disturbed.

The maximum penalty for the offense charged is $10,000, but Section 387.17 of the Federal Motor Carrier Safety Regulations requires the Director, in determining the amount of the penalty, to "take into account the nature, circumstances, extent, the gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to continue to do business, and such other matters as justice may require."

In the original Notice of Claim, it is noted that in assessing the penalty of $5,000, consideration was given to the "seriousness of your violation, your past history, your financial status and other factors (not mentioned)." The documentation included with the motion contains evidence relied upon by the Director, and admitted by respondent that the insurance policy in effect during the period covered by the charges was limited to $750,000 for each accident. The limit required, effective January 1, 1985, was raised from $500,000 to $1,000,000. In its reply, respondent notes that it relied on information from its insurance representative that the required coverage was $750,000; that the transportation was for its own purposes and not "in commerce"; and that once the violation was called to its attention, it was quickly corrected. The reply also includes financial information showing that the respondent was in difficulty, and, in fact, was not operating for several months. The Director has provided nothing in the record to refute any of the claims by the respondent.

While violations of the regulations occurred as charged, their relative seriousness, as well as the financial condition of the respondent, should have received greater consideration. I conclude, therefore, that while separate violations were, in fact, committed, assessing separate penalties, based on the circumstances revealed in the record, was not warranted.

Therefore, it is ordered, That the respondent pay a civil penalty of $1,000 by delivering a certified check in that amount, made payable to the Federal Highway Administration, to the Office of the Chief Counsel, HCC–20, Federal Highway Administration, Washington, DC 20590.

Dated: Washington, DC July 21, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

New England Courier

[Docket No. 86-98H]

Final Order

This matter comes before me on motion of the Director, Office of Motor Carrier Safety Field Operations (formerly Director, Bureau of Motor Carrier Safety, and hereinafter the Director), dated February 6, 1987, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated May 20, 1986, and ordering the respondent, New England Courier, to pay the civil penalty of $5,000 assessed therein.

The respondent replied to the Notice of Claim by letter dated June 16, 1986, which generally denied the violations cited in the Notice, requested a formal hearing, and indicated an interest in discussing settlement of the claims. The reply also requested additional time to file more particular denials. It has now been 1 year since the reply was filed, and no such particular denials have been received.

Having reviewed the motion and supporting documents appended thereto, as well as the official docket of the case, I find the evidence supports the charges and specifications contained in the May 20, 1986, Notice of Claim relating to violations of the Hazardous Materials Regulations. I also find that respondent was duly served with copies of the Notice of Claim and this motion, and that respondent's reply to provide a concise statement of each defense, as required by § 386.14 of the Rules of Practice (49 CFR part 386 (1986)). Without some amplification of its denials, I am unable to find any material facts in dispute. Moreover, there is amply documentation filed with the Director's motion to enable me to find the facts to be as alleged in the Notice of Claims.

Therefore, it is ordered, That respondent, New England Courier, show cause within 30 days of the date of this order why it should not be ordered to pay the full amount of the civil penalty assessed, or, in the alternative, renew its request for a hearing upon a showing that there are factual matters in dispute. If respondent fails to comply with this order within the allotted time, I will entertain a motion for summary entry of a Final Order finding the facts to be as alleged in the Notice of Claim and ordering the payment of the penalty assessed for the serious violations of the Hazardous Materials Regulations.

Dated: Washington, DC July 21, 1987.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Pilot Petroleum Transport, Inc.

[Docket No. 86-7FR]

Final Order

This matter comes before me on motion of the Director, Office of Motor Carrier Safety Field Operations (formerly Director, Bureau of Motor Carrier Safety, and hereinafter the Director), dated April 30, 1987, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated January 23, 1986, ordering the respondent, Pilot Petroleum Transport, Inc., to pay the full amount of the civil penalty of $4,000 assessed therein.

The violations charged in the Notice of Claim occurred in September and October 1985, and consisted of four occasions when respondent's vehicle transported fuel oil in commerce without having in effect the required minimum level of financial responsibility. Documentation submitted with this motion shows that on the dates indicated, trips were made and the liability coverage in effect was at the most $500,000. The applicable law and regulation required $1,000,000. Consequently, I am able to find the facts to be as alleged in the Notice of Claim.

I also find that respondent was duly served with the Notice of Claim, and in fact, corresponded with the attorney for the Director on February 3, 1986. There has been no reply to the Director's Motion for Final Order, and no request for a hearing has been made. Respondent's letter and other documentation indicate that the appropriate level of financial responsibility may have been in effect through August 17, 1985, when the insurance carrier was liquidated. Thereafter, the respondent's coverage was limited to $500,000, and efforts were made to secure an umbrella policy providing the necessary additional coverage. In a letter, presumably from an insurance broker, dated February 4, 1986, respondent was informed that efforts to secure the required coverage were rejected by six different insurance companies.

On May 12, 1986, the attorney for the Director advised the respondent by letter that failure to demonstrate that the appropriate level of insurance was in effect in 3 weeks would preclude mitigation of the claim and result in a Motion for Final Order. Respondent apparently has never replied to that letter.

The maximum penalty for the offenses charged is $10,000 per violation, so that the assessment of $1,000 per violation is not unreasonable on its face. What may be more important, however, is the fact that this carrier may still be operating without the required level of financial responsibility, and in direct violation of 49 CFR 387.7(a) (1985). That possibility and the appropriate remedial measures are not addressed in the Director's motion.

Accordingly, it is ordered that the respondent pay a civil penalty of $4,000 by delivering a certified-check in that amount, made payable to the Federal Highway Administration, to the Office of the Chief Counsel, HCC-20, Federal Highway Administration, Washington, DC 20590. It is further ordered that the Director verify the current liability insurance carried by the respondent and take the appropriate action to assure compliance with the regulation. A report on the status of this matter shall be submitted to me within 30 days.

Dated: Washington, D.C., July 21, 1987.

Richard P. Landis,

Associate Administrator for Motor Carriers.

L. D'Avignon Trucking

[Docket No. RI-87-90]

Final Order

This matter comes before me upon request for a hearing by respondent and Motion for Final Order in response thereto by Counsel for the Regional Director, Region 1. Respondent was issued and received a Notice of claim, documenting alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs), and assessing a civil penalty of $35,000.

The parties have been unable to arrive at a satisfactory resolution of this matter. Respondent has failed to establish the existence of material factual issues in dispute. Instead, respondent appears to be pleading that the documented violations are not serious (malum in prohibita), have been resolved and did not present life-threatening circumstances. The FMCSRs are not casual guidelines to be applied or not at the whim of the commercial trucking industry. They have been promulgated to implement laws passed by the Congress to ensure the safety of the traveling public. As such is the case, it is completely unacceptable to the Federal Highway Administration, when the facts indicate that a business is operated in a manner which can only be characterized as in complete disregard of the law.

The Regional Director is in the best position to determine the necessity for and the degree of abatement applicable in each case. This Office will overturn such assessments only with presentation of the strongest evidence that such determinations are unwarranted, inequitable, or incapable of support for some other reason. Such is not the case in this matter.

Operating with drivers who have been disqualified or have otherwise had their driving privileges revoked is completely unacceptable. The file in this case indicates Mr. D'Avignon had every opportunity to ascertain the status of his employee. Failure to do so is a direct and almost flagrant violation of the law. Likewise, even though paperwork requirements may be time-consuming and burdensome, nevertheless they are with critical purpose and must not be avoided. I cannot acquiesce in the attitude of, "Okay, now I'm caught. In the future I'll comply." The Regional Director appears to have good reason for refusing to mitigate the assessed penalty in this matter.

Although severe, it is behavior such as this which led the Congress to enact the laws. Future compliance is not optional—compliance with the laws and regulations is mandatory. The continuation of operations without compliance will result in the imposition of even more severe penalties.

Therefore, it is ordered, That all requests for hearing are denied and that L. D'Avignon Trucking pay the full amount of the assessed civil penalty of $35,000 within 30 days of the date of this Order.

Dated: July 16, 1987.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Royal Harvest Foods

[Docket No. 86-441]

Final Order

This matter comes before me through a Motion for Final Order from the Regional Office of Motor Carrier Safety, Region 1. Respondent has replied and cross-filed for alternative relief. These motions, cross-motions and replies thereto follow the issuance of an Interim Order, which I issued on March 5, 1987, directing resumption of negotiations between the parties.

It appears that the parties have been unable to resolve this situation without further recourse to my office. The various filings indicate an unusual degree of rancor and, therefore, I am issuing this Order. However, it appears that both parties may have lost sight of the purpose of these regulations and penalties attached to violations thereof. Motor carrier safety must not be taken lightly. The size of a carrier's operations, although a factor in assessing a penalty for violation, does not constitute an excuse or rationale for culpability. These laws and regulations create obligations, which must be acknowledged, learned and addressed.

The purpose of the penalties attached to violations are not to extract an extra pound of flesh or to place a carrier out of business. Their purpose is to create an atmosphere of compliance and to provide a deterrent to non-normative behavior. As such, we cannot dismiss them lightly by saying that since we are now in compliance a penalty serves no purpose. The Regional Office is in the best position to determine the veracity of statements made, the scope of a carrier's operations, and the potential for future compliance, as well as the degree of previous noncompliance.

Notwithstanding these factors, this matter appears capable of resolution without additional proceedings. There is ample evidence in the record to indicate that a penalty is justified. However, I am unable to determine the necessity to impose a maximum penalty. It appears that the carrier has taken steps to eliminate the violations. As discussed above, the law seeks compliance to protect the safety of the public. The carrier should be cautioned by these proceedings. Continued violations in the future will result in the imposition of maximum penalties.

Therefore, it is ordered, That all motions for further proceedings are denied. Royal Harvest Foods is directed to pay $1,500 in full settlement of the penalty assessed in this case within 30 days of the date of this Order.

Dated: June 25, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Gene Yannetta

[Docket No. R6-86-107]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, opposing respondent's request for a hearing and requesting a Final Order assessing a civil forfeiture penalty in the amount of $500.

Having reviewed the motion and the supporting documents appended thereto, I find that the respondent has not provided any indication of material factual issues in dispute. The request for a hearing is denied. I find that the evidence supports the charges and specifications contained in the Notice of Claim, dated October 14, 1986. I also find that Mr. Gene Yannetta received copies of the Notice and has failed to conclude meaningful settlement negotiations.

Therefore, it is ordered, That Gene Yannetta pay the full amount of the assessed civil penalty of $500 within 30 days of the date of this Order.

Dated: June 10, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Fulton Packing Co., Inc.

[Docket No. RI-86-60]

Order of Dismissal

On May 5, 1987, Administrative Law Judge William A. Kane, Jr., issued an Order in this case in response to a motion from the Regional Director for an order of dismissal. In his Order, the Judge indicated that he would consider the Regional Director's motion as an expression of intent not to prosecute and that no purpose would be served by further proceedings. By that Order, Judge Kane has certified the record in this case to the Associate Administrator for appropriate action.

In his Order, the Judge references various provisions of 49 CFR part 386, reserving to the Associate Administrator those functions not delegated to the Administrative Law Judge. The Judge appropriately concludes that termination of proceedings is among those functions so reserved. Under 49 CFR 386.35, all motions filed after a matter is called for hearing are to be submitted to the Judge.

The Order of the Administrative Law Judge provides sufficient basis upon which to dismiss these proceedings in the absence of opposition by either of the parties. Under 49 CFR 386.61 the decision of the Administrative Law Judge becomes the final decision of the Associate Administrator 45 days after it is served. In future proceedings of this nature, the Order of the Administrative Law Judge will, accordingly, become the final decision of the Associate Administrator in the absence of a published Order.

Therefore, it is ordered, That the hearing in the matter of Fulton Packing Co., Inc., is hereby rescinded as provided in the May 5, 1987, Order of the Administrative Law Judge.

Dated: June 10, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Earnest Johnson, Jr.

[Docket No. R6-85-150]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, opposing respondent's request for an oral hearing, and requesting a Final Order assessing a civil forfeiture penalty in the amount of $500.

Having reviewed the motion and the supporting documents appended thereto, including respondent's request for a hearing, I find as follows:

1. The request for a hearing is denied. Respondent does not provide any indication of material factual issues in dispute. In his request, respondent indicates that his violations were the result of company policy. This contention is contrary to respondent's signed statement of April 5, 1985. If, in fact, investigation reveals that a company requires such violative behavior, the company is also subject to a penalty. Respondent is free to file a complaint alleging such a requirement as company policy. However, a mere averment of such in a request for a hearing does not excuse the documented violation of respondent.

2. I find that the evidence supports the charge and specifications contained in the Notice of Claim, dated September 25, 1985. I also find that Mr. Earnest Johnson was duly served with copies of the Notice and has failed to enter into and conclude meaningful settlement negotiations.

Therefore, it is ordered, That respondent's request for a hearing is denied and that Mr. Earnest Johnson, Jr. pay the full amount of the assessed penalty of $500 within 30 days of the date of this Order.

Dated: June 10, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Eight Drivers (United Transports, Inc.)

[Docket Nos. R6-85-84; R6-85-85; R6-85-86; R6-85-90; R6-85-91; R6-85-92; R6-85-94; R6-85-99]

Order of Administrative Law Judge

On May 26, 1987, the Regional Director for Region 6, Office of Motor Carrier Safety, Federal Highway Administration (Director) filed a motion requesting the administrative law judge to dismiss the above-titled proceeding. The motion states that after extensive investigation and review, the Director has discovered information which was not previously known and which casts doubt upon the culpability of respondents for the violations contained in the Notice of Claim. The Director stated that he believed, therefore, that it was in the best interest of all parties for the matter to be dismissed.

As indicated, the motion requests that the Administrative law judge dismiss the action. Nothing in the Federal Highway Administration Rules of Practice (49 CFR part 386) appears to delegate to administrative law judges the authority to dismiss a Notice of Claim which the Associate Administrator for Motor Carriers has assigned for hearing.

As a means of bringing the matter to a close, the Director's motion will be regarded by the undersigned as an expression of intent by the Director not to prosecute the Notice of Claim before the administrative law judge. Under these circumstances, it is found that no purpose would be served by further proceedings before the judge. It is further found that the record in this case should be certified to the Associate Administrator for Motor Carriers for appropriate action.

It is so ordered,

William A. Kane, Jr.,

Chief Administrative Law Judge.

MWR, Inc.

[Docket No. R3-86-87; BMCS No. 3B-85-027-055]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim issued on July 22, 1986. The Notice of Claim assessed a civil penalty of $8,000 for the alleged violations. This motion for a Final Order requests full payment of the assessed amount.

Having reviewed the motion and the supporting documents appended thereto, I find that the carrier has neither requested a hearing nor disputed the alleged violations by establishing any material factual issues in dispute. I find that the carrier was duly served with the Notice of Claim, and chose to participate in an informal settlement conference which failed to resolve this matter.

Therefore, it is ordered, That MWR, Inc., pay the full amount of the assessed civil penalty of $8,000 within 30 days of the date of this Order.

Dated: June 5, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Real Ice Cream Distributors, Inc.

[Docket No. 86-13; BMCS No. NH-85-160-020]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the respondent for an administrative hearing. Counsel for the Regional Director, Region 1 opposes this request on the basis that no material factual issues are in dispute.

There are three separate sections of the regulations at issue in this case, 49 CFR 391.51, 395.8 and 396.11. With respect to § 391.51, respondent alleges that it received misleading information from a former Safety Consultant. Counsel for the Director contends that notwithstanding the supposition that such information was or was not provided, it does not constitute a material facual issue in dispute. I agree with the Counsel for the Director. The request for hearing on this section's counts is denied.

With respect to alleged violations of § 395.8, respodent indicates that several drivers had routes of less than 100 miles. Section 395.8 does provide exemptions for drivers who operate within a 100 air-mile radius of the normal work reporting location. Counsel for the Director contends that respondent was not maintaining adequate time records and therefore the 100 mile exemption is not applicable. On this issue, respondent does provide a material factual issue and I am granting a hearing to determine the scope and applicability of the 100 mile exemption to the alleged violations.

With respect to alleged violations of § 396.11 respondent proffers no material factual issues in dispute, therefore the request for a hearing on this section is denied.

Therefore, it is ordered, That in accordance with 49 CFR 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, to serve as the presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: June 2, 1987.
John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Knudsen Trucking, Inc.

[Case No. 5F-85-044-098]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 5, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated February 26, 1986, and ordering Knudsen Trucking, Inc., to pay the civil penalty of $11,500 assessed therein.

Having reviewed the Motion and the supporting documents apended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Knudsen Trucking, Inc., was duly served with a copy of the Notice of Claim and has failed to settle the outstanding claim.

Therefore, it is ordered, That Knudsen Trucking, Inc., pay the full amount of the assessed civil penalty of $11,500 within 30 days of the date of this Order.

Dated: May 13, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Grane Transportation Lines, Ltd.

[Case No. 5A-84-041-081 and 5A-84-064-080]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 5, for a Final Order finding the facts to be as alleged in a Revised Notice of Claim, dated September 29, 1986, and ordering Grane Transportation Lines, Ltd. to pay the civil penalty of $3,000 assessed therein.

Having reviewed the motion and the supporting documents apended thereto, I find that the evidence supports the charge and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Grane Transportation Lines, Ltd. was duly served with a copy of the Notice of Claim and has failed to settle the outstanding claim.

Therefore, it is ordered, That Grane Transportation Lines, Ltd., pay the full amount of the assessed civil penalty of $3,000 within 30 days of the date of this Order.

Dated: May 13, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Shorty's Heavy Duty Wrecker Service, Inc.

[Case No. 5D-86-017-086]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 5, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated August 14, 1986, and ordering Shorty's Heavy Duty Wrecker Service, Inc., to pay the civil penalty of $2,600 assessed therein.

Having reviewed the motion and the supporting document appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Shorty's Heavy Duty Wrecker Service, Inc., was duly served with a copy of the Notice of Claim and has failed to settle the outstanding claim.

Therefore, it is ordered, That Shorty's Heavy Duty Wrecker Service, Inc., pay the full amount of the assessed civil penalty of $2,600 within 30 days of the date of this Order.

Dated: May 13, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Fulton Packing Company, Inc.

[Docket No. RI-86-60]

Order of Administrative Law Judge

On April 10, 1987, the Regional Director for Region 1, Office of Motor Carrier Safety, Federal Highway Administration (Director), filed a motion for an order of dismissal of the request for hearing in the above-titled proceeding. In support of the motion, the Director states: that the respondent has totally discontinued its business; that it is now represented by new counsel which is overseeing the distribution of assets and the settling of claims (not under the Bankruptcy laws as yet); and that such counsel had invited submission of the Notice of Claim in this proceeding to him for scheduling and settlement. The Director states that in view of the total discontinuance of the respondent's business, and the indication by new counsel of a desire to settle all claims, no useful purpose would be served by continuing this matter.

It is clear this proceeding should now be brought to an end. The question is how to do it procedurally. The Director's motion and proposed order would have the undersigned dismiss the respondent's request for hearing. There does not seem to be any basis for doing that. The respondent has not asked for dismissal of its request for a hearing filed on November 12, 1986 by its then counsel. Moreover the functions assigned to the Administrative Law Judge by 49 CFR 386.54(b) and the order of appointment by the Associate Administrator for Motor Carriers dated March 21, 1987 do not appear to include the authority to dismiss a respondent's request for a hearing even if such a request had been made. Nor does anything in 49 CFR 386 appear to delegate to the administrative law judge authority to dismiss a Notice of Claim which the Associate Administrator has assigned for hearing solely on the basis of a motion by the Regional Director.[1]

As a means of bringing this matter to a close the Director's motion will be regarded by the undersigned as an expression of intent by the Director not to prosecute the Notice of Claim before the administrative law judge. In these circumstances it is found that no purpose would be served by further proceedings before the judge. It is further found that the record in the case should be certified to the Associate Administrator for Motor Carriers for action as appropriate.

It is so ordered.
William A. Kane, Jr.,
Administrative Law Judge.

V. F. Lanasa, Incorporated

[Docket No. R3-86-50; Case No. 3K-86-011-048]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated September 3, 1986. The Notice of Claim assessed a civil penalty of $15,000 for the alleged violations. The request for a Final Order has reduced the amount of the civil penalty assessment to $7,500, based upon the carrier's representations at a settlement conference.

Having reviewed the motion and the supporting documents appended thereto,

[1] It is noted in this connection that under 49 CFR 386.54(b)(6) and 49 CFR 386.21 approval of the termination of proceedings by consent orders is reserved to the Associate Administrator and not delegated to the Administrative Law Judge.

I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that the carrier was duly served with the Notice of Claim, has not requested a formal hearing on the charges, and did participate in a settlement conference. That conference was unable to resolve the matter informally; however, based on certain showings and representations of the carrier, a reduced penalty appears to be in order.

Therefore, it is ordered, that V. F. Lanasa, Inc., pay the amount of $7,500 in settlement of the violations specified in the Notice of Claim. This amount shall be paid within 30 days of the date of this Order.

Date: April 14, 1987.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Bluestone Paving, Incorporated

[Docket No. R3-86-43; Case No. 3C-84-023-168]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated August 4, 1986, and ordering Bluestone Paving, Inc., to pay the civil penalty of $7,800 assessed therein.

Having reviewed the motion and the supporting documents thereto, I find the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. The carrier has not requested any formal hearing under the regulations. I find that the carrier was duly served with copies of the Notice of Claim and that all attempts to resolve this matter informally have been unsuccessful.

Therefore, it is ordered, That Bluestone Paving, Inc., pay the full amount of the assessed civil penalty of $7,800 within 30 days of the date of this Order.

Dated: April 14, 1987.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Eight Drivers (United Transports, Inc.)

[Docket Nos. R6-85-84, R6-85-86, R6-85-90, R6-85-85, R6-85-99, R6-85-94, R6-85-91, R6-85-92]

Order Appointing Administrative Law Judge

This matter comes before me upon the request of several drivers for an oral hearing. All of these drivers are, or were, at the time of the alleged violations in the employ of United Transports, Inc., in Oklahoma City, Oklahoma. The alleged violations involve a determination of "on duty" time under the Federal Motor Carrier Safety Regulations.

Counsel for the Federal Highway Administration (Region 6) objects to each of the drivers' requests on the basis that no material factual issues are in dispute, and on the basis of other technical deficiencies in these requests. Notwithstanding the technical deficiencies. Respondents raise sufficient questions with respect to the factuality of on-duty requirements upon which a hearing may be based. Thus, I am denying the request for an Order finding that no material factual issues are in dispute.

Therefore, it is ordered, That in accordance with 49 CFR § 386.54(a) (1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge Department of Transportation, as the presiding Judge in the consolidated case involving the eight drivers whose names appear on the service list. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: April 3, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Lee Downey, Driver Qualification

[Docket No. 76-8D]

Final Order

Subsequent to my Interim Order of May 29, 1986, the captioned petitioner, Lee Downey, a previously disqualified driver, had his doctor contact the Director's medical expert with the results of the treadmill testing performed in association with the most recent Thallium scan. The conclusion was that Mr. Downey was able to achieve an exercise level of 10 METS and a heart rate of 135 with no symptoms or EKG abnormality suggesting myocardial ischemia. Consequently, both experts agreed that Mr. Downey should be considered medically qualified.

The Director, Bureau of Motor Carrier Safety, then submitted a Supplemental Reply to the Petition for Modification, recommending that petitioner be found conditionally qualified. The conditions are that bi-monthly documentation of pacemaker functioning and semiannual reports of exercise testing be provided. I believe that is a prudent course of action, and petitioner has raised no objections.

Accordingly, I will grant the petition for modification, and find Mr. Downey qualified to operate a motor vehicle in interstate commerce, subject to the following conditions:

1. The petitioner shall submit to the Director, Office of Motor Carrier Standards, a medical report concerning the functioning of his pacemaker every two months, beginning May 1, 1987.

2. The petitioner shall also submit a medical report of the results of current stress testing every six months, beginning July 1, 1987.

It is understood from the foregoing that if petitioner fails to furnish the reports as required, or if the reports reflect a deterioration in his medical condition, the Director may issue a new Determination finding the petitioner disqualified.

Dated: Washington, DC April 3, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Holmes Bus Service, Inc.

[Docket No. R3-86-22; Case No. 3A-85-007-034]

Final Order

This matter comes before me pursuant to a request for a hearing filed by the Respondent in response to a Notice of Claim. Although the request was not timely filed, the Regional Counsel has waived this defense.

Notwithstanding such waiver, the request is not sufficient to establish the existence of any material factual issues upon which a hearing may be granted. Accordingly, I am denying the request for an oral hearing.

The Notice of Claim issued in this matter supports a finding that the Respondent violated the Motor Carrier Safety Regulations. These regulations are designed to bring about compliance with the law and to penalize those who

do not comply. Respondent is free to discuss attempts at ensuring compliance with the Regional Director. The Regional Director may take into account such discussions in any decision as to whether the amount of the penalty should be reduced.

In the absence of such discussions or findings, I find no reason to reduce or suspend any part of the claim.

Therefore, it is ordered, That the request for an oral hearing in this matter is denied.

It is further ordered, That respondent Holmes Bus Service, Inc., pay the full amount of the assessed civil penalty of $5,000 within 30 days of the date of this Order.

Dated: April 2, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Curtis, Inc.

[Docket No. R6-86-010; Case No. 8A-84-017-133]

Order Appointing Administrative Law Judge

This matter comes before me by request of Respondent for an oral hearing. Counsel for the Federal Highway Administration, Region 8, has filed a motion in opposition to this request on the grounds that no material factual issues have been presented. At issue is whether the Respondent's request meets the test of a concise statement of facts in support of general denials. Also at issue is whether the alleged violations constitute a pattern of safety violations.

Respondent's motion on its face fails to meet the test of a concise statement in support of material factual issues. The contention that insufficient time is available to verify the accuracy of the alleged violation is better treated by a motion for an extension. Nevertheless, assuming *arguendo* that a general denial is entered, we are faced with the task of determining whether such is sufficient to enable a granting of a request for an oral hearing. Accepting for the moment the contention that an adequate response requires the pleading of evidence, we would be in agreement with respondent. As this is a question which certainly will occur with increasing frequency in these matters, I am going to grant the respondent's request. Both parties will be able to develop arguments in a dispassionate forum and a decision of an Administrative Law Judge will provide guidance in future matters.

Likewise, respondent contends that alleged violations of 49 CFR 394.9 did not arise out of reportable accidents within the definition of 49 CFR 394.3. I am granting respondent his request for a hearing on this issue also.

Finally, respondent argues that the alleged violations, if established, constitute recordkeeping violations, subject to a maximum penalty of $2,500. Counsel for the Federal Highway Administration counters with an explanation of assessment for each of the alleged recordkeeping violations and avers that there is no statutory cap on the number of violations which may be cited. I am in agreement with this argument. Therefore, the maximum fine to which respondent is subject is limited only by the number of violations alleged. No hearing will be granted on this issue.

Therefore in accordance with 49 CFR 386.54(a)(1985), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge, Department of Transportation, as the presiding Judge in the above-style case. The appointed Judge is authorized to perform those duties specified in 49 CFR 386.54(b)(1985).

Dated: April 1, 1987.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Grady Vallien

[Docket No. R6-86-77; Case No. 6B-86-076-106]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, for a Final Order assessing a civil forfeiture penalty in the amount of $500.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in a Notice of Claim, dated July 28, 1986. I also find that Mr. Grandy Vallien was duly served with copies of the Notice and has failed to enter into meaningful settlement negotiations.

Therefore, it is ordered, That Grandy Vallien pay the full amount of the assessed civil penalty of $500 within 30 days of the date of this Order.

Dated: March 5, 1987.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Plastic Distributing Corp.

[Docket No. RI-86-61]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 1, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated November 10, 1986, and ordering Plastic Distributing Corp. to pay the civil penalty of $4,500 assessed herein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Plastic Distributing Corp. was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to demonstrate a material issue of fact remains in dispute or enter into meaningful settlement negotiations.

Therefore, it is ordered, That Plastic Distributing Corp. pay the full amount of the assessed civil penalty of $4,500 within 30 days of the date of this Order.

Dated: March 5, 1987.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Allan B. Robbins d/b/a Robbins Trailer Service

[Docket No. RI-84-50]

Final Order

This matter comes before me on a supplemental motion of the Office of Motor Carrier Safety, Region I, for a Final Order finding the facts to be as alleged in counts 5 and 6 in a Notice of Claim dated March 20, 1985, and ordering Allan B. Robbins d/b/a Robbins Trailer Service to pay the civil penalty of $3,000 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Allan B. Robbins d/b/a Robbins Trailer Service has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement.

Therefore, it is ordered, That Allan B. Robbins d/b/a Robbins Trailer Service pay the full amount of the assessed civil penalty provided in the Notice of Claim of $1,000 for counts 5 and 6 and $2,000 for counts 1 through 4, for a total of $3,000. This penalty must be paid within 30 days of the date of this Order.

Dated: March 2, 1987.
John P. Eicher for Richard P. Landis,
Associate Administrator for Motor Carriers.

Transport Quebec—U.S. Inc.

[Docket No. RI-87-24]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region I, for a Final Order finding the facts to be as alleged in a Notice of Claim dated December 8, 1986, and ordering Transport Quebec—U.S. Inc. to pay the civil penalty of $11,000 assessed therein.

Having reviewed the motion and supporting documents appended thereto, and the reply of the Carrier to the Notice of Claim, I find the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Transport Quebec—U.S. Inc. was duly served with the Notice of Claim and has failed to respond in accordance with applicable regulations.

Therefore, it is ordered, That Transport Quebec—U.S. Inc. pay the full amount of the assessed civil penalty of $11,000 within 30 days of the date of this Order.

Dated: February 26, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

C & L Trucking, Inc.

[Docket No. R6-85-175; Case No. 6L-85-020-103]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, in opposition to respondent's request for oral hearing and to find that no material factual issues exist.

Having reviewed the motion and supporting documents appended thereto, I find that the respondent's request for hearing does not raise any material factual issues which would necessitate a third party determination. In denying the request for oral hearing, I also find that the evidence supports the charges and specifications contained in the Notice of Claim, dated January 21, 1986, which was duly served upon respondent.

Respondent, in failing to submit all evidence averred to be available during settlement discussions, has failed to substantiate the presence of material factual issues and has rejected the offer of meaningful settlement negotiations.

Therefore, it is ordered, That respondent's request for oral hearing is denied.

It is further ordered, That C & L Trucking, Inc., pay the full amount of the assessed civil penalty of $24,750 within 30 days of the date of this Order.

Dated: February 26, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Hannon Transportation Services, Inc.

[Docket No. RI-86-66]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 1, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated November 19, 1986, and ordering Hannon Transportation Services, Inc. to pay the civil penalty of $17,500 assessed herein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Hannon Transportation Services, Inc. was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to demonstrate a material issue of fact remains in dispute or enter into meaningful settlement negotiations.

Therefore, it is ordered, That Hannon Transportation Services, Inc. pay the full amount of the assessed civil penalty of $17,500 within 30 days of the date of this Order.

Dated: February 26, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Chief Transport Company

[Docket No. R6-86-17; Case No. 6A-85-006-107]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, for a Final Order assessing a civil penalty in the amount of $8,000 in this case.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications thereto, I find that the evidence supports the charges and specifications contained in the Notice of Claim issued on February 14, 1986. I find that Chief Transport has been duly served with all Notices and Orders previously issued in this matter. Having failed to identify with specificity those materials facts necessary to grant a hearing, and having failed to resolve this matter through a negotiated settlement, the carrier is now subject to the entire amount assessed in the Notice of Claim.

Therefore, it is ordered, That Chief Transport Company pay the full amount of the assessed civil penalty of $8,000 within 30 days of the date of this Order.

Dated: February 26, 1987.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Albert J. Matsco

[Docket No. R6-85-125; Case No. 6B-84-118-105]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, for a Final Order assessing a civil forfeiture penalty in the amount of $500.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in a Notice of Claim, dated September 11, 1985. I also find that Mr. Albert J. Matsco was duly served with copies of the Notice and has failed to enter into and conclude meaningful settlement negotiations.

Therefore, it is ordered, That Albert J. Matsco pay the full amount of the assessed civil penalty of $500 within 30 days of the date of this Order.

Dated: December 23, 1986.
Richard P. Landis,
Associate Administrator for Motor Carriers.

Edward D. Derr

[Docket No. R6-86-4; Case No. 6L-85-043-103]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, for a Final Order assessing a civil forfeiture penalty in the amount of $500.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in a Notice of Claim, dated January 31, 1986. I also find that Mr. Edward D. Derr was duly served with copies of the Notice and has failed to enter into and

conclude meaningful settlement negotiations.

Therefore, it is ordered, That Edward D. Derr pay the full amount of the assessed civil penalty of $500 within 30 days of the date of this Order.

Dated: December 9, 1986.

Richard P. Landis,

Associate Administrator for Motor Carriers.

All American Transport Corp.

[Case No. 0A-85-038-164]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 10, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated August 28, 1986, and ordering All American Transport Corp. to pay the civil penalty of $7,475 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that All American Transport Corp. was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement negotiations.

Therefore, it is ordered, That All American Transport Corp. pay the full amount of the assessed civil penalty of $7,475 within 30 days of the date of this Order.

Dated: December 9, 1986.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Steven Freight Service Co. Inc.

[Docket No. 85-14; Case No. 1K-84-002-009]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 1, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated July 29, 1985, and ordering Steven Freight Service Co., Inc. to pay the civil penalty of $3,000 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Steven Freight Service Co., Inc. was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement negotiations.

Therefore, it is ordered, That Steven Freight Service Co., Inc. pay the full amount of the assessed civil penalty of $3,000 within 30 days of the date of this Order.

Dated: November 26, 1986.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

John C. McNease

[Case No. 0A-85-020-165]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 10, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated October 10, 1985, and ordering John C. NcNease to pay the civil penalty of $500 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that John C. McNease was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement negotiations.

Therefore, it is ordered, That John C. NcNease pay the full amount of the assessed civil penalty of $500 within 30 days of the date of this Order.

Dated: November 26, 1986.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

B. W. Brown Trucking Co., Inc.

[Docket No. RI-84-45; BMCS No. 10-84-005-113]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 1, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated February 4, 1985, and ordering B. W. Brown Trucking Co., Inc. to pay the civil penalty of $2,000 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that B. W. Brown Trucking Co., Inc. was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement negotiations.

Therefore, it is ordered, That B. W. Brown Trucking Co., Inc. pay the full amount of the assessed civil penalty of $2,000 within 30 days of the date of this Order.

Dated: November 26, 1986.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

National Paper Stock Co.

[Docket No. RI-85-18; BMCS No. NY-85-054-016]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 1, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated September 6, 1985, and ordering National Paper Stock Co. to pay the civil penalty of $3,500 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that National Paper Stock Co. was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement negotiations.

Therefore, it is ordered, That National Paper Stock Co. pay the full amount of the assessed civil penalty of $3,500, within 30 days of the date of this Order.

Dated: November 26, 1986.

John P. Eicher for Richard P. Landis,

Associate Administrator for Motor Carriers.

Smiles Fuel Oil Company, Inc.

[Docket No. RI-85-23]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 1, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated September 30, 1985, and ordering Smiles Fuel Oil Company, Inc. to pay the civil penalty of $4,500 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the

charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Smiles Fuel Oil Company, Inc. was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement negotiations.

Therefore, it is ordered, That Smiles Fuel Oil Company, Inc. pay the full amount of the assessed civil penalty of $4,500, within 30 days of the date of this Order.

Dated: November 17, 1986.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Western Insert Express, Inc.

[Case No. 0A-86-011-165]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 10, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated August 22, 1986, and ordering Western Insert Express, Inc., to pay the civil penalty of $5,000 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Western Insert Express, Inc., was duly served with copies of the Notice of Claim and has failed to respond in accordance with the applicable regulations or to enter into meaningful settlement negotiations.

Therefore, it is ordered, That Western Insert Express, Inc. pay the full amount of the assessed civil penalty of $5,000 within 30 days of the date of this Order.

Dated: November 17, 1986.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Billy Joe Amburn Trucking, Inc.

[Docket No. R6-85-167; Case No. 6P-85-008-117]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, for a Final Order finding the facts to be as alleged in a Notice of Claim, dated November 12, 1985, and ordering Billy Joe Amburn Trucking, Inc., to pay the civil penalty of $6,000 assessed therein.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in the aforesaid Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations. I also find that Billy Joe Amburn Trucking, Inc., was duly served with copies of the Notice of Claim and has failed to enter into meaningful settlement negotiations.

Therefore, it is ordered, That Billy Joe Amburn Trucking, Inc. pay the full amount of the assessed civil penalty of $6,000, within 30 days of the date of this Order.

Dated: November 17, 1986.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Edward M. McClain

[Docket No. R6-85-110; Case No. 6B-84-076-601]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, for a Final Order assessing a civil forfeiture penalty in the amount of $500.

Having reviewed the motion and the supporting documents appended thereto, I find, that the evidence supports the charges and specifications contained in a Notice Claim, dated August 16, 1985. I also find Mr. Edward M. McClain was duly served with copies of the Notice and has failed to enter into meaningful settlement negotiations.

Therefore, it is ordered, That Edward M. McClain pay the full amount of the assessed civil penalty of $500 within 30 days of the date of this Order.

Dated: November 17, 1986.

Richard P. Landis,

Associate Administrator for Motor Carriers.

John L. Clark

[Case No. 6L-85-037-103]

Final Order

This matter comes before me on motion of the Office of Motor Carrier Safety, Region 6, for a Final Order assessing a civil forfeiture penalty in the amount of $500.

Having reviewed the motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications contained in a Notice of Claim, dated February 10, 1986. I also find that Mr. John L. Clark was duly served with copies of the Notice and has failed to enter into and conclude meaningful settlement negotiations.

Therefore, it is ordered, That John L. Clark pay the full amount of the assessed civil penalty of $500 within 30 days of the date of this Order.

Dated: November 17, 1986.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Chief Transport Company

[Docket No. R6-86-17]

Order

This matter comes before me on motion of the Office of Motor Carrier Safety Field Operations to find that no material factual issues exist which would justify an affirmative finding in response to respondent's request for oral hearing. Having reviewed the motion and supporting documents, I find that the respondent's request for hearing does not raise any material factual issues which would necessitate a third party determination.

Therefore, it is ordered, That the respondent's request for oral hearing is denied.

It is further ordered, That the parties discuss terms of payment or settlement of this claim. In the event that the parties fail to resolve this matter within 60 days, I will consider a Motion for Final Order with additional evidence and written arguments.

Dated: October 28, 1986.

Richard P. Landis,

Associate Administrator for Motor Carriers.

[FR Doc. 90-1546 Filed 1-26-90; 8:45 am]

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Federal Register

Monday
January 29, 1990

Part III

Department of Transportation

Coast Guard

46 CFR Parts 30, 151, 153, and 197
Benzene; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 30, 151, 153, and 197

[CGD 88-040]

RIN 2115-AD08

Benzene

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend its regulations to revise the special carriage requirements for benzene and benzene mixtures and to add new regulations concerning occupational exposure to benzene on Coast Guard inspected vessels. These regulations are being amended to incorporate the lower benzene exposure levels adopted by the Occupational Safety and Health Administration (OSHA) to provide workers in the marine mode with the same protection as their land-based counterparts. Use of the lower exposure levels is expected to result in a 90% lowering of the number of leukemia deaths associated with the inhalation of benzene vapors.

DATE: Comments must be received on or before April 30, 1990.

ADDRESSES: Comments may be mailed to Commandant (G-LRA-2/3600)(CGD 88-040), U.S. Coast Guard, Washington, DC 20593-0001. Comments received may be inspected or copied at the Office of the Marine Safety Council, Room 3600, U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267-1477.

FOR FURTHER INFORMATION CONTACT: Dr. Michael C. Parnarouskis, Hazardous Materials Branch, Office of Marine Safety, Security and Environmental Protection, (202) 267-1577.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rulemaking by submitting written views, data, or arguments. Each letter should include the name and address of the person submitting the comments, reference the docket number (CGD 88-040) and the specific section of the proposal to which each comment applies, and give the reasons for each comment. If acknowledgment of receipt of comments is desired, a stamped, self-addressed postcard or envelope should be enclosed.

All comments received before the expiration of the comment period will be considered before final action is taken on this proposal. The proposal may be changed in view of the comments received. No public hearing is planned but one may be held at a time and place to be set in a later notice in the **Federal Register** if requested in writing and it is determined that the opportunity to make oral presentations will aid the rulemaking process.

Drafting Information

The principal persons involved in drafting this document are Dr. Michael C. Parnarouskis, Project Manager, and Mr. Stephen H. Barber, Project Counsel, Office of Chief Counsel.

Background and Purpose

On June 4, 1984, the Coast Guard published an Advance Notice of Proposed Rulemaking (49 FR 23085) to revise the requirements for the carriage of benzene and other bulk dangerous cargoes on unmanned barges. Because of opposition by marine industry groups and litigation relating to benzene rules being proposed by the Occupational Safety and Health Administration (OSHA), the Coast Guard rulemaking was put in abeyance.

On September 11, 1987, OSHA published a final rule (52 FR 34562) which reduced the benzene permissible exposure limit (PEL) from an eight-hour time-weighted average (TWA) of ten parts of benzene per million parts of air (ten ppm) to an eight-hour TWA of one ppm. The OSHA standard also includes an action level of 0.5 ppm and a short-term exposure limit (STEL) of five ppm averaged over a 15 minute period. OSHA has taken this action to reduce substantially a significant health risk which results from exposure to benzene and benzene vapors. OSHA estimates that the reduction in the TWA from ten to one ppm will result in a 90% decrease in the number of deaths caused by leukemia to those workers exposed to benzene vapors.

Similarly, the Coast Guard is proposing to ensure the same level of protection for workers exposed to benzene in the marine workplace as provided by the OSHA regulations for factory workers. The Coast Guard currently limits benzene exposure to an eight-hour time-weighted average of ten ppm for seamen on board inspected barges and self-propelled vessels.

During the past ten years, Southwest Research Institute (SWRI), under contract to the Coast Guard, has performed a comprehensive study of exposures to chemical vapors (including benzene) on tank vessels (H. Kaplan, W. Astelford, R. Prevost, and R. Bass, "Development and Application of a Method for Toxicological Assessment of Occupational Exposures to Chemicals in Marine Operations", September 1985, NTIS #: ADA 163316). Data obtained by SWRI through personnel sampling and through the use of the Coast Guard's ONDEK vapor dispersion model indicated that benzene exposures often exceed five ppm during routine operations, such as gauging and normal venting through vents and ullages during cargo loading. These results were found for both benzene and mixtures containing benzene. Based on its study, SWRI recommended a program of training, industrial hygiene, medical monitoring, and record keeping that is similar to that included in OSHA's final rule for benzene. SWRI also recommended this type of program for other proven or potential human carcinogens such, as acrylonitrile, ethylene dibromide, and vinyl chloride.

Suggestions have been received from the Towing Safety Advisory Committee (TSAC) and the American Waterways Operators (AWO) that the Coast Guard should develop a separate set of permissible exposure limits for marine personnel in the belief that the exposures received by marine personnel are different from those covered by the OSHA regulations. The contention is that marine personnel work outdoors and the exposures that they receive are variable and intermittent, not the steady eight hours per day, five days per week exposures that are frequently experienced by factory workers.

The Coast Guard has reviewed several scientific studies that have looked at the intermittent and variable exposure question as it pertains to benzene. A study by Dr. Raymond Tice, a staff scientist at Brookhaven National Laboratory (Raymond Tice, Excerpts from a paper presented at the Fourth International Conference on Environmental Mutagens, Stockholm, Sweden, 1985), examined the damage to bone marrow that results from intermittent exposure to benzene. His study consisted of exposing mice to 300 ppm of benzene for six hours per day for a total of 13 weeks. Some of the mice were exposed for five days each week and the remainder of the mice for three days each week. The results of this study showed that a greater amount of damage to bone marrow occurs in those mice exposed under the more intermittent exposure conditions, thereby, indicating that intermittent exposure may be worse than continuous exposure.

A similar study was undertaken by Dr. Richard Irons of the Chemical Industry Institute of Toxicology (Richard

Irons, "Benzene: Metabolism and Mechanisms", International Conference on Benzene, New York, 1983). Dr. Irons exposed mice to hydroquinone and catechol, metabolites of benzene, which a previous study had indicated were responsible for bone marrow suppression in animals exposed to benzene. In his study, one group of mice was given continuous doses of hydroquinone or catechol, the other, three days doses followed by four recovery days so that over a thirty day period the latter group received approximately a 45 percent dose. The results of his experiments showed that the mice receiving the intermittent exposure had a more pronounced drop in bone marrow cellularity and a greater decrease in the circulating white blood cell count, again indicating that intermittent exposure may be worse than continuous exposure.

Dr. Barbara Devine, in a mortality study of refinery workers (Barbara Devine and Samuel Kaplan, "Mortality Among White Male Refinery, Petrochemical, and Research Workers", Texaco Mortality Study, 1983), found a normal level of deaths from leukemia. However, those that did die from leukemia were those that had worked the longest as pipefitters and utility workers. These workers are normally involved in intermittent and variable tasks, such as replacing broken pipes and seals. These results support the contentions of the other researchers that intermittent exposure to benzene vapors is an important factor in the development of leukemia.

Two other studies have shown that short term exposure to benzene vapors at low concentrations can cause chromosomal damage in test animals. In one study (Gregory Erexson, James Wilmer, William Steinhagen, and Andrew Kilgerman, "Induction of Cytogenetic Damage in Rodents After Short-term Inhalation of Benzene", submitted to *Environmental Mutagenesis*), Gregory Erexson found that exposure to concentrations of benzene of one ppm or greater over a six hour period can induce measurable cytogenetic effects in rodents. In the other study (Mohy Gad-El-Karim, Barbara Harper, and Marvin Legator, "Modifications in the Myeloclastogenic Effect of Benzene in Mice with Toluene, Phenobarbitol, 3-Methylcholanthrene, Aroclor 1254 and SKF-525A", *Mutation Research, 135*, 1984), M. Gad-El-Karim found that the induction of chromosomal damage in bone marrow cells through exposure to benzene is dose dependent in test animals.

These toxicity studies indicate that intermittent and variable exposures (typical in the marine environment) are at least as harmful as continuous exposures and can cause health problems that are as serious as those caused by continual exposures at the same or lower levels. For this reason, the Coast Guard takes the position that the establishment of a unique set of permissible exposure levels to be applied to workers in the marine mode is not warranted.

In Coast Guard consultations with OSHA, OSHA indicated that workers under their jurisdiction who receive variable and intermittent exposures are subject to the same regulations as those for workers exposed on a continuous basis. Workers in this category include bulk terminal personnel who work outdoors and are involved in the transport of benzene and benzene containing products by truck, barge, and ship. Because tankermen working on barges and vessels during cargo operations receive exposures which are similar to those received by marine terminal workers and other bulk terminal workers, the permissible exposure limits for vessel personnel should be the same as those for terminal workers. Although the Coast Guard is not aware of any studies which would directly support the application of an STEL to workers that are intermittently exposed to vapors, it is logical to assume that these short period/high concentration exposures will be as harmful to workers exposed intermittently as to those exposed in a continuous manner. However, the Coast Guard solicits comments on this point.

Another area of concern centers around individuals who work an extended work day/work week (more than eight hours per day, more than forty hours per week). The studies referenced in this preamble, other than the SWRI study, only considered exposures of eight hours or less. The SWRI study briefly considers extended workdays in the following excerpts:

> In the marine environment, novel or unusual work schedules with prolonged work shifts may not permit an adequate reduction of body burden of chemicals, thus invalidating the application of TLV-TWA and PEL values.
>
> Existing exposure guidelines are based on a conventional work schedule (8-hour day, 40-hour week) because the vast majority of the land-based employees work this schedule, and measured exposures are interpreted relative to those guidelines.
>
> The approach that is being pursued by industrial hygienists and toxicologists is to mathematically modify or adjust existing limits that are based on a conventional work schedule to predict a new limit value for a novel work schedule. The concept of TLV adjustment involves calculating an exposure limit for the unusual work schedule that will result in a body burden that does not exceed the burden for the TLV level exposure during a conventional work schedule.

The Coast Guard welcomes any comments on the approach suggested by SWRI and any other suggestions or information that would be helpful in determining how to reduce benzene exposure in the marine workplace.

While there are currently no statistics available on death or illnesses of tankermen handling benzene, the National Cancer Institute has recently completed a cancer mortality study of Coast Guard marine inspectors (A.E. Blair, "Mortality among United States Coast Guard Marine Inspectors", National Cancer Institute, Bethesda, MD, June 1987, unpublished). The results of this study show that the number of deaths attributable to cancer of the hematopoietic (blood) system, particularly leukemia, was greater in these inspectors than would normally have been expected. The standardized mortality rate (SMR) is 152 for Coast Guard inspectors and 88 for other Coast Guard personnel. In other words, the number of deaths was approximately twice that expected. Although the activities of the Coast Guard inspectors (such as tank entry) are not identical to those of tankermen, they are similar in many respects.

Recently, both the Towing Safety Advisory Committee (TSAC) (Recommendation Number 57, April 9, 1987) and the American Waterways Operators, Inc. (AWO) have recommended that the Coast Guard apply OSHA's one ppm standard and include it in a performance standard for use in the marine area.

This notice proposes to establish a new subpart C of 46 CFR part 197 for occupational exposure to benzene which would include the OSHA limits within a performance standard. Unlike the OSHA standard, the proposed regulations do not mandate the methods to be used in complying with the performance standard, but would allow any method or combination of methods to be used. These methods may include, but are not limited to, the following:

(1) Engineering controls (e.g. vapor control and recovery systems, closed loading systems, or controlled venting systems);

(2) Revised work practices; or

(3) Personal protective devices.

In addition, this notice proposes to amend the special carriage requirements for benzene and mixtures containing benzene found in subchapters D and O

of title 46 CFR chapter I to reflect the regulations in proposed subpart C.

After two years, OSHA intends to lower the benzene concentration requirement from 0.5% to 0.1%. Before considering such a reduction, the Coast Guard will review the results of initial exposure monitoring on vessels. If this data shows that lowering the percentage from 0.5% to 0.1% benzene is not necessary because of the nature of marine operations, the Coast Guard will retain the 0.5% level. However, by adopting the present OSHA exposure levels, the Coast Guard expects to obtain the same benefits for marine personnel as those established by OSHA for similar personnel under their jurisdiction.

Discussion of Amendments

1. Proposed Section 30.25–1, Table 30.25–1

Certain cargoes in Table 30.25–1 known or suspected to contain 0.5% benzene by volume would be identified by a dagger (†) and the reader would be directed to proposed part 197, subpart C, on benzene.

2. Proposed Section 151.05–1, Table 151.05

In existing § 151.05–1, Table 151.05 would be revised to require restricted gauging for "Benzene" and to add "151.50–60" to the special requirements column for those cargoes known to contain 0.5% benzene or more. Proposed § 151.50–60 refers to part 197, subpart C.

3. Proposed Section 151.50–60

Existing § 151.50–60 would be revised to require the person in charge of a vessel to ensure that the provisions of proposed part 197, subpart C, are applied when cargoes containing 0.5% or more benzene are carried on the vessel.

4. Proposed Section 153.1060

Existing § 153.1060 would be revised to require the master of the vessel to ensure that the provisions of proposed part 197, subpart C, are applied when cargoes containing 0.5% or more benzene are carried on the vessel.

5. Proposed Section 153.1608, Table 1

Existing Table 1, following § 153.1608, would be revised to add ".933" and ".1060" to the special requirements column for those cargoes known to contain 0.5% benzene or more. Existing § 153.933 refers to protective clothing and proposed § 153.1060 refers to proposed part 197, subpart C.

6. Proposed Part 197, Subpart C

A new subpart C (§§ 197.501 through 197.580) and appendices A through E would be added to part 197 to include a performance standard to limit occupational exposure to benzene and benzene vapors for persons on inspected vessels.

7. Proposed Section 197.501, Applicability

These proposed regulations are to apply to all occupational exposures to benzene occurring on Coast Guard inspected vessels, with the exception of vessels under proposed paragraph (b).

Proposed paragraph (b) would exempt vessels with benzene containing mixtures in which the benzene content does not exceed 0.5 percent or more of benzene by volume. Mixtures containing less than 0.5 percent of benzene will not generate vapor concentrations in excess of the action level in the outdoor marine environment. When data resulting from these regulations is obtained and reviewed, modifications to this exemption may be considered in a later rulemaking.

8. Proposed Section 197.505, Definitions

"Action level" would be defined as an airborne concentration of benzene of 0.5 ppm calculated as an eight-hour time-weighted average. In situations where exposures to personnel are below the action level, no action under these regulations would be required. If the level of benzene is above the action level, the proposed requirements for monitoring, medical surveillance, and training must be initiated. The action level provides a means to determine objectively when persons are at risk and when provisions of the regulations must be initiated. It also provides an incentive to reduce exposures below the action level to eliminate the expenses of the monitoring, medical surveillance, and training, as proposed in these regulations.

9. Proposed Section 197.515, Permissible Exposure Limits (PEL's)

This section is based on OSHA's PEL's. Intermittent exposures in the marine environment are at least as harmful as continuous exposures and, in some instances, may be even more harmful.

10. Proposed Section 197.520, Performance Standard

Because of the variability and differences of operations carried out in the marine environment, the Coast Gaurd has proposed that the permissible exposure limits be included within a performance standard. The performance standard would permit the use of any method or combination of methods to comply with these regulations.

11. Proposed Section 197.525, Responsibility of the Person in Charge

Unless otherwise specified within these regulations, the person in charge of a vessel would be responsible for ensuring that the requirements of these regulations are complied with on the person's vessel.

12. Proposed Section 197.530, Persons Other Than Employees

This section would require workers on the vessel other than employees (see definition in proposed § 197.505), such as independent tankermen or marine terminal workers, to certify that they have met the same medical examination, respirator, and personal protective equipment requirements as would be required for employees. Because many of these workers' employers are subject to OSHA's benzene regulations, the workers would be given the option of meeting OSHA's requirements. Though any form of certification that meets the requirements of proposed § 197.530 would be acceptable, a suggested sample form can be found in proposed Appendix F.

13. Proposed Section 197.535, Regulated Areas

These proposed regulations contain requirements that regulated areas be established wherever airborne concentrations are above the permissible exposure limits and that access to these areas be restricted to authorized persons. In addition, these regulated areas must be demarcated in a manner to warn personnel of a benzene hazard.

14. Proposed Section 197.540, Determination of Personal Exposure

The proposed regulations would impose requirements for monitoring personal exposure at such locations and intervals as necessary to ensure the protection of the personnel. Monitoring enables employers to meet their obligation under these regulations to ensure that no one is exposed to benzene in excess of the PEL's. Persons involved in the benzene operation would be notified of the results of the monitoring.

The exposure monitoring provisions would require the employer to determine the exposure for each person exposed to benzene. This does not mean that separate measurements for each person must be taken but rather that measurements be taken on one or more persons that represent all persons engaged in the operation.

Initial exposure monitoring would be required for each type of operation

involving benzene. The monitoring must be repeated each July or August if benzene is carried during those months or at the time of carriage of benzene closest to those months. This would require that monitoring is done during the hottest months of the year when benzene is most volatile. Employers could remonitor, at their option, during colder months to determine if a benzene exposure problem existed. If they found that exposures in the colder months were below the action level, they could suspend compliance with these requirements during those colder months. Our intent is to be flexible on the monitoring requirements and the Coast Guard solicits comments on alternative programs which would provide representative concentrations for different weather conditions.

15. Proposed Section 197.545, Program to Reduce Personal Exposure

When any exposure is over a PEL, the employer would be required to establish and implement a written program to reduce personnel exposure to or below the PEL. These plans would be required to be furnished to the Coast Guard upon request and to affected employees or their representatives.

16. Proposed Section 197.550, Respiratory Protection

If respirators are selected as the method for reducing personal exposures to or below the action level, respirators used would be required to meet the specifications of this section. This section includes requirements for respirator fitting and fit testing.

Four alternative methods for fit testing are described in proposed appendix E—three qualitative methods and one quantitative method. The qualitative methods would be used in the majority of cases, while the quantitative method would be used in these cases where the qualitative methods cannot be used or the results obtained from the qualitative methods are not conclusive. Many employers would probably contract with a third party for these services.

17. Proposed Section 197.555, Personal Protective Clothing and Equipment

This section would specify protective clothing and equipment to prevent eye contact with, and limit dermal exposure to, liquid benzene.

18. Proposed Section 197.560, Medical Surveillance

These proposed regulations require that each employer institute a medical surveillance program for all employees who will be exposed at or above the action level and below the PELs for 30 or more days during the coming year, all employees who will be exposed above the PELs for ten or more days during the coming year, and all employees who were exposed above ten ppm for more than 30 days during the previous year while employed by the current employer.

The purpose of the medical surveillance program is to detect abnormalities which may increase the worker's chances of contracting leukemia. Several studies have indicated that removal of the individual from the benzene environment will result in a reversal of these abnormalities in most cases. In addition, the program can assist in determining the effectiveness of these proposed regulations.

The medical surveillance program would consist of the following:

(a) An initial medical examination, which includes a detailed occupational and medical history, a complete physical examination, and additional tests if recommended by the examining physician.

(b) Periodic medical examinations to be administered once each year so that any abnormalities that can lead to more serious diseases are detected. Once abnormalities are detected, measures can be taken to remove the employee from further benzene exposure, thereby decreasing the changes that serious disease will result.

(c) Additional examinations and referrals that can be used to further screen employees who have developed abnormalities. If these abnormalities persist, provisions are included to refer the employee to a hematologist or internist for evaluation.

(d) Emergency medical examinations for employees that are exposed to excessive amounts of benzene during an emergency situation. Documentation of any enhanced absorption of benzene through the use of a urinary phenol test is required so that increased medical surveillance can be initiated, if needed.

19. Proposed Section 197.565, Notifying Personnel of Benzene Hazards

These proposed regulations include provisions for notifying persons concerning the hazards of benzene through the use of material safety data sheets. The signs required under proposed § 197.535 to indicate a regulated area also warn that exposure to benzene is hazardous.

20. Proposed Section 197.570, Recordkeeping

These proposed regulations would require that the employer maintain both exposure monitoring records and medical records. Copies of the exposure monitoring records must be made available to all persons involved in the benzene operations upon their request. Medical records must be kept for the duration of employment of the worker, plus three years. A copy of all entries in an employee's medical record must be given to that employee and to persons designated by that employee. Because these medical records would contain some information not collected as a result of these regulations, such as records of all previous employment-related medical examinations, the Coast Guard is requesting comments as to the appropriateness of these requirements and any limitation or reservation that should be addressed.

21. Proposed Section 197.557, Observation of Monitoring

This section would require the employer to provide persons involved in the benzene operations or their representatives with the opportunity to observe the monitoring of personal exposures to benzene. In addition, the employer would be required to provide the observers with the respirator and personal protective clothing and equipment that is required to be worn by the persons who are working in the area.

22. Proposed Section 197.580, Appendices

Five appendices are included at the end of proposed subpart C. Appendices A, B, C, and D have been included primarily to provide information. None of the statements contained in appendices A, B, C, D, and F should be construed as establishing a mandatory requirement not otherwise required by these regulations, or as detracting from an obligation which these regulations impose. However, the provisions in appendix E dealing with respiratory fit testing are mandatory under proposed § 197.550(d)(1). The fit testing procedures are placed in appendix E, rather than in the regulatory text, in order to align the appendices with the appendices in OSHA's regulations.

E.O. 12291 and DOT Regulatory Policies and Procedures

These proposed regulations are considered to be non-major under Executive Order 12291 and significant under the Department of Transportation (DOT) regulatory policies and procedures (44 FR 11034; February 26, 1979). A Draft Regulatory Evaluation has been prepared and placed in the rulemaking docket. It may be inspected or copied at the room listed under **"ADDRESSES."** Copies may also be

obtained by contacting the person listed under "FOR FURTHER INFORMATION CONTACT."

The regulatory evaluation prepared for this rulemaking examined the costs and benefits that would be expected upon implementation of these regulations. Two methods of compliance with the regulations were considered, respiratory protection and vapor control.

In determining the costs of respiratory protection, it was assumed that every operation involving the shipment of benzene and benzene containing cargoes would require the use of respirators, because data to determine which operations would result in exposures above the permissible exposure limits (PELs) are not available. Based on the quantity (approximately 275 million short tons) of benzene and benzene containing mixtures shipped each year by tank barge and tankship approximately 68,000 separate loads (57,000 barge and 11,000 tankship) would be carried each year. The average cost of respiratory protection per cargo loaded is approximately $16. In addition, if respiratory protection is chosen as the method of compliance, other costs would be incurred for exposure monitoring and medical surveillance. These costs would amount to approximately $51 per cargo loaded, which gives a total cost per load shipped of $73. Therefore, the total industry cost for respiratory protection during the first year for every benzene containing cargo loaded during the year would be approximately $5.0 million. For subsequent years, the total yearly costs would decrease slightly because certain items, such as respirators and other non-expendable items, do not have to be purchased each year.

The total industry costs for using vapor control methods to comply with these regulations could not be determined. The number of terminals and barges that carry benzene containing cargoes and that would be converted is not known. Conversion costs have been estimated to be about $168,000 per barge and about $1,225,000 per terminal.

The use of vapor control equipment, which is the preferred method because it eliminates benzene exposures entirely, will probably not be chosen by most small companies because of the high initial installation cost. It is expected that many large companies will choose this method of compliance because it will eliminate the benzene exposure problem and also will allow the companies to comply with air pollution standards imposed both locally and on a national level.

The benefit expected due to implementation of these regulations is the saving among the approximately 19,500 marine workers exposed to benzene of 225 lives from leukemia and 98 lives from the other benzene induced diseases for a total of 323 lives over a 45 year working lifetime.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 through 612), the Coast Guard must consider whether this proposal would have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses which are not dominant in their field and which would otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632).

This proposal establishes a performance standard which allows the employer to select the methods for complying with the standard. Compliance can be met, in some instances, by simply revising work practices. In those situations, the costs would be quite low ($1,000 per year for training and for revision of operations manuals). Another alternative is by means of respiratory protection. Costs for this option would be approximately $2,700 per employee per year. By being able to select the methods of compliance, the small business can keep the costs of compliance low by choosing one of these lower cost methods and, thereby, minimize the economic impact.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if promulgated, would not have a significant economic impact on a substantial number of small entities. If, however, you feel that your business may qualify as a small entity and that the proposed rules would have a significant economic impact on your business, please notify the Coast Guard (see "ADDRESSES") and explain why you feel your business qualifies and in what way and to what degree the proposed rules would economically affect your business.

Paperwork Reduction Act

This proposed rulemaking contains information collection requirements in the following sections: § 197.540, Determination of personal exposure; § 197.560, Medical surveillance; § 197.565, Notifying employees of benzene hazards; and § 197.570, Recordkeeping. They have been submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Persons desiring to comment on these information collection requirements should submit their comments to: Office of Regulatory Policy, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503, ATTN: Desk Officer, Coast Guard. Persons submitting comments to OMB are also requested to submit a copy of their comments to the Coast Guard as indicated under "ADDRESSES."

Federalism Implications

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

The Coast Guard has considered the environmental impact of the proposed regulations and concluded that preparation of an environmental impact statement is not necessary. An environmental assessment with a finding of no significant impact has been prepared and is on file in the rulemaking docket.

These proposals are intended to protect workers from exposure to hazardous levels of benzene and would in no way increase the level of benzene released into the atmosphere. In fact, by providing an incentive to install vapor control or recovery systems (thereby relieving employers of the need to furnish and fit test employees with respirators and other protective equipment), the amount of airborne benzene released into the atmosphere would be substantially reduced. This reduction would benefit the environment and enhance safety in the workplace.

List of Subjects

46 CFR Part 30

Cargo vessels, Foreign relations, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements, Seamen.

46 CFR Part 151

Cargo vessels, Hazardous materials transportation, Marine safety, Reporting and recordkeeping requirements.

46 CFR Part 153

Cargo vessels, Hazardous materials transportation, Marine safety, Reporting and recordkeeping requirements.

46 CFR Part 197

Diving, Marine Safety, Occupational Safety and Health, Reporting and recordkeeping requirements, Vessels.

For the reasons set out in the preamble, 46 CFR parts 30, 151, 153, and 197 are proposed to be amended as follows:

PART 30—GENERAL PROVISIONS

1. The authority citation for part 30 continues to read as follows:

Authority: 46 U.S.C. 3306, 3703; 49 U.S.C. App. 1804; 49 CFR 1.45, 1.46; sec. 30.01–2 also issued under the authority of 44 U.S.C. 3507.

§ 30.25–1 [Amended]

2. In § 30.25–1, Table 30.25–1 is amended by adding a dagger (†) in front of the following entries: "Gas oil, cracked", "Gasoline blending stocks: Reformates", "Gasolines: Automotive (containing not over 4.23 grams lead per gallon)", "Gasolines: Aviation (containing not over 4.86 grams lead per gallon)", "Gasolines: Straight run", "Jet fuels: JP–4", "Naphtha: Cracking fraction", "Naphtha: Petroleum", "Naphtha: Solvent", "Naphtha: Stoddard Solvent", "Naphtha: Varnish makers' and painters' (75%)", "Oil: Coal tar", "Oil: Crude", "Turpentine substitute (White spirit)", "White spirit", and "White spirit, Low Aromatic" and by adding a footnote following the table to read: "(†)—The provisions contained in 46 CFR part 197, Subpart C, may apply to this cargo".

PART 151—BARGES CARRYING BULK LIQUID HAZARDOUS MATERIAL CARGOES

3. The authority citation for part 151 continues to read as follows:

Authority: 33 U.S.C. 1903; 46 U.S.C. 3703; 49 CFR 1.46.

§ 151.05–1 [Amended]

4. In § 151.05–1, Table 151.05 is revised by removing the word "Open" in the "Gauging device" column for "Benzene" and adding, in its place, the word "Restr."; by adding "151.50–60" in the "Special requirements (Section)" column for "Benzene-hydrocarbon mixtures (containing acetylenes) (having 10% benzene or more)"; and by removing the word "No" from the "Special requirements (Section)" column for "Benzene hydrocarbon mixtures (having 10% benzene or more)" and for "Benzene, toluene, xylene mixtures (having 10% benzene or more)" and adding, in its place, "151.50–60".

5. Section 151.50–60 is revised to read as follows:

§ 151.50–60 Benzene

The person in charge of a Coast Guard inspected barge shall ensure that the provisions of part 197, subpart C, of this chapter are applied when cargoes containing 0.5% or more benzene by volume are carried.

PART 153—SHIPS CARRYING BULK LIQUID, LIQUEFIED GAS, OR COMPRESSED GAS HAZARDOUS MATERIALS

6. The authority citation for part 153 continues to read as follows:

Authority: 46 U.S.C. 3703; 49 U.S.C. App. 1804; 33 U.S.C. 1903; 49 CFR 1.46.

7. Section 153.1060 is revised to read as follows:

153.1060 Benzene.

The master of a vessel shall ensure that the provisions of part 197, subpart C, of this chapter are applied when cargoes containing 0.5% or more benzene by volume are carried.

8. Table 1 following § 153.1608 is amended by adding in the "Special requirements" column for "Benzene, or hydrocarbon mixtures containing 10% or more Benzene" the number ".933" and by adding in the "Special requirements" column for "Coal tar", "Coal tar naphtha solvent", and "Coal tar pitch (molten)" the numbers ".933" and ".1060".

PART 197—GENERAL PROVISIONS

9. The table of contents for Part 197 is revised by adding a new subpart C and a new authority citation following the table of contents for subpart C to read as follows:

* * * * *

Subpart C—Benzene

Secs.

197.501 Applicability.
197.505 Definitions.
197.510 Incorporation by reference.
197.515 Permissible exposure limits (PELs).
197.520 Performance standard.
197.525 Responsibility of the person in charge.
197.530 Persons other than employees.
197.535 Regulated areas.
197.540 Determination of personal exposure.
197.545 Program to reduce personal exposure.
197.550 Respiratory protection.
197.555 Personal protective clothing and equipment.
197.560 Medical surveillance.
197.565 Notifying personnel of benzene hazards.
197.570 Recordkeeping.
197.575 Observation of monitoring.
197.580 Appendices.

Appendix A—Substance Safety Data Sheet, Benzene
Appendix B—Substance Technical Guidelines, Benzene
Appendix C—Medical Surveillance Guidelines for Benzene.

Secs.

Appendix D—Sampling and Analytical Methods for Benzene Monitoring—Measurement Procedures
Appendix E—Respirator Fit Tests Procedures
Appendix F—Sample Worker Certification Form

Authority: 46 U.S.C. 3703; 49 CFR 1.46.

10. In part 197, a new subpart C with appendices A through F is added to read as follows:

Subpart C—Benzene

197.501 Applicability.

(a) Except for vessels under paragraph (b) of this section, this subpart applies to all Coast Guard inspected vessels, including tank ships and barges, that are carrying benzene or benzene containing products in bulk as cargo.

(b) This subpart does not apply to vessels that are carrying only liquid cargoes containing less than 0.5% benzene by volume.

197.505 Definitions.

As used in the subpart,

"Action level" means an airborne concentration of benzene of 0.5 parts of benzene per million parts of air calculated as an eight-hour time-weighted average.

"Authorized persons" means a person specifically authorized by the person in charge of the vessel to enter a regulated area.

"Benzene" means liquefied or gaseous benzene (C_6H_6; Chemical Abstracts Service Registry No. 71–43–2) and includes benzene contained in liquid mixtures and the benzene vapors released by these mixtures. The term does not include trace amounts of unreacted benzene contained in solid materials.

"Breathing zone" means the area within one foot of a person's mouth and nose.

"Employee" means an individual who is on board a vessel by reason of that individual's employment and who is exployed directly by the owner, charterer, managing operator, or agent of that vessel.

"Employer" means the owner, charterer, managing operator, or agent of a vessel.

"Emergency" means an occurrence, such as an equipment failure, a container rupture, or a control equipment failure, which results or may result in an unexpected release of benzene.

"Performance Standard" means the standard in § 197.520.

"Person in charge" means—

(a) For a self-propelled vessel, the master of the vessel; and

(b) For a barge, the individual in charge of the barge or of an operation involving benzene on the barge.

"Personal exposure" means the concentration of airborne benzene to which a person would be exposed if that person were not using a properly fitted respirator under § 197.550 and the personal protective clothing and equipment under § 197.555.

"Permissible exposure limits" or "PELs" mean the exposure limits under § 197.515.

"Regulated area" means an area designated under § 197.535.

"Short-term exposure limit" or *"STEL"* means an airborne concentration of five parts of benzene per million parts of air (five ppm), as averaged over any 15 minute period.

"Time-weighted average exposure limit" or *"TWA"* means an airborne concentration of one part of benzene per million parts of air (one ppm), as averaged over an eight-hour period.

"Vapor control or recovery system" means a system of piping and equipment used to prevent personnel exposures to vapor by transporting the vapors from a tank being loaded to a tank being unloaded or by collecting the vapors and containing them, recovering them, dispersing them in a location remote from personnel, or destroying them.

§ 197.510 Incorporation by reference.

(a) Certain materials are incorporated by reference into this subpart with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 522(a). To enforce any edition other than the one listed in paragraph (b) of this section, notice of the change must be published in the **Federal Register** and the material made available to the public. All approved material is on file at the Office of the Federal Register, 1000 L Street NW., Washington, DC and at U.S. Coast Guard, Marine Technical and Hazardous Materials Division (G-MTH), 2100 Second Street SW., Washington, DC 20593-0001 and is available from the sources indicated in paragraph (b) of this section.

(b) The material approved for incorporation by reference in this subpart and the sections affected are as follows:

American National Standards Institute (ANSI), 1430 Broadway, New York, NY 10018

ANSI Z 88.2-1980—Practices for Respiratory Protection..... 197.550

§ 197.515 Permissible exposure limits (PELs).

The permissible exposure limits (PELs) for personal exposure are as follows:

(a) The time-weighted average exposure limit (TWA).

(b) The short-term exposure limit (STEL). Exposures at the STEL must not be repeated more than four times a day. There must be at least 60 minutes between successive exposures at the STEL.

§ 197.520 Performance standard.

No person may be subjected to a personal exposure in excess of the permissible exposure limits unless respiratory protection is used.

§ 197.525 Responsibility of the person in charge.

Unless otherwise specified, the person in charge shall ensure that the performance standard and other requirements of this subpart are complied with on that person's vessel.

§ 197.530 Persons other than employees.

(a) Before a person other than an employee engages in a benzene operation on a vessel in which the person is likely to be exposed to benzene in excess of the PELs, that person must certify that—

(1) That person has had, within the previous 12 months, at least one medical examination under § 197.560 or 29 CFR 1910.1028;

(2) The physician conducting the latest medical examination under paragraph (a)(1) of this section did not recommend that that person be excluded from areas where personal exposure may exceed the action level;

(3) All respirators and personal protective clothing and equipment that will be used by that person while on the vessel meet the requirements of §§ 197.550(b) and 197.555(c) or of 29 CFR 1910.1028; and

(4) All respirators that will be used by that person while on the vessel have been fitted and fit tested in accordance with § 197.550 (c) and (d) or with 29 CFR 1910.1028.

(b) The certification under paragraph (a) of this section must be in writing, list the items in paragraphs (a)(1) through (a)(4) of this section, reference 46 CFR 197.530, state the date of certification, and be signed by the person making the certification. A sample certification form is contained in Appendix F of this subpart.

(c) Before the person making the certification engages in a benzene operation on a vessel, that person or a representative of the entity which employs that person must submit a copy of the certification to the person in charge of the vessel.

§ 197.535 Regulated areas.

(a) Whenever the airborne concentration of benzene within an area exceeds, or reasonably can be expected to exceed, the permissible exposure limits, the person in charge shall designate the area as a regulated area.

(b) The person in charge shall restrict access to regulated areas to authorized persons wearing an appropriate respirator under § 197.550 and the personal protective clothing and equipment under § 197.555 and shall not permit any person to enter a regulated area alone.

(c) The boundaries of regulated areas must be indicated by barricades or other devices. A sign bearing the following legend in letters at least three inches high (except for the words "DANGER—BENZENE", which must be printed in letters at least 50 percent larger than the other words) must be posted at each access to the regulated areas:

DANGER—BENZENE REGULATED AREA
CANCER CAUSING AGENT FLAMMABLE—NO SMOKING AUTHORIZED PERSONNNEL ONLY RESPIRATOR REQUIRED

§ 197.540 Determination of personal exposure.

(a) *General.* (1) The employer shall ensure that one or more persons in each type of operation conducted on the vessel which involves the handling of or potential exposure to benzene are monitored. The monitoring must be conducted so as to determine the representative personal exposure of all persons engaged in each particular operation involving benzene.

(2) For long duration operations, such as cargo loading or tank entry, the persons monitored must be monitored to determine the representative TWA for all persons engaged in the operation. The monitoring must be based on breathing zone air samples taken for the duration of the operation or for eight hours, whichever is less.

(3) For short duration operations, such as tank gauging or hose connection and disconnection, the persons monitored must be monitored to determine the representative STEL for all persons engaged in the operation. The monitoring must be based on 15 minute breathing zone air samples. Brief period measuring devices may be used to determine whether monitoring for STEL is needed.

(4) If cargoes with different benzene concentrations are bing carried on the vessel, an operation involving the lower concentration cargoes need not be monitored if the same type of operation involving the highest concentration

cargo is monitored and found to be below the action level.

(5) All monitoring must be conducted during weather conditions typical in the geographic area and during the time of day the operation is normally conducted. If the benzene level is normally high for the operation, monitoring must be conducted under those adverse weather conditions typically encountered for the operation, such as low wind, stable air, or high temperature.

(6) All monitoring must be accurate to a confidence level of 95 percent to within plus or minus 25 percent for airborne concentrations of benzene equal to or greater than 0.5 ppm.

(b) *Initial exposure monitoring.* Before [*Insert date 60 days after the effective date of the final rule*] or when benzene is first loaded as cargo on board the vessel, an initial monitoring of each type of operation must be conducted to determine accurately the representative personal exposure of persons involved in the operation. If an initial monitoring of the operation has been conducted within one year before [*Insert the effective date of the final rule*] and the monitoring procedure used met or exceeded the requirements of this section, that monitoring satisfies the requirements of this paragraph.

(c) *Periodic exposure monitoring.* The monitoring must be repeated each July or August if benzene containing cargoes are carried during those months. If benzene containing cargoes are not carried during those months, monitoring must be conducted at the time of carriage nearest those months.

(d) *Additional exposure monitoring.* (1) Monitoring under paragraphs (b) and (c) of this section must be repeated for the operation when there has been a change in the procedure, equipment, or work practices of the operation which may change personal exposure or whenever the employer or person in charge has any reason to suspect that personal exposure has changed.

(2) Whenever emergencies occur that may change personal exposure, operations affected by the emergency must be monitored using area or personal sampling after the spill is cleaned up or the leak, repture, or other breakdown is repaired to determine when personal exposure has returned to the level that existed before the emergency.

(3) The Coast Guard may require additional monitoring upon reasonable belief that the PEL's are being exceeded.

(e) *Notification of exposure monitoring results.* (1) Within 30 working days after the receipt of the results of monitoring under this section, each person involved in the operation monitored must be given written notice of the results, either by separate letter or by notice posted in a location accessible to all persons involved.

(2) If the results indicate that the PELs were exceeded, the written notice under paragraph (e)(1) of this section must state, or refer to a document available to the persons involved which states, the corrective action to be taken to reduce the personal exposure to or below the PELs.

§ 197.545 Program to reduce personal exposure.

(a) When personal exposure for an operation is over the applicable PEL as determined under § 197.540, the employer shall develop and implement, within 60 working days of the date of that determination, a written program detailing the corrective actions that will be taken to reduce personal exposure to or below the PEL's. The written program must include a timeframe for implementing the corrective actions to be taken.

(b) Corrective actions under paragraph (a) of this section may include, but are not limited to, one or more of the following:

(1) Engineering controls (e.g. vapor control or recovery systems, closed loading systems, or controlled venting systems);

(2) Revised work practices; or

(3) Respirators under § 197.550 and personal protective clothing and equipment under § 197.555.

(c) Whenever the exposure monitoring data changes, the program must be revised to reflect the new data.

(d) Each person involved in the operation must be notified that a written program detailing corrective actions is available upon request.

(e) A copy of the written program must be furnished upon request to the Coast Guard.

§ 197.550 Respiratory protection.

(a) *General.* When the use of respirators under this section and the personal protective clothing and equipment under § 197.555 is chosen as the method or one of the methods under § 197.545 to be used in meeting the performance standard, the respirators used must be selected and fitted according to this section.

(b) *Respirator selection.* (1) The respirator must be approved by the Mine Safety and Health Administration (MSHA) under 30 CFR part 11. When filter elements are used, they must include MSHA approval for organic vapors or benzene.

(2) The employer shall provide the employees with the appropriate respirators free of charge and ensure that the respirators are use properly. Employees who cannot wear negative pressure respirator must be given the option of wearing a respirator with less breathing resistance, such as a powered air-purifying respirator or a supplied air respirator.

(3) Electrically powered respiratory protective equipment must meet the electrical engineering requirements in Subchapter J of this chapter and the electrical equipment requirements in part 151, Table 151.05, and part 153, table 1, of this chapter.

(4) The type of respirator provided must be a type specified in Table 197.550(b) of this section that is appropriate for the exposure.

TABLE 197.550(B).—RESPIRATORY PROTECTION FOR BENZENE

Airborne concentration of benzene or condition of use	Respirator type
10 ppm or less	(1) Half-mask air-purifying respirator with organic vapor cartridges.
50 ppm or less	(1) Full facepiece respirator with organic vapor cartridges. (2) Full facepiece gas mask with chin style canister.[1]
100 ppm or less	(1) Full facepiece powered air purifying respirator with organic vapor canister.[1]
1,000 ppm or less	(1) Supplied air respirator with full facepiece in positive-pressure mode.
Greater than 1,000 ppm or unknown concentration.	(1) Self-contained breathing apparatus with full facepiece in positive pressure mode. (2) Full facepiece positive-pressure supplied-air respirator with auxiliary self-contained air supply.
Escape	(1) Any organic vapor gas mask. (2) Any self-contained breathing apparatus with full facepiece.
Fire fighting	(1) Full facepiece self-contained breathing apparatus in positive pressure mode.

[1] Canisters for non-powered air purifying respirators must have a minimum service life of four hours when tested at 150 ppm benzene, at a flow rate of 64 liters/minute at 25 °C and 85% relative humidity. Cansiters for powered air-purifying respirators must have a flow rate of 115 liters/minute (for tight fitting respirators) or 170 liters/minute (for loose fitting respirators).

(c) *Respirator fitting.* Respirators must be fitted in the manner prescribed in appendix E of this subpart. The employer may contract with a third party for this service.

(2) Persons must be trained in the methods for properly fitting a respirator and informed of the factors which may affect a proper fit, such as beards, sideburns, dentures, eyeglasses, and goggles. (See appendix E of this subpart.)

(3) For persons requiring eyeglasses, corrective lenses should be fitted to the respirator faceplate. As a temporary measure, glasses with short temple bars may be taped to the wearer's head. Contact lenses must not be worn with respirators.

(d) *Respirator fit testing.* (1) Before the person is permitted to use a respirator selected and fitted under this section, the person must undergo an Initial Fit Test (IFT) and either a Qualitative Fit Test (QLFT) or a Quantitative Fit Test (QNFT), under Appendix E of this subpart, using the respirator fitted. If a negative pressure respirator is used, the QLFT or QNFT must be repeated at least once a year thereafter. The employer may contract with a third party for this service.

(2) The objective of the tests is to identify for the person a respirator which minimizes the chance of leakage.

(3) The results of each test under paragraph (d)(1) of this section must be certified by the person conducting the test.

(e) *Respirator use.* Persons wearing a respirator in a regulated area must be permitted to leave the regulated area to wash their face and respirator facepiece, as necessary, in order to prevent skin irritation associated with respirator use or, if an air-purifying respirator is used, to change the filter elements whenever the person wearing the respirator detects a change in breathing resistance or a chemical vapor breakthrough.

(f) *Respirator inspection.* Respirators must be inspected in accordance with ANSI Z88.2—1980, section 8.

(g) *Respirator maintenance.* (1) Respirators must be maintained in accordance with ANSI Z88.2—1980, section 8.

(2) During respirator cleaning, the rubber or elastomer parts of the respirator must be stretched and manipulated with a massaging action to keep the parts pliable and flexible and to keep the parts from taking a set during storage.

(3) The air purifying element of air-purifying respirators must be replaced at the expiration of service life or after a period not to exceed eight hours, whichever comes first. An air purifying element with an end of useful life indicator approved by MSHA or NIOSH for benzene may be used until the indicator indicates end of useful life.

(h) *Respirator storage.* Respirators must be stored in accordance with ANSI Z88.2—1980, section 8.

§ 197.555 Personal protective clothing and equipment.

(a) When the use of respirators under § 197.550 and the personal protective clothing and equipment under this section is chosen as the method or one of the methods under § 197.545 to be used in meeting the performance standard, the clothing and equipment must meet the requirements of this section.

(b) The employer shall provide employees with the necessary personal protective clothing and equipment free of charge and shall ensure that the clothing and equipment are worn or used properly.

(c) Employees must be provided with coveralls or a large apron, boots, gloves, and, if necessary, tight-fitting eye goggles to limit dermal exposure to, and prevent eye contact with, liquid benzene.

§ 197.560 Medical surveillance.

(a) *General.* (1) The employer shall provide the medical surveillance examinations for that person's employees, as required by this section.

(2) All medical surveillance procedures under this section, other than the pulmonary function test under paragraph (b)(5)(v) of this section and all laboratory tests, must be performed by, or under the supervision of, a licensed physician.

(3) The pulmonary function test under paragraph (b)(5)(v) of this section must be administered by a licensed physician or by a person who has completed a training course in spirometry sponsored by a governmental, academic, or professional institution.

(4) All laboratory tests must be conducted by a laboratory accredited by the American Industrial Hygiene Association or other accrediting organization acceptable to the Commandant.

(b) *Initial medical examination.* (1) After [*Insert date 60 days after the effective date of the final rule*], the employer shall make available to employees listed in paragraph (b)(2) of this section an initial medical examination.

(2) The initial medical examination must be made available to the following employees before they are permitted to enter or continue working in a workplace in which they will be or may be exposed to benzene:

(i) Employees who were exposed to more than 10 ppm of benzene on at least 30 calendar days during the year before [*Insert the effective date of the final rule*] and who were employed by their present employer during each of the 30 days.

(ii) Employees, other than employees under paragraph (b)(2)(i) of this section, who will be or may be exposed to benzene at or above the action level on at least 30 calendar days, or at a level above a PEL on at least 10 calendar days, during the coming year.

(3) Exposure to benzene, as referred to in paragraph (b)(2) of this section, means any exposure to benzene, whether or not at the time of the exposure, the employee was or will be wearing an appropriate respirator under § 197.550 and the personal protective clothing and equipment under § 197.555.

(4) An initial medical examination is not required if the employer or employee has adequate records showing that the employee has had, within one year, an examination meeting the requirements of paragraph (b)(5) of this section.

(5) The initial medical examination must include at least the following elements:

(i) A detailed occupational history which includes a history of past work exposure to benzene or any other hematological toxin, a family history of blood dyscrasias including hemotological neoplasms, a history of blood dyscrasias including genetic hemoglobin abnormalities, bleeding abnormalities, and abnormal functions of formed blood elements, a history of renal or liver dysfunction, a history of medicinal drugs routinely taken, a history of previous exposure to ionizing radiation, and a history of exposure to marrow toxins outside of the employee's current work situation.

(ii) A complete physical examination.

(iii) A complete blood count, including a leukocyte count with differential, quantitative thrombocyte count, hematocrit, hemoglobin, erythrocyte count, and erythrocyte indices (MCV, MCH, MCHC). The results of these tests must be reviewed by the examining physician.

(iv) As determined necessary by the examining physician, additional tests based on alterations to the components of the blood or other signs which may be related to benzene exposure.

(v) For employees required to wear respirators for at least 30 days a year, a pulmonary function test.

(c) *Periodic medical examinations.* (1) The employer shall make available to employees having an initial medical examination under paragraph (b) of this section a periodic medical examination each year following the initial medical examination. Periodic examinations

must include, at least, the following elements:

(i) A brief history regarding new exposure to potential marrow toxins, changes in medicinal drug use, and the appearance of physical signs relating to blood disorders.

(ii) A complete blood count, including a leukocyte count with differential, quantitative thrombocyte count, hematocrit, hemoglobin, erythrocyte count, and erythrocyte indices (MCV, MCH, MCHC). The results of these tests must be reviewed by the examining physician.

(iii) As determined necessary by the examining physician, additional tests based on alterations to the components of the blood or other signs which may be related to benzene exposure.

(2) If the employee develops signs and symptoms commonly associated with toxic exposure to benzene, the employee must be provided with an additional medical examination which includes those elements considered appropriate by the examining physician.

(3) For employees required to use respirators for at least 30 days a year, a pulmonary function test must be performed, and specific evaluation of the cardiopulmonary system must be made, at least every three years.

(d) *Additional examinations and referrals.* (1) If the results of the complete blood count laboratory test required for the initial or periodic medical examination indicate that any of the following abnormal conditions exist, the blood count must be retaken within two weeks:

(i) The hemoglobin or the hematocrit falls below the normal limit (outside the 95% confidence interval (C.I.)), as determined by the laboratory, or the hemoglobin or hematocrit shows a persistent downward trend from the employee's pre-exposure norms, if these findings can not be explained by other medical reasons.

(ii) The thrombocyte count varies more than 20 percent below the employee's most recent values or falls outside the normal limit (95% C.I.), as determined by the laboratory.

(iii) The leukocyte count is below 4,000 per cubic millimeter or there is an abnormal differential count.

(2) If the abnormal conditions persist, the employee must be referred by the examining physician to a hematologist or an internist for further evaluation, unless the physician has good reason to believe that the referral is unnecessary. (See Appendix C of this subpart for examples of conditions in which referrals may be unnecessary.)

(3) The hematologist or internist must be provided with the information provided to the physician under paragraph (f) of this section and with the medical record under § 197.570(b).

(4) If the hematologist or internist determines that additional tests are needed, the employer shall ensure that these additional tests are provided.

(e) *Emergency medical examinations.* (1) Whenever an employee is exposed to benzene resulting from an emergency, a sample of that employee's urine must be taken at the end of the employee's shift and a urinary phenol test must be performed on the sample within 72 hours. The specific gravity of the urine must be corrected to 1.024.

(2) If the result of the urinary phenol test is below 75 mg phenol/l of urine, no further testing is required.

(3) If the result of the urinary phenol test is equal to or greater than 75 mg phenol/l of urine, the employee's complete blood count including an erythrocyte count, a leukocyte count with differential, and a thrombocyte count must be taken at monthly intervals for a duration of three months following the emergency.

(4) If any of the conditions specified in paragraph (d)(1) of this section exists, the additional examinations and referrals under paragraph (d) of this section must be performed and the employee must be provided with periodic medical examinations, if any are recommended by the examining physician.

(f) *Information provided to the physician.* The following information must be provided to the examining physician:

(1) A copy of this subpart and its appendices.

(2) A description of the affected employee's duties as they relate to the employee's exposure.

(3) The employee's actual or representative exposure level.

(4) A description of the respirator and personal protective clothing and equipment used or to be used, if any.

(5) Records of all previous employment-related medical examinations of the affected employee which have not been provided to the examining physician.

(g) *Physician's written opinion.* (1) Within 15 days of each examination under this section, the employee must be provided with a copy of the examining physician's written opinion of the examination.

(2) The written opinion must contain at least the following information:

(i) The occupationally pertinent results of the medical examination and tests.

(ii) All medical conditions, if any, of the employee which the examining physician believes would subject the employee to a greater than normal risk of material impairment if the employee is exposed again to benzene.

(iii) The examining physician's recommended limitations, if any, upon the employee's future exposure to benzene or use of respirators or other personal protective clothing or equipment.

(iv) A statement that the employee has been informed by the physician of the results of the medical examination and of all medical conditions of the employee resulting from benzene exposure which require further explanation or treatment.

(3) The physician's written opinion must not reveal specific records, findings, and diagnoses that have no bearing on the employee's ability to work in a benzene-exposed workplace or to use a respirator or other personal protective clothing or equipment.

(h) *Removal from exposure.* (1) From the time an employee is referred to a hematologist or internist under paragraph (d)(2) of this section, the employee must not be permitted to enter areas where personal exposure may exceed the action level until the physician determines under paragraph (h)(2) of this section that the employee again may enter those areas.

(2) After examination by and consultation with the hematologist or internist, the examining physician decides whether or not to permit the employee to enter areas where personal exposure may exceed the action level. The employee must provide the employer with a written copy of the physician's decision signed by the physician. If the decision recommends that the employee not be permitted to enter those areas, the decision must include the examining physician's opinion as to when the employee may be permitted to reenter those areas and the requirements for future medical examinations to review the decision.

(3) Within six months of the date a decision under paragraph (h)(2) of this section not to permit reentry is made, the employee must be provided with a follow-up examination and a decision of the examining physician (based on the follow-up examination and consultation with a hematologist or internist) as to whether reentry should be permitted and, if so, when, or whether it should be permanently prohibited.

§ 197.565 Notifying personnel of benzene hazards.

(a) *Material safety data sheet.* A material safety data sheet (MSDS) addressing benzene must be made

available to all persons involved in the benzene operation. The MSDS must describe the physical and chemical characteristics, physical and health hazards, permissible exposure limits, precautions for safe handling and use, control measures such as personal protection equipment, and first aid procedures for benzene. A copy of Appendices A and B of this subpart or a MSDS on benzene meeting the requirements of 29 CFR 1910.1200(g) is sufficient.

(b) *Training.* (1) All employees must be provided with training at the time of their initial assignment to a work area where benzene is present and, if exposures are above the action level, at least once a year thereafter.

(2) The training must provide information on—

(i) Which operations on the vessel involve or may involve exposure to benzene;

(ii) The methods and observations that may be used to detect the presence or release of benzene;

(iii) The physical and health hazards associated with exposure to benzene;

(iv) The measures that may be taken and the equipment that may be used to protect persons from the hazards of benzene exposure;

(v) The proper selection, fitting, fit testing, and use of personal protective equipment;

(vi) The meaning of a regulated area and the means under § 197.535(c) to indicate a regulated area;

(vii) The contents of this subpart and of Appendices A through E of this subpart and on where copies of this material are available; and

(viii) The medical surveillance program under § 197.560.

§ 197.570 Recordkeeping.

(a) *Record of personal exposure monitoring.* (1) The employer shall maintain an accurate record of all monitoring under § 197.540 for three years.

(2) The record must include—

(i) The dates, number, duration, and results of each sample taken, and a description of the procedure used to determine representative personal exposures;

(ii) A description of the sampling and analytical methods used;

(iii) A description of the type of respirator and personal protective clothing and equipment worn, if any; and

(iv) The name, social security number, and job classification of each person monitored and of all other persons whose exposure the monitoring is intended to represent; and

(v) Indicate the exposure levels to which monitored persons were subjected.

(b) *Medical record.* (1) The employer shall maintain an accurate medical record for each employee subjected to medical surveillance under § 197.560 for three years after the employee's employment is terminated.

(2) The record must include—

(i) The name and social security number of the employee;

(ii) The physician's written opinion on the initial, periodic, and special examinations of the employee, including the results of medical examinations and tests and all opinions and recommendations;

(iii) A list of medical complaints, if any, by the employee related to exposure to benzene;

(iv) A copy of the information provided to the physician under § 197.560 (f)(2) through (f)(5); and

(v) A copy of the employee's medical and work history related to exposure to benzene or other hematologic toxin.

(c) *Availability of records.* (1) All records required to be maintained by this section must be made available upon request to the Coast Guard for examination and copying.

(2) Records of personal exposure monitoring under paragraph (a) of this section must be provided upon request to persons involved in the operation.

(3) A copy of each item entered into the medical record under paragraph (b) of this section for a particular employee must be given to that employee at the time the item is entered into the medical record.

(4) Medical records required by paragraph (b) of this section must be provided to persons upon the written request of the subject employee.

(d) *Transfer of records.* If the employer ceases to do business and there is no successor to receive and retain the records for the prescribed period, the employer shall transfer all records under paragraphs (a) and (b) of this section relating to the affected employees to those employees for their disposition.

§ 197.575 Observation of monitoring.

(a) Persons involved in benzene operations or their representatives must be provided with an opportunity to observe all monitoring under § 197.540. Coast Guard officials may also observe all monitoring under § 197.540.

(b) When observation of monitoring requires entry into regulated areas, the observers shall use any respirator and personal protective clothing and equipment required to be worn by persons working in the area and comply with all applicable Coast Guard safety and health procedures.

§ 197.580 Appendices.

(a) Appendices A through D and F of this subpart contain technical information on benzene and its effects and provide guidance for medical surveillance, monitoring, and measuring. The appendices are informational and advisory and do not create mandatory requirements.

(b) Appendix E of this subpart contains tests and procedures for fitting respirators. Under § 197.550(d)(1), compliance with appendix E of this subpart is mandatory.

Appendix A—Substance Safety Data Sheet, Benzene

I. Substance Identification

(a) *Substance:* Benzene.

(b) *Performance standard exposure limits:* (1) Airborne: The maximum time-weighted average (TWA) exposure limit is one part of benzene vapor per million parts of air (one ppm) for an eight-hour workday and the maximum short-term exposure limit (STEL) is five ppm for any 15-minute period.

(2) Dermal: Eye contact must be prevented and skin contact with liquid benzene must be limited.

(c) *Appearance and odor:* Benzene is a clear, colorless liquid with a pleasant, sweet odor. The odor of benzene does not provide adequate warning of its hazard.

II. Health Hazard Data

(a) *Ways in which benzene affects your health.* Benzene can affect your health if you inhale it or if it comes in contact with your skin or eyes. Benzene is also harmful if you swallow it.

(b) *Effects of overexposure.* (1) Short-term (acute) overexposure: If you are overexposed to high concentrations of benzene, well above the levels where its odor is first recognizable, you may feel breathless, irritable, euphoric, or giddy and you may experience irritation in your eyes, nose, and respiratory tract. You may develop a headache, feel dizzy, nauseated, or intoxicated. Severe exposures may lead to convulsions and loss of consciousness.

(2) Long-term (chronic) exposure: Repeated or prolonged exposure to benzene, even at relatively low concentrations, may result in various blood disorders ranging from anemia to leukemia, and irreversible, fatal disease. Many blood disorders associated with benzene exposure may occur without symptoms.

III. Protective Clothing and Equipment

(a) *Respirators.* Respirators are required for those operations in which engineering controls or work practice controls are not feasible for reducing exposure to the permissible level or are not chosen as the method of complying with the performance standard. If respirators are worn, they must have joint Mine Safety and Health Administration and the National Institute for

Occupational Safety and Health (NIOSH) seal of approval. Cartridges or canisters must be replaced before the end of their service life, or the end of the shift, whichever occurs first. If you experience difficulty breathing while wearing a respirator, you may request a positive pressure respirator from your employer. You must be thoroughly trained to use the assigned respirator, and the training will be provided by your employer.

(b) *Protective clothing.* You must wear appropriate protective clothing (such as boots, gloves, sleeves, and aprons) over any parts of your body that could be exposed to liquid benzene.

(c) *Eye and face protection.* You must wear splash-proof safety goggles if it is possible that benzene may get into your eyes. In addition, you must wear a face shield if your face could be splashed with benzene liquid.

IV. Emergency and First Aid Procedures

(a) *Eye and face exposure.* If benzene is splashed in your eyes, wash it out immediately with large amounts of water. If irritation persists or vision appears to be affected, see a doctor as soon as possible.

(b) *Skin exposure.* If benzene is spilled on your clothing or skin, remove the contaminated clothing and wash the exposed skin with large amounts of water and soap immediately. Wash contaminated clothing before you wear it again.

(c) *Breathing.* If you or any other person breathes in large amounts of benzene, get the exposed person to fresh air at once. Apply artificial respiration if breathing has stopped. Call for medical assistance or a doctor as soon as possible. Never enter any vessel or confined space where the benzene concentration might be high without proper safety equipment and with at least one other person present who will stay outside. A life line should be used.

(d) *Swallowing.* If benzene has been swallowed and the subject is conscious, do not induce vomiting. Call for medical assistance or a doctor immediately.

V. Medical Requirements

If you will be exposed to benzene at a concentration at or above 0.5 ppm as an eight-hour time-weighted average or have been exposed at or above 10 ppm in the past while employed by your current employer, your employer may be required under 46 CFR 197.560 to provide a medical examination and history and laboratory tests. These tests must be provided without cost to you. In addition, if you are accidentally exposed to benzene (either by ingestion, inhalation, or skin/eye contact) under emergency conditions known or suspected to constitute a toxic exposure to benzene, your employer is required to make special laboratory tests available to you.

VI. Observation of Monitoring

The employer is required to conduct monitoring that is representative of your exposure to benzene, and you or your designated representative are entitled to observe the monitoring procedure. You are entitled to observe the steps taken in the measurement procedure and to record the results obtained.

When the monitoring procedure is taking place in an area where respirators or personal protective clothing and equipment are required to be worn, you or your representative must wear the protective clothing and equipment. (See 46 CFR 197.575.)

VII. Access to Records

You or your representative may see the records of monitoring of your exposure to benzene upon written request to your employer. Your medical examination records may be furnished to you, your physician, or a representative designated by you. (See 46 CFR 197.570(c).)

VIII. Precautions for Safe Use, Handling, and Storage

Benzene liquid is highly flammable. Benzene vapor may form explosive mixtures in air. All sources of ignition must be controlled. Use non-sparking tools when opening or closing benzene containers. Fire extinguishers, where required, must be readily available. Know where they are located and how to operate them. Smoking is prohibited in areas where benzene is used or stored.

Appendix B—Substance Technical Guidelines, Benzene

I. Physical and Chemical Data

(a) *Substance identification.* (1) Synonyms: Benzol, benzole, coal naphtha, cyclohexatriene, phene, phenyl hydride, pyrobenzol. (Benzin, petroleum benzin, and benzine do not contain benzen).

(2) Formula: C_6H_6 (CAS Registry Number: 71–43–2).

(b) *Physical data.*

(1) Boiling point (760 mm Hg): 80.1 °C (176 °F).

(2) Specific gravity (water=1): 0.879.

(3) Vapor density (air=1): 2.7.

(4) Melting point: 5.5 °C (42 °F).

(5) Vapor pressure at 20 °C (68 °F): 75 mm Hg.

(6) Solubility in water: .06%.

(7) Evaporation rate (ether=1): 2.8.

(8) Appearance and odor: Clear, colorless liquid with a distinctive sweet odor.

II. Fire, Explosion, and Reactivity Hazard Data

(a) *Fire.* (1) Flash point (closed cup): −11 °C (12 °F).

(2) Autoignition temperature: 580 °C (1076 °F).

(3) Flammable limits in air, % by volume: Lower: 1.3%, Upper: 7.5%.

(4) Extinguishing media: Carbon dioxide, dry chemical, or foam.

(5) Special fire fighting procedures: Do not use a solid stream of water, because it will scatter and spread the fire. Fine water spray may be used to keep fire-exposed containers cool.

(6) Unusual fire and explosion hazards: Benzene is a flammable liquid. Its vapors can form explosive mixtures. All ignition sources must be controlled when benzene is used, handled, or stored. Areas where liquid or vapor may be released are considered hazardous locations. Benzene vapors are heavier than air. Thus, benzene vapors may travel along the deck and ground and be ignited by open flames or sparks at locations remote from the site at which benzene is handled.

(7) Benzene is classified as a flammable liquid for the purpose of conforming to the requirements of 49 CFR 172.101 concerning the designation of materials as hazardous materials. Locations where benzene may be present in quantities sufficient to produce explosive or ignitable mixtures are considered Class I Group D locations for the purposes of conforming to the requirements of 46 CFR parts 30 through 40, 151, and 153 when determining the requirements for electrical equipment under subchapter J (Electrical engineering).

(b) *Reactivity.* (1) Conditions contributing to instability: Heat.

(2) Incompatibility: Heat and oxidizing materials.

(3) Hazardous decomposition products: Toxic gases and vapors (such as carbon monoxide).

III. Spill and Leak Procedures

(a) *Steps to be taken if the material is released or spilled.* As much benzene as possible should be absorbed with suitable materials, such as dry sand or earth. That remaining must be flushed with large amounts of water. Do not flush benzene into a confined space, such as a sewer, because of explosion danger. Remove all ignition sources. Ventilate enclosed places.

(b) *Waste disposal method.* Disposal methods must conform to state and local regulations. If allowed, benzene may be disposed of (a) by absorbing it in dry sand or earth and disposing in a sanitary landfill, (b), if in small quantities, by removing it to a safe location away from buildings or other combustible sources or by pouring onto dry sand or earth and cautiously igniting it, and (c), if in large quantities, by atomizing it in a suitable combustion chamber.

Appendix C—Medical Surveillance Guidelines for Benzene

I. Route of Entry

Inhalation; skin absorption.

II. Toxicology

Benzene is primarily an inhalation hazard. Systemic absorption may cause depression of the hematopoietic system, pancytopenia, aplastic anemia, and leukemia. Inhalation of high concentrations may affect the functioning of the central nervous system. Aspiration of small amounts of liquid benzene immediately causes pulmonary edema and hemorrhage of pulmonary tissue. There is some absorption through the skin. Absorption may be more rapid in the case of abraded skin or if it is present in a mixture or as a contaminant in solvents which are readily absorbed. The defatting action of benzene may produce primary irritation due to repeated or prolonged contact with the skin. High concentrations are irritating to the eyes and the mucous membranes of the nose and respiratory tract.

III. Signs and Symptoms

Direct skin contact with benzene may cause erythema. Repeated or prolonged contact may result in drying, scaling dermatitis or development of secondary skin infections. In addition, benzene is absorbed

through the skin. Local effects of benzene vapor or liquid on the eye are slight. Only at very high concentrations is there any smarting sensation in the eye. Inhalation of high concentrations of benzene may have an initial stimulatory effect on the central nervous systrem characterized by exhilaration, nervous excitation, or giddiness, followed by a period of depression, drowsiness, or fatigue. A sensation of tightness in the chest accompanied by breathlessness may occur and ultimately the victim may lose consciousness. Tremors, convulsions, and death may follow from respiratory paralysis or circulatory collapse in a few minutes to several hours following severe exposures.

The detrimental effect on the blood-forming system or prolonged exposure to small quantities of benzene vapor is of extreme importance. The hematopoietic system is the chief target for benzene's toxic effects which are manifested by alterations in the levels of formed elements in the peripheral blood. These effects may occur at concentrations of benzene which may not cause irritation of mucous membranes or any unpleasant sensory effects. Early signs and symptoms of benzene morbidity are varied. Often, they are not readily noticed and are non-specific. Complaints of headache, dizziness, and loss of appetite may precede or follow clinical signs. Rapid pulse and low blood pressure, in addition to a physical appearance of anemia, may accompany a complaint of shortness of breath and excessive tiredness. Bleeding from the nose, gums, or mucous membranes and the development of purpuric spots (small bruises) may occur as the condition progresses. Clinical evidence of leukopenia, anemia, and thrombocytopenia, singly or in combination, may be among the first signs.

Bone marrow may appear normal, aplastic, or hyperplastic and may not, in all situations, correlate with peripheral blood forming tissues. Because of variations in the susceptibility to benzene morbidity, there is no "typical" blood picture. The onset of effects of prolonged benzene exposure may be delayed for many months or years after the actual exposure has ceased. Identification or correlation with benzene exposure must be sought out in the occupational history.

IV. Treatment of Acute Toxic Effects

Remove from exposure immediately. Make sure you are adequately protected and do not risk being overcome by fumes. Give oxygen or artificial resuscitation, if indicated. Flush eyes, wash skin if contaminated, and remove all contaminated clothing. Symptoms of intoxication may persist following severe exposures. Recovery from mild exposures is usually rapid and complete.

V. Surveillance and Preventive Considerations

(a) *General.* The principal effects of benzene exposure addressed in 46 CFR part 197, subpart C, Appendix A, are pathological changes in the hematopoietic system, reflected by changes in the peripheral blood and manifested clinically as pancytopenia, aplastic anemia, or leukemia. Consequently, the medical surveillance program under 46 CFR 197.560 is designed to observe, on a regular basis, blood indices for early signs of these effects. Although early signs of leukemia are not usually available, emerging diagnostic technology and innovative regimes are making consistent surveillance for leukemia, as well as other hematopoietic effects, more and more beneficial.

Initial and periodic medical examinations must be provided under 46 CFR 197.560. There are special provisions for medical tests in the event of hematologic abnormalities or emergencies.

The blood values which require referral to a hematologist or internist are noted in 46 CFR 197.560(d)(i), (ii), and (iii). That section specifies that, if blood abnormalities persist, the employee must be referred unless the physician has good reason to believe that the referral is unnecessary. Examples of conditions that might make a referral unnecessary despite abnormal blood limits are iron or folate deficiency, menorrhagia, or blood loss due to some unrelated medical abnormality.

Symptoms and signs of benzene toxicity can be non-specific. Only a detailed history and appropriate investigative procedures will enable a physician to rule out or confirm conditions that place the employee at increased risk. To assist the examining physician with regard to which laboratory tests are necessary and when to refer an employee to the specialist, the following guidelines have been established.

(b) *Hematology Guidelines.* A minimum battery of tests is to be performed by strictly standardized methods.

(1) Red cell, white cell, platelet counts, white blood cell differential, hematocrit, and red cell indices must be performed by an accredited laboratory. The normal ranges for the red cell and white cell counts are influenced by altitude, race, and sex and, therefore, should be determined by an accredited laboratory in the specific area where the tests are performed.

Either a decline from an absolute normal or from an individual's base line to a subnormal value or a rise to a supra-normal value are indicative of potential toxicity, particularly if all blood parameters decline. The normal total white blood count is approximately 7,200/mm^3 plus or minus 3,000. For cigarette smokers, the white count may be higher and the upper range may be 2,000 cells higher than normal for the laboratory. In addition, infection, allergies, and some drugs may raise the white cell count. The normal platelet count is approximately 250,000 with a range of 140,000 to 400,000. Counts outside this range should be regarded as possible evidence of benzene toxicity.

Certain abnormalities found through routine screening are of greater significance in the benzene-exposed worker and require prompt consultation with a specialist, namely:

(i) Thrombocytopenia.

(ii) A trend of decreasing white cell, red cell, or platelet indices in an individual over time is more worrisome than an isolated abnormal finding at one test time. The importance of a trend highlights the need to compare an individual's test results to baseline, to previous periodic tests, or to both.

(iii) A constellation or pattern of abnormalities in the different blood indices is of more significance than a single abnormality. A low white count not associated with any abnormalities in other cell indices may be a normal statistical variation. Whereas, if the low white count is accompanied by decreases in the platelet and/or red cell indices, such a pattern is more likely to be associated with benzene toxicity and merits thorough investigation.

Anemia, leukopenia, macrocytosis, or an abnormal differential white blood cell count should alert the physician to investigate further and to refer the patient if repeat tests confirm the abnormalities. If routine screening detects an abnormality, the follow-up tests which may be helpful in establishing the etiology of the abnormality are the peripheral blood smear and the reticulocyte count.

The extreme range of normal for reticulocytes is 0.4 to 2.5 percent of the red cells. The usual range is 0.5 to 1.2 percent of the red cells. A decline in reticulocytes to levels of less than 0.4 percent is to be regarded as possible evidence of benzene toxicity requiring accelerated surveillance (unless another specific cause is found). An increase in reticulocyte levels to above 2.5 percent also may be consistent with, but not characteristic of, benzene toxicity.

(2) A careful examination of the peripheral blood smear is an important diagnostic test. As with the reticulocyte count, the smear should be with fresh uncoagulated blood obtained from a needle tip following venipuncture or from a drop of earlobe blood (capillary blood). If necessary, the smear may, under certain limited conditions, be made from a blood sample anticoagulated with EDTA (but never with oxalate or heparin). When the smear is to be prepared from a specimen of venous blood which has been collected by a commercial Vacutainer® type tube containing neutral EDTA, the smear should be made as soon as possible after the venesection. A delay of up to 12 hours is permissible between the drawing of the blood specimen into EDTA and the preparation of the smear if the blood is stored at refrigerator (not freezing) temperature.

(3) The minimum mandatory observations to be made from the smear are as follows:

(i) The differential white blood cell count.

(ii) Description of abnormalities in the appearance of red cells.

(iii) Description of any abnormalities in the platelets.

(iv) A careful search must be made of every blood smear for immature white cells such as band forms (in more than normal proportion, i.e., over ten percent of the total differential count), any number of metamyelocytes, myelocytes, or myeloblasts. Any nucleate or multinucleated red blood cells should be reported. Large "giant" platelets or fragments of megakaryocytes must be recognized.

An increase in the proportion of band forms among the neutrophilic granulocytes is an abnormality deserving special mention. Such an increase may represent a change which should be considered as an early warning of benzene toxicity in the absence of other causative factors (most commonly

infection). Likewise, the appearance of metamyelocytes, in the absence of another probable cause, is to be considered a possible indication of benzene-induced toxicity.

An upward trend in the number of basophils, which normally do not exceed about 2.0 percent of the total white cells, is to be regarded as possible evidence of benzene toxicity. A rise in the eosinophil count is less specific but may indicate toxicity if the rise is above 6.0 percent of the total white count.

The normal range of monocytes is from 2.0 to 8.0 percent of the total white count with an average of about 5.0 percent. About 20 percent of individuals reported to have mild but persisting abnormalities caused by exposure to benzene show a persistent monocytosis. The findings of a monocyte count which persists at more than ten to 12 percent of the normal white cell count (when the total count is normal) or persistence of an absolute monocyte count in excess of 800/mm^3 should be regarded as a possible sign of benzene-induced toxicity.

A less frequent but more serious indication of benzene toxicity is the finding in the peripheral blood of the so-called "pseudo" (or acquired) Pelger-Huet anomaly. In this anomaly, many, or sometimes the majority, of the neutrophilic granulocytes possess two round nuclear segments, or, less often, one or three round segments, rather than three normally elongated segments. When this anomaly is not hereditary, it is often, but not invariably, predictive of subsequent leukemia. However, only about two percent of patients who ultimately develop acute myelogenous leukemia show the acquired Pelger-Huet anomaly. Other tests that can be administered to investigate blood abnormalities are discussed below. However, these tests should be undertaken by the hematologist.

An uncommon sign, which cannot be detected from the smear but can be elicited by a "sucrose water test" of peripheral blood, is transient paroxysmal nocturnal hemoglobinuria (PNH). This sign may first occur insidiously during a period of established aplastic anemia and may be followed within one to a few years by the appearance of rapidly fatal, acute myelogenous leukemia. Clinical detection of PNH, which occurs in only one or two percent of those destined to have acute myelogenous leukemia, may be difficult. If the "sucrose water test" is positive, the somewhat more definitive Ham test, also known as the acid-serum hemolysis test, may provide confirmation.

(v) Individuals documented to have developed acute myelogenous leukemia years after initial exposure to benzene may have progressed through a preliminary phase of hematologic abnormality. In some instances, pancytopenia (i.e., a lowering in the counts of all circulating blood cells of bone marrow origin, but not to the extent implied by the term "aplastic anemia") preceded leukemia for many years. Depression of a single blood cell type or platelets may represent a harbinger of aplasia or leukemia. The finding of two or more cytopenias or pancytopenia in a benzene-exposed individual must be regarded as highly suspicious of more advanced, although still reversible, toxicity. Pancytopenia coupled with the appearance of immature cells (myelocytes, myeloblasts, erythroblasts, etc.) with abnormal cell (pseudo Pelger-Huet anomaly, atypical nuclear heterochromatin, etc.) or of unexplained elevations of white blood cells must be regarded as evidence of benzene overexposure, unless proved otherwise. Many severely aplastic patients manifested the ominous finding of five to ten percent myeloblasts in the marrow, occasional myeloblasts and myelocytes in the blood, and 20 to 30 percent monocytes. It is evident that isolated cytopenias, pancytopenias, and even aplastic anemias induced by benzene may be reversible and complete recovery has been reported on cessation of exposure. However, because any of these abnormalities is serious, the employee must immediately be removed from any possible exposure to benzene vapor. Certain tests may substantiate the employee's prospects for progression or regression. One such test would be an examination of the bone marrow, but the decision to perform a bone marrow aspiration or needle biopsy must be made by the hematologist.

The findings of basophilic stippling in circulating red blood cells (usually found in one to five percent of red cells following marrow injury) and detection in the bone marrow of what are termed "ringed sideroblasts" must be taken seriously, as they have been noted in recent years to be premonitory signs of subsequent leukemia.

Recently peroxidase-staining of circulating or marrow neutrophil granulocytes, employing benzidine dihydrochloride, have revealed the disappearance of, or diminution in, peroxidase in a sizable proportion of the granulocytes. This has been reported as an early sign of leukemia. However, relatively few patients have been studied to date. Granulocyte granules are normally strongly peroxidase positive. A steady decline in leukocyte alkaline phosphatase has also been reported as suggestive of early acute leukemia. Exposure to benzene may cause an early rise in serum iron, often but not always associated with a fall in the reticulocyte count. Thus, serial measurements of serum iron levels may provide a means of determining whether or not there is a trend representing sustained suppression of erythropoiesis.

Measurement of serum iron and determination of peroxidase and of alkaline phosphatase activity in peripheral granulocytes can be performed in most pathology laboratories. Peroxidase and alkaline phosphatase staining are usually undertaken when the index of suspicion for leukemia is high.

Appendix D—Sampling and Analytical Methods for Benzene Monitoring—Measurement Procedures

Measurements taken for the purpose of determining employee exposure to benzene are best taken so that the representative average eight-hour exposure may be determined from a single eight-hour sample or two four-hour samples. Short-time interval samples (or grab samples) may also be used to determine average exposure level if a minimum of five measurements are taken in a random manner over the eight-hour work shift. In random sampling, any portion of the work shift has the same chance of being sampled as any other. The arithmetic average of all random samples taken on one work shift is an estimate of an employee's average level of exposure for that work shift. Air samples should be taken in the employee's breathing zone (i.e., air that would most nearly represent that inhaled by the employee). Sampling and analysis must be performed with procedures meeting the requirements of 46 CFR part 197, subpart C.

There are a number of methods available for monitoring employee exposures to benzene. The sampling and analysis may be performed by collection of the benzene vapor on charcoal adsorption tubes, with subsequent chemical analysis by gas chromatography. Sampling and analysis also may be performed by portable direct reading instruments, real-time continuous monitoring systems, passive dosimeters, or other suitable methods. The employer is required to select a monitoring method which meets the accuracy and precision requirements of 46 CFR 197.540(a)(6) for the weather conditions expected. Section 197.540(a)(6) requires that monitoring must have an accuracy, to a 95 percent confidence level, of not less than plus or minus 25 percent for concentrations of benzene greater than or equal to 0.5 ppm.

In developing the following analytical procedures, the OSHA Laboratory modified NIOSH Method S311 and evaluated it at a benzene air concentration of one ppm. A procedure for determining the benzene concentration in bulk material samples was also evaluated. This work, as reported in OSHA Laboratory Method No. 12, includes the following two analytical procedures:

I. OSHA Method 12 for Air Samples

Analyte: Benzene.

Matrix: Air.

Procedure: Adsorption on charcoal, desorption with carbon disulfide, analysis by gas chromatograph.

Detection limit: 0.04 ppm.

Recommended air volume and sampling rate: 10 liter at 0.2 liter/min.

1. *Principle of the method.*

1.1. A known volume of air is drawn through a charcoal tube to trap the organic vapors present.

1.2. The charcoal in the tube is transferred to a small, stoppered vial and the analyte is desorbed with carbon disulfide.

1.3. An aliquot of the desorbed sample is injected into a gas chromatograph.

1.4. The area of the resulting peak is determined and compared with areas obtained from standards.

2. *Advantages and disadvantages of the method.*

2.1. The sampling device is small, portable, and involves no liquids. Interferences are minimal and most of those which do occur can be eliminated by altering chromatographic conditions. The samples are analyzed by means of a quick, instrumental method.

2.2. The amount of sample which can be taken is limited by the number of milligrams

that the tube will hold before overloading. When the sample value obtained for the backup section of the charcoal tube exceeds 25 percent of that found on the front section, the possibility of sample loss exists.

3. *Apparatus.*

3.1. A calibrated personal sampling pump having a flow that can be determined within ± five percent at the recommended flow rate.

3.2. Charcoal tubes: Glass with both ends flame sealed, seven cm long with a six mm O.D. and a four mm I.D., containing two sections of 20/40 mesh activated charcoal separated by a two mm portion of urethane foam. The activated charcoal is prepared from coconut shells and is fired at 600 °C before packing. The adsorbing section contains 100 mg of charcoal and the back-up section 50 mg. A three mm portion of urethane foam is placed between the outlet end of the tube and the back-up section. A plug of silanized glass wool is placed in front of the adsorbing section. The pressure drop across the tube must be less than one inch of mercury at a flow rate of one liter per minute.

3.3. Gas chromatograph equipped with a flame ionization detector.

3.4. Column (10 ft. x ⅛ in. stainless steel) packed with 80/100 Supelcoport coated with 20 percent SP 2100 and 0.1 percent CW 1500.

3.5. An electronic integrator or some other suitable method for measuring peak area.

3.6. Two-milliliter sample vials with Teflon-lined caps.

3.7. Microliter syringes: ten microliter (ten ul syringe, and other convenient sizes for making standards. One ul syringe for sample injections.

3.8. Pipets: 1.0 ml delivery pipets.

3.9. Volumetric flasks: convenient sizes for making standard solutions.

4. *Reagents.*

4.1. Chromatographic quality carbon disulfide (CS_2). Most commercially available carbon disulfide contains a trace of benzene which must be removed. It can be removed with the following procedure. Heat, under reflux for two to three hours, 500 ml of carbon disulfide, ten ml concentrated sulfuric acid, and five drops of concentrated nitric acid. The benzene is converted to nitrobenzene. The carbon disulfide layer is removed, dried with anhydrous sodium sulfate, and distilled. The recovered carbon disulfide should be benzene free. (It has recently been determined that benzene can also be removed by passing the carbon disulfide through a 13x molecular sieve).

4.2. Benzene, reagent grade.

4.3. P-Cymene, reagent grade (internal standard).

4.4. Desorbing reagent. The desorbing reagent is prepared by adding 0.05 ml of p-cymene per milliliter of carbon disulfide. (The internal standard offers a convenient means correcting analytical response for slight inconsistencies in the size of sample injections. If the external standard technique is perferred, the internal standard can be eliminated.)

4.5. Purified GC grade helium, hydrogen, and air.

5. *Procedure.*

5.1. Cleaning of equipment. All glassware used for the laboratory analysis should be properly cleaned and free of organics which could interfere in the analysis.

5.2. Calibration of personal pumps. Each pump must be calibrated with a representative charcoal tube in the line.

5.3. Collection and shipping of samples.

5.3.1. Immediately before sampling, break the ends of the tube to provide an opening at least one-half the internal diameter of the tube (two mm).

5.3.2. The smaller section of the charcoal is used as the backup and should be placed nearest the sampling pump.

5.3.3. The charcoal tube should be placed in a vertical position during sampling to minimize channeling through the charcoal.

5.3.4. Air being sampled should not be passed through any hose or tubing before entering the charcoal tube.

5.3.5. A sample size of 10 liters is recommended. Sample at a flow rate of approximately 0.2 liters per minute. The flow rate should be known with an accuracy of at least ± five percent.

5.3.6. The charcoal tubes should be capped with the supplied plastic caps immediately after sampling.

5.3.7. Submit at least one blank tube (a charcoal tube subjected to the same handling procedures, without having any air drawn through it) with each set of samples.

5.3.8. Take necessary shipping and packing precautions to minimize breakage of samples.

5.4. Analysis of samples.

5.4.1. Preparation of samples. In preparation for analysis, each charcoal tube is scored with a file in front of the first section of charcoal and broken open. The glass wool is removed and discarded. The charcoal in the first (larger) section is transferred to a two ml vial. The separating section of foam is removed and discarded and the second section is tranferred to another capped vial. These two sections are analyzed separately.

5.4.2. Desorption of samples. Before analysis, 1.0 ml of desorbing solution is pipetted into each sample container. The desorbing solution consists of 0.05 ul internal standard per milliliter of carbon disulfide. The sample vials are capped as soon as the solvent is added. Desorption should be done for 30 minutes with occasional shaking.

5.4.3. GC conditions. Typical operating conditions for the gas chromatograph are as follows:

1. 30 ml/min (60 psig) helium carrier gas flow.
2. 30 ml/min (40 psig) hydrogen gas flow to detector.
3. 240 ml/min (40 psig) air flow to detector.
4. 150 °C injector temperature.
5. 250 °C detector temperature.
6. 100 °C column temperature.

5.4.4. Injection size. One ul.

5.4.5. Measurement of area. The peak areas are measured by an electronic integrator or some other suitable form of area measurement.

5.4.6. An internal standard procedure is used. The integrator is calibrated to report results in ppm for a 10 liter air sample after correction for desorption efficiency.

5.5. Determination of desorption effeciency.

5.5.1. Importance of determination. The desorption efficiency of a particular compound may vary from one laboratory to another and from one lot of chemical to another. Thus, it is necessary to determine, at least once, the percentage of the specific compound that is removed in the desorption process, provided the same batch of charcoal is used.

5.5.2. Procedure for determining desorption efficiency. The reference portion of the charcoal tube is removed. To the remaining portion, amounts representing 0.5X, 1X, and 2X (X represents target concentration) based on a 10 liter air sample, are injected into several tubes at each level. Dilutions of benzene with carbon disulfide are made to allow injection of measurable quantities. These tubes are then allowed to equilibrate at least overnight. Following equilibration, they are analyzed following the same procedure as the samples. Desorption efficiency is determined by dividing the amount of benzene found by amount spiked on the tube.

6. *Calibration and standards.*

A series of standards varying in concentration over the range of interest is prepared and analyzed under the same GC conditions that will be used on the samples. A calibration curve is prepared by plotting concentration (μg/ml) versus peak area.

7. *Calculations.*

Benzene air concentration can be calculated from the following equation: $mg/m^3 = (A)(B)(C)(D)$.

Where: A = μg/ml benzene, obtained from the calibration curve; B = desorption volume (one ml); C = liters of air sampled; and D = desorption efficiency.

The concentration in mg/m^3 can be converted to ppm (at 25° and 760 mm) with following equation: $ppm = (mg/m^3)(24.46)/(78.11)$.

Where: 24.46 = molar volume of an ideal gas 25 °C and 760 mm; and 78.11 molecular weight of benzene.

8. *Backup data.*

8.1. Detection limit—Air Samples. The detection limit for the analytical procedue is 1.28 ng with a coefficient of variation of 0.023 at this level. This would be equivalent to an air concentration 0.04 ppm for a 10 liter air sample. This amount provided a chromatographic peak that could be identifiable in the presence of possible interferences. The detection limit data were obtained by making one ul injections of a 1.283 μg/ml standard.

Injection	Area count	
1	655.4	
2	617.5	
3	662.0	X = 640.2
4	641.1	SD = 14.9
5	636.4	CV = 0.023
6	629.2	

8.2. Pooled coefficient of variation—Air Samples. The pooled coefficient of variation for the analytical procedure was determined by one ul replicate injections of analytical standards. The standards were 16.04, 32.08, and 64.16 μg/ml, which are equivalent to 0.5, 1.0, and 2.0 ppm for a 10 liter air sample respectively.

8.3. Storage data—Air Samples. Samples were generated at 1.03 ppm benzene at 80%

relative humidity, 22 °C, and 643 mm. All samples were taken for 50 minutes at 0.2 liters/min. Six samples were analyzed immediately and the rest of the samples were divided into two groups by fifteen samples each. One group was stored at refrigerated temperature of −25 °C and the other group was stored at ambient temperature (approximately 23 °C). These samples were analyzed over a period of fifteen days. The results are tabulated below.

Injection	Area counts		
	0.5 ppm	1.0 ppm	2.0 ppm
1	3996.5	8130.2	16481
2	4059.4	8235.6	16493
3	4052.0	8307.9	16535
4	4027.2	8263.2	16609
5	4046.8	8291.2	16552
6	4137.9	8288.8	16618
X=	4053.3	8254.0	16548.3
SD=	47.2	62.5	57.1
CV=	0.0116	0.0076	0.0034
$\overline{CV}$=0.008			

Percent Recovery

Day analyzed	Refrigerated			Ambient		
0	97.4	98.7	98.9	97.4	98.7	98.9
0	97.1	100.6	100.9	97.1	100.6	100.9
2	95.8	96.4	95.4	95.4	96.6	96.9
5	93.9	93.7	92.4	92.4	94.3	94.1
9	93.6	95.5	94.6	95.2	95.6	96.6
13	94.3	95.3	93.7	91.0	95.0	94.6
15	96.8	95.8	94.2	92.9	96.3	95.9

8.4. Desorption data. Samples were prepared by injecting liquid benzene onto the A section of charcoal tubes. Samples were prepared that would be equivalent to 0.5, 1.0, and 2.0 ppm for a 10 liter air sample.

PERCENT RECOVERY

Sample	0.5 ppm	1.0 ppm	2.0 ppm
1	99.4	98.8	99.5
2	99.5	96.7	99.7

PERCENT RECOVERY—Continued

Sample	0.5 ppm	1.0 ppm	2.0 ppm
3	99.2	98.6	99.8
4	99.4	99.1	100.0
5	99.2	99.0	99.7
6	99.8	99.1	99.9
X=	99.4	98.9	99.8
SD=	0.22	0.21	0.18
CV=	0.0022	0.0021	0.0018
$\overline{X}$=99.4			

8.5. Carbon disulfide. Carbon disulfide from a number of sources was analyzed for benzene contamination. The results are given in the following table. The benzene contaminant can be removed with the procedures given in section I.4.1.

Sample	ug Benzene/ml	ppm equivalent (for 10 liter air sample)
ALDRICH Lot 83017	4.20	0.13
BAKER Lot 720364	1.01	0.03
BAKER Lot 822351	1.01	0.03
Malinkrodt Lot WEMP	1.74	0.05
Malinkrodt Lot WDSJ	5.65	0.18
Malinkrodt Lot WHGA	2.90	0.09
Treated CS_2	—	—

II. OSHA Laboratory Method No. 12 for Bulk Samples

Analyte: Benzene

Matrix: Bulk Samples

Procedure: Bulk samples are analyzed directly by high performance liquid chromatography (HPLC).

Detection limits: 0.01% by volume.

1. *Principle of the method.*

1.1. An aliquot of the bulk sample to be analyzed is injected into a liquid chromatograph.

1.2. The peak area for benzene is determined and compared to areas obtained from standards.

2. *Advantages and disadvantages of the method.*

2.1. The analytical procedure is quick, sensitive, and reproducible.

2.2. Reanalysis of samples is possible.

2.3. Interferences can be circumvented by proper selection of HPLC parameters.

2.4. Samples must be free of any particulates that may clog the capillary tubing in the liquid chromatograph. This may require distilling the sample or clarifying with a clarification kit.

3. *Apparatus.*

3.1. Liquid chromatograph equipped with a UV detector.

3.2. HPLC Column that will separate benzene from other components in the bulk sample being analyzed. The column used for validation studies was a Waters μBondapack C18, 30 cm × 3.9 mm.

3.3. A clarification kit to remove any particulates in the bulk if necessary.

3.4. A micro-distillation apparatus to distill any samples if necessary.

3.5. An electronic integrator or some other suitable method of measuring peak areas.

3.6. Microliter syringes—ten μl syringe and other convenient sizes for making standards. 10 μl syringe for sample injections.

3.7 Volumetric flasks, five ml and other convenient sizes for preparing standards and making dilutions.

4. *Reagents.*

4.1. Benzene, reagent grade.

4.2. HPLC grade water, methyl alcohol, and isopropyl alcohol.

5. *Collection and shipment of samples.*

5.1. Samples should be transported in glass containers with Teflon-lined caps.

5.2. Samples should not be put in the same container used for air samples.

6. *Analysis of samples.*

6.1. Sample preparation. If necessary, the samples are distilled or clarified. Samples are analyzed undiluted. If the benzene concentration is out of the working range,

suitable dilutions are made with isopropyl alcohol.

6.2. HPLC conditions. The typical operating conditions for the high performance liquid chromatograph are:

1. Mobile phase—Methyl alcohol/water, 50/50.

2. Analytical wavelength—254 nm.

3. Injection size—10 μl.

6.3. Measurement of peak area and calibration. Peak areas are measured by an integrator or other suitable means. The intergrator is calibrated to report results in % benzene by volume.

7. *Calculations.*

Because the integrator is programmed to report results in % benzene by volume in an undiluted sample, the following equation is used: % Benzene by Volumn = A × B.

Where: A = % by volume on report.
B = Dilution Factor. (B = one for undiluted sample).

8. *Backup data.*

8.1. Detection limit—Bulk Samples. The detection limit for the analytical procedure bulk samples is 0.88 μg, with a coefficient of variation of 0.019 at this level. This amount provided a chromatographic peak that could be identifiable in the presence of possible interferences. The detection limit data were obtained by making ten μl injections of a 0.10% by volume standard.

Injection	Area count	
1	45386	
2	44214	
3	43822	X = 44040.1
4	44062	SD = 852.5
6	42724	CV = 0.019

8.2. Pooled coefficient of variation—Bulk Samples. The pooled coefficient of variation for analytical procedure was determined by 50 μl replicate injections of analytical standards. The standards were 0.01, 0.02, 0.04, 0.10, 1.0, and 2.0% benzene by volume.

AREA COUNT

[Percent]

Injection No.	0.01%	0.02%	0.04%	0.10%	1.0%	2.0%
1	45386	84737	166097	448497	4395380	9339150
2	44241	84300	170832	441299	4590800	9484900
3	43822	83835	164160	443719	4593200	9557580
4	44062	84381	164445	444842	4642350	9677060
5	44006	83012	168398	442564	4646430	9766240
6	42724	81957	173002	443975	4646260	—
X =	44040.1	83703.6	167872	444149	4585767	9564986
SD =	852.5	1042.2	3589.8	2459.1	96839.3	166233
CV =	0.0194	0.0125	0.0213	0.0055	0.0211	0.0174
CV = 0.017						

Appendix E—Respirator Fit Tests Procedures

This appendix contains the procedures for properly fitting a respirator to employees who may be exposed to benzene and includes the Initial Fit Tests (IFT), the Qualitative Fit Tests (QLFT), and the Quantitative Fit Test (QNFT).

I. Initial Fit Tests (IFT)

(a) The test subject must be allowed to select the most comfortable respirator from a selection of respirators of various sizes. The selection must include at least three sizes of elastomeric facepieces for the type of respirator that is to be tested (i.e., three sizes of half mask or three sizes of full facepiece).

(b) Before the selection process, the test subject must be shown how to put on a respirator, how it should be positioned on the face, how to set strap tension, and how to determine a comfortable fit. A mirror must be available to assist the subject in evaluating the fit and positioning the respirator. This instruction is only a preliminary review and must not constitute the subject's formal training on respirator use.

(c) The test subject must be informed that he or she is being asked to select the respirator which provides the most comfortable fit. Each respirator represents a different size and shape and, if fitted and used properly, should provide adequate protection.

(d) The test subject must be instructed to hold each facepiece up to the face and eliminate those facepieces which obviously do not give a comfortable fit.

(e) The more comfortable facepieces must be noted and the most comfortable mask donned and worn at least five minutes to assess comfort. Assistance in assessing comfort may be given by discussing the points in section I(f) of this appendix. If the test subject is not familiar with using a particular respirator, the test subject must be directed to don the mask several times and to adjust the straps each time to become adept at setting proper tension on the straps.

(f) Assessment of comfort must include reviewing the following points with the test subject and allowing the test subject adequate time to determine the comfort of the respirator:

(1) Position of the mask on the nose.

(2) Room for eye protection.

(3) Room to talk.

(4) Position of mask on face and cheeks.

(g) The following criteria must be used to help determine the adequacy of the respirator fit:

(1) Chin properly placed.

(2) Adequate strap tension, not overly tightened.

(3) Fit across nose bridge.

(4) Respirator of proper size to span distance from nose to chin.

(5) Tendency of respirator to slip.

(6) Self-observation in mirror to evaluate fit and respirator position.

(h) The following negative and positive pressure fit tests must be conducted. These fit tests are the same as the fit tests in ANSI Z88.2–1980, Practices for Respiratory Protection, (available from American National Standards Institute, 1430 Broadway, New York, NY 10018). Before conducting a negative or positive pressure fit test, the subject must be told to seat the mask on the face by moving the head from side-to-side and up and down slowly while taking in a few slow deep breaths. Another facepiece must be selected and retested if the test subject fails the fit check tests.

(1) *Positive pressure fit test.* The exhalation valve must be closed off and the subject must exhale gently onto the facepiece. The face fit is considered satisfactory if a slight positive pressure can be built up inside the facepiece without any evidence of outward leakage of air at the seal. For most respirators this method of leak testing requires the wearer to first remove the exhalation valve cover before closing off the exhalation valve and then carefully replacing it after the test.

(2) *Negative pressure fit test.* The inlet opening of the canister or cartridge(s) must be closed off by covering with the palm of the hand(s) or by replacing the filter seal(s). The subject must inhale gently so that the facepiece collapses slightly and hold his or her breath for ten seconds. If the facepiece remains in its slightly collapsed condition and no inward leakage of air is detected, the tightness of the respirator is considered satisfactory.

(i) The test must not be conducted if the subject has any hair growth between the skin and the facepiece sealing surface, such as stubble beard growth, beard, or long sideburns which cross the respirator sealing surface. Any type of apparel, such as a skull cap or the temple bars of eye glasses, which projects under the facepiece or otherwise interferes with a satisfactory fit must be altered or removed.

(j) If the test subject exhibits difficulty in breathing during the tests, the subject must be referred to a physician trained in respiratory disease or pulmonary medicine to

determine whether the test subject can wear a respirator while performing his or her duties.

(k) The test subject must be given the opportunity to wear the successfully fitted respirator for a period of two weeks. If at any time during this period the respirator becomes uncomfortable, the test subject must be given the opportunity to select a different facepiece and to be retested.

(l) Exercise regimen. Before beginning the fit test, the test subject must be given a description of the fit test and of the test subject's responsibilities during the test procedure. The description of the process must include a description of the test exercises that the subject must perform. The respirator to be tested must be worn for at least five minutes before the start of the fit test.

(m) Test Exercises. The test subject must perform the following exercises in the test environment:

(1) Normal breathing. In a normal standing position, without talking, the subject must breathe normally.

(2) Deep breathing. In a normal standing position, the subject must breathe slowly and deeply, taking caution so as to not hyperventilate.

(3) Turning head side to side. Standing in place, the subject must slowly turn his or her head from side to side between the extreme positions on each side. The subject must hold his or her head at each extreme momentarily and inhale.

(4) Moving head up and down. Standing in place, the subject must slowly move his or her head up and down. The subject must be instructed to inhale in the up position (i.e., when looking toward the ceiling).

(5) Talking. The subject must talk slowly and loudly enough so as to be heard clearly by the test conductor. The subject must count backward from 100, recite a memorized poem or song, or read the following passage:

Rainbow Passage

When the sunlight strikes raindrops in the air, they act like a prism and form a rainbow. The rainbow is a division of white light into many beautiful colors. These take the shape of a long round arch, with its path high above, and its two ends apparently beyond the horizon. There is, according to legend, a boiling pot of gold at one end. People look, but no one ever finds it. When a man looks for something beyond reach, his friends say he is looking for the pot of gold at the end of the rainbow.

(6) Grimace. The test subject must grimace by smiling or frowning.

(7) Bending over. The test subject must bend at the waist as if to touch the toes or, for test environments such as shroud type QNFT units which prohibit bending at the waist, the subject must jog in place.

(8) Normal breathing. Same as exercise 1.

Each test exercise must be performed for one minute, except for the grimace exercise which must be performed for 15 seconds. The test subject must be questioned by the test conductor regarding the comfort of the respirator upon completion of test exercises. If it has become uncomfortable, another respirator must be tried and the subject retested.

(n) The employer shall certify that a successful fit test has been administered to the test subject. The certification must include the following information:

(1) Name of employee.

(2) Type, brand, and size of respirator.

(3) Date of test.

Where QNFT is used, the fit factor, strip chart, or other recording of the results of the test must be retained with the certification. The certification must be maintained until the next fit test is administered.

II. Qualitative Fit Tests (QLFT)

(a) *General.* (1) The employer shall designate specific individuals to administer the respirator qualitative fit test program. The employer may contract for these services.

(2) The employer shall ensure that persons administering QLFT are able to properly prepare test solutions, calibrate equipment, perform tests, recognize invalid tests, and determine whether the test equipment is in proper working order.

(3) The employer shall ensure that QLFT equipment is kept clean and maintained so as to operate at the parameters for which it was designed.

(b) *Isoamyl acetate tests.* (1) Odor threshold screening test. The odor threshold screening test, performed without wearing a respirator, is intended to determine if the test subject can detect the odor of isoamyl acetate.

(i) Three one-liter glass jars with metal lids must be used.

(ii) Odor free water (e.g. distilled or spring water) at approximately 25 degrees C must be used for the solutions.

(iii) An isoamyl acetate (IAA) (also known at isopentyl acetate) stock solution must be prepared by adding one cc of pure IAA to 800 cc of odor free water in a one liter jar and by shaking the jar for 30 seconds. A new solution must be prepared at least weekly.

(iv) The screening test must be conducted in a room separate from the room used for actual fit testing. The two rooms must be well ventilated but not connected to the same recirculating ventilation system.

(v) An odor test solution must be prepared in a second one-liter jar by placing 0.4 cc of the stock solution into 500 cc of odor free water using a clean dropper or pipette. The solution must be shaken for 30 seconds and allowed to stand for two to three minutes so that the IAA concentration above the liquid may reach equilibrium. This solution must be used for only one day.

(vi) A test blank must be prepared in a third one-liter jar by adding 500 cc of odor free water.

(vii) The odor test jar and the test blank jar must be labeled "1" and "2" for identification. The labels must be placed on the jar lids so that the labels can be periodically peeled off, dried, and switched to maintain the integrity of the test.

(viii) The following instruction must be typed on a card and placed on a table in front of the odor test jar and the test blank jar:

The purpose of this test is to determine if you can smell banana oil at a low concentration. The two bottles in front of you contain water. One of these bottles also contains a small amount of banana oil. Be sure the covers are on tight, then shake each bottle for two seconds. Unscrew the lid of each bottle, one at a time, and sniff at the mouth of the bottle. Indicate to the test conductor which bottle contains banana oil.

(ix) The mixtures in the jars used in the IAA odor threshold screening must be prepared in an area separate from the test area, in order to prevent olfactory fatigue in the test subject.

(x) If the test subject is unable to correctly identify the jar containing the odor test solution, the IAA qualitative fit test must not be performed.

(xi) If the test subject correctly identifies the jar containing the odor test solution, the test subject may proceed to respirator selection and fit testing.

(2) Isoamyl acetate fit test. (i) The fit test chamber must be a clear 55-gallon drum liner or similar device suspended inverted over a two foot diameter frame so that the top of the chamber is about six inches above the test subject's head. The inside top center of the chamber must have a small hook attached.

(ii) Each respirator used for the fitting and fit testing must be equipped with organic vapor cartridges or offer protection against organic vapors. The cartridges or masks must be changed at least weekly.

(iii) After selecting, donning, and properly adjusting a respirator, the test subject must wear the respirator to the fit testing room. This room must be separate from the room used for odor threshold screening and respirator selection and must be well ventilated by an exhaust fan, lab hood, or other device to prevent general room contamination.

(iv) A copy of the test exercises and any prepared text from which the subject is to read must be taped to the inside of the test chamber.

(v) Upon entering the test chamber, the test subject must be given a six inch by five inch piece of paper towel or other porous, absorbent, single-ply material, folded in half and wetted with 0.75 cc of pure IAA. The test subject must hang the wet towel on the hook at the top of the chamber.

(vi) Two minutes must be allowed for the IAA test concentration to stabilize before starting the fit test exercises. This would be an appropriate time to talk with the test subject, to explain the fit test, the importance of the subject's cooperation, and the purpose for the head exercises, or to demonstrate some of the exercises.

(vii) The test subject must be instructed to perform the exercises described in Section I(n) of this appendix. If at any time during the test the subject detects the banana like odor of IAA, the test is failed. The subject must be removed quickly from the test chamber and the test area to avoid olfactory fatigue.

(viii) If the test is failed, the subject must return to the selection room, remove the respirator, repeat the odor sensitivity test, select and don another respirator, return to the test chamber, and again take the IAA fit test. The process must continue until a respirator that fits well is found. If the odor sensitivity test is failed, the subject must wait at least five minutes before retesting to allow odor sensitivity to return.

(ix) When a respirator is found that passes the test, the subject must demonstrate the efficiency of the respirator by breaking the face seal and taking a breath before exiting the chamber. If the subject cannot detect the odor of IAA, the test is deemed inconclusive and must be rerun.

(x) When the test subject leaves the chamber, the subject must remove the saturated towel and return it to the person conducting the test. To keep the test area from becoming contaminated, the used towel must be kept in a self-sealing bag to avoid significant IAA concentration build-up in the test chamber for subsequent tests.

(c) *Saccharin solution aerosol test.* The saccharin solution aerosol test is an alternative qualitative test. Although it is the only validated test currently available for use with particulate disposable dust respirators not equipped with high-efficiency filters, it may also be used for testing other respirators. The entire screening and testing procedure must be explained to the test subject before the conduct of the saccharin test threshold screening test.

(1) Saccharin taste threshold screening test. The test, performed without wearing a respirator, is intended to determine whether the test subject can detect the taste of saccharin.

(i) The subject must wear an enclosure about the head and shoulders that is approximately 12 inches in diameter by 14 inches tall with at least the front portion clear. If the enclosure is also used for the saccharin solution aerosol fit test under section II(c)(2) of this appendix, the enclosure must allow free movements of the head when a respirator is worn. An enclosure substantially similar to the Minnesota, Mining and Manufacturing (3M) hood assembly, parts No. FT 14 and No. FT 15 combined, is adequate.

(ii) The test enclosure must have a ¾ inch hole in front of the test subject's nose and mouth area to accommodate the nebulizer nozzle.

(iii) The test subject must don the test enclosure. Throughout the threshold screening test, the test subject must breathe with mouth wide open and tongue extended.

(iv) Using a DeVilbiss Model 40 Inhalation Medication Nebulizer, the test conductor must spray the threshold check solution under II(c)(1)(v) of this appendix into the enclosure. The nebulizer must be clearly marked to distinguish it from the fit test solution nebulizer.

(v) The threshold check solution consists of 0.83 grams of sodium saccharin USP in one cc of warm water. It may be prepared by putting one cc of the fit test solution (see Section II(c)(2)(iv) of this appendix) in 100 cc of distilled water.

(vi) To produce the aerosol, the nebulizer bulb must be firmly squeezed so that it collapses completely. Then, the bulb must be released and allowed to expand fully.

(vii) The bulb must be squeezed rapidly ten times and the test subject must be asked whether he or she tastes the saccharin.

(viii) If the first response is negative, the ten rapid squeezes must be repeated and the test subject is again asked whether he or she tastes the saccharin.

(ix) If the second response is negative, ten more squeezes are repeated rapidly and the test subject again asked whether the saccharin is tasted.

(x) The test conductor must take note of the number of squeezes required to solicit a taste response.

(xi) If the saccharin is not tasted after 30 squeezes, the test subject may not perform the saccharin fit test.

(xii) If a taste response is elicited, the test subject must be asked to take note of the taste for reference in the fit test.

(xiii) Correct use of the nebulizer means that approximately one cc of liquid is used at a time in the nebulizer body.

(xiv) The nebulizer must be thoroughly rinsed in water, shaken dry, and refilled at least each morning and afternoon or at least every four-hours.

(2) Saccharin solution aerosol fit test. (i) The test subject may not eat, drink (except plain water), or chew gum for 15 minutes before the test.

(ii) The fit test must be conducted with the same type of enclosure used for the saccharin taste threshold screening test under Section II(c)(1) of this appendix.

(iii) The test subject must don the enclosure while wearing the respirator selected in the saccharin taste threshold screening test. The respirator must be properly adjusted and equipped with a particulate filter(s).

(iv) A second DeVilbiss Model 40 Inhalation Medication Nebulizer must be used to spray the fit test solution into the enclosure. This nebulizer must be clearly marked to distinguish it from the nebulizer used for the threshold check solution under Section II(c)(1)(iv) of this appendix.

(v) The fit test solution must be prepared by adding 83 grams of sodium saccharin to 100 cc of warm water.

(vi) The test subject must breathe with mouth wide open and tongue extended.

(vii) The nebulizer must be inserted into the hole in the front of the enclosure and the fit test solution must be sprayed into the enclosure using the same number of squeezes required to elicit a taste response in the screening test under Sections II(c)(1)(vi) through II(c)(1)(xi) of this appendix.

(viii) After generating the aerosol, the test subject must be instructed to perform the exercises in Section I(n) of this appendix.

(ix) Every 30 seconds, the aerosol concentration must be replenished using one half the number of squeezes used initially.

(x) The test subject must indicate to the test conductor if, at any time during the fit test, the taste of saccharin is detected.

(xi) If the taste of saccharin is detected, the fit must be deemed unsatisfactory and a different respirator must be tried.

(d) *Irritant fume test.* The irritant fume test is an alternative qualitative fit test.

(1) The respirator to be tested must be equipped with high-efficiency particulate air (HEPA) filters.

(2) The test subject must be allowed to smell a weak concentration of the irritant smoke before the respirator is donned to become familiar with the smoke's characteristic odor.

(3) Both ends of a ventilation smoke tube containing stannic oxychloride, such as the Marine Safety Appliance part No. 5645 or equivalent, must be broken. One end of the smoke tube must be attached to a low flow air pump set to deliver 200 milliliters per minute.

(4) The test subject must be advised that the smoke may be irritating to the eyes and that the subject must keep his or her eyes closed while the test is performed.

(5) The test conductor must direct the stream of irritant smoke from the smoke tube towards the face seal area of the test subject. The test must be started with the smoke tube at least 12 inches from the facepiece, moved gradually to within one inch, and moved around the whole perimeter of the mask.

(6) Each test subject who passes the smoke test without evidence of a response must be given a sensitivity check of the smoke from the same tube once the respirator has been removed. This check is necessary to determine whether the test subject reacts to the smoke. Failure to evoke a response voids the fit test.

(7) The fit test must be performed in a location with exhaust ventilation sufficient to prevent general contamination of the testing area by the irritant smoke.

III. Quantitative Fit Tests (QNFT)

(a) *General.* (1) The employer shall designate specific individuals to administer the respirator quantitative fit test program.

(2) The employer shall ensure that persons administering QNFT are able to properly calibrate equipment, perform tests, recognize invalid tests, calculate fit factors, and determine whether the test equipment is in proper working order.

(3) The employer shall ensure that QNFT equipment is kept clean and maintained so as to operate at the parameters for which it was designed.

(b) *Definitions.* (1) "Quantitative fit test" means a test which is performed in a test chamber and in which the normal air-purifying element of the respirator is replaced with a high-efficiency particulate air (HEPA) filter, in the case of particulate QNFT aerosols, or with a sorbent offering contaminant penetration protection equivalent to high-efficiency filters, if the QNFT test agent is a gas or vapor.

(2) "Challenge agent" means the aerosol, gas, or vapor introduced into a test chamber so that its concentration inside and outside of the respirator may be measured.

(3) "Test subject" means the person wearing the respirator for quantitative fit testing.

(4) "Normal standing position" means an erect and straight stance with arms down along the sides and eyes looking straight ahead.

(5) "Maximum peak penetration method" means the method of determining test agent penetration in the respirator as determined by strip chart recordings of the test. The highest peak penetration for a given exercise is taken to be representative of average penetration into the respirator for that exercise.

(6) "Average peak penetration method" means the method of determining test agent penetration into the respirator by using a

strip chart recorder, integrator, or computer. The agent penetration is determined by an average of the peak heights on the graph, or by computer integration, for each exercise except the grimace exercise. Integrators or computers which calculate the actual test agent penetration into the respirator for each exercise also may be used under this method.

(7) "Fit factor" means the ration of challenge agent concentration outside with respect to the inside of a respirator inlet covering (facepiece or enclosure).

(c) *Apparatus.* (1) Instrumentation. Aerosol generation, dilution, and measurement systems using corn oil or sodium chloride as test aerosols must be used for quantitative fit testing.

(2) Test chamber. The test chamber must be large enough to permit all test subjects to perform freely all required exercises without disturbing the challenge agent concentration or the measurement apparatus. The test chamber must be equipped and constructed so that the challenge agent is effectively isolated from the ambient air, yet is uniform in concentration throughout the chamber.

(3) When testing air-purifying respirators, the normal filter or cartridge element must be replaced with a high-efficiency particulate filter supplied by the same manufacturer.

(4) The sampling instrument must be selected so that a strip chart record may be made of the test showing the rise and fall of the challenge agent concentration with each inspiration and expiration at fit factors of at least 2,000. Integrators or computers which integrate the amount of test agent penetration leakage into the respirator for each exercise may be used if a record of the readings is made.

(5) The combination of substitute air-purifying elements, challenge agent, and challenge agent concentration in the test chamber must be such that the test subject is not exposed to a concentration of the challenge agent in excess of the established exposure limit for the challenge agent at any time during the testing process.

(6) The sampling port on the test specimen respirator must be placed and constructed so that no leakage occurs around the port (e.g. where the respirator is probed), so that a free air flow is allowed into the sampling line at all times, and so that there is no interference with the fit or performance of the respirator.

(7) The test chamber and test set up must permit the person administering the test to observe the test subject inside the chamber during the test.

(8) The equipment generating the challenge atmosphere must maintain a constant concentration of challenge agent inside the test chamber to within a ten percent variation for the duration of the test.

(9) The time lag (i.e. the interval between an event and the recording of the event on the strip chart, computer, or integrator) must be kept to a minimum. There must be a clear association between the occurrence of an event inside the test chamber and the recording of that event.

(10) The sampling line tubing for the test chamber atmosphere and for the respirator sampling port must be of equal diameter and of the same material. The length of the two lines must be equal.

(11) The exhaust flow from the test chamber must pass through a high-efficiency filter before release.

(12) When sodium chloride aerosol is used, the relative humidity inside the test chamber must not exceed 50 percent.

(13) The limitations of instrument detection must be taken into account when determining the fit factor.

(14) Test respirators must be maintained in proper working order and inspected for deficiencies, such as cracks, missing valves, and gaskets.

(d) *Procedural requirements.* (1) When performing the initial positive or negative pressure test, the sampling line must be crimped closed in order to avoid air pressure leakage during either of these tests.

(2) In order to reduce the amount of QNFT time, an abbreviated screening isoamyl acetate test or irritant fume test may be used in order to quickly identify poor fitting respirators which passed the positive or negative pressure test. When performing a screening isoamyl acetate test, combination high-efficiency organic vapor cartridges or canisters must be used.

(3) A reasonably stable challenge agent concentration must be measured in the test chamber before testing. For canopy or shower curtain type of test units, the determination of the challenge agent stability may be established after the test subject has entered the test environment.

(4) Immediately after the subject enters the test chamber, the challenge agent concentration inside the respirator must be measured to ensure that the peak penetration does not exceed five percent for a half mask or one percent for a full facepiece respirator.

(5) A stable challenge concentration must be obtained before the actual start of testing.

(6) Respirator restraining straps must not be overtightened for testing. The straps must be adjusted by the wearer without assistance from other persons to give a fit reasonably comfortable for normal use.

(7) After obtaining a stable challenge concentration, the test subject must be instructed to perform the exercises described in Section I(n) of this appendix. The test must be terminated whenever any single peak penetration exceeds five percent for half masks and one percent for full facepiece respirators. The test subject must be refitted and retested. If two of the three required tests are terminated, the fit is deemed inadequate.

(8) In order to successfully complete a QNFT, three successful fit tests must be conducted. The results of each of the three independent fit tests must exceed the minimum fit factor needed for the class of respirator (e.g. half mask respirator, full facepiece respirator).

(9) Calculation of fit factors. (i) The fit factor must be determined for the quantitative fit test by taking the ratio of the average chamber concentration to the concentration inside the respirator.

(ii) The average test chamber concentration is the arithmetic average of the test chamber concentration at the beginning and of the end of the test.

(iii) The concentration of the challenge agent inside the respirator must be determined by one of the following methods:

(A) Average peak concentration.

(B) Maximum peak concentration.

(C) Integration by calculation of the area under the individual peak for each exercise. This includes computerized integration.

(10) Interpretation of test results. The fit factor established by the quantitative fit testing must be the lowest of the three fit factor values calculated from the three required fit tests.

(11) The test subject must not be permitted to wear a half mask or a full facepiece respirator unless a minimum fit factor equivalent to at least ten times the hazardous exposure level is obtained.

(12) Filters used for quantitative fit testing must be replaced at least weekly, whenever increased breathing resistance is encountered, or whenever the test agent has altered the integrity of the filter media. When used, organic vapor cartridges and canisters must be replaced daily or whenever there is an indication of a breakthrough by a test agent.

Appendix F—Sample Worker Certification Form

Benzene Worker's Certification

I, _____ (Name of Worker) _____, certify in accordance with 46 CFR 197.530—

(1) That I have had, within the previous twelve months, at least one medical examination under 46 CFR 197.560 or 29 CFR 1910.1028;

(2) That the physician conducting the latest medical examination under paragraph (1) of this certification did not recommend that I be excluded from areas where personal exposure may exceed the action level;

(3) That all respirators and personal protective clothing and equipment that I will use while on the vessel meet the requirements of 46 CFR 197.550(b) and 197.555(c) or of 29 CFR 1910.1028; and

(4) That all respirators that I will use while on the vessel have been fitted and fit tested in accordance with 46 CFR 197.550 (c) and (d) or with 29 CFR 1910.1028.

[Signature of Worker]
[Printed Name of Worker]
[Date Signed by Worker]

Dated: October 16, 1989.

M.J. Schiro,

Captain, U.S. Coast Guard, Acting Chief, Office of Marine Safety, Security and Environmental Protection.

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January 29, 1990

Part IV

Department of Energy

Office of Conservation and Renewable Energy

10 CFR Parts 420, 440, 455, and 465

Grant Appeals Procedures for State Energy Conservation Program, Weatherization Assistance Program for Low-Income Persons, Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Institutions, and Energy Service Program; Notice of Interim Final Rule

DEPARTMENT OF ENERGY

Office of Conservation and Renewable Energy

10 CFR Parts 420, 440, 455, 465

[Docket No. CE-RM-90-101]

Grant Appeals Procedures for State Energy Conservation Program; Weatherization Assistance Program for Low-Income Persons; Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Institutions; and Energy Extension Service Program

AGENCY: Department of Energy.

ACTION: Notice of Interim Final Rule, Public Hearings and Request for Public Comment.

SUMMARY: The Department of Energy gives notice of interim final amendments to establish clear and, to the extent practicable, uniform administrative review procedures, focusing principally on appeals of preaward denials of financial assistance in the State Energy Conservation Program (10 CFR part 420), the Weatherization Assistance Program for Low-Income Persons (10 CFR part 440), the Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Institutions (10 CFR part 455), and the Energy Extension Service Program (10 CFR part 465). The amendments would also conform existing postaward administrative review procedures to generally applicable administrative review procedures for the Department of Energy's financial assistance programs in 10 CFR part 600 which provide for review by the Department's Financial Assistance Appeals Board. Public written comments on the amendments are requested and an opportunity for public hearing is provided.

EFFECTIVE DATE: February 28, 1990.

DATES: Written comments (ten copies) on the interim final amendments must be received by March 30, 1990 to ensure their consideration. Three public hearings are scheduled to be held: Kansas City, Missouri, on February 26, 1990, Washington, DC, on February 27, 1990, and San Francisco, California on March 1, 1990. Requests to speak at the hearing must be received no later than February 22, for Kansas City, Missouri and Washington, DC and February 27, for San Francisco, California.

ADDRESSES: All written comments (ten copies), as well as requests to speak at the public hearing, are to be submitted to: U.S. Department of Energy, Office of Conservation and Renewable Energy, CE 43.1, Hearings and Dockets, Interim Final Rule on Appeals Process, SLAP, CE-RM-90-101, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-3012.

The public hearings will all begin at 9:30 a.m., and will be held at the following locations:

February 26:
Federal Building, 601 East 12th Street, Room 110 (1st Floor), Kansas City, Missouri 64106.

February 27:
U.S. Department of Energy, Forrestal Building, Room 1 E-245, 1000 Independence Avenue, SW., Washington, DC 20585.

March 1:
Philip Burton Federal Building, 450 Golden Gate Avenue (at Turk and Polk Streets), Room 15018 (15th Floor), San Francisco, California 94102.

Each person to be heard is requested to bring ten copies of his/her statement. In the event any person wishing to testify cannot meet this requirement, alternative arrangements can be made with the Office of Hearings and Dockets in advance by so indicating in the letter or phone request to make an oral presentation.

A transcript of the hearing, as well as the entire rulemaking record, will be available for inspection between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday except Federal holidays at the following address: DOE Freedom of Information Reading Room, United States Department of Energy, Room 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6020.

For more information concerning public participation in this rulemaking proceeding, see section XI, "Opportunity for Public Comment," of this notice.

FOR FURTHER INFORMATION CONTACT: Frank M. Stewart, Director/Robert K. Volk, Jr., Staff Director, Office of State and Local Assistance Programs, Department of Energy, Mail Stop CE-20, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9240/2300.

Neal J. Strauss, Office of General Counsel, Conservation and Regulations, Mail Stop GC-12, 6A-141, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9507.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

The Department of Energy (DOE) today gives notice of interim final amendments to the regulations for four State and local financial assistance programs to promote energy conservation which will provide, pursuant to 42 U.S.C. 7254, clear and, to the extent practicable, uniform administrative review procedures for resolution of *preaward* disputes over initial DOE field office decisions to deny financial assistance. The notice would also revise existing procedures for resolving certain *postaward* disputes arising out of field office notices of enforcement actions, such as termination for cause, in light of dispute resolution procedures in DOE's general financial assistance regulations which provide for administrative review by the DOE Financial Assistance Appeals Board. *See* 10 CFR 600.26.

The administrative review procedures are being revised principally to provide more effective remedies for the few cases where an applicant for financial assistance is unable to work out differences informally with DOE officials in field offices. DOE expects that informal settlement of issues in the field will continue to be the norm, with resort to administrative review procedures a rarity.

The four programs and their regulations are: (1) The State Energy Conservation Program (SECP), 10 CFR part 420; (2) the Weatherization Assistance Program for Low-Income Persons (WAP), 10 CFR part 440; (3) the Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Institutions (Schools and Hospitals Program), 10 CFR part 455; and (4) the Energy Extension Service Program (EES), 10 CFR part 465. Today's amendments would replace existing preaward administrative review procedures for SECP (10 CFR 420.9), WAP (10 CFR 440.30), and EES (10 CFR 465.10) which have proved confusing to the States and are unnecessarily inconsistent with each other. Today's amendments would also revise SECP, WAP, and EES postaward administrative review procedures by reallocating the responsibility for conducting a public hearing required by program rule to the DOE Financial Assistance Appeals Board. Finally, today's amendments would provide administrative review procedures in the Schools and Hospitals Program for preaward disputes where no administrative review procedures have previously existed.

The four programs were initially authorized by Congress in the 1970's and have been in operation more than ten years. Administration of the programs is largely decentralized, with applications for financial assistance, approvals of

State plans and plan amendments, and other routine administrative functions handled by a DOE Operations Office or, more often, a DOE Field Support Office which reports to an Operations Office Manager. National policy on programmatic matters, such as amendments to program regulations, is issued by the Assistant Secretary for Conservation and Renewable Energy or his or her designee. There are headquarters program staff for the four programs who report to the Assistant Secretary through the Director of the Office of State and Local Assistance Program (OSLAP).

All four programs are subject to DOE's general financial assistance regulations (10 CFR part 600). The general regulations provide that preaward appeals of denials of new applications for financial assistance are barred; that postaward appeals of suspensions (90 days or less) are barred; and that postaward appeals of enforcement actions, such as terminations for cause, go to the DOE Financial Assistance Appeals Board. *See* 10 CFR 600.26. The procedural rules of the Financial Assistance Appeals Board are set forth at 10 CFR part 1024. The general financial assistance regulations apply to all four programs *except* as otherwise provided in statute or program regulations.

Today's interim final regulatory amendments, described hereafter, will eliminate the main procedural inconsistencies among the different program regulations, and make it clear that the right of appeal extends to disputes over individual projects in a State's application for financial assistance under one of the programs. DOE hereby invites the States and members of the public to comment on the regulations during the comment period provided by this notice. Specifically requested are comments with any suggestions for improvement. DOE will respond to relevant comments in a **Federal Register** notice to promulgate the final version of today's interim final regulations.

II. Comparison of Existing and Interim Final Regulations

Existing regulations for the four programs affected by this notice were promulgated at different times. The SECP and EES regulations on administrative review are identical. *Compare* 10 CFR 420.9 *with* 10 CFR 465.10. The WAP regulation, 10 CFR 440.30, differs in some matters of detail, but shares common characteristics with the SECP and EES Program regulations. Schools and Hospitals regulations did not provide for administrative review except under 10 CFR 600.26.

Under SECP, EES and WAP, the Operations Office Manager (or more often, the Director of the local Support Office as the Manager's designee) is the key and almost the exclusive actor. The Manager reviews the application initially and provides an opportunity to amend and resubmit. The Manager must notify the applicant in writing of the reasons for denial, and the date, time, and place of a public hearing. Under SECP and EES regulations, the public hearing is conducted by a three member review panel selected by the Manager (including two non-DOE members) which submits a written report. The WAP hearing is conducted by the Manager. Under SECP and EES regulations, the Manager submits recommendations to the Secretary who is obliged to act on them within 10 days of receipt. The WAP regulation provides for a Manager's final determination which is subject to appeal to the Secretary who, upon receipt of the appeal, has 21 days to decide whether to take action or let the Manager's decision stand as is. Although there has never been an appeal under these regulations, the deadlines for the Secretary to act are so short that, as a practical matter, meaningful review would have been difficult.

To some extent, today's amendments add to the Manager's responsibilities, but more importantly, they promote opportunities for meaningful review by senior headquarters program officials. The amendments to the regulations of each program have the same common elements.

First, definitions are added for the Director of OSLAP and the Assistant Secretary, Conservation and Renewable Energy, who are the policy and decisionmaking officials in headquarters to act on appeals, and the definition of "Operations Office Manager" is amended. Each definition includes officials who may succeed to the Director's or Assistant Secretary's functions by virtue of a reorganization.

Second, the Manager is assigned the responsibility to decide initially whether to approve an application for financial assistance "to the extent that" the application conforms to applicable requirements. The words "to the extent that" are intended to indicate that, if an application includes an objectionable project or program measure but otherwise meets regulatory requirements, a Manager can and should grant the application, except as to the objectionable project or program measure.

Third, the regulations refer to informal voluntary dispute resolution at the field office level. Although never explicitly discussed in existing regulatory language, informal voluntary dispute resolution has always been and should continue to be the most expeditious and main method of working out differences between Managers and applicants. The Manager's decision becomes final if the applicant does not appeal.

Fourth, the conduct of a public hearing in a preaward dispute, to the extent that the regulations provide for such a hearing, is reassigned to the OSLAP Director. This provision ensures that the applicant has the opportunity to make an oral presentation to a policymaker in Washington, DC, rather than to the Manager. It should be noted that the type of public hearing referred to in the regulations is informal and legislative (like a rulemaking hearing).

Fifth, the OSLAP Director, after holding any public hearing which may be requested and reviewing the case file received from the field office, may concur in the field office decision, modify it, or reverse it. The latter two actions require a statement of reasons. If no appeal to the Assistant Secretary follows, the OSLAP Director's determination is final for DOE.

Sixth, the final level of appeal for an applicant is reassigned to the Assistant Secretary whose review is discretionary. It is anticipated that the Assistant Secretary would deny review in cases such as an appeal where the appellant is arguing for a policy which is inconsistent with a governing statutory provision. If the Assistant Secretary granted review and decided to modify or reverse the OSLAP Director's action, there would be an obligation to issue a written decision including a supporting statement of reasons.

Seventh, both the OSLAP Director and the Assistant Secretary are given longer times within which to act than the deadlines in the existing regulations. The times allotted should be sufficient to promote timely, meaningful review.

Eighth, the regulations are explicit regarding when and under what circumstances a decision becomes "final for DOE". Those words should be interpreted to mean that there is no further right to appeal to DOE's Office of Hearings and Appeals (OHA), to the Financial Assistance Appeals Board, or to any other official or office within DOE.

While the common elements of the interim final regulatory amendments are the most important aspects of today's rulemaking to participants in the four affected programs, there are unique

features of these amendments which should promote effective review by state officials and members of the public. First, while the SECP, WAP, and EES amendments broadly provide for administrative review of adverse preaward denials of financial assistance, the Schools and Hospital amendments are more narrowly drawn. For the most part, section 455.110 limits the disputes subject to administrative review to certain kinds of issues which arise under the program regulations as distinguished from the general financial assistance regulations. The list of disputes subject to administrative review is divided between applicants which are States and applicants which are institutions, i.e., schools, hospitals, or coordinating agencies (as defined by 10 CFR 455.2). States may seek administrative review of adverse decisions on State plans, State plan amendments, and applications for administrative expense grants. In light of the large number of applications, institutions are limited to appealing certain adverse decisions on applications for a grant award to acquire and install an energy conservation measure. The adverse decisions subject to appeal by institutions are those based on a determination of ineligibility for any reason, or of the unacceptability of an energy use evaluation submitted in lieu of an energy audit pursuant to § 455.20, or of the inadequacy of a privately funded technical assistance program. No other decisions, including decisions regarding the percent of project costs DOE decides to fund, 10 CFR 455.82, or denials of grant applications under general financial assistance regulations, 10 CFR part 600, are subject to administrative review under the regulatory amendments. The list of appealable matters has been limited to those involving issues which commonly arise and as to which there has been experience of a desire by applicants for headquarters review. Shorter time periods for institutional appeals, as distinguished from appeals by States, are provided because the funds available for grant awards are subject to deobligation after August 31, and then subject to reobligation during the succeeding four months in order to ensure that available funds are productively expended. The shorter time periods will promote resolution of any appeals by December 31 which is the date that funds, which may have been withheld to the end of the reobligation period pending a decision on appeal, will no longer be earmarked for a particular grant applicant.

Second, the provisions regarding availability of public hearings vary from program to program. The SECP, Schools and Hospitals, and EES amendments permit a public hearing only as to the denial of an entire application by a State for financial assistance because those denials implicate the interests of broad segments of the public and denials of an application by an institution typically involve the interests of many fewer members of the public. The WAP amendments broadly provide for a public hearing requested by any applicant on an adverse preaward denial of financial assistance or on an adverse termination from further participation in the program because the opportunity for hearing is specifically required by section 418(a) of the Energy Conservation and Production Act, as amended. 42 U.S.C. 6868(a). Third, the provisions regarding postaward enforcement actions and remedies continue to vary. The principal effect of the revised provisions is to reallocate the responsibility for conducting a public hearing, in the event such a hearing is requested, to the DOE Financial Assistance Appeals Board. However, the existing rights to prior notice and opportunity for public hearing in SECP, EES, and WAP are preserved intact. Under SECP and EES, such rights exist with respect to suspension or termination for failure to implement a State plan in accordance with program regulations. *See* 10 CFR 420.9(b) and 465.10(b). Under WAP, such rights exist with respect to termination from eligibility for further participation in the program. *See* 10 CFR 440.30 (d), (j). As noted above, the Schools and Hospitals program regulations do not have special provisions which deal with postaward enforcement actions or remedies. Grantees in the Schools and Hospitals Program have the limited postaward remedies which are generally available to DOE grantees under 10 CFR 600.26. It should be noted that the rights to prior notice and opportunity for public hearing, under SECP, EES, and WAP program regulations continue to be drawn very narrowly. The regulatory language does not preclude immediate enforcement action in appropriate cases of financial irregularities under the general financial assistance regulations.

III. Petroleum Violation Escrow Funds

Until 1982, the sole source of funding for the four programs subject to this notice was congressional appropriations. In late 1982, section 155 of the Further Continuing Appropriations Act, 1983 (known as the Warner Amendment), 96 Stat. 1830, became law. The Warner Amendment provided for disbursement to the States of $200 million obtained from settlement of petroleum overcharge cases and specified the four programs subject to this notice as eligible to receive those monies. The Warner Amendment was followed by the decision of the United States District Court for the District of Columbia in *United States* v. *Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (1985), *cert. denied*, 474 U.S. 1105 (1986), in which the court adopted the Warner Amendment as the general framework for restitutionary use of Exxon overcharge monies which amounted to more than $2 billion dollars.

Since *Exxon* was decided, substantial petroleum violation escrow funds have become available in other petroleum overcharge cases. *E.g., In Re: the Department of Energy Stripper Well Exemption Litigation*, M.D.L. 378 (D. Kan. 1986); *Diamond Shamrock Refining and Marketing* v. *Department of Energy*, C2–84–1832 (S.D. Ohio 1986); and the Petroleum Overcharge Distribution and Restitution Act, Public Law 99–509.

Under the settlement agreement *In Re: the Department of Energy Stripper Well Exemption Litigation, supra* at pp. 8–9, monies received by States for restitutionary purposes may be allocated to fund one or more existing or new energy-related programs. State expenditure of such monies is limited to: (1) Programs approved by OHA in subpart V refund proceedings; (2) programs referenced in the consent order in *Standard Oil Company of California (Chevron)* (46 FR 52221, October 26, 1981); (3) energy conservation activities in the Federal program which benefited under the *Exxon* decision; and (4) other court-approved restitutionary programs. If a State proposed allocation of funds is deemed inconsistent with the settlement agreement, the State may seek redress from OHA. However, once funds are properly allocated to one or more of the four programs subject to this notice, the expenditure of those funds is subject to the statutory and regulatory provisions, including administrative review procedures, which apply to appropriated funds for the program or programs.

With regard to petroleum violation escrow funds allocated to SECP, EES, and WAP, it is the general practice of States to make provision for their expenditure in the State plan. The States make such provision as part of the annual application for financial assistance or during the year in an application for approval of an amendment to a State plan. In Schools

and Hospitals, the general practice of States regarding such funds is to submit additional applications for financial assistance for approval. Under today's interim final amendments, field office decisions on State plans, State plan amendments, or Schools and Hospitals applications for financial assistance, to be financed by petroleum violation escrow funds, will be subject to administrative review on the same basis as similar decisions to be financed with appropriated funds. DOE invites comment on the need, if any, for special administrative review provisions tailored to petroleum violation escrow funds. At the present time, DOE does not think that there is a need for such special provisions.

IV. Review Under Executive Order 12291

Today's regulatory amendments were reviewed under Executive Order 12291. DOE has concluded that the rule is not a "major rule" because it will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete in domestic export markets. In accordance with the requirements of the Executive Order, this notice has been reviewed by the Office of Management and Budget.

V. Review Under the Regulatory Flexibility Act

These regulations were reviewed under the Regulatory Flexibility Act, Public Law 96–354, which requires preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities, i.e., small businesses, small government jurisdictions. DOE has concluded that the rule will affect a few small entities (principally in Schools and Hospitals) who appeal from denials of financial assistance, but that impact is not appreciably greater than the expense of appeal under existing regulations. DOE therefore certifies that there will not be a significant economic impact on a substantial number of small entities, and that preparation of a regulatory flexibility analysis is not warranted.

VI. Review Under the Paperwork Reduction Act

No information collection or recordkeeping requirements are imposed on the public by today's rules. Accordingly, no OMB clearance is required under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, or implementing regulations at 5 CFR part 1320.

VII. Review Under National Environmental Policy Act

DOE has concluded that promulgation of these wholly procedural rules would not represent a major Federal action having a significant impact on the human environment under the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*), Council of Environmental Quality guidelines (40 CFR parts 1500–1508), and DOE environmental guidelines (10 CFR part 1021). Therefore, no environmental impact statement has been prepared.

VIII. Review Under Executive Order 12612

Executive Order 12612 requires that regulations be reviewed for any substantial direct effects on States, on the relationship between the national government and the States, or in the distribution of power among various levels of government. If there are sufficient substantial direct effects, the Executive Order requires preparation of a federalism assessment to be used in decisions by senior policymakers in promulgating or implementing the regulation.

Today's regulatory amendments will affect appeal rights of States on denials of financial assistance applications. However, they are purely procedural, and will not have a substantial direct effect on the traditional rights and prerogatives of States in relationship to the Federal Government.

IX. Review Under the Federal Energy Administration Act

This notice was submitted for comment to the Administrator of the Environmental Protection Agency under section 7(c)(2) of the Federal Energy Administrator Act, as amended, 15 U.S.C. 766(c)(2). The Administration did not submit any comments.

X. Interim Final Effect

The regulatory amendments issued today are purely procedural. The amendments neither alter nor jeopardize substantive rights. For the most part, they reallocate decisionmaking responsibilities or provide for more time to submit documents or process cases. Accordingly, there is no need to propose the regulations for public comment prior to giving them final effect. 5 U.S.C. 553. However, DOE is providing for public comment and an opportunity for public hearing, and as indicated above, expects to respond to relevant comments in a notice of final rulemaking.

XI. Opportunity for Public Comment

A. *Written Comments.*—Interested persons are invited to participate in this rulemaking by submitting data, views or arguments with respect to the interim final regulatory amendments set forth in this notice. Comments should be submitted to the address for the Office of Hearings and Dockets, which is given in the beginning of this notice. The envelope and written comments submitted should be identified with the designation Interim Final Rule on Appeals Process, SLAP, Docket Number CE–RM–90–101. Ten (10) copies should be submitted.

All comments received on or before the date specified in the beginning of this notice and all other relevant information will be considered by DOE before taking final action on the interim final regulatory amendments.

Any persons submitting information which that person believes to be confidential and which may be exempt by law from public disclosure should submit one complete copy, as well as ten (10) copies from which the information claimed to be confidential has been deleted. DOE reserves the right to determine the confidential status of the information or data and to treat it according to its determination. This procedure is set forth in 10 CFR 1004.11, 44 FR 1908, January 8, 1979.

B. *Public Hearing.*—DOE will hold three public hearings on the interim final regulatory amendments as specified at the beginning of this notice.

Any person who has an interest in the interim final regulatory amendments or who is a representative of a group or class of persons which has an interest in it may make a request for an opportunity to make an oral presentation. Such a request to speak at the hearing should be directed to the Hearings and Dockets address given in the Addresses section of this notice and must be received by 4:30 p.m. local time, on the date specified in the Dates section.

The person making the request should describe briefly his or her interest in the proceeding. The person should also provide a phone number where the person may be reached. Those persons requesting an opportunity to provide testimony should bring ten copies of their statement to the hearing.

DOE reserves the right to select the persons to be heard at the hearing, to schedule the respective presentations, and to establish the procedures

governing the conduct of the hearing. The length of each presentation is limited to 20 minutes.

List of Subjects

10 CFR Part 420:

Appeals, Administrative review.

10 CFR Part 440:

Appeals, Administrative review.

10 CFR Part 455:

Appeals, Administrative review.

10 CFR Part 465:

Appeals, Administrative review.

Issued in Washington, DC, December 18, 1989.

J. Michael Davis,

Assistant Secretary, Conservation and Renewable Energy.

In 10 CFR, chapter II, parts 420, 440, 455, and 465 are amended as follows:

Part 420 is amended as follows:

1. The authority citation for part 420 continues to read as follows:

Authority: Title III, part C, as amended, of the Energy Policy and Conservation Act (42 U.S.C. 6321 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*).

1a. Section 420.2 is amended by adding the definitions of "Assistant Secretary" and "Director" in the appropriate alphabetical order and revising the definition of "Operations Office Manager" as follows:

§ 420.2 Definitions.

* * * * *

Assistant Secretary means the Assistant Secretary for Conservation and Renewable Energy or any official to whom the Assistant Secretary's functions may be redelegated by the Secretary.

* * * * *

Director means the Director of the Office of State and Local Assistance Programs or any official to whom the Director's functions may be redelegated by the Assistant Secretary.

* * * * *

Operations Office Manager means the manager of a DOE Operations Office or the manager's designee, or any official to whom the manager's functions part may be redelegated by the Secretary.

* * * * *

2. Section 420.5 is revised to read as follows:

§ 420.5 Review and approval of annual State applications and State plans.

(a) After receipt of an application for financial assistance or for approval of an amendment to a State plan, the Operations Office Manager may request the State to submit within a reasonable period of time any revisions necessary to make the application complete or to bring the application into compliance with the requirements of this part. The Operations Office Manager shall attempt to resolve any dispute over the application informally and to seek voluntary compliance. If a State fails to submit timely appropriate revisions to complete an application, the Operations Office Manager may reject the application as incomplete in a written decision, including a statement of reasons, which shall be subject to administrative review under § 420.9 of this part.

(b) On or before 60 days from the date that a timely filed application is complete, the Operations Office Manager shall decide whether DOE shall approve the application. The Operations Office Manager may—

(1) Approval the application in whole or in part to the extent that—

(i) The application conforms to the requirements of this part;

(ii) The proposed program measures are consistent with a State's achievement of its energy conservation goals in accordance with § 420.4; and

(iii) The provisions of the application regarding program measures satisfy the minimum requirements prescribed by § 420.6 and § 420.7 as applicable;

(2) Approve the application in whole or in part subject to special conditions designed to ensure compliance with the requirements of this part; or

(3) Disapprove the application if it does not conform to the requirements of this part.

3. Section 420.9 is revised to read as follows:

§ 420.9 Administrative review.

(a) An applicant shall have 20 days from the date of decision under § 420.5 to file a notice requesting administrative review in accordance with paragraph (b) of this section. If an applicant does not timely file such a notice, the decision under § 420.5 shall become final for DOE.

(b) A notice requesting administrative review shall be filed with the Operations Office Manager and shall be accompanied by a written statement containing supporting arguments. If the Operations Office Manager has disapproved an entire application for financial assistance, the State may request a public hearing.

(c) A notice or any other document shall be deemed filed under this section upon receipt.

(d) On or before 15 days from receipt of a notice requesting administrative review which is timely filed, the Operations Office Manager shall forward to the Director, the notice requesting administrative review, the decision under § 420.5 as to which administrative review is sought, a draft recommended final decision for concurrence, and any other relevant material.

(e) If the State requests a public hearing on the disapproval of an entire application for financial assistance, the Director, within 15 days, shall give actual notice to the State and **Federal Register** notice of the date, place, time, and procedures which shall apply to the public hearing. Any public hearing under this section shall be informal and legislative in nature.

(f) On or before 45 days from receipt of documents under paragraph (d) of this section or the conclusion of the public hearing, whichever is later, the Director shall concur in, concur in as modified, or issue a substitute for the recommended decision of the Operations Office Manager.

(g) On or before 15 days from the date of the determination under paragraph (f) of this section, the Governor may file an application for discretionary review by the Assistant Secretary. On or before 15 days from filing, the Assistant Secretary shall send a notice to the Governor stating whether the Director's determination will be reviewed. If the Assistant Secretary grants review, a decision shall be issued no later than 60 days from the date review is granted.

(h) A decision under paragraph (f) of this section shall be final for DOE if there is no review under paragraph (g). If there is review under paragraph (g), the decision thereunder shall be final for DOE and no appeal shall lie elsewhere in DOE.

(i) Prior to the effective date of the termination or suspension of a grant award for failure to implement an approved State plan in compliance with the requirements of this part, a grantee shall have the right to written notice of the basis for the enforcement action and of the opportunity for public hearing before the DOE Financial Assistance Appeals Board notwithstanding any provisions to the contrary of 10 CFR 600.26, 600.28(b), 600.29, 600.121(c), and 600.443. To obtain a public hearing, the grantee must request an evidentiary hearing, with prior **Federal Register** notice, in the election letter submitted under Rule 2 of 10 CFR 1024.4 and the request shall be granted notwithstanding any provisions to the contrary of Rule 2.

PART 440—[AMENDED]

Part 440 is amended as follows:

1. The authority citation for part 440 continues to read as follows:

Authority: Title IV, Energy Conservation and Production Act, Pub. L. 94–385, 90 Stat. 1150 (42 U.S.C. 6851 *et seq.*), as amended; Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*).

1a. Section 440.3 is amended by adding the definitions of "Assistant Secretary" and "Director" in the appropriate alphabetical order and by revising the definition of "Operations Office Manager" as follows:

§ 440.3 Definitions.

* * * * *

"*Assistant Secretary*" means the Assistant Secretary for Conservation and Renewable Energy or official to whom the Assistant Secretary's functions may be redelegated by the Secretary.

* * * * *

"*Director*" means the Director of the Office of State and Local Assistance Programs or any official to whom the Director's functions may be redelegated by the Assistant Secretary.

* * * * *

"*Operations Office Manager*" means the manager of a DOE Operations Office or the manager's designee, or any official to whom the manager's functions may be redelegated by the Secretary.

* * * * *

2. Section 440.12 is amended by striking the last sentence of paragraph (a) and substituting in lieu thereof the following: "After receipt of an application for financial assistance or for approval of an amendment to a State plan, the Operations Office Manager may request the State to submit within a reasonable period of time any revisions necessary to make the application complete or to bring the application into compliance with the requirements of this part. The Operations Office Manager shall attempt to resolve any dispute over the application informally and to seek voluntary compliance. If a State fails to submit timely appropriate revisions to complete the application, the Operations Office Manager may reject the application as incomplete in a written decision, including a statement of reasons, which shall be subject to administrative review under § 440.30 of this part."; and § 440.12 is further amended by adding paragraph (c) to read as follows:

§ 440.12 State application.

* * * * *

(c) On or before 60 days from the date that a timely filed application is complete, the Operations Office Manager shall decide whether DOE shall approve the application. The Operations Office Manager may—

(1) Approve the application in whole or in part to the extent that the application conforms to the requirements of this part;

(2) Approve the application in whole or in part subject to special conditions designed to ensure compliance with the requirements of this part; or

(3) Disapprove the application if it does not conform to the requirements of this part.

§ 440.15 [Amended]

3. Section 440.15(c) is amended by removing the reference "§ 440.30(d)" and substituting the reference "§ 440.30(i)" in lieu thereof.

4. Section 440.30 is revised to read as follows:

§ 440.30 Administrative review.

(a) An applicant shall have 20 days from the date of a decision under § 440.12 to file a notice requesting administrative review. If an applicant does not timely file such a notice, the decision under § 440.12 shall become final for DOE.

(b) A notice requesting administrative review shall be filed with the Operations Office Manager and shall be accompanied by a written statement containing supporting arguments and requesting, if desired, the opportunity for a public hearing.

(c) A notice or any other document shall be deemed filed under this section upon receipt.

(d) On or before 15 days from receipt of a notice requesting administrative review which is timely filed, the Operations Office Manager shall forward to the Director, the notice requesting administrative review, the decision under § 440.12 as to which administrative review is sought, a draft recommended final decision for the concurrence of the Director, and any other relevant material.

(e) If the applicant requests a public hearing, the Director, within 15 days, shall give actual notice to the State and **Federal Register** notice of the date, place, time, and procedures which shall apply to the public hearing. Any public hearing under this section shall be informal and legislative in nature.

(f) On or before 45 days from receipt of documents under paragraph (d) of this section or the conclusion of the public hearing, whichever is later, the Director shall concur in, concur in as modified, or issue a substitute for the recommended decision of the Operations Office Manager.

(g) On or before 15 days from the date of the determination under paragraph (f) of this section, the Governor may file an application, with a supporting statement of reasons, for discretionary review by the Assistant Secretary. On or before 15 days from filing, the Assistant Secretary shall send a notice to the Governor stating whether the Director's determination will be reviewed. If the Assistant Secretary grants review, a decision shall be issued no later than 60 days from the date review is granted.

(h) A decision under paragraph (f) of this section shall be final for DOE if there is no review under paragraph (g). If there is review under paragraph (g), the decision thereunder shall be final for DOE, and no appeal shall lie elsewhere in DOE.

(i) Prior to the effective date of the termination of eligibility for further participation in the program because of failure to comply substantially with the requirements of the Act or of this part, a grantee shall have the right to written notice of the basis for the enforcement action and the opportunity for a public hearing notwithstanding any provisions to contrary of 10 CFR 600.26, 600.28(b), 600.29, 600.121(c), and 600.443. A notice under this paragraph shall be mailed by the Operations Office Manager by registered mail, return-receipt requested, to the State, local grantee, and other interested parties. To obtain a public hearing, the grantee must request an evidentiary hearing, with prior **Federal Register** notice, in the election letter submitted under Rule 2 of 10 CFR 1024.4 and the request shall be granted notwithstanding any provisions of Rule 2 to the contary.

Part 455 is amended as follows:

PART 455—[AMENDED]

1. The authority citation for part 455 continues to read as follows:

Authority: Title III of the National Energy Conservation Policy Act, Pub. L. 95–619, 92 Stat. 3238 (42 U.S.C. 6371 *et seq.*); and Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*).

2. Section 455.2 is amended by adding the definitions of "Assistant Secretary", "Director" and "Operations Office Manager" in the appropriate alphabetical order as follows:

§ 455.2 Definitions.

* * * * *

"*Assistant Secretary*" means the Assistant Secretary for Conservation and Renewable Energy or official to whom the Assistant Secretary's functions may be redelegated by the Secretary.

* * * * *

"*Director*" means the Director of the Office of State and Local Assistance Programs or any offical to whom the Director's functions may be redelegated by the Assistant Secretary.

* * * * *

"*Operations Office Manager*" means the manager of a DOE Operations Office or the manager's designee, or any official to whom the manager's functions may be redelegated by the Secretary.

* * * * *

3. Subpart J of 10 CFR Part 455 is added to read as follows:

Subpart J—Administrative Review

Subpart J—Administrative Review

§ 455.110 Right to administrative review.

(a) A State shall have a right to file a notice requesting administrative review of a decision by an Operations Office Manager to disapprove an application under § 455.83 for a grant award for State administrative expenses subject to special conditions or a decision under § 455.91 of this part by an Operations Office Manager to disapprove a State plan or an amendment to a State plan.

(b) A school, hospital, or coordinating agency shall have a right to file a notice requesting administrative review of a decision by an Operations Office Manager to disapprove an application for a grant award to acquire and install an energy conservation measure under § 455.82 of this part if the disapproval is based on a determination that—

(1) The applicant is ineligible under § 455.51 or for any other reason;

(2) An energy use evaluation submitted in lieu of an energy audit, pursuant to § 455.20, is unacceptable under the State plan; or

(3) A technical assistance program equivalent performed without the use of Federal funds does not comply with the requirements of § 455.42 for purposes of satisfying the eligibility requirements of § 455.51(a)(3).

§ 455.111 Notice requesting administrative review.

(a) Any applicant shall have 20 days from the date of receipt of a decision under § 455.110 to disapprove its application for a grant award to file a notice requesting administrative review. If an applicant does not timely file such a notice, the decision to disapprove shall become final for DOE.

(b) A notice requesting administrative review shall be filed with the Operations Office Manager and shall be accompanied by a written statement containing supporting arguments.

(c) If the applicant is a State appealing pursuant to paragraph (a) of § 455.110, the State shall have the right to a public hearing. To exercise that right, the State must request such a hearing in the notice filed under paragraph (b) of this section. A public hearing under this section shall be informal and legislative in nature.

(d) A notice or any other document shall be deemed filed under this subpart upon receipt.

§ 455.112 Transmittal of record on review.

On or before 15 days from receipt of a notice requesting administrative review which is timely filed, the Operations Office Manager shall forward to the Director, the notice requesting administrative review, the decision to disapprove as to which administrative review is sought, a draft recommended final decision for concurrence, and any other relevant material.

§ 455.113 Review by the Director.

(a) If a State requests a public hearing pursuant to paragraph (a) of § 455.110, the Director, within 15 days, shall give actual notice to the State and **Federal Register** notice of the date, place, time, and procedures which shall apply to the public hearing. Any public hearing under this section shall be informal and legislative in nature.

(b) The Director shall concur in, concur in as modified, or issue a substitute for the recommended decision of the Operations Office Manager—

(1) With respect to a notice filed pursuant to paragraph (a) of § 455.110, on or before 60 days from receipt of documents under § 455.112 or the conclusion of a public hearing, whichever is later; or

(2) With respect to a notice filed pursuant to paragraph (b) of § 455.110, on or before 30 days from receipt of documents under § 455.112.

§ 455.114 Discretionary Review by the Assistant Secretary.

On or before 15 days from the date of the determination under § 455.113(b), the applicant for a grant award may file an application, with a supporting statement of reasons, for discretionary review by the Assistant Secretary. If administrative review is sought pursuant to paragraph (a) of § 455.110, the Assistant Secretary shall send a notice granting or denying discretionary review within 15 days and upon granting such review, shall issue a decision no later than 60 days from the date discretionary review is granted. If administrative review is sought pursuant to paragraph (b) of § 455.110, the Assistant Secretary shall send a notice granting or denying discretionary review within 10 days, and upon granting such review shall issue a decision no later than 30 days from the date discretionary review is granted.

§ 455.115 Finality of decision.

A decision under § 455.113 shall be final for DOE if there is no review sought under § 455.114. If there is review under § 455.114, the decision thereunder shall be final for DOE, and no appeal shall lie elsewhere in DOE.

PART 465—[AMENDED]

Part 465 is amended as follows:

1. The authority citation for part 465 continues to read as follows:

Authority: National Energy Extension Service Act, enacted as title V of the Energy Research and Development Administration Authorization Act of 1977, title V of Pub. L. 95–39, 91 Stat. 191 *et seq.* (42 U.S.C. 7001 *et seq.*); Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 956 *et seq.* (42 U.S.C. 7101 *et seq.*); Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95–224, 92 Stat. 3 *et seq.* (41 U.S.C. 501 *et seq.*); Section 1007(b) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, 95 Stat. 611 (42 U.S.C. 7270 Note); E.O. 12009 (42 FR 46267); E.O. 12291 (46 FR 13193).

1a. Section 465.2 is amended by adding the definitions of "Assistant Secretary" and "OSLAP Director" in the appropriate alphabetical order and revising the definition of "Operations Office Manager" as follows:

§ 465.2 Definitions.

* * * * *

Assistant Secretary means the Assistant Secretary for Conservation and Renewable Energy or any official to whom the Assistant Secretary's functions may be redelegated by the Secretary.

* * * * *

Operations Office Manager means the manager of a DOE Operations Office or the manager's designee, or any official to whom the manager's functions may be redelegated by the Secretary.

OSLAP Director means the Director of the Office of State and Local Assistance Programs or any official to whom the Director's functions may be redelegated by the Assistant Secretary.

* * * * *

2. Section 465.8 is revised to read as follows:

§ 465.8 Approval of annual State applications and State plans.

(a) After receipt of an application, the Operations Office Manager may request the State to submit within a reasonable period of time any amendments necessary to make the application complete or amendments to bring the application into compliance with the requirements of this part. The Operations Office Manager shall attempt to resolve any dispute over an application informally and to seek voluntary compliance. If a State fails to submit timely appropriate amendments to complete the application, the Operations Office Manager may reject the application as incomplete in a written decision, including a statement of reasons, which shall be subject to administrative review under § 465.10 of this part.

(b) On or before 60 days from the date that a timely filed application is complete, the Operations Office Manager shall decide whether DOE shall make a financial assistance award. The Operations Office Manager may—

(1) Approve the application in whole or in part to the extent that—

(i) The State plan meets the objectives of the Act;

(ii) The annual State application and the State plan meet the requirements of § 465.6 and § 465.7, respectively; and

(iii) Implementation of the State plan by the State conforms to the requirements of this part;

(2) Approve the application in whole or in part subject to special conditions designed to ensure compliance with the requirements of this part; or

(3) Disapprove the application if it does not conform to the requirements of this part.

3. Section 465.10 is revised to read as follows:

§ 465.10 Administrative review.

(a) A State shall have 20 days from the date of decision under § 465.8 to file a notice requesting administrative review. If the State does not timely file such a notice, the decision under § 465.8 shall become final for DOE.

(b) A notice requesting administrative review shall be filed with the Operations Office Manager and shall be accompanied by a written statement containing supporting arguments. If the Operations Office Manager has disapproved the entire application, the State may request a public hearing.

(c) A notice of any other document shall be deemed filed under this section upon receipt.

(d) On or before 15 days from receipt of a notice requesting administrative review which is timely filed, the Operations Office Manager shall forward to the OSLAP Director, the notice requesting administrative review, the decision under § 465.8 as to which administrative review is sought, a draft recommended final decision for concurrence, and any other relevant material.

(e) If the State requests a public hearing on the disapproval of an entire application, the OSLAP Director, within 15 days, shall give actual notice to the State and **Federal Register** notice of the date, place, time, and procedures which shall apply to the public hearing. Any public hearing under this section shall be informal and legislative in nature.

(f) On or before 45 days from receipt of documents under paragraph (d) or the conclusion of the public hearing, whichever is later, the OSLAP Director shall concur in, concur in as modified, or issue a substitute for the recommended decision of the Operations Office Manager.

(g) On or before 15 days from the date of the determination under paragraph (f) of the section, the Governor may file an application for discretionary review by the Assistant Secretary. On or before 15 days from filing, the Assistant Secretary shall send a notice to the Governor whether the OSLAP Director's determination will be reviewed. If the Assistant Secretary grants review, a decision shall be issued no later than 60 days from the date review is granted.

(h) A decision under paragraph (f) of this section shall be final for DOE if there is no review under paragraph (g). If there is review under paragraph (g), the decision thereunder shall be final for DOE and no appeal shall lie elsewhere in DOE.

(i) Prior to the effective date of the termination or suspension of a grant award for failure to implement an approved State plan in compliance with the requirements of this part, a grantee shall have the right to written notice of the basis for the enforcement action and of the opportunity for public hearing before the DOE Financial Assistance Appeals Board notwithstanding any provisions to contrary of 10 CFR 600.26, 600.28(b), 600.29, 600.121(c), and 600.443. To obtain a public hearing, the grantee must request an evidentiary hearing, with prior **Federal Register** notice, in the election letter submitted under Rule 2 of 10 CFR 1024.4 and the request shall be granted notwithstanding any provisions to the contrary of Rule 2.

[FR Doc. 90-1823 Filed 1-26-90; 8:45 am]

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Federal Register

Monday
January 29, 1990

Part V

Department of Labor

Employment and Training Administration

Unemployment Insurance State Operations Funding Shortage in Fiscal Year (FY) 1990; Notice

DEPARTMENT OF LABOR

Employment and Training Administration

Unemployment Insurance State Operations Funding Shortage in Fiscal Year (FY) 1990

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice and opportunity to comment on the Department of Labor's (DOL) plans for addressing the Unemployment Insurance (UI) State operations funding shortage in FY 1990.

SUMMARY: This notice provides a description of the Fiscal Year 1990 Unemployment Insurance administrative funding shortfall, the principles that guided the Department's development of plans for addressing this shortfall, the operational decisions made, and alternatives explored and rejected. The public is invited to comment on these FY 1990 decisions and the proposed change for FY 1991, and provide any additional suggestions on ways to address such a situation in the future.

DATE: Written comments must be received in the Department of Labor by the close of business on March 15, 1990.

ADDRESS: Submit written comments to Mary Ann Wyrsch, Director, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–4231, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Darla Letourneau, Budget Officer, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–4219, Washington, DC 20210. Telephone (202) 535–0210 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Program Description

The Secretary of Labor is required by title III of the Social Security Act to provide grants to States for amounts determined to be necessary for the proper and efficient administration of the State's unemployment insurance laws.

The President's annual budget reflects the Administration's economic assumptions from which estimates of the volume of unemployment claims filed per week, or the average weekly insured unemployment (AWIU), are derived. This average weekly workload figure serves as the basis for determining the total funding level needed. This total level is then divided into "base" and "contingency" funding requests.

States are provided with funds to process both base and contingency workloads. Base funds, which represent the largest portion of all workload funds, are allocated to the States at the beginning of the fiscal year and are distributed based on cost estimates for each State's projected unemployment workload levels. As State workloads exceed the base level, contingency funds are allocated to the States to process the additional actual workload experienced above this base level. This added funding is provided quarterly and is computed at a lower rate, since States tend to rely more upon temporary, less expensive staff to process workloads above the base allocations.

B. FY 1990 Background

Several factors have developed that impact on the implementation of the FY 1990 budget for the UI program, which have major implications for State operations.

The President's FY 1990 budget request included amounts to fully fund the administrative costs associated with a base program at the estimated volume of 1.7 million AWIU weeks of unemployment. This represented a reduction from the FY 1989 base level of 1.8 million. The FY 1990 request also included contingency funds to process an estimated additional 332,000 AWIU weeks of unemployment.

Following usual practice, the base resource level in the President's FY 1990 budget request was used to develop planning targets and guidelines, which were sent to the States in June 1989. Final base allocation amounts are usually issued to the States in the fall after actual appropriation levels have been enacted by Congress. For FY 1990, the final appropriation (Pub. L. 101–166) was enacted on November 21, 1989, and the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 100–239) was enacted in December. As a result of the late passage of these two funding measures, final base allocations could not be issued in the fall of 1989.

The enacted FY 1990 appropriation (Pub. L. 101–166) adopted the President's requested funding level for State UI operations activities. However, the funding levels contained in this appropriation were impacted by the government-wide reductions contained in the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239).

The Balanced Budget and Emergency Deficit Control Act of 1985 (Pub. L. 99–177) (referred to as the Gramm-Rudman-Hollings Act or G-R-H), sets deficit reduction targets for each year and establishes a sequestration process that provides for across-the-board reductions on all government programs, unless otherwise exempted by statute, if these targets are not met. For FY 1990, there was a two-step process for implementing these reduction targets: On October 16, 1989, the Office of Management and Budget (OMB) issued a final sequestration report, with sequestration of 5.3 percent. This across-the-board reduction on FY 1990 full year funding was effective October 1, 1989.

Federal payments to States for the administration of UI programs are subject to sequestration; therefore, the initial 5.3 percent reduction would have resulted in a $91 million reduction in funds for State UI operations activities. However, in December, Congress enacted Public Law 101–239, which reduced the sequestration to 1.4 percent for FY 1990 full year funding. This resulted in a $24 million reduction in funds for State UI operations activities. Public Law 101–239 requires that this reduction be taken across-the-board on all budget categories specified in the Congressional appropriation.

In addition to being impacted by the G-R-H reductions, the State operations funding needs are also affected by changes in unemployment workload projections. As part of the FY 1991 budget process, the President's revised economic assumptions for FY 1990 were shared with the Department in early December of 1989. These revised economic assumptions anticipate higher unemployment rates in FY 1990 than previously estimated. The following table summarizes the changes:

	Administration's economic assumptions		Change
	President's FY 90 request	Revised FY 90 projections	
TUR	5.2%	5.5%	+.3%
IUR	1.95%	2.2%	+.25%
AWIU:			
Base	1.7M	1.7M	
Contingency	.332M	.621M	+.289M

TUR = total unemployment rate.
IUR = insured unemployment rate.
AWIU = average weekly insured unemployment.
M = millions.

In the past, the Administration has requested a supplemental appropriation to finance the added administrative workload resulting from changes in the economic assumptions. However, given the Federal budget constraints due to the G–R–H targets for FY 1990, the Department is faced with the reality of living within its appropriated levels.

Therefore, the Department has had to make unprecedented decisions about how to manage the funding shortage.

As soon as this funding shortfall became known to the Department in mid-December, the State employment security agencies (SESAs) were notified so that they could begin to exercise caution in anticipation of the lower funding availability for the year.

Given the broad effects of these decisions and the high level of interest in UI administrative financing issues, the Department has chosen to outline its decisions on the use of FY 1990 funds in a public forum by publication of this notice. This is being done in tandem with the release of the revised allocations data in order to notify the public of the Department's policy decisions as soon as possible.

C. Description of the Shortfall

Funds to meet the projected workload and staffing costs for UI State operations in FY 1990 are short an estimated $120 million, or 6.7 percent. The shortfall is composed of two parts: $96 million is related primarily to the increased workload projections; and $24 million is due to the 1.4 percent G–R–H reductions.

The following table summarizes the shortfall estimate:

FY 1990 Shortfall Estimate		
1. President's Request		$1,725.4
2. 1.4% Sequester		−23.9
3. Additional Need:		
Increased Workload	89.9	
Trade Coordinator	1.7	
Salary Increases	5.0	
Total		−96.6
4. Shortfall (#2 plus #3)		$120.5

D. Guiding Principles

To guide the Department's development of plans for addressing this shortfall, the following principles were followed:

(1) Service to claimants must come first. Therefore, the Department's first priority is meeting UI workload needs.

(2) Other UI fund sources should be examined to free up resources for use in meeting the shortfall.

(3) Any change in policy or approach should be applied prospectively.

(4) All reductions in funding workload activities should be made in a fair and equitable manner, treating base and contingency funding in the same manner.

(5) Base grant allocations should be based on the best possible forecasts of FY 1990 needs.

(6) The Department's current allocation methodologies should be used in any revisions to the allocations.

(7) The approach chosen should maximize the State agency's flexibility to decide how best to manage the shortfall.

E. Operational Decisions

Based on the guiding principles outlined in Section D. above, and after consideration of several alternatives (outlined in section F. below), the Department selected the following approach, which results in providing States with the maximum resources to meet UI workload needs:

(1) *Other UI Funds:* Consistent with Principle 2, funds for certain UI national activities, such as Quality Control and Internet, were reduced where critical activities could be deferred. As part of this effort, the Department will seek approval to reprogram some funds from national Quality Control activities to the State operations activity.

(2) *Base Allocations:*

(a) Revised Workload Data: Consistent with Principle 5, before reductions were applied to State base allocations, the Department decided to recalculate the existing staffyear allocations based on up-to-date workload forecasts. Under normal circumstances a geographic shift in workload would not have been a major concern, since States with higher than expected workload would have received additional dollars from the contingency funds to fully fund this increased workload. However, given the limited contingency funds available, the Department decided that the base allocations needed to be revised to better address workload needs.

The original FY 1990 planning targets were based on forecasts using each State's actual workload data through December 31, 1988. Revised workload forecasts for FY 1990 were developed using each State's actual workload data through the end of FY 1989, adjusted for first quarter FY 1990 actual experience for initial claims and weeks claimed.

The revised forecasts confirmed that the geographic distribution of the projected claims workload has changed substantially since the base planning targets for FY 1990 were developed. For example, over 50 percent of the States have experienced a 10 percent or greater change in their projected workload (measured in the number of weeks claimed), as compared to their FY 1990 planning targets.

Since the first quarter of the fiscal year has already passed and States operated during this period based on their planning targets, consistent with Principle 3, the Department decided to retain the previous workload forecasts used in the planning targets for the first quarter; therefore, the new forecasts will have only a three-quarter year impact.

Consistent with Principle 6, the Department decided to use the existing allocation model and methodology in calculating the staffyears. This includes retention of the current 15 percent hold-harmless limit. This hold-harmless provision ensures that no State loses more than 15 percent of its previous year's staff level for claims activities. In FY 1991, the Department is proposing to increase the hold-harmless limit to 20 percent. (See section F (3) below.) Although the Department recognizes that the effect of this hold harmless policy is to lessen the impact of the new workload data on the actual State base allocations, the intent of the hold-harmless limit is to moderate the shifts in resources from year to year in order to minimize disruptions to the system.

(b) Trade Coordinators: Each State will receive funds for a Trade Coordinator. However, because of a recent legal interpretation, these positions will be financed with base funds rather than contingency funds, as was done in the past.

(c) Salary Increases: Consistent with Principle 6, the Department decided to continue the current practice of funding increased salary and benefit rate costs due to changes in statewide compensation plans. Salary increases that have been enacted since the FY 1990 planning targets are included in the final base allocations. Base funds are reserved to fund salary increases that are projected to be enacted later in FY 1990.

The Department's estimate of total salary increase needs has been revised upwards since the FY 1990 budget request was developed, thereby adding $5 million to the funding shortage.

(d) Bottom-line Shortfall Assessment: Consistent with Principles 1 and 4, the Department decided that the most equitable way to fund the shortfall was an across-the-board reduction in each State's base allocation. To ensure that all workload is treated in a similar manner, a similar across-the-board reduction is also applied to contingency funds (see (3)(a) below).

Based on these revised staffyear estimates and each State's salary and benefit rates and nonpersonal services (NPS) cost rates, estimates of total funding requirements were determined.

The total dollar amount in each State's base allocation was then reduced by 6.7 percent to meet the fund availability.

(3) *Contingency Funding:* Contingency funds are used to fund added workload costs above the base allocations, including trade readjustment (TRA) benefit payments workload and workload associated with implementation of the Systematic Alien Verification for Entitlement (SAVE) program, as well as increased costs due to salary increases and State law changes.

Consistent with Principle 1 and given the magnitude of the shortfall, all contingency funds will be used for funding contingency workload needs. This is also consistent with the Department's funding priorities in previous shortfall situations. This means that salary increases will now be funded with base resources, as described in (2)(c) above, and that no funds are reserved for State law changes in FY 1990.

Consistent with Principle 4, and parallel to the approach taken in base funds outlined in (2)(d) above, an across-the-board annualized reduction of 6.7 percent will be applied to each State's quarterly contingency costs.

Consistent with Principle 3, the first quarter contingency payments will be made using the first quarter actual experience and the previous contingency workload policy of funding 100 percent of workload costs. As a result of fully funding the first quarter, contingency workload for the remainder of the year will be funded at an estimated 91 percent of the funding needs. Second and third quarter funding will be based on this percentage, while the fourth quarter percentage funding is subject to change, depending on fund availability at the end of the year.

(4) *State Flexibility:* Consistent with Principle 7, States continue to have bottom-line authority to use UI administrative resources based on State assessment of needs, since States are no longer held accountable by specific cost category. Thus, States retain the flexibility to devise various strategies to meet the increased workload.

F. Alternative Considered

Before arriving at the decisions described in E. above, the Department considered and rejected the following alternative approaches:

(1) *Protect base operations—take maximum reductions in contingency workload activities:* The Department considered an approach that would have reduced the base allocations only by the G–R–H cuts, with the shortfall being absorbed in the contingency funds, primarily contingency workload. This would have resulted in a 53 percent annual payoff rate for contingency workload, and approximately 38 percent for the remaining three quarters after paying 100 percent of first quarter actual costs. The Department rejected this approach for the following reasons:

(a) Violation of workload priority: This approach is inconsistent with Principle 1, since it does not give claimants and workload needs first priority.

(b) Inequity among States: Paying base and contingency workload at such different rates is inconsistent with Principle 4 and would create significant inequities among the States in terms of the percentage of their total workload costs covered by Federal funds. This inequity is partially the result of the impact of the hold-harmless provision, which constrains the increases in base resources for States experiencing major increases in projected workload, since resources from those States are moved to States experiencing significant decreases in projected workload.

(c) Departure from past policy: This approach is inconsistent with Principle 3, since funding contingency workload needs at a significantly lower rate would have been a major departure from past policies. In the history of the program, this approach has never been taken. Since this shortfall estimate relates only to FY 1990, it did not appear wise to make a major change in the Department's funding policies.

(d) Lateness of notification: Under this approach States would have been notified of this policy change after one-third of the fiscal year had passed. States with large funding reductions would have had too little time remaining to adjust without serious disruptions.

(e) Constraint on State flexibility: This approach was also inconsistent with Principle 7. State flexibility in deciding how best to manage the shortfall would have been constrained, since more of the decisions about where to take the cuts would have been made at the Federal level.

(2) *Retain the workload projections contined in the FY 1990 base planning targets, i.e., do not redistribute the base:* The Department's existing policy on this issue is that there must be sufficiently strong justification related to funding resources and/or substantial geographic shifts in anticipated claims workload to consider updating the forecasts for base allocations. Unless these compelling reasons exist, the Department believes that the States' need for certainty so that they can effectively plan and manage their systems outweighs the need to update the final base allocations in the fall. The Department applied these criteria in its decisionmaking process.

Retaining the workload projections contained in the FY 1990 planning targets would have been less disruptive to the system; however, consistent with Principle 5 and given the magnitude of the funding shortfall, the substantial nature of the projected workload shifts, and the contingency funding policy selected, the Department determined that the revisions were necessary.

(3) *Increasing the base allocation hold-harmless limit from 15 to 20 percent:* The Department considered increasing the current hold-harmless limit from 15 to 20 percent so that the revised workload forecasts could have more impact on the allocations. However, this approach was in conflict with Principle 6, since if represented a change from the current grant allocation methodology.

The intent of the hold-harmless limit is to moderate the shifts in resources from year to year in order to minimize disruptions to the system. The hold-harmless limit has been held at 15 percent throughout the recent history of the program, with the exception of FY 1989, when the limit was increased to 20 percent as a result of the reduction on the national base resource level from 2.0 million to 1.8 million AWIU.

Although the Department is concerned about the impact the 15 percent hold-harmless provision has on the ability to redistribute base resources to those States experiencing the greatest workload increases, it was decided that it was not appropriate to change the hold-harmless limit because of the short time available to these States to adjust to further funding decreases. Under the Department's selected approach, the States with significant increases in workload will be paid for this workload through contingency funding.

The impact of the hold-harmless limit is particularly pronounced in years when the total funding level is declining and the hold-harmless limit is held steady from one year to the next, such as occurred in the FY 1990 planning targets when the base level declined from 1.8 million AWIU in FY 1989 to 1.7 million AWIU in FY 1990, yet the hold-harmless level remained constant at 15 percent. As a result, in the FY 1990 planning targets, States already at the maximum 15 percent loss level were protected from the impact of the reduction in the total national funding level.

In light of these impacts, the Department believes that the hold-harmless provision should be reviewed for future years. Therefore, the

Department is proposing to increase the hold-harmless limit to 20 percent in the FY 1991 base allocations to address problems of the previous year, and to review the entire hold-harmless concept for future years. Respondents are specifically invited to comment upon this proposal.

(4) *Fully fund contingency workload:* The Department considered exempting contingency workload activities from any shortfall assessment, and funding 100 percent of workload costs. In the past several years when small budget reductions had to be made in the program, all the reductions were made in the base program through lowering the staff salary rates used to determine the allocations, while contingency salary rates were not reduced.

Given the magnitude of the shortfall and the goal of addressing all workload (Principles 1 and 4), the Department believes that both the base and contingency workload should share equally in addressing the shortfall; therefore, an equal across-the-board percentage reduction was applied to base and contingency workload funding requirements. Had the previous years' approach been retained, the reduction in base funding would have been 9 percent.

G. Comments

The preceding information is presented for the general information of those interested in funding for State administration of the UI program. Since States were well into the operating year when the funding shortfall became known, it was imperative that the Department quickly make operational decisions about how to handle the shortfall so that States had the maximum amount of time to implement necessary changes. Therefore, the Department was unable to solicit public comments prior to making these decisions.

However, the Department invites public reactions to the approach chosen and any additional suggestions on ways to address such unanticipated funding shortfalls in the future. Comments regarding the hold-harmless issue will be taken into account in developing the FY 1991 base allocations. Unless there is a compelling reason for change, the Department's decisions on FY 1990 funding as contained in this notice will constitute the Department's final decisions. Comments received will also assist the Department in its ongoing effort to improve the overall administrative financing systems for SESAs.

Signed at Washington, DC, on January 23, 1990.

Roberts T. Jones,

Assistant Secretary of Labor.

[FR Doc. 90–1912 Filed 1–26–90, 8:45 am]

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federal register

Monday
January 29, 1990

Part VI

Department of Commerce

Bureau of Export Administration

15 CFR Part 776

Definition of Supercomputer; Public Hearings; Proposed Rule

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Part 776

[Docket No. 81137-9256]

Definition of Supercomputer; Public Hearings

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Proposed rule; notice of public hearings.

SUMMARY: The Bureau of Export Administration will hold public hearings on a proposed rule that would amend § 776.10 of the Export Administration Regulations to include a definition of the term "supercomputer". The Bureau of Export Administration is publishing this proposed rule elsewhere in this issue of the **Federal Register.**

This notice identifies the issues on which the Department is interested in obtaining the public's views. It also identifies the sites and dates of the public hearings and sets forth the procedures for public participation in the hearings.

DATES: See **SUPPLEMENTARY INFORMATION.**

ADDRESSES: For location of hearings see **SUPPLEMENTARY INFORMATION.** Send requests to speak to: Betty Ferrell, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, Room 1600, Washington, DC 20230. FAX: (202) 377-5270.

Send written copies of the oral presentation to the Bureau of Export Administration, Freedom of Information Records Inspection Facility, ATTN: Margaret Cornejo, U.S. Department of Commerce, Room 4518, 14th Street and Pennsylvania Ave., NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Betty Ferrell, Office of Technology and Policy Analysis, Bureau of Export Administration, Telephone: (202) 377-2583.

SUPPLEMENTARY INFORMATION: The hearings will be scheduled as follows—

Date	*Location*
Feb. 12, 1990	Earle Cabell Federal Building, Room 7A23, 1100 Commerce Street, Dallas, TX 75242.
Feb. 14, 1990	Santa Clara City Council Chamber, City Hall, 1500 Warburton Street, Santa Clara, CA 95050.
Feb. 16, 1990	Thomas P. O'Neill Federal Building, First Floor Auditorium, 10 Causeway Street, Boston, MA 02222.
Feb. 19, 1990	Hotel Sofitel Minneapolis, 5601 W. 78th Street (I-494 & State Highway 100), Minneapolis, MN 55435.

All hearings are scheduled to commence at 9:30 a.m. and end at 4:00 p.m.

Background

Section 5(a)(6) of the Export Administration Act of 1979, as amended by the Omnibus Trade and Competitiveness Act of 1988, requires that the Export Administration Regulations (EAR) be amended to provide a definition of the term "supercomputer" for national security controls. A proposed rule containing a supercomputer definition was published in the **Federal Register** on December 5, 1988 (53 FR 48932). Having considered public comments on that rule, as well as other comments from industry, the Department of Commerce has developed a revised definition, which it is publishing elsewhere in this issue of the **Federal Register.** The definition and related technical parameters contained in this second proposed rule will be the subject of discussions at the public hearings.

This second proposed rule, like the earlier proposed rule, uses theoretical peak performance capability as the measurement for determining whether a computer should be classified as a supercomputer. Specific technical guidelines are provided to measure a computer's performance in order to determine its theoretical peak performance capability. A supercomputer is defined as any computer having a theoretical peak performance capability equal to or greater than 100 MFLOPS (million floating-point operations per second).

The second proposed rule also identifies two threshold performance levels (150 and 300 MFLOPS) at which certain standard safeguards would be imposed on the export of supercomputers. The threshold performance level for exports to member countries of COCOM and Austria, Finland, Iceland, Ireland, New Zealand, Switzerland, and Sweden is set at 300 MFLOPS or above. Only minimal safeguards would apply to exports to these countries of supercomputers with a theoretical peak performance capability equal to or greater than 150 MFLOPS, but less than 300 MFLOPS. A lower threshold level of 150 MFLOPS or above would apply to all other countries, and the security safeguards required would be equal to or greater than those required for the COCOM group at the 300 MFLOPS level.

This second proposed rule also contains provisions exempting certain workstations and minisupercomputers from the special licensing requirements that apply only to supercomputers. Exporters would be required to submit supercomputer classification requests to the Department of Commerce, which would issue determinations of eligibility. Eligibility for the exemptions would be limited to systems having a theoretical peak performance capability of less than 300 MFLOPS (for exports to COCOM member countries and the other countries listed above) and less than 150 MFLOPS (for exports to all other destinations).

The second proposed rule does not describe the supercomputer security safeguards. The Commerce Department is drafting a rule that will contain a detailed description of the standard supercomputer security safeguards.

Authority

Pub. L. 96-72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97-145 of December 29, 1981, by Pub. L. 99-64 of July 12, 1985, and by Pub. L. 100-418 of August 23, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985.)

Specific Comments Requested

The presentations at the hearings will assist the Department of Commerce in learning more about industry perspectives concerning U.S. export controls on supercomputers. The Department requests speakers to provide suggestions on the proposed supercomputer definition.

In particular, but without limiting the scope of the information requested, we solicit your views on the following:

(a) The use of "theoretical peak performance capability" as the measurement for determining whether a computer should be classified as a supercomputer;

(b) The appropriateness of the three "technical guidelines" that the proposed rule provides for measuring a computer's theoretical peak performance capability;

(c) The appropriateness of 100 MFLOPS (million floating point operations per second) as the threshold level for defining what constitutes a supercomputer;

(d) The adequacy of the exemptions from the special supercomputer licensing requirements (i.e., certain workstations and minisupercomputers) and the appropriateness of the qualifying procedures for these exemptions;

(e) The appropriateness of the proposed levels for imposing

supercomputer security safeguards (i.e., 150 MFLOPS and 300 MFLOPS) and;

(f) The bifurcated structure—based on the country of destination—for imposing supercomputer security safeguards.

Procedure for Requesting Participation

Interested public participants are encouraged to present their views orally at the hearings. You may make a written request for an opportunity to make an oral presentation at the hearing. The request must be made to the address noted above by:

Date	*Location of hearing*
Feb. 6, 1990	Dallas, TX
Feb. 6, 1990	Santa Clara, CA
Feb. 8, 1990	Boston, MA
Feb. 9, 1990	Minneapolis, MN

In addition, a written synopsis of your comments may be submitted at the same time as your request to speak. If all interested parties cannot be accommodated, these statements will be used to allocate speaking time and ensure that a full range of comments are heard. Please note that—although the submission of written comments for these public hearings is separate from the request for written comments contained in the "Definition of Supercomputer" rule that is published elsewhere in this issue of the **Federal Register**—written comments submitted for these public hearings will be considered by the Commerce Department in drafting a final rule on the supercomputer definition.

In addition, the request to speak should contain a daytime phone number where you may be contacted before the hearing. Since it may be necessary to limit the number of persons making presentations, you should be prepared to describe your interest in this proceeding. If appropriate, please explain why you are a proper representative of a group or class of persons that has such an interest; and provide a concise summary of your proposed presentation.

The DOC will notify each person selected to be heard, as follows:

Notification date	*Location of hearing*
Feb. 8, 1990	Dallas, TX
Feb. 8, 1990	Santa Clara, CA
Feb. 12, 1990	Boston, MA
Feb. 13, 1990	Minneapolis, MN

Each person will be contacted by phone before 5:00 p.m. on the appropriate notification date. In addition, the DOC will arrange the presentation times for the speakers. Attendees will be seated on a first-come, first-served basis. Persons selected to be heard should bring 100 copies of their oral presentation on the day of the hearing to the hearing address indicated at the beginning of the **SUPPLEMENTARY INFORMATION** section of this notice.

In addition, please submit 10 written copies of your oral presentation to the Bureau of Export Administration, Freedom of Information Records Inspection Facility, Attn: Margaret Cornejo, U.S. Department of Commerce, Room 4518, 14th Street and Pennsylvania Ave., NW., Washington, DC 20230, telephone (202) 377–2593. All comments received will be available for public inspection, in the Freedom of Information Records Inspection Facility, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

Identify separately any information you consider to be company confidential and submit it in writing, one copy only. We reserve the right to return information if we do not deem it to qualify for business confidential treatment.

Conduct of the Hearing

We reserve the right to select the persons to be heard at this hearing, to schedule their respective presentations, and to establish the procedures governing the conduct of the hearing. Each speaker will be limited to 30 minutes, and comments must be directly related to the "Definition of Supercomputer" proposed rule.

A Commerce official will be designated to preside at the hearings. Representatives from the Departments of State and Defense will also be invited to participate in the hearings. This will not be a judicial, trial-type, or evidentiary-type hearing. Only those conducting the hearing may ask questions, and there will be no cross-examination of persons presenting statements.

Any further procedural rules for the proper conduct of the hearing will be announced by the presiding officer.

Dated: January 24, 1990.

William L. Clements,

Director, Office of Technology and Policy Analysis, Bureau of Export Administration.

[FR Doc. 90–2028 Filed 1–25–90; 8:45 am]

BILLING CODE 3510–DT–M

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15 CFR Part 776

[Docket No. 81137–9256]

RIN 0694–AA03

Definition of Supercomputer

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Proposed rule with request for comments.

SUMMARY: This rule proposes to amend § 776.10 of the Export Administration Regulations (EAR) by adding a new paragraph (d) that contains a definition of the term "supercomputer". Inclusion of the supercomputer definition in the EAR is mandated by section 5(a)(6) of the Export Administration Act of 1979, as amended by the Omnibus Trade and Competitiveness Act of 1988. An earlier proposed rule containing a supercomputer definition was published in the **Federal Register** on December 5, 1988 (53 FR 48932). Having considered the comments on that rule, as well as other comments from industry, the Department of Commerce has developed a revised definition. Because of the variety of differing opinions that the Commerce Department has received on this issue, it intends to solicit additional comments on the revised definition before issuing a final rule. Therefore, the Department is publishing a second proposed rule, with a request for comments.

The Department has scheduled public hearings on this proposed rule to be held at Dallas, TX (2/12/90), Santa Clara, CA (2/14/90), Boston, MA (2/16/90), and Minneapolis, MN (2/19/90). Specific information on these public hearings is contained in a document published by the Bureau of Export Administration elsewhere in this issue of the **Federal Register**.

DATES: Comments must be received by March 15, 1990.

ADDRESSES: Written comments (six copies) should be sent to: Willard Fisher, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, Room 1622, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Willard Fisher, Regulations Branch, Bureau of Export Administration, Telephone: (202) 377–3856.

SUPPLEMENTARY INFORMATION:

Background

Section 5(a)(6) of the Export Administration Act of 1979 (the Act), as amended by the Omnibus Trade and Competitiveness Act of 1988, requires that the Export Administration Regulations (EAR) be amended to provide a definition of the term "supercomputer" for national security reexport controls.

On December 5, 1988 (53 FR 48932), the Department of Commerce published a proposed rule in the **Federal Register**

that would have implemented section 5(a)(6) of the Act by amending § 776.10 of the EAR to include a definition of the term "supercomputer". After considering comments on that rule, the Department has developed the revised definition contained in this proposed rule.

Like the first proposed rule, this rule uses theoretical peak performance capability as the measurement for determining whether a computer should be classified as a supercomputer. The supercomputer definition contains specific technical guidelines for measuring a computer's performance. It also contains a threshold performance level above which a computer would be considered a "supercomputer" for export control purposes. Since this supercomputer definition is based on U.S. national security controls, it does not necessarily reflect industry standards. However, the Department is sensitive to industry concerns and will review this definition annually.

The technical guidelines in the supercomputer definition for calculating theoretical peak performance capability differ, in several significant aspects, from those contained in the first proposed rule that was published in the **Federal Register** on December 5, 1988. The first proposed rule required that the number of operations per cycle be measured on a 50/50 ratio of multiply/add calculations. This requirement was based on the assumption that multiply/add calculations would be performed simultaneously. Since certain foreign-made supercomputers do not perform multiply/add calculations simultaneously, this rule proposes to require that the number of operations per cycle be measured by counting the maximum number of floating-point additions and/or multiplications that can be completed during one cycle time.

Several comments on the first proposed rule were critical of the technical guideline requiring that the total MFLOPS for a single processor be multiplied by the number of processors, if the machine has more than one processor. This rule proposes to revise the technical guideline by requiring, for all multiprocessor machines, that the MFLOPS of all floating-point processors that work independently of each other in the same cycle be added together when calculating the total theoretical peak performance of the machine. Since single processors in a multiprocessor supercomputer may have different performance levels, adding their specific performance levels will result in a more accurate reading of the total capability of the supercomputer.

The first proposed rule designated 160 MFLOPS as the threshold performance level at which a computer would be considered a supercomputer and, therefore, subject to certain standard security safeguards applicable to any eligible destination. The majority of comments on the first proposed rule expressed support for a threshold performance level higher than the theoretical peak performance capability of 160 MFLOPS.

This rule proposes to establish a threshold performance level of 100 MFLOPS for determining what is a supercomputer. While this level is below the 160 MFLOPS level contained in the first proposed rule, this rule would compensate for that by establishing two threshold performance levels (150 and 300 MFLOPS) for imposing certain standard security safeguards on the export of supercomputers. The nature of the security safeguards and the threshold performance level at which the safeguards will apply are based primarily on the country of destination. The threshold performance level for member countries of COCOM and Austria, Finland, Iceland, Ireland, New Zealand, Switzerland and Sweden (all listed in a new Supplement No. 1 to part 776) is set at 300 MFLOPS or above. Certain standard security safeguards will be required for exports to Supplement No. 1 countries of supercomputers with a theoretical peak performance capability that reaches or exceeds this level. Only minimal security safeguards—prohibiting access to COCOM—proscribed nationals and requiring written authorization from the Department of Commerce to retransfer or reexport supercomputers—will apply to exports to Supplement No. 1 countries for supercomputers with a theoretical peak performance capability equal to or greater than 150 MFLOPS, but less than 300 MFLOPS. A lower threshold performance level of 150 MFLOPS or above is established for all non-Supplement No. 1 countries, and more stringent security safeguards than those applied to Supplement No. 1 countries at the 300 MFLOPS level may be required. Any license authorizing the export of a supercomputer will contain a condition prohibiting the reexport of the supercomputer—to any destination—without the prior written authorization of the Department of Commerce.

The actual security safeguards that will be required for any destination may also depend on the end-use, end-user, specific location of the ultimate end-user, and other factors that could affect the security of the supercomputer. This proposed rule does not contain provisions that apply to these additional security factors. The Commerce Department will publish a rule describing the standard supercomputer security safeguards before publishing a final rule on the supercomputer definition. Until a final rule is published, applicants should contact the Office of Technology and Policy Analysis for information on supercomputer security safeguards.

This rule proposes to exempt certain workstations and minisupercomputers from the special licensing requirements that apply only to supercomputers. Exporters who wish to qualify for an exemption will be required to submit a supercomputer classification request to the Department of Commerce, which will issue a determination of eligibility. In order to qualify, the theoretical peak performance capability of the system (workstation or minisupercomputer) must be less than 300 MFLOPS for destinations listed in Supplement No. 1 of part 776 and less than 150 MFLOPS for non-Supplement No. 1 destinations.

The Commerce Department will consider public comments that address the supercomputer definition, the threshold level of performance, and the supercomputer licensing process, including comments concerning the linkage between security safeguards and the importing country. A final rule will be published following consultations with appropriate U.S. allies.

Public Hearings

The Bureau of Export Administration will hold public hearings on this proposed rule. The hearings will be scheduled as follows:

Date	*Location*
Feb. 12, 1990	Earle Cabell Federal Building, Room 7A23, 1100 Commerce Street, Dallas, TX 75242.
Feb. 14, 1990	Santa Clara City Council Chamber, City Hall, 1500 Warburton Street, Santa Clara, CA 95050.
Feb. 16, 1990	Thomas P. O'Neill Federal Building, First Floor Auditorium, 10 Causeway Street, Boston, MA 02222.
Feb. 19, 1990	Hotel Sofitel Minneapolis, 5601 W. 78th Street, (I-494 & State Highway 100), Minneapolis, MI 55435.

All hearings are scheduled to commence at 9:30 a.m. and end at 4:00 p.m. The Bureau of Export Administration is publishing a document containing specific information on these public hearings elsewhere in this issue of the **Federal Register.**

Rulemaking Requirements and Invitation to Comment

1. This rule complies with Executive Order 12291 and Executive Order 12661.

2. This rule contains a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This collection has been approved by the Office of Management and Budget under Control No. 0694–0048. Public reporting for this collection of information is estimated to average one-half hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Security and Management Support, Bureau of Export Administration, U.S. Department of Commerce, Room 3889, Washington, DC 20230; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503—ATTN: Paperwork Reduction Project (0694–0048).

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

4. Section 13(a) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. This rule is also exempt from these APA requirements because it involves a foreign and military affairs function of the United States. Because this rule is being issued in proposed form, this rule complies with section 13(b) of the Export Administration Act. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

However, because of the importance of the issues raised by these regulations, this rule is issued in proposed form and comments will be considered in the development of final regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close March 15, 1990. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. Identify separately any information that you consider to be company confidential and submit it in writing (six copies). The Department reserves the right to return information if it is not deemed to qualify for confidential treatment—comments returned for this reason will not be considered in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form. Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 4518, Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in part 4 of title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Margaret Cornejo, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 377–2593.

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

List of Subjects in 15 CFR Part 776

Exports, Reporting and recordkeeping requirements.

Accordingly, part 776 of the Export Administration Regulations (15 CFR Part 776) is proposed to be amended as follows:

PART 776—[AMENDED]

1. The authority citation for 15 CFR part 776 continues to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981, by Pub. L. 99–64 of July 12, 1985, and by Pub. L. 100–418 of August 23, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985).

2. Section 776.10 is amended by adding a new paragraph (d) to read as follows:

§ 776.10 Electronic computers and related equipment.

* * * * *

(d) *Supercomputers*—(1) *Definition of supercomputer.* For the purposes of the Export Administration Regulations, a "supercomputer" is any computer that has a theoretical peak performance capability greater than or equal to 100 MFLOPS (million floating-point operations per second). This performance capability will apply equally to all vector, array, and parallel processors, as well as other architectures, as appropriate. BXA will rely on the computer manufacturer to provide the information necessary to identify the variables in the standard formula for determining performance capability. The standard formula that must be used in calculating the theoretical peak performance capability of a single processor is as follows:

$$\frac{\text{Number of operations}}{\text{1 cycle}} \times \frac{\text{1 cycle}}{\text{cycle time}} = \text{Number of MFLOPS}$$

Note: Three technical guidelines must be followed in measuring theoretical peak performance capability:

(a) The number of operations per cycle should be measured by counting the maximum number of floating-point additions and/or multiplications that can be completed during one cycle time of the machine.

(b) The results will be measured on 64-bit

word lengths, regardless of the word length of the processor.

(c) For machines with more than one processor, the MFLOPS for all floating-point processors that work independently of each other in the same machine cycle should be added together to derive the total theoretical peak performance of the machine.

(2) *Exemption for certain workstations and minisupercomputers.* Certain computer workstations and minisupercomputers that are categorized as supercomputers under the definition in paragraph (d)(1) of this section may be exempt from the special licensing requirements applicable to supercomputers. In order to qualify for an exemption, the applicant must verify, with the Office of Technology and Policy Analysis, that the computer workstation or minisupercomputer meets the eligibility criteria in paragraph (d)(2)(i) of this section.

(i) *Eligibility criteria for exemption.*—(A) *Computer workstation.* The workstation must be a microprocessor-based computer; or

(B) *Minisupercomputer.* The minisupercomputer must be a multi-processor computer where each individual processor (scalar plus vector) has a theoretical peak performance capability that falls below the supercomputer definition threshold of 100 MFLOPS; and

(C) *Theoretical peak performance capability.* The theoretical peak performance capability of the system (workstation or minisupercomputer) must be less than 300 MFLOPS for destinations listed in Supplement No. 1 to part 776 or less than 150 MFLOPS for non-Supplement No. 1 destinations.

(ii) *Verification of eligibility.* Applicants must submit a supercomputer classification request to the Office of Technology and Policy Analysis (OTPA) in order to qualify for an exemption—applicants are *not* permitted to determine eligibility for an exemption based on their own review. The following requirements apply to submissions of supercomputer classification requests:

(A) The applicant must explain, in appropriate technical terms, why the workstation or minisupercomputer should qualify for an exemption from the special supercomputer licensing requirements.

(B) The classification request must contain descriptive literature, brochures, technical papers, or specifications that provide sufficient detail to enable OTPA staff to determine whether the workstation or minisupercomputer qualifies for an exemption.

(C) The request must be mailed to the following address: Office of Technology and Policy Analysis, Bureau of Export Administration, P.O. Box 273, Washington, DC 20044.

(D) The request must be clearly marked at the top of the first page and on the lower left-hand corner of the envelope "ATTN: Supercomputer classification request".

(E) The applicant may be required to follow up submission of the classification request with a presentation to OTPA staff and representatives of other agencies.

(iii) *Scope of exemption.* This exemption covers the special licensing requirements that apply only to supercomputers. No other BXA licensing requirements are affected.

(3) *Security safeguard procedures.* BXA may impose certain security safeguards as a condition of issuing export authorization for supercomputers. The nature of the security safeguards and the threshold performance level at which the safeguards will be required will be based primarily on the country of destination, as follows:

(i) *Countries listed in Supplemental No. 1 to part 776.* Certain standard security safeguards are required for supercomputers with a theoretical peak performance capability equal to or greater than *300 MFLOPS.*

Note: A minimal level of security safeguards—prohibiting access to COCOM-proscribed nationals and requiring written authorization from the Department of Commerce to retransfer or reexport supercomputers—is required for supercomputers with a theoretical peak performance capability equal to or greater than 150 MFLOPS, but less than 300 MFLOPS.

(ii) *Countries not included in Supplement No. 1 to part 776.* Security safeguards at least as stringent as those applied—at the 300 MFLOPS level—to Supplement No. 1 countries are required for supercomputers with a theoretical peak performance capability equal to or greater than *150 MFLOPS.*

(iii) *Other factors.* In certain cases, the actual security safeguards that will be required for a country will also be determined, in part, by factors other than the performance of the computer or the country of destination (e.g., end-use, end-user, or specific location of the ultimate end-user). Applicants should contact the Office of Technology and Policy Analysis, at the following address, to obtain specific information on the applicable supercomputer security safeguards: Supercomputer Licensing, Office of Technology and Policy Analysis, Special Projects Branch, Room 4086, U.S. Department of Commerce, Washington, DC 20230, Telephone: (202) 377–4220.

3. Part 776 is amended by adding a new Supplement No. 1 to part 776 (Supercomputers—Countries Eligible Under § 776.10(d)(2)(i)) at the end of the part, to read as follows:

Supplement No. 1 to Part 776

Supercomputers

[Countries Eligible Under § 776.10(d)(2)(i)]

Australia	Japan
Austria	Luxembourg
Belgium	Netherlands
Canada	New Zealand
Denmark	Norway
Finland	Portugal
France	Spain
Germany (FR)	Switzerland
Greece	Sweden
Iceland	Turkey
Ireland	United Kingdom
Italy	

Dated: January 24, 1990.

William L. Clements,

Director, Office of Technology and Policy Analysis, Bureau of Export Administration.

[FR Doc. 90–2027 Filed 1–25–90; 11:03 am]

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federal register

Monday
January 29, 1990

Part VII

Department of Energy

Proposed Laser Isotope Separation Experiments with Plutonium in the Engineering Demonstration System; Postponement of Public Scoping Hearings; Notice

DEPARTMENT OF ENERGY

Postponement of Public Scoping Hearings for an Environmental Impact Statement for Proposed Laser Isotope Separation Experiments with Plutonium in the Engineering Demonstration System at Lawrence Livermore National Laboratory

AGENCY: U.S. Department of Energy (DOE).

ACTION: Notice of postponement of public hearings on the scope of an Environmental Impact Statement (EIS) for proposed laser isotope separation experiments with plutonium in the Engineering Demonstration System (EDS) at the Lawrence Livermore National Laboratory (LLNL).

Notice: DOE announces a change of plans for an EIS scoping process including public scoping hearings previously announced in the **Federal Register** (Volume 55, No. 6, Tuesday, January 9, 1990; pp. 774–776).

The public scoping hearing scheduled for February 2 and 3, 1990 at Livermore, CA and on February 7, 1990 at Idaho Falls, ID, are postponed. The public comment period on the EIS scope wil be extended on a basis consistent with the delay in the conduct of the scoping process and associated hearings. DOE will retain public input received to date for inclusion in the record in a resumed process.

Any rescheduling of the hearings or resumption of the scoping process will be appropriately announced in the **Federal Register** and in the local media. All efforts are being made to contact interested parties, including those who have registered to speak at hearings, to inform them of this change.

FOR FURTHER INFORMATION CONTACT: Questions concerning this announcement should be directed to: Mr. Tommy D. Chang, U.S. Department of Energy, 1333 Broadway, Oakland, CA 94612, 1–800–545–4330.

Signed in Washington, DC, this 25th day of January 1990, for the United States Department of Energy.

Peter N. Brush,

Acting Assistant Secretary, Environment, Safety and Health.

[FR Doc. 90–2158 Filed 1–26–90; 11:15 am]

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Part VIII

Office of the United States Trade Representative

U.S.-Soviet Trade and Investment Agreements; Notice

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Appendix

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

U.S.-Soviet Trade and Investment Agreements

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Request for written comments in connection with the negotiation of trade and investment agreements with the Soviet Union.

SUMMARY: The Trade Policy Staff Committee (TPSC), in conjunction with the Trade Policy Review Groupo (TPRG) Working Groups on U.S.-Soviet Trade and Investment Agreements, is seeking the views of interested parties in connection with the negotiation of trade and investment agreements with the Soviet Union. The TPSC invites written comments which address (1) the economic impact of granting Most-Favored Nation (MFN) treatment (i.e., column 1 rates of duty) to products from the Soviet Union, and (2) problems encountered or anticipated by U.S. entities in conducting trade and investment activities in the Soviet Union or with Soviet entities.

FOR FURTHER INFORMATION CONTACT: Daniel Price, Office of the General Counsel, USTR, on (202) 395–6800 or Gordana Earp, Director for Eastern European Affairs, USTR, on (202) 395–3074.

SUPPLEMENTARY INFORMATION:

I. General

At the conclusion of the Malta Summit meeting between Presidents Bush and Gorbachev, President Bush announced his desire to conclude a U.S.-Soviet trade agreement by June of 1990 granting MFN treatment to the Soviet Union. The conclusion of such an agreement is a prerequisite under Title IV of the Trade Act of 1974 to the extension of MFN treatment. The President also announced his intent to begin discussions of an investment agreement.

In December 1989 the interagency TPRG established Working Groups to formulate the U.S. Government's positions for such trade and investment agreements and draft agreement texts. The TPSC, in conjunction with the Working Groups, is seeking the views of all interested parties concerning the negotiation of such agreements.

II. Written Comments

Written comments are invited on (1) the economic impact of granting Most-Favored Nation (MFN) treatment (i.e., column 1 rates of duty) to products from the Soviet Union, and (2) problems encountered or anticipated by U.S. entities in conducting trade and investment activities in the Soviet Union or with Soviet entities.

All comments should be submitted in 30 copies, by noon, Tuesday, February 20, 1990, to Carolyn Frank, Secretary, TPSC, room 523, 600 Seventeenth Street NW., Washington, DC 20506.

Any submissions which include business confidential material must be clearly marked as such on the cover page (or letter) and succeeding pages. Such submissions must be accompanied by a nonconfidential summary. Non-confidential information received will be available for public inspection by appointment in the USTR Reading Room, 600 Seventeenth Street NW., Room 101, Washington, DC, Monday through Friday, 10 a.m. to 12 noon and 1 p.m. to 4 p.m. For an appointment call Brenda Webb on (202) 395–6186.

David A. Weiss,

Chairman, Trade Policy Staff Committee.

[FR Doc. 90–2195 Filed 1–26–90; 12:08 pm]

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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws.**

Last List: January 19, 1990.

CFR CHECKLIST

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An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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3 (1988 Compilation and Parts 100 and 101)	21.00	[1] Jan. 1, 1989
4	15.00	Jan. 1, 1989
5 Parts:		
1–699	15.00	Jan. 1, 1989
700–1199	17.00	Jan. 1, 1989
1200–End, 6 (6 Reserved)	13.00	Jan. 1, 1989
7 Parts:		
0–26	15.00	Jan. 1, 1989
27–45	12.00	Jan. 1, 1989
46–51	17.00	Jan. 1, 1989
52	23.00	[2] Jan. 1, 1988
53–209	18.00	Jan. 1, 1989
210–299	24.00	Jan. 1, 1989
300–399	12.00	Jan. 1, 1989
400–699	19.00	Jan. 1, 1989
700–899	22.00	Jan. 1, 1989
900–999	28.00	Jan. 1, 1989
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1060–1119	13.00	Jan. 1, 1989
1120–1199	11.00	Jan. 1, 1989
1200–1499	20.00	Jan. 1, 1989
1500–1899	10.00	Jan. 1, 1989
1900–1939	11.00	Jan. 1, 1989
1940–1949	21.00	Jan. 1, 1989
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2000–End	9.00	Jan. 1, 1989
8	13.00	Jan. 1, 1989
9 Parts:		
1–199	20.00	Jan. 1, 1989
200–End	18.00	Jan. 1, 1989
10 Parts:		
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51–199	17.00	Jan. 1, 1989
200–399	13.00	[3] Jan. 1, 1987
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500–End	28.00	Jan. 1, 1989
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300–499	15.00	Jan. 1, 1989
500–599	20.00	Jan. 1, 1989
600–End	14.00	Jan. 1, 1989
13	22.00	Jan. 1, 1989
14 Parts:		
1–59	24.00	Jan. 1, 1989
60–139	21.00	Jan. 1, 1989
140–199	10.00	Jan. 1, 1989
200–1199	21.00	Jan. 1, 1989
1200–End	12.00	Jan. 1, 1989
15 Parts:		
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800–End	14.00	Jan. 1, 1989
16 Parts:		
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150–999	14.00	Jan. 1, 1989
1000–End	19.00	Jan. 1, 1989
17 Parts:		
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18 Parts:		
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280–399	14.00	Apr. 1, 1989
400–End	9.50	Apr. 1, 1989
19 Parts:		
1–199	28.00	Apr. 1, 1989
200–End	9.50	Apr. 1, 1989
20 Parts:		
1–399	13.00	Apr. 1, 1989
400–499	24.00	Apr. 1, 1989
500–End	28.00	Apr. 1, 1989
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22 Parts:		
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1700–End	13.00	Apr. 1, 1989
25	25.00	Apr. 1, 1989
26 Parts:		
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§§ 1.61–1.169	25.00	Apr. 1, 1989
§§ 1.170–1.300	18.00	Apr. 1, 1989
§§ 1.301–1.400	15.00	Apr. 1, 1989
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27 Parts:		
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29 Parts:		
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33 Parts:		
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34 Parts:		
1–299	22.00	July 1, 1988
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400–End	26.00	July 1, 1988
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] No amendments to this volume were promulgated during the period Jan.1, 1988 to Dec.31, 1988. The CFR volume issued January 1, 1988, should be retained.

[3] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1988. The CFR volume issued January 1, 1987, should be retained.

[4] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[5] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

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