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Presidential Documents

Title 3—

The President

Executive Order 12828 of January 5, 1993

Delegation of Certain Personnel Management Authorities

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3 of the United States Code and sections 3502(e), 4505a(e), and 5377(i)(2) of title 5 of the United States Code, it is hereby ordered as follows:

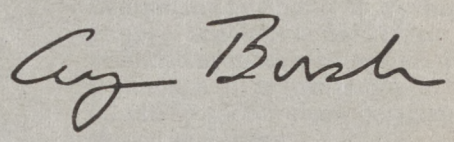
Section 1. The Office of Personnel Management is designated and empowered to exercise, without the approval, ratification, or other action of the President, the following:

(1) The authority of the President under 5 U.S.C. 3502(e), as added by section 4433 of Public Law 102–484, to shorten the period of advance notice otherwise required by law with respect to reductions in force.

(2) The authority of the President under 5 U.S.C. 4505a(e), as added by section 2(19) of Public Law 102–378, to permit performance-based cash awards to be paid to categories of employees who would not otherwise be eligible.

Sec. 2. The Director of the Office of Management and Budget is designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority of the President under 5 U.S.C. 5377(i)(2), as added by section 2(34) of Public Law 102–378, to designate one or more categories of positions within an agency to be treated as critical positions within the meaning of 5 U.S.C. 5377(a)(2).

Sec. 3. This order shall be effective immediately.



THE WHITE HOUSE,
January 5, 1993.

[FR Doc. 93–456
Filed 1–5–93; 4:42 pm]
Billing code 3195–01–M

Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 101

Administration; Delegation of Authority, Claims Review Committees

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: The Small Business Administration (SBA) is amending its regulations delegating authority to its claims review committees. Presently, claims review committees exist at the District, Regional, and Central Office level and have the authority to approve settlement on primary obligations or other evidence of an indebtedness owed the SBA for an amount less than the total amount due thereon. This rule sets forth authority by which claims review committees may be established at the Branch Office level.

DATE: This rule is effective January 7, 1993.

FOR FURTHER INFORMATION CONTACT: Earl Chambers, Director, Office of Portfolio Management, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, (202) 205–6481.

SUPPLEMENTARY INFORMATION: SBA is amending its regulations setting forth the authority delegated to its various claims review committees. Claims reviews committees are established at the District, Regional, and Central Office level for the purpose of determining the action SBA will take with respect to debts owed the Agency. Specifically, the various claims review committees have authority, at differing amounts depending upon their organizational level, to reach settlement on primary obligations or other evidence of an indebtedness owed the SBA for an amount less than the total amount due thereon. This rule provides authority by which a claims review committee may be constituted at the Branch Office level.

In each qualified SBA Branch Office, a Branch Claims Review Committee may be established. The membership of the Committee shall consist of three incumbents (or those officially acting in their behalf) in the following order of position classification: Assistant Branch Manager for Finance and Investment (F&I); Portfolio Management (PM) Chief or Senior PM Staff Member; Branch Counsel; Finance Division (FD) Chief or Senior FD Staff Member; and Business Development Specialist. The first person available in the above order shall serve as chairperson of the committee. The regulation sets forth the degree of concurrence required of committee members in order to undertake certain action as well as the level of authority, in specific dollar amounts, which may be exercised by the Branch Claims Review Committee. Finally, the rule states that split decisions and reconsiderations (appeals) of actions taken by the Branch Claims Review Committee are to be taken directly to the Regional Claims Review Committee. A split decision for purposes of this rule means less than unanimity on those matters which require unanimity.

The establishment of a Branch Claims Review Committee pursuant to this authority shall require publication of a notice in the **Federal Register**. This regulation states that Branch Claims Review Committees will not be organized in each SBA Branch Office. Rather, this rule describes the authority that a Branch Claims Review Committee may exercise and requires that, in order to create a Branch Claims Review Committee in a particular SBA Branch Office, a notice must be published specifically designating such office. This system ensures that only those SBA Branch Offices with sufficient personnel and loan volume have the authority to undertake compromise activities.

Due to the fact that this rule governs matters of agency organization, management, and personnel and makes no substantive change to the current regulation, SBA is not required to determine if it constitutes a major rule for purposes of Executive Order 12291, to determine if it has a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), to do a Federalism Assessment pursuant to Executive Order 12612, or to determine if this rule imposes an annual recordkeeping or reporting requirement on 10 or more persons under the Paperwork Reduction Act (44 U.S.C. ch. 35).

SBA is publishing this regulation governing agency organization, practice, and procedure as a final rule without opportunity for public comment pursuant to 5 U.S.C. 553(b)(A).

List of Subjects in 13 CFR Part 101

Administrative practice and procedure; Authority delegation; Organization and function, Government agency; Reporting and recordkeeping requirement.

For the reasons set forth above, SBA is amending part 101 of Title 13, Code of Federal Regulations, as follows.

PART 101—[AMENDED]

1. The authority citation for part 101 continues to read as follows:

Authority: Secs. 4 and 5 of Pub. L. 85–536, 72 Stat. 384 and 385 (15 U.S.C. 633 and 634, as amended); sec. 308, Pub. L. 85–699, 72 Stat. 694 (15 U.S.C. 687, as amended); sec. 5(b)(11), Pub. L. 93–386 (Aug. 23, 1974); and 5 U.S.C. 552.

2. Part V of Section 101.3–2, Delegation of authority to conduct program activities in field offices, is amended by redesignating paragraphs (a) through (d) as paragraphs (b) through (e) and by adding a new paragraph (a) to read as follows:

§ 101.3–2 Delegation of authority to conduct program activities in field offices.

* * * * *

PART V—CLAIMS REVIEW COMMITTEE

Committee Authority

No authority has been delegated within SBA to take final action in compromise settlement of any Agency claim except through the established Claims Review Committees. Actions taken by such Committees must be in compliance with the provisions of this regulation.

a. *Branch Claims Review Committee.* A Branch Claims Review Committee (BCRC) may be established in each qualified branch office. Membership shall generally consist of three available incumbents (or those acting officially on their behalf) in the following order of position classification. The first member

available in this order shall serve as chairperson:

Assistant Branch Manager/Finance and Investment Portfolio Management Chief or Senior Portfolio Management Staff Member
Branch Counsel
Finance Division Chief or Senior Finance Division Staff Member
Business Development Specialist

In the face of limited staffing availability, the Branch Manager may authorize a different committee structure if such structure is monitored to ensure that each member of the committee is free to give independent opinions regarding the matters at hand. This committee structure must be approved by the District Director overseeing the particular Branch Office at issue.

1. Authority is delegated to this Committee to take final approval action on:

(A) Claims not in excess of $200,000 (excluding interest), upon the majority vote of its members.

(B) Claims exceeding $200,000 but not in excess of $300,000 (excluding interest), upon the unanimous vote of its members.

(C) Claims of any size when the amount offered represents the full principal balance due (thereby forgiving only accrued interest), upon the majority vote of its members.

(D) Claims of any size involved in insolvency proceedings (bankruptcies, state and Federal receiverships, USDA Certified Mediation cases, assignments for the benefit of creditors, etc.) or which are under the administrative control of the U.S. Department of Justice, upon the unanimous vote of its members.

(E) Requests to reduce or eliminate the interest rate charged and/or the interest accrued by the Agency when authority for such action is not otherwise delegated to the line supervisor or the Central Office Claims Review Committee, upon the majority vote of its members.

(F) Private sales of collateral and collateral purchased which exceed the delegated authority of the line supervisor, upon the unanimous vote of its members.

(G) Bid proposals responding to an authorized Request For Proposals for annual auctioneering services, upon the unanimous vote of its members.

2. Committee recommendations to sell a loan or other evidence of indebtedness owed the Agency for less than the principal amount due, or to compromise an Agency claim against a "going" business which is not involved in insolvency proceedings or under the administrative control of U.S. Department of Justice, must be forwarded through channels, with Branch and Regional Committee comments, to the Central Office Claims Review Committee for final action.

3. Settlement offers on claims of any size may be declined by majority vote of its members.

4. Split decisions and reconsiderations (appeals) of actions taken by this Committee must go directly to the Regional Claims Review Committee.

5. A Branch Claims Review Committee will not be organized in each SBA Branch Office. Rather, a Branch Claims Review Committee may be established at an SBA Branch Office only pursuant to a specific designation of a particular branch office, published as a notice in the **Federal Register**. Such designation will be based upon the sufficiency of that office's personnel as well as its loan volume.

* * * * *

Dated: December 28, 1992.

Patricia Saiki,

Administrator.

[FR Doc. 93–15 Filed 1–6–93; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 346 and 381

[Docket No. RM92–17–000]

Elimination of Filing Fees

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to eliminate certain filing fees. The Commission will retain filing fees for petitions for issuance of a declaratory order and the fees for blanket certificate applications made by Hinshaw pipelines and local distribution companies, for petitions for rate approval pursuant to § 284.123(b)(2), and for initial or extension reports for title III transactions, in addition to the six filing fees proposed for retention in the notice of proposed rulemaking. The Commission also is revising the current methodology for annual adjustments to its filing fees and direct billing.

EFFECTIVE DATE: This rule is effective January 4, 1993.

FOR FURTHER INFORMATION CONTACT: Julia Lake White, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208–0457.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission has made this document available so that all interested persons may inspect or copy its contents during normal business hours in room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to use 300, 1200, 2400 baud, full duplex, no parity, 8 data bits and 1 stop bit. The full text of this document will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

Before Commissioners:
Martin L. Allday, Chairman;
Charles A. Trabandt, Elizabeth Anne Moler,
Jerry J. Langdon and Branko Terzic.

Elimination of Certain Filing Fees in Parts 346 and 381

[Docket No. RM92–17–000; Order No. 548]

Issued January 4, 1993.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending its regulations in parts 346 and 381 to eliminate certain filing fees. The Commission will retain the filing fees for petitions for issuance of a declaratory order in § 381.302 and the fees in § 381.207(a)(1) for blanket certificate applications made by Hinshaw pipelines and local distribution companies, in § 381.403 for petitions for rate approval pursuant to § 284.123(b)(2), and in § 381.404 for initial or extension reports for Title III transactions, in addition to the six filing fees proposed for retention in the Notice of Proposed Rulemaking. The Commission also is revising the current methodology for annual adjustments to its filing fees in § 381.104(c) and direct billing in § 381.107(a) of the regulations.

This rule will be effective upon issuance.

II. Background

The Commission is authorized under the Independent Offices Appropriation Act of 1952 (IOAA) to establish fees for the services and benefits it provides.[1] In addition, the Omnibus Budget Reconciliation Act of 1986 (OBRA) authorizes the Commission to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year."[2]

On October 15, 1992, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to eliminate most filing fees, with the exception of six.[3] The Commission proposed to recover costs associated with filings for which fees are being eliminated in the annual charges assessed pursuant to part 382 of the Commission's regulations. The Commission reserved the option to order direct billing for filings that may be unusually extensive in scope and that present complex factual, legal, or policy issues requiring an extraordinary amount of time and effort to process them. The Commission also sought comments on whether to substitute a different approach for the current methodology for annual adjustment of the retained filing fees.

Twenty-four comments were received in response to the NOPR.[4] Thirteen commenters generally supported the Commission's proposal because it will simplify the filing process, expedite the consideration of filings, eliminate barriers to actions that may be economically efficient and in the public interest, and to some extent reduce the Commission's administrative costs.[5] At the same time, some of these commenters expressed concerns with the final rule's potential impact on certain types of transactions and services.[6]

Eleven commenters opposed the elimination of filing fees.[7] These commenters argued that elimination of the Commission's filing fees will not result in either simplifying the filing process or expediting the review and consideration of filings. According to commenters, the Commission has not shown that elimination of the filing fees will reduce the Commission's administrative costs.

Commenters also proposed modifications to the annual charges assessment methodology, retention of additional filing fees, and modifications to direct billing procedures and the methodology for updating the filing fees.

For the reasons discussed below, the Commission is adopting as final its proposal to eliminate certain filing fees, with some modifications.

III. Discussion

A. Comments Supporting Elimination of Filing Fees

The Commission received thirteen comments that supported this rulemaking, recognizing its procompetitive and public interest aspects. Commenters noted that the proposed rule would reduce overall administrative costs for the Commission and the companies it regulates.[8] This in turn will benefit consumers since public utilities and pipelines generally pass on the fees and the costs associated with filings to purchasers and consumers.[9] They also noted that filing fees discourage otherwise economically advantageous and efficient jurisdictional transactions.[10]

One commenter identified two market-distorting effects of the Commission's current filing fees system for the electric industry: (1) utilities may forgo transactions or structure them inefficiently in order to avoid fees; and (2) utilities may design transactions to maximize filing fees passed through to customers/competitors, seeking to gain a competitive advantage or to block competitors from participating in the bulk power and coordination markets.[11]

According to commenters, removing filing fees will eliminate the cost of filing as a consideration in determining whether to engage in certain transactions, allowing those decisions to be made on their merits.[12] Commenters also noted that the Commission's existing filing fees system is not clear and leaves filing parties uncertain as to the fee, if any, that is due.[13]

Commenters supporting the rule also pointed out that the final rule will eliminate market barriers for some participants, especially smaller entities.

B. Impact of Elimination of Filing Fees on Annual Charges Assessments

1. Perceived Impacts on Jurisdictional Companies

The Commission proposed to eliminate most filing fees and to recover the Commission's costs associated with these filings as part of the annual charges assessed each year. The Commission noted in the NOPR that the resulting increase in annual charges would be modest and have no effect on the financial health or competitive viability of any jurisdictional company.[14]

Commenters opposing the elimination of the filing fees, apparently believing that the increase in annual charges will be much higher than will actually be the case, argued that the Commission must accurately allocate costs and eliminate or avoid cross-subsidies. According to these commenters, the Commission should require pipelines to pay regulatory costs in proportion to, or to compensate for, their regulatory activities.[15] One commenter argued that the proposed collection method would move further away from the theory that those who incur the costs of

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[1] 31 U.S.C. 9701.

[2] 42 U.S.C. 7178.

[3] Elimination of Certain Filing Fees in parts 346 and 381, Docket No. RM92–17–000, 57 FR 48005 (Oct. 21, 1992), IV FERC Stats. & Regs. ¶32,488. The six filing fees to be retained are: reviews of Department of Energy remedial orders in § 381.303; reviews of Department of Energy denials of adjustment in § 381.304; five Megawatt exemption applications under section 405 of the Public Utility Regulatory Policy Act (PURPA) in § 381.601; reviews of jurisdictional agency determinations in § 381.402; certifications of qualifying status as small power production facility or cogeneration facility in § 381.505; and interpretations by the Office of the General Counsel in § 381.305.

[4] A list of the commenters is in the Appendix.

[5] See, e.g., Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company (Columbia), Commonwealth Edison Company (Edison): Edison Electric Institute (EEI); Enron Interstate Pipelines (Enron); Green Mountain Power Corporation (Green Mountain); National Fuel Gas Supply Corporation (National Fuel); New England Power Company; Pacific Gas Transmission Company (Pacific Gas); Public Systems; Tennessee Gas Pipeline Company (Tennessee Gas); Northern Distributor Group; Florida Power & Light Company (Florida); and UtiliCorp United Inc. (UtiliCorp).

[6] See, e.g., Columbia Gas; Edison; EEI; Enron; and Tennessee Gas.

[7] See, e.g., Arizona Public Service Company (Arizona); Arkla Energy Resources and Mississippi River Transmission Corporation (AER and MRT); ANR Pipeline Company and Colorado Interstate Gas Company (ANR and CIG); El Paso Natural Gas Company (EL Paso); Iowa-Illinois Gas & Electric (Iowa-Illinois); JMC Power Projects; Philadelphia Electric Company; PEC Pipeline Group; Transok Gas; Washington Water Power Company (Washington Water); and Williston Basin Interstate Pipeline Company (Williston).

[8] See, e.g., Public Systems at 2; Northern Distributor Group at 1; and Pacific Gas Transmission at 2.

[9] See, e.g., Public Systems at 2; Northern Distributor Group at 2.

[10] See, e.g., New England Power at 1; Northern Distributor Group at 2.

[11] Public Systems at 5.

[12] See, e.g., Edison Electric Institute at 1; New England Power at 1; Pacific Gas Transmission at 2; Northern Distributor Group at 2–4.

[13] See, e.g., Commonwealth Edison at 4; Green Mountain Power Corporation at 1–2; Pacific Gas Transmission at 2.

[14] See Notice of Proposed Rulemaking, slip op. at 6–9.

[15] See, e.g., AER and MRT; JMC Power Projects; ANR and CIG; and El Paso.

Commission services should pay for them.[16]

Arizona Public Service Co. (Arizona) argued that the elimination of filing fees would penalize jurisdictional utilities that collect applicable filing fees directly from the entity causing the filing. Arizona also fears that annual charges would be increased as the filing fees now recovered on an individual basis are spread out and recovered from all applicable jurisdictional utilities. Arizona noted that a utility may be required to seek a rate increase to absorb the increase in the annual charges assessments (ACA).[17]

Jurisdictional utilities that collect applicable filing fees directly from the entity causing the filing will not be penalized by this final rule. The increase in annual charges paid by utilities will be modest. Utilities may file to recover the increased annual charges if they choose to do so. Utilities may also seek to have these adjusted annual charges allocated to the customers who use those kilowatt hours.

Commenters also noted that, under the current ACA methodology, jurisdictional entities are not guaranteed recovery of annual charges payments to the Commission. According to one commenter, under current market conditions, merely having the right to collect the ACA does not guarantee that regulated entities will actually collect the ACA on volumes of natural gas transported. This commenter noted that, when the pipeline is forced to offer a discounted rate that includes the full ACA surcharge, the pipeline shareholders, not customers, would fund a portion of the Commission's activities.[18] According to two joint commenters, the annual charges element in a pipeline's rate may constitute a significant portion in a deeply discounted transportation arrangement. They alleged that, in a low margin transaction, the annual charge increase may render the transaction uneconomic.[19]

The Commission has considered these comments but nonetheless believes that eliminating filing fees will have a moderate impact on annual charges for jurisdictional companies. To the extent that these commenters believe that the elimination of filing fees will vastly increase their annual charges assessments, they are mistaken.

In 1992, the total annual charges assessments to oil companies were $2,589,000; if filing fees had been eliminated, the total annual charges would have been $2,675,000, a difference of $86,000, which will be spread out over 137 companies. The largest annual charges assessed against an oil pipeline in 1992 were $164,000 and the smallest annual charges assessed against an oil pipeline were $18. If filing fees had been eliminated, the largest annual charges that would have been assessed against an oil pipeline would have been $170,000 and the smallest annual charges that would have been assessed would have been $19. This is a difference of $6,000 and $1, respectively.

In 1992, the total annual charges assessments to electric public utilities were $29,083,000; if the filing fees other than for small power and co-generation had been eliminated, the annual charges would have been $31,306,000, which is a difference of $2,223,000, which would be spread out over 182 companies. The largest annual charges assessed against a public utility in 1992 were $1,330,174[20] and the smallest annual charges assessed against a public utility were $2. If filing fees had been eliminated, the largest annual charges that would have been assessed against a public utility would have been $1,431,799 and the smallest annual charges that would have been assessed would have been $2. This is a difference of $101,625 and zero, respectively.

In 1992, the total annual charges assessments to gas companies were $61,018,000; if the filing fees had been eliminated, the annual charges would have been $68,265,000, which is a difference of $7,247,000, which will be spread out over 115 companies. The largest annual charges assessed against a gas company in 1992 were $3,951,147 and the smallest annual charges assessed against a gas company were $145. If filing fees other than producer fees had been eliminated, the largest annual charges that would have been assessed against a gas company would have been $4,420,543 and the smallest annual charges that would have been assessed would have been $162. This is a difference of $469,396 and $17, respectively.

The benefits that will accrue as a result of this rule will not be counterbalanced by burdensome increases in annual charges. If the proposal to eliminate most filing fees had been in effect in 1992, there would have been no increase in annual charges for hydro-electric companies and an increase of only about 3 percent for oil pipelines. For electric utilities and natural gas pipelines, there would have been overall increased annual charges of about 7.64 and 11.88 percent, respectively.

The largest assessments and the smallest assessments are both being affected equally; the effect is a low percentage increase in annual charges. The highest increase in annual charges would have occurred with respect to the gas pipelines and this increase would only have been 11.88 percent.

Of equal importance to the modest increase in annual charges occasioned by this rule is the fact the increase in annual charges does not result in any additional revenue to the Commission. The increases in annual charges are offset, dollar for dollar, by decreases in filing fees. Those filing fees are generally paid by the very same entities that are paying annual charges. For example, in 1992, Texas Eastern Transmission Corporation (Texas Eastern) paid annual charges of $2,292,048 and filing fees for all its various filings of $589,618, or total charges of $2,881,666. If the rule had been in place for 1992, Texas Eastern would have paid annual charges of $2,564,343. While as an industry the offset will be dollar-for-dollar, for any given company in any given year the effect of the rule change may cause its total charges to be higher or lower than without the change. This would occur because the Commission offsets total program costs with total fees paid before assessing annual charges, rather than offsetting individual companies' annual charges with individual fees paid. The Commission would expect differentials to balance out over time.

The Commission does not anticipate that the removal of filing fees will result in a large number of frivolous filings by companies that were inhibited from making such filings prior to the fees' removal. To expect such behavior on the part of regulated entities is to anticipate that they will act in an economically irrational manner. The Commission cannot presume that this will be the case.

Recovering costs through annual charges rather than filing fees has the advantage of enhanced convenience and certainty for jurisdictional companies. Fees for specific types of regulatory action are, by their nature, subject to greater fluctuation than is a single annual charge based on a pro rata share of the Commission's costs for an entire regulatory program.[21]

[16] Williston Basin at 1.

[17] Arizona Public Service Co. at 2–3.

[18] Columbia at 5–6.

[19] AER and MRT at 4.

[20] New England Power Co. This utility supports this rulemaking.

[21] For example, certain pipeline tariff filing fees (under 18 CFR 381.205(a)(1)) increased from $6,600 in 1990 to $8,080 in 1992; pipeline certificate

The commenters who questioned a possible increase in annual charges that could result from elimination of most filing fees did not properly account for the fact that, to some extent, entities that pay annual charges are always cross-subsidizing activities at the Commission in which they do not actively participate or as to which they are not necessarily direct beneficiaries. The cross-subsidy to which some commenters allude is not unique to this proposal and is to some extent inherent in annual charges. Thus, raising the possibility of problems that occur with respect to annual charges to oppose elimination of filing fees is an impermissible and untimely collateral attack on the annual charges methodology.

2. Perceived Impact on Companies With Little Direct Involvement With FERC.

Iowa-Illinois is concerned that the Commission's proposal to shift recovery of costs from filing fees to annual charges assessments will adversely impact companies who have little direct involvement with the Commission. Iowa-Illinois pointed out that it generates few filings and the Commission therefore expends little time and resources processing Iowa-Illinois' filings. According to Iowa-Illinois, movement away from direct assessment methodology raises the possibility that Iowa-Illinois will be assessed a portion of the charges for the multitude of filings made by interstate natural gas pipelines and other entities.[22]

Iowa-Illinois' contentions lack merit. First, as previously noted, no jurisdictional company that presently pays annual charges will experience a significant increase in its annual charges. Second, Iowa-Illinois' arguments are a collateral attack on annual charges. Filing fees may actually distort the economic costs of doing business with the Commission more than annual charges and may also inhibit smaller companies, with a lesser ability to pay, from making beneficial filings.

Perhaps most significantly, based on this year's data, Iowa-Illinois actually will benefit from the rule change. According to Commission records, Iowa-Illinois paid electric annual charges for 1992 in the amount of $34,854 (disregarding an adjustment for the prior year's overpayment). If the rule change had been in effect, the annual charges would have been $37,517. In fiscal year 1992, Iowa-Illinois also paid $4,850 in filing fees—meaning that, under the rule change, Iowa-Illinois would have paid over $2,000 less than it did under the current system. Iowa-Illinois' fear of a dramatic increase in the amount of its annual charges is unfounded.

Finally, its contention that it has had relatively few filings in recent years does not signify that it should be given a waiver from the annual charges that jurisdictional companies must pay, according to statute.

C. Collateral Attack on Annual Charges Assessments Methodology

In addition to objecting to a perceived increase in the amount of annual charges that they will be required to pay, certain commenters identified problems with the Commission's current methodology for assessing annual charges pursuant to Part 382 of the Commission's regulations, including: (1) The proposal to eliminate filing fees is inconsistent with Order No. 636's policy initiatives[23]; (2) ACA charges should not be collected on interstate pipeline sales under blanket certification[24]; (3) pipelines should be able to recover ACA charges in their demand charges[25]; (4) pipelines should be able to recover ACA charges in a "50–50 demand/commodity split,"[26]; (5) pipelines should be allowed to recover increased ACA charges by changing their method of collecting annual charges from a cost-of-service item to a surcharge, or vice-versa[27]; (6) pipelines should be allowed to recover increased ACA charges by adjusting their base tariff rates in limited Section 4(e) filings to reflect the increase in annual charges[28]; (7) pipelines should be allowed to recover increased ACA charges by continuing to collect the existing level of annual charges in their base tariff rates, and collecting the increase in annual charges resulting from this rule through an interim surcharge[29]; (8) pipelines should be allowed to recover increased ACA charges by maintaining the status quo and continuing to pay filing fees in lieu of the increase in annual charges, until the pipelines make their next general Section 4 rate filing[30]; (9) pipelines should be allowed to recover annual charges through a reservation surcharge[31]; (10) the ACA charge should only be collected by the pipeline at the end of the transaction chain[32]; (11) annual charges must be assessed only once[33]; (12) the Commission should include a true-up mechanism whereby an entity is assured of remitting only the annual charges amounts actually collected[34]; (13) increased annual charges assessments should be billed by the Commission on a quarterly basis[35]; (14) the ACA methodology will result in regional inequities that will create a substantial and unrecoverable cost burden on companies operating where pipeline construction has slowed due to an excess of capacity[36]; (15) increased annual charges will have deleterious consequences for "incremental shippers"[37]; and (16) the Commission should expand of the types of companies assessed annual charges[38].

First, the Commission will not address in this docket the commenters' attacks on the way annual charges are assessed and collected. These issues are irrelevant to the question of eliminating certain filing fees. As the Commission repeatedly has noted, shifting the recovery of the Commission's costs from filing fees to annual charges will not substantially increase any one company's costs—and on an industry-wide basis, the change is zero. The incremental increase in the pipelines' annual charges should have negligible consequences, particularly when these consequences are balanced against the administrative burden of maintaining two different collection systems. Moreover, because this action is being taken in mid-year, the impact of doing away with filing fees will be spread over two years.

Second, questions that have been raised with respect to the Commission's annual charges adjustment (ACA) mechanism are beyond the scope of this rulemaking. The Commission nevertheless acknowledges that several of the commenters have raised issues that deserve further consideration. Revisitation of the ACA mechanism may be appropriate, particularly as a result of the policy initiatives in Order No. 636.[39]

application fees rose in the same period from $26,260 to $39,440; and curtailment filing fees increased from $6,270 to $11,432.

[22] See Iowa-Illinois at 1–2.

[23] See PEC Pipeline Group at 1–2 and 5–7.

[24] Tennessee Gas Pipeline Company at 4.

[25] *Id.*

[26] Columbia at 6–7.

[27] ANR and CIG at 4.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] The PEC Pipeline Group at 11–12.

[32] Williston at 3.

[33] Enron at 6–7.

[34] Columbia at 7.

[35] Enron at 5–6

[36] JMC Power Projects at 3 and 5.

[37] JMC Power Projects at 3–4.

[38] PEC Pipeline Group at 9–10.

[39] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 FR

Continued

The Commission therefore will issue a notice of inquiry in the near future seeking comments on the ACA mechanism and current market conditions. That notice will take into account the comments that were filed by all commenters in this case and will seek additional comments from entities that are affected by the Commission's annual charges assessments.

D. Retention of Certain Filing Fees

The Commission proposed to retain six filing fees including: (1) reviews of Department of Energy remedial orders in § 381.303; (2) reviews of Department of Energy denials of adjustment in § 381.304; (3) five megawatt exemption applications under Section 405 of the Public Utility Regulatory Policy Act (PURPA) in § 381.601; (4) reviews of jurisdictional agency determinations in § 381.402; (5) certifications of qualifying status as a small power production facility or cogeneration facility in § 381.505; and (6) interpretations by the Office of the General Counsel in § 381.305.

Commenters generally supported retention of these filing fees. However, several commenters proposed retention of other filing fees. Two commenters requested that the Commission retain the filing fee for petitions for issuance of a declaratory order in § 381.302.[40] These commenters noted that non-jurisdictional entities may file requests for a declaratory order disclaiming jurisdiction and that these filings are of specific interest and benefit to the party making the filing. According to Tennessee, the number of these petitions seems to be increasing as more companies seek gathering status determinations for various facilities.[41]

The Commission will retain the filing fee for petitions for issuance of a declaratory order in § 381.302, as Arizona and Tennessee requested. This is consistent with the Commission's intention to retain filing fees assessed against nonjurisdictional entities. The Commission recognizes, in the case of petitions for declaratory orders for gathering status determinations or for other determinations of nonjurisdictional status, that these filings are made by entities that may well not pay annual charges.

The Commission will retain a filing fee for blanket certificate applications made by Hinshaw pipelines and local distribution companies in § 381.207(a)(1). The PEC Pipeline Group pointed out that elimination of the filing fee for all certificate applications will allow intrastate pipelines that are not subject to annual charges assessments to avoid paying for Commission services.[42] The PEC Pipeline Group argues that interstate pipelines should not be required to pay for filings made by intrastate pipelines when interstate pipelines do not enjoy the same benefits as do the intrastate pipelines providing section 311 service.

The PEC Pipeline Group's arguments do not warrant retention of this filing fee. Since 1989, the Commission has processed only 23 applications pursuant to § 381.207(a)(1). Those applications are routine in nature, are now acted upon pursuant to delegated authority, and do not require significant expenditures of Commission resources. Since 1989, these applications have not once been protested. Retention of the current level of filing fees for this category of applicant (now $39,440) would result in disproportionately high costs, however, because the applications would be considered on the same base that is discussed in section F, herein.

On the other hand, the Commission believes that these categories of filers, who do not pay annual charges and therefore do not defray the costs applicable to consideration of their applications, should pay a filing fee for applications filed under § 381.207(a)(1). Based on recent experience with these types of filings, the Commission has determined that a comparable category in terms of resources expended is in § 381.208, requests under the blanket certificate notice and protest procedures. Presently, these filing fees are $490. However, the applications filed pursuant to § 381.207(a)(1) require preparation of an order, which should add to the fee that the applicant will pay. The Commission therefore has determined to retain an application fee for these applications, but will change § 381.207(b) to reflect the reduced filing fee. The fee that the Commission will charge for such filings in the future, to be updated on an annual basis based on the data available with respect to these transactions in the Commission's data base, as explained in section F herein, will initially be $1,000.

The Commission also will retain the filing fees under §§ 381.403 and 381.404, that are applicable to petitions for rate approval pursuant to § 284.123(b)(2) and initial or extension reports for Title III transactions for intrastate pipelines, respectively. These fees are charged for filings that are made by nonjurisdictional companies that do not pay annual charges. The volume of these filings, which are made on a continuous and routine basis, can be significant. The Commission has determined to continue to charge filing fees in these circumstances and will therefore retain §§ 381.403 and 381.404 intact.

Philadelphia Electric Company (PECo) requested the Commission to exempt rate filings to effect transmission services under the Federal Power Act from the NOPR's proposal to eliminate filing fees. PECo did not specify the provision(s) that it wanted the Commission to retain, but noted that a number of the filing fees incurred by PECo arise from customer requests for new transmission services and the accompanying new rate schedules. PECo alleges that it and a number of other electric power companies recover these filing fees directly from the customer. According to PECo, without a separately identified filing fee, it would be unlikely that electric power companies could assess the costs caused by each rate filing to the party that is responsible for the expense. Annual charges for public utilities are based, in part, on the amount of power they transmit. Thus, PECo alleges, inclusion of annual charges in the regulatory expense portion of their base rates would be one way for PECo to recover these costs.

Edison Electric Institute (EEI) requested the Commission to charge filing fees for preliminary permit applications, and original license applications filed under part I of the Federal Power Act (FPA).[43] EEI noted that a large percentage of these applications do not result in licensed projects, so the applicants never pay annual charges for back charges to cover their share of the Commission's administrative costs.[44] EEI also noted that few preliminary permits and

13267 (Apr. 16, 1992), III FERC Stats. & Regs. Preambles ¶ 30,939 (Apr. 8, 1992); *order on reh'g*, Order No. 636–A, 57 FR 36128 (Aug. 12, 1992), III FERC Stats. & Regs. Preambles ¶ 30, 950 (Aug. 3, 1992); *order denying reh'g and clarifying*, 57 FR 57911 (Dec. 8, 1992), 61 FERC ¶ 61,272 (Nov. 27, 1992).

[40] See Arizona Public Service Co. at 4; and Tennessee Gas Pipeline Co. at 3.

[41] Tennessee Gas Pipeline Co. at 3. Commission records indicate that 10 petitions for declaratory orders for gathering determinations were filed in FY 91, 11 petitions were filed in FY 92, and to date 4 petitions have been filed in FY 93.

[42] The PEC Pipeline Group at 9–10.

[43] EEI at 2.

[44] EEI cited testimony by Dick Hunt, former Director of the Commission's Office of Hydropower Licensing to the Senate Energy Committee in February 1991, that only 54% of permit, license, and exemption applications filed with FERC between 1980 and 1990 were approved and only 13% of the approved projects resulted in operating power plants. See EEI at 2.

original license applications are filed by owners of existing projects.

The costs of administering part I of the Federal Power Act are collected pursuant to section 10(e) of the Act. Changes to the manner in which part I costs are collected are beyond the scope of this rulemaking.

E. Direct Billing

The Commission proposed to retain the option to order a direct billing procedure at the beginning of processing a filing or at any time up to one year after receiving a complete filing for extraordinary filings.

Several commenters requested the Commission to clarify what constitutes an "extraordinary filing," to implement objective standards for determining when and how the direct billing mechanism will be applied, and to provide for notice to an affected applicant as soon as possible after an extraordinary filing is submitted, including an estimate of the fee.[45] Tennessee and Williston requested the Commission to place a cap on direct billing charges.[46] UtiliCorp requested the Commission to simplify the direct billing mechanism by replacing the periodic assessment of costs provision with a one-time standardized complexity surcharge.[47] The PEC Pipeline Group reserved the right to comment further on the direct billing test because the NOPR did not suggest a test.[48]

The PEC Pipeline Group also requested the Commission to clarify its intent regarding the direct billing alternative. According to the PEC Pipeline Group, once filing fees are eliminated, it is unclear whether the Commission intends to direct bill for an extraordinary filing that no longer requires a filing fee to be remitted. The PEC Pipeline Group interprets § 381.107(a) as indicating that direct billing will occur only on applications associated with payment of a filing fee. The PEC Pipeline Group requested clarification if this interpretation is not the Commission's interpretation.[49] Contrary to the PEC Pipeline Group's interpretation, the direct billing mechanism is not restricted to situations where a filing fee would otherwise be paid.

The Commission expects that the occasions on which it will resort to direct billing will be extremely rare. The direct billing procedures will be utilized, at the Commission's discretion, only in those cases involving complex factual, technical, environmental, procedural and/or legal issues that involve a disproportionate expenditure of Commission resources. One such situation is a large LNG project that is unrelated to any class of domestic customers or domestic rate payers and thus would not pay annual charges.[50]

F. Annual Adjustment of Fees

The Commission invited comments on whether it should continue the current annual recalculation process on the fees being retained. Few comments were submitted on the current annual recalculation process in § 381.104(c).[51] EEI noted that, although the Commission's current method of updating filing fees may be the most cumbersome of those identified in the NOPR, it also appears to be the most accurate. EEI requested the Commission to ensure that any alternative other than the current method selected to recalculate the filing fees produce accurate results.[52] EEI also suggested that filing fees should be "spot checked" periodically to ensure that they reflect actual costs for processing specific filings.[53]

EEI specifically requested that, if the Commission uses a constant number of employee hours for each type of filing to calculate filing fees, the constants should be developed using a sufficiently large data base to ensure that they accurately represent typical filings. EEI also requested that, if fees are updated by applying an inflation factor to base year fees, the "base year" should be carefully chosen to ensure that it reflects the level and nature of filings for which fees will be charged.[54]

The Commission is substituting a new formula for the present annual adjustment. The formula for determining each fee will use a constant base. That base will be the total number of actual workmonths dedicated to a given fee category for all years for which the Commission has data, through FY 92[55], divided by the total number of actual completions in those years for which the Commission has data, through FY 92. This base will be multiplied by the average cost per workmonth in the most recent complete fiscal year.[56]

This methodology for computing the annual adjustment of fees is preferable to other proposed methodologies because this method will simplify the Commission's procedures while retaining an accurate update of the fees. Using five or six years' data rather than the present three-year base will reduce year-to-year fluctuations. At the same time, using the most current cost factor will allow fees to reflect Commission costs more accurately than would an inflation factor, which would increase the fees yearly based on the rate of inflation only for that year.

If this formula for determining the filing fees had been in effect for FY 92, it would have affected the fees that the Commission proposed originally to retain in the following manner[57]: (1) Reviews of Department of Energy remedial orders would have been $12,940 instead of $13,400; (2) reviews of Department of Energy denials of adjustment would have been $6,940 instead of $5,760; (3) the fee for five Megawatt exemptions would have been $19,900 instead of $20,650; (4) reviews of jurisdictional agency determinations would have been $90 instead of $85; (5) the fee for certification as a qualifying small power production facility would have been $8,120 instead of $9,100 and the fee for certification as a qualifying cogeneration facility would have been $9,560 instead of $10,540; and (6) the fee for interpretations by the Office of the General Counsel would have been $2,450 instead of $2,310.

The Commission is revising § 381.104(c) to reflect its new formula.

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[45] See AER and MRT at 7–8; Commonwealth Edison at 1 and 4–5; Tennessee at 5; and Williston Basin at 2.

[46] Tennessee Gas Pipeline Company at 5 and Williston at 2.

[47] UtiliCorp at 9.

[48] PEC Pipeline Group at 13–14.

[49] PEC Pipeline Group at 13.

[50] See Yukon Pacific Co. L.P., 59 FERC ¶ 61,153 (1992), order on reh'q 60 FERC ¶ 61,132 (1992), appeal pending sub nom. Yukon Pacific Co. L.P. v. FERC, No. 92–1503 (D.C. Cir. filed Oct. 7, 1992).

[51] 18 CFR 381.104(c).

[52] EEI at 2.

[53] Id. at 3.

[54] EEI at 2.

[55] Two fees, those for certifications of qualifying status as a small power production facility and cogeneration facilities, will use data for only five years (1988–1992) because prior to 1988 these fees were combined, and no data are available for 1987. All other fees will use data for the six fiscal years 1987 through 1992.

[56] Under this formula, the number of workmonths reported for a class of docketed activity is added to that class's pro rata share of the workmonths reported for relevant support activities. This figure, representing the total number of workmonths dedicated to a class of docketed activity for the indicated years, is divided by the number of completions for those six years for the given activity. The resulting quotient will be a constant factor used each year which represents the average number of workmonths required to complete one proceeding in that given class of docketed activity. Next, the average cost of a workmonth is calculated based on the Commission's most recent fiscal year actual costs. Then, in order to determine the fee for a given class of activity, the average cost per workmonth is multiplied by the constant factor. After rounding, according to current practice, this number will represent the fee in that category.

[57] These numbers for the filing fees being retained have been calculated without workmonth and completion data for FY 92, which are not yet available.

The Commission has determined to retain the filing fees for blanket certificate applications filed by Hinshaw pipelines and local distribution companies in § 381.207(a)(1). The data base that currently exists takes into account all pipeline certificate applications, however, not just these less substantial certificate applications. The present fee therefore is based on inclusion of larger and more complex transactions that are filed by jurisdictional companies. The Commission henceforth will rely on the data generated with respect to only the Hinshaw and LDC applicants in updating the filing fees that will be applicable to these transactions, which are made pursuant to section 7(c) of the Natural Gas Act filed in accordance with § 284.224 of the Commission's regulations. For the first year, the Commission will make the filing fee $1,000, based on the § 381.208 filing fee and its own experience. The Commission will add each succeeding year's information to create a data base for the filing fees for these applications.

G. Miscellaneous Comments

1. AER and MRT requested the Commission to expand the scope of this docket to re-examine all aspects of its cost collection methodology including: (1) Assigning costs directly to entities that cause the costs through their regulatory activity; (2) giving pipelines a reasonable opportunity to recover any annual charges allocated to discounted transactions; and (3) addressing the problem of multiple collections of annual charges for transactions that traverse more than one interstate pipeline.[58]

The Commission will not expand the scope of this docket to accommodate AER's and MRT's interests in order to re-examine all aspects of the cost collection methodology. AER's and MRT's first request, that the Commission assign costs directly to entities that cause the costs through their regulatory activities, would result in the Commission's abandoning the annual charges concept and potentially could overburden smaller companies, with a lesser ability to pay, with disproportionate costs. In any event, this request is beyond the scope of this rulemaking.

The Commission is not honoring in this docket AER's and MRT's request that the Commission consider giving pipelines a reasonable opportunity to recover any annual charges allocated to discounted transactions. First, this request appears to be premised on the false assumption that there will be a significant increase in annual charges as a result of the elimination of the filing fees at issue. As the Commission has previously explained, however, filing fees overall constitute less than 12 percent of the revenues; annual charges are the vast majority. Second, the annual charges adjustment mechanism set out in § 154.38(d)(6) of the Commission's regulations is not mandatory, but rather is one option by which pipelines may recover their annual charges.[59] Such charges may also be included and recovered as a part of regulatory expense in the pipelines' base rates. In any event, the Commission will be pursuing possible revisions to the ACA methodology in the near future.

The last problem that AER and MRT identified, multiple collections of annual charges for transactions that traverse more than one interstate pipeline, is similarly inappropriate for the Commission to address in the instant rulemaking. To the extent that the problem exists at all (and AER and MRT did not quantify the extent to which it allegedly exists), it is not unique to this case and will not be significantly exacerbated by the modest increase in annual charges that might occur after the elimination of the filing fees.

2. UtiliCorp United Inc. (UtiliCorp) proposed that the Commission should consider three refinements to the filing fees mechanism if the Commission should retain a filing fees approach to cost recovery.[60] The three proposals are: (1) within each currently existing category of filing, distinctions should be drawn based upon the type of application being made; (2) more of the existing filing fee categories should be broken down based on the dollar amount involved; and (3) the Commission must streamline its direct billing provision.

There is no need to address UtiliCorp's proposal because the Commission is eliminating most filing fees in this final rule.

3. In assessing annual charges under Part I of the FPA to recover the cost of other agencies participating in the hydro licensing process, EEI requested the Commission to set standards for documentation that other agencies must provide to substantiate their costs. EEI also requested the Commission to screen and occasionally audit the bills submitted by those other agencies.[61]

The Commission declines EEI's request to set standards for documentation that other agencies must provide to substantiate their costs in this rulemaking. EEI's request is beyond the scope of this rulemaking docket. The Commission intends to address this issue in a future rulemaking proceeding.

4. Filing Fee for Persons Seeking Exempt Wholesale Generator Status

On November 10, 1992, the Commission issued a notice of proposed rulemaking in Docket No. RM93–1–000 implementing section 32 of the Public Utility Holding Company Act of 1935 (PUHCA), as added by section 711 of the Energy Policy Act of 1992.[62] PUHCA section 32 requires persons seeking a determination of exempt wholesale generator (EWG) status to file for a determination with the Commission. The Commission requested comments in the NOPR concerning whether to create a separate fee category for applications for EWG status for non-public utility EWGs. The Commission noted that comments received in Docket No. RM93–1–000 would be placed in the record of this rulemaking docket. Comments are due in Docket No. RM93–1–000 on or before December 24, 1992.

Florida Power & Light Company (FPL) filed comments in support of the proposal to establish a filing fee for non-public utility EWG applicants in this rulemaking docket. FPL also raised several concerns with the Commission's proposal. The Commission will address FPL's comments along with the other comments filed in Docket No. RM93–1–000 separately from this rulemaking eliminating certain filing fees.

IV. Regulatory Flexibility Certification

The Regulatory Flexibility Act of 1980 (FRA)[63] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.[64] Pursuant to section 605(b) of the RFA, the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

[58] AER and MRT at 6–7.

[59] 18 CFR 154.38(d)(6).

[60] *See* UtiliCorp at 7–11.

[61] EEI at 3.

[62] Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, Docket No. RM93–1–000, 57 FR 55195 (Nov. 24, 1992), IV FERC Stats. & Regs. ¶ 32,490 (Nov. 10, 1992).

[63] 5 U.S.C. 601–612.

[64] Section 601(c) of the RFA defines a "small entity" as a small business, a small not-for-profit enterprise, or a small governmental jurisdiction. A "small business" is defined by reference to section 3 of the Small Business Act as an enterprise which is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. 632(a).

V. Environmental Statement

The Commission concludes that issuance of this rule would not represent a major federal action having a significant adverse effect on the human environment under the Commission regulations implementing the National Environmental Policy Act.[65] This rule would be procedural in nature and therefore falls within the categorical exemptions provided in the Commission's regulations. Consequently, neither an environmental impact statement nor an environmental assessment is required.[66]

VI. Information Collection Statement

The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection requirements imposed by agency rule.[67] However, this proposed rule contains no information collection requirements and therefore is not subject to OMB approval.

VII. Effective Date

Public Systems requested the Commission to make the final rule effective immediately, rather than 30 days after publication in the **Federal Register**. Pursuant to 5 U.S.C. 553(d)(1), Public Systems noted that a rule that grants an exemption may be placed into immediate effect. Public Systems argued that the Commission's rule would exempt certain filings from fees and that significant savings may be effected if filing fees can be eliminated by year's end. According to Public Systems, parties can begin their transactions in the new year with considerably more flexibility and without the anti-competitive impediments created by the present regulation.[68]

The Commission will make this rule immediately effective on the date of issuance. The Commission is eliminating a regulatory burden in the form of filing fees and does not foresee that those affected by the change will need time to make adjustments to comply with this rule.

This final rule, therefore, is effective January 4, 1993.

List of Subjects

18 CFR Part 346

Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 381

Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission is amending parts 346 and 381, chapter I, title 18, Code of Federal Regulations, as set forth below.

By the Commission. Commissioner Langdon dissented with a separate statement attached.

Lois D. Cashell,

Secretary.

PART 346—FEES

1. Part 346 is removed in its entirety.

PART 381—FEES

2. The authority citation for Part 381 is revised to read as follows:

Authority: 15 U.S.C. 717–717w; 16 U.S.C. 791–828c, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; and 49 U.S.C. 1–27.

3. In § 381.104, paragraph (c) is revised to read as follows:

§ 381.104 Annual adjustment of fees.

* * * * *

(c) *Formula.* (1) Except as provided in paragraph (c)(2) of this section, the formula for determining each fee is the workmonths dedicated to the given fee category for the six fiscal years 1987 through 1992 or all years prior to FY 93 for which data are available divided by the number of actual completions in the six fiscal years 1987 through 1992 or all years prior to FY 93 for which data are available multiplied by the average monthly employee cost in the most recent fiscal year for which data are available.

(2) With respect to the fees charged to pipelines filing pursuant to § 381.207(a), the fee for the first year will be $1,000. The formula for the fee in future years will be the workmonths from the immediately prior year divided by the number of actual completions in that year multiplied by the average monthly employee cost in the most recent fiscal year for which data are available. With the addition of future years, the formula for § 381.207(a) fees will be updated to include that year as part of the base period.

* * * * *

4. In § 381.107, paragraph (a) is revised to read as follows:

§ 381.107 Direct billing.

(a) *Applicability.* If a filing presents an issue of fact, law, policy, procedural difficulty, or technical complexity that requires an extraordinary amount of expense to process, the Commission may institute a direct billing procedure for the direct and indirect costs of processing that filing. The Commission will make a direct billing determination under this paragraph not later than one year after receiving a complete filing from an applicant.

* * * * *

5. Sections 381.201 through 381.206 are removed, §§ 381.207(a) and (b) are revised, §§ 381.208, 381.209, 381.301, and 381.401 are removed, § 381.404 is revised, §§ 381.405, 381.502 through 381.504, and 381.506 through 381.512, are removed to read as follows:

§ 381.207 Pipeline certificate applications.

(a) *Definition.* For purposes of this section, "pipeline certificate application" means any application for authorization or exemption, any substantial amendment to such an application, and any application, other than an application for a temporary certificate, for authorization to amend an outstanding authorization or exemption, by any person, made pursuant to section 7(c) of the Natural Gas Act filed in accordance with § 284.224 of this chapter.

(b) *Fee.* Unless the Commission orders direct billing under § 381.107 or otherwise, the fee established for a blanket certificate application is $1,000. The fee filed under this paragraph must be submitted in accordance with § 284.224 of this chapter.

* * * * *

§ 381.404 Initial or extension reports for Title III transactions.

The fee established for an initial or extension report is $120. The fee must be submitted in accordance with subpart A of this part and §§ 284.126(c), 284.148(e), and 284.165(d).

Note: The following Appendix will not be published in the Code of Federal Regulations.

Appendix—Commenters

1. Arizona Public Service Company.
2. Arkla Energy Resources and Mississippi River Transmission Corporation (filed joint comments).
3. ANR Pipeline Company and Colorado Interstate Gas Company.
4. Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company.
5. Commonwealth Edison Company.
6. Edison Electric Institute.
7. El Paso Natural Gas Company.
8. Enron Interstate Pipelines (consisting of Northern Natural Gas Company, Transwestern Pipeline Company and Florida Gas Transmission Company).
9. Florida Power & Light Company.
10. Green Mountain Power Corporation.
11. Iowa-Illinois Gas and Electric Company.
12. JMC Power Projects (consisting of Ocean State Power, Ocean State Power II,

[65] See Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (Dec. 10, 1987) (codified at 18 CFR Part 380).

[66] See 18 CFR 380.4(a)(1).

[67] 5 CFR part 1320.

[68] Public Systems at 6.

Selkirk Cogen Partners. L.P., and MASSPOWER).

13. National Fuel Gas Supply Corporation.

14. New England Power Company.

15. Northern Distributor Group (consisting of the Great Plains Natural Gas Company, Interstate Power Company, Iowa Electric Light & Power Company, Iowa Southern Utilities Company, Metropolitan Utilities District of Omaha, Michigan Gas Company, Midwest Gas, a division of Midwest Power Systems, Inc., Northern Minnesota Utilities, Northern States Power Company (Minnesota), Northern States Power Company (Wisconsin), Northwestern Public Service Company, Peoples Natural Gas Company, Division of UtiliCorp, Inc., Wisconsin Gas Company, and Wisconsin Power & Light Company).

16. Pacific Gas Transmission Company.

17. Philadelphia Electric Company.

18. Public Systems (consisting of the American Public Power Association, Belmont, Massachusetts Municipal Light Department, the City of Burlington, Vermont Electric Light Department, the Connecticut Municipal Electric Energy Cooperative, the Florida Municipal Power Agency, the Indiana Municipal Power Agency, the Massachusetts Municipal Wholesale Electric Company, the Michigan Municipal Cooperative Group, the Northern California Power Agency, the City Utilities of Springfield, Missouri, the City of Westfield, Massachusetts Gas and Electric Department, and the City of Riverside, California).

19. Tennessee Gas Pipeline Company.

20. Texas Eastern Transmission Corporation, Panhandle Eastern Pipe Line Company, Trunkline Gas Company, and Algonquin Gas Transmission Company (the "PEC Pipeline Group") (filed joint comments).

21. Transok, Inc. and Transok Gas Transmission Company.

22. UtiliCorp United Inc.

23. Washington Water Power.

24. Williston Basin Interstate Pipeline Company.

Elimination of Certain Filing Fees in Parts 346 and 381

[Docket No. RM92–17–000]

Issued January 4, 1993.

Jerry J. Langdon, Commissioner, *dissenting.*

In light of the many negative comments received in response to the NOPR in this Docket, I will dissent from this order's departure from the time-honored principle of "cost responsibility stems from cost incurrence." In my concurrence to the NOPR, I noted that we were well down the road toward this departure by already having a large portion of our budget be recovered through annual charges. Nevertheless, I still believe that, despite the small percentage of our revenue that it recovers, the filing fee structure has multiple benefits.

Filing fees force parties to make more complete filings at the Commission. For example, rather than piecemealing tariff provision changes through the soon-to-be cost-free filing process, a pipeline, under our current provisions, has an incentive to put these provisions together into a rate case.[1] This allows its customers and the Commission to view the issues more globally.

In addition, individual filing fees are good indications to parties about the relative amount of Commission effort needed to process an application. This Final Rule would limit such instances to extraordinary direct bill situations.

Also, filing fees are a good check on our own efficiency. By having our employees allocate their time to projects (much as a law firm does for its lawyers), we have a useful way of tracking employee efficiency, if necessary. By having filing fees, the ratepaying public can look over our shoulder to see how we're doing.

The statutory language relied upon in this order to support a further move away from filing fees is selectively quoted. A review of the statute reveals that both fees and annual charges were envisioned. I see no reason to eliminate them altogether here; the statute, certainly, does not require it.

In response to the NOPR, some parties complained about the seeming inadequacy of the present filing fee structure to accommodate various levels of complexity within filings. This should be addressed by *reforming* the filing fee structure, not by eliminating it!

I am pleased that parties responded to the concerns I raised in my NOPR concurring statement about problems with the ACA charge, particularly in multiple pipeline transactions. I welcome the Commission's decision to examine this issue in the near future through a Notice of Inquiry. In my review of the legislative history of the statute, I discovered that this precise point was of concern to its drafters.

This Final Rule is a step backward from our progress toward implementing "good government" procedures at the Commission; therefore, I will dissent from its issuance.

Jerry J. Langdon,

Commissioner.

[FR Doc. 93–286 Filed 1–6–93; 8:45 am]

BILLING CODE 6717–01–M

[1] The order mistakenly views the arguments in this vein as asserting that such filings will be "frivolous." *Mimeo* at page 11. Although I suppose they could be "frivolous," piecemealed filings are not necessarily so by definition.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 177

[Docket No. 89F–0115]

Indirect Food Additives; Polymers

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the additional use of Nylon 12 in coatings for repeated use in contact with food. This action responds to a petition filed by Huls America, Inc.

DATES: Effective January 7, 1993; written objections and requests for a hearing by February 8, 1993.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Hortense S. Macon, Center for Food Safety and Applied Nutrition (HFF–335), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–254–9500.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of May 10, 1989 (54 FR 20203), FDA announced that a food additive petition (FAP 9B4137) had been filed by Huls America, Inc., 80 Centennial Ave., Piscataway, NJ 08855–0456, proposing that § 177.1500 *Nylon resins* (21 CFR 177.1500) be amended to provide for the additional use of Nylon 12 in coatings intended for repeated use in contact with food.

FDA has evaluated data in the petition and other relevant material and concludes that the proposed use of the food additive is safe. The agency further concludes that § 177.1500 should be amended as set forth below.

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

The agency has carefully considered the potential environmental effects of

this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this regulation may at any time on or before (*insert date 30 days after date of publication in the* **Federal Register**), file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 177

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 177 is amended as follows:

PART 177—INDIRECT FOOD ADDITIVES: POLYMERS

1. The authority citation for 21 CFR part 177 continues to read as follows:

Authority: Secs. 201, 402, 409, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 376).

2. Section 177.1500 is amended in the table in paragraph (b) by revising entry "9" in the first column under the heading "Nylon resins" to read as follows. The text under the remaining headings is unchanged.

§ 177.1500 *Nylons resins.*

* * * * *

(b)

Nylon resins	Specific gravity	Melting point (degrees Fahrenheit)	Solubility in boiling 4.2*N* HCl	Viscosity No. (mL/g)	Maximum extractable fraction in selected solvents (expressed in percent by weight of resin)			
					Water	95 percent ethyl alcohol	Ethyl acetate	Benzene
9. Nylon 12 resins for use only:	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *
a. In food-contact films having an average thickness not to exceed 0.0016 inch intended for use in contact with nonalcoholic food under the conditions of use A (sterilization not to exceed 30 minutes at a temperature not to exceed 250° F), and B through H of Table 2 of § 176.170(c) of this chapter, except as provided in § 177.1390(d)..								
b. In coatings intended for repeated use in contact with all food types described in Table 1 of § 176.170(c) of this chapter, except those containing more than 8 percent alcohol, under conditions of use B through H described in Table 2 of § 176.170(c) of this chapter..								

* * * * *

Dated: December 15, 1992.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 93-240 Filed 1-6-93; 8:45 am]

BILLING CODE 4160-01-F

PEACE CORPS

22 CFR Part 309

Claims Collection

AGENCY: Peace Corps of the United States (Peace Corps).

ACTION: Final rule.

SUMMARY: The Peace Corps revises its regulations regarding the Collection of Claims by Administrative Offset. These changes are made to enhance Peace Corps' ability to collect its debts by providing guidance to officers and employees charged with debt collection responsibilities. The rule implements the collection procedures authorized by the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982 (31 U.S.C. 3701–3719 and 5 U.S.C. 5514) (Pub. L. 97–365, 96 Stat. 1749). In addition, the rule implements 31 U.S.C. 3720A, which authorizes Federal agencies to notify the Internal Revenue Service of a past-due legally enforceable debt for the purpose of offsetting the debtor's tax refund. These laws have been implemented by the Federal Claims Collection Standards issued jointly by the General Accounting Office and the Department

of Justice, regulations issued by the Office of Personnel Management, the procedures prescribed by the Office of Management and Budget in Circular A–129, and by the Internal Revenue Service procedures.

On November 24, 1992, the Peace Corps published for comment in the **Federal Register** a proposed regulation for claims collection, 57 FR 55202–55212. Interested parties were invited to submit comments within 30 days. The Peace Corps received no comments by the deadline of December 24, 1992. Except for some editorial changes, the final rule is the same as the proposed regulation.

EFFECTIVE DATE: January 7, 1993.

FOR FURTHER INFORMATION CONTACT: Stephen Rademaker, Peace Corps General Counsel, or Daniel Bosco, Assistant General Counsel at (202) 606–3114 (Voice) or (202) 606–1313 (TDD).

SUPPLEMENTARY INFORMATION: The Debt Collection Act of 1982 authorizes procedures for the collection of debts owed to the United States including: (1) Salary offset, (2) administrative offset, (3) contracting for collection services to recover debts. In addition, section 3720A of title 31 U.S.C. authorizes agencies to notify the Internal Revenue Service of a past-due legally enforceable debt for the purpose of offsetting the debtor's tax refund. Although these are separate procedures, any procedure may be used by itself or in conjunction with other procedures.

Salary Offset. Section 5 of the Debt Collection Act (codified at 5 U.S.C. 5514) establishes the procedures to be used when an agency collects money owed it by offsetting the salary of a federal employee. Agencies of the Government may cooperate with one another in order to effectuate recovery of the claim. Salary offset procedures permit an employee to review the determination of indebtedness before offset is implemented, and an employee against whom an offset is sought is automatically entitled to a hearing on matters surrounding the determination of the debt, or the percentage of disposable pay to be deducted each pay period.

Administrative Offset. The procedures authorized for administrative offset are contained in section 10 of the Debt Collection Act (codified at 31 U.S.C. 3716). The Act requires that notice procedures be observed by the agency. The debtor is also afforded an opportunity to inspect and copy government records pertaining to the claim, enter into an agreement for repayment, and to a review of the claim (if requested). Like salary offset, agencies may cooperate with one another in order to effectuate recovery of the claim.

Collection Services. Section 13 of the Debt Collection Act (codified at 31 U.S.C. 3718) authorizes agencies to enter into contracts for the collection services to recover debts owed the United States. The Act requires that certain provisions be contained in such contracts including:

(1) The agency retains the authority to resolve a dispute, including the authority to terminate a collection action or refer the matter to the Attorney General for civil remedies; and

(2) The contractor is subject to the Privacy Act of 1974, as it applies to private contractors, as well as subject to State and Federal laws governing debt collection practices.

Tax Refund Offset. Title 31 U.S.C. 3720A authorizes the Internal Revenue Service (IRS) to reduce a refund of a taxpayer's overpayment of tax by the amount of any legally enforceable debt which is owed to a Federal agency and is at least three months overdue. This section also requires the agency to give taxpayer-debtors at least 60 days notice of the agency's intention to use the provisions of this section. Under this authority, the Peace Corps may refer to the IRS for collection by tax refund offset from refunds otherwise payable, past-due legally enforceable debts owed to the Peace Corps if: (i) the debts are eligible for offset pursuant to 31 U.S.C. 3720A, section 6402(d) of the Internal Revenue Code, 26 CFR 301.6420T, and the agreement between the Peace Corps and the IRS, and (ii) the Peace Corps provides the information required by the agreement for each debt.

Executive Order 12291

This rule is not a "major rule" as defined under Executive Order 12291 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 geographical regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Regulatory Flexibility Act of 1980

The Director of the Peace Corps certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. The economic impact of the rule is expected to be minimal. In this regard, measures would be triggered only by a failure to pay debts owed the United States and, therefore, are avoidable. Peace Corps has no reason to believe that small entities, in particular, would be seriously effected by this rule.

Paperwork Reduction Act of 1980

In accordance with the Paperwork Reduction Act (Pub. L. 96.511, 44 U.S.C. Chapter 35), any reporting or recordkeeping provisions that are included in this rule will be submitted for approval to the Office of Management and Budget (OMB).

Environmental Impact

This rule does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*), because it is not a major Federal action significantly affecting the quality of the human environment.

Executive Order 12778

This final rule has been reviewed under the principles set forth in section 2 of Executive Order 12778 (56 FR 55195) on Civil Justice Reform. The Peace Corps has determined that this rule meets the applicable standards of section 2 of Executive Order 12778.

List of Subjects in 22 CFR Part 309

Administrative practice and procedure, Claims collection, Government employees, Salary offset, Tax refund offset, Volunteers, and Trainees.

Accordingly, the Peace Corps hereby amends title 22 of the Code of Federal Regulations chapter III by revising part 309 to read as follows:

PART 309—CLAIMS COLLECTION

Subpart A—General Provisions

Sec.
309.1 General purpose.
309.2 Scope.
309.3 Definitions.
309.4 Interest, penalties, and administrative costs.
309.5 Designation.

Subpart B—Salary Offset

309.6 Purpose.
309.7 Scope.
309.8 Applicability of regulations.
309.9 Waiver requests and claims to the General Accounting Office.
309.10 Notice requirements before offset.
309.11 Review.
309.12 Certification.
309.13 Voluntary repayment agreements as an alternative to salary offset.
309.14 Special review.

309.15 Notice of salary offset.
309.16 Procedures for salary offset.
309.17 Coordinating salary offset with other agencies.
309.18 Interest, penalties and administrative costs.
309.19 Refunds.
309.20 Request for the services of a hearing official from the creditor agency.
309.21 Non-waiver of rights by payments.

Subpart C—Tax Refund Offset

309.22 Applicability and scope.
309.23 Past-due legally enforceable debt.
309.24 Definitions.
309.25 Peace Corps participation in the IRS tax refund offset program.
309.26 Procedures.
309.27 Referral of debts for offset.
309.28 Notice requirements before offset.

Subpart D—Administrative Offset

309.29 Applicability and scope.
309.30 Definitions.
309.31 General.
309.32 Demand for payment—notice.
309.33 Debtor's failure to respond.
309.34 Agency review.
309.35 Hearing.
309.36 Written agreement for repayment.
309.37 Administrative offset procedures.
309.38 Civil and Foreign Service Retirement Fund.
309.39 Jeopardy procedure.

Subpart E—Use of Consumer Reporting Agencies and Referrals to Collection Agencies

309.40 Use of consumer reporting agencies.
309.41 Referrals to collection agencies.

Subpart F—Compromise, Suspension or Termination and Referral of Claims

309.42 Compromise.
309.43 Suspending or terminating collection.
309.44 Referral of claims.

Authority: 31 U.S.C. 3701–3719; 5 U.S.C. 5514; 22 U.S.C. 2503(b); 31 U.S.C. 3720A; 4 CFR parts 101–105; 5 CFR part 550; 26 CFR 301.6402–6T.

Subpart A—General Provisions

§ 309.1 General purpose.

This part prescribes the procedures to be used by the Peace Corps of the United States (Peace Corps) in the collection of claims owed to Peace Corps and to the United States.

§ 309.2 Scope.

(a) Applicability of Federal Claims Collection Standards (FCCS). Except as set forth in this part or otherwise provided by law, Peace Corps will conduct administrative actions to collect claims (including offset, compromise, suspension, termination, disclosure and referral) in accordance with the Federal Claims Collection Standards of the General Accounting Office and the Department of Justice, 4 CFR parts 101 through 105.

(b) This part is not applicable to: (1) Claims against any foreign country or any political subdivision thereof, or any public international organization.

(2) Claims where the Peace Corps Director (or designee) determines that the achievement of the purposes of the Peace Corps Act, as amended, 22 U.S.C. 2501 *et seq.*, or any other provision of law administered by the Peace Corps require a different course of action.

§ 309.3 Definitions.

As used in this part (except where the context clearly indicates, or where the term is otherwise defined elsewhere in this part) the following definitions shall apply:

(a) *Agency* means: (1) An Executive Agency as defined by section 105 of title 5, United States Code, including the U.S. Postal Service and the U.S. Postal Rate Commission;

(2) A military department as defined by section 102 of title 5, United States Code.

(3) An agency or court of the judicial branch including a court as defined in section 610 of title 28, United States Code, the District Court for the Northern Mariana Islands and the Judicial Panel on Multidistrict Litigation;

(4) An agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives; and

(5) Other independent establishments that are entities of the Federal Government.

(b) *Certification* means a written debt claim form received from a creditor agency which requests the paying agency to offset the salary of an employee.

(c) *Consumer reporting agency* means a reporting agency as defined in 31 U.S.C. 3701(a)(3).

(d) *Creditor agency* means the agency to which the debt is owed.

(e) The term *debt and claim* refers to an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person, organization or entity, except another Federal agency. A debtor's liability arising from a particular contract or transaction shall be considered a single claim for purposes of monetary ceilings of the FCCS.

(f) *Delinquent debt* means any debt which has not been paid by the date specified by the Government in writing or in an applicable contractual agreement for payment or which has not been satisfied in accordance with a repayment agreement.

(g) *Disposable pay* means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. These deductions are described in 5 CFR 581.105(b) through (f). These deductions include, but are not limited to: Social Security withholdings; Federal, State and local tax withholdings; retirement contributions; and life insurance premiums.

(h) *Employee* means a current or former employee of the Peace Corps or other agency, including a member of the Armed Forces or Reserve of the Armed Forces of the United States.

(i) *FCCS* means the Federal Claims Collection Standards jointly published by the Department of Justice and the General Accounting Office at 4 CFR parts 101 through 105.

(j) *Hearing official* means an individual responsible for conducting any hearing with respect to the existence or amount of a debt claimed, and rendering a decision on the basis of such hearing. Except in the case of an administrative law judge, a hearing official may not be under the supervision or control of the Peace Corps when the Peace Corps is the creditor agency.

(k) *Paying agency* means the agency which employs the individual and authorizes the payment of his or her current pay. In some cases, the Peace Corps may be both the creditor and the paying agency.

(l) *Notice of intent to offset* or *notice of intent* means a written notice from a creditor agency to an employee which alleges that the employee owes a debt to the creditor agency and apprising the employee of certain administrative rights.

(m) *Notice of salary offset* means a written notice from the paying agency to an employee after a certification has been issued by a creditor agency, informing the employee that salary offset will begin at the next officially established pay interval.

(n) *Payroll office* means the payroll office in the paying agency which is primarily responsible for the payroll records and the coordination of pay matters with the appropriate personnel office with respect to an employee.

(o) *Salary offset* means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction at one or more officially established pay intervals from the current pay account of an employee, without the employee's consent.

(p) *Salary Offset Coordination Officer* means an official designated by the Director who is responsible for

coordinating debt collection activities for the Peace Corps.

(q) *Waiver* means the cancellation, remission, forgiveness, or nonrecovery of a debt or debt related charge as permitted or required by law.

§ 309.4 Interest, penalties, and administrative costs.

(a) Except as otherwise provided by statute, contract or excluded in accordance with FCCS, Peace Corps will assess:

(1) Interest on unpaid claims in accordance with existing Treasury rules and regulations, unless the agency determines that a higher rate is necessary to protect the interests of the United States.

(2) Penalty charges at a rate of 6 percent a year on any portion of a claim that is delinquent for more than 90 days.

(3) Administrative charges to cover the costs of processing and handling the debt beyond the payment due date.

(b) Late payment charges shall be computed from the date of mailing or hand delivery of the notice of the claim and interest requirements.

(c) When a debt is paid in partial or installment payments, amounts received shall be applied first to outstanding penalty and administrative cost charges, second to accrued interest, and then to outstanding principal.

(d) Waiver. Peace Corps will consider waiver of interest, penalties and/or administrative costs in accordance with the FCCS, 4 CFR 102.13(g).

§ 309.5 Designation.

The Chief Financial Officer and his or her delegates, or any person discharging the functions presently vested in the Chief Financial Officer, are designated to perform all the duties for which the Director is responsible under the foregoing statutes and Joint Regulations: Provided, however, That no compromise of a claim shall be effected or collection action terminated except with the concurrence of the General Counsel. No such concurrence shall be required with respect to the compromise or termination of collection activity on any claim in which the unpaid amount of the debt is $300 or less.

Subpart B—Salary Offset

§ 309.6 Purpose.

The purpose of the Debt Collection Act of 1982 (Pub. L. 97–365), is to provide a comprehensive statutory approach to the collection of debts due the United States Government. This subpart implements section 5 thereof which authorizes the collection of debts owed by Federal employees to the Federal Government by means of salary offsets. No claim may be collected by salary offset if the debt has been outstanding for more than 10 years after the agency's right to collect the debt first accrued, unless facts material to the Government's right to collect were not known and could not reasonably have been known by the official or officials who were charged with the responsibility for discovery and collection of such debts.

§ 309.7 Scope.

(a) This subpart provides Peace Corps' procedures for the collection by salary offset of a Federal employee's pay to satisfy certain past due debts owed the United States Government.

(b) This subpart applies to collections by the Peace Corps from:

(1) Federal employees who owe debts to the Peace Corps; and

(2) Employees of the Peace Corps who owe debts to other agencies.

(c) This subpart does not apply to debts or claims arising under the Internal Revenue Code of 1954, as amended (26 U.S.C. 1 *et seq.*); the Social Security Act (42 U.S.C. 301 *et seq.*); the tariff laws of the United States; or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (e.g., travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108).

(d) This subpart does not apply to any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less.

(e) Nothing in this subpart precludes the compromise, suspension, or termination of collection actions where appropriate under the standards implementing the Federal Claims Collection Act (31 U.S.C. 3711 *et seq.*; 4 CFR parts 101 through 105).

§ 309.8 Applicability of regulations.

The provisions of this subpart are to be followed in instances where:

(a) The Peace Corps is owed a debt by an individual currently employed by another agency;

(b) The Peace Corps is owed a debt by an individual who is a current employee of the Peace Corps; or

(c) The Peace Corps currently employs an individual who owes a debt to another Federal agency. Upon receipt of proper certification from the creditor agency, the Peace Corps will offset the debtor-employee's salary in accordance with these regulations.

§ 309.9 Waiver requests and claims to the General Accounting Office.

The provisions of this subpart do not preclude an employee from requesting waiver of an overpayment under 5 U.S.C. 5584 or 8346(b), 10 U.S.C. 2774, 32 U.S.C. 716, or in any way questioning the amount or validity of a debt by submitting a subsequent claim to the General Accounting Office in accordance with the procedures prescribed by the General Accounting Office. This subpart also does not preclude an employee from requesting a waiver pursuant to other statutory provisions pertaining to the particular debts being collected.

§ 309.10 Notice requirements before offset.

(a) Deductions under the authority of 5 U.S.C. 5514 shall not be made unless the creditor agency first provides the employee with written notice that he/she owes a debt to the Federal Government at least 30 calendar days before salary offset is to be initiated. When Peace Corps is the creditor agency this notice of intent to offset an employee's salary shall be hand-delivered or sent by certified mail to the most current address that is available. The written notice will state:

(1) That Peace Corps has reviewed the records relating to the claim and has determined that a debt is owed, its origin and nature, and the amount of the debt;

(2) The intention of Peace Corps to collect the debt by means of deduction from the employee's current disposable pay account until the debt and all accumulated interest is paid in full;

(3) The amount, frequency, approximate beginning date, and duration of the intended deductions;

(4) An explanation of the Peace Corps' policy concerning interest, penalties and administrative costs, including a statement that such assessments must be made unless excused in accordance with § 309.4(d);

(5) The employee's right to inspect and copy all records of the Peace Corps pertaining to the debt claimed or to receive copies of such records if personal inspection is impractical;

(6) The right to a hearing conducted by a hearing official (an administrative law judge, or alternatively, a hearing official not under the supervision or control of the Peace Corps) with respect to the existence and amount of the debt claimed, or the repayment schedule (i.e., the percentage of disposable pay to be deducted each pay period), so long as a petition is filed by the employee as prescribed in § 309.11;

(7) If not previously provided, the opportunity (under terms agreeable to the Peace Corps) to establish a schedule for the voluntary repayment of the debt or to enter into a written agreement to establish a schedule for repayment of the debt in lieu of offset. The agreement must be in writing, signed by both the employee and the creditor agency (4 CFR 102.2(e));

(8) The name, address and telephone number of an officer or employee of the Peace Corps who may be contacted concerning procedures for requesting a hearing;

(9) The method and time period for requesting a hearing;

(10) That the timely filing of a petition for hearing within 15 calendar days after delivery of the notice of intent to offset will stay the commencement of collection proceedings;

(11) The name and address of the office to which the petition should be sent;

(12) That the Peace Corps will initiate certification procedures to implement a salary offset, as appropriate, (which may not exceed 15 percent of the employee's disposable pay) not less than 30 calendar days from the date of delivery of the notice of debt, unless the employee files a timely petition for a hearing;

(13) That a final decision on the hearing (if one is requested) will be issued at the earliest practical date, but not later than 60 calendar days after the filing of the petition requesting the hearing, unless the employee requests and the hearing official grants a delay in the proceedings;

(14) That any knowingly false or frivolous statements, representations or evidence may subject the employee to:

(i) Disciplinary procedures appropriate under chapter 75 of 5 U.S.C., 5 CFR 752, or any other applicable statutes or regulations;

(ii) Penalties under the False Claims Act, §§ 3729–3731 of title 31, United States Code, or any other applicable statutory authority; and

(iii) Criminal penalties under 18 U.S.C. sections 286, 287, 1001, and 1002 or any other applicable authority;

(15) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made;

(16) That unless there are applicable contractual or statutory provisions to the contrary, amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee; and

(17) That proceedings with respect to such debt are governed by section 5 of the Debt Collection Act of 1982 (5 U.S.C. 5514).

(b) The Peace Corps is not required to comply with paragraph (a) of this section for any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

§ 309.11 Review.

(a) *Request for review.* Except as provided in paragraph (b) of this section, an employee who desires a review concerning the existence or amount of the debt or the proposed offset schedule must send a request to the office designated in the notice of intent. See § 309.10(a)(8). The request for review must be received by the designated office not later than 15 calendar days after the date of delivery of the notice as provided in § 309.10(a). The request must be signed by the employee and should identify and explain with reasonable specificity and brevity the facts, evidence and witnesses which the employee believes support his or her position. If the employee objects to the percentage of disposable pay to be deducted from each check, the request should state the objection and the reasons for it. The employee must also specify whether an oral hearing or a review of the documentary evidence is requested. If an oral hearing is desired, the request should explain why the matter cannot be resolved by review of the documentary evidence alone.

(b) *Failure to timely submit.*

(1) If the employee files a petition for a review after the expiration of the 15 calendar day period provided for in paragraph (a) of this section, the designated office may accept the request if the employee can show that the delay was the result of circumstances beyond his or her control, or because of a failure to receive the notice of the filing deadline (unless the employee has actual knowledge of the filing deadline).

(2) An employee waives the right to a review, and will have his or her disposable pay offset in accordance with Peace Corps' offset schedule, if the employee fails to file a request for a hearing unless such failure is excused as provided in paragraph (b)(1) of this section.

(3) If the employee fails to appear at an oral hearing of which he or she was notified, unless the hearing official determines failure to appear was due to circumstances beyond the employee's control, his or her appeal will be decided on the basis of the documents then available to the hearing official.

(c) *Representation at the hearing.* The creditor agency may be represented by a representative of its choice. The employee may represent himself or herself or may be represented by an individual of his or her choice and at his or her expense.

(d) *Review of Peace Corps records related to the debt.*

(1) An employee who intends to inspect or copy creditor agency records related to the debt in accordance with § 309.10(a)(5), must send a letter to the official designated in the notice of intent to offset stating his or her intention. The letter must be sent within 15 calendar days after receipt of the notice.

(2) In response to a timely request submitted by the debtor, the designated official will notify the employee of the location and time when the employee may inspect and copy records related to the debt.

(3) If personal inspection is impractical, copies of such records shall be sent to the employee.

(e) *Hearing official.* Unless the Peace Corps appoints an administrative law judge to conduct the hearing, the Peace Corps must obtain a hearing official who is not under the supervision or control of the Peace Corps.

(f) *Obtaining the services of a hearing official when the Peace Corps is the creditor agency.*

(1) When the debtor is not a Peace Corps employee, and in the event that the Peace Corps cannot provide a prompt and appropriate hearing before an administrative law judge or before a hearing official furnished pursuant to another lawful arrangement, the Peace Corps may contact an agent of the paying agency designated in appendix A to part 581 of title 5, Code of Federal Regulations or as otherwise designated by the agency, and request a hearing official.

(2) When the debtor is a Peace Corps employee, the Peace Corps may contact any agent of another agency designated in appendix A to part 581 of title 5, Code of Federal Regulations or otherwise designated by that agency, to request a hearing official.

(g) *Procedure.* (1) If the employee requests a review, the hearing official or administrative law judge shall notify the employee of the form of the review to be provided. If an oral hearing is authorized, the notice shall set forth the date, time and location of the hearing. If the review will be on documentary evidence, the employee shall be notified that he or she should submit arguments in writing to the hearing official or administrative law judge by a specified

date, after which the record will be closed. This date shall give the employee reasonable time (not less than 14 calendar days) to submit documentation.

(2) *Oral hearing.* An employee who requests an oral hearing shall be provided an oral hearing if the hearing official or administrative law judge determines that the matter cannot be resolved by review of documentary evidence alone (e.g. when an issue of credibility or veracity is involved). The hearing is not an adversarial adjudication, and need not take the form of an evidentiary hearing. Oral hearings may take the form of, but are not limited to:

(i) Informal conferences with the hearing official or administrative law judge, in which the employee and agency representative will be given full opportunity to present evidence, witnesses and argument;

(ii) Informal meetings with an interview of the employee; or

(iii) Formal written submissions, with an opportunity for oral presentation.

(3) *Paper review.* If the hearing official or administrative law judge determines that an oral hearing is not necessary, he or she will make the determination based upon a review of the available written record.

(4) *Record.* The hearing official must maintain a summary record of any hearing provided by this subpart. See 4 CFR 102.3. Witnesses who testify in oral hearings will do so under oath or affirmation.

(h) *Date of decision.* The hearing official or administrative law judge shall issue a written opinion stating his or her decision, based upon documentary evidence and information developed at the hearing, as soon as practicable after the hearing, but not later than 60 calendar days after the date on which the petition was received by the creditor agency, unless the employee requests a delay in the proceedings. In such case the 60 day decision period shall be extended by the number of days by which the hearing was postponed.

(i) *Content of decision.* The written decision shall include:

(1) A statement of the facts presented to support the origin, nature, and amount of the debt;

(2) The hearing official's findings, analysis and conclusions; and

(3) The terms of any repayment schedules, if applicable.

(j) *Failure to appear.* In the absence of good cause shown (e.g., excused illness), an employee who fails to appear at a hearing shall be deemed, for the purpose of this subpart, to admit the existence and amount of the debt as described in the notice of intent. If the representative of the creditor agency fails to appear, the hearing official shall schedule a new hearing date upon the request of the agency representative upon showing of good cause. Both parties shall be given the time and place of the new hearing.

§ 309.12 Certification.

(a) The Peace Corps salary offset coordination officer shall provide a certification to the paying agency in all cases where:

(1) The hearing official determines that a debt exists;

(2) The employee admits the existence and amount of the debt by failing to request a review; or

(3) The employee admits the existence of the debt by failing to appear at a hearing.

(b) The certification must be in writing and must state:

(1) That the employee owes the debt;

(2) The amount and basis of the debt;

(3) The date the Government's right to collect the debt first accrued;

(4) That the Peace Corps' regulations have been approved by OPM pursuant to 5 CFR part 550, subpart K;

(5) The amount and date of any lump sum payment;

(6) If the collection is to be made in installments, the number of installments to be collected, the amount of each installment, and the date of the first installment, if a date other than the next officially established pay period is required; and

(7) The date the action was taken and that it was taken pursuant to 5 U.S.C. 5514.

§ 309.13 Voluntary repayment agreements as alternative to salary offset.

(a) In response to a notice of intent, an employee may propose a written agreement to repay the debt as an alternative to salary offset. Any employee who wishes to repay a debt without salary offset shall submit in writing a proposed agreement to repay the debt. The proposal shall admit the existence of the debt and set forth a proposed repayment schedule. Any proposal under this paragraph must be received by the official designated in that notice within 15 calendar days after receipt of the notice of intent.

(b) When the Peace Corps is the creditor agency, in response to a timely proposal by the debtor the agency will notify the employee whether the employee's proposed written agreement for repayment is acceptable. It is within the agency's discretion to accept a repayment agreement instead of proceeding by offset.

(c) If the Peace Corps decides that the proposed repayment agreement is unacceptable, the employee will have 15 calendar days from the date he or she received notice of the decision to file a petition for a review.

(d) If the Peace Corps decides that the proposed repayment agreement is acceptable, the alternative arrangement must be in writing and signed by both the employee and a designated agency official.

§ 309.14 Special review.

(a) An employee subject to salary offset or a voluntary repayment agreement, may at any time request a special review by the creditor agency of the amount of the salary offset or voluntary payment, based on materially changed circumstances such as, but not limited to, catastrophic illness, divorce, death, or disability.

(b) In determining whether an offset would prevent the employee from meeting essential subsistence expenses (costs for food, housing, clothing, transportation and medical care), the employee shall submit a detailed statement and supporting documents for the employee, his or her spouse and dependents indicating:

(1) Income from all sources;

(2) Assets;

(3) Liabilities;

(4) Number of dependents;

(5) Expenses for food, housing, clothing and transportation;

(6) Medical expenses; and

(7) Exceptional expenses, if any.

(c) If the employee requests a special review under this section, the employee shall file an alternative proposed offset or payment schedule and a statement, with supporting documents, showing why the current salary offset or payments result in significant financial hardship to the employee.

(d) The Peace Corps shall evaluate the statement and supporting documents, and determine whether the original offset or repayment schedule imposes significant financial hardship on the employee. The Peace Corps shall notify the employee in writing of such determination, including, if appropriate, a revised offset or payment schedule.

(e) If the special review results in a revised offset or repayment schedule, the Peace Corps salary offset coordination officer shall provide a new certification to the paying agency.

§ 309.15 Notice of salary offset.

(a) Upon receipt of proper certification of the creditor agency, the Peace Corps payroll office will send the employee a written notice of salary offset. Such notice shall, at a minimum:

(1) Contain a copy of the certification received from the creditor agency; and

(2) Advise the employee that salary offset will be initiated at the next officially established pay interval.

(b) The payroll office shall provide a copy of the notice to the creditor agency and advise such agency of the dollar amount to be offset and the pay period when the offset will begin.

§ 309.16 Procedures for salary offset.

(a) The Director (or designee) shall coordinate salary deductions under this subpart.

(b) The payroll office shall determine the amount of the employee's disposable pay and will implement the salary offset.

(c) Deductions shall begin within 3 official pay periods following receipt by the payroll office of certification.

(d) Types of collection. (1) *Lump-sum payment.* If the amount of the debt is equal to or less than 15 percent of disposable pay, such debt generally will be collected in one lump-sum payment.

(2) *Installment deductions.* Installment deductions will be made over a period not greater than the anticipated period of employment. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted from any period may not exceed 15 percent of the disposable pay from which the deduction is made unless the employee has agreed in writing to the deduction of a greater amount.

(3) *Lump-sum deductions from final check.* A lump-sum deduction exceeding the 15 percent of disposable pay limitation may be made from any final salary payment pursuant to 31 U.S.C. 3716 in order to liquidate the debt, whether the employee is being separated voluntarily or involuntarily.

(4) *Lump-sum deductions from other sources.* Whenever an employee subject to salary offset is separated from the Peace Corps, and the balance of the debt cannot be liquidated by offset of the final salary check, the Peace Corps, pursuant to 31 U.S.C. 3716, may offset any later payments of any kind against the balance of the debt.

(e) *Multiple debts.* In instances where two or more creditor agencies are seeking salary offsets, or where two or more debts are owed to a single creditor agency, the payroll office may, at its discretion, determine whether one or more debts should be offset simultaneously within the 15 percent limitation.

(f) *Precedence of debts owed to the Peace Corps.* For Peace Corps employees, debts owed to the agency generally take precedence over debts owed to other agencies. In the event that a debt to the Peace Corps is certified while an employee is subject to a salary offset to repay another agency, the payroll office may decide whether to have that debt repaid in full before collecting its claim or whether changes should be made in the salary deduction being sent to the other agency. If debts owed the Peace Corps can be collected in one pay period, the payroll office may suspend the salary offset to the other agency for that pay period in order to liquidate the Peace Corps' debt. When an employee owes two or more debts, the best interests of the Government shall be the primary consideration in the determination by the payroll office of the order of the debt collection.

§ 309.17 Coordinating salary offset with other agencies.

(a) *Responsibility of the Peace Corps as the creditor agency.*

(1) The Director or Director's designee shall coordinate debt collections and shall, as appropriate:

(i) Arrange for a hearing upon proper petition by a federal employee; and

(ii) Prescribe such practices and procedures as may be necessary to carry out the intent of this subpart.

(2) Designate a salary offset coordination officer who will be responsible for:

(i) Ensuring that each notice of intent to offset is consistent with the requirements of § 309.10;

(ii) Ensuring that each certification of debt sent to a paying agency is consistent with the requirements of § 309.12;

(iii) Obtaining hearing officials from other agencies pursuant to § 309.11(f); and

(iv) Ensuring that hearings are properly scheduled.

(3) Request recovery from current paying agency. Upon completion of the procedures established in these regulations and pursuant to 5 U.S.C. 5514, the Peace Corps must:

(i) Certify, in writing, that the employee owes the debt, the amount and basis of the debt, the date on which payments are due, the date the Government's right to collect the debt first accrued, and that the Peace Corps' regulations implementing 5 U.S.C. 5514 have been approved by the Office of Personnel Management;

(ii) Advise the paying agency of the actions taken under 5 U.S.C. 5514(a) and give the dates the actions were taken (unless the employee has consented to the salary offset in writing or signed a statement acknowledging receipt of the required procedures and the written consent or statement is forwarded to the paying agency);

(iii) Except as otherwise provided in paragraph (a)(3) of this section, submit a debt claim containing the information specified in paragraphs (a)(3) (i) and (ii) of this section and an installment agreement (or other instruction on the payment schedule), if applicable, to the employee's paying agency;

(iv) If the employee is in the process of separating, the Peace Corps must submit its debt claim to the employee's paying agency for collection as provided in § 309.16. The paying agency must certify the total amount of its collection and notify the creditor agency and the employee as provided in paragraph (b)(4) of this section. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the provisions of this section have been fully complied with. However, the Peace Corps must submit a properly certified claim to the agency responsible for making such payments before the collection can be made.

(v) If the employee is already separated and all payments due from his or her former paying agency have been paid, the Peace Corps may request, unless otherwise prohibited, that money due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801 *et seq.*) or other similar funds, be administratively offset to collect the debt (See 31 U.S.C. 3716 and 41 CFR 102.4).

(4) When an employee transfers to another paying agency, the Peace Corps need not repeat the due process procedures described in 5 U.S.C. 5514 and this subpart to continue the collection. The Peace Corps must review the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is continued by the new paying agency.

(b) *Responsibility of the Peace Corps as the paying agency.*

(1) *Complete claim.* When the Peace Corps receives a certified claim from a creditor agency, deductions should be scheduled to begin at the next officially established pay interval. The employee must receive written notice that the Peace Corps has received a certified debt claim from the creditor agency (including the amount) and written

notice of the date salary offset will begin and the amount of such deductions.

(2) *Incomplete claim.* When the Peace Corps receives an incomplete certification of debt from a creditor agency, the Peace Corps must return the debt claim with notice that procedures under 5 U.S.C. 5514 and this subpart must be followed and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) *Review.* The Peace Corps is not authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(4) *Employees who transfer from one paying agency to another.* If, after the creditor agency has submitted the debt claim to the Peace Corps, the employee transfers to another agency before the debt is collected in full, the Peace Corps must certify the total amount collected on the debt. One copy of the certification must be furnished to the employee and one copy to the creditor agency along with notice of the employee's transfer.

§ 309.18 Interest, penalties and administrative costs.

The Peace Corps shall assess interest, penalties and administrative costs on debts owed pursuant to 31 U.S.C. 3717 and 4 CFR 102.13.

§ 309.19 Refunds.

(a) In instances where the Peace Corps is the creditor agency, it shall promptly refund any amounts deducted under the authority of 5 U.S.C. 5514 when:

(1) The debt is waived or otherwise found not to be owed to the United States; or

(2) An administrative or judicial order directs the Peace Corps to make a refund.

(b) Unless required or permitted by law or contract, refunds under this subpart shall not bear interest.

§ 309.20 Request for the services of a hearing official from the creditor agency.

(a) The Peace Corps will provide a hearing official upon request of the creditor agency when the debtor is employed by the Peace Corps and the creditor agency cannot provide a prompt and appropriate hearing before an administrative law judge or before a hearing official furnished pursuant to another lawful arrangement.

(b) The Peace Corps will provide a hearing official upon request of a creditor agency when the debtor works for the creditor agency and that agency cannot arrange for a hearing official.

(c) The salary offset coordination officer will appoint qualified personnel to serve as hearing officials.

(d) Services rendered under this section will be provided on a fully reimbursable basis pursuant to the Economy Act of 1932, as amended, 31 U.S.C. 1535.

§ 309.21 Non-waiver of rights by payments.

An employee's involuntary payment of all or any portion of a debt being collected under this subpart shall not be construed as a waiver of any rights which the employee may have under 5 U.S.C. 5514 or any other provision of a written contract or law unless there are statutory or contractual provisions to the contrary.

Subpart C—Tax Refund Offset

§ 309.22 Applicability and scope.

This subpart implements 31 U.S.C. 3720A which authorizes the Internal Revenue Service (IRS) to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States.

§ 309.23 Past-due legally enforceable debt.

For purposes of this subpart, a past-due legally enforceable debt referable to the IRS is a debt which is owed to the United States and:

(a) Except in the case of a judgment debt, has been delinquent for at least 3 months and will not have been delinquent more than 10 years at the time offset is made;

(b) Cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514;

(c) Is ineligible for administrative offset under 31 U.S.C. 3716(a) by reason of 31 U.S.C. 3716(c)(2) or cannot be collected by administrative offset under 31 U.S.C. 3716(a) by the Peace Corps against amounts payable to the debtor by the Peace Corps;

(d) With respect to which the Peace Corps has given the taxpayer at least 60 days to present evidence that all or part of the debt is not past-due or legally enforceable, has considered evidence presented by such taxpayer, and determined that an amount of such debt is past-due and legally enforceable;

(e) Has been disclosed by the Peace Corps to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless the consumer reporting agency would be prohibited from reporting information concerning the debt by reason of 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100;

(f) Is at least $25; and

(g) With respect to which the Peace Corps has notified or has made a reasonable attempt to notify the taxpayer that:

(1) The debt is past due, and

(2) Unless repaid within 60 days thereafter, the debt will be referred to the IRS for offset against any overpayment of tax. For the purposes of paragraph (g) of this section, in order to make a reasonable attempt to notify the debtor, Peace Corps must use such address for the debtor as may be obtainable from IRS pursuant to section 6103(m)(2), (m)(4), or (m)(5) of the Internal Revenue Code.

§ 309.24 Definitions.

For purpose of this subpart:

Commissioner means the Commissioner of the Internal Revenue Service.

Memorandum of Understanding (MOU or agreement) means the agreement between the IRS and the Peace Corps which prescribes the specific conditions the Peace Corps must meet before the IRS will accept referrals for tax refund offsets.

§ 309.25 Peace Corps' participation in IRS tax refund offset program.

(a) The Peace Corps will provide information to the IRS within the time frame prescribed by the Commissioner of the IRS to enable the Commissioner to make a final determination as to the Peace Corps' participation in the tax refund offset program. Such information will include a description of:

(1) The size and age of the Peace Corps' inventory of delinquent debts;

(2) The prior collection efforts that the inventory reflects; and

(3) The quality controls the Peace Corps maintains to assure that any debt that may be submitted for tax refund offset will be valid and enforceable.

(b) In accordance with the timetable specified by the Commissioner, the Peace Corps will submit test magnetic media to the IRS, in such form and containing such data as the IRS shall specify.

(c) The Peace Corps will provide the IRS with a telephone number which the IRS may furnish to individuals whose refunds have been offset to obtain information concerning the offset.

§ 309.26 Procedures.

(a) The Chief Financial Officer (or designee) shall be the point of contact with the IRS for administrative matters regarding the offset program.

(b) The Peace Corps shall ensure that:

(1) Only those past-due legally enforceable debts described in § 309.23 are forwarded to the IRS for offset; and

(2) The procedures prescribed in the MOU between the Peace Corps and the

IRS are followed in developing past-due debt information and submitting the debts to the IRS.

(c) The Peace Corps shall submit a notification of a taxpayer's liability for past-due legally enforceable debt to the IRS on magnetic media as prescribed by the IRS. Such notification shall contain:

(1) The name and taxpayer identifying number (as defined in section 6109 of the Internal Revenue Code) of the individual who is responsible for the debt;

(2) The dollar amount of such past-due and legally enforceable debt;

(3) The date on which the original debt became past due;

(4) A statement accompanying each magnetic tape certifying that, with respect to each debt reported on the tape, all of the requirements of eligibility of the debt for referral for the refund offset have been satisfied. See § 309.23.

(d) The Peace Corps shall promptly notify the IRS to correct data submitted when the Peace Corps:

(1) Determines that an error has been made with respect to a debt that has been referred;

(2) Receives or credits a payment on such debt; or

(3) Receives notification that the individual owing the debt has filed for bankruptcy under title 11 of the United States Code or has been adjudicated bankrupt and the debt has been discharged.

(e) When advising debtors of an intent to refer a debt to the IRS for offset, the Peace Corps shall also advise the debtors of all remedial actions available to defer or prevent the offset from taking place.

§ 309.27 Referral of debts for offset.

(a) The Peace Corps shall refer to the IRS for collection by tax refund offset, from refunds otherwise payable, only such past-due legally enforceable debts owed to the Peace Corps:

(1) That are eligible for offset under the terms of 31 U.S.C. 3720A, section 6402(d) of the Internal Revenue Code, 26 CFR 301.6402–6T and the MOU; and

(2) That information will be provided for each such debt as is required by the terms of the MOU.

(b) Such referrals shall be made by submitting to the IRS a magnetic tape pursuant to § 309.26(c), together with a written certification that the conditions or requirements specified in 26 CFR 301.6402–6T and the MOU have been satisfied with respect to each debt included in the referral on such tape. The certification shall be in the form specified in the MOU.

§ 309.28 Notice requirements before offset.

(a) The Peace Corps must notify, or make a reasonable attempt to notify, the individual that:

(1) The debt is past due; and

(2) Unless repaid within 60 days thereafter, the debt will be referred to the IRS for offset against any refund of overpayment of tax.

(b) The Peace Corps shall provide a mailing address for forwarding any correspondence and a contact name and telephone number for any questions.

(c) The Peace Corps shall give the individual debtor at least 60 days from the date of the notification to present evidence that all or part of the debt is not past due or legally enforceable. The Peace Corps shall consider the evidence presented by the individual and shall make a determination whether any part of such debt is past due and legally enforceable. For purposes of this subpart, evidence that collection of the debt is affected by a bankruptcy proceeding involving the individual shall bar referral of the debt to the IRS.

(d) Notification given to a debtor pursuant to paragraphs (a), (b), and (c) of this section shall advise the debtor of how he or she may present evidence to the Peace Corps that all or part of the debt is not past due or legally enforceable. Such evidence may not be referred to, or considered by, individuals who are not officials, employees, or agents of the United States in making the determination required under paragraph (c) of this section. Unless such evidence is directly considered by an official or employee of the Peace Corps, and the determination required under paragraph (c) of this section has been made by an official or employee of the Peace Corps, any unresolved dispute with the debtor as to whether all or part of the debt is past due or legally enforceable must be referred to the Peace Corps for ultimate administrative disposition, and the Peace Corps must directly notify the debtor of its determination.

Subpart D—Administrative Offset

§ 309.29 Applicability and scope.

The provisions of this subpart apply to the collection of debts owed to the United States arising from transactions with the Peace Corps. Administrative offset is authorized under section 5 of the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982 (31 U.S.C. 3716). These regulations are consistent with the Federal Claims Collection Standards on administrative offset issued jointly by the Department of Justice and the General Accounting Office as set forth in 4 CFR part 102.

§ 309.30 Definitions.

(a) *Administrative offset,* as defined in 31 U.S.C. 3701(a)(1), means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government.

(b) *Person* includes a natural person or persons, profit or nonprofit corporation, partnership, association, trust, estate, consortium, or other entity which is capable of owing a debt to the United States Government except that agencies of the United States, or of any State or local government shall be excluded.

§ 309.31 General.

(a) The Director of the Peace Corps (or designee) will determine the feasibility of collection by administrative offset on a case-by-case basis for each claim established. The Director (or designee) will consider the following issues in making a determination to collect a claim by administrative offset:

(1) Can administrative offset be accomplished?

(2) Is administrative offset practical and legal?

(3) Does administrative offset best serve and protect the interest of the U.S. Government?

(4) Is administrative offset appropriate given the debtor's financial condition?

(b) The Director (or designee) may initiate administrative offset with regard to debts owed by a person to another agency of the United States Government, upon receipt of a request from the head of another agency or his or her designee, and a certification that the debt exists and that the person has been afforded the necessary due process rights.

(c) The Director (or designee) may request another agency that holds funds payable to a Peace Corps debtor to offset the debt against the funds held and will provide certification that:

(1) The debt exists; and

(2) The person has been afforded the necessary due process rights.

(d) No collection by administrative offset shall be made on any debt that has been outstanding for more than 10 years unless facts material to the Government's right to collect the debt were not known, and reasonably could not have been known, by the official or officials responsible for discovering the debt.

(e) Administrative offset under this subpart may not be initiated against:

(1) A debt in which administrative offset of the type of debt involved is

explicitly provided for or prohibited by another statute;

(2) Debts owed by other agencies of the United States or by any State or local Government; or

(3) Debts arising under the Internal Revenue Code of 1954; the Social Security Act; or the tariff laws of the United States.

(f) The procedures for administrative offset in this subpart do not apply to the offset of Federal salaries under 5 U.S.C. 5514.

§ 309.32 Demand for payment—notice.

(a) Whenever possible, the Peace Corps will seek written consent from the debtor to initiate immediate collection before starting the formal notification process.

(b) In cases where written agreement to collect cannot be obtained from the debtor, a formal notification process shall be followed, 4 CFR 102.2. Prior to collecting a claim by administrative offset, the Peace Corps shall send to the debtor, by certified or registered mail with return receipt, written demands for payment in terms which inform the debtor of the consequences of failure to cooperate. A total of 3 progressively stronger written demands at not more than 30 day intervals will normally be made unless a response to the first or second demand indicates that a further demand would be futile or the debtor's response does not require rebuttal, or other pertinent information indicates that additional written demands would be unnecessary. In determining the timing of the demand letters, the Peace Corps should give due regard to the need to act promptly so that, as a general rule, if necessary to refer the debt to the Department of Justice for litigation, such referral can be made within 1 year of the final determination of the fact and the amount of the debt. When appropriate to protect the Government's interests (for example, to prevent the statute of limitations from expiring), written demand may be preceded by other appropriate actions, including immediate referral for litigation.

(c) Before offset is made, a written notice will be sent to the debtor. This notice will include:

(1) The nature and amount of the debt;

(2) The date when payment is due (not less than 30 days from the date of mailing or hand delivery of the notice);

(3) The agency's intention to collect the debt by administrative offset, including asking the assistance of other Federal agencies to help in the offset whenever possible, if the debtor has not made payment by the payment due date or has not made an arrangement for payment by the payment due date;

(4) Any provision for interest, late payment penalties and administrative charges, if payment is not received by the due date;

(5) The possible reporting of the claim to consumer reporting agencies and the possibility that Peace Corps will forward the claim to a collection agency;

(6) The right of the debtor to inspect and copy Peace Corps' records related to the claim;

(7) The right of the debtor to request a review of the determination of indebtedness and, in the circumstances described below, to request an oral hearing from the Peace Corps;

(8) The right of the debtor to enter into a written agreement with the agency to repay the debt in some other way; and

(9) In appropriate cases, the right of the debtor to request a waiver.

(d) Claims for payment of travel advances and employee training expenses require notification prior to administrative offset as described in this section. Because no oral hearing is required, notice of the right to a hearing need not be included in the notification.

§ 309.33 Debtor's failure to respond.

If the debtor fails to respond to the notice described in § 309.32 (c) by the proposed effective date specified in the notice, the Peace Corps may take further action under this part or the FCCS under 4 CFR parts 101 through 105. Peace Corps may collect by administrative offset if the debtor:

(a) Has not made payment by the payment due date;

(b) Has not requested a review of the claim within the agency as set out in § 309.34; or

(c) Has not made an arrangement for payment by the payment due date.

§ 309.34 Agency review.

(a) A debtor may dispute the existence of the debt, the amount of the debt, or the terms of repayment. A request to review a disputed debt must be submitted to the Peace Corps official who provided notification within 30 calendar days of the receipt of the written notice described in § 309.32(c).

(b) The Peace Corps will provide a copy of the record to the debtor and advise him/her to furnish available evidence to support his or her position. Upon receipt of the evidence, the Peace Corps will review the written record of indebtedness and inform the debtor of its findings.

(c) Pending the resolution of a dispute by the debtor, transactions in any of the debtor's accounts maintained by the Peace Corps may be temporarily suspended. Depending on the type of transaction the suspension could preclude its payment, removal, or transfer, as well as prevent the payment of interest or discount due thereon. Should the dispute be resolved in the debtor's favor, the suspension will be immediately lifted.

(d) During the review period, interest, penalties, and administrative costs authorized under the Federal Claims Collection Act of 1966, as amended, will continue to accrue.

§ 309.35 Hearing.

(a) A debtor will be provided a reasonable opportunity for an oral hearing when:

(1)(i) By statute, consideration must be given to a request to waive the indebtedness;

(ii) The debtor requests waiver of the indebtedness; and

(iii) The waiver determination rests on an issue of creditability or veracity; or

(2) The debtor requests reconsideration and the Peace Corps determines that the question of indebtedness cannot be resolved by reviewing the documentary evidence.

(b) In cases where an oral hearing is provided to the debtor, the Peace Corps will conduct the hearing, and provide the debtor with a written decision.

§ 309.36 Written agreement for repayment.

If the debtor requests a repayment agreement in place of offset, the Peace Corps has discretion and should use sound judgment to determine whether to accept a repayment agreement in place of offset. If the debt is delinquent and the debtor has not disputed its existence or amount, the Peace Corps will not accept a repayment agreement in place of offset unless the debtor is able to establish that offset would cause undue financial hardship or be unjust. No repayment arrangement will be considered unless the debtor submits a financial statement, executed under penalty of perjury, reflecting the debtor's assets, liabilities, income, and expenses. The financial statement must be submitted within 10 business days of the Peace Corps' request for the statement. At the Peace Corps' option, a confess-judgment note or bond of indemnity with surety may be required for installment agreements. Notwithstanding the provisions of this section, any reduction or compromise of a claim will be governed by 4 CFR part 103 and 31 CFR 5.3.

§ 309.37 Administrative offset procedures.

(a) If the debtor does not exercise the right to request a review within the time

specified in § 309.34, or if as a result of the review, it is determined that the debt is due and no written agreement is executed, then administrative offset shall be ordered in accordance with this subpart without further notice.

(b) *Travel advance.* The Peace Corps will deduct outstanding advances provided to Peace Corps travelers from other amounts owed the traveler by the agency whenever possible and practicable. Monies owed by an employee for outstanding travel advances which cannot be deducted from other travel amounts due that employee, will be collected through salary offset as described in subpart B of this part.

(c) *Volunteer allowances.* The Peace Corps may deduct through administrative offset amounts owed the U.S. Government by Volunteers and Trainees from the readjustment allowance account.

(1) Overseas posts will obtain written consent from Volunteers or Trainees who are indebted to the agency upon close of service or termination, to deduct amounts owed from their readjustment allowances. Posts will immediately submit the written consent to Volunteer and Staff Payroll Services Division (VSPS).

(2) In cases where written consent from indebted Volunteers or Trainees cannot be obtained, overseas posts will immediately report the documented debts to VSPS. VSPS may then initiate offset against the readjustment allowance. Prior to offset action, VSPS will notify the debtor Volunteer or Trainee of their rights as required in § 309.32.

(d) *Requests for offset to other Federal agencies.* The Director or his or her designee may request that a debt owed to the Peace Corps be administratively offset against funds due and payable to a debtor by another Federal agency. In requesting administrative offset, the Peace Corps, as creditor, will certify in writing to the Federal agency holding funds of the debtor;

(1) That the debtor owes the debt;

(2) The amount and basis of the debt; and

(3) That the Peace Corps has complied with the requirements of 31 U.S.C. 3716, its own administrative offset regulations and the applicable provisions of 4 CFR part 102 with respect to providing the debtor with due process.

(e) *Requests for offset from other Federal agencies.* Any Federal agency may request that funds due and payable to its debtor by the Peace Corps be administratively offset in order to collect a debt owed to such Federal agency by the debtor. The Peace Corps shall initiate the requested offset only upon:

(1) Receipt of written certification from the creditor agency:

(i) That the debtor owes the debt;

(ii) The amount and basis of the debt;

(iii) That the agency has prescribed regulations for the exercise of administrative offset; and

(iv) That the agency has complied with its own administrative offset regulations and with the applicable provisions of 4 CFR part 102, including providing any required hearing or review.

(2) A determination by the Peace Corps that collection by offset against funds payable by the Peace Corps would be in the best interest of the United States as determined by the facts and circumstances of the particular case, and that such offset would not otherwise be contrary to law.

§ 309.38 Civil and Foreign Service Retirement Fund.

(a) Unless otherwise prohibited by law, Peace Corps may request that monies that are due and payable to a debtor from the Civil Service Retirement and Disability Fund, the Foreign Service Retirement Fund or any other Federal retirement fund be administratively offset in reasonable amounts in order to collect in one full payment or a minimal number of payments, debts owed the United States by the debtor. Such requests shall be made to the appropriate officials of the respective fund servicing agency in accordance with such regulations as may be prescribed by the Director of that agency. The requests for administrative offset will certify in writing the following:

(1) The debtor owes the United States a debt and the amount of the debt;

(2) The Peace Corps has complied with applicable regulations and procedures;

(3) The Peace Corps has followed the requirements of the FCCS as described in this subpart.

(b) Once Peace Corps decides to request offset under paragraph (a) of this section, it will make the request as soon as practical after completion of the applicable procedures in order that the fund servicing agency may identify and flag the debtor's account in anticipation of the time when the debtor requests or becomes eligible to receive payments from the fund. This will satisfy any requirements that offset will be initiated prior to expiration of the statute of limitations.

(c) If Peace Corps collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, Peace Corps shall act promptly to modify or terminate its request for offset.

(d) This section does not require or authorize the fund servicing agency to review the merits of Peace Corps' determination relative to the debt.

§ 309.39 Jeopardy procedure.

The Peace Corps may effect an administrative offset against a payment to be made to the debtor prior to the completion of the procedures required by § 309.32(c) of this subpart if failure to take the offset would substantially jeopardize the Peace Corps' ability to collect the debt, and the time available before the payment is to be made does not reasonably permit the completion of those procedures. Such prior offset shall be promptly followed by the completion of those procedures. Amounts recovered by offset but later found not to be owed to the Peace Corps shall be promptly refunded.

Subpart E—Use of Consumer Reporting Agencies and Referrals to Collection Agencies

§ 309.40 Use of consumer reporting agencies.

(a) The Peace Corps may report delinquent debts to consumer reporting agencies (see 31 U.S.C. 3701(a)(3)). Sixty days prior to release of information to a consumer reporting agency, the debtor shall be notified, in writing, of the intent to disclose the existence of the debt to a consumer reporting agency. Such notice of intent may be separate correspondence or included in correspondence demanding direct payment. The notice shall be in conformance with 31 U.S.C. 3711(f) and the Federal Claims Collection Standards.

(b) The information that may be disclosed to the consumer reporting agency is limited to:

(1) The debtor's name, address, social security number or taxpayer identification number, and any other information necessary to establish the identity of the individual;

(2) The amount, status, and history of the claim; and

(3) The Peace Corps program or activity under which the claim arose.

§ 309.41 Referrals to collection agencies.

(a) Peace Corps has authority to contract for collection services to recover delinquent debts in accordance with 31 U.S.C. 3718(c) and the FCCS (4 CFR 102.6).

(b) Peace Corps will use private collection agencies where it determines that their use is in the best interest of

the Government. Where Peace Corps determines that there is a need to contract for collection services, the contract will provide that:

(1) The authority to resolve disputes, compromise claims, suspend or terminate collection action, and refer the matter to the Department of Justice for litigation or to take any other action under this Part will be retained by the Peace Corps;

(2) Contractors are subject to the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m) and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692;

(3) The contractor is required to strictly account for all amounts collected;

(4) The contractor must agree that uncollectible accounts shall be returned with appropriate documentation to enable Peace Corps to determine whether to pursue collection through litigation or to terminate collection;

(5) The contractor must agree to provide any data in its files relating to paragraphs (a) (1), (2) and (3) of section 105.2 of the Federal Claims Collection Standards upon returning the account to Peace Corps for subsequent referral to the Department of Justice for litigation.

(c) Peace Corps will not use a collection agency to collect a debt owed by a current employed or retired Federal employee, if collection by salary or annuity offset is available.

Subpart F—Compromise, Suspension or Termination and Referral of Claims

§ 309.42 Compromise.

Peace Corps may attempt to effect compromise in accordance with the standards set forth in part 103 of the FCCS (4 CFR part 103).

§ 309.43 Suspending or terminating collection.

Suspension or termination of collection action shall be made in accordance with the standards set forth in Part 104 of the FCCS (4 CFR 104)

§ 309.44 Referral of claims.

Claims on which an aggressive collection action has been taken and which cannot be collected, compromised or on which collection action cannot be suspended or terminated under parts 103 and 104 of the FCCS (4 CFR parts 103 and 104), shall be referred to the General Accounting Office or the Department of Justice, as appropriate, in accordance with the procedures set forth in part 105 of the FCCS (4 CFR part 105).

Barbara Zartman,

Acting Director, Peace Corps of the United States.

[FR Doc. 93–239 Filed 1–6–93; 8:45 am]

BILLING CODE 6051–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

24 CFR Part 100

Discriminatory Conduct Under the Fair Housing Act

CFR Correction

In title 24 of the Code of Federal Regulations, parts 1-199, revised as of April 1, 1992, on page 786, in § 100.135, paragraph (c) was incorrectly printed and paragraph (d) was inadvertently omitted. The correct paragraphs (c) and (d) appear as follows:

§ 100.135 Unlawful practices in the selling, brokering or appraising of residential real property.

* * * * *

(c) Nothing in this section prohibits a person engaged in the business of making or furnishing appraisals of residential real property from taking into consideration factors other than race, color, religion, sex, handicap, familial status, or national origin.

(d) Practices which are unlawful under this section include, but are not limited to, using an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status or national origin.

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[COTP St. Louis Regulation 92–10]

Safety Zone Regulations; Upper Mississippi River Mile 202.1 through 202.6

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the Upper Mississippi River, from Mile 202.1 through 202.6, to protect commercial traffic and private vessels from hazards associated with construction of the Clark Highway Bridge. Entry into this zone is prohibited unless authorized by the Captain of the Port.

EFFECTIVE DATES: This regulation is effective daily, from November 6, 1992 through April 30, 1993 between the hours of 7 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Commander Scott Cooper, Captain of the Port, St. Louis, Missouri at 314–539–3823.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking was not published for this regulation and good cause exists for making it effective less than 30 days after publication in the **Federal Register**. Publishing an NPRM and delaying the effective date would be contrary to the public interest since immediate action is necessary to ensure the safety of vessels operating in the regulated area.

Drafting Information

The drafter of this regulation is MSTC M.G. Bryan, project officer for the Captain of the Port.

Discussion of Regulation

This regulation is required to protect commercial traffic and private vessels from hazards associated with construction of the Clark Highway Bridge spanning the Mississippi River. The event requiring this regulation will begin on November 6, 1992 and will conclude on April 30, 1993. Entry into this zone between 7 a.m. and 5 p.m. will be prohibited at various times and dates during the construction period. The M/V MISS JAN will be on scene to update closure periods as conditions warrant. Questions can be directed to the M/V MISS JAN on VHF channels 13 and 16. Reopening broadcasts will be made by M/V MISS JAN. This regulation is issued pursuant to 33 U.S.C. 1231 as set out in the authority citation for all of 33 CFR part 165.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

Regulation

In consideration of the foregoing, subpart C of part 165 of title 33, Code of Federal Regulations, is amended as follows:

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5

2. A new § 165.T0255 is added to read as follows:

§ 165.T0255 Safety zone: Upper Mississippi River.

(a) *Location.* The following area is a safety zone: Upper Mississippi River from Mile 202.1 through 202.6.

(b) *Effective Date.* This regulation is effective daily on November 6, 1992 through April 30, 1993 between the hours of 7 a.m. and 5 p.m.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port or his on scene representative, the M/V MISS JAN.

Dated: November 3, 1992.

Scott P. Cooper,

Commander, U.S. Coast Guard, Captain of the Port, St. Louis, Missouri.

[FR Doc. 93–270 Filed 1–6–93; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Part 1001

[RIN 0991–AA69]

Medicare and State Health Care Programs; Fraud and Abuse; Safe Harbors for Protecting Health Plans—Extension of Comment Period

AGENCY: Office of Inspector General (OIG), HHS.

ACTION: Interim final rule with request for comment; extension of comment period.

SUMMARY: On November 5, 1992, we published an interim final rule establishing two new safe harbors, and amended one existing safe harbor, to provide protection for certain health care plans, such as health maintenance organizations and preferred provider organizations (57 FR 52723). We are extending the comment period at the request of several organizations.

DATES: Comments may be submitted until March 5, 1993.

ADDRESSES: Comments should be submitted to: Office of Inspector General, Department of Health and Human Services, Attention: LRR–28–FC, room 5246, 330 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Joel Schaer, Office of Inspector General, (202) 619–0089.

SUPPLEMENTARY INFORMATION: These safe harbors specifically set forth various standards and guidelines that, if met, will result in the particular arrangement being protected from criminal prosecution or civil sanctions under the anti-kickback provisions of the statute. Although this rule was issued in final form and became effective on the date of publication, we indicated in the preamble of that document that we were allowing a 60-day public comment period during which time interested parties could submit their comments and concerns regarding these safe harbors to the Office of Inspector General. The OIG agreed to consider all comments received on or before January 4, 1993.

Since publication of that final rule, we have received requests from several outside organizations to extend the existing comment period beyond the 60-day period. Specifically, because of our desire to work with affected outside groups in considering innovative suggestions and ideas in establishing practical and workable safe harbors, and concerns made known to us by some parties that the holiday season has hampered their ability to poll their constituents in a timely and effective manner to provide necessary and comprehensive information, we have agreed to extend the public comment period on this interim final rulemaking until March 5, 1992. We note that even though we are formally extending the comment period by an additional 60 days, these managed care safe harbor provision regulations have the effect of a final rule and such extension will not have an effect on the current implication of this rule.

Dated: December 18, 1992.

Approved: December 31, 1992.

Bryan B. Mitchell,

Principal Deputy Inspector General.

Louis W. Sullivan,

Secretary.

[FR Doc. 93–272 Filed 1–4–93; 11:52 am]

BILLING CODE 4150–04–M

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 665

[Docket No. 89–B]

RIN 2132–AA30

Bus Testing Program; Reopening of Comment Period

AGENCY: Federal Transit Administration, DOT.

ACTION: Interim final rule; reopening of comment period.

SUMMARY: On July 28, 1992, the Federal Transit Administration (FTA) published interim procedures for its bus testing program. The comment period ended on December 14, 1992. Because of the complexity of the issues involved and the desire of the FTA to give interested parties the maximum opportunity to comment, the FTA has found reasonable cause to extend the comment period of FTA Docket 89–B for an additional forty-five (45) days from the December 14, 1992, closing date.

DATES: Comments must be submitted by January 29, 1993. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments should be addressed to: Federal Transit Administration, Department of Transportation, Office of the Chief Counsel, Docket 89–B, 400 Seventh Street SW., room 9316, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: For technical issues, Steven A. Barsony, Director, Office of Engineering Evaluations, Office of Technical Assistance and Safety, (202) 366–0090; for legal issues, Richard L. Wong, Attorney-Advisor, General Law Division, Office of the Chief Counsel, (202) 366–1936 (voice); (202) 366–2979 (TDD).

SUPPLEMENTARY INFORMATION: On July 28, 1992, the Federal Transit Administration (FTA) published an Interim Final Rule (IFR), implementing section 12(h) of the Federal Transit Act (FT Act), which in turn implements section 317 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA). Section 12(h) of the FT Act states that no Federal funds * * * may be obligated or expended for the acquisition of a new bus model (including any model using alternative fuels) unless a bus of such model has been tested [at the Federal bus testing facility at Altoona, Pennsylvania]. The IFR adds two categories of vehicles to the three existing categories of vehicles which must be tested before a recipient of Federal funds could expend those funds for a vehicle. The IFR also proposes a partial testing program for those vehicles which have already completed testing at the Federal bus testing facility at Altoona, Pennsylvania. (57 FR 33394, July 28, 1992).

The IFR had an effective date of August 27, 1992, thirty days after publication. Allowing only thirty days between the publication date and the

effective date raised unforeseen issues regarding the effect of the regulation on the small bus industry, affecting both operators and manufacturers. To address this problem, the FTA amended the IFR, temporarily postponing the effective date of the regulation as it applies to the two categories of vehicles until February 10, 1993, and extending the comment period until December 14, 1992. (57 FR 46814, October 13, 1992). Given the complexity of the issues involved and the desire of the FTA to give interested parties the maximum opportunity to comment, the FTA has found reasonable cause to extend the comment period of FTA Docket 89–B for an additional forty-five (45) days from the December 14, 1992, closing date to January 29, 1993.

Issued: December 31, 1992.

Brian W. Clymer,

Administrator.

[FR Doc. 93–228 Filed 1–6–93; 8:45 am]

BILLING CODE 4910–57–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 227

[Docket No. 910779–2317]

Sea Turtle Conservation; Shrimp Trawling Requirements

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

ACTION: Final rule, technical amendment.

SUMMARY: The Secretary of Commerce issues this final rule to amend the regulations requiring shrimp trawlers in the Gulf of Mexico and the Atlantic Ocean off the southeastern United States to use Turtle Excluder Devices (TEDs) to reduce incidental captures of endangered and threatened sea turtles during shrimp fishing operations. This rule removes out-dated language concerning temporary exemptions from the requirement that shrimp trawlers equip their nets with TEDs.

EFFECTIVE DATE: January 1, 1993.

FOR FURTHER INFORMATION CONTACT: Phil Williams, (301) 713–2319 or Charles A. Oravetz, (813) 893–3366.

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act (ESA).

Pursuant to its authority under the ESA, NMFS issued a final rule to revise sea turtle conservation measures effective December 1, 1992 (57 FR 57348, December 4, 1992). The specific requirements, their background and rationale, including comments and responses, and summaries of relevant biological opinions, were included in the initial publication of the rule (57 FR 57348, December 4, 1992) and are not repeated here.

This final rule technical amendment removes the language in the Code of Federal Regulations concerning two temporary exemptions that expire on January 1, 1993.

Classification

This final rule, technical amendment, is issued under 50 CFR part 227. Because this rule makes only minor, non-substantive changes, it is unnecessary under 5 U.S.C. 553(b)(B) to provide for prior public comment and there is good cause under 5 U.S.C. 553(d) not to delay for 30 days its effective date.

Because this rule is being issued without prior comment, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act and none has been prepared.

This rule makes minor technical changes to a rule that has been determined not to be a major rule under Executive Order 12291, does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612, and does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act. There is no change in the regulatory impacts previously reviewed and analyzed.

List of Subjects in 50 CFR Part 227

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

Dated: December 31, 1992.

Samuel W. McKeen,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 227 is amended as follows:

PART 227—THREATENED FISH AND WILDLIFE

1. The authority citation for part 227 continues to read as follows:

Authority: 16 U.S.C. 1531 et seq.

2. In § 227.72, paragraphs (e)(2)(ii)(A)(*5*) and (e)(2)(ii)(A)(*6*) are removed and paragraph (e)(2)(ii)(A)(*7*) is redesignated (e)(2)(ii)(A)(*5*).

[FR Doc. 93–249 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–22–M

50 CFR Parts 611 and 663

[Docket No. 921253–2353]

Foreign Fishing; Pacific Coast Groundfish Fishery

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

ACTION: Notice of 1993 groundfish fishery specifications and management measures, and request for comments.

SUMMARY: NMFS announces the 1993 fishery specifications and management measures for groundfish taken in the U.S. exclusive economic zone and state waters off the coasts of Washington, Oregon, and California as authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP). The specifications include the level of the acceptable biological catch, harvest guidelines and quotas, and their distribution between domestic and foreign fishing operations. The management measures for 1993 are designed to keep landings within the harvest guidelines or quotas, if any, and to achieve the goals and objectives of the FMP and its implementing regulations. The intended effect of these actions is to establish allowable harvest levels of Pacific coast groundfish and to implement management measures designed to achieve but not exceed those harvest levels.

EFFECTIVE DATE: January 1, 1993, until modified, superseded, or rescinded. Comments will be accepted until February 8, 1993.

ADDRESSES: Comments on these actions should be sent to Mr. Rolland A. Schmitten, Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE., BIN C15700—Bldg. 1, Seattle, WA 98115–0070; or Dr. Gary Matlock, Acting Director, Southwest Region, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213. Information relevant to these specifications and management measures has been compiled in aggregate form and is available for public review during business hours at the office of the NMFS Northwest Regional Director or may be obtained from the Pacific Fishery Management Council (Council), by writing Pacific Fishery Management Council, Metro Center, Suite 420, 2000 SW. First Avenue, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: William L. Robinson (Northwest Region, NMFS) 206–526–6140; or Rodney R. McInnis (Southwest Region, NMFS) 310–980–4040.

SUPPLEMENTARY INFORMATION: The FMP requires that fishery specifications for groundfish be evaluated each calendar year, that harvest guidelines or quotas be specified for species or species groups in need of additional protection, and that management measures designed to achieve the harvest guidelines or quotas be published in the **Federal Register** and implemented by January 1, the beginning of the next fishing year.

These final fishery specifications and management measures have been recommended by the Council and approved by the Secretary of Commerce (Secretary) for implementation on January 1, 1993. The acceptable biological catches (ABCs) and harvest guidelines announced herein are the basis for the management measures recommended for 1993, and may be modified during the year as provided in the FMP. All of the management measures announced in this notice are considered "routine," and have been so designated at 50 CFR 663.23. A proposed rule to designate trip landing and frequency limits for Pacific whiting as "routine" was published on December 1, 1992 (57 FR 56897). A final rule is expected imminently.

The FMP provides for announcement of the final fishery specifications in the **Federal Register** after consideration at two Council meetings. The process for adopting ABCs, harvest guidelines and quotas for 1993 was initiated early in 1992 so that preliminary specifications could be adopted by the Council at its September 1992 meeting. New stock assessments, the basis for changes to the 1992 ABCs, were distributed to the public prior to the September Council meeting. The documents were reviewed and commented upon by the Council's scientific and industry advisory committees and by the public. After receiving comments, the Council adopted preliminary ABCs and harvest guidelines at its September meeting, which were subsequently made available to the public. Comments were requested before and at the November Council meeting. The final recommendations of harvest specifications, and management measures designed to achieve those specifications, adopted at the November Council meeting were forwarded to the Secretary for implementation by January 1, 1993.

I. Final Specifications of ABC, Harvest Guidelines or Quotas, and Apportionments to DAP, JVP, DAH, and TALFF

The fishery specifications include the ABC, the designation and amounts of harvest guidelines or quotas for species that need individual management, and the apportionment of the harvest guidelines or quotas between domestic and foreign fisheries. For those species needing individual management that will not be fully utilized by domestic processors or harvesters, and that can be caught without severely impacting species that are fully utilized by domestic processors or harvesters, the harvest guidelines or quotas may be apportioned to domestic annual harvest (DAH, which includes domestic annual processing (DAP) and joint venture processing (JVP)) and the total allowable level of foreign fishing (TALFF).

The final 1993 management specifications are listed in Tables 1 and 2, followed by a discussion of each species with an ABC, harvest guideline, or quota that differs from 1992 levels. As in the past, these specifications include fish caught in state ocean waters (0–3 nautical miles offshore) as well as fish caught in the exclusive economic zone (EEZ, 3–200 nautical miles offshore).

TABLE 1.—FINAL SPECIFICATIONS OF ABC FOR 1993 FOR WASHINGTON, OREGON, AND CALIFORNIA BY MANAGEMENT SUBAREAS DEFINED IN 50 CFR PART 663 (THESE CORRELATE WITH INTERNATIONAL NORTH PACIFIC FISHERIES COMMISSION—INPFC—AREAS)

[In thousands of metric tons]

Species	Subarea					Total
	Vancouver[1]	Columbia	Eureka	Monterey	Conception	
Groundfish:						
Lingcod	1.0	4.0	0.5	1.1	0.4	7.0
Pacific cod	.....	.....	(2)	(2)	(2)	3.2
Pacific whiting	.....	.....	.....	.....	(3)	177.0
Sablefish	.....	.....	.....	0.425	(4)	5.0–7.0
Jack mackerel	.....	.....	.....	.....	(6)	52.6
Rockfish:						
Pacific ocean perch	0.0	0.0	(2)	(2)	(2)	0.0
Shortbelly	.....	.....	.....	.....	(5)	13.0
Widow	.....	.....	.....	.....	(5)	7.0
Thornyheads:						
Shortspine	.....	(7)	(7)	(7)	.....	1.9
Longspine	.....	(7)	(7)	(7)	.....	10.1
Sebastes complex:						
Bocaccio	(2)	(2)	(7)	(7)	(7)	1.54
Canary	0.8	1.5	0.6	(2)	(2)	2.9
Chilipepper	.....	.....	.....	.....	(5)	3.6
Yellowtail	1.3	3.1	0.3	(2)	(2)	4.7
Remaining rockfish	0.8	3.7	1.9	4.3	3.3	14.0
Flatfish:						
Dover sole	2.4	4.0	3.5	5.0	1.0	15.9
English sole	.....	.....	.....	.....	(5)	1.9
Petrale sole	0.6	1.1	0.5	0.8	0.2	3.2
Arrowtooth	.....	.....	.....	.....	.....	5.8
Other flatfish	0.7	3.0	1.7	1.8	0.5	7.7
Other fish[8]	2.5	7.0	1.2	2.0	2.0	14.7

[1] U.S. portion, except for Pacific whiting.
[2] These species are not common or important in the areas footnoted. Rockfish species with this footnote are included in the "remaining rockfish" category for the areas footnoted only. Other groundfish species with this footnote are included in the "other fish" category for the areas footnoted.
[3] ABC for the U.S. and Canada combined.
[4] The 7,000-mt sablefish ABC applies only to the Vancouver, Columbia, Eureka, and Monterey subareas. There is a separate 425-mt ABC for the Conception subarea.

[5] Total—all areas off Washington, Oregon, and California.
[6] Includes areas beyond the EEZ (200 nm), and in the EEZ north of 39° N. latitude. The FMP governs only jack mackerel in the EEZ north of 39° N. latitude.
[7] The ABC is for these areas combined. For bocaccio, the Eureka subarea contribution is small.
[8] "Other fish" includes sharks, skates, rays, ratfish, morids, grenadiers, and groundfish species (except rockfish) in those areas designated by footnote 2.

TABLE 2.—FINAL HARVEST GUIDELINE (HG) SPECIFICATIONS AND THEIR APPORTIONMENT TO DAP, JVP, DAH, AND TALFF IN 1993

[in thousands of metric tons]

Species	HG	DAP	JVP [1]	DAH	Reserve	TALFF [1]
Pacific whiting [2]	142.0	142.0	0.0	142.0	0.0	0.0
Shortbelly rockfish	13.0	13.0	0.0	13.0	0.0	0.0
Jack mackerel [3]	46.5	46.5	0.0	46.5	0.0	0.0
Sablefish [4]	7.0	7.0	0.0	7.0	0.0	0.0
Pacific ocean perch [5]	[5] 1.55	1.55	[5] 0.0	1.55	0.0	0.0
Widow rockfish	7.0	7.0	0.0	7.0	0.0	0.0
Bocaccio [6]	1.54	1.54	0.0	1.54	0.0	0.0
Yellowtail rockfish [7]	4.4	4.4	0.0	4.4	0.0	0.0
Thornyheads [8]	7.0	7.0	0.0	7.0	0.0	0.0
Dover sole [4]	17.9	17.9	0.0	17.9	0.0	0.0
Sebastes:						
Complex [7]	11.2	11.2	0.0	11.2	0.0	0.0
Rockfish [9]						

[1] In the event of foreign trawl or joint venture fisheries for Pacific whiting, incidental catch allowance percentages (based on TALFF) and incidental retention allowance percentages (based on JVP) are: Sablefish 0.173 percent; Pacific ocean perch 0.062 percent; rockfish excluding Pacific ocean perch 0.738 percent; flatfish 0.1 percent; jack mackerel 3.0 percent; and other species 0.5 percent. In foreign trawl and joint venture fisheries, "other species" means all species, including nongroundfish species, except Pacific whiting, sablefish, Pacific ocean perch, other rockfish (that is, rockfish excluding Pacific ocean perch), flatfish, jack mackerel, and prohibited species. In a foreign trawl or joint venture fishery for species other than Pacific whiting, incidental allowance percentages will be stated in the conditions and restrictions to the foreign fishing permit. See 50 CFR 611.70(c) for application of incidental retention allowance percentages to joint venture fisheries.
[2] U.S. only, based on 80 percent of the 177,000-mt ABC for the United States and Canada combined.
[3] The harvest guideline for jack mackerel north of 39° N. latitude is derived by subtracting the potential harvest outside of 200 nm (6,100 mt) from the 52,600-mt ABC that applies both inside and outside of 200 nm.
[4] Sablefish, thornyheads, and Dover sole may be managed together as the "deepwater complex." The harvest guideline for sablefish does not apply to the Conception subarea. The sablefish trawl and nontrawl allocations also are harvest guidelines. (See the section on trawl and nontrawl sablefish management for 1993.) The 17,900 mt coastwide harvest guideline for Dover sole includes a 6,000-mt harvest guideline for the Columbia subarea.
[5] The harvest guideline for Pacific ocean perch applies to the Vancouver and Columbia subareas combined.
[6] The harvest guideline for bocaccio applies to the Eureka, Monterey, and Conception subareas.
[7] The harvest guideline for yellowtail rockfish is 4,400 mt for the Vancouver and Columbia subareas. The harvest guideline for the *Sebastes* complex (including yellowtail rockfish) in the Vancouver and Columbia subareas is 11,200 mt.
[8] The harvest guideline for thornyheads includes both shortspine and longspine thornyheads in the Columbia, Eureka, and Monterey subareas.
[9] Harvest guidelines for commercial harvests of all species of rockfish by members of the Makah, Quileute, Hoh, and Quinault Indian tribes are established as follows: 51,000 pounds (23.1 mt) for the area between the U.S.-Canada border and Cape Alava (48°09'30" N. latitude); and 10,000 pounds (4.5 mt) for the area between Destruction Island (47°40'00" N. latitude) and Leadbetter Point (46°38'10" N. latitude).

Changes to the ABCs and Harvest Guidelines

The 1993 final ABCs are changed from the 1992 levels for the following species: Pacific whiting, sablefish, bocaccio, Dover sole. A numerical ABC is established for arrowtooth flounder for the first time. These changes are based on the best available scientific information.

Information considered in determining these specifications is available from the Council (see ADDRESSES) and was distributed to the public in the Council's stock assessment and fishery evaluation (SAFE) document. The SAFE document, required under the Guidelines for Fishery Management Plans at 50 CFR part 602, summarizes the best available scientific information concerning the past, present, and possible future condition of the stocks and fisheries being managed under Federal regulation.

Those species or species groups with harvest guidelines in 1992 will continue to be managed with harvest guidelines in 1993. As in 1992, no quotas are established. The harvest guidelines are changed in 1993 for Pacific whiting, sablefish, bocaccio, Dover sole, yellowtail rockfish, and the *Sebastes* complex.

The changes to the ABCs and harvest guidelines are announced below. All other specifications announced in 1992 (57 FR 1654, January 15, 1992) continue in effect for 1993.

Pacific Whiting

Based on the 1992 stock assessment, the Council recommended a coastwide 1993 ABC for the United States and Canada combined of 177,000 mt, 24 percent lower than the 232,000-mt combined ABC in 1992. This ABC is based on a hybrid fishing strategy that combines the features of a constant fishing mortality (F) strategy at higher levels of biomass, and, at lower levels of biomass, a variable F strategy where fishing mortality for a particular year is proportional to the level of female spawning biomass. Although the Council has assumed a moderate harvest rate in setting the U.S. harvest guideline for the past 2 years, lack of agreement with Canada over the sharing of this transboundary stock has resulted in combined catches exceeding the ABC. If recruitment remains near the 1960–1989 median recruitment of 0.678 billion fish, the outlook for the immediate future is for a continuing decline in annual yield. This decline will steepen if the combined catch for the United States and Canada continues above the ABC for both countries. The recruitment of a strong year class would substantially increase the projected yields.

Pacific whiting is a transboundary stock and the U.S. and Canadian governments do not yet agree on the appropriate levels of harvest by each country. In 1992, the combined U.S. and Canadian catch is expected to exceed the ABC for both countries by 29 percent. The 1992 U.S. harvest guideline of 208,800 mt was 90 percent of the U.S.-Canada ABC of 232,000 mt, whereas Canada based its quota of 90,000 mt on 30 percent of the expected total catch. In bilateral negotiations with Canada, the United States indicated that it would ask the Council to recommend lowering the U.S. harvest guideline to 80 percent of the U.S.-Canada ABC in 1993. Subsequently, the Council recommended that the 1993 U.S. harvest guideline be set at 142,000 mt, 80 percent of the 177,000-mt coastwide ABC for the United States and Canada.

If Canada continues to calculate its share in the same manner as in 1992, the U.S. and Canadian total harvest would be 15 percent above the coastwide ABC in 1993. If fishing occurs at this level in 1993, future ABCs will be reduced but the overfishing level for whiting will not be reached.

Sablefish

The ABC is decreased from 8,900 mt coastwide in 1992 to 5,000–7,000 mt north of the Conception subarea (north of 36°00′ N. latitude) in 1993. Coastwide landings in 1991 were 9,454 mt, and in 1992 are expected to be close to the 8,900-mt 1992 ABC. The sablefish stock was assessed in 1992 through application of a stock synthesis model to fishery size and age composition data from 1986–1991 and trawl and pot survey data. However, it was not possible to satisfactorily reconcile differences in the results of the slope trawl surveys and the pot surveys. Consequently, an ABC range of 5,000–7,000 mt was selected to protect the stock until more certainty can be achieved. Trawl discards have been estimated to be about 1,220 mt in recent years and are already subtracted from the ABC range.

For the first time, the harvest guideline for sablefish will apply only to the Vancouver, Columbia, Eureka, and Monterey subareas. The 1993 harvest guideline is 7,000 mt, the same as the ABC for those areas. The trawl and nontrawl gear allocations for sablefish also will continue to be specified as harvest guidelines. This is done so that the Council's goal of providing very small trip limits until the end of the year will not be compromised by premature closure of the fishery due to difficulties in estimating landings, as occurred in the nontrawl sablefish fishery in 1991.

A separate ABC of 425 mt is designated for sablefish in the Conception subarea, which is approximately the amount landed in that area in recent years. The Conception subarea is excluded from the stock assessment because of smaller size-at-age and delayed maturity in that area. In addition, sablefish larvae are rare in that area, suggesting that any spawning in that area makes a minimal contribution to coastwide recruitment.

Bocaccio

A new stock assessment was completed for bocaccio in the Eureka-Monterey-Conception subareas, resulting in an increase in the ABC from 800 mt in 1992 to 1,540 mt in 1993. The new assessment incorporates improved estimates of historical catch, including trawl, set net, hook-and-line, and recreational data. The stock synthesis model indicates that biomass has declined substantially since 1980 due to low recruitment, and is approaching 20 percent of its estimated unfished level. (Unfished level means the biomass that would exist if no fishing occurred.) Landings are substantially lower than they were before trip limits were imposed in 1991. However, weak recruitment since 1979 is expected to cause the stock to continue to decline unless the total harvest is kept closer to 1,100 mt, the 1991 harvest guideline. Landings in 1992 are projected to be less than 1,300 mt, and the overfishing level in 1993 is 1,840 mt. The Council supported its Groundfish Management Team's (GMT) recommendation for setting the ABC at 1,540 mt, because it is consistent with the current harvest policy for most of the groundfish species which assumes a fishing mortality rate that would reduce egg production per female to 35 percent of its unfished level. This ABC also includes an estimate of expected discards (160 mt) in the trawl and set net fisheries that often fish to the 2-week cumulative vessel limit for bocaccio.

The 1993 harvest guideline for bocaccio is equal to the ABC for the same areas.

Dover Sole

A new stock assessment for Dover sole was conducted in 1992. As a result, the 1993 ABC is reduced from 6,100 to 4,000 mt in the Columbia subarea, and from 4,900 mt to 3,500 mt in the Eureka subarea, and the coastwide ABC is reduced from 19,400 mt to 15,900 mt. There are no changes to the ABCs for the Vancouver, Monterey, and Conception subareas. The 1993 coastwide ABC is close to the level of landings in 1990 and 1992, but is lower than the 1991 landings of 18,203 mt. Recent landings are close to the recommended area ABC's for 1993 except for the Columbia subarea where landings were approximately 8,000 mt annually in 1988–1991, twice the recommended ABC for that area.

To mitigate the economic impact of abrupt reductions in ABC, the Council has recommended phasing in reductions by setting the harvest guideline higher than the ABC and decreasing the harvest guideline gradually over a few years. Consistent with this policy, the Council recommended a separate harvest guideline of 6,000 mt for Dover sole in the Columbia subarea in 1993, intermediate between the 4,000-mt 1993 ABC and the 8,000-mt projected landings for 1992. As a result, the coastwide harvest guideline, which includes the Columbia subarea harvest guideline, is 17,900 mt, 2,000 mt higher than the sum of the ABCs.

Arrowtooth Flounder

A stock assessment on arrowtooth flounder currently is underway, and a separate ABC is specified because of the growing importance of this fishery. Landings in 1991 declined to 4,960 mt from 5,824 mt in 1990. Pending completion of the new stock assessment, the ABC for arrowtooth flounder is set equal to the highest recent catch of 5,800 mt.

Yellowtail Rockfish and the Sebastes Complex

The 1993 ABCs for yellowtail rockfish and the other components of the *Sebastes* complex in the Vancouver and Columbia subareas are the same as in 1992. However, the harvest guideline applies to different areas in 1993. Before 1992, the harvest guidelines applied only to the Vancouver-Columbia area. However, in 1992, the Columbia subarea was divided at Cape Lookout, Oregon, and the harvest guidelines for yellowtail rockfish and the *Sebastes* complex applied to the Vancouver-northern Columbia area, and a separate harvest guideline was established for yellowtail in the southern Columbia-Eureka area. There was no separate trip limit for yellowtail in the southern area. The 1992 areas were difficult to monitor and high catch rates in the southern area suggested that management should be the same throughout the Columbia subarea. By July 29, 1992, trip limits were changed to be the same throughout the Vancouver and Columbia subareas. Consequently, the 1993 harvest guidelines for yellowtail rockfish of 4,400 mt and the *Sebastes* complex of 11,200 mt will be assigned only to the Vancouver and Columbia subareas combined, as they were in 1991.

Setting Harvest Guidelines Greater Than ABC

In most cases, harvest guidelines equal the ABCs, or prorated ABCs, for specific areas. However, for 1993 the Council recommended harvest guidelines that exceed the ABCs for two species, Pacific ocean perch (POP) and Dover sole. The FMP requires that the Council consider certain factors when setting a harvest guideline above an ABC. These factors were considered in establishing the 20-year rebuilding schedule for POP in the 1981 FMP, and were considered again for POP and Dover sole in the most recent stock assessment in the Council's August 1992 SAFE document, which provides the basis for the 1993 ABCs.

POP

POP currently is managed under a 20-year rebuilding schedule specified in the original 1981 FMP. The 1993 harvest guideline for POP is the same as in 1992, 1,550 mt, even though the ABC

remains at zero. As for the last several years, the harvest guideline, in conjunction with a very small trip limit, is necessary to accommodate only incidental catches of POP. Landings in 1992 are projected to be 1,023 mt. This harvest guideline is consistent with the 1,550-mt quota established in the original FMP to allow for incidental catches while achieving the 20-year rebuilding schedule for POP.

Dover Sole

The Council's GMT recommended that the 1993 harvest guideline for the Columbia subarea be set 2,000 mt above the area's ABC, and that the harvest guideline in 1994 and 1995 for the Columbia subarea be stepped down 1,000 mt each year so that it equals the ABC in 1995. This recommendation was based on the need to resolve uncertainty in the stock assessment and to mitigate the economic impact on the fishing industry. The risk of overfishing Dover sole in the Columbia subarea is not appreciably increased by a harvest guideline that exceeds the ABC during 1993 and 1994.

Overfishing

The FMP defines "overfishing" as a fishing mortality rate that would reduce spawning biomass per recruit to 20 percent of its unfished level (unless the species is above the level that would produce the maximum sustainable yield (MSY)). If the overfishing level is reached, the Guidelines for Fishery Management Plans at 50 CFR part 602 require the Council to identify actions to be undertaken to alleviate overfishing. No groundfish species are believed to have been overfished in 1992, and none, with the possible exception of POP, are expected to be overfished in 1993.

POP was depleted off Washington, Oregon, and California, mainly by foreign fishing during the 1960's and early 1970's. In 1981, a rebuilding program was established for POP in the Vancouver and Columbia subareas. (POP is neither common nor important in the more southern areas.) A new comprehensive review of fishery and survey data does not indicate any significant rebuilding. The stock is estimated to be about 50 percent of its MSY level and the recent harvests of about 1,000 mt are near the level of overfishing (1,100 mt). The review also indicates that strong year classes, which are necessary to rebuild the stock, occur infrequently so the lack of rebuilding is not unexpected. The Council's GMT recognized that, as long as trawling occurs in these areas, incidental catches of POP will result. The GMT recommended that trip limits continue to be set to discourage targeting on POP while allowing landings of incidental catches. It is not anticipated that lowering the level of the trip limit or the harvest guideline will reduce the fishing mortality of POP. The level of catch will vary with effort in the Vancouver-Columbia area, and it is possible that the overfishing level will be reached in 1993. Under the same harvest guideline and trip limit (3,000 pounds (1,361 kg) or 20 percent of all groundfish per trip, whichever is less), the total landed catch was 1,378 mt in 1991 and is projected at 1,023 mt in 1992.

Two species (bocaccio and shortspine thornyheads) reached their overfishing levels in 1991, and a number of restrictions were imposed to minimize this possibility in 1992. These appear to have been successful because they did not reach their respective levels of overfishing in 1992.

Although landings of bocaccio in 1992 are greater than in 1991, a new stock assessment has increased the ABC significantly, from 800 mt in 1992 to 1,540 mt in 1993. In 1993, the harvest guideline is equal to the ABC, and the overfishing level is 1,840 mt. Landings in 1992 are projected to be 1,268 mt, higher than the 1,000-mt harvest guideline. As discussed in the next section on management measures, the 1992 trip limit for bocaccio still is appropriate and is continued in 1993.

As in 1992, a 7,000-mt combined harvest guideline is recommended in 1993 for shortspine and longspine thornyheads because they are caught together and are difficult to tell apart. The ABC for shortspine thornyheads (1,900 mt) is much smaller than for longspines (10,100 mt). The harvest guideline is less than the combined ABCs for the two species because if it were equal to the sum of the ABCs for both species it would likely result in overfishing of shortspine thornyheads which contribute only 16 percent of the available yield. Thus, the shortspine ABC is expected to be exceeded in 1992 and 1993, while the ABC for longspine thornyheads will not be reached. The catch of shortspine thornyheads is projected to be 2,530 mt in 1992, above its ABC of 1,900 mt and well below its overfishing level of 3,500 mt. Thornyheads are projected to exceed their harvest guideline by 9 percent in 1992, and there is some uncertainty as to whether the increase in trawl mesh size (57 FR 12212, April 9, 1992, effective May 11, 1992) will increase the proportion of shortspine thornyheads in the catch. The more productive longspine thornyheads contributed about 75 percent of the landed catch during the first half of 1992, but if both species are caught in roughly equal proportions in 1993, the overfishing level of shortspine thornyheads could be reached. Consequently, the trip limits in January 1993 are lower than in January 1992 (as discussed in the section on management measures).

Discards

Stock assessments and in-season catch monitoring are designed to account for all fishing mortality, including that discarded at sea. Discards of rockfish and sablefish in the fishery for whiting processed at sea are well-monitored and are accounted for in-season as they occur. In the other fisheries, discards caused by trip limits are not monitored, so discard factors have been developed to reasonably account for this extra catch. These discard factors are applied in one of two ways. In some cases (trawl sablefish, widow rockfish, bocaccio, Dover sole), the discard factor was used in the stock assessment and in the setting of the ABC. Therefore the ABC and harvest guideline are defined in terms of landed catch, with the understanding that the discard factor is not applied for in-season catch monitoring. In other cases (yellowtail rockfish, POP, thornyheads), a discard factor was not anticipated in the stock assessment leading to the setting of the ABC because it was developed before the trip limits became low enough to induce discards. Therefore, an estimate of discards caused by trip limits is included in the in-season landing estimates.

Apportionment to DAP, JVP, DAH, and TALFF

In 1993, there are no surplus groundfish available for joint venture or foreign fishing operations. Consequently, the entire harvest guidelines in 1993 are designated entirely for DAP (which also equals DAH), and JVP and TALFF are set at zero.

II. 1993 Management Measures

The 1993 management measures announced in this notice have been designated as "routine" under the procedures contained in Amendment 4 to the FMP. This means that the measure is likely to need adjustment on an annual or more frequent basis, the effects of the particular management measure have been analyzed previously, and it may be implemented and adjusted for a specified species or species group and gear type after consideration at a single Council meeting and after a notice is published in the **Federal Register**, as long as the

purpose of the measure is the same as when it was designated as routine.

The Sebastes Complex (Including Yellowtail Rockfish and Bocaccio)

In 1993, the cumulative trip limit for yellowtail rockfish of 8,000 pounds (3,629 kg) in a 2-week period is the same as at the beginning of 1992. However, it applies to the larger area north of Coos Bay, Oregon, rather than north of Cape Lookout, Oregon. In 1992, for the first time, different trip limits and harvest guidelines were set for yellowtail rockfish in the northern area (Vancouver-Columbia north of Cape Lookout) and the southern area (Eureka-Columbia south of Cape Lookout). Because landings of yellowtail rockfish from the southern area were expected to be small, they were restricted only by the trip limit for the *Sebastes* complex. However, landings in the southern area have grown and it became apparent that management should be the same throughout the Columbia subarea. On July 29, 1992, the trip limits for yellowtail rockfish were again applied to the Vancouver-Columbia area, as has been the case since 1985. This practice is continued in 1993.

The 1992 cumulative trip limit for bocaccio of 10,000 pounds (4,536 kg) in a 2-week period caught, south of Cape Mendocino (the Monterey and Conception subareas), is not changed for 1993, except that it will be applied the same as for yellowtail rockfish: that is, if a vessel is used to fish south of Cape Mendocino at any time during the 2-week period, the more restrictive trip limit for bocaccio caught south of Cape Mendocino will apply to all landings by that vessel during the 2-week period, even if some fishing occurred north of Cape Mendocino. This change is not expected to affect fishing operations since few bocaccio fishers, if any, operate both north and south of Cape Mendocino.

The 1993 coastwide cumulative trip limit for the *Sebastes* complex of 50,000 pounds (22,680 kg) in a 2-week period, which includes yellowtail rockfish and bocaccio as well as most other rockfish species, is the same as in 1992.

Widow Rockfish

The 1993 cumulative trip limit for widow rockfish is 30,000 pounds (13,608 kg) in a 4-week period, the same as at the beginning and end of 1992. On whatever date during the 1993 fishing season it is determined necessary to extend the fishery to the end of the year, a 3,000 pound (1,361 kg) trip limit may be imposed. If imposed, the 3,000-pound (1,361 kg) trip limit will apply per trip, not cumulatively.

POP

The 1993 trip limit for POP is the same as in 1991 and 1992: 3,000 pounds (1,361 kg) or 20 percent of all fish on board, whichever is less, in landings of POP above 1,000 pounds (454 kg). This is not a cumulative limit because it is intended to accommodate only incidental catches. It therefore applies to each fishing trip.

Deepwater Complex (Thornyheads, Dover Sole, and Trawl-Caught Sablefish)

The cumulative trip limits for the deepwater complex and thornyheads are reduced from January 1992 levels, but the sablefish trip limit is unchanged. This is intended to reduce landings of thornyheads which are expected to exceed their harvest guideline by 9 percent in 1992. It also is intended to reduce landings of Dover sole, which is projected to be 6 percent below its coastwide harvest guideline in 1992, but must be reduced further to accommodate the lower harvest guideline in the Columbia area in 1993. Consequently, the cumulative trip limit for the deepwater complex is reduced from 55,000 pounds (24,948 kg) in a 2-week period in January 1992 to 45,000 pounds (20,412 kg) in a 2-week period in January 1993. Similarly, the cumulative trip limit for thornyheads, which is included in the trip limit for the deepwater complex, will be lower in January 1993 than in January 1992, reduced from 25,000 pounds (13,340 kg) to 20,000 pounds (9,072 kg) for each 2-week period. As in 1991 and 1992, sablefish cannot exceed 25 percent of any landing of the deepwater complex containing more than 1,000 pounds (454 kg) of sablefish, and, in any landing, no more than 5,000 pounds (2,268 kg) of sablefish may be smaller than 22 inches. Even though the sablefish harvest guideline applies only to the Vancouver, Columbia, Eureka, and Monterey subareas, these trip limits are applied coastwide to avoid effort shifts into the Conception subarea.

Nontrawl Trim Limits for Sablefish

In 1993, a 250-pound (113 kg) daily trip limit will apply until the first 72-hour closure before the start of the regular season, and again on the date necessary to extend the harvest guideline to the end of the year without exceeding it. In 1993, the regular season is expected to begin on May 12. If fishing rates are similar to 1992, the 1993 regular season will be shorter than 3 weeks.

The level of trip limits in the nontrawl sablefish fishery prior to the regular season was the subject of considerable debate in 1991 and 1992. These limits are intended to allow small incidental catches to be landed and to allow small fisheries to operate year-round. In 1992, the year began with a 500-pound (227 kg) daily trip limit which was increased to 1,500 pounds (680 kg) daily on March 1. Because the sablefish catch continued at a more rapid rate than the Council intended, the trip limit was reduced to 500 pounds on March 20, 1992, and to 250 pounds on April 17, 1992, until the regular season opened on May 12, 1992. The regular season lasted only 15 days, after which the 250-pound (113 kg) daily trip limit was reimposed. Nontrawl landings are expected to be close to the 1992 nontrawl allocation of 3,612 mt by the end of the year.

More restrictive trip limits are necessary in 1993 because the nontrawl harvest guideline is smaller than in 1992 due to the reduction in ABC. A trip limit larger than 250 pounds (113 kg) per day most likely would result in a shorter open season, which already is expected to be 3 weeks or less.

Management Measures Recommended as "Routine" in 1993 or Under Amendment 7

The Council recommended that trip limits for Pacific whiting be designated as routine during the time periods before and after the large-scale target season that starts in the spring, and also for whiting caught shoreward of 100-fathoms in the Eureka subarea. Routine trip limits are listed in the Federal regulations at 50 CFR 663.23(c). A proposed rule to designate whiting trip limits as routine before and after the main season was published at 57 FR 56897 (December 1, 1992). A final rule is expected imminently. The Council recommended that Pacific whiting trip limits be set at 10,000 pounds (4,536 kg) per trip for 1993.

If approved, the routine designation for the trip limit for whiting caught inside of 100 fathoms in the Eureka subarea will be combined in the same rule with a number of other recommended nonroutine actions that would impose restrictions to minimize the bycatch of salmon in the whiting fishery. These restrictions include: no fishing for whiting at night south of 42° N. latitude; no at-sea processing operations south of 42° N. latitude; no fishing for whiting in the Columbia River and Klamath River salmon conservation zones; no fishing for whiting inside the 100-fathom contour in the Eureka subarea, except for a small "routine" trip limit, if any; and opening of the whiting season on March 1

between 42°00′ and 40°30′ N. latitude. These actions are contingent on approval of Amendment 7 to the FMP and, if approved, may not be effective before the spring of 1993.

Secretarial Actions

The Secretary concurs with the Council's recommendations and announces the following management actions, including those that have not been changed (for POP, widow rockfish, sablefish caught with nontrawl gear, and recreational bag and size limits).

A. General Definitions and Provisions

The following definitions and provisions apply to the 1993 management measures, unless otherwise specified in a subsequent notice:

(1) *A trip limit* is the total allowable amount of a groundfish species or species complex, by weight, or by percentage of fish on board, that may be taken and retained, possessed, or landed per vessel from a single fishing trip.

(2) *A daily trip limit* is the maximum amount that may be taken and retained, possessed or landed per vessel in 24 consecutive hours, starting at 0001 hours local time. Only one landing of groundfish may be made in that 24-hour period.

(3) *A cumulative trip limit* is the maximum amount that may be taken and retained, possessed or landed per vessel in a specified period of time, without a limit on the number of landings or trips. Cumulative trip limits for 1993 initially apply to 2-week and 4-week periods.

The 2-week and 4-week periods in 1993 are as follows, and start at 0001 hours Wednesday and end at 2400 hours Tuesday (local time), except for the first period which is short 2 days, and the last period which includes an extra 3 days to extend to the end of the year:

Two-week periods: 1/1–1/12; 1/13–1/26; 1/27–2/9; 2/10–2/23; 2/24–3/9; 3/10–3/23; 3/24–4/6; 4/7–4/20; 4/21–5/4; 5/5–5/18; 5/19–6/1; 6/2–6/15; 6/16–6/29; 6/30–7/13; 7/14–7/27; 7/28–8/10; 8/11–8/24; 8/25–9/7; 9/8–9/21; 9/22–10/5; 10/6–10/19; 10/20–11/2; 11/3–11/16; 11/17–11/30; 12/1–12/14; 12/15–12/31.

Four-week periods: 1/1–1/26; 1/27–2/23; 2/24–3/23; 3/24–4/20; 4/21–5/18; 5/19–6/15; 6/16–7/13; 7/14–8/10; 8/11–9/7; 9/8–10/5; 10/6–11/2; 11/3–11/30; 12/1–12/31.

(4) Unless the fishery is closed, a vessel which has landed its 2-week (or 4-week) limit may continue to fish on the limit for the next 2-week (or 4-week) period so long as the fish are not landed (offloaded) until the next 2-week (or 4-week) period.

(5) All weights are round weights or round weight equivalents.

(6) Percentages are based on round weights, and, unless otherwise specified, apply only to legal fish on board.

(7) Legal fish means fish taken and retained, possessed, or landed in accordance with the provisions of 50 CFR part 663, the Magnuson Act, any notice issued under subpart B of part 663, and any other regulation promulgated or permit issued under the Magnuson Act.

(8) Closure, when referring to closure of a fishery, means that taking and retaining, possessing or landing the particular species or species group is prohibited. (See the regulations at 50 CFR 663.2.)

(9) The fishery management area for these species is the EEZ off the coasts of Washington, Oregon, and California between 3 and 200 nautical miles offshore, and bounded on the north by the Provisional International Boundary between the United States and Canada, and bounded on the south by the International Boundary between the United States and Mexico. All groundfish possessed 0–200 nautical miles offshore, or landed in, Washington, Oregon, or California are presumed to have been taken and retained from the fishery management area, unless otherwise demonstrated by the person in possession of those fish.

(10) Inseason changes to trip limits are announced by notices published in the **Federal Register**. Information concerning changes to trip limits also is available from the NMFS Northwest and Southwest regional offices [see ADDRESSES above]. Changes to trip limits are effective at the times stated in the **Federal Register** notices. Once a change is effective, it is illegal to take and retain, possess, or land more fish than allowed under the new trip limit.

B. Widow Rockfish

No more than 30,000 pounds (13,608 kg) cumulative may be taken and retained, possessed, or landed per vessel in a 4-week period. (Widow rockfish also are called brownies.)

C. Sebastes Complex (Including Yellowtail and Bocaccio Rockfish)

(1) General. (a) *Sebastes* complex means all rockfish managed by the FMP except Pacific ocean perch (*Sebastes alutus*), widow rockfish (*S. entomelas*), shortbelly rockfish (*S. jordani*), and *Sebastolobus* spp. (thornyheads, idiot, or channel rockfish). Yellowtail rockfish (*S. flavidus*) are commonly called greenies. Bocaccio (*S. paucispinis*) are commonly called rock salmon.

(b) Coos Bay means 43°21′34″ N. latitude, the north jetty at Coos Bay, Oregon.

(c) Cape Mendocino means 40°30′00″ N. latitude.

(2) Cumulative trip limits. Coastwide, no more than 50,000 pounds (22,680 kg) cumulative of the *Sebastes* complex may be taken and retained, possessed or landed per vessel in a 2-week period. Of this 50,000 pounds (22,680 kg), no more than 8,000 pounds (3,629 kg) cumulative may be yellowtail rockfish taken and retained north of Coos Bay, and no more than 10,000 pounds (4,536 kg) cumulative may be bocaccio taken and retained south of Cape Mendocino.

(3) If any vessel is used to fish north of Coos Bay during a 2-week period, then that vessel is subject to the trip limit for yellowtail rockfish taken and retained north of Coos Bay, no matter where the fish are possessed or landed. Similarly, if a vessel is used to take and retain yellowtail rockfish south of Coos Bay and possesses or lands yellowtail rockfish north of Coos Bay, that vessel is subject to the northern trip limit.

(4) If any vessel is used to fish south of Cape Mendocino during a 2-week period, then that vessel is subject to the trip limit for bocaccio taken and retained south of Cape Mendocino, no matter where the fish are possessed or landed. Similarly, if a vessel is used to take and retain bocaccio north of Cape Mendocino and possesses or lands bocaccio south of Cape Mendocino, that vessel is subject to the southern trip limit.

D. Pacific Ocean Perch (POP)

The trip limit for Pacific ocean perch coastwide is 3,000 pounds (1,361 kg) or 20 percent of all legal fish on board, whichever is less. If less than 1,000 pounds (454 kg) of Pacific ocean perch are landed, the 20 percent limit does not apply.

[Note: Twenty percent of all legal fish on board including Pacific ocean perch is equivalent to 25 percent of all legal groundfish on board other than Pacific ocean perch.]

E. Sablefish and the Deepwater Complex (Sablefish, Dover Sole, and Thornyheads

(1) *1993 Management Goal.* The sablefish fishery will be managed to achieve the 7,000 mt harvest guideline in 1993.

(2) *Washington Coastal Tribal Fisheries.* An estimate will be made of the catch to the end of the year for the Washington coastal treaty tribes. It is anticipated that these tribes will regulate their fisheries so as not to exceed their estimated catch. There will

be no Federally imposed tribal allocation or quota. In 1993, the estimated tribal catch is 300 mt, the same as in 1991 and 1992.

(3) *Gear Allocations.* After subtracting the tribal-imposed catch limit, the remaining harvest guideline will be allocated 58 percent to the trawl fishery and 42 percent to the nontrawl fishery.

[Note: The 1993 harvest guideline for sablefish is 7,000 mt. After subtracting the 300-mt tribal-imposed catch limit, the remaining 6,700 mt is allocated 3,886 mt to the trawl fishery and 2,814 mt to the nontrawl fishery. The trawl and nontrawl gear allocations are harvest guidelines in 1993, which means the fishery will be managed so that the harvest guidelines are not exceeded, but will not necessarily be closed if they are reached.]

(4) *Trawl Trim and Size Limits.* (a) *Trawl gear.* Trawl gear includes bottom trawls, roller or bobbin trawls, pelagic trawls, and shrimp trawls.

(b) "Deepwater complex" means sablefish (*Anoplopoma fimbria*), Dover sole (*Microstomus pacificus*), and thornyheads (*Sebastolobus* spp.). Sablefish also are called blackcod. Thornyheads also are called idiots, channel rockfish or hardheads.

(c) *Trip limits.* Coastwide, no more than 45,000 pounds (20,412 kg) cumulative of the deepwater complex may be taken and retained, possessed, or landed per vessel in a 2-week period. Within this 45,000 pounds (20,412 kg), no more than 20,000 pounds (9,072 kg) cumulative may be thornyheads. In any landing of the deepwater complex, no more than 25 percent of the deepwater complex may be sablefish, unless less than 1,000 pounds (454 kg) of sablefish are landed, in which case the percentage does not apply. In any landing, no more than 5,000 pounds (2,268 kg) of sablefish may be smaller than 22 inches (56 cm) (total length).

[Note: Twenty-five percent of the deepwater complex (including sablefish) is equivalent to 33.333 percent of the legal thornyheads and Dover sole.]

(5) *Nontrawl trip and size limits.* (a) Nontrawl gear means all legal commercial groundfish gear other than trawl gear (see 50 CFR 663.2), including set nets (gill and trammel nets), traps or pots, longlines, commercial vertical hook-and-line gear, and troll gear.

(b) The coastwide daily trip limit for sablefish caught with nontrawl gear is 250 pounds (113 kg). This trip limit, which applies to sablefish of any size, remains in effect until the regular season begins, as specified at 50 CFR 663.23(b)(2).

[Note: Currently, the regular season begins on April 1. However, the Council has recommended, and NMFS has proposed (57 FR 53313, November 9, 1992) that the regular season be changed so that it begins 3 days prior to the first sablefish opening in Alaska, with 72-hour closures immediately before and after the regular season. If the Council's recommendation is approved by the Secretary, and Alaska opens its sablefish fishery on May 15, 1993, as currently expected, the 250-pound (113 kg) daily trip limit would be in effect from 0001 hours January 1 through 2400 hours May 8; the first 72-hour closure would occur from 0001 hours May 9 through 2400 hours May 11; and the regular season would start at 0001 hours May 12.]

(c) During the "regular" season, the only trip limit in effect applies to sablefish smaller than 22 inches (56 cm) (total length) which may comprise no more than 1,500 pounds (680 kg) or 3 percent of all legal sablefish on board, whichever is greater. (See paragraph (6) regarding length measurement.)

(d) Following the regular season, on a date to be announced in the **Federal Register**, the 250-pound (113 kg) daily trip limit may be reimposed for sablefish (of any size) caught with nontrawl gear.

(6) *Length measurement.* (a) Total length is measured from the tip of the snout (mouth closed) to the tip of the tail (pinched together) without mutilation of the fish or the use of additional force to extend the length of the fish.

(b) For processed ("headed") sablefish,

(i) the minimum size limit is 15.5 inches (39 cm) measured from the origin of the first dorsal fin (where the front dorsal fin meets the dorsal surface of the body closest to the head) to the tip of the upper lobe of the tail; the dorsal fin and tail must be left intact; and,

(ii) the product recovery ratio (PRR) established by the state where the fish is or will be landed will be used to convert the processed weight to round weight for purposes of applying the trip limit. (The PRR currently is 1.6 in Washington, Oregon, and California. However, the state PRRs may differ and fishermen should contact fishery enforcement officials in the state where the fish will be landed to determine that state's official PRR.)

(7) No sablefish may be retained which is in such condition that its length has been extended or cannot be determined by the methods stated above in paragraph (6).

III. Recreational Fishing

(1) *California.* The bag limit for each person engaged in recreational fishing seaward of the State of California is 5 lingcod which may be no smaller than 22 inches (56 cm) (total length) and 15 rockfish per day. Multi-day limits are authorized by a valid permit issued by the State of California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

(2) *Washington (South of Leadbetter Point) and Oregon.* The bag limit for each person engaged in recreational fishing seaward of the States of Washington south of Leadbetter Point (46°38′10″ N. latitude) and Oregon is 3 lingcod per day and 15 rockfish per day.

(3) *Washington (North of Leadbetter Point).* The bag limit for each person engaged in recreational fishing seaward of the State of Washington north of Leadbetter Point (46°38′10″ N. latitude) is 3 lingcod per day and 12 rockfish per day.

IV. Inseason Adjustments

At subsequent meetings, the Council will review the best data available and recommend modifications to these management measures if appropriate. The Council intends to examine the progress of these fisheries during the year in order to avoid overfishing and to achieve the goals and objectives of the FMP and its implementing regulations.

V. Other Fisheries

A. Foreign Vessels

Receipt or retention of groundfish by foreign fishing or foreign processing vessels, if any, is limited by incidental allowances established under 50 CFR 611.70.

B. Experimental Fisheries

U.S. vessels operating under an experimental fishing permit issued under 50 CFR 663.10 also are subject to these restrictions unless otherwise provided in the permit.

C. Shrimp and Prawn Fisheries

Landings of groundfish in the pink shrimp, spot and ridgeback prawn fisheries are governed by regulations at 50 CFR 663.24, which state:

Section 663.24(a) Pink Shrimp

The trip limit for a vessel engaged in fishing for pink shrimp is 1,500 pounds (680 kg) (multiplied by the number of days of the fishing trip) of groundfish species other than Pacific whiting, shortbelly rockfish, or arrowtooth flounder (which are not limited under this paragraph).

Section 663.24(b) Spot and Ridgeback Prawns

The trip limit for a vessel engaged in fishing for spot or ridgeback prawns is 1,000 pounds (454 kg) of groundfish species per fishing trip.

However, if fishing for groundfish and pink shrimp, spot or ridgeback prawns in the same fishing trip, the groundfish restrictions in this notice apply.

Classification

The final specifications and management measures for 1993 are issued under the authority of and in accordance with the regulations implementing the FMP at 50 CFR parts 611 and 663.

An Environmental Impact Statement (EIS) was prepared for the FMP in 1982 and a Supplemental EIS was prepared for Amendment 4 in accordance with the National Environmental Policy Act (NEPA). The alternatives considered and environmental impacts of the actions contained in this notice are not significantly different than those considered in either the EIS or SEIS for the FMP. Therefore this action is categorically excluded from the NEPA requirements to prepare an environmental assessment in accordance with paragraph 6.02c3(f) of the NOAA Administrative Order 216–6 because the alternatives and their impacts have not changed significantly and this action falls within the scope of the EIS and SEIS.

This action is in compliance with Executive Order 12291 and the Regulatory Flexibility Act.

This action does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

Much of the data necessary for these specifications and management measures comes from the current fishing season. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the fishing year, there is good cause to waive the publication of proposed specifications in the **Federal Register** and a 30-day comment period on the proposed specifications. Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations, and set up a system by which the interested public was notified, through **Federal Register** notice and Council mailings, of meetings and of the development of these measures, and was provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, Scientific and Statistical Committee, and Council meetings in August, September, October, and November 1992 that resulted in these recommendations from the Council. Additional public comments will be accepted for 30 days after publication of this notice in the **Federal Register.** The Assistant Administrator for Fisheries, NOAA, will consider all comments made during the public comment period and may propose modifications as appropriate.

The Administrative Procedure Act requires that publication of an action be made not less than 30 days before its effective date unless the Secretary finds and publishes with the rule good cause for an earlier effective date. Good cause for waiving the delay in effectiveness is found if the delay is impracticable, unnecessary, or contrary to the public interest. These specifications announce the harvest goals and the management measures designed to achieve those harvest goals in 1993. A delay in implementation could compromise the management strategies that are based on the projected landings from these trip limits. Therefore, a delay in effectiveness is contrary to the public interest and these actions are effective on January 1, 1993.

List of Subjects

50 CFR Part 611

Fisheries, Foreign relations, Reporting and recordkeeping requirements.

50 CFR Part 663

Administrative practice and procedure, Fisheries, Fishing, Reporting and recordkeeping requirements.

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

Dated: December 31, 1992.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 92–31957 Filed 12–31–92; 4:53 pm]

BILLING CODE 3510–22–M

Proposed Rules

Federal Register
Vol. 58, No. 4
Thursday, January 7, 1993

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.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270

[Release Nos. 33–6971, IC–19192; File No. S7–41–92]

RIN 3235–AF60

Revision of Certain Annual Review Requirements of Investment Company Boards of Directors

AGENCY: Securities and Exchange Commission.

ACTION: Proposed amendments to rules and guidelines, and requests for comment.

SUMMARY: The Commission is proposing for public comment amendments to five rules under the Investment Company Act of 1940. The proposed amendments would eliminate requirements in these rules that directors annually review certain arrangements and procedures, and require instead that directors make and approve changes only when necessary. The proposals are intended to substitute more meaningful requirements for the current annual review requirements, which are not necessary to further the purposes of the rules or protect investors. The proposals would also make conforming changes to the Guidelines to Forms N–1A and N–3.

DATES: Comments must be received on or before March 8, 1993.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 6–9, Washington, DC 20549. All comment letters should refer to File No. S7–41–92. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Edward J. Rubenstein, Attorney, or Diane C. Blizzard, Deputy Chief of Office, both at (202) 272–2048, Office of Regulatory Policy, Division of Investment Management, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission today is requesting public comment on proposed amendments to rules 10f–3, 17a–7, 17e–1, 17f–4, and 22c–1 [17 CFR 270.10f–3, 270.17a–7, 270.17e–1, 270.17f–4, and 270.22c–1] under the Investment Company Act of 1940 [15 U.S.C. 80a–1, *et seq.*] (the "Act").[1] The proposed amendments implement recommendations made in chapter 7 of the Division of Investment Management's recently issued report, Protecting Investors: A Half Century of Investment Company Regulation (the "Protecting Investors Report").[2]

I. Background

In connection with the *Protecting Investors Report*, the Division examined ways to relieve investment company boards of directors from tasks that perform little useful purpose and that actually interfere with the ability of boards to operate efficiently. The Division concluded that these goals would be furthered by the elimination of the requirements in rules 10f–3, 17a–7, 17e–1, 17f–4, and 22c–1 that the boards of directors annually review certain procedures and arrangements.[3] These requirements may take up a substantial amount of the boards' time and attention and increase costs, and are unnecessary because, generally, the arrangements do not change from year to year.[4] Consequently, these annual review requirements do not materially strengthen the rules or add to the protection of investors. The Division concluded that a more appropriate approach would be to require the boards to make and approve changes only as warranted by circumstance.[5]

The Commission agrees with these recommendations, and proposes to amend rules 10f–3, 17a–7, 17e–1, 17f–4, and 22c–1 to eliminate the annual review requirements, and to require instead that the boards make and approve changes to the various arrangements as the boards deem necessary. These proposed amendments would remove unnecessary regulatory burdens without diminishing investor protection, and should permit the directors to devote time and attention to more important matters.

II. Discussion

A. Rules 10f–3, 17a–7, and 17e–1

Rules 10f–3 and 17a–7 permit certain otherwise prohibited, affiliated transactions to go forward if the transactions meet the conditions enumerated in the rules.[6] Rule 17e–1

[1] The proposals also make conforming changes to the Guidelines to Forms N–1A [17 CFR 239.15A and 274.11A] and N–3 [17 CFR 239.17a and 274.11b].

[2] Sec, Division of Investment Management, Protecting Investors: A Half Century of Investment Company Regulation, *Corporate Governance* 251–289 (May 1992) [hereinafter the Protecting Investors Report].

[3] In response to the Commission's Request for Comment on Reform of the Regulation of Investment Companies, Investment Company Act Release No. 17534 (June 15, 1990), 55 FR 25322, several commenters also suggested the deletion of the annual review requirements in one or all of these rules. *See, e.g.*, Letter from Davis Polk & Wardwell to Jonathan G. Katz, Secretary, SEC (March 7, 1991) File No. S7–11–90 [hereinafter Davis Polk Study Comment]; Letter from Dechert Price & Rhoads to Jonathan G. Katz, Secretary, SEC 36–44 (Oct. 10, 1990), File No. S7–11–90; and Letter from R. James Gormley to Jonathan G. Katz, Secretary, SEC 18–19 (Oct. 9, 1990), File No. S7–11–90. The Act contains other board of directors annual review requirements that neither the commenters nor the Division recommended eliminating. *See, e.g.*, rule 17g–1 [17 CFR 270.17g–1] (annual approval of fidelity bonds).

In the future, the Commission anticipates considering an amendment to rule 17f–5 [17 CFR 270.17f–5] to revise a requirement in that rule that directors annually approve foreign custody arrangements after considering numerous factors, and an amendment to rule 12d3–1 [17 CFR 270.12d3–1] that, among other things, would delete the requirement that directors determine that any debt security of an issuer in which the investment company intends to invest is "investment grade," if the issuer derived more than fifteen percent of its gross revenues from securities-related activities in its most recent fiscal year. Both of these rule proposals would implement recommendations contained in the Protecting Investors Report. *See id.* at 270–271.

[4] See, e.g., Davis Polk Study Comment, *supra* note 3, at 2.

[5] See Protecting Investors Report at 251–271.

[6] Section 10(f) (15 U.S.C. 80a–10(f)) generally prohibits a registered investment company from acquiring securities during the existence of an underwriting syndicate if a principal underwriter of that syndicate is an affiliate of the investment company. Rule 10f–3 (17 CFR 270.10f–3) provides a limited exemption, permitting a registered investment company to purchase securities in a transaction prohibited by section 10(f) as long as the transaction complies with certain conditions. The purpose of these provisions, and the rule's conditions, is to prevent underwriters from "dumping" unmarketable securities on affiliated investment companies, or from earning excessive underwriting fees in connection with such transactions. See Investment Company Acquisition of Securities Underwritten by an Affiliate of that Company, Investment Company Act Release No. 14924 (Feb. 4, 1986), 51 FR 4386.

Continued

provides a safe harbor from the Act's restriction on affiliated brokers' compensation in connection with the sale of securities.[7] All three rules require that the full board and a majority of the independent directors must adopt procedures designed to assure that all relevant conditions and standards have been satisfied, review the procedures at least annually for "continuing appropriateness," and determine at least quarterly that all relevant transactions during the preceding quarter were effected in compliance with the established procedures.[8]

Annual review of these operating procedures should not be necessary to achieve the purposes that give rise to these rules. The conditions in rules 10f–3, 17a–7, and 17e–1 are intended to prevent overreaching,[9] or assure fair compensation.[10] Annual review of the operating procedures do not advance these purposes because, ordinarily, the procedures do not change after they are adopted.[11] In the case of rules 10f–3 and 17a–7, the procedures are virtually prescribed by the rules and thus generally are unlikely to change unless the rules change.

The Commission thus proposes to amend these rules to delete the annual review requirements, and to require instead that the board make and approve any changes to the procedures as the board deems necessary.[12] Careful attention to the required quarterly reviews of transactions,[13] which are retained in these rules, should enable boards to monitor the procedures and identify any problems that might require an adjustment to procedures. Boards should also take note of any other information about the effectiveness of the procedures that is presented or observed.

B. Rule 17f–4

Section 17(f)[14] permits an investment company or its custodian to deposit the company's securities in a securities depository that complies with Commission requirements. Under rule 17f–4,[15] the depository must be either a clearing agency registered with the Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) or the Federal Reserve book-entry system.[16] In addition, the arrangement with the depository must comply with several conditions, which include initial approval and annual review by the board of directors.[17] The purpose of the rule is "to enable investment companies to participate, with minimum risks, in the potential benefits incident to the deposit of securities in securities depositories."[18]

Annual review of depository arrangements does not appear necessary. The use of domestic securities depositories has become an integral part of securities investing; most funds investing in United States securities could not conduct business without using them. The eligible depositories are either registered with the Commission or, in the case of the book-entry system, operated by the Federal Reserve,[19] and the depository arrangements must comply with substantive conditions intended to minimize risks.[20] Most of the key elements of the arrangements are prescribed by the rule, leaving the boards of directors very little discretion, other than to make sure that the arrangements continue to comply with the rule. Accordingly, once established, the essential terms of the arrangements remain unchanged from year to year unless the rule changes. The annual review becomes perfunctory. At the same time, this requirement consumes time and attention that could be better spent on other matters.

The Commission proposes to amend rule 17f–4 to delete the annual review requirement.[21] Directors would only be required to approve depository arrangements initially, and any subsequent changes proposed by the adviser.

C. Rule 22c–1

Rule 22c–1 generally requires that the purchase and redemption of a redeemable security be effected at the current net asset value next computed after receipt of a purchase or redemption request.[22] Current net asset value must be computed at least once daily, subject to limited exceptions, and, at least annually, the board of directors must set the time or times each day that the company will calculate current net asset value.[23] The purpose of section 22(c) and rule 22c–1 is to address the problem of "dilution" and to curb certain speculative trading practices.[24]

Requiring the directors annually to set the time of day does not materially advance the purpose of the rule. This is accomplished by the fundamental requirement of forward pricing. In addition, the pricing time is not something that normally needs to be changed annually. The proposed rule amendments would delete this requirement, and require instead that the board initially set the pricing time or times, and thereafter make and approve any changes as it deems necessary.[25] For example, it may be

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Section 17(a) (15 U.S.C. 80a–17(a)) generally prohibits an affiliated person of a registered investment company (or an affiliated person of such person) from engaging in a purchase, sale, or loan transaction with such registered investment company (or any company controlled by such registered investment company). Rule 17a–7 (17 CFR 270.17a–7) provides an exemption from section 17(a) for purchases and sales of securities between funds that are considered affiliates because of a common adviser, director, or officer, subject to conditions that are intended to limit the exemption to those situations where there is no likelihood of overreaching with respect to the participating investment companies. See Exemption of Certain Purchase or Sale Transactions Between Affiliated Registered Investment Companies, Investment Company Act Release No. 4697 (Sept. 16, 1966), 31 FR 12092. The rule permits funds under common management to trade securities with each other and thus to avoid brokerage commissions. The rule also limits the prices at which inter-fund transfers may occur in order to prevent inequitable pricing practices that could benefit one fund at the expense of another.

[7] Section 17(e)(2)(A) (15 U.S.C.80a–17(e)(2)(A)) prohibits an affiliated broker-dealer from receiving a commission that exceeds the usual and customary broker's commission where the sale is effected on a securities exchange. Rule 17e–1 (17 CFR 270.17e–1) provides, in part, that a commission will not be considered as exceeding the usual and customary broker's commission if the board has adopted procedures designed to ensure that the commissions paid are reasonable and fair compared to commissions paid to brokers in connection with comparable transactions involving similar securities being sold on a securities exchange during a comparable period. The purpose of the rule's conditions is to ensure compliance with this standard. See Agency Transactions by Affiliated Persons on a Securities Exchange, Investment Company Act Release No. 10605 (Mar. 6, 1979), 44 FR 12202.

[8] Rules 10f–3(h), 17a–7(e), and 17e–1(b) (17 CFR 270.10f–3(h), .17a–7(e), and .17e–1(b)).

[9] See supra note 6.

[10] See supra note 7.

[11] See, e.g., Davis Polk Study Comment, supra note 3, at 2.

[12] The Commission also proposes to amend rules 10f–3 and 17e–1 to make technical, non-substantive language changes.

[13] See rules 10f–3(h)(3), 17a–7(e)(3), and 17e–1(b)(3).

[14] 15 U.S.C. 80a–17(f).

[15] Rule 17f–4(b) (17 CFR 270.17f–4(b)).

[16] See 31 CFR Part 306, subpart O; and 31 CFR Part 350.

[17] See rule 17f–4(c)(3) and (d)(5), (17 CFR 270.17f–4(c)(3) and .17f–4(d)(5)).

[18] Deposits of Securities in Securities Depositories, Investment Company Act Release No. 10453 (Nov. 1, 1978), 43 FR 50869.

[19] See rule 17f–4(b).

[20] See rules 17f–4(c) and (d).

[21] The Commission also proposes to amend rule 17f–4 to make technical, non-substantive language changes.

[22] 17 CFR 270.22c–1(a).

[23] See rule 22c–1(b)(1) [17 CFR 270.22c–1(b)].

[24] See Pricing of Redeemable Securities for Distribution, Redemption and Repurchase and Time-Stamping of Orders by Dealers, Investment Company Act Release No. 5519 (Nov. 7, 1968), 33 FR 16331.

[25] This would require amending rule 22c–1(b)(1), and adding a new paragraph (e). There is already pending a proposal to add a new paragraph (d) to rule 22c–1. See Periodic Repurchases By Closed-End Management Investment Companies; Redemptions by Open-End Management Investment Companies and Registered Separate Accounts at

necessary for the board to change the pricing time in response to new developments, such as twenty-four hour trading, or changes in the nature of the investment company's investments.

In connection with the proposed amendments to rule 22c–1, the Division would make conforming amendments to the Guidelines to Forms N–1A [17 CFR 239.15A, 274.11A] and N–3 [17 CFR 239.17a, 274.11b]. The revision to the Guidelines to Form N–1A would delete the words "at least once a year" in the eleventh paragraph of Guide 28. The revision to the Guidelines to Form N–3 would delete the words "no less frequently than annually" in the last paragraph of Guide 27.

III. Cost/Benefit of Proposed Action

Proposed amendments to rules 10f–3, 17a–7, 17e–1, 17f–4, and 22c–1 would not impose any significant burdens on investment companies. These proposed amendments would benefit investment companies by reducing the burdens on directors and freeing their time for more important matters. Comment is requested, however, on these matters and on the costs or benefits of any other aspect of the proposed actions. Commenters should submit estimates of any costs and benefits perceived, together with any supporting empirical evidence available.

IV. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. 603 regarding amendments to rules 10f–3, 17a–7, 17e–1, 17f–4, and 22c–1. The Analysis explains that the proposed amendments would eliminate the requirement in these rules that directors annually review certain arrangements and procedures, and require instead that directors make and approve changes only when necessary.[26] The Analysis states that the proposed amendments are intended to delete those annual review requirements that are more form than substance, and that are not necessary to further the purposes of the rules or to protect investors, and to substitute more meaningful requirements. The Analysis states that the proposed amendments are intended to maintain the highest level of investor protection. It also states that the proposed amendments contain no reporting or recordkeeping requirements. By eliminating the annual review requirements, the proposed amendments will reduce the costs incurred by investment companies. The Commission considered a number of significant alternatives to the proposed amendments, but prefers the proposed approach because it eliminates unnecessary burdens while preserving investor protection. A copy of the Initial Regulatory Flexibility Analysis may be obtained by contacting Edward J. Rubenstein, Esq. or Diane C. Blizzard, Esq., both at Mail Stop 10–4, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

V. Statutory Authority

The Commission is proposing the amendments to rules 10f–3, 17a–7, 17e–1, 17f–4, and 22c–1 pursuant to sections 6(c), 10(f), 17(e), 17(f), 22(c), and 38(a) of the Act.

List of Subjects in 17 CFR Part 270

Investment Companies, Reporting and recordkeeping requirements, Securities

Text of Proposed Rule Amendments

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–37, 80a–39 unless otherwise noted:

* * * * *

Section 270.22 c–1 also issued under secs. 6(c), 22(c), and 38(a) [15 U.S.C. 80a–6(c), 80a–22(c), and 80a–37a].

2. Section 270.10f–3 is amended by revising paragraph (h) to read as follows:

§ 270.10f–3 Exemption of acquisition of securities during the existence of underwriting syndicate.

* * * * *

(h) The board of directors, including a majority of the directors of the investment company who are not interested persons with respect thereto:

(1) Has adopted procedures, pursuant to which such purchases may be effected for the company, which are reasonably designed to provide that all the conditions of this section in paragraphs (a) through (g) have been complied with;

(2) Makes and approves such changes as the board deems necessary; and

(3) Determines no less frequently than quarterly that all purchases made during the preceding quarter were effected in compliance with such procedures; and

* * * * *

3. Section 270.17a–7 is amended by revising paragraph (e)(2) to read as follows:

§ 270.17a–7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof.

* * * * *

(e) * * *

(2) Makes and approves such changes as the board deems necessary, and

* * * * *

4. Section 270.17e–1 is amended by revising paragraph (b) to read as follows:

§ 270.17e–1 Brokerage transactions on a securities exchange.

* * * * *

(b) The board of directors, including a majority of the directors of the investment company who are not interested persons thereof:

(1) Has adopted procedures which are reasonably designed to provide that such commission, fee, or other remuneration is consistent with the standard described in paragraph (a) of this section;

(2) Makes and approves such changes as the board deems necessary; and

(3) Determines no less frequently than quarterly that all transactions effected pursuant to this section during the preceding quarter were effected in compliance with such procedures; and

* * * * *

5. Section 270.17f–4 is amended by revising paragraphs (b), (c)(3), and (d)(5) to read as follows:

§ 270.17f–4 Deposits of securities in securities depositories.

* * * * *

(b) A registered management investment company (investment company) or any qualified custodian may deposit all or any part of the securities owned by the investment company in a foreign securities depository or clearing agency in accordance with rule 17f–5 (17 CFR 270.17f–5) or in:

(1) A clearing agency registered with the Commission under section 17A of the Securities Exchange Act of 1934 (clearing agency), which acts as a securities depository, or

(2) The book-entry system as provided in subpart O of Treasury Circular No. 300, 31 CFR part 306, subpart B of 31 CFR part 350, and the book-entry regulations of federal agencies substantially in the form of subpart O,

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Periodic Intervals or with Extended Payment, Investment Company Act Release No. 18869 (August 6, 1992), 57 FR 34701, 34721.

[26] The Analysis also notes that the proposals would make certain technical, non-substantive language changes to rules 10f–3, 17e–1, and 17f–4, as well as conforming changes to the Guidelines to Forms N–1A [17 CFR 239.15A, 274.11A] and N–3 [17 CFR 239.17a, 274.11b].

in accordance with the following paragraphs of this section.

(c) * * *

(3) The investment company, by resolution of its board of directors, initially approved the arrangement, and any subsequent changes thereto.

(d) * * *

(5) The investment company, by resolution of its board of directors, initially approved the arrangement, and any subsequent changes thereto.

6. Section 270.22c–1 is amended by revising paragraph (b)(1) and adding paragraph (e) to read as follows:

§ 270.22c–1 Pricing of redeemable securities for distribution, redemption and repurchase.

* * * * *

(b) * * *

(1) The current net asset value of any such security shall be computed no less frequently than once daily, Monday through Friday, at the specific time or times during the day that the board of directors of the investment company sets, in accordance with paragraph (e) of this section, except on:

(i) Days on which changes in the value of the investment company's portfolio securities will not materially affect the current net asset value of the investment company's redeemable securities;

(ii) Days during which no security is tendered for redemption and no order to purchase or sell such security is received by the investment company; or

(iii) Customary national business holidays described or listed in the prospectus and local and regional business holidays listed in the prospectus; and

* * * * *

(e) The board of directors shall initially set the time or times during the day that the current net asset value shall be computed, and shall make and approve such changes as the board deems necessary.

Text of Proposed Changes to Guidelines

Note: The Guides to Forms N–1A and N–3 are not codified in the Code of Federal Regulations.

1. Guide 28 to Form N–1A (239.15A and 274.11A) is amended by revising the first three sentences of paragraph eleven (unnumbered) to read as follows:

Guide 28. Valuation of Securities Being Offered

* * * * *

Item 7 requires a statement in the prospectus as to when calculations of net asset value are generally made. The current net asset value of redeemable securities should be computed at least once each day whenever there is enough trading in the investment company's portfolio securities to materially affect the current net asset value of the investment company's redeemable securities and on which an order for purchase, redemption, or repurchase of its securities is received. Calculations of net asset values should be made at such time or times during the day as set by the directors of the investment company. * * *

* * * * *

2. Guide 27 to Form N–3 (239.17a and 274.11b) is amended by revising the first three sentences of the last paragraph (unnumbered) to read as follows:

Guide 27. Valuation of Securities Being Offered

* * * * *

The prospectus must disclose when calculations of accumulation unit value are generally made. The current accumulation unit value of redeemable securities should be computed in accordance with rule 22c–1 under the 1940 Act [17 CFR 270.22c–1], i.e., at least once daily on each weekday (except for customary national and local business holidays listed in the prospectus) in which there is sufficient trading in the separate account's portfolio securities so that the current accumulation unit value might be materially affected by changes in the value of these portfolio securities and on which an order for purchase or redemption of its securities is received. These calculations of accumulation unit value should be made at such specific time or times during the day as determined by a majority of the board of managers of the separate account. * * *

By the Commission.

Dated: December 30, 1992.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–291 Filed 1–6–93; 8:45 am]

BILLING CODE 8010–01–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Ch. I

[FRL–4552–9]

Change in Meeting Location for the January 13–14 Disinfection By-products Negotiated Rulemaking Advisory Committee Meeting

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Disinfection By-products Negotiated Rulemaking Advisory Committee's January 13–14 meeting to continue to develop consensus that can be used as the basis of a proposed rule will be held at the Quality Hotel, 415 N. Jersey Ave, NW, Washington, D.C., NOT at "Resolve" on 24th Street as Noticed earlier.

DATES: The meeting will take place on January 13–14. On January 13 the meeting will start at 9:30 a.m. and end at 5:00 p.m. On January 14, it will start at 8:30 a.m. and end by 4:00 p.m.

ADDRESSES: The Committee will meet at the Quality Hotel, 415 N. Jersey Ave NW, Washington, D.C. [202] 638–1616.

FOR FURTHER INFORMATION CONTACT: For further information on substantive aspects of the rule, call Stig Regli of EPA's Water Office at [202] 260–7379. For further information on the meeting, call Gail Bingham, the Committee Co-Chair, at [202] 293–4800.

Chris Kirtz,

Director, Consensus and Dispute Program.

Dated: January 4, 1993.

[FR Doc. 93–300 Filed 1–6–93; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 92–304; FCC 92–557]

Renewal Reporting Requirements

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission initiates this Notice of Proposed Rule Making to consider whether to require licensees of certain types of broadcast stations to report on their license renewal applications the status of their operations. Specifically, the Commission proposes to modify Form 303–S to require licensees of full power commercial AM, FM and TV stations to report, at the time of license renewal, whether their stations are on the air or have discontinued operations.

DATES: Comments are due on or before February 23, 1993, and reply comments are due on or before March 10, 1993.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: David E. Horowitz, Policy and Rules Division, Mass Media Bureau, (202) 632–7792.

SUPPLEMENTARY INFORMATION: The following collection of information requirements contained in these proposed form changes have been

submitted to the Office of Management and Budget for review under Section 3504(h) of the Paperwork Reduction Act. Copies of the submission may be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452–2422, 1990 M Street, NW., Suite 640, Washington, DC 20036. Persons wishing to comment on this information should direct their comments to Jonas Neihardt, (202) 395–4814, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503. A copy of any comments should also be sent to the Federal Communications Commission, Office of Managing Director, Washington, 20554. For further information contact Judy Boley, Federal Communications Commission, (202) 632–7513.

OMB Number: 3060–0110.

Title: Application for Renewal of License for Commercial and Noncommercial AM, FM or TV Broadcast Station.

Form: FCC 303–S.

Action: Revised Collection.

Respondents: Businesses or other for-profit, small businesses or organizations.

Frequency of Response: Once every 5 years for TV; once every 7 years for radio.

Estimated Annual Response: 144 noncommercial TV licensees, 0.666 per response; 330 commercial TV licensees, 3.166 per response; 6 off-the-air commercial TV licensees, 4.166 per response, 1,166 hours total.

Needs and Uses: FCC 303–S is a data collection device filed by licensees of commercial and noncommercial AM, FM and TV station licensees. The data are used to assure that the necessary forms connected with the renewal application have been filed and that the licensee continues to meet basic statutory requirements to remain a licensee of a broadcast station. The following is a synopsis of the Commission's Notice of Proposed Rule Making, in MM Docket No. 92–304, adopted December 18, 1992, and released December 30, 1992. The complete text of this Notice of Proposed Rule Making is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452–1422, 1990 M Street, NW., Suite 640, Washington, DC 20036.

Synopsis of Notice of Proposed Rule Making

1. The Commission initiates this Notice of Proposed Rule Making ("Notice") on its own motion, to consider whether to require licensees of certain types of broadcast stations to report on their license renewal applications the status of their operations. Specifically, the Commission proposes to modify Form 303–S to require licensees of full power commercial AM, FM and TV stations to report whether, at the time of license renewal, their stations are on the air or have discontinued operations.

2. Section 73.1740(a)(4) of the Commission's Rules permits commercial AM, FM, and TV licensees to limit or discontinue operations for a period of thirty days without authority from the Commission. However, licensees are required to notify the Commission of limited or discontinued operations not later than the tenth day of such operation. Licensees are also required to request additional time if operations are not resumed within thirty days. In addition, 73.1750 requires commercial licensees to tender their license authorizations to the Commission for cancellation when discontinuance of station operations are permanent.

3. Preliminary information gathered by the Commission indicates that commercial AM, FM, and TV stations may not be complying fully with the requirements of §§ 73.1740 and 73.1750. The Commission is aware of an increasing number of stations that have discontinued operation. Many of these stations did not notify the Commission of discontinued operations in a timely manner, and few that have permanently discontinued operations have tendered the license to the Commission for cancellation.

4. When a licensee discontinues operations for a long period of time, the public is harmed through diminished service. Allowing licensees to preserve their exclusive right to use the frequency precludes the provision of service to the public by another interested party that would resume station operations. Unjustified prolonged suspension of station operations disserves the public interest, and the information which the Commission proposes to seek would promote the expeditious restoration of service to the public. Accordingly, the Commission seeks comment on its proposal to add to FCC Form 303–S the following questions: "Is the station off the air as of the date of this filing?" and "If yes, attach as Exhibit No. _____a statement of explanation, including the steps the applicant intends to take to restore service to the public."

Ex Parte Rules—Non-Restricted Proceeding

4. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. See generally 47 CFR 1.1202, 1.1203 and 1.1206(a).

Comment Information

5. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before February 23, 1993, and reply comments on or before March 10, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (room 239) of the Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

Initial Regulatory Flexibility Analysis

6. As required by section 603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981)).

I. Reason for the Action: The purpose of this Notice is to consider whether to

solicit information at renewal time as to the status of licensees' broadcast operations.

II. Objective of This Action: This action is intended to determine whether soliciting such information would be in the public interest.

III. Legal Basis: Authority for the actions proposed in this Notice may be found in sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303.

IV. Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule: Licensees would be required to report as to the status of their broadcast operations at renewal time.

V. Federal Rules Which Overlap, Duplicate, or Conflict With the Proposed Rule: None.

VI. Description, Potential Impact and Number of Small Entities Involved: Approximately 10,000 existing commercial broadcasters of all sizes would be affected by the proposals contained in this Notice.

VII. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent With the Stated Objectives: None.

List of Subjects in 47 CFR Part 73

Radio broadcasting and Television broadcasting.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 93–311 Filed 1–6–93; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 92–305; FCC 92–556]

TV Transmission Standards

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission proposes to amend its television technical standards to provide for enhanced closed-captioning service and the transmission of a ghost-cancelling reference signal. This action is necessary to respond to respective petitions filed by the Electronic Industries Association and the American Television Systems Committee and to update the TV technical rules to provide for new service made possible by advancements in television technology. The intended effect of the action is to significantly improve the performance and versatility of television receivers.

DATES: Comments must be filed by March 1, 1993. Reply comments must be filed by March 16, 1993.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: James E. McNally, Jr., Mass Media Bureau, Engineering Policy Branch, (202) 632–9660.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making in MM Docket No. 92–305 adopted December 18, 1992, and released on December 31, 1992. The complete text of this Notice of Proposed Rule Making is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M St., NW., Washington, DC, and may be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452–1422, 1114 21st Street, NW., Washington, DC 20036.

Synposis of Notice of Proposed Rule Making

1. By this Notice of Proposed Rule Making, the Commission proposes to amend §§ 73.682 and 73.699 of its rules to permit optional transmission of expanded closed-captioning and other types of information using all of line 21, field 2, of the vertical blanking interval (VBI) of broadcast television signals. This action is being taken in response to a petition for rule making (RM–8066) which was filed by the Consumer Electronics Group of the Electronic Industries Association (EIA/CEG) on July 7, 1992.

2. Additionally, the Commission, in response to a petition for rule making (RM–8067) filed by the Advanced Television Systems Committee (ATSC) on August 14, 1992, proposes to reserve use of line 19 of the VBI for the optional use of a ghost-canceling reference (GCR) signal. Because each of the petitions is directed at improving the quality of television service through new or modified uses of the VBI, and because neither of the two petitions appears to involve any significant technical difficulty, the Commission believes that a consolidated rulemaking proceeding would expedite their resolution and facilitate introduction of these new technologies to the American public.

3. The Commission believes that the proposals and rationale presented in both the EIA/CEG Petition and the ATSC Petition have merit. Of particular importance in the former petition is the fact that the first half of line 21, field 2 has not been utilized in its current technical configuration. The Commission agrees with the petitioner that reconfiguration of line 21, field 2 to provide enhanced closed-captioning (whether it be for a second language or a higher level of captioning quality) would appear to serve the public interest. This change may not only enhance closed-captioning for hearing-impaired persons, but may also expand various captioning uses for non hearing-impaired person as well. It also believes that EIA/CEG's proposed distinction in the priority of use (with non-captioning uses permitted only on a secondary basis) of line 21 may be appropriate.

4. The second half of line 21, field 2 is ostensibly in the visible portion of the TV signal. The Commission believes that this is not cause for concern, however, because the scanning beam in every TV receiver available to date "overscans" the visible picture by several lines on the top and the bottom of the screen. (Overscanning is the deflection of the scanning beam beyond the mask on a television picture tube. The mask is usually part of the television cabinet and it covers the edges of the picture. Line 22, also part of the active video, has been used for several years for program source identification signaling. Since initiation of this use, no complaints of picture degradation have been received.)

5. In sum, both EIA/CEG's petition and the Commission's experience indicate that there is no likely adverse impact if it assigns all of line 21, field 2 for enhanced closed-captioning and, on a secondary basis, other broadcast-related uses. The Commission seeks comment on this proposal and on any unforeseen or overlooked problems or circumstances that exist which would argue for or against this use of line 21, field 2. Comments also are solicited on whether or not any adverse interaction may occur between line 21 and line 22 from the standpoint of line identification and decoding circuitry. If so, should use of line 22, which may be used for "special signals" (see 22 FCC 2d 779 (1970)), be made secondary to that of line 21?

6. With respect to ATSC's petition, the Commission believes that while many advances in NTSC television quality have been made over the years, picture degradation through ghosting may be the most significant reception defect yet to be eliminated or minimized. Therefore, an effective system of reducing or eliminating ghosts would be a significant technical improvement which would be of direct benefit to viewers.

7. There are several issues requiring exploration in this matter. First, is there any significant use of the VIR signal today? As ATSC notes in its petition:

For the VIR signal to be maximally effective for the consumer, the VIR signal must be added at the time the program is created and must remain unchanged during distribution of that program in a television distribution system. It was difficult for television stations to consistently apply the VIR signal given the complexities of program production and distribution. And a mis-applied VIR signal could actually change the consumer's received color rendition for the worse. (ATSC Petition, p. 5.)

This statement indicates that VIR implementation has been far from complete. Nevertheless, the Commission solicits additional comment on any current uses of the VIR and whether they should preclude its abandonment in favor of a GCR signal.

8. Second, ATSC asks that the Commission embody the definition of the Philip's Laboratory GCR signal in an OET Bulletin with a reference to it being placed in the rules, inasmuch as ATSC membership agreed on the selection of Philip's GCR system as being the best of those tested. By this action the Commission would clearly ratify the industry's selection. The Commission has taken similar action in the past, most notably when it adopted standards for TV stereo. (Reference is made to the "BTSC system of stereophonic sound transmission" in § 73.682(c)(3) of the Rules, the specifications of which are described in detail in OST Bulletin No. 60.) Comment is requested on this proposal. The Commission also asks whether or not flexibility and future improvements in ghost-cancelling technology would be hindered by this approach. Alternatively, it could simply reserve all of line 19 for use by ghost-cancelling reference signals without specifying any particular system. Lastly, comment is solicited on any other relevant circumstances or potential problems that may be associated with the implementation of the GCR reference signal on line 19.

9. Significant benefits can be derived by prompt action in this rule making. TV manufacturers currently are designing receivers equipped with closed-captioning circuitry mandated by the Television Decoder Circuitry Act of 1990 (Pub. L. 101–431) as implemented in § 15.119 of the Commission's Rules. The earlier action can be taken on the proposals discussed herein, the less disruptive it will be for manufacturers already planning their compliance with this requirement and the sooner televisions equipped with these features can be made available to the public. Therefore, to bring these improvements to the public with a minimum of delay, relatively short deadlines for filing comments and reply comments are specified below. Extensions of the comment and reply comment deadlines will require substantial justification, as the Commission desires to proceed to the Report and Order phase of this proceeding as soon as possible.

Initial Regulatory Flexibility Analysis

10. As required by section 603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981)).

11. *Reason for Action:* The purpose of this Notice is to consider changes in the use of the vertical blanking interval of broadcast television signals.

12. *Objectives of This Action:* This action is intended to improve the general quality of television service by providing for enhanced closed-captioning service and, secondary to that, other broadcast-related information services capable of depiction in an alpha-numeric format. Additionally, the rules proposed would permit the transmission of a special ghost-cancelling reference signal that when used with TV receivers having the proper decoding circuitry, could eliminate much, if not all, picture degradation due to the reception of reflected, low amplitude TV signals.

13. *Legal Basis.* Authority for the actions proposed in this Notice may be found in sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303.

14. *Reporting, Recordkeeping, and Other Compliance Requirements:* None.

15. *Federal Rules Which Overlap, Duplicate, or Conflict With the Proposed Rule:* None.

16. *Description, Potential Impact and Number of Small Entities Involved:* The services permitted by the new rules are entirely optional in character. However, their appeal to the public is likely to be such that most TV broadcast licensees will want to obtain the equipment with which to provide them. Thus, as a practical matter, the new rules would have an impact on some 1,500 licensees.

17. *Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent With the Stated Objectives:* There are none.

Ex Parte

18. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 CFR 1.1202, 1.1203 and 1.1206(a).

Comment Information

19. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before March 1, 1993 and reply comments on or before March 16, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (room 239) of the Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

List of Subjects in 47 CFR Part 73

Television broadcasting.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 93–271 Filed 1–6–93; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 76

[MM Docket No. 92–306, FCC 92–561]

Cable Television Services; List of Major Television Markets

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission invites comments on its proposal, initiated by a request filed by Press Broadcasting Company, Inc. (Press), to amend the Commission's Rules to change the

designation of the Orlando-Daytona Beach-Melbourne-Cocoa, Florida television market to include the community of Clermont, Florida. This action is taken to test the proposal for market hyphenation through the rulemaking process and through the record established based on comments filed by interested parties.

DATES: Comments are due by February 22, 1993, and reply comments are due by March 9, 1993.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Alan E. Aronowitz, Mass Media Bureau, Policy and Rules Division (202) 632-7792.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making in MM Docket No. 92-306, FCC 92-561, adopted December 21, 1992, released December 31, 1992. The complete text of this document is available for inspection and coping during normal business hours in the FCC Reference Center, 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, Downtown Copy Center, at (202) 452-1422, 1990 M Street, NW., room 640, Washington, DC 20554.

Synopsis of the Notice of Proposed Rule Making

1. The Commission, in response to a Petition for Rulemaking filed by Press, licensee of WKCF (TV), Clermont, Florida, proposed to amend § 76.51 of the Rules (47 CFR 76.51) to change the designation of the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, television market to include the community of Clermont, Florida. In previous decisions, the Commission granted a Press request for waiver of § 73,658(m) of the Rules to allow WKCF to be included in the subject market for territorial exclusivity purposes (4 FCC Rcd 8799 (1989), *aff'd on recon.*, 6 FCC Rcd 6563 (1991)), and granted Press' Petition for Extraordinary Relief, ruling that WKCF was a "local signal" in the market for mandatory cable carriage (and thus copyright) purposes for the period between December 11, 1989, and November 13, 1991 (FCC 92-460, released November 9, 1992).

2. The Commission, based on the facts presented, believes that a sufficient case for market hyphenation has been set forth to justify testing this proposal through the rulemaking process and notice and comment procedures. Therefore, comment is requested on this proposal to amend § 76.51 of the Commission's Rules by adding Clermont to the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, market designation.

Administrative Matters

Initial Regulatory Flexibility Analysis

3. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by section 601(3) of the Regulatory Flexibility Act. A few number of television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the chief counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

Ex Parte

4. This is a non-restricted notice and comment rule-making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206(a).

Comment Dates

5. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before February 22, 1993, and reply comments on or before March 9, 1993. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, room 239, 1919 M Street, NW., Washington, DC 20554.

6. Authority for this proposed Rule Making is contained in sections 4 (i) and (j), and 303 of the Communications Act of 1934, as amended.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 93-269 Filed 1-6-93; 8:45 am]

BILLING CODE 6712-01-M

Notices

Federal Register
Vol. 58, No. 4
Thursday, January 7, 1993

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 COMMERCE

Agency Forms Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposals for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: National Marine Sanctuary Permits.

Agency Form Number: None.

OMB Approval Number: 0648–0141.

Type of Request: Extension of the expiration date of a currently approved collection.

Burden: 273 hours.

Number of Respondents: 140.

Avg Hours Per Response: Ranges between 30 minutes and 2 hours.

Needs and Uses: Individuals who wish to conduct research or other regulated activities in National Marine Sanctuaries must submit a written permit request. Following permit issuance, a cruise log report and an annual report of activities must be submitted.

Affected Public: Individuals, state or local governments, businesses or other for–profit institutions, federal agencies, non–profit institutions, and small businesses or organizations.

Frequency: On occasion, annually.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Ron Minsk, (202) 395–3084.

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Atlantic Bluefin Tuna Dealer Reports.

Form Number: NOAA 88–144.

OMB Approval Number: 0648–0239.

Type of Request: Revision.

Burden: 983 hours.

Number of Respondents: 360.

Avg Hours Per Response: Ranges between 3 and 33 minutes.

Needs and Uses: The U.S. is a member of the International Commission for the Conservation of Atlantic Tunas (ICAAT). As a member nation, the U.S. is required to take part in the collection of biological statistics and adhere to specific quotas assigned to it by ICAAT. The purpose of this collection is to satisfy both these requirements by obtaining information for stock assessments and to monitor the catch so that the U.S. quota is not exceeded.

Affected Public: Businesses or other for–profit institutions, small businesses or organizations.

Frequency: Daily and bi–weekly.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ron Minsk, (202) 395–3084.

Copies of the above information collection proposals can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, room 5327, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collections should be sent to Ron Minsk, OMB Desk Officer, room 3019, New Executive Office Building, Washington, DC 20503.

Dated: January 4, 1993.

Edward Michals,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR DOC 93–252 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–CW–F

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of Issuance of an Export Trade Certificate of Review, Application No. 92–00012.

SUMMARY: The Department of Commerce has issued an Export Trade Certificate of Review to Balmac International, Inc., effective December 29, 1992. This notice summarizes the conduct for which certification has been granted.

FOR FURTHER INFORMATION CONTACT: George Muller, Director, Office of Export Trading Company Affairs, International Trade Administration, 202–482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III are found at 15 CFR part 325 (1991) (50 FR 1804, January 11, 1985).

The Office of Export Trading Company Affairs is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Secretary of Commerce to publish a summary of a Certificate in the **Federal Register**. Under section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

DESCRIPTION OF CERTIFIED CONDUCT:

Export Trade

1. Products

Cold storage warehouses, ice flakers, ice machines, block ice machines, commercial and industrial mechanical refrigeration equipment and accessories.

2. Services

Design and modification of the above listed products pursuant to foreign buyers' specifications.

Export Markets

The Export Markets include all parts of the world except Canada and the United States (the fifty states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

Export Trade Activities and Methods of Operation

1. With respect to the sale of Products and Services, BALMAC, subject to the terms and conditions listed below, may:

(a) Enter into and terminate exclusive independent agreements with Bally Engineered Structures, Inc. and other Supplier separately wherein:

(1) BALMAC agrees not to represent any competitors of such Supplier as an Export Intermediary unless authorized by the Supplier;

(2) The Supplier agrees not to sell, directly or indirectly, through any other intermediary, into the Export Markets in which BALMAC represents the Supplier

as an Export Intermediary and, if such sales do occur to pay a commission to BALMAC; or

(3) Both (1) and (2) above

(b) Enter into and terminate exclusive agreements with Export Intermediaries wherein:

(1) BALMAC agrees to deal in Products in the Export Markets only through that Export Intermediary;

(2) That Export Intermediary agrees not to represent BALMAC's competitors in the Export Markets or not to buy from BALMAC's competitors for resale in the Export Markets; or

(3) Both (1) and (2) above.

(c) Enter into exclusive or nonexclusive agreements with an individual buyer in the Export Markets to act as a Purchasing Agent with respect to a particular transaction.

(d) On behalf of BALMAC itself, or while acting as an Export Intermediary for separate Suppliers:

(1) Establish prices and quantities at which Products will be acquired, sold or resold for or in the Export Markets;

(2) Establish the price and other terms of sale at which Services will be acquired, sold or resold for or in the Export Markets;

(3) Allocate foreign territories or customers among BALMAC's Export Intermediaries or to a Supplier and that Supplier's Export Intermediaries; or

(4) Any combination of (1), (2), and (3) above.

BALMAC may engage in the activities in (d) above by agreement with BALMAC's Export Intermediaries, by independent agreement with separate Suppliers, by agreement with that Supplier's Export Intermediaries, or on the basis of its own determination.

(e) Disclose to an individual buyer in the Export Market prices and other terms of export marketing or sale.

Terms and Conditions of Certificate

1. In engaging in Export Trade Activities and Methods of Operation, BALMAC will not intentionally disclose, directly or indirectly, to any Supplier any information about any other Supplier's costs, production, capacity, inventories, domestic prices, domestic sales, or U.S. business plans, strategies, or methods that is not already generally available to the trade or public.

2. BALMAC will comply with requests made by the Secretary of Commerce on behalf of the Secretary of Commerce or the Attorney General for information or documents relevant to conduct under the Certificate. The Secretary of Commerce will request such information or documents when either the Attorney General or the Secretary of Commerce believes that the information or documents are required to determine whether the Export Trade, Export Trade Activities, and Methods of Operation of a person protected by this Certificate continue to comply with the standards of Section 303(a) of the Act.

Definitions

For purposes of this certificate, the following terms are defined:

(a) "Export Intermediary" means:

(1) "Broker"—a person that locates buyers in the Export Markets for the Supplier or that locates Suppliers for buyers in the Export Markets on a straight commission or cost-plus commission basis and that, in so acting, offers, provides or engages in some or all Services;

(2) "Distributor"—a person that purchases Products for its own account from a Supplier, that may establish the resale price or maintain an inventory of Products for perspective, unidentified sales and that, in so acting, offers, provides or engages in some or all Services; or

(3) "Sales Representative or Agent"—a person that identifies and locates Products for sale; gives advice on, or chooses among prospective buyers in the Export Markets, advises on or negotiates prices, quantities, and other sale terms and conditions, sells Products for its own account or for the account of others; and that, in so acting, offers, provides or engages in some or all Services.

(b) "Purchasing Agent" means an intermediary who identifies and locates Products for purchase; gives advice on, or chooses among prospective Suppliers; advises on or negotiates prices, quantities, and other purchase terms and conditions; and purchases Products for its own account or for the account of others; and who, in so acting, offers, provides or engages in some or all Services.

(c) "Supplier" means a person who produces or sells Products or Services to be exported from the United States.

Protection Provided by Certificate

This Certificate protects BALMAC, its partners, officers, and employees acting on its behalf from private treble damage actions and government criminal and civil suits under U.S. federal and state antitrust laws for the export conduct specified in this Certificate and carried out during its effective period in compliance with its terms and conditions.

Effective Period of Certificate

This Certificate continues in effect from the effective date until it is relinquished, modified, or revoked as provided in the Act and Regulations.

Other Conduct

Nothing in this Certificate prohibits BALMAC from engaging in conduct not specified in this Certificate, but such conduct is subject to the normal application of the antitrust laws.

Disclaimer

The issuance of this Certificate of Review to BALMAC by the Secretary of Commerce with the concurrence of the Attorney General under the provisions of the Act does not constitute, explicitly or implicitly, an endorsement or opinion by the Secretary of Commerce or by the Attorney General concerning either (a) the viability or quality of the business plans of BALMAC or (b) the legality of such business plans of BALMAC under the laws of the United States (other than as provided in the Act) or under the laws of any foreign country.

The application of this Certificate to conduct in export trade where the United States Government is the buyer or where the United States Government bears more than half the cost of the transaction is subject to the limitations set forth in Section V.(D.) of the "Guidelines for the Issuance of Export Trade Certificates of Review (Second Edition)," 50 FR 1786 (January 11, 1985).

A copy of each certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, room 4102, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Dated: December 29, 1992.

George Muller,

Director, Office of Export Trading Company Affairs.

[FR Doc. 93–304 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–DR–M

National Oceanic and Atmospheric Administration

[Docket No. 91–6133]

Endangered and Threatened Wildlife and Plants: Steller Sea Lion Recovery Plan

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

ACTION: Response to comments on Draft Plan and notice of availability of Final Plan.

SUMMARY: NMFS published an emergency ruling listing the Steller sea lion as threatened under the Endangered

Species Act (ESA) on April 5, 1990 (55 FR 12645), and a final rule on November 26, 1990 (55 FR 49204).

Section 4(f) of the ESA requires that NMFS develop and implement plans for the conservation and survival of endangered and threatened species. Accordingly, the Assistant Administrator for Fisheries appointed a Steller Sea Lion Recovery Team (hereafter referred to as the Recovery Team) who submitted a draft Steller Sea Lion Recovery Plan (referred to as the Recovery Plan) to NMFS on February 15, 1991. NMFS released the draft Recovery Plan for public review and comment on March 15, 1991 (56 FR 11204). The Recovery Team, to the maximum extent possible, incorporated all comments that were submitted to NMFS during the technical review process into the draft Recovery Plan. The final draft of the Recovery Plan by the Recovery Team was submitted to NMFS for review on October 3, 1991. This notice summarizes and responds to comments received on the draft Recovery Plan. The draft Recovery Plan was reviewed and finalized by NMFS, and a final Recovery Plan is now available upon request.

ADDRESSES: Requests for the Steller Sea Lion Recovery Plan should be addressed to Steller Sea Lion Recovery Plan, either at the National Marine Fisheries Service, Office of Protected Resources/PR2, 1335 East-West Highway, Silver Spring, MD 20910, or the NMFS, Alaska Regional Office, POB 21668, Juneau, AK 99802.

FOR FURTHER INFORMATION CONTACT: Michael Payne at (301) 713–2322.

SUPPLEMENTARY INFORMATION: NMFS received nine sets of comments regarding the draft Recovery Plan. Generally, the draft Recovery Plan was considered (by consensus of those who provided comments) to be comprehensive and exceedingly well done, providing good suggestions regarding specific management actions, as well as future research activities, required for assuring the recovery of Steller sea lions. Comments received by NMFS during the technical review process focused on the following issues: a Recovery Plan Coordinator, reclassification criteria suggested by the Recovery Team in the draft Recovery Plan, critical habitat and habitat protection, disturbance at rookeries and haulout sites, determining prey requirements (and protecting prey species) of Steller sea lions, commercial fisheries impacts on Steller sea lions, and public education. The following section addresses comments received on each of these issues.

Reclassification Criteria

The draft Recovery Plan described criteria, and an application of these criteria, for determining whether the species should be reclassified from a threatened to an endangered status under the ESA. Several commenters commended the Recovery Team for attempting to develop a framework for making decisions regarding the status of Steller sea lions. One commenter suggested that the approach (for reclassification) seemed reasonable and that it be adopted. However, two other commenters questioned whether there was any biological or theoretical bases for the threshold values recommended by the Recovery Team, stating that there was no explanation given for the value of "17 percent of a benchmark population" threshold point for the endangered cutoff value in the draft Recovery Plan. A commenter continued by stating that "it is hard to argue for or against the specific trigger points recommended (in the draft Recovery Plan) without further information." Several commenters agreed that a biological justification must be provided for the threshold values used in the reclassification criteria for Steller sea lions, and that these should be adopted by appropriate review. The same comment regarding biological justification of the threshold criteria was extended by one commenter to the "40 percent of a benchmark population" value suggested in the draft Recovery Plan as a cutoff determination for listing or delisting the species as threatened.

Another commenter suggested that this section should be expanded to address the removal of the species from the list of depleted species under the Marine Mammal Protection Act (MMPA). That is, if the population data on Steller sea lions satisfy the recommended delisting criteria and the species is removed from the list of threatened species, it is possible, if not likely, that it could still be considered depleted under the MMPA. Therefore, to ensure that this plan also meets the planning requirements of the MMPA when Steller sea lions are not listed as endangered or threatened under the ESA, the commenter recommended that either: (a) This section be expanded to describe the threshold at which Steller sea lions would no longer be considered depleted under the MMPA; or (b) a new task be added to define this point as and when necessary.

Response: The draft Recovery Plan suggested that an objective evaluation of whether and how Steller sea lions should be listed under provisions of the ESA could be made by comparing the most recent data available with the measurable criteria which were described in the draft Recovery Plan. In the draft Recovery Plan the Recovery Team recommended that evaluation criteria should be applied based on a percent of a benchmark population value in the Trend Count study area (for example if the adult/juvenile Trend Count in the Kenai-Kiska area is less than 17 percent of the benchmark value, the species should be listed as endangered), or based on trends of the adult/juvenile Trend Count or a Pup Production Index from the survey data (see Part II, Section 1.C, draft Recovery Plan).

It is the intent of NMFS to support the recovery activities outlined in the Recovery Plan. However, concerns associated with the proposed evaluation criteria regarding the quantitative measures for changing status under the ESA require further analysis and discussion. Thus, NMFS has not adopted Part II, Section 1.C of the draft Recovery Plan at this time. NMFS believes that the strategy in this section focuses on small, short-term changes (e.g., in II.1.C(3), a 10-percent decline over three years) but neglects an analysis of long-term trends and the effects of stochastic variability. NMFS supports and will evaluate a combination of techniques, like population viability analysis and analysis of data on historical trends, to provide a more robust estimation of the likelihood of extinction. At the conclusion of these analyses, NMFS will reconsider the threshold levels proposed by the Recovery Team, as well as other criteria which emerge as part of the analytical procedure.

However, section 4 of the ESA requires that objective, measurable criteria be incorporated into each Recovery Plan which, when met, would result in a determination that the species be removed from the list. The data currently available on Steller sea lion relative abundance come from aerial photographic surveys of adults and juveniles and land-based counts of pups (section II.E.3 of Recovery Plan). Preliminary simulation studies conducted at an April 1992 workshop indicated that the confidence interval around the recent estimates of adult and juvenile numbers of sea lions from aerial surveys is quite small; therefore, NMFS has adopted the delisting criteria proposed in the draft Recovery Plan. However, these criteria will also be evaluated as part of the risk analysis to determine their adequacy for long-term protection of the species.

The Recovery Team believed that the goal of this Recovery Plan will be met

when the Steller sea lion population has recovered to the extent that it can be removed from ESA listings. As previously suggested, it is possible that at that point the species would still qualify as depleted under terms of the MMPA. In that case, the conservation plan requirements of the MMPA would apply. At present, the Recovery Plan acts as both an ESA and an MMPA Plan. When the Steller sea lion is removed from ESA listing, the Recovery Plan, at that time, will be reviewed and revised as necessary to reflect MMPA requirements, and the biological and ecological situations.

Steller Sea Lion Recovery Plan Coordinator

Several commenters recommended that NMFS immediately take steps to appoint or hire a full-time Steller sea lion Recovery Plan coordinator to implement the Recovery Plan.

Response: The draft Recovery Plan recognized the need for a full-time Recovery Plan coordinator to facilitate recovery activities outlined in the Plan (draft Recovery Plan, Stepdown Outline, Item 7(1)). Accordingly NMFS employed such a position. Some of the duties of the Recovery Plan coordinator include evaluating and developing regulations, designation of critical habitat, ESA section 7 consultations, providing liaison between NMFS Steller sea lion recovery efforts and the fishery management councils, enforcement agencies, researchers and other interested parties.

Habitat Requirements and Protection

The ESA requires that critical habitat be identified and designated, to the extent possible, in conjunction with or shortly after a species is listed. Section 15, page 59, of the draft Recovery Plan recognized the need to identify critical habitat for Steller sea lions. Several commenters noted that recommendations for critical habitat have been submitted to NMFS by the Recovery Team and recommended that NMFS (1) review the Recovery Team's recommendation; (2) complete the necessary economic impact analyses, environmental assessments, and other supporting documentation; and (3) propose a critical habitat designation.

One commenter questioned why, in the draft Recovery Plan, buffer areas around rookeries and haulout sites were not considered. The commenter made reference to a 30-mile no fishing zone that has been established around Steller sea lion rookeries in the Kuril Islands and suggested that the important, large rookeries [in Alaska] should have buffers considerably larger than the 3-nautical mile (nm) zone established in the listing regulations. Another commenter also recommended that the buffer zones be increased significantly as it has been well documented that Steller sea lions move considerable distances beyond 3-miles from the rookeries.

Response: The Recovery Team recommended to NMFS terrestrial and aquatic areas which they believed should be considered as critical habitat for the Steller sea lion. These areas included all rookeries, major haulout sites, and important feeding areas identified in Sections 111, 112, and 113 of the draft Recovery Plan. The Recovery Team further indicated that when areas are designated they should be large enough to ensure that potential impacts can be controlled and minimized, and that seasonal-use patterns by Steller sea lions (Section 12) should, if applicable, be documented when critical habitat designation is made. NMFS is reviewing the recommendations of the Recovery Team and is developing a proposed rule to designate critical habitat for Steller sea lions.

Disturbance at Rookeries and Haulout Sites and Intentional Takes

Several commenters stated that disturbances of animals at rookeries and on haulouts must be diminished, including restricting water and air traffic. Several commenters also stated that intentional takes must cease. Shooting at or near Steller sea lions must be stopped.

Response: Information on the possible effects of disturbance caused by human activities was summarized in the draft Recovery Plan. The draft Recovery Plan suggested that information about the causes and impacts on sea lions of disturbance caused by human activities (e.g., noise from aircraft, boats, or other vehicles; shooting; habitat alterations; etc.) should be archived and summarized, and an effort made to document the response of sea lions to disturbance in areas where such observations can be made (e.g., at rookeries in California and Oregon). Instances of disturbance should also be recorded by observers who are now in place on commercial fishing vessels.

The draft Recovery Plan also suggested that (1) regulations and guidelines should be developed and/or revised to minimize potential impacts of human activities, and that buffer zones may be the best way to limit disturbance around rookeries and major haulouts; (2) major feeding areas at sea need to be protected from human disturbance through the prohibition or control of certain activities (e.g., shooting); and (3) specific guidelines or regulations should address disturbance that may be caused by vessels (commercial and sport fishing, tourist, research, and recreational), aircraft (private, charter, and military), and activity on the ground (tourists, researchers, motorized vehicles, and industrial activities).

Several of these issues were addressed at the time the species was listed as threatened. The discharge of firearms was prohibited within 100 yards (91.4 meters) of a Steller sea lion; and (2) no-entry buffer zones of 3 nautical miles (5.5 kilometers) were established around the principal Steller sea lion rookeries in the GOA and BSAI specifically to reduce disturbance and possible intentional takes at those sites. No vessels are allowed to operate within the buffer zones, with exceptions outlined in the final rule (FR 55 49209, Nov. 26, 1990).

NMFS continues to monitor and limit disturbances around Steller sea lion rookeries and haulouts, and the possible impacts of commercial fishery activities through the ESA section 7 consultation review process, and the review process associated with obtaining permits to conduct research, or to approach Steller sea lion rookeries at a distance less than that specified at the time of listing.

Prey Requirements of Steller Sea Lions and Commercial Fisheries

The draft Recovery Plan recognized that commercial fisheries may remove millions of metric tons of main prey species of the Steller sea lion. It further suggests that this may cause nutritional stress due to large-scale changes in food abundance, localized prey depletion, and disrupting fish behavior causing the Steller sea lion to expend more energy to obtain food (page 26, draft Recovery Plan). The draft Recovery Plan recognized that if a fishery is having a detrimental effect on prey availability, then regulation of the fishery will be necessary.

In light of this, one commenter suggested that the handling of this issue in the draft Recovery Plan was inadequate, and that the final Recovery Plan should suggest stronger measures to limit fishing in critical areas to ensure adequate prey availability. Another commenter suggested that in order to require sufficient quality of food at all times, fishing should be restricted using quotas and time/area closures to see if this speeds [sea lion] recovery. Several comments discussed the need for reviewing data on commercial fishing activities in Steller sea lion feeding areas, and another recommended establishing procedures to evaluate

whether fisheries compete for Steller sea lion prey, including listing explicit criteria for determining when a fishery becomes a limiting factor.

Response: Although the data available on abundance of Steller sea lions, and changes that have occurred over time, are not as comprehensive as is desirable, it is certain that a major population decline has occurred. Both natural and human-caused factors have been hypothesized as contributing to these declines. The Recovery Team recognized that for the Steller sea lion population to grow (i.e., recover) measures must be taken to ensure that food availability is not limiting. A large combined biomass of assorted prey species does not necessarily indicate an adequate food supply, since some of the species may be nutritionally poor at times or energetically costly to catch. The draft Recovery Plan stated that if a fishery is having detrimental effects on prey availability, either through removals of target species or bycatch, additional regulation of the fishery may be necessary. In some instances it may be possible to reduce competition between commercial fisheries and sea lions by changing fishing areas, seasons, time of day, and types of operations. Where alterations in operations can reduce competition, the Recovery Team recommended that appropriate changes should be initiated and the sea lions monitored for responses (see Section 621). Quotas for catches should be set on a regional and seasonal basis for each stock of each prey species identified as important (Section 614).

Since the final listing, NMFS has developed under the MFCMA additional fishery management regulations to further reduce the potential adverse effects of the walleye pollock fishery on Steller sea lions. By emergency rule (56 FR 28112, June 19, 1991), NMFS established restrictions to ensure that the 1991 GOA walleye pollock fishery would not jeopardize the continued existence or recovery of Steller sea lions. Concurrent with specification of the 1991 GOA walleye pollock harvest levels, NMFS (a) prohibited groundfish trawling within 10 nm of 14 GOA and 4 BSAI Steller sea lion rookeries (rookeries are listed at 56 FR 28116, June 19, 1991); (b) spatially allocated the walleye pollock harvest to divert fishing effort away from sea lion foraging areas; and (c) placed further restrictions on the amount of walleye pollock that could be harvested in any quarter of the year. On November 18, 1991, NMFS issued a proposed rule to make the above emergency fishery management measures permanent (56 FR 58214). The final rule was issued on January 23, 1992 (57 FR 2683) and expanded the proposed rule to (1) prohibit trawling year-round within 10 nm of 37 rookeries in the GOA and BSAI; and (2) expand the 10 nm buffer zone around five of the rookeries (Akutan Island, Akun Island, Sea Lion Rocks, Seguam Island, and Adligadak Island) to 20 nm from January 1 through April 15 of each year. These closures are intended to further reduce any effects that groundfish trawling may have on the Steller sea lions, particularly to their foraging success.

NMFS will continue to research the condition and required foraging range of Steller sea lions through research activities specified in the Recovery Plan. If certain age/sex classes of sea lions are found to be especially food limited, then special efforts should be made to regulate total allowable catches in their feeding areas. Where prey abundance is low, or where the sea lions show signs of nutritional stress, prey availability must be increased, if possible. NMFS recognizes that the types of prey available and the energetic cost of obtaining the prey should be acceptable at required times in all critical feeding areas.

Education

One commenter emphasized the need for public education and awareness. They continued by stating that an aggressive campaign of producing posters illustrating identifying features and closely related species [i.e. California sea lions] and bulletins identifying the minimal impact by Steller sea lions on selected commercially valuable species are just some of the education related activities that are of great importance.

Response: Steller sea lion public information/education efforts to date have included mass mailings, press releases, and public presentations of ongoing research and management activities at Fishery Management Council meetings and at symposia and public hearings in affected communities. Mass mailings to vessel operators, other affected parties, and government agencies that included a description of the regulations and maps depicting buffer zones have accompanied each rulemaking. A public information poster was developed and placed in strategic locations throughout Alaska.

NMFS held a meeting of the Recovery Team in November 1992 and appropriate directions for the information and education program objectives specified in the Recovery Plan were discussed. The Recovery Team recommended that (a) an Alaska Department of Fish and Game (ADFG) video on the Steller sea lion be distributed to Marine Advisory Program offices; (b) NMFS-funded subsistence studies be used as a possible education avenue to Alaska coastal communities; (c) a Steller sea lion brochure be developed for distribution at government and tourist facilities; (d) a Steller sea lion newsletter and other marine mammal issues be developed; and (e) greater emphasis on the rationale behind management actions taken need to be included in information packages to affected parties. NMFS recognizes the need and importance of these information and education programs. NMFS, ADFG and Alaska Sea Grant have agreed to work cooperatively on the implementation of these actions.

Recovery Plan Summary

The stated goal of the Recovery Team was to develop a Steller Sea Lion Recovery Plan which would promote recovery of the Steller sea lion population to a level appropriate to justify its removal from ESA listings. Immediate objectives of the Recovery Plan were to identify factors that limit the population, to propose a set of actions that minimize any human-induced activities considered detrimental to the survival or recovery of the population, and actions necessary to cause the population to increase. The Recovery Team recognized that, although it is not clear what factors have contributed to the Steller sea lion population decline and that a great deal of information vital to the effective management of the species is lacking, there was an urgent need to take immediate actions to safeguard against further population declines, and to provide for recovery of the species. The Recovery Team recommended that immediate actions should be taken to reduce human-caused mortality to the lowest level practicable, to protect important habitats through buffer zones and other means, and enhance population productivity by ensuring that there is an ample food supply available. Conservation and management measures implemented when Steller sea lions were listed under the ESA, and since, have addressed some of these needs. Additional management actions are described in the final Steller Sea Lion Recovery Plan.

The final Steller Sea Lion Recovery Plan has been approved by NMFS and is available upon request. The Recovery Plan was prepared by the Recovery Team but does not necessarily represent official positions nor approvals of all the Recovery Team members, or cooperating agencies, other than NMFS, involved in

the plan formulation. The final Recovery Plan represents the official position of NMFS only after it has been signed by the Assistant Administrator for Fisheries as approved. The approved Recovery Plan is still subject to modification as dictated by new findings, changes in species status and completion of tasks described in the plan. Goals and objectives will be attained and funds expended contingent upon agency appropriations and priorities.

References

References in this notice can be found in the Steller Sea Lion Recovery Plan, or provided upon request.

Dated: December 29, 1992.

William W. Fox, Jr.,

Assistant Administrator for Fisheries.

[FR Doc. 93–254 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–22–M

Atlantic Mackerel, Loligo and Illex Squid, and Butterfish Under U.S. Jurisdiction, Excluding the Gulf of Mexico and Caribbean Sea

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

ACTION: Notice of intent to prepare a supplemental environmental impact statement (SEIS) and request for scoping comments.

SUMMARY: NOAA announces its intention to prepare, in cooperation with the Mid-Atlantic Fishery Management Council (Council), an SEIS pursuant to the National Environmental Policy Act, to assess effects of any changes to the management regime of Atlantic mackerel (*Scomber scrombrus*), two squid species, *Loligo pealei* and *Illex illecebrosus*, and butterfish (*Peprilus triacanthus*) pursuant to the Magnuson Fishery Conservation and Management Act of 1976, as amended (MFCMA). The Council is considering amending the Atlantic Mackeral, Squid, and Butterfish Fishery Management Plan (FMP) by developing appropriate management measures to be contained in Amendment 5. The SEIS will analyze the potential impacts of any proposed new measures in the amendment, and the fishery, itself, on the human environment. If such an amendment to the FMP is approved by the Secretary of Commerce (Secretary), implementation of such action is expected no sooner than 1994.

In addition, the Council announces a public process for determining the scope of issues to be addressed and for identifying the significant issues relating to revising management of Atlantic mackerel, *Loligo* and *Illex* squid, and butterfish. The intended effect of this notice is to alert the interested public of the commencement of a scoping process and to provide for public participation. This action is necessary to comply with Federal environmental documentation requirements.

DATES: Scoping comments are invited until January 7, 1993, when the scoping process will end at the conclusion of a scoping meeting that will begin at 1:00 p.m. on January 7, 1993, at the Ramada Inn, 76 Industrial Highway, Essington, PA 19029, (215–521–9600).

FOR FURTHER INFORMATION CONTACT: Mr. John C. Bryson, Room 2115 Federal Building 300 South New Street, Dover, Delaware 19901–6790 (Phone 302–674–2331) (FAX 302–674–5399).

SUPPLEMENTARY INFORMATION:

Problems Discussed for this Amendment

1. Overcapitalization Should be Avoided

The fishery currently has more than sufficient capacity to harvest all the allowable biological catch (ABC) for each species. This FMP was initially designed to encourage U.S. fishermen to harvest underutilized resources. The U.S. fishery may have grown to where there is no need for foreign harvests, and additional investment by U.S. fishermen could only dissipate any profits for existing fishermen who have invested heavily to build this fishery.

2. Additional Management Measures Are Necessary for Loligo and Illex

Both of these fisheries have become completely Americanized. No foreign harvests of either of these species of squid have occurred since 1987. Domestic harvests for both species are approaching the maximum sustainable yield (MSY) levels. At present, the Regional Director can only close the fishery if the quotas are reached. This management alternative may not be the best solution for the continued smooth and efficient operation of these fisheries.

3. Butterfish Bycatch Discard Mortality May be Inhibiting Sufficient Growth Such That Achievement of Maximum Sustainable Yields is Prevented

Sea sampling data for 1989, 1990, and 1991 indicate that as much butterfish (by weight) is discarded as is landed. This may be a partial explanation for why there have been relatively low levels of butterfish landings over the past several years in light of very favorable stock assessments. The MSY is 16,000 metric tons. However, actual landings have only been around one quarter this level. The lack of availability of butterfish for fishermen was thought to have been the explanation in the past. However, the new sea sampling data indicate that discards may be having a significant impact on the resource.

4. Lack of Data

National standard 2 states that "measures shall be based upon the best scientific information available." Although recreational and commercial catch data have been adequate to formulate and implement management measures, data collection should be improved, in order to allow for better management in the future. An improved data base will allow the Council to more finely tune the management system to the needs of the fishery. These data are necessary to assess the impact and effectiveness of management measures, as well as monitor fishing mortality and increases in stock size to determine if additional amendments to the FMP will be necessary.

5. Mixed-Species Fishery

The Mid-Atlantic mixed-species fishery relies principally on summer flounder, scup, black sea bass, yellowtail flounder, butterfish and *Loligo*, as either directed or bycatch in other directed fisheries. Many of these species are also components of the southern New England trawl areas. Generally, fishing activities follow these species as they make annual migrations from south to north and from offshore to inshore waters. Many of the species identified above that are in this mixed fishery are overexploited. Directed effort from some of the species has been switched to species managed in this FMP. These factors complicate the identification of appropriate and effective management strategies, thus requiring close coordination of regulatory measures for the different species in order to manage properly this species assemblage.

Possible Management Measures

Part of this scoping is the possible reevaluation of the existing objectives. Current management objectives of the FMP are:

1. Enhance the probability of successful (i.e., the historical average) recruitment to the fisheries.
2. Promote the growth of the U.S. commercial fishery, including the fishery for export.
3. Provide the greatest degree of freedom and flexibility to all harvesters of these resources consistent with the

attainment of the other objectives of this FMP.

4. Provide marine recreational fishing opportunities, recognizing the contribution of recreational fishing to the national economy.

5. Increase understanding of the conditions of the stocks and fisheries.

6. Minimize harvesting conflicts among U.S. commercial, U.S. recreational, and foreign fishermen.

POSSIBLE COMMERCIAL FISHERY MANAGEMENT MEASURES INCLUDE

	Atlantic Mackerel	Loligo	Illex	Butterfish
Minimum fish size	X	X	X	X
Minimum mesh size	X	X	X	X
Closed seasons	X	X	X	X
Closed areas	X	X	X	X
Quotas	X	X	X	X
Moratorium on vessels	X	X	X	X
ITQs	X	X	X	X
Dealer and vessel permits	X	X	X	X
Dealer and vessel reports	X	X	X	X
Operator permits	X	X	X	X
Gear restrictions & limits	X	X	X	X

POSSIBLE MANAGEMENT MEASURES FOR THE ATLANTIC MACKEREL RECREATIONAL FISHERY INCLUDED

	Atlantic Mackerel
Minimum fish size	X
Maximum possession limit	X
Closed seasons	X
Closed areas	X
Gear restrictions & limits	X
Quotas	X
Restrictions on the ability to sell recreational caught fish.	X
Dealer and vessel permits	X
Dealer and vessel reports	X
Operator permits	X

It is likely that any of these measures would be implemented through a frameworking procedure. That is, a Monitoring Committee, made up of representatives of the three Councils and NMFS, would annually review the condition of the resource and fishery and recommend adjustment of the measures (e.g., possession limit, quota, etc.) to achieve the desired goals.

Permitting and Reporting

It is anticipated that vessels landing squid, mackerel, and butterfish for sale would be required to have permits, and that party and charter boats in the Atlantic mackerel fisheries would be required to have permits.

It is anticipated that operators of commercial vessels (vessels with permits to sell squid, mackerel, and butterfish) and operators of party and charter boats would be required to obtain permits.

It is anticipated that vessels landing squid, mackerel, and butterfish for sale would be required to submit logbook reports. It is anticipated that dealers purchasing these species from permitted commercial vessels would be required to submit reports. It is anticipated that dealers purchasing these species from permitted commercial vessels would need to submit reports. It is anticipated that operators of charter and party boats would need to submit logbooks.

Under the Paperwork Reduction Act, in the SF–83 forms prepared by NMFS for Amendment 2 to the Summer Flounder FMP, the dealer purchase report was estimated to involve 1,255 respondents and 26+responses per respondent per year, for a total of 33,135 responses at 0.0448 hours per response, for a total of 1,485 hours. The vessel logbook was estimated at 1,314 respondents, 12 responses per respondent, at 0.08 hours per response, for a total of 1,261 burden hours. The vessel permit was estimated at 24,943 annual responses at 0.2878 hours per response, for a total of 7,179 burden hours. Similar burden hours per respondent should be expected through squid, mackerel, and butterfish management.

Timetable for SEIS Preparation and Decisionmaking

The Council has adopted a tentative amendment preparation, review, and approval schedule for Amendment 5. Under this schedule, the draft SEIS is planned for completion prior to the Council's October 1993 meeting. If an acceptable draft is completed, the Council would decide at that meeting whether to submit the draft SEIS for public review. Oral comments to the Council on their decision could be made at that meeting. If the Council's decision is affirmative, public review of the draft SEIS would occur during 45 days in November and December, 1993. At its February, 1994, meeting, the Council would decide on the revisions to the management of Atlantic mackerel, *Loligo* and *Illex* squid, and butterfish. Again, oral comments on this decision could be made to the Council at that meeting. If the Council's decision is affirmative, the SEIS would be made final and submitted with the amendment recommendation and other rulemaking documents to the Secretary for review and approval. The Council reserves the right to modify or abandon this schedule if determined necessary.

Under the Magnuson Act, Secretarial review and approval of a proposed amendment is completed in no more than 95 days and includes concurrent public comment periods on the amendment and proposed regulations. If approved by the Secretary under this schedule, the revised Atlantic mackerel, squid, and butterfish management measures would be effective late in 1994.

Dated: January 4, 1993.

David S. Crestin,

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

[FR Doc. 93–305 Filed 1–4–93; 8:45 am]

BILLING CODE 3510–22–M

[Docket No. 921248–2348]

Taking and Importing of Marine Mammals

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

ACTION: Notice of Yellowfin tuna embargo.

SUMMARY: The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), announces that yellowfin tuna and products derived from yellowfin harvested by Panamanian purse seine vessels operating in the eastern tropical Pacific Ocean (ETP) are prohibited from entry into the United States until further notice.

EFFECTIVE DATES: This finding was effective December 22, 1992, and remains in effect until further notice.

FOR FURTHER INFORMATION CONTACT: Dr. Gary Matlock, Acting Director, Southwest Region, NMFS, 501 W. Ocean Blvd., suite 4200, Long Beach, CA 90802–4213, telephone 310/980–4000.

SUPPLEMENTARY INFORMATION: The Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) requires a ban on the importation of commercial fish or products from fish that have been caught with commercial fishing technology that results in the incidental kill or serious injury of ocean mammals in excess of U.S. standards. In the case of yellowfin tuna from the ETP, the MMPA requires the ban unless nations have met standards comparable to those of the United States. Regulations at 50 CFR 216.24(e)(5) provide, consistent with the MMPA, specific criteria for issuing initial and subsequent affirmative findings to a harvesting nation that implements a prohibition against the intentional deployment of nets to encircle marine mammals by its purse seine vessels.

On January 9, 1992, NMFS published a finding in the **Federal Register** (57 FR 883), that Panama had enacted by Presidential Decree No. 111 a marine mammal regulatory program that prohibited its vessels from intentionally deploying purse seine nets on or to encircle marine mammals in the course of harvesting yellowfin tuna in the ETP.

The Assistant Administrator has determined that this finding must now be revoked on the basis that a Panamanian purse seine vessel greater than 400 short tons (362.9 metric tons) carrying capacity caused dolphin mortalities in purse seine sets intentionally deployed to encircle marine mammals on two successive trips within 180 days of each other during the 1992 fishing season. An observer approved by the Assistant Administrator accompanied both trips. Regulations at 50 CFR 216.24(e)(5)(x)(A)(1) provide that a nation enters into probationary status for 180 days, effective upon the date the vessel returns to port to unload, if the vessel made an intentional purse seine set on marine mammals. Section 216.24(e)(5)(x)(A)(2) provides that the Assistant Administrator will immediately revoke an affirmative finding if there are any additional intentional purse seine sets made on marine mammals during the 180-day probationary period by any vessel operating under the flag of that nation.

In addition, the Assistant Administrator has determined that Panama has enacted Presidential Decree No. 70, dated October 20, 1992, that modifies Presidential Decree No. 111, to allow Panamanian purse seine vessels operating under the Inter-American Tropical Tuna Commission (IATTC) dolphin mortality reduction program to intentionally deploy their nets on, or to encircle, marine mammals. Decree No. 70 substantively changes the regulatory program upon which the 1991 and 1992 affirmative findings to allow importation of Panamanian yellowfin tuna was based.

The MMPA's import ban under section 101(a)(2) also applies to intermediary nations, nations that export yellowfin tuna or yellowfin tuna products to the United States and that import yellowfin tuna and yellowfin tuna products that are subject to a direct ban on importation into the United States. All yellowfin tuna and yellowfin tuna products from such nations will be prohbiited unless such nations certify and provide reasonable proof that they have not imported, within the preceding 6 months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States.

Therefore, in adherence with the regulations implementing the MMPA, the Assistant Administrator announces that the importation of yellowfin tuna, or products derived from yellowfin tuna harvested with purse seine in the ETP by the Republic of Panama is prohibited until further notice. Under 50 CFR 216.24(e)(xiv), all intermediary nations that export yellowfin tuna and yellowfin tuna products to the United States and also import yellowfin tuna and yellowfin tuna products harvested in the ETP by Panamanian purse seine vessels of greater than 400 short tons (362.9 metric tons) carrying capacity, must certify and provide reasonable proof to the Assistant Administrator that they have not imported yellowfin tuna or yellowfin tuna products subject to a U.S. import prohibition within the preceding 6 months. Yellowfin tuna and yellowfin tuna products from intermediary nations that fail to provide such certification will not be allowed to enter the United States.

Dated: December 31, 1992.

Samuel W. McKeen,

Program Management Officer.

[FR Doc. 93–248 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–22–M

[Docket No. 921249–2349]

Taking and Importing of Marine Mammals

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

ACTION: Notice of affirmative findings.

SUMMARY: The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), announces that the Republic of Ecuador has submitted documentation that it is in compliance with the yellowfin tuna importation regulations for nations that have acted to ban purse seine sets on marine mammals in the eastern tropical Pacific Ocean (ETP). In addition, the Republic of Vanuatu has submitted documentary evidence which establishes under the yellowfin importation regulations that the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by U.S. vessels in the course of harvesting yellowfin tuna by purse seine in the ETP, and that other requirements for an affirmative finding have been met. Affirmative findings have been made that will allow yellowfin tuna and yellowfin tuna products to be imported into the United States from Vanuatu and Ecuador through December 31, 1993.

DATES: This finding is effective January 1, 1993, and remains in effect through December 31, 1993, or until further notice.

FOR FURTHER INFORMATION CONTACT: Gary Matlock, Acting Director, NMFS Southwest Region, NOAA, 501 W. Ocean Blvd., suite 4200, Long Beach, CA 90802–4213, or by telephone at 310/980–4000, or by FAX at 310/980–4018.

SUPPLEMENTARY INFORMATION: On November 18, 1992, NMFS published a final rule (57 FR 54334) that established a provision for timely consideration and granting of an affirmative finding under the yellowfin tuna import regulations to a nation which prohibits its vessels from intentionally setting on marine mammals in the course of harvesting yellowfin tuna by purse seine in the ETP. With an affirmative finding, yellowfin tuna and tuna products from the harvesting nation can be imported into the United States.

On March 30, 1990, NMFS promulgated a final rule (55 FR 11921) to implement portions of the Marine Mammal Protection Act Amendments of 1988. This rule governs the importation of yellowfin tuna caught by purse seining in the ETP and requires submission of an annual report to include, among other things, the

number, by species, of marine mammals killed and seriously injured, and the number of sets made. With an affirmative finding under this section, yellowfin tuna and tuna products from the harvesting nation can be imported into the United States.

The Assistant Administrator, after consultation with the Department of State, finds that the Republic of Ecuador and the Republic of Vanuatu have submitted documentary evidence that establishes that their regulatory programs comply with the tuna importation provisions of 50 CFR 216.24(e). As a result of these affirmative findings, yellowfin tuna and products derived from yellowfin tuna harvested by Ecuadorian-flag and Vanuatuan-flag purse seine vessels operating in the ETP may be imported into the United States from Ecuador and Vanuatu, either directly or through another nation, through December 31, 1993.

Dated: December 31, 1992.

Samuel W. McKeen,

Program Management Officer.

[FR Doc. 93–245 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–22–M

National Marine Fisheries Service; Marine Fisheries Advisory Committee; Notice of Public Meeting

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

TIME AND DATE: Meeting will convene at 8:45 a.m., February 2, and adjourn at 3:30 p.m., February 3, 1993.

PLACE: The Le Pavillon Hotel, 833 Poydras Street, New Orleans, Louisiana.

STATUS: As required by section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1982), notice is hereby given of a meeting of the Marine Fisheries Advisory Committee (MAFAC). MAFAC was established by the Secretary of Commerce on February 17, 1971, to advise the Secretary on all living marine resource matters which are the responsibility of the Department of Commerce. This Committee ensures that the living marine resource policies and programs of this Nation are adequate to meet the needs of commercial and recreational fishermen, and environmental, state, consumer, academic, and other national interests.

MATTERS TO BE CONSIDERED: February 2, 1993, 8:45 a.m.—5:30 p.m., (1) Magnuson Act issues and reauthorization, (2) in season management of fishery resources, (3) Gulf long line fisheries, (4) bycatch effort mandated by Magnuson Act amendment, and (5) overview of fishery data programs.

February 3, 1993, 9 a.m.—3:30 p.m., (1) health and preservation of wetlands, (2) marine mammal exemption program, (3) NMFS habitat office, and (4) budget and program planning.

FOR FURTHER INFORMATION CONTACT: Ann Smith, Executive Secretary, Marine Fisheries Advisory Committee, Policy and Coordination Office, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910. Telephone: (301) 713–2252.

Dated: December 30, 1992.

Samuel W. McKeen,

Program Management Officer, National Marine Fisheries Service, NOAA.

[FR Doc. 93–255 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–08–M

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The New England Fishery Management Council (Council) will hold a public meeting on January 13–14, 1993, at the King's Grant Inn, Route 128 at Trask Lane, Danvers, MA; telephone: (508) 774–6800. The Council will begin its meeting at 10 a.m. on January 13. The meeting will reconvene on January 14 at 9 a.m.

The meeting will open on the first day with a Lobster Committee report and discussion on Amendment #4 to the Lobster Fishery Management Plan (FMP). The Large Pelagic Committee report will follow which will include ICCAT meeting highlights and discussion of the NMFS Shark FMP. In the afternoon, the Groundfish Committee will discuss progress on Amendment #5 of the Groundfish FMP.

On the second day of the meeting, discussion of the Groundfish Amendment #5 will continue. Reports from the Council Chairman and Executive Director, the NMFS Regional Director, Northeast Fisheries Science Center Liaison, Mid-Atlantic Council liaison, and representatives for the Department of State, Coast Guard, Fish and Wildlife Service and Atlantic States Marine Fisheries Commission will follow.

For more information contact Douglas G. Marshall, Executive Director, New England Fishery Management Council, 5 Broadway, Saugus, MA 01906; telephone: (617) 231–0422.

Dated: December 31, 1992.

Richard H. Schaefer,

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

[FR Doc. 93–246 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–22–M

North Pacific Fishery Management Council; Revision to Public Meeting Agenda

AGENCY: National Marine Fisheries Service, NOAA, Commerce. The meeting agenda for the North Pacific Fishery Management Council (Council) and its Committees, which are scheduled to meet January 18–21, 1993, has been revised. Notice of the meeting was published in the **Federal Register** at 57 FR 62303 on December 30, 1992.

Revision

Council: Delete agenda item 7, final review of plan amendments for the Pribilof Island trawl closure and an amendment to separate Atka mackerel from the "Other Species" category in the Gulf of Alaska. This item will be rescheduled for review in April, 1993.

For more information contact the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510, (907) 271–2809.

Dated: December 31, 1992

Richard H. Schaefer,

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

[FR Doc. 93–247 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–22–M

COMMODITY FUTURES TRADING COMMISSION

New York Cotton Exchange: Proposed Amendments Relating to the Grade Standards and Price Differentials for Cotton Certificated for Delivery on the Cotton No. 2 Futures Contract

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed contract market rule change.

SUMMARY: The New York Cotton Exchange (NYCE) has submitted proposed amendments to the cotton No. 2 futures contract. The proposed amendments will change the contract's grade standards to conform with new official U.S. grade standards for cotton promulgated by the Agricultural Marketing Service of the United States Department of Agriculture (USDA–AMS) which will become effective

beginning on August 5, 1993. The proposal also will establish special quality price differentials applicable to the delivery of certain new qualities of cotton that will become deliverable on the futures contract under the proposed amendments. The proposed amendments will apply to all cotton certificated for delivery on and after August 5, 1993.

Acting pursuant to the authority delegated by Commission Regulation 140.96, the Director of the Division of Economic Analysis (Division) of the Commodity Futures Trading Commission (Commission) has determined that publication of the proposed amendments is in the public interest and will assist the Commission in considering the views of interested persons.

DATES: Comments must be received on or before February 8, 1993.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Reference should be made to the proposed changes in grade standards for cotton certificated for the cotton No. 2 futures contract.

FOR FURTHER INFORMATION CONTACT: Fred Linse, Division of Economic Analysis, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581, telephone (202) 254–7303.

SUPPLEMENTARY INFORMATION: The existing rules of the cotton No. 2 futures contract provide for the delivery of 11 cotton grades. The par delivery grade of cotton is strict low middling white. The contract also provides for the delivery of the following additional grades of cotton at price differentials to the par grade: Good middling white; strict middling white; middling plus white; middling white; strict low middling plus white; low middling plus white; low middling white; good middling light spotted; strict middling light spotted; and middling light spotted cotton. The existing price differentials applicable to the delivery of the above-noted non-par grades of cotton are based on actual commercial differences in value which are published by the USDA–AMS.

The USDA–AMS recently amended the official U.S. grade standards for American Upland Cotton to become effective with the 1993 cotton marketing year, beginning August 5, 1993.[1] Under the new grade standards, each bale of cotton will be given two separate grades: one grade for the color of the cotton and another grade for the leaf content of the cotton. The current grading system, by contrast, assigns one grade to each cotton bale that represents a composite grade reflecting the combination of color and leaf content of the cotton. The new U.S. standards will consist of 30 color grades and seven leaf grades.

The proposed amendments will revise the contract's existing list of deliverable grades of cotton to conform with the new USDA–AMS cotton classification system; that is, the proposed amendments will establish a list of deliverable color grades and deliverable leaf grades of cotton. For color, the proposed amendments will provide for the delivery of the following eight grades: Good middling white; strict middling white; middling white; strict low middling white; low middling white; good middling light spotted; strict middling light spotted, and middling light spotted cotton.[2] Each of the new color grades has the same color ranges set forth in the corresponding standards for the existing U.S. grades of American Upland Cotton. The proposed amendments will allow delivery of cotton in these color grades that also meets leaf grades 1 through 5, provided that the cotton is one of the deliverable white grades of cotton, and leaf grades 1 through 3 for cotton meeting the standards for the light spotted color grades.

Table 1 below indicates the color and leaf grade combinations which correspond to those cotton grades from the existing grading system that presently are deliverable on the futures contract, and the color and leaf grade combinations from the new grading system that will be deliverable under the proposed amendments.

TABLE 1.—DELIVERABLE COLOR AND LEAF GRADES UNDER THE CURRENT AND PROPOSED TERMS OF THE COTTON NO. 2 FUTURES CONTRACT

Color grade	Leaf grade	
	Deliverable under current system	Deliverable under new system
Good middling white.	1,2	1,2,3,4,5.
Strict middling white.	1,2,3	1,2,3,4,5.
Middling white.	2,3,4	1,2,3,4,5.
Strict low middling white.	3,4,5	1,2,3,4,5.

TABLE 1.—DELIVERABLE COLOR AND LEAF GRADES UNDER THE CURRENT AND PROPOSED TERMS OF THE COTTON NO. 2 FUTURES CONTRACT—Continued

Color grade	Leaf grade	
	Deliverable under current system	Deliverable under new system
Low middling white.	4,5	1,2,3,4,5.
Good middling light spotted.	1,2	1,2,3.
Strict middling light spotted.	1,2,3	1,2,3.
Middling light spotted.	2,3	1,2,3.

Under the proposed revised grade standards, cotton which is classed as strict low middling white (color grade), and number 4 (leaf grade) will be deliverable at par. All of the non-par combinations of color grades in the left-hand column and corresponding leaf grades shown in the right-hand column of Table 1 will be deliverable at quality price differentials which are equivalent to the commercial price differences published by the USDA–AMS for these grade combinations, with the exception of certain combinations discussed below.

Certain color and leaf grade combinations will become deliverable under the proposed amendments at special price differentials that are equal to the commercial price differences published by the USDA–AMS for cotton of certain other specified color and leaf grade combinations. Table 2 indicates these grade combinations and the assigned color and leaf grade combinations whose price differentials will be used in determining the futures delivery value of these certain specified grades of cotton.[3] In Table 2, the left-hand column indicates the grade combinations that will be deliverable at special price differentials and the right-hand column shows the corresponding color and leaf grade combinations whose price differentials will be used to determine the delivery value of such cotton.[4]

[1] See the August 5, 1992, **Federal Register** notice of final rules issued by the USDA–AMS concerning "Grade Standards for American Upland Cotton" (57 FR 34495).

[2] The new US standards eliminate certain existing grade categories, including all "plus" grades, because they are no longer needed to describe special color and leaf combinations.

[3] Some of the newly deliverable cotton grade combinations indicated in Table 1 will be delivered at published commercial price differences for those particular combinations and therefore are not included in Table 2.

[4] The NYCE notes that, under existing U.S. standards, the cotton grade combinations noted in the left hand column of Table 2 would have been classified as "Average Rule Used (ARU)" cotton. The NYCE notes, however, that ARU cotton is not tenderable under existing Exchange rules. The NYCE further notes that, under the new standards, the ARU designation will be eliminated since the new standards for color and leaf will provide a more precise method of classifying cotton.

TABLE 2.—PROPOSED PRICE DIFFERENTIALS FOR CERTAIN COLOR AND LEAF GRADE COMBINATIONS

Actual color and leaf grade combination	Assigned color and leaf grade combination for purposes of calculating price differential
Good middling white color, No. 3 leaf.	Strick middling white color, No. 3 leaf.
Good middling white color, No. 4 leaf.	Middling white color, No. 4 leaf.
Good middling white color, No. 5 leaf.	Strict low middling white color, No. 5 leaf.
Good middling light spotted color, No. 3 leaf.	Middling light spotted color, No. 3 leaf.
Strict middling white color, No. 4 leaf.	Middling white color, No. 4 leaf.
Strict middling white color, No. 5 leaf.	Strict low middling white color, No. 5 leaf.
Middling white color, No. 5 leaf.	Strict low middling white color, No. 5 leaf.

The NYCE proposes to implement the proposed amendments simultaneously with the introduction of the new U.S. standards by the USDA–AMS, effective for all cotton classified on and after August 5, 1993. A NYCE spokesperson has represented that cotton that had been classified under the old standards and certificated for delivery on the cotton No. 2 futures contract prior to August 5, 1993 will continue to be deliverable on the futures contract after August 5, 1993, with no requirement that such cotton be regraded under the new standards before delivery. To facilitate the delivery of cotton that has been classified and certificated prior to August 5, 1993, the NYCE proposes to permit delivery of such cotton using the below conversion chart (Table 3) between the old and new grade standards.

TABLE 3.—CONVERSION CHART FOR COTTON CLASSIFIED AND CERTIFICATED PRIOR TO AUGUST 5, 1993

Current grade designation	New grade designation	
	Color grade	Leaf grade
Good middling	Good middling	1
Good middling light spotted.	Good middling light spotted.	1
Strict middling	Strict middling	2
Strict middling light spotted.	Strict middling light spotted.	2
Middling plus	Strict middling	3
Middling	Middling	3
Middling light spotted	Middling light spotted.	3
Strict low middling plus.	Middling	4
Strict low middling	Strict low middling	4
Low middling plus	Strict low middling	5
Low middling	Low middling	5

The Commission is requesting comments on the proposed amendments and proposed implementation plan. Specifically, the Commission is requesting comment on the extent to which the proposed price differentials described in Table 2 above reflect commercial price differences for the cotton color and grade combinations shown in the left-hand column of that table. In addition, the Commission is requesting comment on the adequacy of the conversion chart shown above (Table 3) in assuring that cotton which meets the standards for the existing grades shown in the left-hand column has the same economic value as cotton that meets the standards for the corresponding specified new grades for color and leaf shown in the right-hand columns.

Copies of the proposed amendments will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, at the above address. Copies of the amended terms and conditions can be obtained through the Office of the Secretariat by mail at the same address or by telephone at (202) 254–6314.

The materials submitted by the NYCE in support of the proposed amendments may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 CFR part 145 (1987)). Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of the Secretariat at the above address in accordance with 17 CFR 145.7 and 145.8.

Any person interested in submitting written data, views, or arguments on the proposed amendments should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, at the above address by the specified date.

Issued in Washington, DC on January 4, 1993.

Gerald Gay,

Director.

[FR Doc. 93–279 Filed 1–6–93; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Public Information Collection Requirements 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: Department of Defense Personnel Security Questionnaire (PSQ); DD Form 398, DD Form 398–INST, DD Form 1879; OMB Control No. 0704–0299.

Type of Request: Revision.

Average Burden Hours/Minutes Per Response: 1.5 Hours.

Responses Per Respondent: 1.

Number of Respondents: 310,000.

Annual Burden Hours: 465,000.

Annual Responses: 310,000.

Needs and Uses: The information collected by the DD Form 398 is used by the Defense Investigative Service to conduct Single Scope Background investigations (SSBI), Periodic Reinvestigations (PR), and Special Investigative Inquiries (SII). These provide the basis for determination of a person's eligibility for access to classified information, appointment to a sensitive position, assignment to duties that require a personnel security or trustworthiness determination, continuing eligibility for retention of a security clearance, or assignment to other sensitive duties. The DD Form 398–INST provides guidance for completing the DD Form 398. The DD Form 1879 is used to request an SSBI, PR, or SII, and accompanies the DD Form 398.

Affected Public: Individuals or households; Federal agencies or employees.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. William P. Pearce.

Written requests for copies of the information collection proposal should be sent to Mr. Pearce at WHS/DIOR, 1215 Jefferson Davis Highway, suite 1204, Arlington, Virginia 22202–4302.

Dated: January 4, 1993.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 93–268 Filed 1–6–93; 8:45 am]

BILLING CODE 3810–01–M

Department of the Navy

CNO Executive Panel; Meeting

Notice was published Thursday December 24, 1992, at 57 FR 61401, that

the Chief of Naval Operations Executive Panel will meet on January 12, 1993, from 9:00 am to 5:00 pm, in Alexandria, Virginia. That Meeting has been rescheduled and will be held on January 21, 1993. All other information in the previous notice remains effective. In accordance with 5 U.S.C. section 552b(e)(2), the meeting change is publicly announced at the earliest time.

For further information concerning this meeting contact: Judith A. Holden, Executive Secretary to the CNO Executive Panel, 4401 Ford Avenue, Room 601, Alexandria, Virginia 22302-0268, Phone (703) 756-1205.

December 29, 1992.

Michael P. Rummel

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 93–256 Filed 1–6–93; 8:45 am]

BILLING CODE 3810–AE–F

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Information Resources Management Service, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before February 8, 1993.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok: Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Cary Green, Department of Education, 400 Maryland Avenue, SW., room 5624, Regional Office Building 3, Washington, DC 20202–4651.

FOR FURTHER INFORMATION CONTACT: Cary Green (202) 708–5174.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director of the Information Resources Management Service, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Cary Green at the address specified above.

Dated: December 30, 1992.

Wallace McPherson,

Acting Director, Information Resources Management Service.

Office of Special Education and Rehabilitative Services

Type of Review: Reinstatement.

Title: Traumatic Brain Injury Effective Practices Study.

Frequency: One time.

Affected Public: Businesses or other for-profit.

Reporting Burden:

Responses: 46.

Burden Hours: 50.

Recordkeeping Burden:

Recordkeepers: 0.

Burden Hours: 0.

Abstract: This evaluation will identify current Vocational Rehabilitation (VR) agency policy and practice in serving clients with Traumatic Brain Injury (TBI), describe their strengths and weaknesses, and identify effective practices that RSA may suggest for implementation. The Department uses the information for program evaluation and to make recommendations for improvement of services.

[FR Doc. 93–280 Filed 1–6–93; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER93–85–000, and EL93–7–000]

Connecticut Yankee Atomic Power Co.; Initiation of Proceeding and Refund Effective Date

December 31, 1992.

Take notice that on December 22, 1992, the Commission issued an order in the above-indicated dockets initiating an investigation in Docket No. EL93–7–000 under section 206 of the Federal Power Act.

The refund effective date in Docket No. EL93–7–000 will be 60 days after publication of this notice in the **Federal Register.**

Lois D. Cashell,

Secretary.

[FR Doc. 93–287 Filed 1–6–93; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. ER93–96–000, and EL93–11–000]

Delmarva Power & Light Co.; Initiation of Proceeding and Refund Effective Date

December 31, 1992.

Take notice that on December 31, 1992, the Commission issued an order in the above-indicated dockets initiating an investigation in Docket No. EL93–11–000 under section 206 of the Federal Power Act.

The refund effective date in Docket No. EL93–11–000 will be 60 days after publication of this notice in the **Federal Register.**

Lois D. Cashell,

Secretary.

[FR Doc. 93–288 Filed 1–6–93; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–4552–9]

Meetings of the Science Advisory Board and Environmental Financial Advisory Board and the Executive Committee

Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Science Advisory Board and the Environmental Financial Advisory Board (SAB/EFAB) will conduct a meeting on Wednesday, January 27, 1993. The purpose of the meeting is to explore the utility of

blending scientific, engineering and financial advice to the Administrator. The issues of nitrates in ground water and treatment of surface waters by filtration will be examined as case studies.

Also, January 28–29, the Executive Committee will meet. The purpose of this meeting is to review reports from the following Committees:

Environmental Economics Advisory Committee: Commentary on the possible trade-off between health benefits and disbenefits from regulation.

Environmental Engineering Committee: Review of underground storage tank (UST) research and Review of indoor air research.

Environmental Health Committee: Review of Dermal Exposure Assessment document and Review of Risk Assessment Guidance for Superfund: Human Health Evaluation Manual (RAGS/HHEM).

Radiation Advisory Committee: Commentary on radiation exposure models and assessment of uncertainty and Review of release of C–14 Carbon Dioxide from High Level Radioactive Waste Sites.

Additional items on the agenda will likely include the following:

A briefing on State and Local Risk Reduction projects

A report on the Resources for the Future Conference featuring the SAB's Reducing Risk report.

A discussion on the plans of the new Administration as they relate to the SAB.

An update on the project joint project with the Environmental Financial Advisory Board (EFAB) to investigate the utility of melding scientific, engineering, and financial advice to the Administrator.

On the afternoon of January 29 the Executive Committee's Subcommittee on RCRA Regulatory Impact Analysis review will meet to coordinate plans for that review during the spring.

Both meetings are being held at the Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. SAB/EFAB will take place in the Administrator's Conference room 1103W, from 9 a.m. to 12 noon. The Executive Committee will meet the first day in the Administrator's Conference Room from 8: 30 a.m. to 5 p.m. and continue its deliberation on the 29th in the Washington Information Center, Room 17 from 8:30 a.m. to 5:00 p.m.

The meeting is open to the public. Any member of the public wishing further information concerning the meeting or who wishes to submit comments should contact Darlene Sewell-Oliver, A–101, U.S. Environmental Protection Agency, Washington, DC 20460, at (202) 260–4126 or by Fax at (202) 260–9232. Limited unreserved seating available at the meeting.

Dated: December 29, 1992.

Donald G. Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 93–301 Filed 1–6–93; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL RESERVE SYSTEM

Report to Congressional Committees Regarding Differences in Capital and Accounting Standards Among the Federal Banking and Thrift Agencies

December 19, 1992.

AGENCY: Board of Governors of the Federal Reserve System.

ACTIONS: Report to the Committee on Banking, Housing, and Urban Affairs of the United States Senate and to the Committee on Banking, Finance and Urban Affairs of the United States House of Representatives regarding differences in capital and accounting standards among the Federal banking and thrift agencies.

SUMMARY: This report has been prepared by the Federal Reserve Board pursuant to section 121 of the Federal Deposit Insurance Corporation Improvement Act of 1991. Section 121 requires each Federal banking and thrift agency to report annually to the above specified Congressional Committees regarding any differences between the accounting or capital standards used by such agency and the accounting or capital standards used by other banking and thrift agencies. The report must also contain an explanation of the reasons for any discrepancy in such accounting or capital standards. The report must be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Rhoger H. Pugh, Assistant Director (202/728–5883), Norah M. Barger, Manager (202/452–2402), Gerald A. Edwards, Jr., Assistant Director (202/452–2741), John M. Frech, Supervisory Financial Analyst (202/452–2275), or Robert E. Motyka, Senior Financial Analyst (202/452–3621), Division of Banking Supervision and Regulation, Board of Governors. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), Earnestine Hill or Dorothea Thompson (202/452–3544).

Introduction and Overview

This report addresses the question of what differences in capital standards and accounting practices currently exist among the three banking agencies (The Board of Governors of the Federal Reserve System (FRB), The Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC)) and the Office of Thrift Supervision (OTS). Section One of the report focuses on differences that exist in capital standards; Section Two discusses differences in accounting standards. The remainder of this introduction provides, in turn, an overview of the discussion of each of the following sections.

Capital Standards

As stated in reports [1] the FRB has submitted to the Congress in previous years, the three bank regulatory agencies [2] have, for a number of years, employed a common regulatory framework that establishes minimum capital adequacy ratios for commercial banking organizations. Throughout the 1980's, the banking agencies utilized a common standard that required banking organizations to maintain a level of primary capital (principally, permanent shareholders' equity, general loan loss reserves, and certain mandatory convertible securities) equal to at least 5.5 percent of total assets. Banking organizations also were required to maintain a level of total capital (primary capital plus secondary capital, such as subordinated debt) equal to at least 6.0 percent of total assets.

In 1989, all three banking agencies and the OTS adopted a risk-based capital framework that was based upon the international capital accord developed by the Basle Committee on Banking Regulations and Supervisory Practices (Basle Accord) and endorsed by the central bank governors of the G–10 countries. This framework establishes minimum ratios of total and Tier 1 (core) capital to risk-weighted assets. The Basle Accord requires banking organizations to have total and core capital equal to at least 7.25 percent and 3.625 percent, respectively, of risk-weighted assets during a phase-in period which began at the end of

[1] The previous report prepared by the Federal Reserve Board was made pursuant to section 1215 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) which was superseded by section 121 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA).

[2] At the federal level, the Federal Reserve System has primary supervisory responsibility for state-chartered banks that are members of the Federal Reserve System as well as all bank holding companies. The FDIC has primary responsibility for state nonmember banks and FDIC-supervised savings banks. National banks are supervised by the OCC. The OTS has primary responsibility for savings and loan associations.

1990. This interim transition standard will expire at the end of 1992, when banking and thrift organizations will be required to maintain total capital equal to at least 8 percent of risk-weighted assets. At least one half of the total capital requirement, or a minimum of 4 percent by the end of 1992, must consist of Tier 1 capital (principally, common shareholders' equity and qualifying perpetual preferred stock, less disallowed intangibles such as goodwill). The other half, Tier 2, may include certain supplementary capital items, such as general loan loss reserves and subordinated debt. The risk-based capital requirements are viewed by the three banking agencies and the OTS as minimum standards, and most institutions are expected to, and generally do, maintain capital levels well above the minimums.

In addition to specifying identical ratios, the risk-based framework being implemented by the three banking agencies and the OTS includes a common definition of regulatory capital and a uniform system of risk weights and categories. While the minimum standards and risk weighting framework are common to all the banking agencies, there are some technical differences in language and interpretation among the agencies that are discussed in Section One. Also discussed in Section One are the banking agencies' guidelines relating to the treatment of identifiable intangible assets, which are not entirely uniform at the present time. All four of the agencies have issued coordinated proposals designed to achieve uniformity with respect to the treatment of identifiable intangible assets for capital purposes. Section One also discusses the three banking agencies' revised leverage standards that were adopted in the second half of 1990 and in early 1991, and are based upon the common definition of Tier 1 capital contained in the risk-based capital guidelines.

Several sections of FDICIA had the effect of codifying the risk-based capital and leverage requirements adopted by the Federal Reserve and the other agencies. During 1992, the three banking agencies and the OTS adopted uniform prompt corrective action regulations, as mandated by section 131 of FDICIA, which required the establishment of specific capital categories based on risk-based capital and leverage measures. Also, pursuant to section 308, the Federal Reserve has adopted a regulation to limit certain interbank liabilities which is keyed to risk-based capital levels. The FDIC adopted risk-based insurance premiums, pursuant to section 302, and has set limits on the acceptance of brokered deposits, pursuant to section 301. Both of these regulations entail reliance upon capital categories.

The agencies are continuing their efforts to revise the risk-based capital requirements to ensure that those standards take account of interest-rate risk. Section 305 of FDICIA mandates that the risk-based capital standards consider interest rate risk, as well as concentration of credit risk and the risks of nontraditional activities. At this writing, the OTS is contemplating issuing in the near term an approach for requiring that adequate capital be maintained against interest rate risk. The three banking agencies have sought comment on a proposed approach for incorporating interest-rate risk into the risk-based capital standards. The approach ultimately adopted by the banking agencies could differ from that taken by the OTS.

The differences in the capital standards between the three banking agencies and the OTS are set forth in Section One. The staffs of the agencies have been meeting regularly to identify and address differences and inconsistencies in their capital standards. The agencies are committed to continuing this process in an effort to achieve full uniformity in their capital standards.

Accounting Standards

Over the years, the three banking agencies, under the auspices of the Federal Financial Institutions Examination Council (FFIEC), have developed Uniform Reports of Condition and Income (Call Reports) for all commercial banks and FDIC-supervised savings banks. The reporting standards followed by the three banking agencies are substantially consistent, aside from a few limited exceptions, with generally accepted accounting principles (GAAP) as they are applied by commercial banks.[3] The uniform bank Call Report serves as the basis for calculating risk-based capital and leverage ratios, as well as for other regulatory purposes. Thus, material differences in regulatory accounting and reporting standards among commercial banks and FDIC-supervised savings banks do not exist.

The OTS requires each thrift institution to file the Thrift Financial Report (TFR), which is consistent with GAAP as it is applied by thrifts. The TFR differs in some respects from the bank Call Report. One reason is that thrift GAAP is different in a few limited areas from GAAP as it is applied by banks; another, as previously mentioned, is that there are a few minor areas in which the bank Call Report departs from bank GAAP. A summary of the differences between the bank Call Report and the TFR is presented in Section Two.

Over the past year, the three banking agencies and the OTS have continued to undertake projects that seek to simplify and reduce differences in reporting standards between commercial banks and thrift institutions. As a compromise, the OTS has adopted some of the policies of the three banking agencies where differences had previously existed.[4] In addition, all four agencies have issued uniform accounting and reporting guidance governing assets held for trading or for sale and high risk mortgage derivative products. All four agencies have also been discussing ways of establishing conformity in reporting requirements (and capital treatment) for recourse arrangements. Furthermore, the staffs of the agencies are meeting regularly to review their approaches in evaluating the allowance for loan and lease losses and the valuation of real estate collateral in order to improve their practices in these areas and promote consistency among them.

The agencies have also jointly requested public comment on the accounting and reporting treatment for deferred tax assets, in response to new accounting standards issued by the Financial Accounting Standards Board (FASB). The agencies are currently studying the comments received and expect to announce a uniform policy on deferred tax assets by the end of this year.

The FASB recently issued a proposed accounting standard on the accounting for loan impairment. If adopted, this standard will narrow the differences in GAAP between bank and thrift accounting for measuring and reporting the effects of impairment on troubled loans. In addition, the American Institute of Certified Public Accountants (AICPA) has recently issued standards governing the accounting for and reporting of foreclosed assets, which became effective for fiscal years ending

[3] In those cases where bank Call Report standards are different from GAAP, the regulatory reporting requirements are intended to be more conservative than GAAP.

[4] The main area of accounting policy that the OTS has adopted involves a new OTS requirement that savings associations maintain general valuation allowances (GVAs) for all assets, including the loan portfolio, in addition to specific valuation allowances. This requirement for a GVA for the loan portfolio is essentially equivalent to the allowance for loan and lease losses required in regulatory financial reports for banks. In addition, certain minor accounting policies of the banking agencies have been adopted this year by the OTS.

after December 15, 1992. These accounting changes, will promote greater uniformity of regulatory reporting requirements in these two areas.

Section One

Differences in Capital Standards Among Federal Banking and Thrift Supervisory Agencies

Leverage Capital Ratios

Throughout most of the 1980's, the three banking agencies required banking organizations to meet minimum capital to total assets (leverage) ratios. In the past, these requirements included a minimum 5.5 percent primary capital ratio and a minimum 6.0 percent total capital ratio.

In the second half of 1990 and in early 1991, the three banking agencies developed revised leverage standards based upon the common definition of Tier 1 capital contained in their risk-based capital guidelines. These standards require the most highly-rated institutions to meet a minimum Tier 1 capital ratio of 3 percent, and for all other institutions, these standards generally require an additional cushion of at least 100 to 200 basis points, i.e., a minimum leverage ratio of at least 4 to 5 percent, depending upon an organization's financial condition.

As required by FIRREA, the OTS has established a 3 percent core capital ratio and a 1.5 percent tangible capital leverage requirement for thrift institutions. However, the OTS is in the process of finalizing a new leverage rule that will generally conform to the rules of the three banking agencies. The differences that will exist after the OTS has adopted its new standard pertain to the definition of core capital. While this definition generally conforms to Tier 1 bank capital, certain adjustments discussed below apply to the core capital definition used by savings associations. In addition, core capital as currently defined by the OTS includes qualifying supervisory goodwill. Such goodwill is to be phased out of thrift core capital by the end of 1994, after which time the treatment of goodwill for thrift institutions will be consistent with that of the banking agencies.

Risk-based Capital Ratios

The three banking agencies have adopted risk-based capital standards consistent with the Basle Accord. These standards require all commercial banking organizations to maintain a minimum ratio of total capital (Tier 1 plus Tier 2) to risk-weighted assets of 7.25 percent by year-end 1990; this minimum standard increases to 8 percent as of year-end 1992. Tier 1 capital comprises common stockholders' equity, qualifying perpetual preferred stock, and minority interests in consolidated subsidiaries, less goodwill. (The treatment of other intangible assets is discussed below.) Tier 1 capital must comprise at least 50 percent of the total risk-based capital requirement. Tier 2 capital includes such components as general loan loss reserves, subordinated term debt, and certain other preferred stock and convertible debt capital instruments, subject to appropriate limitations and conditions. Risk-weighted assets are calculated by assigning risk weights of 0, 20, 50, and 100 percent to broad categories of assets and off-balance sheet items based upon their relative credit risks.

The banking agencies view the risk-based capital standard as a minimum supervisory benchmark. In part, this is because the risk-based capital standard focuses primarily on credit risk; it does not take full or explicit account of certain other banking risks, such as exposure to changes in interest rates. The full range of risks to which depository institutions are exposed are reviewed and evaluated carefully during on-site examinations. In view of these risks, most banking organizations are expected to operate with capital levels well above the minimum risk-based and leverage capital requirements.

The Federal Reserve is working with the other U.S. banking agencies and the regulatory authorities on the Basle Supervisor's Committee to develop possible methods to measure and address certain market and price risks. These risks include exposures resulting from foreign exchange positions, imbalances between the maturity of debt instruments held as assets and issued as liabilities, and holdings of traded debt and equity securities. One important reason for addressing these risks on an international level is to develop supervisory approaches that do not undermine the competitiveness of U.S. banking organizations.

OTS has adopted a risk-based capital standard that in most respects is similar to the framework adopted by the banking agencies. The OTS standard currently requires a minimum risk-based capital ratio equal to 7.20 percent of risk-adjusted assets, and this minimum required ratio will increase to 8 percent at year-end 1992. The OTS has proposed an additional element for interest rate risk. Differences between the risk-based capital guidelines by the OTS and the other agencies are discussed below.

Equity Investments

In general, commercial banks that are members of the Federal Reserve System are not permitted to invest in equity securities, nor are they generally permitted to engage in real estate investment or development activities. To the extent that commercial banks are permitted to hold equity securities (for example, in connection with debts previously contracted), the three banking agencies generally assign such investments to the 100 percent risk category for risk-based capital purposes.

The three banking agencies' guidelines permit, on a case-by-case basis, a deduction of equity investments from the parent bank's capital or other options, if necessary, to assess an appropriate capital charge above the minimum requirement. The banking agencies' treatment of investments in subsidiaries is discussed below.

The OTS risk-based capital standards require that thrift institutions deduct certain equity investments from capital over a phase-in period, which ends on July 1, 1994, as explained more fully below in the section on subsidiaries.

FSLIC/FDIC—Covered Assets (Assets Subject to Guarantee Arrangements by the FSLIC or FDIC)

The three banking agencies generally place these assets in the 20 percent risk category, the same category to which claims on depository institutions and government-sponsored agencies are assigned.

The OTS places these assets in the zero percent risk category.

Repossessed Assets and Assets More Than 90 Days Past Due

The three banking agencies require that foreclosed real estate be written down to fair value (see Section Two of this appendix, "Specific Valuation Allowances for, and Charge-Offs of, Troubled Real Estate Loans not in Foreclosure" for further details) with the resulting asset assigned to the 100 percent risk category. The write-down effectively results in a reduction of capital. Assets 90 days or more past due, including 1- to 4-family mortgages, are assigned to the 100 percent risk category. If and when such assets are eventually charged-off, capital is effectively adjusted for any resulting loss.

Consistent with the Basle Accord, the 100 percent risk category is the highest risk category under the risk-based capital guidelines of the three banking agencies. As noted above, however, the bank risk-based capital standards represent minimum ratios.

Consequently, organizations with high levels of risk, including a significant volume of nonperforming or past due assets, are expected to maintain capital ratios above minimum levels. Accordingly, the risk-based capital framework of the banking agencies provides the latitude to place a higher than minimum capital charge on assets of this type.

The OTS risk-based capital framework assigns a 200 percent risk weight to repossessed assets (generally referred to as REO) and assets more than 90 days past due. An exception exists for 1- to 4-family mortgages more than 90 days past due, which are assigned to the 100 percent risk category. The OTS intends to change the risk weight for all REO to 100 percent in conjunction with recent changes in the accounting for REO.

Limitation on Subordinated Debt and Limited-Life Preferred Stock

Consistent with the Basle Accord, the three banking agencies limit the amount of subordinated debt and limited-life preferred stock that may be included in Tier 2 capital. This limit, in effect, states that these components together may not exceed 50 percent of Tier 1 capital. In addition, maturing capital instruments must be discounted by 20 percent in each of the last five years prior to maturity.

Neither of these capital components is a permanent source of funds, and subordinated debt cannot absorb losses while the bank continues to operate as a going concern. On the other hand, both components can provide a cushion of protection to the FDIC insurance fund. Thus, this limitation permits the inclusion of some subordinated debt in capital, while assuring that permanent stockholders' equity capital remains the predominant element in bank regulatory capital.

The OTS has no limitation on the total amount of limited-life preferred stock or maturing capital instruments that may be included within Tier 2 capital. In addition, the OTS allows thrifts the option of: (1) Discounting maturing capital instruments, issued on or after November 7, 1989, by 20 percent a year over the last 5 years of their term—the approach required by the banking agencies; or (2) including the full amount of such instruments provided that the amount maturing in any of the next seven years does not exceed 20 percent of the thrift's total capital.

Subsidiaries

Consistent with the Basle Accord and long-standing supervisory practices, the three banking agencies generally consolidate all significant majority-owned subsidiaries of the parent organization for capital purposes. This consolidation assures that the capital requirements are related to all of the risks to which the banking organization is exposed.

As with most other bank subsidiaries, banking and finance subsidiaries generally are consolidated for regulatory capital purposes. However, in the case of banking and finance subsidiaries that are not consolidated, the Federal Reserve, consistent with the Basle Accord, generally deducts investments in such subsidiaries in determining the adequacy of the parent bank's capital.

The Federal Reserve's risk-based capital guidelines provide a degree of flexibility in the capital treatment of unconsolidated subsidiaries (other than banking and finance subsidiaries) and investments in joint ventures and associated companies. For example, the Federal Reserve may deduct investments in such subsidiaries from an organization's capital, may apply an appropriate risk-weighted capital charge against the proportionate share of the assets of the entity, may require a line-by-line consolidation of the entity, or otherwise may require that the parent organization maintain a level of capital above the minimum standard that is sufficient to compensate for any risks associated with the investment.

The guidelines also permit the deduction of investments in subsidiaries that, while consolidated for accounting purposes, are not consolidated for certain specified supervisory or regulatory purposes. For example, the Federal Reserve deducts investments in, and unsecured advances to, section 20 securities subsidiaries from the parent bank holding company's capital. The FDIC accords similar treatment to securities subsidiaries of state nonmember banks established pursuant to § 337.4 of the FDIC regulations.

Similarly, in accordance with § 325.5(f) of the FDIC regulations, investments in, and extensions of credit to, certain mortgage banking subsidiaries are also deducted in computing the parent bank's capital. (The Federal Reserve does not have a similar requirement with regard to mortgage banking subsidiaries. The OCC does not have requirements dealing specifically with the capital treatment of either mortgage banking or securities subsidiaries. The OCC, however, does reserve the right to require a bank, on a case-by-case basis, to deduct from capital investments in, and extensions of credit to, any nonbanking subsidiary.)

The deduction of investments in subsidiaries from the parent's capital is designed to ensure that the capital supporting the subsidiary is not also used as the basis of further leveraging and risk-taking by the parent banking organization. In deducting investments in, and advances to, certain subsidiaries from the parent's capital, the Federal Reserve expects the parent banking organization to meet or exceed minimum regulatory capital standards without reliance on the capital invested in the particular subsidiary. In assessing the overall capital adequacy of banking organizations, the Federal Reserve may also consider the organization's fully consolidated capital position.

Under OTS capital guidelines, a distinction, mandated by FIRREA, is drawn between subsidiaries that are engaged in activities that are permissible for national banks and subsidiaries that are engaged in "impermissible" activities for national banks. Subsidiaries of thrift institutions that engage only in permissible activities are consolidated on a line-for-line basis if majority-owned and on a pro rata basis if ownership is between 5 percent and 50 percent. As a general rule, investments, including loans, in subsidiaries that engage in impermissible activities are deducted in determining the capital adequacy of the parent. However, investments, including loans, outstanding as of April 12, 1989 to subsidiaries that were engaged in impermissible activities prior to that date are grandfathered and will be phased-out of capital over a transition period that expires on July 1, 1994. During this transition period, investments in subsidiaries engaged in impermissible activities that have not been phased out of capital are to be consolidated on a pro rata basis.

Presold Residential Construction Loans

As mandated under section 618(a) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (RTCRRIA), the banking and thrift agencies are amending the risk-based capital guidelines to lower the risk weight to 50 percent for loans to finance the construction of 1- and 4-family residential properties that have been presold. Prior to this amendment, these loans were considered to be construction and land development loans and generally assigned to the 100 percent risk weight category.

This section of the statute required the three banking agencies and the OTS to assign to the 50 percent risk category any presold residential construction loan that meets the following criteria: (1) The loan is for the construction of a 1- to 4-family residential property, (2)

the bank has sufficient documentation, as may be required by the appropriate federal banking agency, to demonstrate the intent and ability of the buyer to purchase the property, (3) the purchaser has provided to the builder a nonrefundable deposit in an amount determined by the appropriate federal banking agency, but not less than one percent of the principal amount of the mortgage, and (4) the loan satisfies prudent underwriting standards as established by the appropriate federal banking agency.

The OTS and OCC have already issued final rules implementing this change. The FDIC is in the process of adopting a final rule. The FRB is planning to issue an interim rule amending its risk-based capital guidelines. There is a difference between the OTS and OCC rules and those under consideration by the FDIC and FRB. Under the OTS and OCC rules, a requirement is in place that the property be presold before the construction loan is extended in order for the loan to qualify for the 50 percent risk weight. The FDIC and FRB amendments would allow loans for the construction of such properties to qualify for the 50 percent risk weight once the property is presold, even if that sale occurs after the construction loan was made.

Qualifying Multifamily Mortgage Loans

The three banking agencies place multifamily mortgage loans (five units or more) in the 100 percent risk weight category. Historically, when compared to loans secured by mortgages on 1- to 4-family residences, which generally are assigned to the 50 percent risk category, the credit risk associated with multi-family mortgage loans, unless conservatively underwritten and seasoned, is more akin to that experienced on commercial property loans, which are assigned to the 100 percent risk category. The OTS allows certain multifamily mortgage loans to qualify for the 50 percent risk category. This would apply, for example, to loans secured by buildings with 5–36 units, provided these loans have a maximum 80 percent loan-to-value ratio and an 80 percent occupancy rate.

Pursuant to section 618(b) of the RTCRRIA, the three banking agencies and the OTS were directed to amend their risk-based capital guidelines to lower the risk weight of certain multifamily housing loans, and securities backed by such loans, from 100 percent to 50 percent. The section specifies several criteria that a multifamily housing loan must satisfy in order to qualify for a 50 percent risk weight. These criteria are: (1) The loan is secured by a first lien, (2) the ratio of the principal obligation to the appraised value of the property, that is, the loan-to-value ratio, does not exceed 80 percent (75 percent if the loan is based on a floating interest rate), (3) the annual net operating income generated by the property (before debt service) is not less than 120 percent of the annual debt service on the loan (115 percent if the loan is based on a floating interest rate), (4) the amortization of principal and interest occurs over a period of not more than 30 years and the minimum maturity for repayment of principal is not less than7 years, and (5) all principal and interest payments have been made on time for a period of not less than one year.

In addition, section 618(b) also provides that multifamily housing loans accorded a 50 percent risk weight must meet any underwriting characteristics that the appropriate federal banking agency may establish, consistent with the purposes of the minimum acceptable capital requirements to maintain the safety and soundness of financial institutions.

The agencies have proposed revisions to their capital standards to meet the requirement of section 618(b). The comments received in response to these proposals are currently under review and consideration.

Nonresidential Construction and Land Loans

The three banking agencies assign loans for real estate development and construction purposes to the 100 percent risk category. Reserves or charge-offs are required, in accordance with examiner judgment, when weaknesses or losses develop in such loans. The banking agencies have no requirement for an automatic charge-off when the amount of a loan exceeds the fair value of the property pledged as collateral for the loan.

The OTS generally assigns these loans to the 100 percent risk category. However, if the amount of the loan exceeds 80 percent of the fair value of the property, that excess portion must be deducted from capital in accordance with a phase-in arrangement, which ends on July 1, 1994.

Mortgage-Backed Securities (MBS)

The three banking agencies, in general, place privately-issued MBS in a risk category appropriate to the underlying assets but in no case to the zero percent risk category. In the case of privately-issued MBSs where the direct underlying assets are mortgages, this treatment generally results in a risk weight of 50 percent or 100 percent. Privately-issued MBSs that have government agency or government-sponsored agency securities as their direct underlying assets are generally assigned to the 20 percent risk category.

The OTS assigns privately-issued high quality mortgage-related securities to the 20 percent risk category. These are, generally, privately-issued MBSs with AA or better investment ratings.

At the same time, both the banking and thrift agencies automatically assign to the 100 percent risk weight category certain MBSs, including interest-only strips, residuals, and similar instruments that can absorb more than their pro rata share of loss. The Federal Reserve, in conjunction with the other banking agencies and the OTS, is in the process of developing more specific guidance as to the types of "high risk" MBSs that will qualify for a 100 percent risk weight.

Intangible Assets

The federal banking agencies do not allow banks or FDIC-supervised savings banks to include goodwill in the calculation of Tier 1 capital for either risk-based or leverage capital purposes. Bank holding companies may include goodwill acquired prior to March 12, 1988 in Tier 1 for risk-based capital purposes (although not for leverage capital purposes), until the end of the 1992. After 1992, all goodwill is to be deducted from bank holding company capital.

Pursuant to FIRREA, the OTS allows "qualifying supervisory goodwill" to be included as part of core capital through year-end 1994. After this date, thrift institutions must meet their minimum core capital requirement without reliance on goodwill.

Presently, the three banking agencies and the OTS differ somewhat with regard to the treatment of identifiable intangible assets (that is, intangible assets other than goodwill) in the calculation of regulatory capital ratios. The FDIC and OCC fully deduct all intangibles other than limited amounts of purchased mortgage servicing rights (PMSRs) from Tier 1 capital. The Federal Reserve does not automatically deduct any identifiable intangible assets from Tier 1 capital, but determines the appropriateness of their inclusion in an organization's capital position on a case-by-case basis. The OTS deducts all intangibles other than limited amounts of PMSRs unless an institution can document that its holdings of other intangibles meet certain criteria, in which case certain limited amounts of these qualifying intangibles may be included in capital.

All of the agencies have some means of limiting the amount of intangibles that institutions can include in capital. The OCC permits PMSRs to account for up to 25 percent of Tier 1 capital, while the FDIC permits them to account for up to 50 percent of Tier 1. The OTS also permits PMSRs to be included up to 50 percent of Tier 1 capital and limits other qualifying intangibles to 25 percent of Tier 1 capital. The Federal Reserve's current risk-based capital guidelines indicate that identifiable intangible assets in excess of 25 percent of Tier 1 capital are subject to particularly close scrutiny. The FDIC and the OTS also subject PMSRs to certain valuation and discounting requirements.

In order to develop a uniform capital treatment for identifiable intangible assets, the agencies issued separate proposals, on a coordinated basis, for public comment in 1992. The Federal Reserve's proposal stated that banking organizations would be permitted to include PMSRs and purchase credit card relationships (PCCRs) in capital, provided that, in the aggregate, the amount included does not exceed 50 percent of an organization's Tier 1 capital. PCCRs would be subject to a separate sublimit of 25 percent of Tier 1. Amounts of PMSRs and PCCRs in excess of these amounts, as well as all other identifiable intangible assets, including core deposit intangibles, would be deducted from Tier 1 for purposes of calculating regulatory capital ratios.

The proposal also addresses the valuation of identifiable intangible assets included in capital in a manner that is consistent with section 475 of FDICIA. Section 475 requires the agencies to determine the appropriate capital treatment to be given to PMSRs, where the fair market value of the PMSRs is calculated at least quarterly and the amount of PMSRs included in capital is discounted to no more than 90 percent of fair market value. The proposal also states that, for purposes of calculating regulatory capital (but not for financial statement purposes), the amount of PMSRs and PCCRs reported on the balance sheet would be reduced to the lesser of:

(i) 90 percent of the fair market value of the PMSRs; or

(ii) 90 percent of the original purchase price paid for the PMSRs; or

(iii) 100 percent of the remaining unamortized book value of the PMSRs.

Similarly, the FDIC and the OTS also currently require state nonmember banks and savings associations to discount their holdings of PMSRs.

The proposal also states that, in accordance with current FDIC and OTS rules, institutions wishing to include PMSRs and PCCRs in capital must carry them at a book value that does not exceed the discounted value of their future net servicing income. The proposal further requires that the discount rate used for this purpose not be less than the original discount rate derived at the time of acquisition, based upon the estimated cash flows and the price paid for the asset at the time of purchase.

The Federal Reserve and the other agencies have received public comments on the proposal and are reviewing these comments in preparation for issuing their final rules.

Assets Sold With Recourse

In general, recourse arrangements allow the purchaser of an asset to "put" the asset back to the originating institution under certain circumstances, for example if the asset ceases to perform satisfactorily. This, in turn, can expose the originating institution to any loss associated with the asset. As a general rule, the three banking agencies require that sales of assets involving any recourse be reported as financings and that the assets be retained on the balance sheet. This effectively requires a full leverage and risk-based capital charge whenever assets are sold with recourse, including limited recourse. The Federal Reserve generally applies a capital charge to any off-balance sheet recourse arrangement that is the equivalent of a guarantee, regardless of the nature of the transaction that gives rise to the recourse obligation.

An exception to this general rule involves pools of 1- to 4-family residential mortgages and to certain farm mortgage loans. Certain recourse transactions involving these assets are reported in the bank Call Report as sales, thereby removing these transactions from leverage ratio calculations. These transactions, which are the equivalent of off-balance sheet guarantees, involve the type of credit risk that is addressed by bank risk-based capital requirements, although some questions in this regard have been raised because of the treatment afforded these transactions for leverage purposes. The Federal Reserve has clarified its risk-based capital guidelines to ensure that recourse sales involving residential mortgages are to be taken into account for determining compliance with risk-based capital requirements. The FDIC is also in process of clarifying its guidelines.

In general, the OTS also requires a full capital charge against assets sold with recourse. However, in the case of limited recourse, the OTS limits the capital charge to the lesser of the amount of recourse or the actual amount of capital that would otherwise be required against that asset, that is, the normal full capital charge.

Some securitized asset arrangements involve the issuance of senior and subordinated classes of securities against pools of assets. When a bank originates such as transaction by placing loans that it owns in a trust and retaining any portion of the subordinated securities, the banking agencies require that capital be maintained against the entire amount of the asset pool. When a bank acquires a subordinated security in a pool of assets that it did not originate, the banking agencies assign the investment in the subordinated piece to the 100 percent risk-weight category. The Federal Reserve carefully reviews these instruments to determine if additional reserves, asset write-downs, or capital are necessary to protect the bank.

The OTS requires that capital be maintained against the entire amount of the asset pool in both of the situations described in the preceding paragraph. Additionally, the OTS applies a capital charge to the full amount of assets being serviced when the servicer is required to absorb credit losses on the assets being serviced.

In 1990, the three banking agencies and the OTS, under the FFIEC, issued for public comment a fact finding paper pertaining to the wide range of issues relating to recourse arrangements. These issues include the definition of "recourse" and the appropriate reporting and capital treatments to be applied to recourse arrangements, as well as so-called recourse servicing arrangements and limited recourse. The objective of this effort was to develop a comprehensive and uniform approach to recourse arrangements for capital adequacy, reporting, and other regulatory purposes. The comments received were very extensive and generally illustrated the extreme complexity of the subject. In view of the project's significance and complexity, the FFIEC in December 1990 decided to narrow the scope of the initial phase of the recourse project to credit-related risks, including the appropriate treatment of credit-related recourse arrangements that involve limited recourse or that support a third party's assets.

A recourse working group, composed of representatives from the member agencies of the FFIEC, presented a report and recommendations to the FFIEC in August 1992 and were directed

to carry out a study of the impact of their recommendations on depository institutions, financial markets, and other affected parties. Plans to carry-out this study are being developed by the interagency working group.

Agricultural Loan Loss Amortization

In the computation of regulatory capital, those banks accepted into the agricultural loan loss amortization program pursuant to Title VIII of the Competitive Equality Banking Act of 1987 are permitted to defer and amortize losses incurred on agricultural loans between January 1, 1984 and December 31, 1991 The program also applies to losses incurred between January 1, 1983 and December 31, 1991, as a result of reappraisals and sales of agricultural Other Real Estate Owned (OREO) and agricultural personal property. These losses must be fully amortized over a period not to exceed seven years and, in any case, must be fully amortized by year-end 1998. Thrifts are not eligible to participate in the agricultural loan loss amortization program established by this statute.

Treatment of Junior Liens on 1- to 4-Family Properties

In some cases, a banking organization may make two loans on a single residential property, one loan secured by a first lien, the other by a second lien. In such a situation, the Federal Reserve views these two transactions as a single loan, provided there are no intervening liens. This could result in assigning the total amount of these transactions to the 100 percent risk weight category, if, in the aggregate, the two loans exceeded a prudent loan-to-value ratio and, therefore, did not qualify for the 50 percent risk weight. This approach is intended to avoid possible circumvention of the capital requirements and capture the risks associated with the combined transactions.

The FDIC, OCC, and the OTS generally assign the loan secured by the first lien to the 50 percent risk-weight category and the loan secured by the second lien to the 100 percent risk-weight category.

Pledged Deposits and Nonwithdrawable Accounts

The capital guidelines of OTS permit thrift institutions to include in capital certain pledged deposits and nonwithdrawable accounts that meet the criteria of the OTS. Income Capital Certificates and Mutual Capital Certificates held by the OTS may also be included in capital by thrift institutions. These instruments are not relevant to commercial banks, and, therefore, they are not addressed in the three banking agencies' capital guidelines.

Mutual Funds

The three banking agencies assign all of a bank's holdings in a mutual fund to the risk category appropriate to the highest risk asset that a particular mutual fund is permitted to hold under its operating rules. The purpose of this is to take into account the maximum degree of risk to which a bank may be exposed when investing in a mutual fund in view of the fact that the future composition and risk characteristics of the fund's holdings cannot be known in advance.

The OTS applies a capital charge appropriate to the riskiest asset that a mutual fund is actually holding at a particular time. In addition, the OTS guidelines also permit, on a case-by-case basis, investments in mutual funds to be allocated on a pro rata basis in a manner consistent with the actual composition of the mutual fund.

Section Two

Differences in Accounting Standards Among Federal Banking and Thrift Supervisory Agencies

Under the auspices of the FFIEC, the three banking agencies have developed uniform reporting standards for commercial banks which are used in the preparation of the Call Report. The FDIC has also applied these uniform Call Report standards to savings banks under its supervision. The income statement and balance sheet accounts presented in the Call Report are used by the bank supervisory agencies for determining the capital adequacy of banks and for other regulatory, supervisory, surveillance, analytical, and general statistical purposes. The reporting standards set forth in the Call Report are based almost entirely on GAAP for banks, and, as a matter of policy, deviate from GAAP only in those instances where statutory requirements or overriding supervisory concerns warrant a departure from GAAP. Thus, in so far as the federal bank supervisory agencies are concerned, material differences in accounting standards for regulatory purposes do not exist.

The OTS has developed and maintains a separate reporting system for the thrift institutions under its supervision. The TFR, is based on GAAP as applied by thrifts, which differs in some respects from GAAP for banks. The following discussion addresses the differences in reporting standards among the federal banking agencies and the OTS.

Futures and Forward Contracts

The banking agencies, as a general rule, do not permit the deferral of losses by banks on futures and forwards whether or not they are used for hedging purposes. All changes in market value of futures and forward contracts are reported in current period income. The banking agencies adopted this reporting standard as a supervisory policy prior to the adoption of FASB Statement No. 80, which allows hedge or loss deferral accounting, under certain circumstances. Contrary to this general rule, hedge accounting in accordance with FASB Statement No. 80 is permitted by the three banking agencies only for futures and forward contracts used in mortgage banking operations.

The OTS practice is to follow FASB Statement No. 80 for futures contracts. In accordance with this statement, when hedging criteria are satisfied, the accounting for the futures contract is related to the accounting for the hedged item. Changes in the market value of the futures contract are recognized in income when the effects of related changes in the price or interest rate of the hedged item are recognized. Such reporting can result in deferred losses which would be reflected as assets on the thrift's balance sheet in accordance with GAAP.

Excess Servicing Fees

As a general rule, the three banking agencies do not follow GAAP for excess servicing fees, but require a more conservative treatment. Excess servicing results when loans are sold with servicing retained and the stated servicing fee rate is greater than the normal servicing fee rate. With the exception of sales of pools of residential mortgages for which the banking agencies' approach is consistent with FASB Statement No. 65, excess servicing fee income in banks must be reported as realized over the life of the transferred asset, not recognized up front as required by FASB Statement No. 65.

The OTS allows the present value of the future excess servicing fee to be treated as an adjustment to the sales price for purposes of recognizing gain or loss on the sale. This approach is consistent with FASB Statement No. 65.

In-substance Defeasance of Debt

The banking agencies do not permit banks to report defeasance of their debt obligations in accordance with FASB Statement No. 76. Defeasance involves a debtor irrevocably placing risk-free monetary assets in a trust solely for satisfying the debt. Under FASB

Statement No. 76, the assets in the trust and the defeased debt are removed from the balance sheet and a gain or loss for the current period can be recognized. Commercial banks are not permitted to defease their debt obligations for reporting or supervisory purposes. Thus, banks may not remove assets or liabilities from their balance sheets or recognize resulting gains or losses. The banking agencies have not adopted FASB Statement No. 76 because of uncertainty regarding the irrevocable trusts established for defeasance purposes. Furthermore, defeasance would not relieve the bank of its contractual obligation to pay depositors or other creditors.

OTS practice is to follow FASB Statement No. 76.

Sales of Assets With Recourse

In accordance with FASB Statement No. 77, a transfer of receivables with recourse is recognized as a sale if: (1) The transferor surrenders control of the future economic benefits, (2) the transferor's obligation under the recourse provisions can be reasonably estimated, and (3) the transferee cannot require repurchase of the receivables except pursuant to the recourse provisions.

The practice of the three banking agencies is generally to permit commercial banks to report transfers of receivables with recourse as sales only when the transferring institution (1) retains no risk of loss from the assets transferred and (2) has no obligation for the payment of principal or interest on the assets transferred. As a result, virtually no transfers of assets with recourse can be reported as true sales. However, this rule does not apply to the transfer of 1- to 4-family or agricultural mortgage loans under certain government-sponsored programs (including the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation). Transfers of mortgages under these programs are generally treated as sales for Call Report purposes.

Furthermore, private transfers of mortgages are also reported as sales if the transferring institution retains only an insignificant risk of loss on the assets transferred. However, the seller's obligation under recourse provisions related to sales of mortgage loans under the government programs is viewed as an off-balance sheet exposure. Thus, for risk-based capital purposes, capital is generally expected to be held for recourse obligations associated with such transactions.

The OTS policy is to follow FASB Statement No. 77. However, in the calculation of risk-based capital under the OTS guidelines, off-balance sheet recourse obligations generally are converted at 100 percent. This effectively negates the sale treatment recognized on a GAAP basis for risk-based capital purposes, but not for leverage capital purposes. Thus, by making this adjustment in the risk-based capital calculation, the differences between the OTS and the banking agencies for capital adequacy measurement purposes, are substantially reduced.

During the past year, the three banking agencies and the OTS have continued to discuss the possibility of conforming the reporting practices of the banking agencies and the OTS in this area.

Specific Valuation Allowances for and Charge-offs of Troubled Loans

Currently, the OTS uses net realizable value (NRV) to determine the level of specific valuation allowances or charge-offs for troubled, collateral-dependent loans. Existing OTS policy requiring the use of NRV may be more or less stringent than that required by the banking agencies. The OTS has proposed a new policy for the classification and valuation of troubled collateral-dependent real estate loans that relies on the use of fair value rather than NRV of the collateral.

Push-Down Accounting

When a depository institution is acquired by a holding company in a purchase transaction, the holding company is required to revalue all of the assets and liabilities of the depository institution at fair value at the time of acquisition. When push-down accounting is applied, the same revaluation made by the parent holding company is made at the depository institution level.

The three banking agencies require push-down accounting when there is at least a 95 percent change in ownership. This approach is generally consistent with interpretation of the Securities and Exchange Commission.

The OTS requires push-down accounting when there is at least a 90 percent change in ownership.

Negative Goodwill

The three banking agencies require that negative goodwill be reported as a liability, and not be netted against goodwill assets. Such a policy ensures that all goodwill assets are deducted in regulatory capital calculations, consistent with the Basle Accord.

The OTS permits negative goodwill to offset goodwill assets reported in the financial statements.

Other Real Estate Owned—Other Than Primary Residences

The three banking agencies require that receivables resulting from sales of OREO that cannot be accounted for under the full accrual method be reported as OREO when the buyer's initial investment is less than 10 percent.

The OTS follows GAAP which does not provide explicit guidance on this issue. Thus, GAAP may permit the receivable to be reported as a loan when the buyer's initial investment is less than 10 percent.

Board of Governors of the Federal Reserve System, December 31, 1992.

William W. Wiles,

Secretary of the Board.

[FR Doc. 93–273 Filed 1–6–93; 8:45 am]

BILLING CODE 6210–01–M

GENERAL SERVICES ADMINISTRATION

[GSA Bulletin FPMR D–232]

Public Buildings and Space

December 11, 1992.

To: Heads of Federal agencies.

Subject: Limitation on expenditures for Presidential appointees' offices.

1. *Purpose.* This bulletin cancels GSA Bulletin FPMR D–222 and informs agencies and departments of new guidelines limiting the obligation and expenditure of monies used for offices of Presidential appointees to the Federal Government.

2. *Expiration date.* This bulletin contains information of a continuing nature and will remain in effect until canceled.

3. *Background.* GSA Bulletin FPMR-222, February 16, 1990, informed agencies that the Joint Resolutions making continuing appropriations each year prohibited agencies and departments from spending or obligating more than $5,000 to furnish or redecorate, or to purchase furniture or make improvements for Presidential appointees' offices. This limitation applied during the appointee's term of office. Advance notification and express approval by the House and Senate Committees on Appropriations were required where the expenditures exceeded the $5,000 limitation. The Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102–393, Sec. 618, 106 Stat. 1729 (1992) amended the previous

language by defining "office" as "the entire suite of offices assigned to the individual, as well as any other space used primarily by the individual or the use of which is directly controlled by the individual."

4. *Summary.* In accordance with the language of the Treasury, Postal Service, and General Government Appropriations Act, 1992, Pub. L. No. 102–393, Sec. 618, 106 Stat. 1729 (1992), agencies and departments may not obligate or expend in excess of $5,000 to furnish or redecorate, or to purchase furniture or make improvements for Presidential appointees' offices. This limitation applies during the appointee's term of office. Advance notification and express approval by the House and Senate Committees on Appropriations are required where the expenditures exceed the $5,000 limitation.

For the purposes of this section the word "office" shall include the entire suite of offices assigned to the individual, as well as any other space used primarily by the individual or the use of which is directly controlled by the individual.

Earl E. Jones,

Commissioner, Federal Property, Asset Management Service.

[FR Doc. 93–257 Filed 1–6–93; 8:45 am]

BILLING CODE 6820–23–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 92F–0392]

Hoechst Aktiengesellschaft; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Hoechst Aktiengesellschaft has filed a petition proposing that the food additive regulations be amended to provide for the safe use of polyhydric alcohol esters and calcium salts of oxidatively refined (Gersthofen process) montan wax acids as lubricants for all polymers intended for use in contact with food.

FOR FURTHER INFORMATION CONTACT: Vir D. Anand, Center for Food Safety and Applied Nutrition (HFF–335), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–254–9500.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a petition (FAP 2B4344) has been filed by Hoechst Aktiengesellschaft, c/o 1001 G St. NW., Washington, DC 20001. The petition proposes to amend the food additive regulations in § 178.3770 *Polyhydric alcohol esters of oxidatively refined (Gersthofen process) montan wax acids* (21 CFR 178.3770) to provide for the safe use of polyhydric alcohol esters and calcium salts of oxidatively refined (Gersthofen process) montan wax acids as lubricants for all polymers intended for use in contact with food.

The potential environmental impact of this action is being reviewed. If the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Dated: December 15, 1992.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 93–243 Filed 1–6–93; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 92F–0432]

Victorian Chemical Co., Pty. Ltd.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Victorian Chemical Co., Pty. Ltd., has filed a petition proposing that the food additive regulations be amended to provide for the safe use of: ethyl esters of fatty acids in aqueous emulsions for dehydrating corn, cereal grains, and beans and sulfated butyl oleate and sulfated ethyl oleate alone or in combination for dehydrating grapes to raisins, cereal grains, and beans.

FOR FURTHER INFORMATION CONTACT: Gerald J. Buonopane, Center for Food Safety and Applied Nutrition (HFS–217), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–254–9519.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a petition (FAP 2A4340) has been filed by Victorian Chemical Co., Pty. Ltd., P.O. Box 71, Richmond, Victoria 3121, Australia. The petition proposes to amend the food additive regulations in § 172.225 *Methyl and ethyl esters of fatty acids produced from edible fats and oils* (21 CFR 172.225) (57 FR 12709, April 13, 1992) and § 172.270 *Sulfated butyl oleate* (21 CFR 172.270) (57 FR 12709, April 13, 1992) to provide for the safe use of: (1) ethyl esters of fatty acids in aqueous emulsions for dehydrating corn, cereal grains, and beans and (2) sulfated butyl oleate and sulfated ethyl oleate alone or in combination in aqueous emulsions for dehydrating grapes to raisins, cereal grains, and beans.

The potential environmental impact of this action is being reviewed. If the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Dated: December 15, 1992.

Fred R. Shank,

Director Center for Food Safety and Applied Nutrition.

[FR Doc. 93–241 Filed 1–6–93; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 92N–0499]

Lyphomed, Division of Fujisawa USA, Inc.; Withdrawal of Approval of 10 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of 10 abbreviated new drug applications (ANDA's) held by Lyphomed, Division of Fujisawa USA, Inc., 2045 North Cornell Ave., Melrose Park, IL 60160–1002 (Lyphomed). FDA is withdrawing approval of these applications because of questions raised about the reliability of the data and information submitted to FDA in support of the applications. Lyphomed has waived its opportunity for hearing.

EFFECTIVE DATE: January 7, 1993.

FOR FURTHER INFORMATION CONTACT: Jean M. Olson, Center for Drug Evaluation and Research (HFD–366), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–295–8041.

SUPPLEMENTARY INFORMATION: Recently, FDA became aware of discrepancies concerning the data used to support approval of the following ANDA's held by Lyphomed:

ANDA 70–751, Nalbuphine Hydrochloride Injection, 10 milligrams

per milliliter (mg)/(mL) - 2 and 10 mL vials;

ANDA 70–752, Nalbuphine Hydrochloride Injection, 20 mg/mL - 2 and 10 mL vials;

ANDA 70–962, Dacarbazine for Injection, 100 mg/vial;

ANDA 70–990, Dacarbazine for Injection, 200 mg/vial;

ANDA 70–992, Droperidol Injection, 2.5 mg/mL - 2 and 5 mL vials;

ANDA 70–993, Droperidol Injection, 2.5 mg/mL - 10 mL vials;

ANDA 71–187, Haloperidol Injection, 5 mg/mL - 2 and 10 mL vials;

ANDA 71–188, Ritodrine Hydrochloride Injection, 10 mg/mL - 5 mL vial;

ANDA 71–189, Ritodrine Hydrochloride Injection, 15 mg/mL - 10 mL vial; and

ANDA 86–754, Mannitol Injection, 25% - 50 mL vial.

Lyphomed has identified discrepancies in data submitted to obtain approval of the applications listed above which have raised questions about the reliability of the data. Subsequently, in letters dated June 1, 1992, and September 15, 1992, Lyphomed requested withdrawal of these ANDA's. Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)), and under authority delegated to the Director, Center for Drug Evaluation and Research (21 CFR 5.82), approval of the ANDA's listed above, and all amendments and supplements thereto, is hereby withdrawn, effective January 7, 1993. Distribution of drug products in interstate commerce without an approved application is unlawful.

Dated: December 15, 1991.

Carl C. Peck,

Director, Center for Drug Evaluation and Research.

[FR Doc. 93–242 Filed 1–6–93; 8:45 am]

BILLING CODE 4160–01–F

Health Care Financing Administration

[OIS–019–N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances and Coverage Decisions

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: General notice.

SUMMARY: This notice lists HCFA manual instructions, substantive and interpretive regulations and other **Federal Register** notices, and statements of policy that were published during July, August, and September of 1992 that relate to the Medicare and Medicaid programs. Section 1871(c) of the Social Security Act requires that we publish a list of Medicare issuances in the **Federal Register** at least every 3 months. Although we are not mandated to do so by statute, for the sake of completeness of the listing, we are including all Medicaid issuances and Medicare and Medicaid substantive and interpretive regulations (proposed and final) published during this timeframe.

We also are providing the content of revisions to the Medicare Coverage Issues Manual published between July 1 and September 30, 1992. On August 21, 1989 (54 FR 34555), we published the contents of the Manual and indicated that we will publish quarterly any updates. Adding the Medicare Coverage Issues Manual changes to this listing allows us to fulfill this requirement in a manner that facilitates identification of coverage and other changes in our manuals.

FOR FURTHER INFORMATION CONTACT:

Margaret Cotton, (410) 966–5260 (For Medicare Instruction Information)

Sam DellaVecchia, (410) 966–5395 (For Medicare Coverage Information)

Dusty Kowalewski, (410) 965–3377 (For Medicaid Instruction Information)

Margaret Teeters, (410) 966–4678 (For All Other Information)

SUPPLEMENTARY INFORMATION:

I. Program Issuances

The Health Care Financing Administration (HCFA) is responsible for administering the Medicare and Medicaid programs, which pay for health care and related services for 35 million Medicare beneficiaries and 31 million Medicaid recipients. Administration of these programs involves (1) providing information to Medicare beneficiaries and Medicaid recipients, health care providers, and the public; and (2) effective communications with regional offices, State governments, State Medicaid Agencies, State Survey Agencies, various providers of health care, fiscal intermediaries, and carriers who process claims and pay bills, and others. To implement the various statutes on which the programs are based, we issue regulations under authority granted the secretary under sections 1102, 1871, and 1902 and related provisions of the Social Security Act (the Act) and also issue various manuals, memoranda, and statements necessary to administer the programs efficiently.

Section 1871(c)(1) of the Act requires that we publish in the **Federal Register** at least every 3 months a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations. We published our first notice June 9, 1988 (53 FR 21730). Although we are not mandated to do so by statute, for the sake of completeness of the listing of operational and policy statements, we are continuing our practice of including Medicare substantive and interpretive regulations (proposed and final) published during this timeframe. Since the publication of our quarterly listing on June 12, 1992 (57 FR 24797), we decided to add Medicaid issuances to our quarterly listings. Accordingly, we are listing in this notice, Medicaid issuances and Medicaid substantive and interpretive regulations published from July 1 through September 30, 1992.

II. Medicare Coverage Issues

We receive numerous inquiries from the general public about whether specific items or services are covered under Medicare. Providers, carriers, and intermediaries have copies of the Medicare Coverage Issues Manual, which identifies those medical items, services, technologies, or treatment procedures that can be paid for under Medicare. On August 21, 1989, we published a notice in the **Federal Register** (54 FR 34555) that contained all the Medicare coverage decisions issued in that manual.

In that notice, we indicated that revisions to the Coverage Issues Manual will be published at least quarterly in the **Federal Register.** We also sometimes issue proposed or final national coverage decision changes in separate **Federal Register** notices. Table IV of this notice contains the text of the revisions to the Coverage Issues Manual published between July 1 and September 30, 1992. Readers should find this an easy way to identify both issuance changes to all our manuals and the text of changes to the Coverage Issues Manual.

Revisions to the Coverage Issues Manual are not published on a regular basis but on an as needed basis. We publish revisions as a result of technological changes, medical practice changes, responses to inquiries we receive seeking clarifications, or the resolution of coverage issues under Medicare. If no Coverage Issues Manual revisions were published during a particular quarter, our listing will reflect that fact.

Not all revisions to the Coverage Issues Manual contain major changes. As with any instruction, sometimes minor clarifications or revisions are made within the text. We have reprinted manual revisions as transmitted to

manual holders. The new text is shown in italics. We will not reprint the table of contents, since the table of contents serves primarily as a finding aid for the user of the manual and does not identify items as covered or not.

We issued updates that included the text of changes to the Coverage Issues Manual in the following issues of the **Federal Register:**

- March 20, 1990 (55 FR 10290).
- February 6, 1991 (56 FR 4830).
- July 5, 1991 (56 FR 30752).
- November 22, 1991 (56 FR 58913).
- January 22, 1992 (57 FR 2558).
- March 16, 1992 (57 FR 9127).
- June 12, 1992 (57 FR 24797).
- October 16, 1992 (57 FR 47468).

The issuance updates found in Table IV of this notice, when added to material from the manual published on August 21, 1989, and the updates listed above constitute a complete manual as of September 30, 1992. Parties interested in obtaining a copy of the manual and revisions should follow the instructions in section IV of this notice.

III. How To Use the Listing

This notice is organized so that a reader may review the subjects of all manual issuances, memoranda, substantive and interpretive regulations, or coverage decisions published during this timeframe to determine whether any are of particular interest. We expect it to be used in concert with previously published notices. Most notably, those unfamiliar with a description of our Medicare manuals may wish to review Table I of our first three notices (53 FR 21730, 53 FR 36891, and 53 FR 50577); those desiring information on the Medicare Coverage Issues Manual may wish to review the August 21, 1989 publication; and those seeking information on the location of regional depository libraries may wish to review Table IV of our first notice. We have divided this current listing into four tables.

Table I describes where interested individuals can get a description of all previously published HCFA Medicare and Medicaid manuals and memoranda.

Table II of this notice lists, for each of our manuals or Program Memoranda, a transmittal number unique to that instruction and its subject matter. A transmittal may consist of a single instruction or many. Often it is necessary to use information in a transmittal in conjunction with information currently in the manuals.

Table III lists all substantive and interpretive Medicare and Medicaid regulations and general notices published in the **Federal Register** during the quarter covered by this notice. For each item, we list the date published, the **Federal Register** citation, the title of the regulation, and the Parts of the Code of Federal Regulations (CFR) which have changed.

Table IV sets forth the revisions to the Medicare Coverage Issues Manual that were published during the quarter covered by this notice. For the revisions, we give a brief synopsis of the revisions as they appear on the transmittal sheet, the manual section number, and the title of the section. We present a complete copy of the revised material, no matter how minor the revision, and identify the revisions by printing in italics the text that was changed. If the transmittal includes material unrelated to the revised section, for example, when the addition of revised material causes other sections to be repaginated, we do not reprint the unrelated material.

IV. How To Obtain Listed Material

A. Manuals

An individual or organization interested in routinely receiving any manual and revisions to it may purchase a subscription to that manual. Those wishing to subscribe should contact either the Government Printing Office (GPO) or the National Technical Information Service (NTIS) at the following addresses:

Superintendent of Documents, Government Printing Office, ATTN: New Order, P.O. Box 371954, Pittsburgh, PA 15250–7954, Telephone (202) 783–3238, Fax number (202) 512–2250 (for credit card orders); or

National Technical Information Service, Department of Commerce, 5825 Port Royal Road, Springfield, VA 22161, Telephone (703) 487–4630.

In addition, individual manual transmittals and Program Memoranda listed in this notice can be purchased from NTIS. Interested parties should identify the transmittal(s) they want. GPO or NTIS can give complete details on how to obtain the publications they sell.

B. Regulations and Notices

Regulations and notices are published in the daily **Federal Register**. Interested individuals may purchase individual copies or subscribe to the **Federal Register** by contacting the GPO at the same address indicated above for manual issuances. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

C. Rulings

Rulings are published on an infrequent basis by HCFA. Interested individuals can obtain copies from the nearest HCFA Regional Office or review them at the nearest regional depository library. We also sometimes publish Rulings in the **Federal Register**.

V. How to Review Listed Material

Transmittals or Program Memoranda can be reviewed at a local Federal Depository Library (FDL). Under the Federal Depository Library Program, government publications are sent to approximately 1400 designated libraries throughout the United States. Interested parties may examine the documents at any one of the FDLs. Some may have arrangements to transfer material to a local library not designated as an FDL. To locate the nearest FDL, individuals should contact any library.

In addition, individuals may contact regional depository libraries, which receive and retain at least one copy of nearly every Federal Government publication, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library.

Superintendent of Documents numbers for each HCFA publication are shown in Table II, along with the HCFA publication and transmittal numbers. To help FDLs locate the instruction, use the Superintendent of Documents number, plus the HCFA transmittal number. For example, to find the Hospital Manual (HCFA—Pub. 10) transmittal entitled "Advance Directive Requirements," use the Superintendent of Documents No. HE 8/2 and the HCFA transmittal number 641.

VI. General Information

It is possible that an interested party may have a specific information need and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing information contact persons to answer general questions concerning these items. Copies are not available through the contact persons. Individuals are expected to purchase copies or arrange to review them as noted above.

Questions concerning Medicare items in Tables I or II may be addressed to Margaret Cotton, Office of Issuances, Health Care Financing Administration, room 688, East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (410) 966–5260.

Questions concerning Medicaid items in Tables I or II may be addressed to Dusty Kowalewski, Medicaid Bureau, Office of Medicaid Policy, Health Care Financing Administration, Room 233

East High Rise, 6325 Security Blvd., Baltimore, MD 21207. Telephone (410) 965–3377.

Questions concerning Medicaid items in Table IV may be addressed to Sam DellaVecchia, Office of Coverage and Eligibility Policy, Health Care Financing Administration, Room 445 East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (410) 966–5395.

Questions concerning all other information may be addressed to Margaret Teeters, Regulations Staff, Health Care Financing Administration, Room 132 East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (410) 966–4678.

Table I—Description of Manuals, Memoranda, and HCFA Rulings

An extensive descriptive listing of Medicare manuals and memoranda was previously published on June 9, 1988 at 53 FR 21730 and supplemented on September 22, 1988 at 53 FR 36891 and December 16, 1988 at 53 FR 50577. Also, a complete description of the Medicare Coverage Issues Manual was published on August 21, 1989 at 54 FR 34555. A brief description of the various Medicaid manuals and memoranda that we maintain was published on October 16, 1992 at 57 FR 47468.

TABLE II.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS

[July through September 1992]

Trans. No.	Manual/Subject/Publication No.
Intermediary Manual Part 1—Fiscal Administration (HCFA—Pub. 13–1) (Superintendent of Documents No. HE 22.8/6–3)	
123	• General information about termination costs—vouchering procedures.
Intermediary Manual Part 3—Claims Process (HCFA—Pub. 13–3 (Superintendent of Documents No. HE 22.8/6)	
1575	• Swing-bed services.
1576	• Application of fee schedule and determining payments and patient liability.
1577	• Federal government's right to sue and collect double damages.
	Excise tax penalties for contributors to nonconforming group health plans.
1578	• Review of form HCFA–1450 for inpatient and outpatient bills.
	Addendum C—coding structures.
1579	• Claims processing timeliness.
	Review of the form HCFA–1450 for inpatient and outpatient bills.
	Addendum C—coding structures.
Intermediary Manual Part 4—Audit Procedures (HCFA—Pub. 13–4) (Superintendent of Documents No. HE 22.8/6–4)	
29	• Standards for audits under medicare.
	Field work standards.
	Internal control questionnaire.
Carriers Manual Part 1—Fiscal Administration (HCFA—Pub. 14–1) (Superintendent of Documents No. HE 22.8/7–2)	
117	• General information about termination costs.
Carriers Manual Part 2—Program Administration (HCFA—Pub. 14–2) (Superintendent of Documents No. HE 22.8/7–3)	
120	• Beneficiary services.
121	• Claims processing timeliness.
Carriers Manual Part 3—Claims Process (HCFA—Pub. 14–3) (Superintendent of Documents No. HE 22.8/7)	
1428	• Medicare carriers manual index, part 3.
1429	• Evidence of medical necessity for home oxygen therapy.
	Completion of form HCFA–484.
	Completion oxygen prescribed.
	Testing under conditions other than at room air
	Explanation of need for ambulatory or portable equipment.
	Evidence of medical necessity—oxygen claims.
	Initial certifications.
	Revised certification.
	Scheduling and documenting recertification of medical necessity for oxygen.
	First recertification required at 3 months.
	First recertification for long-term therapy.
	Options in requesting recertifications.
	Attending physician of record no longer involved with the patient.
1430	• National standard EMC format maintenance procedures.
	National standard EMC change request procedures.
1431	• Physician and supplier overpayment reporting system, data entry.
	PSOR user instructions.
1432	• Establishing extended repayments.
	Documentation required to support a request for extended repayments.
	Referral of requests for extended repayment schedule to RO.
	Execution of promissory note.
	Monitoring an approved extended repayment schedule.
	Protocol for reviewing extended repayment schedule.
	Statement of source and application of funds period covered.
	Cash flow statement period covered.

TABLE II.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July through September 1992]

Trans. No.	Manual/Subject/Publication No.
	Projected cash flow statement cash from operations (schedule A) period covered.
	Promissory note containing agreement for judgment.
1433	• Completing page eleven of the carrier performance report.
	Checking reports prior to submittal to HCFA.
	Carrier workload report.
1434	• Part D—claims processing timeliness.
	Part E—interest payment date.
	Claims reduced and denied.
	Part D—selected claim data by participation status.
	Checking HCFA–1565C prior to submittal to HCFA.
1435	• Payment for extracorporeal shock wave lithotripsy.
1436	• Federal government's right to sue and collect double damages.
	Excise tax penalties for contributors to nonconforming group health plans.
1437	• 1992 CPT–4 additional procedure codes.
1438	• Coding type of supplier.
	Inter-fields verification of BMAD files.
1439	• Rebundling of CPT–4 codes.
Program Memorandum Intermediaries (HCFA—Pub 60 A) (Superintendent of Documents No. HE 22.8/6–5)	
A–92–3	• Prohibition against admission deposits.
A–92–4	• Financial arrangements between hospitals and hospital-based physicians.
A–92–5	• Health care financing administration's audit and cost report settlement expectations.
A–92–6	• Adjusting interim payments for capital-related costs for hospitals paid under the medicare prospective payment system.
Program Memorandum Intermediaries/Carriers (HCFA—Pub. 60A/B) (Superintendent of Documents No. HE 22.8/6–5)	
AB–92–1	• HMO directory.
AB–92–2	• 1992 HCPCS update and corresponding payment instructions.
AB–92–3	• Temporary codes for new drugs.
AB–92–4	• Current status of medicare program memorandums and letters issued before calendar year 1992.
State Operations Manual (HCFA)—Pub. 7) (Superintendent of Documents No. HE 22.8/12)	
253	• Federal minimum qualification standards for long-term care facility surveyors.
	Test administration.
	Test-related activities.
	State test administration plan.
254	• Screening mammography, citations, and description.
	Interim certification process.
	Site of screening mammography services.
	Survey process.
	Screening mammography services data report.
	Interpretive guidelines, screening mammography suppliers.
	Screening mammography services data report.
Regional Office Manual Medicare (HCFA—Pub. 23–2) (Superintendent of Documents No. HE 22.8/8)	
322	• Instructions for completing the regional office all trunks busy report.
323	• Annual contractor evaluation report.
	Target dates in preparing ACERs/service area reports.
	ACERs for multi-regional contractors.
	Evaluation of contractors under other-than-standard cost reimbursement contracts.
	Evaluation of contractors under budget-flexibility contracts.
	Scoring methodology.
	Corrective action.
	ACER format.
	Contractor profile.
	Performance criteria.
	Regional home health intermediary performance evaluation program.
324	• General information about termination costs—vouchering procedures.
Regional Office Manual Standards and Certification (HCFA)—Pub. 23–4) (Superintendent of Documents No. HE 22.8/8–3)	
IM–92–1	• Medicare approval of federally qualified health centers.
	Interim approval process.
52	Federal minimum qualification standards for long-term care facility surveyors.
	Test administration.
	Test-related activities
	State test administration plan.
	Model letter announcing to state survey agency the requirements for administering the long term care surveyor minimum qualifications test.
Health Maintenance Organization/Competitive Medical Plan Manual (HCFA—Pub. 75) (Superintendent of Documents No. HE 22.8/21:989)	
11	• General Requirements

TABLE II.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July through September 1992]

Trans. No.	Manual/Subject/Publication No.
	Plan operating experience requirements.
	Composition of enrollment.
	Open enrollment.
	Additional open enrollment periods.
	Enrollment application procedures.
	Processing applications.
	Effective date of enrollment and disenrollment.
	General requirements.
	How to process applicants with ESRD.
	Hospice patients.
	Reenrollments.
	Conversion enrollments.
	Failure to pay premium.
	Permanent move out of geographic area.
	Retention of enrollees who temporarily leave geographic area.
	Beneficiary chooses to disenroll.
	Disenrollment for clause.
12	• Basic contract requirements for HMOs/CMPs.
	Basic requirements under HCPP agreement.
	Types of contract and agreement cessations.
	Supplemental policy coverage (HMOs and CMPs only).
	Systems issues.
	Model beneficiary notice.
	Model public notice.
	Hospital Manual (HCFA—Pub. 10) (Superintendent of Documents No. HE 22.8/2)
638	• Note: See Transmittal No. 640.
639	• Swing-bed services.
640	• Fraud and abuse—general.
	Definition and examples of fraud.
	Definition and examples of abuse.
	Responsibility for combatting fraud, waste, and abuse.
	Federal government administration of the health insurance program.
641	• Advance directive requirements.
642	• Completion of form HCFA–1450 FOR inpatient and/or outpatient billing.
643	• Claims processing timeliness requirement.
	Peer Review Organization Manual (HCFA—Pub. 19) (Superintendent of Documents No. HE 22.8/15)
1	Authority.
	Purpose of PRO review.
	PRO responsibilities.
	Health care financing administration's role.
	Background.
	MOAs with FIs and carriers.
	Background.
	Objective development.
	Problem identification.
	Required elements.
	Monitoring PRO performance.
	Contract modification.
	Record and documentation of review activities.
	Retention of review documentation.
	Review documentation.
	Retention of medical records.
	Electronic data retention requirements.
	Contractor records retention.
	Disposal of records.
	Background.
	Provisions of the notice.
	Uses of evaluation criteria.
	Background.
	Purpose.
	Timing.
	Methods of evaluation.
	Report of findings.
	Home Health Agency Manual (HCFA—Pub. 11) (Superintendent of Documents No. HE 22.8/5)
253	• Fraud and Abuse—General
	Definition and examples of fraud.
	Definition and examples of abuse.
	Responsibility for combatting fraud, waste, and abuse.
	Federal government administration of the health insurance program.
254	• Advance directive requirements.
255	• Completion of form HCFA–1450 for home health agency billing.
	Addendum C—coding structures.

TABLE II.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July through September 1992]

Trans. No.	Manual/Subject/Publication No.
256	• Completion of form HCFA–1450 for home health agency billing.
Skilled Nursing Facility Manual (HCFA—Pub. 12) (Superintendent of Documents No. HE 22.8/3)	
311	• Fraud and abuse—general.
	Definition and examples of fraud.
	Definition and examples of abuse.
	Responsibility for combatting fraud, waste, and abuse.
	Role of health care financing administration.
	Role of the public health service.
312	• Advance directive requirements.
313	• Completion of form HCFA–1450 for inpatient and/or outpatient billing.
	Addendum C—coding structures.
314	• Completion of form 1450 for inpatient and/or outpatient billing.
315	• Prohibition against "Rules of Thumb" in medical review determinations.
Rural Health Clinic Manual (HCFA—Pub. 27) (Superintendent of Documents No. HE 22.8/19:985)	
46	• Completion of form HCFA–1450 by independent rural health clinics.
47	• Completion of form HCFA–1450 by independent rural health clinics.
Renal Dialysis Facility Manual (HCFA—Pub. 29) (Superintendent of Documents No. HE 22.8/13)	
54	• Fraud and abuse—general.
	Definition and examples of fraud.
	Definition and examples of abuse.
	Responsibility for combatting fraud, waste, and abuse.
55	• Completion of form HCFA—1450 by independent facilities for home dialysis items and services billed under the composite rate (method I).
56	• Completion of form HCFA—1450 by independent facilities for home dialysis items and services billed under the composite rate (method I).
Hospice Manual (HCFA—Pub. 21) (Superintendent of Documents No. HE 22.8/18)	
29	• Note: see transmittal No. 30.
30	• Fraud and abuse—general.
	Definition and examples of fraud.
	Definition and examples of abuse.
	Responsibility for combatting fraud, waste, and abuse.
	Federal government administration of the health insurance program.
31	• Advanced directive requirements.
Outpatient Physical Therapy and Comprehensive Outpatient Rehabilitation Facility Manual (HCFA—Pub. 9) (Superintendent of Documents No. HE 22.8/9)	
106	• Completion of form HCFA—1450 for billing comprehensive outpatient rehabilitation facility, outpatient physical therapy, occupational therapy or speech pathology services.
	Addendum C—coding structures.
107	• Completion of form HCFA—1450 for billing CORF, outpatient physical therapy, occupational therapy or speech pathology services.
Coverage Issues Manual (HCFA—Pub. 6) (Superintendent of Documents No. HE 22.8/14)	
59	• Apheresis (Therapeutic pheresis).
60	• Adult liver transplantation.
61	• General anesthesia in cataract surgery endothelial cell photography.
Provider Reimbursement Manual Part 1 (HCFA—Pub. 15–1) (Superintendent of Documents No. HE 22.8/4)	
367	• Nonowners compensation.
	Transportation costs.
368	• Costs of approved nursing and paramedical education programs.
Provider Reimbursement Manual Part 1—Chapter 27 Reimbursement for ESRD and Transplant Services (HCFA—Pub. 15–1–27) (Superintendent of Documents No. HE 22.8/4)	
20	• Exception to present method selection of payment method on the form HCFA—382 (ESRD beneficiary selection form).
Provider Reimbursement Manual Part II—Provider Cost Reporting Forms and Instructions (HCFA—Pub. 15–IIN) (Superintendent of Documents No. HE 22.8/4)	
3	• Obsoletes chapter 14, freestanding hospice cost report.

TABLE II.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July through September 1992]

Trans. No.	Manual/Subject/Publication No.
State Medicaid Manual Part 3—Eligibility (HCFA—Pub. 45–3) (Superintendent of Documents No. HE 22.8/10)	
59	• Requirements of state CSE agency and cooperative agreements. Funding.
State Medicaid Manual Part 5—Early and Periodic Screening, Diagnosis, and Treatment (HCFA—Pub. 45–5) (Superintendent of Documents No. HE 22.8/10)	
5	• Screening service content.
State Medicaid Manual Part 7—Quality Control (HCFA—Pub. 45–7) (Superintendent of Documents No. HE 22.8/10)	
46	• Definitions of key terms. Cases which are not reviewed. Review of SSI cash cases in SSI-criteria and 209(b) states. Field investigation. Hold harmless provision of the immigration reform and control act. Systematic alien verification of entitlement documentation. Verification standards. Basic program requirements (100). Resources (200)—Element 212. Verification guide. Hierarchy of MEQC errors. Cases to be reviewed. Case record review. Resources (200)—element 211. Income (300)—elements 312, 321, 322, 323, 331, and 350. Medicaid eligibility quality control review. In-person interview. Basic program requirements (100)—element 185. Income (300)—element 311. Computation of financial eligibility (500)—elements 530 and 550. Instructions for integrated review schedule—form HCFA 301. Administrative period. Classification of errors. Technical errors. Eligible with ineligible services. Computation of liability errors. Determining final misspent dollar amounts of cases containing initial liability understated errors. Federal monitoring.
Program Memorandum Medicaid State Agencies (HCFA—Pub. 17)	
92–5	• Current status of medicaid program memorandums and action transmittals issued before calender year 1992.
92–6	• Preadmission screening and annual resident review requirement.
Regional Office Manual Medicaid (HCFA—Pub. 23–6) (Superintendent of Documents No. 22.8/8–4)	
34	• Title XIX compliance policies.
Medicare/Medicaid Sanction—Reinstatement Report (HCFA—Pub. 69)	
92–8	• Report of physicians/practitioners, providers and/or other health care suppliers excluded/reinstated (July 1992).
92–9	• Report of physicians/practitioners, providers and/or other health care suppliers excluded/reinstated (August 1992).

TABLE III.—REGULATIONS AND NOTICES PUBLISHED JULY THROUGH SEPTEMBER 1992

Publication date/citation	42 CFR Part	Title
FINAL RULES		
07/31/92 (57 FR 33878)	405, 410, 412, 413, 482	Medicare Program; Fee Schedules for the Services of Certified Registered Nurse Anesthetists (Correction Published 09/01/92 (57 FR 39743)).
07/31/92 (57 FR 33992)	493, 498	Clinical Laboratories Improvement Act Program; Granting and Withdrawal of Deeming Authority to Private Nonprofit Accreditation Organizations and of CLIA exemption Under State Laboratory Programs.
08/12/92 (57 FR 36006)	405, 406, 409, 410, 411, 412, 413, 418, 489	Medicare Program; Self-Implementing Coverage and Payments Provisions: 1990 Legislation (Correction Published 09/30/92 (57 FR 45112)).
08/26/92 (57 FR 38616)	403	Medicare Program; Beneficiary Counseling and Assistance Grants Program.

TABLE III.—REGULATIONS AND NOTICES PUBLISHED JULY THROUGH SEPTEMBER 1992—Continued

Publication date/citation	42 CFR Part	Title
08/27/92 (57 FR 38778)	433	Medicaid Program; Medicaid Management Information System (MMIS) Performance Review; Notification Procedures for Changes in Requirements, Performance Standards, and Reapproval Conditions (Correction Published 09/30/92 (57 FR 45112)).
09/01/92 (57 FR 39746)	412, 413	Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1993 Rates; Final Rule.
09/23/92 (57 FR 43922)	431, 442, 447, 483, 488, 489, 498	Medicare and Medicaid Programs; Requirements for Long Term Care Facilities.
09/23/92 (57 FR 43906)	413, 447	Medicare and Medicaid Programs; Revaluation of Assets.
PROPOSED RULES		
07/08/92 (57 FR 30301)	412, 413	Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal year 1993 Rates.
08/17/92 (57 FR 36968)	435, 436	Medicare Program; Qualified Family Members.
08/28/92 (57 FR 39278)	431, 442, 488, 489	Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities.
09/22/92 (57 FR 43659)	413	Medicare Program; Payment for Nursing and Allied Health Education.

Publication date/citation	Title
NOTICES	
07/01/92 (57 FR 29410)	Medicare Program; Schedule of Limits on Home Health Agency Costs Per Visit for Cost Reporting Periods Beginning On or After July 1, 1992 (Correction Notices Published 08/27/92 (57 FR 38959) and 09/17/92 (57 FR 43004)).
07/17/92 (57 FR 31664)	Medicare Program; Clinical Laboratory Improvement Act Program Fee Collection; Correction.
07/27/92 (57 FR 33202)	Health Maintenance Organizations; HMO Qualification Determinations and Compliance Actions (Correction Notice Published 09/11/92 (57 FR 41810)).
08/11/92 (57 FR 35760)	Medicare Program; Carrier Jurisdiction for Claims for Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) and Standards for Evaluating Regional DMEPOS Carriers; Correction.
08/11/92 (57 FR 35760)	Medicare Program; Medicare and Laboratory Certification Program; Enforcement Procedures for Laboratories; Correction.
08/11/92 (57 FR 35836)	Medicare Program; Update of Ambulatory Surgical Center Payment Rates and Additions to and Deletions From the Current List of Covered surgical Procedures; Correction.
08/11/92 (57 FR 35837)	Medicare Program; Peer Review Organizations: Revised Scopes of Work for the District of Columbia, Puerto Rico, the Virgin Islands, and All States Except Delaware, Florida, Missouri, Montana, Nebraska, Nevada, Oklahoma, Rhode Island, South Carolina, Washington and Wyoming; Correction.
08/21/92 (57 FR 37980)	Medicare Program; HHS' Recognition of NAIC Model Standards for Regulation of Medigap Policies.
09/15/92 (57 FR 4291)	Medicare Program; Fee Schedule for Physicians' Services; Correction Notice.
09/18/92 (57 FR 43230)	Medicare Program; Criteria and Standards for Evaluating Intermediary and Carrier Performance During FY 1993.

Table IV—Medicare Coverage Issues Manual

(For the reader's convenience, new material and changes to previously published material are in italics. If any part of a sentence in the manual instruction has changed, the entire line is shown in italics. The transmittal includes material unrelated to revised sections. We are not reprinting the unrelated material.) Transmittal No. 59; section 35–60, Apheresis (Therapeutic Pheresis)

CHANGED IMPLEMENTING INSTRUCTIONS—EFFECTIVE DATE: For services performed on or after 07/30/92.

Section 35–60, Apheresis (Therapeutic Pheresis), is updated and revised to provide that apheresis may now be covered when performed either in a hospital setting (inpatient or outpatient) or in a nonhospital setting if the patient is under the care of a physician and a physician is also present to direct and supervise the nonphysician services. Also, while indications for the procedure remain unchanged, obsolete references to specific dates of coverage were removed.

35–60 Apheresis (Therapeutic Pheresis)

A. General.—Apheresis (also known as pheresis or therapeutic pheresis) is a medical procedure utilizing specialized equipment to remove selected blood constituents (plasma, leukocytes, platelets, or cells) from whole blood. The remainder is retransfused into the person from whom the blood was taken.

For purposes of Medicare coverage, apheresis is defined as an autologous procedure, i.e., blood is taken from the patient, processed, and returned to the patient as part of a continuous procedure (as distinguished from the procedure in which a patient donates blood preoperatively and is transfused with the donated blood at a later date).

B. Indications.—Apheresis is covered for the following indications:

- *Plasma exchange for acquired myasthenia gravis;*
- *Leukapheresis in the treatment of leukemia;*
- *Plasmapheresis in the treatment of primary macroglobulinemia (Waldenstrom);*
- *Treatment of hyperglobulinemias, including (but not limited to) multiple myelomas, cryoglobulinemia and hyperviscosity syndromes;*

• *Plasmapheresis or plasma exchange as a last resort treatment of thromobotic thrombocytopenic purpura (TTP);*

• *Plasmapheresis or plasma exchange in the last resort treatment of life threatening rheumatoid vasculitis;*

• *Plasma perfusion of charcoal filters for treatment of pruritis of cholestatic liver disease;*

• *Plasma exchange in the treatment of Goodpasture's Syndrome;*

• *Plasma exchange in the treatment of glomerulonephritis associated with antiglomerular basement membrane antibodies and advancing renal failure or pulmonary hemorrhage;*

• *Treatment of chronic relapsing polyneuropathy for patients with severe or life threatening symptoms who have failed to respond to conventional therapy;*

• *Treatment of life threatening schleroderma and polymyositis when the patient is unresponsive to conventional therapy;*

• *Treatment of Guillain-Barre Syndrome; and*

• *Treatment of last resort for life threatening systemic lupus erythematosus (SLE) when conventional therapy has failed to prevent clinical deterioration.*

C. Settings.—Apheresis is covered only when performed in the following settings:

• *In a hospital setting (either inpatient or outpatient). Nonphysician services furnished to hospital patients are covered and paid for as hospital services. When covered services are provided to hospital patients by an outside provider/supplier, the hospital is responsible for paying the provider/supplier for the services.*

• *In a nonhospital setting, e.g., a physician directed clinic (see HCFA Pub. 14–3, § 2050.4) when the following conditions are met:*

—*A physician (or a number of physicians) is present to perform medical services and to respond to medical emergencies at all times during patient care hours;*

—*Each patient is under the care of a physician; and*

—*All nonphysician services are furnished under the direct, personal supervision of a physician.*

Transmittal No. 60; section 35–53, Adult Liver Transplantation.

CLARIFICATION—EFFECTIVE DATE: Not Applicable.

Section 35–53, Adult Liver Transplantation.—This section is revised to add International Classification of Diseases, Ninth Revision, Clinical Modification (ICD–9–CM) codes not included with previous revision.

35–53 Adult Liver Transplantation

A. General.—Adult liver transplantation is covered under Medicare when performed in a facility which is approved by HCFA as meeting institutional coverage criteria, and for patients with one of the following conditions:

• *Primary biliary cirrhosis (ICD–9–CM 571.6);*

• *Primary sclerosing cholangitis (ICD–9–CM 576.1);*

• *Postnecrotic cirrhosis, hepatitis B surface antigen negative (ICD–9–CM 571.5);*

• *Alcoholic cirrhosis (ICD–9–CM 571.2);*

• *Alpha-1 antitrypsin deficiency disease (ICD–9–CM 277.6);*

• *Wilson's disease (ICD–9–CM 275.1); or*

• *Primary hemochromatosis (ICD–9–CM 275.0).* Coverage of adult liver transplantation is effective as of the date of the facility's approval, but for applications received before July 13, 1991, can be effective as early as March 8, 1990. (See **Federal Register** 56 FR 15006 dated April 12, 1991.)

B. Follow-up Care.—Follow-up care or retransplantation (ICD–9–CM 996.82, Complications of Transplanted Organ, Liver) required as a result of a covered liver transplant is covered, provided such services are otherwise reasonable and necessary. Follow-up care is also covered for patients who have been discharged from a hospital after receiving a noncovered liver transplant. Coverage for follow-up care is for items and services that are reasonable and necessary as determined by Medicare guidelines. (See Intermediary Manual § 3101.14 and Carriers Manual § 2300.1.)

C. Immunosuppressive Drugs.—See Intermediary Manual § 3660.8 and Carriers Manual §§ 2050.5, 4471 and 5249.

Transmittal No. 61; section 35–44, General Anesthesia in Cataract Surgery, and section 50–38, Endothelial Cell Photography.

CHANGED IMPLEMENTING INSTRUCTONS—EFFECTIVE DATE: Services performed on or after 08/31/92

Section 35–44, General Anesthesia in Cataract Surgery.—This section has been renamed to indicate more clearly its subject matter. The new title is "Use of Visual Tests Prior to and General Anesthesia During Cataract Surgery." Section 50–38, Endothelial Cell Photography.—This section has been revised to include a paragraph that stipulates that endothelial cell photography is subject to the limitation on coverage of visual tests prior to cataract surgery as described in § 35–44.

35–44 Use of Visual Tests Prior to and General Anesthesia During Cataract Surgery

50–38 Endothelial Cell Photography (Effective for Services Rendered on and After August 19, 1983)

Endothelial cell photography involves the use of a specular microscope to determine the endothelial cell count. It is used by ophthalmologists as a predictor of success of ocular surgery or certain other ocular procedures. Endothelial cell photography is a covered procedure under Medicare when reasonable and necessary for patients who meet one or more of the following criteria:

• Have slit lamp evidence of endothelial dystrophy (cornea guttata),

• Have slit lamp evidence of corneal edema (unilateral or bilateral),

• Are about to undergo a secondary intraocular lens implantation,

• Have had previous intraocular surgery and require cataract surgery,

• Are about to undergo a surgical procedure associated with a higher risk to corneal endothelium; i.e., phacoemulsification, or refractive surgery (see § 35–54 for excluded refractive procedures),

• With evidence of posterior polymorphous dystrophy of the cornea or irido-corneal-endothelium syndrome, or

• Are about to be fitted with extended wear contact lenses after intraocular surgery.

When a pre-surgical examination for cataract surgery is performed and the conditions of this section are met, if the only visual problem is cataracts, endothelial cell photography is covered as part of the presurgical comprehensive eye examination or combination brief/intermediate examination provided prior to cataract surgery, and not in addition to it. (See § 35–44.)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance, Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.714, Medical Assistance Program)

Dated: December 29, 1992.

William Toby, Jr.,

Acting Deputy Administrator, Health Care Financing Administration.

[FR Doc. 93–276 Filed 1–6–93; 8:45 am]

BILLING CODE 4120–01–M

National Institutes of Health

National Cancer Institute; Meetings of the Board of Scientific Counselors, Division of Cancer Prevention and Control and its Subcommittees

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors, Division of Cancer Prevention and Control (DCPC), National Cancer Institute, and its Subcommittees on January 7–8, 1993. The full Board will meet in Conference Room 10, 6th Floor, Building 31C, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892. Meetings of the Subcommittees of the Board will be held at the times and places listed below. Except as noted below, the meetings of the Board and its Subcommittees will be open to the public to discuss issues relating to committee business as indicated in the notice. Attendance by the public will be limited to space available.

A portion of the Board meeting will be closed to the public 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, for the critique and evaluation of individual DCPC intramural and extramural programs and projects, including the 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 Committee Management Office, National Cancer Institute, National Institutes of Health, room 10A06, Building 31, 9000 Rockville Pike, Bethesda, Maryland 20892 (301/496–5708), will provide a summary of the meeting and a roster of committee members, upon request.

Other information pertaining to this meeting can be obtained from the Executive Secretary, Linda M. Bremerman, National Cancer Institute, Executive Plaza-North, room 318, National Institutes of Health, Bethesda, Maryland 20892 (301–496–8526), upon request.

Name of Committee: Board of Scientific Counselors, Division of Cancer Prevention and Control.
Executive Secretary: Mrs. Linda M. Bremerman, Building—EP–N, room 318 Bethesda, MD 20892; (301) 496–8526.
Dates of Meeting: January 7–8, 1993.
Place of Meeting: Building 31, Conference Room 10.
Open: January 7—8:30 a.m. to 8:45 a.m.; 10:30 a.m. to 3 p.m.
Agenda: Review progress of programs within the Division and review of concepts being considered for funding.
Closed: January 7—3 p.m. to recess.
Agenda: For review and discussion of individual grant applications.
Open: January 8—8:30 a.m. to approximately 5 p.m.
Agenda: Review progress of programs within the Division and review of concepts being considered for funding.
Name of Committee: Subcommittee on Surveillance.
Executive Secretary: Mrs. Linda M. Bremerman, Building—EP–N, room 318 Bethesda, MD 20892; (301) 496–8526.
Date of Meeting: January 7, 1993.
Place of Meeting: Building 31C, Conference Room 10.
Open: 8:45 a.m. to 10:30 a.m.
Agenda: Discuss current and future programs of the Surveillance Subcommittee and review of concepts being considered for funding.
Name of Committee: Subcommittee on Early Detection and Community Oncology.
Executive Secretary: Mrs. Linda M. Bremerman, Building—EP–N, room 318 Bethesda, MD 20892; (301) 496–8526.
Date of Meeting: January 7, 1993.
Place of Meeting: Building 31C, Conference Room 8.
Open: 8:45 a.m. to 10:30 a.m.
Agenda: Discuss current and future programs of the Early Detection and Community Oncology Subcommittee and review of concepts being considered for funding.
Name of Committee: Subcommittee on Cancer Control Science.
Executive Secretary: Mrs. Linda M. Bremerman, Building—EP–N, room 318 Bethesda, MD 20892; (301) 496–8526.
Date of Meeting: January 7, 1993.
Place of Meeting: Building 31C, Conference Room 9.
Open: 8:45 a.m. to 10:30 a.m.
Agenda: Discuss current and future programs of the Cancer Control Science Subcommittee and review of concepts being considered for funding.
Name of Committee: Subcommittee on Cancer Prevention Research.
Executive Secretary: Mrs. Linda M. Bremerman, Building—EP–N, room 318 Bethesda, MD 20892; (301) 496–8526.
Date of Meeting: January 7, 1993.
Place of Meeting: Building 31C, Conference Room 7.
Open: 8:45 a.m. to 10:30 a.m.
Agenda: Discuss current and future programs of the Cancer Prevention Research Subcommittee and review of concepts being considered for funding.

CATALOG OF FEDERAL DOMESTIC ASSISTANCE PROGRAM NUMBERS: (93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control.)

Dated: December 24, 1992.

Susan K. Feldman,
Committee Management Officer, NIH.

[FR Doc. 93–427 Filed 1–6–93; 8:45 am]

BILLING CODE 4140–01–M

Public Health Service

Office of the Assistant Secretary for Health; Office of Disease Prevention and Health Promotion; Cooperative Agreements to Coordinate Healthy People 2000 Implementation

The Office of Disease Prevention and Health Promotion (ODPHP) announces the availability of funds for Fiscal Year 1993 for cooperative agreements to coordinate implementation of Healthy People 2000: National Health Promotion and Disease Prevention Objectives and related prevention policy initiatives.

ODPHP was established by Pubic Law 94–317, the National Consumer Health Information and Health Promotion Act of 1976, and functions under the provisions of title XVII of the Public Health Services Act, as amended. Located within the Office of the Assistant Secretary for Health, the mission of ODPHP is to provide leadership for prevention policy and program undertaken by the Public Health Service, to coordinate prevention policy and program among Public Health Service agencies, and to undertaken prevention initiatives on behalf of the Assistant Secretary for Health. ODPHP undertakes this mandate through the formulation and management of national health goals and objectives, contained in Healthy People 2000 and through the stimulation of public and private programs and strategies to enhance the health of the Nation through preventive approaches. ODPHP is organized around four areas: Prevention policy, clinical preventive services, nutrition policy, and health communication.

The Public Health Service is committed to achieving the health promotion and disease prevention goals

and objectives of Healthy People 2000, a national activity to reduce morbidity and mortality and improve the quality of life. This program announcement is related specifically to priority areas of Healthy People 2000 on clinical preventive services and nutrition. [Copies of Healthy People 2000 may be ordered from the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (telephone 202–783–3238), stock number 017–001–00474–0].

FY 1993 Priorities

ODPHP uses cooperative agreements with national membership organizations in order to support its mandate to provide leadership to promote health and prevent disease among Americans through management and coordination of the implementation of Healthy People 2000. Through these cooperative agreements, ODPHP has forged public-private partnerships to extend the reach and effectiveness of its work. In Fiscal Year 1993, ODPHP intends to establish, or renew existing, cooperative agreements specifically in the areas of clinical preventive services and nutrition policy. Support for prevention policy and health communication is provided principally through collaborations among Public Health Service lead agencies for the priority areas of Healthy People 2000 (for prevention policy) and contracted services (for health communication).

For clinical preventive services, ODPHP intends to provide financial assistance, up to a total of $400,000 per year, for one or two cooperative agreements. National professional membership organizations wishing to enter into a cooperative agreement with ODPHP to collaborate in carrying out its clinical preventive services efforts must demonstrate their ability to address the following activities:

- Implementation of the Public Health Service's national professional and public education program, entitled "Put Prevention into Practice," by primary health care providers. "Put Prevention into Practice" includes a package of materials for use by clinicians, office practices, and patients related to age- and sex-specific
- Work with the U.S. Preventive Services Task Force to revise the Guide to Clinical Preventive Services, first published in 1989 and due to be released in a second edition in 1994.
- Work with a consortium of societies of teachers of primary health care and preventive medicine to continue the process of selecting and managing the Luther L. Terry Fellowship in Clinical Preventive Services, begun in 1985 and involving the Society for General Internal Medicine, the Ambulatory Pediatrics Association, the Society of Teachers of Family Medicine, and the Association of Teachers of Preventive Medicine.
- Support for preventive medicine residents (and residents in other relevant specialties) to experience residency rotations in a health policy setting as a part of their residency programs.

For nutrition policy, ODPHP intends to provide financial assistance, up to $150,000, for one cooperative agreement. A national professional membership organization wishing to enter into a cooperative agreement with ODPHP to collaborate in carrying out its nutrition policy efforts must demonstrate its ability to address the following activity:

- Serve as a communication forum for development of effective nutrition policy by Federal and non-Federal nutrition scientists, addressing issues such as definition of "healthy" weight, assessment of nutritional status of high-risk populations, translation of nutrition science into dietary guidance that is understandable by the lay public, and provision of leadership to the nutrition professional community in defining new nutrition policy issues and using federally generated nutrition-related research and policy.

Eligibility Requirements

Cooperative agreements awarded to address the ODPHP priorities outlined above are limited to national membership organizations, due to limitations on availability of funds and as a function of the kinds of public-private collaboration which the priorities entail. Requests to Congress for funds for the National Health Promotion Program have specified this limitation of applicant eligibility. ODPHP has a history of facilitating Public Health Service work with national membership organizations to implement national health promotion and disease prevention programs and policies. As representatives of special constituencies, membership organizations are in a unique position to be able to identify realistic, appropriate, and effective strategies for reaching their members or the populations that their members represent.

In order to be eligible to participate in these cooperative agreements, an organization must meet all of the following requirements:

- Be a national, private, nonprofit organization;
- Have a national membership, state/local chapters, and/or otherwise well-defined affiliate structure;
- Demonstrate an understanding of the current and potential role of the membership in health promotion and disease prevention efforts;
- Have in place a variety of communication channels that are appropriate for informing members and other constituents about how to become involved in meeting the objectives of the cooperative agreement; and
- Demonstrate top level support within the organization for the project and, where appropriate, demonstrate similar support from the membership.

For purposes of this announcement, national membership organizations are defined as organizations with individual or institutional members in more than one state and region of the United States. "Members" must voluntarily and expressly associate themselves with the organization as through payment of a membership fee or other declaration of association (i.e. request and receipt of membership card or certificate of membership).

Period of Performance

Contingent on the availability of funds and satisfactory performance, cooperative agreements will be awarded to national membership organizations for a period of four years. Awards will be made for 12-month budget periods. To obtain funding after the initial budget period, continuation applications and approvals will be required for each subsequent 12-month period. Continuation applications will not be subject to competitive review but will be subject to review for satisfactory progress and availability of funds. The award of funds for any budget period is not a legal commitment to award funds in any subsequent budget period.

Terms and Conditions

Federal funds allocated for cooperative agreements are not intended to cover all of the costs that will be incurred in the process of completing the proposed projects. Applicants should demonstrate a commitment of financial or in-kind resources to their support. Organizations participating in the cooperative agreement program may use awarded funds to support salaries of individuals assigned to the project. Award recipients are encouraged to seek additional sources of funds to complement the activities of the proposed project.

ODPHP Involvement

ODPHP will:

• Provide a significant portion of the time of one or two professional staff persons to work with the award recipient on the cooperative agreement and to coordinate its activities with the work of ODPHP.

• Make available the resources of the ODPHP National Health Information Center and other access to Federal information resources, as needed and appropriate.

• Make available technical assistance from other Federal agencies and sources, as needed and appropriate.

• Provide liaison with other Federal agencies, as needed and appropriate.

Application Process

1. All applications must be submitted with a signed copy of PHS Form 5161, with the required information filled in appropriately. The required application form with instructions will be mailed to potential applicants who make telephone requests to Ms. Delores Flenoury at (202) 205–8583 or write to her at ODPHP/PHS, Department of Health and Human Services, Switzer 2132, Washington, DC 20201.

2. All applications must be either received or postmarked on or before 5 p.m. on March 8, 1993. Applications received or postmarked later than 5 p.m. (E.S.T.) on that day will be ineligible. Applications postmarked but not received by March 8, 1993, will be eligible only if they are received in time for orderly process and review.

3. Application packages should be mailed or delivered to: Ms. Delores Flenoury, ODPHP/PHS/DHHS, 2132 Switzer Building, 330 C Street, SW, Washington, DC 20201.

4. Applications must be typed on one side of the page only.

5. The original and two copies of each application, with attachments and documentation, must be submitted.

6. Applications for projects which are national in scope or note required to carry out the provisions of Executive Order 12372.

Application Requirements

Applications must include the following information:

• A description of the organization and its membership and documentation that it meets all the eligibility requirements, with examples of the organization's prior efforts and activities as needed to substantiate its capability to undertake the proposed project.

• A description of how the project will contribute to the Public Health Service's efforts to promote health, prevent disease, and improve the quality of life.

• A detailed delineation of the tasks that will be undertaken in the first budget period and the outcomes expected at the end of that period.

• A detailed budget for the first budget period.

• A brief delineation of the tasks that will be undertaken in each of the remaining budget periods, as appropriate, and how they will contribute toward accomplishing the project's goals and objectives.

• A timetable for each budget period of the project.

• An evaluation plan which will show how the conduct of the project will be assessed on an ongoing basis.

• The background and qualifications of individuals who will manage and staff the project. If the individuals are not now known, provide a list of the qualifications that will be sought.

• If it is anticipated that any individuals or other organizations will be subcontracted in the first budget period, information about the role they will play and their qualifications.

• If organizations are collaborating on a proposal, information about the role each will play, along with complete eligibility information and specification of which will have leadership responsibility for overall project management. One organization should be identified as the lead to receive and manage funds.

Review and Selection Process

Applications will be screened by ODPHP upon receipt to assure that all eligibility requirements have been met. Applications meeting these requirements will be reviewed by a Federal panel of reviewers using the criteria outlined below. The results of the review will be recommended to the Director of ODPHP for FY 1993 cooperative agreement awards. ODPHP intends to make awards between March and July 1993.

Evaluation Criteria

1. Understanding the Project—20

Understanding of the issues and the program priority that the project proposes to address. Clarity, feasibility, and practicality of the objectives of the project and the plan to meet them.

2. Methodology and Approach—30

Soundness, practicality, and feasibility of the technical approach to the work, including how the tasks are to be carried out, anticipated problems and proposed solutions. The potential for the project to make an innovative, significant impact and contribution to health promotion and disease prevention.

Feasibility and appropriateness of the proposed ongoing assessment of project activities.

3. Organizational Capability—25

Commitment of financial or in-kind resources to support the proposed project. Relevant experience of the organization in conducting similar projects. Adequacy of project management to keep project on track and on schedule. Demonstrated capacity for reaching key audiences to project.

4. Project Direction, Management, and Staffing—25

Management plan, advisory and supervisory structure, and qualifications and relevant experience of proposed staff both in the content and execution of proposed project.

Further Information

This Notice contains information collections required from respondents for the subject cooperative agreements.

The information collection is approved under OMB control number 0937–0189.

To request additional copies of this notice or for further clarification, contact: Ms. Delores Flenoury, (202) 205–8583, Switzer 2132, 330 C Street, SW., Washington, DC.

For technical or program assistance, contact James A. Harrell, whose telephone number is (202) 205–8611. For business management questions, contact Ms. Martha Frazier, on (202) 205–8583.

J. Michael McGinnis,

Deputy Assistant Secretary for Health, Director, Office of Disease Prevention and Health Promotion.

[FR Doc. 93–275 Filed 1–6–93; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

[Docket No. N–93–3559; FR–3429–N–01]

Establishment of a Task Force on Occupancy Standards in Public and Assisted Housing

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice of establishment of an Advisory Committee.

SUMMARY: HUD is establishing a Task Force on Occupancy Standards in Federally Assisted Housing as required by section 643 of the Housing and

Community Development Act of 1992 (Pub. L. 102–550), and in accordance with the provisions of the Federal Advisory Committee Act [5 U.S.C. App 2]. The Task Force will review all existing standards, regulations and guidelines governing lease provisions and occupancy and tenant selection policies in public and assisted housing, and make recommendations for revisions of such standards, regulations and guidelines to provide accurate and complete guidance to owners and managers of public and assisted housing as authorized by section 643.

The Task Force will continue to exist for a period of 12 months from the date its charter becomes effective unless the charter is sooner amended or revoked.

DATE: The charter of the Occupancy Standards Task Force will become effective on the date the Secretary of Housing and Urban Development files it with the Senate Committee on Banking, Housing and Urban Affairs, and the House Committee on Banking, Finance and Urban Affairs which are the standing committees of Congress having legislative jurisdiction over the Department.

FOR FURTHER INFORMATION CONTACT: Barbara Capozzola, Committee Management Officer, Telephone (202) 708–3123, room 5168, or Laurence D. Pearl, Telephone (202) 708–3727, (TDD) (202) 708–0113, room 5226, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: Section 643 of the Housing and Community Development Act of 1992 (Pub. L. 102–550) directs the Secretary of HUD to establish a task force to review all rules, policy statements, handbooks, and technical assistance memoranda issued by the Department on the standards and obligations governing residency in public and assisted housing and make recommendations to the Secretary for the establishment of reasonable criteria for occupancy. The charter of the task force is being published with this notice.

The membership of the Task Force will consist of no more than 35 people. Members will include representatives of owners, managers and tenants of federally assisted housing, public housing agencies, owner and tenant advocacy organizations, persons with disabilities and disabled families, organizations assisting homeless individuals, and social service, mental health and other nonprofit service providers who serve federally assisted housing.

The Task Force will continue to exist for a period of 12 months from the date its charter becomes effective as provided in the Federal Advisory Committee Act, unless the charter is amended or revoked sooner. All meetings of the Task Force will be open to the public.

The time, place, and agenda for the first Task Force meeting and for each subsequent meeting, will be published in the **Federal Register** at least 15 days prior to the meeting. At the time the first meeting is announced, the names of the members of the Task Force will be published.

Dated: December 31, 1992.

Gordon H. Mansfield,

Assistant Secretary for Fair Housing and Equal Opportunity.

Charter of the HUD Task Force on Occupancy Standards in Public and Assisted Housing

Section 1. Purpose. The purpose of this document is to establish a Charter for a Task Force on Occupancy Standards in Public and Assisted Housing, as required under the provisions of the Federal Advisory Committee Act (FACA).

Section 2. Authority. The Task Force is established by the Secretary pursuant to section 643 of the Housing and Community Development Act of 1992 (Pub. L. 102–550), and implements the determination of the Secretary of Housing and Urban Development to establish an Advisory Committee in accordance with section 9(a)(1) of the FACA.

Section 3. Objectives, Scope of Activities and Duties. The Task Force will (1) review all existing standards, regulations and guidelines governing occupancy and tenant selection policies, and lease provisions and other rules of occupancy in public and assisted housing; (2) propose criteria for occupancy, standards for reasonable behavior of tenants, compliance standards consistent with reasonable accommodation and other requirements of civil rights laws and procedures for eviction of tenants who fail to comply with the standards; and (3) report to the Secretary and the Congress on its findings and recommendations.

Section 4. Membership. The Task Force will be composed of no more than 35 members, and will include representatives of owners, managers and tenants of federally assisted housing, public housing agencies, owner and tenant advocacy organizations, persons with disabilities and disabled families, organizations assisting homeless individuals, and social service, mental health and other nonprofit service providers who serve federally assisted housing. The members will be selected on the basis of personal experience and expert knowledge.

Section 5. Appointments. The Task Force members will be appointed by the Secretary to serve a term of 12 months from the effective date of the charter. Members will serve at the pleasure of the Secretary.

Section 6. Chair. The Chair will be elected by the Task Force from among its members. The Chair is responsible for:

a. Establishing the informal organization of the Task Force and appointing such subcommittees as may be necessary;

b. Developing, with the advice and consent of the Task Force, procedures for its effective and efficient operation;

c. Ensuring that procedures for public participation in Task Force meetings are established in accordance with the FACA;

d. Taking other actions required to facilitate the discharge of Task Force duties.

Section 7. Task Force Organization. The organization and agenda of the Task Force will be established at its first full meeting. Once established, the organization of the Task Force may be modified as appropriate by the Chair. Any subcommittee appointed by the Chair will be subordinate and advisory to the full Task Force. Subcommittees may meet at such times and places as the subcommittee Chair has approved for the performance of Task Force business. The results of all subcommittee meetings will be reported to the Task Force for its review.

Section 8. Meetings. The Task Force will meet at least twice during its term. The Task Force Chair may call special meetings as needed. The Task Force and any of its subcommittees will convene under the following conditions:

a. A notice of each Task Force or subcommittee meeting will be published in the **Federal Register** at least 15 days in advance of the meeting. Shorter notice is permissible in cases of emergency, but the basis for the declaration of an emergency must be reported in the notice.

b. Detailed minutes of each meeting of the Task Force will be kept, and the accuracy of the minutes will be certified to by the Task Force Chair, submitted to the Secretary of HUD, and filed with the Departmental Committee Management Officer. The minutes will include:

(1) The time and place of the meeting;

(2) A list of Task Force members and staff and department employees present at the meeting;

(3) A complete summary of matters discussed and the conclusions reached;

(4) Copies of all reports received, issued or approved by the Task Force;

(5) A description of the extent to which the meeting was open to the public;

(6) A description of public participation, including a list of members of the public who attended the meeting and a list of those who presented oral or written statements.

c. In accordance with the FACA, an employee designated by the Secretary will attend every meeting of the Task Force. The employee, or his or her designee, must call or approve the calling of each meeting, and is authorized to adjourn any Task Force meeting whenever he or she determines that adjournment is in the public interest.

Section 9. Support Services. The Assistant Secretary for Fair Housing and Equal Opportunity, to the extent permitted by law and subject to the availability of funds, will provide the Task Force with administrative services, funds, facilities, staff and other support necessary for the effective performance of its functions.

Section 10. Estimated Support and Cost. The Department estimates that the operating cost of the Task Force will not exceed $45,000, including staff support costs.

Section 11. Travel and Compensation. Members of the Task Force will serve without compensation, but are entitled to be paid for travel and subsistence in the performance of duties as authorized by 5 U.S.C. 5703(b).

Section 12. Reports. The Task Force will submit a written report to the Secretary, describing its membership, functions and actions before its termination. The Task Force will submit other written reports from time to time to the Secretary and the Congress as required by section 643.

Section 13. Expiration. The Task Force established under this Charter will terminate 12 months after the charter is filed, unless sooner extended.

Dated: December 31, 1992.

Approved:

Frank Keating,

Acting Secretary.

[FR Doc. 93-264 Filed 1-6-93; 8:45 am]

BILLING CODE 4210-29-M

[Docket No. N-93-3558; FR-3428-N-01]

Task Force on Occupancy Standards in Public and Assisted Housing; Meeting

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity.

ACTION: Notice of open meeting.

SUMMARY: The Task Force on Occupancy Standards in Public and Assisted Housing was established on December 31, 1992 in accordance with the provisions of section 643 of the Housing and Community Development Act of 1992 (Pub. L. 102-550), the Task Force's charter and the Federal Advisory Committee Act (FACA). The Task Force was created to review all rules, policy statements, handbooks, and technical assistance memoranda issued by the Department on the standards and obligations governing residency in public and assisted housing and make recommendations to the Secretary for the establishment of reasonable criteria for occupancy. This is a notice announcing the first meeting of the Task Force.

TIME AND PLACE: The Task Force will meet on Friday, January 15, 1993 from 10 a.m. to approximately 3 p.m. The meeting will take place in room 10233 (10th floor) of the Department of HUD Building, 451 Seventh Street, SW., Washington, DC. This is an open meeting. Fifteen days advance notice of this meeting could not be provided because of the necessity to schedule the organizational meeting of the Task Force before the congressionally mandated date for an interim report on the progress of the Task Force (January 28, 1993).

AGENDA: The Task Force will address the following during its initial meeting:

Introduction of Task Force Members and HUD Staff
Overview of Section 643—Background on the Creation of the Task Force
Review of material relating to occupancy and tenant selection
Task Force Methodology
- Study of Materials
- Public Hearings
- Written Comments
- Preliminary and Final Reports

Perspectives of Task Force members
Plans for Next Meeting/Public Hearings
Election of Chair and Vice Chair

PUBLIC PARTICIPATION: The public is invited to submit written comments on any aspect of the Task Force's mandate or activities. The Task Force will plan for subsequent public hearings as required by section 643(a)(5) of the Housing and Community Development Act of 1992.

FOR FURTHER INFORMATION CONTACT: Laurence D. Pearl, Office of Fair Housing and Equal Opportunity, room 5226, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Telephone: (202) 708-3727. (TDD) (202) 708-0113 (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act and section 643(a)(2) of the Housing and Community Development Act of 1992, the Secretary has appointed a balanced and diverse Task Force consisting of representatives of owners, managers and tenants of federally assisted housing, public housing agencies, owner and tenant advocacy organizations, persons with disabilities and disabled families, organizations assisting homeless individuals, and social service, mental health and other nonprofit service providers who serve federally assisted housing.

The Task Force members are:

Charles Achilles, Vice President, Institute of Real Estate Management, Chicago, IL.
Lynn Aronson, Director of Housing, Connecticut Department of Mental Health, Hartford, CT.
John Bohm, Executive Director, National Assisted Housing Management Association, Alexandria, VA.
Conrad Egan, Chairman, Multifamily Housing Management Committee, National Association of Home Builders, Reston, VA.
Diane Engster, Esq., Northern Virginia Alliance for the Mentally Ill, Alexandria, VA.
Mike Finkle, On Our Own, Baltimore, MD.
Joseph Finnegan, Government Affairs Specialist, Walpole, MA.
Kimi Gray, President, Kenilworth-Parkside Resident Management Corporation, Washington, DC.
Jon Gutzman, National Association of Housing and Redevelopment Officials, Washington, DC.
Loretta Hall, Manager, Carr Square Tenant Management Corporation, St. Louis, MO.
Fred Karnas, Jr., Executive Director, National Coalition for the Homeless, Washington, DC.
Thomas L. Kenyon, Executive Director, National Alliance to End Homelessness, Washington, DC.
Ruth Lowenkron, Esq., New York Lawyers in the Public Interest, New York, NY.
Kathy McGinley, The Association for Retarded Citizens, Washington, DC.
Larry McNicol, Director of Housing Policy, American Association of

Homes for the Aging, Washington, DC.
Bonnie Milstein, National Mental Health Law Project, Washington, DC.
Bill Mitchell, National Association of Protection and Advocacy Systems, Washington, DC.
Denise Muha, Executive Director, National Leased Housing Association, Washington, DC.
Gerald Nicely, Public Housing Agencies Directors' Association, Washington, DC.
Debby Pilch, Esq., Disability Law Center, Boston, MA.
Don Redfoot, American Association of Retired Persons (AARP), Washington, DC.
Greg Russ, Advocate for Mixed Housing, Odenton, MD.
MaryAnn Russ, Council of Large Public Housing Agencies, Washington, DC.
Kim Savage, Esq., National Senior Citizens Law Center, Los Angeles, CA.
Susan Silverstein, Esq., Monroe County Legal Assistance, Rochester, NY.
Harry Thomas, Executive Director, Seattle Housing Authority, Seattle WA.
Steve Townsend, National Council of Community Menal Health Centers, Rockville, MD.
Larry Volk, Director of Programs, National Council of State Housing Finance Agencies, Washington, DC.
Ramsey Weit, Esq., Office of Commissioner Polly Casterline, Portland, OR.
Dorinda Wider, Esq., Minneapolis Legal Aid Society, Minneapolis, MN.
Daniel Wuenschel, Executive Director, Cambridge Housing Authority, Cambridge, MA.
Roberta Youmans, National Housing Law Project, Washington, DC.
Mildred Zanditon, Vinfen Corporation, Boston, MA.

Dated: December 31, 1992.

Gordon H. Mansfield,

Assistant Secretary for Fair Housing and Equal Opportunity, United States Department of Housing and Urban Development.

[FR Doc. 93–265 Filed 1–6–93; 8:45 am]

BILLING CODE 4210–28–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–943–4210–05; IDI–17811C]

Order Providing for Opening of Public Land; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of cancellation of classification and opening of public lands.

SUMMARY: This Order revokes the suitable and unsuitable classification for the lands in a desert land application which is considered to have lapsed with the death of the applicant, pursuant to IBLA Order 86–643, dated May 21, 1992. This order opens the lands to the land, mining and mineral leasing laws.

EFFECTIVE DATE: February 8, 1992.

FOR FURTHER INFORMATION CONTACT: Larry L. Lievsay, BLM, Idaho State Office, 3380 Americana Terrace, Boise, Idaho 83706, 208–384–3166.

1. The suitable classification for desert land entry on the following described land is hereby revoked.

Boise Meridian, Idaho

T. 2 N., R. 3 W.,
Sec. 21, E½SW¼NE¼, E½W½SE¼, NE¼NW¼ and NW¼NE¼;
Sec. 28, W½NE¼, NW¼NW¼NW¼, S½NE¼NW¼, S½NE¼NW¼ and E½SE¼NW¼.

2. The unsuitable classification for desert land entry on the following described land is hereby revoked.

Boise Meridian, Idaho

T. 2 N., R. 3 W.,
Sec. 28, N½NE¼NW¼ and NE¼NW¼NW¼.

The area described contains 300 acres in Canyon County.

3. At 9 a.m. on February 8, 1993, the lands described in paragraphs 1 and 2 will be opened to the operation of the 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 February 8, 1993, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

4. At 9 a.m. on February 8, 1993, the lands described in paragraphs 1 and 2 will be opened to location and entry under the United States mining laws and to applications and offers under the mineral leasing 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: December 15, 1992.

Bill R. LaVelle,

Acting State Director.

[FR Doc. 93–253 Filed 1–6–93; 8:45 am]

BILLING CODE 4310–66–M

[MT–930–4210–06; SDM 79849]

Opening of Land in a Proposed Withdrawal; South Dakota

Correction

In notice document 92–29642 appearing on page 58025 in the issue of Tuesday, December 8, 1992, make the following corrections:

1. In the first line, the serial number "MTM 79849" should read "SDM 79849."

2. In the second line of the document heading, "Montana" should read "South Dakota."

Dated: December 28, 1992.

John A. Kwiatkowski,

Deputy State Director, Division of Lands and Renewable Resources.

[FR Doc. 93–259 Filed 1–6–93; 8:45 am]

BILLING CODE 4310–DN–M

National Park Service

General Management Plan; Great Basin National Park; Notice of Availability of Final General Management Plan and Environmental Impact Statement

SUMMARY: In accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, Public Law 91–190, and National Park Service (NPS) planning guidelines, the NPS has prepared a Final General Management Plan/Environmental Impact Statement (GMP/EIS) for Great Basin National Park, established in 1986.

The Draft General Management/Environmental Impact Statement (GMP/EIS) was circulated for public review between October 11 and December 31, 1991 (56 FR 50924). Both the Draft and Final GMP/EIS describe and analyze a proposal and three alternatives, for future management and use of the park. The proposal would provide a diversity of visitor opportunities by expanding interpretation, improving access to and within the park, construction of a new visitor center, adding new camping and trail facilities and moving administrative support facilities outside the park. Alternatives include: (A) Minimal improvements and no relocation of support facilities; (B) maximizing natural resource protection with concentration and restriction of visitor facilities and relocation of

support facilities; and (C) providing more extensive visitor development and accessibility to the park with support facilities remaining in the park.

The 30 day no action period on the Final GMP/EIS will end February 8, 1993. Requests for additional information and/or copies of the Final GMP/EIS should be directed to: Superintendent, Great Basin National Park, Baker NV 89311, telephone number (702) 234–7331.

Copies of the Final GMP/EIS are available at the park headquarters and at the following libraries: Lincoln and White Pine county libraries, NV; Beaver and Millard county libraries, UT; Harold E. Lee Library, Brigham Young University; and Southern Utah University Library. Copies also are available for inspection at the following address: Western Regional Office, National Park Service, Division of Planning, Grants and Environmental Quality, 600 Harrison St., suite 600, San Francisco, CA 94107–1372.

Dated: November 4, 1992.

Lewis Albert,

Acting Regional Director, Western Region.

[FR Doc. 93–309; Filed 1–6–93; 8:45 am]

BILLING CODE 4310–70–M

Chesapeake and Ohio Canal National Historical Park Commission Meeting

Notice is hereby given in accordance with Federal Advisory Committee Act that the meeting that was scheduled for December 12, 1992, and postponed due to inclement weather, has been rescheduled for January 23, 1993, at 10:30 a.m. at J. Paul's Restaurant, 3218 M Street, Georgetown, Washington, DC.

The Commission was established by Public Law 91–664 to meet and consult with the Secretary of the Interior on general policies and specific matters related to the administration and development of the Chesapeake and Ohio Canal National Historical Park.

This will be an orientation meeting for the nine newly appointed Commission members and the ten members who were reappointed. Robert Stanton, Regional Director, National Capital Region, will swear the new commissioners.

The members of the Commission are as follows:

Mrs. Sheila Rabb Weidenfeld, Chairman, Washington, DC
Ms. Diane C. Ellis, Brunswick, Maryland
Brother James T. Kirkpatrick, F.S.C., Cumberland, Maryland
Ms. Anne L. Gormer, Cumberland, Maryland
Ms. Elise B. Heinz, Arlington, Virginia
Mr. George M. Wykoff, Jr., Cumberland, Maryland
Mr. Rockwood H. Foster, Washington, DC
Mr. Barry A. Passett, Washington, DC
Mrs. Jo Reynolds, Potomac, Maryland
Ms. Nancy C. Long, Glen Echo, Maryland
Ms. Mary Elizabeth Woodward, Shepherdstown, West Virginia
Dr. James H. Gilford, Frederick, Maryland
Mr. Edward K. Miller, Hagerstown, Maryland
Mrs. Sue Ann Sullivan, Williamsport, Maryland
Mr. Terry W. Hepburn, Hancock, Maryland
Mr. Laidley E. McCoy, Charleston, West Virginia
Ms. Jo Ann M. Spevacek, Burke, Virginia
Mr. Charles J. Weir, Falls Church, Virginia
Ms. Donna Pope, Alexandria, Virginia

The agenda for this meeting includes discussion of the legislative process that created the C&O Canal Commission by former Commission Chairman, Carrie Johnson; Planning of the Park by John Parsons, Associate Regional Director, National Capital Region; the Role of the Commission, Overview of Park Operations, Update of the Vail Agenda and Superintendent's Report by Superintendent Thomas Hobbs.

The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning the matters to be discussed. Persons wishing further information concerning this meeting, or who wish to submit written statements, may contact Thomas O. Hobbs, Superintendent, C&O Canal National Historical Park, P.O. Box 4, Sharpsburg, Maryland 21782.

Minutes of the meeting will be available for public inspection six (6) weeks after the meeting at Park Headquarters, Sharpsburg, Maryland.

Dated: December 29, 1992.

Robert Stanton,

Regional Director, National Capital Region.

[FR Doc. 93–308 Filed 1–6–93; 8:45 am]

BILLING CODE 4310–70–M

Gettysburg National Military Park Advisory Commission; Meeting

AGENCY: Gettsburg National Military Park Advisory Commission.

ACTION: Notice of Meeting.

SUMMARY: This notice sets forth the date of the sixth meeting of the Gettysburg National Military Park Advisory Commission.

DATE: January 28, 1993.

TIME: 2 p.m.–4 p.m.

INCLEMENT WEATHER RESCHEDULE DATE: None.

ADDRESS: Holiday Inn, 516 Baltimore Street, Gettysburg, Pennsylvania 17325.

AGENDA: Sub-Committee Reports, presentation on Memorial Landscape, update on removal of overhead utility lines in the Park, status of Land Protection Plan, release of the Eisenhower Statement for Management, report on the status of the fast food directional signs on Taneytown Road, and an operational update on the park.

FOR FURTHER INFORMATION CONTACT: Jose A. Cisneros, Superintendent, Gettysburg National Military Park, P.O. Box 1080, Gettysburg, Pennsylvania 17325.

SUPPLEMENTAWRY INFORMATION: The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. The statement should be addressed to the Advisory Commission, Gettysburg National Military Park, P.O. Box 1080, Gettysburg, Pennsylvania 17325. Minutes of the meeting at the permanent headquarters of the Gettysburg National Military Park located at 95 Taneytown Road, Gettysburg, Pennsylvania 17325.

John McKenna,

Acting Regional Director, Mid-Atlantic Region.

[FR Doc. 93–307 Filed 1–6–93; 8:45 am]

BILLING CODE 4310–70–M

Gettysburg National Military Park Advisory Commission; Meeting

AGENCY: Gettysburg National Military Park Advisory Commission.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the date of a special meeting of the Gettysburg National Military Park Advisory Commission.

DATES: January 30, 1993.

TIME: 8:30 a.m.–9:30 a.m.

INCLEMENT WEATHER RESCHEDULE DATE: None.

ADDRESSES: Hotel Gettysburg, Lincoln Square, Gettysburg, Pennsylvania 17325.

AGENDA: Update on Gettysburg National Military Park to the Civil War Sites Advisory Commission.

FOR FURTHER INFORMATION CONTACT: Jose A. Cisneros, Superintendent, Gettysburg National Military Park, P.O. Box 1080, Gettysburg, Pennsylvania 17325.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. The statement should be addressed to the Advisory Commission, Gettysburg National Military Park, P.O. Box 1080, Gettysburg, Pennsylvania 17325. Minutes of the meeting will be available for inspection four weeks after the meeting at the permanent headquarters of the Gettysburg National Military Park located at 95 Taneytown Road, Gettysburg, Pennsylvania 17325.

John McKenna,

Acting Regional Director, Mid-Atlantic Region.

[FR Doc. 93-306 Filed 1-6-93; 8:45 am]

BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32227]

Louisiana & Delta Railroad, Inc.; Trackage Rights Exemption; Southern Pacific Transportation Co.

Southern Pacific Transportation Company (SP) has agreed to grant trackage rights to Louisiana & Delta Railroad, Inc. (LDR) over approximately 3 miles between SP's mileposts 128.0 at New Iberia, LA, and 131.0 west of the Ara Spur, LA. The trackage rights were to become effective on December 30, 1992.

This notice is filed under 49 CFR 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Charles D. Crampton, 700 Midtown Tower, Rochester, NY 14604.

As a condition to the use of this exemption, any employees adversely affected by the trackage rights will be protected under *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Decided: December 31, 1992.

By the Commission, Donald J. Shaw, Acting Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 93-278 Filed 1-6-93; 8:45 am]

BILLING CODE 7035-01-M

MERIT SYSTEM PROTECTION BOARD

Call for Riders for the U.S. Merit Systems Protection Board Report, "A Question of Equity: Women and the Glass Ceiling in the Federal Government"

AGENCY: U.S. Merit Systems Protection Board.

ACTION: Notice of call for riders for the Board's report, "A Question of Equity: Women and the Glass Ceiling in the Federal Government".

SUMMARY: The purpose of this notice is to inform Federal departments and agencies that the U.S. Merit Systems Protection Board's report, "A Question of Equity: Women and the Glass Ceiling in the Federal Government," will be available on a rider basis from the Government Printing Office. Departments and agencies may order this publication by riding the Board's requisition number 3-00106.

DATES: Agency requisitions must be received by the Government Printing Office on or before February 22, 1993.

ADDRESSES: Interested departments and agencies should send requisitions from their headquarter offices authorized to procure printing to the Government Printing Office, Requisition Section, room C-836, Washington, DC 20401.

FOR FURTHER INFORMATION CONTACT: Annette Johnson, Office of Policy and Evaluation, U.S. Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419, 202-254-8014.

SUPPLEMENTARY INFORMATION: This report examines the reasons that so few women are in top-level positions in the Civil Service. The Board finds that the underrepresentation of women in senior career positions and, particularly, the slower promotion rates in GS-9 through GS-12 ranks are only partially explained by such factors as education, experience, and mobility. The report discusses these barriers and offers recommendations for ways to achieve greater equity for women.

In making this report available, the Board intends to provide useful information on this issue to Federal managers as they consider ways to effectively manage Federal employees.

The Board is unable to fill large volume orders from agencies for this publication; therefore, agencies are urged to take advantage of this opportunity to order copies directly from the Government Printing Office. Because of budgetary constraints, the Board is uncertain when and if there will be another reprinting of this publication in the current fiscal year. This requisition is for reprinting the first edition of the report, dated October 1992.

Dated: January 4, 1993.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 93-289 Filed 1-6-93; 8:45 am]

BILLING CODE 7400-01-M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration, Office of Records Administration.

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Records schedules identify records of sufficient value to warrant preservation in the National Archives of the United States. Schedules also authorize agencies after a specified period to dispose of records lacking administrative, legal, research, or other value. Notice is published for records schedules that (1) propose the destruction of records not previously authorized for disposal, or (2) reduce the retention period for records already authorized for disposal. NARA invites public comments on such schedules, as required by 44 U.S.C. 3303a(a).

DATES: Request for copies must be received in writing on or before February 22, 1993. Once the appraisal of the records is completed, NARA will send a copy of the schedule. The requester will be given 30 days to submit comments.

ADDRESSES: Address requests for single copies of schedules identified in this notice to the Records Appraisal and Disposition Division (NIR), National Archives and Records Administration, Washington, DC 20408. Requesters must cite the control number assigned to each schedule when requesting a copy. The control number appears in the parentheses immediately after the name of the requesting agency.

SUPPLEMENTARY INFORMATION: Each year, U.S. Government agencies create billions of records on paper, film, magnetic tape, and other media. In order to control this accumulation, agency records managers prepare records

schedules specifying when the agency no longer needs the records and what happens to the records after this period. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. These comprehensive schedules provide for the eventual transfer to the National Archives of historically valuable records and authorize the disposal of all other records. Most schedules, however, cover records of only one office or program or a few series of records, and many are updates of previously approved schedules. Such schedules also may include records that are designated for permanent retention.

Destruction of records requires the approval of the Archivist of the United States. This approval is granted after a thorough study of the records that takes into account their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and historical or other value.

This public notice identifies the Federal agencies and their subdivisions requesting disposition authority, includes the control number assigned to each schedule, and briefly describes the records proposed for disposal. The records schedule contains additional information about the records and their disposition. Further information about the disposition process will be furnished to each requester.

Schedules Pending

1. Department of the Air Force (N1-AFU-93-4). Environmental Training Records.
2. Department of the Air Force (N1-AFU-93-5). Depot Maintenance Records.
3. Department of the Army (N1-AU-93-2). Medical Malpractice Records.
4. Department of Commerce, Office of Environmental Affairs (N1-40-92-4). Environmental Impact Statements and other environmental records.
5. Department of Commerce, International Trade Administration (N1-151-92-8). Canadian lumber export notices.
6. Defense Investigative Service (N1-446-92-2). Routine and facilitative records relating to recurring reports, leave slips and port security.
7. Defense Investigative Service (N1-446-92-3). Export license forms received from Department of State.
8. Defense Logistics Agency (N1-361-93-1). Publications background files from field activities.
9. Defense Logistics Agency (N1-361-93-2). Flight operations records.
10. Department of Health and Human Services, Indian Health Service (N1-513-92-5). General program and administrative records.
11. Federal Bureau of Investigation (N1-65-93-1). Sound recordings which are duplicative, lack historical value, or exhibit poor quality.
12. Department of State, All Foreign Service Posts (N1-84-93-1). Personnel folders of uncompensated non-Americans.
13. Department of State, All Foreign Service Posts (N1-84-93-2). Cash receipts and records of fees.
14. Department of State, All Foreign Service Posts (N1-84-93-3). Legal inquiries.
15. Department of State, All Foreign Service Posts (N1-84-93-4). American citizens services precedent case files.
16. Office of Thrift Supervision (N1-483-92-9). Records relating to data processing and management information systems.
17. Panama Canal Commission (N1-185-92-2). Routine civilian personnel records.
18. Panama Canal Commission (N1-185-92-3). Police and Convict Records.
19. White House Conference on Library and Information Science (N1-220-92-2). Facilitative and housekeeping records.

Dated: December 23, 1992.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 93-260 Filed 1-6-93; 8:45 am]

BILLING CODE 7515-01-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Agency Information Collection Under OMB Review

AGENCY: National Endowment for the Humanities, NFAH.

ACTION: Notice.

SUMMARY: The National Endowment for the Humanities (NEH) has sent to the Office of Management and Budget (OMB) the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Comments on this information collection must be submitted on or before February 8, 1993.

ADDRESSES: Send comments to Ms. Susan Daisey, Assistant Director, Grants Office, National Endowment for the Humanities, 1100 Pennsylvania Avenue, NW., room 310, Washington, DC 20506 (202-606-8494) and Mr. Steve Semenuk, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., room 3002, Washington, DC 20503 (202-395-6880).

FOR FURTHER INFORMATION CONTACT: Ms. Susan Daisey, Assistant Director, Grants Office, National Endowment for the Humanities, 1100 Pennsylvania Avenue, NW., room 310, Washington, DC 20506 (202) 606-8494 from whom copies of forms and supporting documents are available.

SUPPLEMENTARY INFORMATION: All of the entries are grouped into new forms, revisions, extensions, or reinstatements. Each entry is issued by NEH and contains the following information: (1) the title of the form; (2) the agency form number, if applicable; (3) how often the form must be filled out; (4) who will be required or asked to report; (5) what the form will be used for; (6) an estimate of the number of responses; (7) the frequency of response; (8) an estimate of the total number of hours needed to fill out the form; (9) an estimate of the total annual reporting and recordkeeping burden. None of these entries are subject to 44 U.S.C. 3504(h).

Category: Revisions

Title: Guidelines and Application Forms for the Division of Preservation and Access
Form Number: Not Applicable
Frequency of Collection: Semi-annual
Respondents: Humanities researchers and institutions
Use: Application for funding
Estimated Number of Respondents: 250
Frequency of Response: Once
Estimated Hours for Respondents to Provide Information: 40 per respondent
Estimated Total Annual Reporting and Recordkeeping Burden: 12,500 hours

Thomas S. Kingston,

Assistant Chairman for Operations.

[FR Doc. 93-281 Filed 1-6-93; 8:45 am]

BILLING CODE 7536-01-M

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Mathematical Sciences; Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting.

Date and Time: January 25-26, 1993 9 a.m.-5 p.m.

Place: National Science Foundation, 1800 'G' Street, NW., room 1243, Washington, DC 20550.

Type of Meeting: Closed.

Contact Person: Alvin Thaler, Program Director, Division of Mathematical Sciences, Room 339, National Science Foundation, 1800 G St. NW., Washington, DC 20550. Telephone: (202) 357-3691.

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate Grants for Scientific Computing Research Environments of the Mathematical Sciences proposals as part of the selection process for 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 exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: January 4, 1993.

Modestine Rogers,

Acting Committee Management Officer.

[FR Doc. 93–310 Filed 1–6–93; 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 (NRC).

ACTION: Notice of the OMB review of information collection.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35).

1. Type of submission, new, revision or extension: Revision.

2. The title of the information collection: Proposed Rule, "10 CFR Part 110: Requirements for the Specific Licensing of Exports of Certain Alpha-Emitting Radionuclides and Byproduct Material".

3. The form number if applicable: NRC Form 7.

4. How often the collection is required: On occasion.

5. Who will be required or asked to report: Some exporters of bulk tritium, americium-242m, californium-249, californium-251, curium-245, curium-247 and certain alpha-emitting radionuclides.

6. An estimate of the number of reporting responses annually: 9.

7. An estimate of the total number of hours annually needed to complete the requirement or request: 28. 22 hours of reporting burden is estimated (an average of 2.4 hours per response) and 6 hours of recordkeeping burden is estimated.

8. An indication of whether section 3504(h), Public Law 96–511 applies: Applicable.

9. Abstract: 10 CFR part 110 provides application, reporting, and recordkeeping requirements for exports and imports of nuclear equipment and material. The proposed revision would require that specific licenses be obtained for certain exports of byproduct materials and some alpha-emitting radionuclides.

Copies of the submittal may be inspected or obtained for a fee from the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC 20555.

Comments and questions may be directed by mail to the OMB reviewer: Ronald Minsk, Office of Information and Regulatory Affairs (3150–0036 and 3150–0027), NEOB–3019, 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 23rd day of December 1992.

For the Nuclear Regulatory Commission.

Gerald F. Cranford,

Designated Senior Official for Information Resources Management.

[FR Doc. 93–267 Filed 1–6–93; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–31673; File No. SR–DTC–92–16]

Self-Regulatory Organizations; The Depository Trust Company; Order Approving Proposed Rule Change Relating to the Deposit of Nontransferable Securities

December 30, 1992.

On October 14, 1992, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR–DTC–92–16) pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change will establish procedures that will enable DTC to provide expanded safekeeping and depository services for nontransferable securities. The Commission published notice of the proposed rule change in the **Federal Register** on November 18, 1992.[2] No comments were received. For the reasons discussed below, the Commission is approving the proposed rule change.

I. Description

The proposed rule change will establish procedures for the deposit of nontransferable securities at DTC. Securities may become nontransferable for a number of reasons, including the bankruptcy or insolvency of the issuer, the failure to pay fees to a transfer agent, a final or complete liquidation of the issuer, the filing of a certificate of dissolution, the placement of the issuer in receivership, or the revocation of the issuer's charter. Currently, nontransferable securities are eligible for limited clearing and depository services.

A. Background

In prior years, when a depository eligible security became nontransferable, depositories declared the security "ineligible" and distributed certificates to participants to the extent properly denominated certificates were available. When such certificates were unavailable, remaining participant positions were "frozen" in some fashion within the depositories to prevent further processing activities. This presented a variety of problems. Because no clearing or book-entry services were available, settlement could occur only by physical delivery or by a cumbersome process which debited a delivering participant and credited a receiving participant within the depository. In this environment, failed deliveries occurred regularly and remained outstanding as the result of trading and account transfer activity. Participants were burdened with the expense of safekeeping certificates exited by the depositories and monitoring the ongoing transferability status of the securities. Participants forced to assume these responsibilities individually developed procedures and practices to address this burden.

Over the past two years, depositories and clearing corporations have ameliorated this situation somewhat. Instead of declaring a security "ineligible," securities can now be designated as "inactive." This designation permits a more flexible determination of the specific types of services to be provided. Most depositories and clearing corporations now act to restrict continuous-net-settlement, deposit, withdrawal, and transfer activity for nontransferable securities, while permitting book-entry deliveries. This action has stopped the outflow of nontransferable securities from the depositories and permitted the settlement of fails to the extent a

[1] 15 U.S.C. 78(b)(1).

[2] Securities Exchange Act Release No. 31439 (November 12, 1992), 57 FR 54432.

deliverer has a sufficient position within the depository at the time a security is designated inactive. Participants must continue, however, to safekeep certificates exited by depositories in prior years, in addition to safekeeping those securities registered in customer or firm name that the depositories will not currently accept as deposits, because they cannot be registered in the name of the depositories' nominees.

DTC currently has two ongoing programs for the deposit of nontransferable securities. The first is for the redeposit of nontransferable securities registered in DTC's nominee name, Cede & Co., and was introduced primarily to allow participants to make book-entry deliveries of these redeposited securities. The second allows participants to cover short positions, and permits deposits of securities registered in Cede & Co., customer, or street name. The procedures, forms, and loss allocation method of the proposed rule change, as described below, will replace those in the two ongoing programs and permit participants to deposit all DTC-eligible nontransferable securities at DTC, regardless of purpose, and allow them to make book-entry deliveries to one another where deliveries of physical certificates may not be possible.

B. Deposit Procedures

When DTC announces to participants that an issue is "nontransferable," DTC will change the transfer agent number on DTC's records, which may be viewed by participants via DTC's Participant Terminal System, to reflect the fact that the issue is nontransferable. Participants will then be permitted to deposit their DTC-eligible nontransferable securities by adhering to several procedures. Specifically, participants will be asked to:

(1) Send to their Participant Services representative a copy of the Blanket Indemnification executed by an authorized officer. Procedures set forth in the Indemnification will, among other things, require the participant to verify with the Securities Information Center ("SIC") that the certificate has not been reported to SIC as lost, stolen, missing, or counterfeit;

(2) Use a Legal deposit ticket clearly marked "N/T." No more than ten certificates may be included in each individual deposit. Participants will also be asked not to commingle different types of registrations on a single deposit ticket (*i.e.*, all nominee-name and street-name registrations will be deposited under separate tickets); and

(3) Check the certificates for assignment to Cede & Co., New York State tax waiver, endorsements, and other requirements, and provide the appropriate signature guarantees.

C. Procedures for Sharing of Loss Related to Deposit of Nontransferable Securities

Under the proposed rule change, DTC has developed a loss allocation method in the event that a certificate that represents a nontransferable security is deposited at DTC and later, most likely after the reinstatement of transfer services and presentation of the certificate for transfer, is found to be stolen, counterfeit, or otherwise defective. If the depositing/indemnifying participant is still in business or if DTC is holding the participant's Participants Fund deposit in an amount sufficient to cover the loss, DTC will first seek to charge the participant or its deposit. In the event, however, in which at the time that DTC becomes aware of the loss: (1) The depositing participant has transferred the underlying securities by book-entry; (2) the participant does not itself cover the loss because it is not in business or for some other reason; and (3) the participant's deposit to the Participants Fund is insufficient to cover the loss, then the loss will be allocated as follows.[3]

The loss will be shared *pro rata* among all participants that have a position in such issue on the date that DTC determines that the certificate is defective, excluding participants' positions, however, to the extent that positions existed on the day that DTC first announced to participants that the issue was "nontransferable."[4] For example, if a participant already held a position of 1,000 shares in an issue at the time that the issue was identified by DTC as being nontransferable and then acquires 500 additional shares later, any proportionate loss calculation would be only against the additional 500 shares and not against the 1,500 share total position. DTC will first seek to charge the participant's Participants Fund deposit in an amount sufficient to cover the loss. If the deposit will not cover the total amount of the loss, DTC will then charge the participant directly for the remaining amount. In the event, however, that the loss allocation method as described above does not cover the total amount of the loss related to the deposit of the nontransferable securities, DTC will then charge the loss in accordance with its current loss allocation scheme.[5]

II. Discussion

The Commission believes that DTC's proposed rule change is consistent with section 17A of the Act and specifically, with sections 17A(b)(3) (A) and (F) thereunder.[6] Sections 17A(b)(3) (A) and (F) of the Act require that a clearing agency be organized and its rules be designed to enable it to facilitate the prompt and accurate clearance and settlement of securities transactions and to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible. In addition, section 17A(a)(1) encourages the adoption of efficient and effective procedures for the clearance and settlement of securities transactions.

The Commission believes that DTC's proposal will reduce the costs and inefficiencies associated with the clearance and settlement of nontransferable securities by bringing the benefits of centralized, automated book-entry clearance and settlement to nontransferable issues. At the present time, there are approximately 4,200 DTC-eligible nontransferable issues at DTC.[7] As a result of the proposed rule, which would enable participants to deposit these nontransferable issues at DTC, participants will be able to reduce their physical vault inventory, which will in turn allow them to reduce processing expense, audit time and interest expense that results from outstanding fails to deliver. This will eventually allow participants to

[3] Assuming that book-entry transfers have been made, it would not be feasible for DTC to trace the transfers and attribute the security positions represents by the defective certificate to particular participants. According to DTC, in order to trace the transfers, DTC would have to keep records relating to these transactions indefinitely. At the present time, DTC retains records for a period not longer than 10 years. In the absence of a procedure to allocate losses, therefore, any such loss would be shared by all participants. Telephone conversation between Jack R. Wiener, Associate Counsel, DTC, and Ari Burstein, Law Clerk, Commission (October 26, 1992).

[4] To assure that the effect of this proposal is prospective, this procedure applies to issues that become "non-transferable" at DTC subsequent to the Commission's approval of this procedure. In the event that the issue is already "non-transferable" as of the date of the Commission's approval order, DTC will instead exclude participants' positions to the extent that positions existed on the date of the approval order.

[5] Conversation between Richard Nesson, General Counsel and Senior Vice President, DTC, and Ari Burstein, Law Clerk, Commission (November 9, 1992).

For further details see Rules of The Depository Trust Company, Rule 4 (Participants Fund).

[6] 15 U.S.C. 78q–1(b)(3) (A) and (F).

[7] Telephone conversation between Jack R. Wiener, Associate Counsel, DTC, and Ronald Burns, Vice President, Operations, DTC, and Ari Burstein, Law Clerk, Commission (October 26, 1992).

minimize their total overhead by reducing staff and insurance costs.

The proposed procedure is also consistent with industry efforts toward greater immobilization of securities certificates and with industry efforts to maximize efficiency in securities processing. The proposal, therefore, is consistent with the requirement of section 17A(b)(3)(F) of the Act requiring that the rules of a clearing agency be designed to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

DTC received ten comment letters from participants regarding the proposed rule change.[8] Six of the letters were in favor of the program as proposed by DTC to accept nontransferable securities and stated interest in participating in the program when it was approved.[9] One letter stated that there was no need for the proposed rule change in light of the two programs that DTC currently has in place for the deposit of transferable securities.[10] The remaining three letters had no objection to the rule change as proposed by DTC but instead provided several suggestions, as discussed below, relating to potential improvements to the nontransferable securities program.[11]

Two commenters expressed concern about the process by which DTC will notify participants of a security's nontransferable status.[12] These participants stated that because their current systems are completely automated, it would not be possible to extract the nontransferable issues from the regular daily transmissions of securities. These participants suggested that a special coding system be implemented to allow their automated systems to differentiate between a legal deposit and a regular deposit, which in turn will prevent their automated systems from becoming more manual in nature.

DTC stated that they are currently exploring the feasibility of implementing the suggested special coding system.[13] Under the proposed rule, once DTC announces that an issue is nontransferable, DTC will change the transfer agent number on DTC's records to "2400," which is a special transfer agent number assigned to nontransferable securities. Participants can then determine which issues are nontransferable by keying in the security's CUSIP number over DTC's Participant Terminal System and examining the transfer agent number assigned to the issue by DTC.

The Commission believes that the proposed system for notifying participants of the nontransferable status of an issue is consistent with the requirement of section 17A(b)(3)(F) of the Act that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions. The Commission, however, encourages DTC to explore ways, including the suggested special coding system, to allow participants to process nontransferable deposits in the same manner as those currently employed for other DTC deposits.

Two other participants expressed concerns to DTC regarding the proposed loss allocation scheme.[14] The participants urged that the loss allocation procedure was inequitable and will unjustly penalize a participant for merely having a position in a security in which losses will result from deposits made by other participants. They suggested that DTC set up a reserve which would be funded by a portion of the nontransferable deposit fee, against which future losses could be allocated. In the absence of a reserve, the participants suggested that the loss be allocated among all participants in the nontransferable securities program, instead of merely against the participants in the particular nontransferable issue.

Under the proposed loss allocation procedure for the nontransferable securities program, DTC will first seek to charge the depositing/indemnifying participant for an amount sufficient to cover the loss. DTC will not charge the loss to participants that have positions in the nontransferable issue unless the depositing participant cannot cover the loss. Moreover, as described above, DTC will not allocate the loss to participants whose positions in a nontransferable issue predate the nontransferable status. Given these conditions and in the absence of identified losses to date, the Commission believes DTC's decision not to establish a specific reserve by raising or allocating nontransferable deposit fees is consistent with sections 17A(b)(3) (D) and (F) of the Act which require that the rules of the clearing agency provide for the equitable allocation of reasonable dues, fees and other charges among its participants and that the rules of the clearing agency are not designed to permit unfair discrimination among participants in the use of the clearing agency.

Commenters also expressed concern about the amount of the deposit fee that DTC is proposing to charge per deposit. One participant stated that because the securities are nontransferable, there should not be any transfer costs associated with the deposit except for expenses which are storage related. The participants claimed that the cost of the deposit fee is therefore excessive for the amount of service required.[15] DTC explained that since all of the deposits must be fully examined and indemnifications verified by DTC, it is necessary to charge the full service legal examination fee per deposit.

The deposit fee to be charged under the proposed nontransferable securities program is identical to that charged for other similar DTC services. In addition, the fee is needed to cover the additional safeguards DTC is required to implement under the proposed rule. Accordingly, the Commission believes that the amount of the deposit fee is consistent with the requirements of section 17A(b)(3)(D) of the Act which requires that the rules of the clearing agency provide for the equitable allocation of reasonable dues, fees and other charges among its participants.

The restrictions on the number of certificates that can be deposited per deposit ticket and the requirement that

[8] See letter from Louis Chiaccheri, Vice President, The Bank of New York, to Ronald Burns, Vice President, DTC (September 18, 1992); letter from Jan Fenty, President, Cashiers' Association of Wall Street, Inc., to Val Stevens, Director, DTC (September 25, 1992); letter from Linda M. Rushlow, Vice President, Chase Lincoln First Bank, N.A., to Gerry Marotta, Participant Services Representative, DTC (September 29, 1992); letter from John Bertuzzi, Vice President, Dean Witter Reynolds Inc., to Ronald Burns, Vice President, DTC (September 17, 1992); letter from Philip Fox, Associate Vice President, A.G. Edwards & Sons, Inc., to Ronald Burns, Vice President, DTC (September 16, 1992); letter from Claude Schmook, Assistant Vice President, The First National Bank of Chicago, to Tony Gazzola, DTC (October 1, 1992); letter from Frank Delia, Vice President, Kidder Peabody & Co., to Everett Smith, Participant Services Representative, DTC (September 30, 1992); letter from Albert Howell, Vice President, Merrill Lynch, to Valentine Stevens, Director, DTC (September 29, 1992); letter from Maureen G. Tomshack, Vice President, NBD Bank, N.A., to Michael Miklas, Senior Securities Officer, DTC (October 1, 1992); and letter from Joe Ricca, Vice President, Pershing, to Valentine Stevens, Director, DTC (October 1, 1992).

[9] See supra, note 8, letters from Cashiers' Association of Wall street; Chase Lincoln First Bank; Kidder, Peabody; Merrill Lynch; NBD Bank; and Pershing.

[10] See supra, note 8, letter from First National Bank of Chicago.

[11] See supra, note 8, letters from The Bank of New York, Dean Witter Reynolds; and A.G. Edwards & Sons.

[12] See supra, note 8, letters from Dean Witter Reynolds and the Bank of New York.

[13] Telephone conversation between Jack R. Wiener, Associate Counsel, DTC, and Ron Burns, Vice President, Operations, DTC, and Ari Burstein, Law Clerk, Commission (October 26, 1992).

[14] See *supra*, note 8, letters from A.G. Edwards & Sons and The First National Bank of Chicago.

[15] See *supra*, note 8, A.G. Edwards & Sons letter.

registrations cannot be commingled was addressed in two comment letters from participants.[16] The participants stated that the restrictions can result in costly deposit fees and asked DTC to eliminate the restrictions to minimize costs. DTC believes that the restrictions are necessary to minimize the problems associated with the manual balancing of those deposits and to help safeguard the nontransferable program in general. In addition to the restrictions on the amount of certificates that can be deposited, other safeguards implemented by DTC include the requirement that participants, through the procedures set forth in the Blanket Indemnification, verify with the Securities Information Center ("SIC") that the certificate has not been reported as lost, stolen, missing, or counterfeit. Participants will also be asked to check the certificates for proper assignment, endorsements, and other requirements, and provide the appropriate signature guarantees.

The Commission believes that the safeguards and controls DTC has established under the nontransferable securities program are reasonable and that the proposal is consistent with the requirements of sections 17A (b)(3)(A) and (b)(3)(F) of the Act in that it promotes the prompt and accurate clearance and settlement of securities transactions and assures the safeguarding of funds and securities which are in DTC's custody or control or for which it is responsible.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the Act, and in particular with section 17A of the Act, and with the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[17] that the proposed rule change (File No. SR–DTC–92–16) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–292 Filed 1–6–93; 8:45 am]

BILLING CODE 8010–01–M

[16] See *supra*, note 8, letters from The Bank of New York and A.G. Edwards & Sons.

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

[Release No. 34–31674; File No. SR–MSTC–92–07]

Self-Regulatory Organizations; Midwest Securities Trust Company; Order Approving Proposed Rule Change Relating to the Deposit of Nontransferable Securities

December 30, 1992.

On August 19, 1992, the Midwest Securities Trust Company ("MSTC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR–MSTC–92–07) pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change will establish procedures that will enable MSTC to provide safekeeping and limited depository services for nontransferable securities.[2] The Commission published notice of the proposed rule change in the **Federal Register** on October 14, 1992.[3] The Commission received one comment letter supporting the proposal.[4] For the reasons discussed below, the Commission is approving the proposed rule change.

I. Description

The proposed rule change will establish procedures for the safekeeping and limited depository services of nontransferable securities at MSTC. Securities may become nontransferable for a number of reasons, including the bankruptcy or insolvency of the issuer, failure to pay fees to a transfer agent, a final or complete liquidation of the issuer, the filing of a certificate of dissolution, placement of the issuer in receivership, or revocation of the issuer's charter. Currently, nontransferable securities are eligible for limited clearing and depository services.

A. Background

In prior years, when a depository eligible security became nontransferable, depositories declared the security "ineligible" and distributed certificates to participants to the extent properly denominated certificates were available. When such certificates were unavailable, remaining participant positions were "frozen" in some fashion within the depositories to prevent further processing activities. This presented a variety of problems. Because no clearing or book-entry services were available, settlement could occur only by physical delivery or via a cumbersome process which debited a delivering participant and credited a receiving participant within the depository. In this environment, failed deliveries occurred regulatory and remained outstanding as the result of trading and account transfer activity. Participants were burdened with the expense of safekeeping certificates exited by the depositories and monitoring the ongoing transferability status of the securities. Participants forced to assume these responsibilities individually developed procedures and practices to address this burden.

Over the past two years, depositories and clearing corporations have ameliorated this situation somewhat. Instead of declaring a security "ineligible," securities can now be designated as "inactive." This designation permits more flexible determination of the specific types of services to be provided. Most depositories and clearing corporations now act to restrict continuous-net-settlement, deposit, withdrawal, and transfer activity for nontransferable securities, while permitting book-entry deliveries. This action has stopped the outflow of nontransferable securities from the depositories and permitted the settlement of fails to the extent a deliverer has a sufficient position within the depository at the time a security is designated inactive. Participants must continue, however, to safekeep certificates exited by depositories in prior years, in addition to safekeeping those securities registered in customer or firm name that the depositories will not currently accept as deposits, because they cannot be registered in the name of the depositories' nominees.

The problem of adequately monitoring nontransferable securities to identify a change in transferable status is also of concern to participants. Because of tax considerations, it is often necessary for participants to verify whether a nontransferable security is worthless. Moreover, verification is important because it will allow participants to strike the position from their records. Under current procedures, it is extremely time consuming and cumbersome for participants to verify that a security is nontransferable and to ascertain whether the security has, to the best of anyone's knowledge, been declared worthless. As each participant

[1] 15 U.S.C. 78(b)(1).

[2] On December 10, 1992, MSTC amended the proposed rule change by providing the indemnification agreement to be signed by participants in the nontransferable securities program. Letter from George T. Simon, Foley & Lardner, MSTC, to Ester Saverson, Jr., Branch Chief, Division of Market Regulation, Commission (December 10, 1992).

[3] Securities Exchange Act Release No. 31290 (October 6, 1992), 57 FR 47148.

[4] See letter from Albert Howell, Vice President, Merrill Lynch, to the Commission (June 1, 1992).

is verifying and validating nontransferable securities independently, enormous amounts of time, money, and resources are wasted. In response to these concerns, MSTC has developed a method of providing safekeeping and limited depository services for nontransferable securities.

B. Deposit Procedures

The proposed rule change, in conjunction with the implementation of new procedures, will allow nontransferable securities to be deposited in MSTC either through physical delivery or by book-entry. In the case of physical deliveries, MSTC will physically inspect the security to verify that no notorials[5] are attached to the security and that the appropriate NASD Ownership Transfer Indemnification Stamp is properly executed.[6] At the time of delivery, participants will provide a warranty and indemnification to MSTC to protect MSTC against the possibility that a defect in any documentation or ownership rights causes MSTC a financial loss in the event the security becomes transferable in the future but the transfer agent rejects the specific certificates held by MSTC.[7] Specifically, each participant will warrant that there are no defects in title in a security delivered to or deposited with MSTC, that they have inquired of the Securities Information Center ("SIC") regarding the particular security and that, as of the date of the deposit with MSTC, the security has not been reported to the SIC as lost, stolen, missing or counterfeit. In addition to physical deposits, all incoming interdepository book-entry movements of the nontransferable securities will be permitted. Once deposited, MSTC will make sure that the security has a CUSIP number and if not, MSTC will obtain one for the security.[8]

Under new procedures, MSTC will revalidate the continuing nontransferable status of each issue on a simi-annual basis and provide participants with the last date of revalidation, thereby reducing the cost that participants currently incur in monitoring the status of each nontransferable issue. In addition, MSTC will promptly restore an issue to full eligibility status for normal depository processing once it again becomes transferable, so long as it meets the current eligibility requirements for normal depository processing. Finally, at the time of regained transferability, MSTC will forward all prior participant deposits to the transfer agent for re-registration into the name of the depository's nominee. Rejected transfers would be reclaimed to the original depositing participant in accordance with MSTC's current reclamation procedures.

C. Procedures for Sharing of Loss Related to Deposit of Nontransferable Securities

Under the proposed rule change, in the event that a certificate that represents a nontransferable security is deposited at MSTC and later, most likely after the reinstatement of transfer services and presentation of the certificate for transfer, is found to be stolen, counterfeit, or otherwise defective, MSTC will initially seek to charge the depositing participant for the amount of the loss. In the event, however, that the depositing participant is no longer in business or for some other reason cannot cover the loss, the loss will then be charged to the individual who has signed the NASD indemnification accompanying the certificate, assuming they are also not the depositing participant.

If the loss allocation method as described above still does not cover the total amount of the loss related to the deposit of the nontransferable securities, MSTC will then charge the loss in accordance with MSTC's standard loss provision rules.[9]

II. Discussion

The Commission believes that MSTC's proposed rule change is consistent with section 17A of the Act and, specifically, with section 17A(b)(3)(A) and (F) thereunder.[10] Sections 17A(b)(3)(A) and (F) of the Act require that a clearing agency be organized and its rules be designed to enable it to facilitate the prompt and accurate clearance and settlement of securities transactions and to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible. In addition, section 17A(a)(1) encourages the adoption of efficient and effective procedures for the clearance and settlement of securities transactions.

The Commission believes that MSTC's proposal will reduce the costs and inefficiencies associated with the clearance and settlement of nontransferable securities by bringing the benefits of centralized, automated book-entry clearance and settlement to nontransferable issues. At the present time, there are approximately 1,500 nontransferable issues at MSTC.[11] As a result of the proposed rule, which would enable the participants to deposit these nontransferable issues at MSTC, participants will be able to reduce their physical vault inventory, which will in turn allow them to reduce processing expense, audit time and interest expense that results from outstanding fails to deliver. This, in turn, will eventually allow participants to minimize their total overhead by reducing staff and insurance costs.

The proposed procedure also promotes industry efforts to immobilize securities certificates and to maximize efficiency in securities processing. Under the new procedures, MSTC will provide participants with uniform information regarding the status of nontransferable issues through a central database of information. This will eliminate the need for each participant to individually determine the status of an issue and will reduce the time and cost currently incurred by individual monitoring. The change, therefore, is consistent with section 17A(b)(3)(F) in that it removes impediments to and perfects the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

MSTC has established several safeguards under the nontransferable securities program to minimize the risk of loss in the event that a certificate is found to have a defect in title or is reported as lost, stolen, missing or

[5] A "notorial" is a legal form which is used to validate a signature when a security ceases to be active.

[6] The NASD Ownership Transfer Indemnification Stamp acknowledges that the transfer books for a specific stock issue have been closed and indemnifies future parties holding the certificate against claims on the security.

[7] See supra, note 2, amendment to proposed rule change providing the indemnification agreement to be signed by participants in the nontransferable securities program.

[8] Telephone conversation between George T. Simon, Attorney, Foley & Lardner, MSTC, and Jonathan Kallman, Associate Director, Division of Market Regulation, Commission (December 28, 1992).

[9] Letter from George T. Simon, Foley & Lardner, MSTC, to Ari Burstein, Law Clerk, Commission (December 1, 1992).

For further details, see Rules of the Midwest Securities Trust Company, Article VI, Rule 2 (Participants Fund).

Today, the Commission is also approving a proposed rule change by The Depository Trust Company ("DTC") concerning safekeeping and depository services for nontransferable securities. See Securities Exchange Act Release No. 31673 (December 30, 1992). MSTC and DTC have proposed different procedures for the sharing of losses resulting from the deposit of nontransferable securities. The Commission believes that nothing in the Act explicitly requires uniform loss allocation schemes, as long as each such scheme is consistent with the Act.

[10] 15 U.S.C. 78q-1(b)(3)(A) and (F).

[11] Telephone conversation between David Rusoff, Attorney, Foley & Lardner, MSTC, and Ari Burstein, Law Clerk, Commission (November 16, 1992).

counterfeit. As previously discussed, in the case of physical deliveries, MSTC will physically inspect the security to verify that no notorials are attached to the security and that the appropriate NASD stamp is properly executed. In addition, each participant will warrant that there are no defects in title in a security delivered to or deposited with MSTC, that they have inquired of SIC regarding the particular security and that, as of the date of the deposit with MSTC, the security has not been reported to the SIC as lost, stolen, missing or counterfeit. Accordingly, the Commission believes that the safeguards and controls MSTC has established under the nontransferable securities program are reasonable and that the proposal is consistent with the requirements of sections 17A(b)(3)(A) and (F) of the Act in that it promotes the prompt and accurate clearance and settlement of securities transactions and assures the safeguarding of funds and securities which are in MSTC's custody or control or for which it is responsible.

MSTC received three comment letters from participants regarding the proposed rule change.[12] All of the letters were in favor of the program to accept nontransferable securities as proposed by MSTC. In addition, the Commission received one letter from a participant expressing support for the proposed rule change.[13]

One comment letter expressed concern that the deposit charge for nontransferable securities will be prohibitive and will discourage brokers from using the depository.[14] MSTC has stated that the higher deposit charge is necessary to cover the additional cost of manually checking and examining each nontransferable securities deposit. The Commission believes that the amount of the deposit charge is consistent with the requirements of section 17A(b)(3)(D) of the Act, which requires that the rules of the clearing agency provide for the equitable allocation of reasonable dues, fees and other charges among its participants, because the higher deposit charge will be allocated to processing the nontransferable securities deposits.

[12] See letter from Francis X. Hughes, Senior Vice President, United States Trust Company of New York, to Lou Klobuchar, Jr., Senior Vice President, MSTC (June 8, 1992); letter from Jan Fenty, President, The Cashiers' Association of Wall Street, to Lou Klobuchar, Jr., Senior Vice President, MSTC (June 12, 1992); and letter from Robert J. Petrizzo, Director, New York Operations, Charles Schwab & Co., Inc. to Lou Klobuchar, Jr., Senior Vice President, MSTC (June 15, 1992).

[13] See letter from Albert Howell, Vice President, Merrill Lynch, to the Commission (June 1, 1992).

[14] See supra, note 12, Cashiers' Association of Wall Street letter.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the Act, and in particular with section 17A of the Act, and with the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[15] that the proposed rule change (File No. SR–MSTC–92–07) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–293 Filed 1–6–93; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–31675; File No. SR–MSTC–92–09]

Self-Regulatory Organizations; Midwest Securities Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Adoption of Fees for the Nontransferable Securities Program

December 30, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on December 3, 1992, the Midwest Securities Trust Company ("MSTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (File No. SR–MSTC–92–09) as described in Items I, II and III below, which Items have been prepared primarily by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

MSTC has amended its rules to provide for the deposit, safekeeping and monitoring of nontransferable securities.[2] The proposed rule change sets forth the fees (*see Exhibit A*) to be charged under the nontransferable securities program.

[15] 15 U.S.C. 78s(b)(2).

[16] 17 C.F.R. 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] For further details concerning the nontransferable securities program, see Securities Exchange Act Release No. 31674 (December 30, 1992).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to establish fees for the deposit, safekeeping and monitoring of nontransferable securities in connection with MSTC's nontransferable securities program. Under the proposal, MSTC will charge a deposit fee of $3.70 per deposit with a maximum of ten certificates permissible per deposit. MSTC also will charge a safekeeping fee per CUSIP per month. There are two types of safekeeping fees that will be charged under the proposed rule change. Every nontransferable CUSIP will be charged a "Position Fee" of $0.45 per CUSIP per month. In addition, where applicable, a "less active issue surcharge" will be imposed. If eight participants or less hold a position in a particular equity or corporate issue, a surcharge of $0.22 will be charged per CUSIP per month in addition to the Position Fee. If two participants or less hold a position in a particular municipal issue, a surcharge of $0.72 will be charged per CUSIP per month in addition to the Position Fee.[3]

MSTC also will divide nontransferable securities into monitored and nonmonitored classifications. For those securities that will be monitored, participants will have the option of subscribing to a service for a charge of $0.32 per CUSIP per month which will provide them with an on line inquiry of major events occurring with respect to that security, listed in chronological order. Other fees, where applicable, will be charged at existing rates.

[3] The "less active issue surcharge" is identical to the fee charged for transferable securities that are deemed "less active." Telephone conversation between David Rusoff, Attorney, Foley & Lardner, MSTC and Ari Burstein, Staff Attorney, Commission (December 11, 1992).

MSTC believes that the proposed rule change is consistent with the requirements of section 17A(b)(3)(D) of the Act, and the rules and regulations thereunder, which requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees and other charges among its participants.

(B) Self-Regulatory Organization's Statement on Burden on Competition

MSTC does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

MSTC has not solicited written comments with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b–4 thereunder, because the proposed rule change establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. At any time within 60 days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of MSTC. All submissions should refer to the File No. SR–MSTC–92–09 and should be submitted by January 28, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

EXHIBIT A.—NONTRANSFERABLE FEES

Activity	Fee
Deposits [1]	$3.70
Safekeeping (per CUSIP/per month)	.....
Position Fee	.45
Less Active Issue Surcharges	.....
Less Active Equity or Corporate	.....
Issue Surcharge	[2] .22
Less Active Municipal Issue Surcharge	[3] .72
Optional On Line Monitoring [4] (per CUSIP/per month)	.32
Street withdrawals (COD's), Depository Delivery Instructions (DO's), and other fees, where applicable, are at existing rates.	

[1] Maximum of ten certificates permissible per deposit.
[2] Less active, in this context, is defined as 8 or less participants holding a position in the CUSIP. This fee is in addition to the Position Fee.
[3] Less active, in this context, is defined as 2 or less participants holding a position in the CUSIP. This fee is in addition to the Position Fee.
[4] MSTC will divide securities into monitored and nonmonitored classifications. For those securities that will be monitored, participants will have the option of subscribing to a service providing them with an on line inquiry of major events occurring with respect to that security, listed in chronological order.

[FR Doc. 93–294 Filed 1–6–93; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–31677; File No. SR–NASD–92–59]

Self-Regulatory Organizations; Notice and Order Granting Accelerated Approval of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to an Interim Extension of the OTC Bulletin Board Service through March 31, 1993

December 31, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 21, 1992, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and simultaneously approving the proposal.

[4] 17 C.F.R. 200.30–3(a)(12).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On June 1, 1990, the NASD initiated operation of the OTC Bulletin Board Service ("OTCBB Service" or "Service") in accord with the Commission's approval of File No. SR–NASD–88–19, as amended.[1] The OTCBB Service provides a real-time quotation medium that NASD member firms can elect to use to enter, update, and retrieve quotation information (including unpriced indications of interest) for securities traded over-the-counter that are neither included in the Nasdaq System nor listed on a registered national securities exchange (collectively referred to as "unlisted securities"). Essentially, the Service supports NASD members' market making in unlisted securities through authorized Nasdaq Workstation™ units. Real-time access to quotation information captured in the Service is available to subscribers of Level 2/3 Nasdaq service as well as subscribers of vendor-sponsored services that now include OTCBB Service data. The Service is currently operating under an interim approval that expires on December 31, 1992.[2]

The NASD hereby files this proposed rule change, pursuant to section 19(b)(1) of the Act and Rule 19b–4 thereunder, to obtain authorization for an interim extension of the Service through March 31, 1993. During this interval, there will be no material change in the OTCBB Service's operational features.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

[1] Securities Exchange Act Release No. 27975 (May 1, 1990), 55 FR 19124 (May 8, 1990).

[2] Securities Exchange Act Release No. 31264 (September 30, 1992), 57 FR 46215 (October 7, 1992).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this filing is to ensure continuity in the operation of the OTCBB Service while the Commission considers an earlier NASD rule filing (File No. SR–NASD–92–7) that requested permanent approval of the Service. For the month of October 1992, the service reflected 12,130 market making positions based on 304 NASD member firms displaying quotations/indications of interest in 4,074 unlisted securities.[3]

During the proposed extension, foreign securities and American Depositary Receipts (collectively, "foreign/ADR issues") will remain subject to the twice-daily, update limitation that traces back to the Commission's original approval of the OTCBB Service's operation. As a result, all priced bids/offers displayed in the Service for foreign/ADR issues will remain indicative.

In conjunction with the start of the Service in 1990, the NASD implemented a filing requirement (under Section 4 of Schedule H to the NASD By-Laws) and review procedures to verify member firms' compliance with Rule 15c2–11 under the Act. During the proposed extension, this review process will continue to be an important component of the NASD's self-regulatory oversight of broker-dealers' market making in unlisted securities. The NASD also expects to work closely with the Commission staff in developing further enhancements to the Service to fulfill the market structure requirements mandated by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Reform Act"), particularly section 17B of the Act.[4] The NASD notes that implementation of the Reform Act entails Commission rulemaking in several areas, including the development of mechanisms for gathering and disseminating reliable quotation/transaction information for "penny stocks."

The NASD believes that this proposed rule change is consistent with sections 11A(a)(1), 15A(b) (6) and (11), and section 17B of the Act as the statutory basis for the instant rule change proposal. Section 11A(a)(1) sets forth the Congressional findings and policy goals respecting operational enhancements to the securities markets. Basically, the Congress found that new data processing and communications techniques should be applied to improve the efficiency of market operations, broaden the distribution of market information, and foster competition among market participants. Section 15A(b)(6) requires, *inter alia*, that the NASD's rules promote just and equitable principles of trade, facilitate securities transactions, and protect public investors. Subsection (11) thereunder authorizes the NASD to adopt rules governing the form and content of quotations for securities traded over-the-counter for the purposes of producing fair and informative quotations, preventing misleading quotations, and promoting orderly procedures for collecting and disseminating quotations. Finally, section 17B contains Congressional findings and directives respecting the collection and distribution of quotation information on low-priced equity securities that are neither Nasdaq nor exchange-listed.

The NASD believes that extension of the Service through March 31, 1993 is fully consistent with the foregoing provisions of the Act.

B. Self-Regulatory Organization's Statement on the Burden on Competition

The NASD does not believe any burden will be placed on competition as a result of this filing.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The NASD requests that the Commission find good cause, pursuant to section 19(b)(2) of the Act, for approving the proposed rule change prior to the 30th day after its publication in the **Federal Register** to avoid any interruption of the Service. The current authorization for the Service extends through December 31, 1992. Hence, it is imperative that the Commission approve the instant filing on or before that date. Otherwise, the NASD will be required to suspend operation of the Service pending Commission action on the proposed extension.

The NASD believes that accelerated approval is appropriate to ensure continuity in the Service's operation pending a determination on permanent status for the Service, as requested in File No. SR–NASD–92–7. Continued operation of the Service will ensure the availability of an electronic quotation medium to support member firms' market making in approximately 4,100 unlisted equity securities and the widespread dissemination of quotation information on these securities. The Service's operation also expedites price discovery and facilitates the execution of customer orders at the best available price. From a regulatory standpoint, the NASD's capture of quotation data from participating market makers supplements the price and volume data reported by member firms pursuant to Section 2 of Schedule H to the NASD By-Laws.

The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publishing notice of the filing thereof. Accelerated approval of the NASD's proposal is appropriate to ensure continuity in the Service's operation as an electronic quotation medium that supports NASD members' market making in these securities and that facilitates price discovery and the execution of customer orders at the best available price. Additionally, continued operation of the Service will materially assist the NASD's surveillance of trading in unlisted securities that are eligible and quoted in the Service.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by January 28, 1993.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act, that the

[3] These are average daily figures calculated for the entire month.

[4] On November 24, 1992, the NASD filed an application with the Commission for interim designation of the Service as an automated quotation system pursuant to section 17B(b) of the Act.

proposed rule change be, and hereby is, approved for a three month period, inclusive of March 31, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–295 Filed 1–6–93; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–31672; File No. SR–PHLX–92–4]

Self-Regulatory Organizations; Order Granting Temporary Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., To Amend Certain Rules to Facilitate the Trading of NASDAQ/NMS Securities on the PHLX

December 30, 1992.

On February 26, 1992, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change is designed to facilitate the trading of NASDAQ/National Market System ("NMS") securities on the PHLX pursuant to unlisted trading privileges ("UTP") or the listing of those securities on the PHLX. Notice of the proposed rule change appeared in the **Federal Register** on August 12, 1992.[2] The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change on a temporary basis through December 31, 1993.

I. Description of the Proposed Rule Change

On June 26, 1990, the Commission approved a transaction reporting plan submitted by the National Association of Securities Dealers, Inc. ("NASD"), the American Stock Exchange ("Amex"), the Boston Stock Exchange ("BSE"), the Midwest Stock Exchange ("MSE"), and the PHLX.[3] The Joint Industry Plan ("Plan") governs the collection, consolidation, and dissemination of quotation and transaction information for NASDAQ/NMS securities listed on an exchange or traded on an exchange pursuant to a grant of UTP.[4] The PHLX represented to the Commission that it has complied with the requirements and standards of the Plan, enabling the PHLX to trade NASDAQ/NMS securities pursuant to UTP.[5] The purpose of the proposed rule change is to accommodate the trading of NASDAQ/NMS securities on the PHLX pursuant to the grant of UTP or the listing of those securities on the PHLX.

The proposed rule change makes several amendments to the PHLX rules conforming the rules to the granting of UTP. These changes were described in the notice of proposed rule change,[6] and are restated below.

The proposed rule change adds Rule 233, to enable the trading of NASDAQ/NMS securities pursuant to the listing of those securities or the granting of UTP. The proposed rule change also amends existing PHLX rules to accommodate the trading of NASDAQ/NMS securities on a UTP basis:

Rule 102: Specifies that all NASDAQ/NMS securities transactions must be conducted during the applicable Exchange floor hours.

Rule 104: Provides authority for appropriate members to trade NASDAQ/NMS securities with non-floor persons under rule 233.

Rule 105: Declares that NASDAQ/NMS quotations displayed by competing markets shall have no standing in the trading crowds on the floor under the PHLX recognized quotation rule.

Rule 132: Exempts NASDAQ/NMS securities from off-board trading restrictions.

Supplementary Material .01: Includes language requiring that in the event of unusual market conditions, as determined by the Floor Procedure Committee, quotations in a given issue will not be subject to firmness provided that the Exchange also notifies the processor for NASDAQ/NMS securities.

Rule 216: Requires that every specialist trading NASDAQ/NMS securities keep records in accordance with the Commission and Exchange recordkeeping rules.

Rule 225: Incorporates provisional language for dealing with odd-lot orders in NASDAQ/NMS securities.

Rule 226: Incorporates provisional language for dealing with round-lot orders in NASDAQ/NMS securities.

Rule 229: Enables specialists trading in NASDAQ/NMS securities to receive orders over the Philadelphia Stock Exchange Automated Communication and Execution System ("PACE"), but provides that such orders will not be subject to automatic parameters set forth by the PACE rule.

Rule 455: Exempts NASDAQ/NMS securities from the short-sale rule.[7]

Rule 606: Enables telephone access to the PHLX assigned specialist for any NASDAQ system market maker.

II. Discussion

Section 12(f)(2) of the Act granted the Commission explicit authority to approve UTP in over-the-counter ("OTC") securities. Section 12(f)(2) requires the Commission, prior to approving UTP, to determine that the granting of UTP is consistent with the maintenance of fair and orderly markets and the protection of investors. The Commission believes that the proposed rule change is consistent with these goals and thus, the Commission is approving the proposed rule change on a temporary basis subject to the PHLX complying with the requirements of the Plan.

In 1985, the Commission published its policy to extend UTP to national securities exchanges in certain OTC securities provided certain terms and conditions are satisfied.[8] The

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[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 30984 (July 31, 1992), 57 FR 36114.

The PHLX initially filed the proposed rule change for immediate effectiveness, pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b–4 thereunder. On March 13, 1992, the PHLX amended the rule change by withdrawing its request for immediate effectiveness and agreed to abide by the procedure specified in section 19(b)(2) of the Act. See letter to Christine A. Sakach, Branch Chief, National Market System Branch, Division of Market Regulation ("Division"), Commission from Michele R. Weisbaum, Assistant General Counsel, PHLX dated March 13, 1992.

On March 24, 1992, the PHLX amended the proposed rule change to clarify the exemption to the PHLX's short sale rule, Rule 455. The amended proposed rule change adopts language based on the Commission's short sale rule, Rule 10a–1. See letter to Christine A. Sakach, Branch Chief, National Market System Branch, Division, Commission, from William W. Uchimoto, General Counsel, PHLX, dated March 24, 1992.

On June 30, 1992, the PHLX submitted a request for accelerated approval of the proposed rule change. See letter to Elizabeth MacGregor, Branch Chief, National Market System Branch, Division, Commission, from William W. Uchimoto, General Counsel, PHLX, dated June 30, 1992.

[3] Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917.

[4] The Plan also superseded an interim transaction reporting plan filed by the NASD and the MSE and approved by the Commission on April 29, 1987. See Securities Exchange Act Release No. 24407 (April 29, 1987), 52 FR 17349.

[5] See letter to Kathryn Natale, Assistant Director, Division, Commission, from William Uchimoto, General Counsel, PHLX, dated June 18, 1992.

[6] See Securities Exchange Act Release No. 30984 (July 31, 1992), 57 FR 36114.

[7] See SR–NASD–92–12 (April 9, 1992), the NASD's proposed rule change to limit short sales of NASDAQ/NMS securities. Securities Exchange Act Release No. 31003 (August 6, 1992), 57 FR 36421.

The PHLX has filed a comment letter with the Commission in connection with the NASD's proposed short sale rule (File No. SR–NASD–92–12), expressing opposition to the proposal. Among other things, the PHLX asserted that the NASD's proposed short sale rule would not be effective and would result in unequal regulation between NASD market makers and exchange option market makers in NASDAQ/NMS securities. The PHLX represented, however, that if the Commission approves the NASD's proposed short sale rule, the PHLX would cooperate in good faith to create comparable short sale regulations applicable to exchange trading in NASDAQ/NMS securities pursuant to Commission approval of OTC/UTP. See letter to Anthony R. Bosch, Attorney, Division, Commission, from William W. Uchimoto, General Counsel, PHLX, dated December 11, 1992.

[8] Securities Exchange Act Release No. 22412 (September 16, 1985), 50 FR 38640.

Commission's policy stated that UTP approval would be conditioned, in part, on the approval of a plan to consolidate and disseminate exchange and OTC quotation data and transaction data upon which UTP is granted.[9] As noted above, the Commission approved a Plan to provide for the collection, consolidation, and dissemination of quotation and transaction information for NASDAQ/NMS securities listed on an exchange or traded on an exchange pursuant to a grant of UTP.[10] Securities approved for UTP on the PHLX pursuant to section 12(f)(1)(C) will be reported in the consolidated transaction reporting system established under the Plan.[11]

In approving the Plan, the Commission noted that the Plan should enhance market efficiency and fair competition, avoid investor confusion, and facilitate regulatory surveillance of concurrent exchange and OTC trading. The Commission believes that the proposed rule change will further promote these goals and the development of a National Market System.

The Commission reasserts the obligation of the UTP participants to evaluate the effect of OTC/UTP trading on the OTC market. The UTP participants should evaluate the quality of execution of customer orders and whether the Plan facilitates the goals of a National Market System. The UTP participants also should develop an intermarket trading linkage and an accompanying trade-through rule.

Recently, the PHLX filed a separate proposed rule change to prevent the potential abuse of the informational advantage that options traders could acquire from the equity floor.[12] The Commission is approving the instant proposed rule change for one year, through December 31, 1993, while it monitors the side-by-side trading concerns.

Approval of the proposed rule change also is limited to providing the PHLX authority to submit applications for securities for OTC/UTP in 100 NASDAQ/NMS securities. The PHLX must submit OTC/UTP applications to the Commission for specific securities for approval pursuant to section 12(f) of the Act. In considering an application for extension of UTP to an OTC security under section 12(f)(1)(C), the Commission is required to consider, among other matters, the public trading activity in the security, the character of that trading, the impact of an extension of UTP on the existing markets for the security, and the desirability of removing impediments to and the progress that has been made toward the development of a National Market System.

III. Conclusion

For the reasons stated above, the Commission believes that it would be appropriate, pursuant to sections 11A and 12 of the Act and under the terms of the Plan, for the PHLX to trade NASDAQ/NMS securities pursuant to UTP, assuming those securities otherwise meet the requirements of OTC/UTP.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act, that the proposed rule change be, and hereby is, approved, on a temporary basis through December 31, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–296 Filed 1–6–93; 8:45 am]

BILLING CODE 8010–01–M

[9] The Commission determined that an intermarket trading linkage, accompanied by a trade-through rule, was not necessary during the initial stages of trading of OTC/UTP securities. The Commission, however, encouraged the NASD and exchanges to develop through their own initiatives an intermarket trading linkage and a trade-through rule. The Commission also noted that despite a formal linkage the Plan participants are subject to fiduciary obligations to seek best execution of customer orders and to the requirements of the firm quote rule, Rule 11Ac1–1. *Id.*

[10] See note 3.

[11] As noted above, the PHLX represented to the Commission that it has complied with its requirements under the Plan. *See supra* note 5. The Commission emphasizes the PHLX specialists trading NASDAQ/NMS securities pursuant to the grant of UTP will be subject to Plan requirements as well as PHLX By-Laws and Rules. For example, PHLX specialists will be required to display limit orders that better the market. PHLX Rules, Rule 118. This requirement is similar to the requirement imposed on MSE specialists under MSE rules.

[12] See Securities Exchange Act Release No. 31453 (November 11, 1992), 57 FR 54884.

[Investment Company Act Rel. No. 19201; 812–8178]

The Munder Funds, Inc., et al.; Notice of Application

December 31, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("Act").

APPLICANTS: The Munder Funds, Inc., (the "Fund") and Ascher/Decision Services, Inc. (the "Distributor").

RELEVANT ACT SECTIONS: Exemption requested pursuant to section 6(c) from the provisions of sections 2(a)(32), 2(a)(35), 22(c), and 22(d) and rule 22c–1.

SUMMARY OF APPLICATION: Applicants seek an order that would permit them to impose a contingent deferred sales charge ("CDSC") on the redemption of certain shares and to waive the CDSC in certain specified instances.

FILING DATE: The application was filed on November 20, 1992 and amended on December 29, 1992.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 25, 1993, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, 777 South Figueroa, 38th Floor, Los Angeles, California 90017.

FOR FURTHER INFORMATION CONTACT: James E. Anderson, Staff Attorney, at (202) 272–7027, or C. David Messman, Branch Chief, at (202) 272–3018 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. The Fund, a Maryland corporation, is an open-end management investment company registered under the Act. Munder Capital Management, Inc. serves as investment adviser to the Fund. Distribution services for the Fund are presently provided by the Distributor.

2. Initially the Fund intends to offer one class of shares in The Munder Multi-Seasons Growth Fund (the "Portfolio"). The Fund intends to seek regulatory authority to issue one or more additional classes of shares of the Portfolio. Applicants seek an order that would permit the Fund, and any existing or future open-end investment company which is or may become a member of the Munder "group of investment companies" as that term is

defined in rule 11a–3 under the Act and which employs a CDSC under the same terms and conditions as those described in this application, to impose a CDSC on certain redemptions of shares.

3. Under the proposed CDSC arrangement, the amount of the CDSC will depend on the number of years since the purchase of the shares being redeemed. The amount of the CDSC will range from 5% for redemptions made during the first year after purchase to 1% for redemptions made in the sixth year after purchase. No CDSC will be charged on shares of a Portfolio purchased prior to the date that an order is issued pursuant to this application.

4. No CDSC will be imposed on shares representing capital appreciation or purchased with reinvested income dividends or capital gains distributions. In determining the applicability and rate of any CDSC, it will be assumed that a redemption is made first of shares representing capital appreciation, next of shares representing payment of dividends, and finally of other shares held by the shareholder for the longest period of time. As a result, any charge will be imposed at the lowest possible rate. The applicants will not impose a CDSC on shares issued prior to receipt of the requested relief.

5. Applicants request the ability to waive the CDSC in the case of redemptions in connection with: (a) Redemptions by investors who have invested $1 million or more in the Portfolio; (b) redemptions by the officers, directors, and employees of Munder Capital Management, Inc. or the Distributor and such persons' immediate families; (c) dealers or brokers who have a sales agreement with the Distributor, for their own accounts, or for retirement plans for their employees or sold to registered representatives or full-time employees (and their families) that certify to the Distributor at the time of purchase that such purchase is for their own account (or for the benefit of their families); and (d) involuntary redemptions effected pursuant to the Portfolio's right to liquidate shareholder accounts having an aggregate net asset value of less than $500.

6. The applicants propose to provide a *pro rata* credit for any CDSC paid in connection with a redemption of shares followed by a reinvestment effected within 90 days of the redemption. The credit will allow investors who erroneously redeemed or otherwise had second thoughts about having redeemed their shares to reinvest the proceeds plus the amount of any CDSC paid. The credit will be paid for by the Distributor.

Applicants' Legal Conclusion

Applicants believe that implementation of the CDSC in the manner and under the circumstances described above would be fair and in the best interests of the shareholders of the Fund. Thus the granting of the requested order would be appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Consequently, applicants request an order of the Commission pursuant to section 6(c) of the Act for an exemption from the provisions of sections 2(a)(32), 2(a)(35), 22(c), and 22(d) of the Act and rule 22c-1 thereunder to the extent necessary to permit the proposed CDSC arrangement.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

Applicants will comply with the provisions of proposed rule 6c-10 under the Act, Investment Company Act Release No. 16619 (Nov. 2, 1988), as such rule is currently proposed, and as it may be reproposed, adopted, or amended.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–297 Filed 1–6–93; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–19202; 811–4877]

Titan Institutional Investments, Inc.; Notice of Application

December 31, 1992.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Titan Institutional Investments, Inc.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on January 28, 1992 and amended on November 27, 1992.

HEARING OR NOTIFICIATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. and January 25, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, 31 West 52nd Street, New York, NY 10019.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272–3026, or Nancy M. Rappa, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end diversified investment company that was organized as a corporation under the laws of Maryland. On October 20, 1986, applicant filed a notification of registration pursuant to section 8(a) of the Act. Applicant has not filed any registration statement pursuant to the Securities Act of 1933.

2. On September 4, 1991, applicant's board of directors approved a plan of complete liquidation and dissolution and recommended it be approved by shareholders. At a meeting held on September 19, 1991, applicant's shareholders approved the liquidation.

3. A notice of liquidating distribution was mailed by on July 31, 1992 to applicant's shareholders of record and a notice of liquidating distribution was published in The New York Times on August 13, August 20, and August 27, 1992. Such notices indicated that shareholders of record of applicant had until October 31, 1992 to prove their interests in assets of applicant to be distributed.

4. On November 20, 1992, applicant made a liquidating distribution to its shareholders in an amount equal to $3,884, representing a net asset value of $20.90 per share for each of the 185.862 shares outstanding.

5. There were seven shareholders whose whereabouts applicant could not ascertain after diligent efforts, to whom checks were mailed in complete liquidation of their interests at their respective addresses of record. Those

checks that are returned unclaimed will be held by Investors Bank and Trust Company, applicant's transfer and dividend disbursing agent, and will remain there during the applicable escheatment period.

6. Applicant incurred approximately $172,525 in liquidation-related expenses, consisting primarily of legal, accounting, and transfer agent fees.

7. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

8. On July 20, 1992, articles of dissolution were filed and approved by the State Department of Assessments and Taxation of Maryland.

9. Applicant is not now engaged, nor does it purpose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–298 Filed 1–6–93; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 101

Administration; Delegation of Authority, Branch Claims Review Committee

AGENCY: Small Business Administration.

ACTION: Notice Delegating Authority to Establish a Branch Claims Review Committee.

SUMMARY: This notice delegates authority to certain specific Small Business Administration (SBA) branch offices to establish a Branch Claims Review Committee. The authority to constitute a claims review committee in the enumerated branch offices is based upon the education, training, and experience of such office's personnel as well as its staffing level and loan volume.

EFFECTIVE DATE: This notice is effective January 7, 1993.

FOR FURTHER INFORMATION CONTACT: Earl L. Chambers; Director, Office of Portfolio Management; U.S. Small Business Administration; 409 Third Street, SW.; Washington, DC 20416; Tel. (202) 205–6481.

SUPPLEMENTARY INFORMATION: Elsewhere in today's **Federal Register**, SBA is publishing a final rule amending Section 101.3-2 of part 101, title 13, Code of Federal Regulations, to set forth a standard delegation of authority to SBA branch offices for the establishment of a Branch Claims Review Committee. However, this regulation states that Branch Claims Review Committees will not be organized in each SBA Branch Office. Rather, the rule provides that, in order to create a Branch Claims Review Committee in a particular SBA Branch Office, a notice must be published in the **Federal Register** specifically designating such office. This system ensures that only those SBA Branch offices with sufficient staff and portfolio volume have the authority to undertake compromise activities.

The Agency believes that, when appropriate, delegating increased levels of authority to field office personnel yields increased benefits for program participants and SBA. SBA claims review committees are established for the purpose of determining the action SBA will take with respect to debts owed the Agency. Specifically, the various claims review committees have authority, at differing amounts depending upon their organizational level, to reach settlement on primary obligations or other evidence of an indebtedness owed the SBA for an amount less than the total amount due thereon. It is essential that the Agency have qualified field personnel process expeditiously and accurately the matters submitted to the various claims review committees. Only certain designated Agency branch offices are authorized to establish Branch Claims Review Committees in light of its personnel and the large size of its portfolio. This system allows for loan debt and compromise cases being processed by the office servicing the account. In this fashion, the borrower is provided quicker and more accurate claims processing, while the Agency is benefited by maximizing its recovery on defaulted loans.

This notice delegates authority to specific SBA branch offices to constitute a Branch Claims Review Committee. The SBA branch offices in Sacramento, California; Springfield, Illinois; and Milwaukee, Wisconsin have sufficient loan volume and personnel. Thus, these offices are delegated authority to establish a Branch Claims Review Committee pursuant to the authority set forth at paragraph (a) of part V of 13 CFR 101.3-2.

This delegation of authority to establish a Branch Claims Review Committee is contingent upon the above named branch offices maintaining their current level of loan approval authority.

Dated: December 28, 1992.

Charles R. Hertzberg,

Assistant Administrator for Financial Assistance.

[FR Doc. 93–16 Filed 1–6–93; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF STATE

Bureau of Oceans and International Environmental and Scientific Affairs

[Public Notice 1750]

Conservation Measures for Antarctic Fishing Under the Auspices of the Commission for the Conservation of Antarctic Marine Living Resources

AGENCY: Bureau of Oceans and International Environmental and Scientific Affairs, State.

ACTION: Notice.

SUMMARY: At its Eleventh Annual Meeting in Hobart, Tasmania, October 26 to November 6, 1992, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), of which the United States is a member, adopted the conservation measures and the resolution listed below, pending countries' approval, pertaining to fishing in the CCAMLR Convention Area in Antarctic waters. These were agreed upon in accordance with article IX, paragraph 6(A) of the Convention for the Conservation of Antarctic Marine Living Resources. The measures restrict overall catches of certain species of fish, prohibit the taking of certain species of fish, list the fishing seasons, and define reporting requirements.

DATES: Persons wishing to comment on the measures or desiring more information should submit written comments within 30 days of the publication of this notice in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Ray Arnaudo, Chief, Division of Polar Affairs, Office of Oceans Affairs (OES/OA), room 5801, Department of State, Washington, DC 20520, (202) 647–3262.

SUPPLEMENTARY INFORMATION: Conservation Measures Adopted at the Eleventh Annual Meeting of CCAMLR.

At its Eleventh Annual Meeting in Hobart, Tasmania, October 26 to November 6, 1992, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) adopted the following conservation measures and one resolution. The conservation measures addressing catch limitations

were adopted in accordance with Conservation measure 7/V and therefore enter into force immediately.

Conservation Measures Adopted This Year

Conservation Measure 44/XI

Limitation of the Total Catch of *Dissostichus eleginoides* in Statistical Subarea 48.4 in the 1992/93 Season

The Commission,

Endorsing the application of Chile to conduct a new fishery on *Dissostichus eleginoides* in Statistical Subarea 48.4 in accordance with Conservation Measure 31/X,

Welcoming the invitation of Chile for one scientist to participate as an observer onboard the vessel fishing for *Dissostichus eleginoides*,

Noting that no other Member has notified the Commission of proposals to establish a new fishery for this species and Statistical Subarea,

Agrees that no other fishing shall occur for *Dissostichus eleginoides* in Statistical Subarea 48.4 in the 1992/93 season,

Hereby adopts the following Conservation Measure in accordance with Article IX of the Convention:

1. The new fishery by Chile for *Dissostichus eleginoides* in Statistical Subarea 48.4 in 1992/93 shall be limited to 240 tons.

2. For the purposes of this new fishery for *Dissostichus eleginoides* in Statistical Subarea 48.4 the 1992/93 fishing season is defined as the period from 6 November 1992 to the close of the Commission meeting in 1993.

3. Full data shall be provided to the CCAMLR Secretariat for consideration by the Working Group on Fish Stock Assessment and Scientific Committee, as specified in CCAMLR–XI/7, supplemented by SC–CCAMLR–XI, paragraph 3.45.

Conservation Measure 45/XI

Precautionary Catch Limitation on *Euphausia superba* in Statistical Division 58.4.2

The total catch of *Euphausia superba* in Statistical Division 58.4.2 shall be limited to 390,000 tons in any fishing season. A fishing season begins on 1 July and finishes on 30 June of the following year.

This limit shall be kept under review by the Commission, taking into account the advice of the Scientific Committee. For the purposes of implementing this Conservation Measure, the catches shall be reported to the Commission on a monthly basis.

Conservation Measure 46/XI

Allocation of Precautionary Catch Limit on *Euphausia superba* in Statistical Area 48 (Conservation Measure 32/X) to Statistical Subareas

If the total catch of *Euphausia superba* in Statistical Subareas 48.1, 48.2 and 48.3 in any fishing season exceeds 620,000 tons, then catches in the following Statistical Subareas shall not exceed the precautionary catch limit prescribed below:

	Subarea	Tons
Antarctic Peninsula	48.1	420,000
South Orkney Islands	48.2	735,000
South Georgia	48.3	360,000
South Sandwich Islands	48.4	75,000
Weddell Sea	48.5	75,000
Bouvet Island region	48.6	300,000

Notwithstanding these subareal limits, the total sum of catches in any fishing season in all Subareas shall not exceed the precautionary catch limit of 1.5 million tons for the whole of Statistical Area 48 prescribed by Conservation Measure 32/X. A fishing season begins on 1 July and finishes on 30 June of the following year.

The above precautionary catch limits shall apply to the fishing seasons 1992/93 and 1993/94 after which time they will be reviewed by the Commission, taking into account the advice of the Scientific Committee.

For the purpose of implementing this Conservation Measure, the catches shall be reported to the Commission for each Statistical Subarea on a monthly basis.

Conservation Measure 47/XI

Scientific Research Exemption Provisions

This Conservation Measure is adopted in accordance with article IX of the Convention.

1. Catches taken during fishing for research purposes by commercial fishing or fishery support vessels, or vessels of a similar catching capacity, will be considered as part of any catch limit.

2. For the purposes of implementing this conservation measure, the catch reporting procedure set out in Conservation Measure 51/XI shall apply whenever the catch within any five-day reporting period exceeds 5 tons, unless more specific regulations apply to the particular species.

Conservation Measure 48/XI

Prohibition of Directed Fishery on *Notothenia gibberifrons, Chaenocephalus aceratus, Pseudochaenichthys geogianus, Notothenia squamifrons* and *Patagonotothen guntheri*, in Statistical Subarea 48.3 for the 1992/93 and 1993/94 Seasons

This Conservation Measure is adopted in accordance with Conservation Measure 7/V:

Directed fishing on *Notothenia gibberifrons, Chaenocephalus aceratus, Pseudochaenichthys georgianus, Notothenia squamifrons* and *Patagonotothen guntheri* in Statistical Subarea 48.3 is prohibited in the 1992/93 and 1993/94 seasons, defined as the period from 6 November 1992 to the end of the Commission meeting in 1994.

Conservation Measure 49/XI

Limitation of the Total Catch of *Champsocephalus gunnari* in Statistical Subarea 48.3 in the 1992/93 Season

This Conservation Measure is adopted in accordance with Conservation Measure 7/V:

1. The total catch of *Champsocephalus gunnari* in the 1992/93 season, which shall commence on 6 November 1992 shall not exceed 9 200 tons in Statistical Subarea 48.3.

2. The fishery for *Champsocephalus gunnari* in Statistical Subarea 48.3 shall close if the by-catch of any of the species listed in Conservation Measure 50/XI reaches their by-catch limit or if the total catch of *Champsocephalus gunnari* reaches 9 200 tons, whichever comes first.

3. if, in the course of the directed fishery for *Champsocephalus gunnari*, the by-catch of any one haul of any of the species named in Conservation Measure 50/XI exceeds 5%, the fishing vessel shall move to another fishing ground within the subarea.

4. The use of bottom trawls in the directed fishery for *Champsocephalus gunnari* in Statistical Subarea 48.3 is prohibited.

5. The fishery for *Champsocephalus gunnari* in Statistical Subarea 48.3 shall be closed from 1 April 1993 until the end of the Commission meeting in 1993.

6. For the purpose of implementing paragraphs 1 and 2 of this Conservation Measure:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 51/XI shall apply in the 1992/93 season commencing on 6 November 1992.

(ii) The Monthly Effort and Biological Data Reporting System set out in

Conservation Measure 50/XI shall apply for *Champsocephalus gunnari* and all by-catch species listed in Conservation Measure 50/XI in the 1992/93 season, commencing on 6 November 1992.

Conservation Measure 50/XI

Limitation of the By-catch of *Notothenia gibberifrons, Chaenocephalus aceratus, Pseudochaenichthys georgianus, Notothenia rossii* and *Notothenia squamifrons*, in Statistical Subarea 48.3 for the 1992/93 Season

This Conservation Measure is adopted in accordance with Conservation Measure 7/V:

In any directed fishery in Statistical Subarea 48.3, during the 1992/93 season commencing 6 November 1992, the by-catch of *Notothenia gibberifrons* shall not exceed 1470 tons; the by-catch of *Chaenocephalus aceratus* shall not exceed 2200 tons; and the by-catch of *Pseudochaenichthys georgianus, Notothenia rossii* and *Notothenia squamifrons* shall not exceed 300 tons each.

Conservation Measure 50/XI

Five-day Catch and Effort Reporting System

This Conservation Measure is adopted in accordance with Conservation Measure 7/V where appropriate:

1. For the purposes of this Catch and Effort Reporting System the calendar month shall be divided into six reporting periods, viz: day 1 to day 5, day 6 to day 10, day 11 to day 15, day 16 to day 20, day 21 to day 26 and day 26 to the last day of the month. These reporting periods are hereinafter referred to as periods A, B, C, D, E and F.

2. At the end of each reporting period, each Contracting Party shall obtain from each of its vessels its total catch and total days and hours fished for that period and shall, by cable or telex, transmit the aggregated catch and days and hours fished for its vessels so as to reach the Executive secretary not later than the end of the next reporting period.

3. The catch of all species, including by-catch species, must be reported.

4. Such reports shall specify the month and reporting period (A, B, C, D, E or F) to which each report refers.

5. Immediately after the deadline has passed for receipt of the reports for each period, the Executive Secretary shall notify all Contracting Parties engaged in fishing activities in the area, of the total catch taken during the reporting period, the total aggregate catch for the season to date together with an estimate of the date upon which the total allowable catch is likely to be reached for that season. The estimate shall be based on a projection forward of the trend in daily catch rates, obtained using linear regression techniques from a number of the most recent catch reports.

6. At the end of every six reporting periods, the Executive Secretary shall inform all Contracting Parties of the total catch taken during the five most recent reporting periods, the total aggregate catch for the season to date together with an estimate of the date upon which the total allowable catch is likely to be reached for that season.

7. If the estimated date of completion of the TAC is within five days of the date on which the Secretariat received the report of the catches, the Executive Secretary shall inform all Contracting Parties that the fishery will close on that estimated day or on the day on which the report was received, whichever is the later.

Conservation Measure 52/XI

Monthly Effort and Biological Data Reporting System for Trawl Fisheries

This Conservation Measure is adopted in accordance with Conservation Measure 7/V, where appropriate:

1. Specification of "target species" and "by-catch" species referred to in this Conservation Measure shall be made in the Conservation Measure to which it is attached.

2. At the end of each month each Contracting Party shall obtain from each of its vessels the data required to complete the CCAMLR fine-scale catch and effort data form for trawl fisheries (Form C1, latest version). It shall transmit those data to the Executive Secretary not later than the end of the following month.

3. The catch of all species, including by-catch species, must be reported.

4. At the end of each month each Contracting Party shall obtain from each of its vessels representative samples of length composition measurements of the target species and by-catch species from the fishery (Form B2, latest version). It shall transmit those data to the Executive Secretary not later than the end of the following month.

5. Failure by a Contracting Party to provide the fine-scale catch and effort data or length composition data for three consecutive months shall result in the closure of the fishery to vessels of that Contracting Party. If the Executive Secretary has not received length composition data for two consecutive months he shall notify the Contracting Party that the fishery will be closed to that Contracting Party unless those data (including arrears of data) are provided by the end of the next month. If at the end of the next month those data have still not been provided, the Executive Secretary shall notify all Contracting Parties of the closure of the fishery to vessels of the Contracting Party which has failed to supply the data as required.

6. For the purpose of implementing this Conservation Measure;

(i) Length measurements of fish should be of total length, to the nearest centimeter below;

(ii) Representative samples of length composition should be taken from a single fishing ground. In the event that the vessel moves from one fishing ground to another during the course of a month, then separate length compositions should be submitted for each fishing ground.

Note: Pending the provision of a more appropriate definition, the term fishing ground is defined here as the area within a single fine-scale grid rectangle (0.5° latitude by 1° longitude).

Conservation Measure 53/XI

Limitation of the Total Catch of *Electrona carlsbergi* in Statistical Subarea 48.3 for the 1992/93 Season

This Conservation Measure is adopted in accordance with Conservation Measure 7/V:

1. For the purposes of this Conservation Measure the fishing season for *Electrona carlsbergi* is defined as the period from 6 November 1992 to the end of the Commission meeting in 1993.

2. The total catch of *Electrona carlsbergi* in the 1992/93 season shall not exceed 245,000 tons in Statistical Subarea 48.3.

3. In addition, the total catch of *Electrona carlsbergi* in the 1992/93 season shall not exceed 53,000 tons in the Shag Rocks region, defined as the area bounded by 52°30′S, 40°W; 52°30′S, 44°W, 54°30′S, 40°W and 54°30′S, 44°W.

4. The directed fishery for *Electrona carlsbergi* in Statistical Subarea 48.3 shall close if the by-catch of any of the species detailed in Conservation Measure 50/XI reaches their by-catch limit or if the total catch of *Electrona carlsbergi* reaches 245,000 tons, whichever comes first.

5. The directed fishery for *Electrona carlsbergi* in the Shag Rocks region shall close if the by-catch of any of the species detailed in Conservation Measure 50/XI above reaches their by-catch limit or if the total catch of *Electrona carlsbergi* reaches 53,000 tons, whichever comes first.

6. If, in the course of the directed fishery for *Electrona carlsbergi*, the by-

catch of any one haul of any of the species named in Conservation Measure 50/XI exceeds 5%, the fishing vessel shall move to another fishing ground within the subarea.

7. For the purpose of implementing this Conservation Measure:

(i) The Catch Reporting System set out in Conservation Measure 41/X shall apply in the 1992/93 season; and,

(ii) The Data Reporting System set out in Conservation Measure 54/XI shall apply in the 1992/93 season.

Conservation Measure 54/XI

Biological Data Reporting System for *Electrona carlsbergi* in Statistical Subarea 48.3.

This Conservation Measure is adopted in accordance with Conservation Measure 7/V.

Each month the length composition of a minimum of 500 fish, randomly collected from the commercial fishery, will be measured and the information passed to the Executive Secretary not later than the end of the month following.

Conservation Measure 55/XI

Catch Limit on *Dissostichus eleginoides* in Statistical Subarea 48.3 for the 1992/93 Season

This Conservation measure is adopted in accordance with Conservation measure 7/V:

1. The total catch of *Dissostichus eleginoides* in Statistical Subarea 48.3 caught in the 1992/93 season shall be limited to 3 350 tons.

2. For the purposes of the fishery for *Dissostichus eleginoides* in Statistical Subarea 48.3, the 1992/93 fishing season is defined as the period from 6 December 1992(1) to the end of the Commission meeting in 1993, or until the TAC is reached, whichever is sooner.

3. For the purpose of implementing, this Conservation Measure:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 50/XI shall apply in the 1992/93 season, commencing on 6 December 1992.

(ii) The Effort and Biological Data Reporting System set out in Conservation Measure 56/XI shall apply in the 1992/93 season, commencing on 6 December 1992.

4. There will be no increase over the 1991/92 season in the number of vessels of Members who have been fishing in the 1991/92 season for *Dissostichus eleginoides* in Subarea 48.3

Note: The December 6 date allows one month to elapse from the end of the Commission meeting in order for notification of this measure to be transmitted to the fishing vessels.

Conservation Measure 56/XI

Effort and Biological Data Reporting System for *Dissostichus eleginoides* in Statistical Subarea 48.3 for the 1992/93 Season

This Conservation Measure is adopted in accordance with Conservation Measure 7/V:

1. The end of each month, each Contracting Party shall obtain from each of its vessels the haul-by-haul data required to complete the CCAMLR fine-scale catch and effort data form for longline fisheries (Form C2, latest version). It shall transmit those data to the Executive Secretary not later than the end of the following month.

2. At the end of each month, each Contracting Party shall obtain from each of its vessels a representative sample of length composition measurements from the fishery (Form B2, latest version). It shall transmit those data to the Executive Secretary not later than the end of the following month.

3. Failure by a Contracting Party to provide either/or both of the haul-by-haul and length composition data for three consecutive months shall result in the closure of the fishery to vessels of that Contracting Party. If the Executive Secretary has not received either/or both of the haul-by-haul and length composition data for two consecutive months he shall notify the Contracting Party that the fishery will be closed to that Contracting Party unless those data (including arrears of data) are provided by the end of the next month. If at the end of the next month those data have still not been provided, the Executive Secretary shall notify all Contracting Parties of the closure of the fishery to vessels of the Contracting Party which has failed to supply the data as required.

Conservation Measure 57/XI

Prohibition of Directed Fishing for Finfish in Statistical Subarea 48.2 for the 1992/93 Season

Taking of finfish, other than for scientific research purposes, in Statistical Subarea 48.2 is prohibited in the 1992/93 season, defined as the period from 6 November 1992 to the end of the Commission meeting in 1993.

Conservation Measure 58/XI

Prohibition of Directed Fishing for Finfish in Statistical Subarea 48.1 for the 1992/93 Season

Taking of finfish, other than for scientific research purposes, in Statistical Subarea 48.1 is prohibited in the 1992/93 season, defined as the period from 6 November 1992 to the end of the Commission meeting, in 1993.

Conservation Measure 59/XI

Limitation of Total Catch of *Notothenia squamifrons* in Statistical Division 58.4.4 (Ob and Lena Banks) in the 1992/93 and 1993/94 Season

1. The total catch of *Notothenia squamifrons* for the entire two year period shall not exceed 1150 tons, which shall be made up of 715 tons on Lena Bank and 435 tons on Ob Bank.

2. The two year period shall be from 6 November 1992 to the end of the Commission meeting in 1994.

3. For the purpose of implementing this Conservation Measure:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 51/XI shall apply in the period 1992 to 1994 commencing, on 6 November 1992;

(ii) The Monthly Effort and Biological Data Reporting System set out in Conservation Measure 52/XI shall apply for *Notothenia squamifrons* commencing on 6 November 1992;

(iii) Age frequency and age/length keys for *Notothenia squamifrons* and any other species forming a significant part of the catch shall be collected and reported to each annual meeting of Working Group on Fish Stock Assessment for each Bank separately; and

(iv) The fishery for *Notothenia squamifrons* will be subject to review at the 1993 annual meeting of the Scientific Committee and the Commission.

Conservation Measure 60/XI

Limits on the Exploratory Crab Fishery in Statistical Area 48 in the 1992/93 Season

The following measures apply to all crab fishing within Statistical Area 48:

1. The crab fishery is defined as any harvest activity in which the target species is any member of the crab group (Order Decapoda, Suborder Reptantia).

2. The crab fishery in Statistical Area 48 shall be closed from 15 November 1992 until the CCAMLR Workshop to develop the Longterm Management Plan for crabs (planned for April or May, 1993) has met, revised the data reporting forms and provided modified forms to Members who have notified the Secretariat of their intention to fish for crabs.

3. The crab fishery shall be limited to one vessel per Member; however, if the Secretariat is notified that more than three vessels intend to fish for crabs, no more than 1600 tons shall be taken during the period from the start of the

fishery until the end of the next meeting of the Commission in 1993.

4. Each Member intending to participate in the crab fishery shall notify the CCAMLR Secretariat at least three months in advance of starting, fishing of the name, type, size, registration number and radio call sign and fishing plan of the vessel that the Member has authorized to participate in the crab fishery.

5. The following data shall be reported to CCAMLR by 30 August 1993 for crabs caught prior to 30 July 1993:

(i) The location, date, depth, fishing effort (number and spacing of pots) and catch (numbers and weight) of commercially sized crabs (reported on as fine a scale as possible, but no coarser than 1° longitude by 0.5° latitude) for each 10-day period;

(ii) The species size and sex of a representative subsample of crabs and by-catch caught in traps; and

(iii) Other relevant data, as possible, according to the logbook formats already being used in the crab fishery (SC–CCAMLR–XI, Annex 5, Appendix F).

6. For the purposes of implementing this Conservation Measure the 10-day catch and effort reporting system set out in Conservation Measure 61/XI shall apply.

7. Data identified by the Workshop that are required to determine the appropriate harvest levels shall be collected during the 1993 season by all vessels fishing for crabs. These data shall be reported to CCAMLR in the form specified by the Workshop. Data on catches taken before 30 August 1993 shall be reported to the CCAMLR Secretariat by 30 September to enable the data to be available to Working Group on Fish Stock Assessment.

8. Crab fishing gear shall be limited to the use of crab pots (traps). The use of all other methods of catching crabs (e.g., bottom trawls) shall be prohibited.

9. The crab fishery shall be limited to sexually mature male crabs—all female and undersized male crabs caught shall be released unharmed. In the case of *Paralomis spinosissisma* and *P. formosa*, males with a minimum carapace width of 102 mm and 90 mm, respectively, may be retained in the catch; and

10. Crab processed at sea shall be frozen as crab sections (minimum size of crabs to be determined when using, crab sections).

Conservation Measure 61/XI

Ten-day Catch and Effort Reporting System

This Conservation Measure is adopted in accordance with Conservation Measure 7/V where appropriate:

1. For the purposes of this Catch and Effort Reporting System the calendar month shall be divided into three reporting periods, viz: day 1 to day 10, day 11 day 20, day 21 to the last day of the month. These reporting periods are hereinafter referred to as periods A, B and C.

2. At the end of each reporting period, each Contracting Party shall obtain from each of its vessels its total catch and total days and hours fished for that period and shall, by cable or telex, transmit the aggregated catch and days and hours fished for its vessels so as to reach the Executive Secretary not later than the end of the next reporting period.

3. The retained catch of all species and by-catch species, must be reported.

4. Such reports shall specify the month and reporting period (A, B and C) to which each report refers.

5. Immediately after the deadline has passed for receipt of the reports for each period, the Executive Secretary shall notify all Contracting Parties engaged in fishing activities in the area, of the total catch taken during the reporting period, the total aggregate catch for the season to date together with an estimate of the date upon which the total allowable catch is likely to be reached for that season. The estimate shall be based on a projection forward of the trend in daily catch rates, obtained using, linear regression techniques from a number of the most recent reports.

6. At the end of every three reporting periods, the Executive Secretary shall inform all Contracting Parties of the total catch taken during, the three most recent reporting periods, the total aggregate catch for the season to date together with an estimate of the date upon which the total allowable catch is likely to be reached for that season.

1. If the estimated date of completion of the TAC is within ten days of the date on which the Secretariat received the report of the catches, the Executive Secretary shall inform all Contracting Parties that the fishery will close on that estimated day or on the day on which the report was received, whichever is the later.

Conservation Measure 62/XI

Protection of the Seal Islands CEMP Site

1. The Commission noted that a program of longterm studies is being undertaken at the Seal Islands, South Shetland Islands, as part of the CCAMLR Ecosystem Monitoring Program (CEMP). Recognizing that these studies may be vulnerable to accidental or willful interference, the Commission expressed its concern that this CEMP site, the scientific investigations, and the Antarctic marine living resources therein be protected.

2. Therefore, the Commission considers it appropriate to accord protection to the Seal Islands CEMP site, as defined in the Seal Islands management plan.

3. Members are required to comply with the provisions of the Seal Islands CEMP site management plan, which is recorded in Annex B of Conservation Measure 18/IX.

4. To allow Members adequate time to implement the relevant permitting procedures associated with this measure and the management plan, Conservation Measure 62/XI shall become effective as of 1 May 1993.

5. In accordance with article X, the Commission shall draw this Conservation Measure to the attention of any State that is not a Party to the Convention and whose nationals or vessels are present in the Convention Area.

Conservation Measure 29/XI

Minimization of the Incidental Mortality of Seabirds in the Course of Longline Fishing or Longline Fishing Research in the Convention Area

The Commission,

Noting the need to reduce the incidental mortality of seabirds during longline fishing by minimizing their attraction to the fishing vessels and by preventing them from attempting to seize baited hooks, particularly during the period when the lines are set.

Recognizing that successful techniques for reducing the mortality of albatrosses have been employed in the longline fishery for tuna immediately to the north of the Convention Area.

Agrees to the following measures to reduce the possibility of incidental mortality of seabirds during longline fishing.

1. Fishing operations shall be conducted in such a way that the baited hooks sink as soon as possible after they are put in the water.

2. During the setting of longlines at night, only the minimum ship's lights necessary for safety shall be used.

3. Trash and offal are not to be dumped while longline operations are in progress.

4. A streamer line designed to discourage birds from settling, on baits during deployment of longlines shall be towed. The specification of the streamer line and its method of deployment is given in the Appendix to this Measure.

5. This Measure shall not apply to designated research vessels investigating better methods for

reducing incidental mortality of seabirds.

Appendix to Conservation Measure 29/XI

1. The streamer line is to be suspended at the stern from a point approximately 4.5 m above the water and such that the line is directly above the point where the baits hit the water.

2. The streamer line is to be approximately 3 mm diameter, have a minimum length of 150 m and be weighted at the end so that it streams directly behind the ship even in cross winds.

3. At 5 m intervals commencing from the point of attachment to the ship five branch streamers each comprising two strands of approximately 3 mm diameter cord should be attached. The length of the streamer should range between approximately 3.5 m nearest the ship to approximately 1.25 m for the fifth streamer. When the streamer line is deployed the branch streamers should reach the sea surface and periodically dip into it as the ship heaves. Swivels should be placed in the streamer line at the towing point, before and after the point of attachment of each branch streamer and immediately before any weight placed on the end of the streamer line. Each branch streamer should also have a swivel at its attachment to the streamer line.

Resolution 9/XI

Scientific Research Exemption Provisions for Finfish

In accordance with Conservation Measure 47/XI, the Commission adopts the following resolutions:

1. (i) Any member planning to use commercial fishing or fishery support vessels or vessels of a similar catching capacity to conduct fishing for research purposes when the estimated catch may exceed 50 tons, shall notify and provide the opportunity for other members to review and comment on their research plans. Such plans shall be provided to the Secretariat for distribution to members at least six months in advance of the planned starting date for the research. In the event of any request for a review of such plans, the Executive Secretary shall notify all members and submit the plan to the Scientific Committee for review. Based on the submitted research plan and any advice provided by the appropriate Working Group, the Scientific Committee will provide advice to the Commission where the review process will be concluded. Until the review process is complete the planned fishing for research purposes should not proceed.

(ii) The Scientific Committee, in consultation with its Working Groups, shall develop standardized guidelines and formats for research plans.

2. (i) Until such time as the Scientific Committee, in consultation with its Working Groups, develops standardized guidelines and formats for research plans, the member planning to undertake research fishing in accordance with 1(i) above should provide the following information:

Vessel details

(a) Name of vessel;

(b) Name and address of vessel owner;

(c) Port of registration, registration number and radio call sign;

(d) Vessel type, size, fish processing and storage capacity; and

(e) Gear type, fishing capacity and anticipated catch.

Research plan

(a) A statement of the planned research objectives;

(b) A description of when, where, and what activities are planned including a fishing plan which includes the number and duration of hauls and the fishing gear to be used: and

(c) The name(s) of the chief scientific(s) responsible for the planning and coordinating the research, and the number of scientists and crew expected to be aboard the vessel(s).

3. (i) A summary of the results of any research fishing subject to the research exemption provisions shall be provided to the Secretariat within 180 days of the completion of the research fishing. A full report should be provided within 12 months.

(ii) Catch and effort data resulting, from the research fishing in accordance with I (1) should be reported to the Secretariat according to the haul-by-haul reporting format for research vessels (C4).

Other Conservation Measures in Force

The Commission agreed that conservation measures 2/III (as amended by Conservation Measure 19/IX to delete the reference to *Champsocephalus gunnari*), 3/IV 4/V, and 7/V and 18/IX, 19/IX, 29/IX (as at this year, see above), 30/X, 31/X, 32/X, and 40/X should remain in force as they stand.

Cathch Reporting

Catches of *E. superba* shall be reported on a monthly basis, as set out in Conservation Measure 45/XI and 46/XI.

Catches of *E. carlsbergi* shall be reported to the Secretariat at the end of each calendar month, according to the system described in Conservation measure 40/X. In addition, biological data should be reported every month in accordance with Conservation Measure 54/XI.

Catches of *D. eleginoides* shall be reported to the Secretariat at the end of five-day intervals, according to the system described in Conservation Measure 51/XI. In addition, biological data should be reported every month in accordance with Conservation Measure 56/XI.

Catches of *C. gunnari* and *N. squamifrons* shall be reported to the Secretariat at the end of five-day intervals, according to the system described in Conservation Measure 51/XI. In addition, biological data should be reported every month in accordance with Conservation Measure 52/XI.

Catches of crabs shall be reported to the Secretariat at the end of ten-day intervals, according to the system described in Conservation Measure 61/XI. In addition, data on all crabs caught before June 30 shall be reported to CCAMLR by August 30, in accordance with Conservation Measure 60/XI.

Catches for scientific research shall be reported to the Secretariat at the end of each five-day period whenever the catch within that period exceeds five tons.

Dated: December 24, 1992.

Raymond Arnaudo,

Chief, Division of Polar Affairs, Office of Oceans Affairs.

[FR Doc. 93–261 Filed 1–6–93; 8:45 am]

BILLING CODE 4710–09–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Kitsap County, WA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement (EIS) will be prepared for a proposed highway project in Kitsap County, Washington Telephone.

FOR FURTHER INFORMATION CONTACT: Barry F. Morehead, Division Administrator, Federal Highway Administration, 711 South Capitol Way, suite 501, Olympia, Washington, 98501. Telephone: (206) 753–2120; or Gary Demich, District Administrator, Washington State Department of Transportation, District 3, P.O. Box 9327, Olympia, Washington, 98504, Telephone: (206) 357–2605; or Dan

Eisses, City of Bremerton, 239 4th Street, Bremerton, Washington, Telephone: (206) 478–5272.

SUPPLEMENTARY INFORMATION: The FHWA, the Washington State Department of Transportation (WSDOT), and the City of Bremerton, in cooperation with Kitsap County, the U.S. Department of Defense, and Kitsap Transit, will prepare an EIS on a proposal to improve a 5.25 mile portion of SR 3 and SR 304. The proposed improvement will include adding two to four lanes on SR 3 from the Gorst railroad bridge to the SR 304 junction, and improving traffic flow on SR 304 to the ferry terminal using one-way couplets or a four lane two-way route.

Improvements to the corridor are considered necessary to provide for the existing and projected traffic demand. The primary purpose of the proposed project is to improve transportation access to and throughout downtown Bremerton, which includes the Puget Sound Naval Shipyard and the State ferry terminal, both major regional destinations. The existing peak hour traffic volumes in the corridor result in congestion and delay for traffic associated with these destinations. Future traffic volumes are expected to rise due to the high growth rate of the region, expansion of the Puget Sound Naval Shipyard and increased ferry system usage by commuters. Alternatives under considered on the SR 3 portion include (1) taking no action; (2) widening SR 3 along Sinclair Inlet adjacent to the roadway from the existing four lanes to six or eight lanes; or (3) adding new lanes in one direction on a higher grade then the existing roadway. Alternatives under consideration for the SR 304 portion include (1) taking no action; (2) a one way couplet; (3) a four lane facility from SR 3 to the ferry terminal. Included in all of the build alternatives are the replacement of the Gorst railroad bridge, consideration of including provisions for high occupancy vehicles (HOV), and consideration of adding a southbound to eastbound movement at the SR 3/SR 304 interchange.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, affected Indian tribes, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. A series of public meetings will be held between November 1992 and May 1993. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and hearing. The draft EIS will be available for public and agency review prior to the public hearing.

To ensure that the full range of issues related to this proposed project are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of federal programs and activities apply to this program.)

Issued on: December 30, 1992.

Richard Schimelfenyg,

Area Engineer, Washington Division.

[FR Doc. 93–262 Filed 1–6–93; 8:45 am]

BILLING CODE 4910–22–M

Environmental Impact Statement: Stillwater County, MT

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed highway project in Stillwater County, Montana.

FOR FURTHER INFORMATION CONTACT: Dale Paulson, Environmental Coordinator, Federal Highway Administration, 301 South Park, Drawer 10056, Helena, MT 59626–0056; Telephone: (406) 449–5310; or Edrie L. Vinson, Chief, Environmental and Hazardous Waste Bureau, Montana Department of Transportation, 2701 Prospect Street, Helena, MT 59620; Telephone: (406) 444–7632.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Montana Department of Transportation (MDT), is preparing an Environmental Impact Statement for a proposal to improve the Montana Highway Route 78 corridor from the East Rosebud Creek Bridge south of Absarokee, Montana to the Yellowstone River Bridge south of Columbus, Montana.

Improvements to the corridor are considered necessary to provide for the existing and projected traffic demand. During the development of an environment assessment for this project it was determined that an environmental impact statement was required. Comments are being solicited from appropriate Federal, State, and local agencies and from private organizations and citizens who have previously expressed or are known to have interest in this proposal. Public meetings will be held in the project area and in addition a public hearing will be held. Public Notice will be given of the time and place of the meetings and hearings. The draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of all issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments, or questions concerning this proposed action and the EIS should be directed to the FHWA, or the MDT at the addresses listed previously.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed action.)

Issued on: December 29, 1992.

Hank D. Honeywell,

Division Administrator Montana Division, Helena.

[FR Doc. 93–263 Filed 1–6–93; 8:45 am]

BILLING CODE 4910–22–M

National Highway Traffic Safety Administration

[Docket No. 93–01; Notice 1]

Ford Motor Company; Receipt of Petition for Temporary Exemption From 14 Federal Motor Vehicle Safety Standards

Ford Motor Company of Dearborn, Michigan, has petitioned for a temporary exemption from 14 Federal motor vehicle safety standards for an electric panel delivery van. The basis of the petition is that an exemption will facilitate the development and field evaluation of low-emission motor vehicles.

Notice of receipt of the petition is published in accordance with agency regulations on the subject (49 CFR part 555) and does not represent any judgment of the agency of the merits of the petition.

Ford intends to manufacture up to 105 low emission experimental electric panel delivery vans, including prototypes, to be called the Ford Ecostar. The Ecostar will be leased to test fleets operated by Ford's electric vehicle development partners in the U.S. and Europe for up to three years of cooperative field testing. thus, an exemption would facilitate the development and field evaluation of it in the United States.

There appear to be three versions of the Ecostar, which will be classified as a truck for purposes of the standards. The first is a hybrid internal combustion-electric vehicle. The second is an electric vehicle with a fuel-fired heating and defrosting system. Both versions are being designed to meet the California Air Resource Board (CARB) requirements for ultra-low emissions. The third type, an electric vehicle with an electric heating/defrosting system would meet CARB's zero emission requirements. Components of these vehicles have been developed in cooperation with the United States Department of Energy, General Electric, and other suppliers.

The Ecostar is based upon an Escort delivery van manufactured by Ford of England which was designed to meet all applicable European (EEC and ECE) regulations. The van bodies would be shipped to the U.S. where the electric motor, inverter, transaxle drivetrain, batteries, controls, and other components unique to the Ecostar would be installed in the U.S. Electrical/electronic controls handling high current/voltage would be packaged outside the passenger compartment, with the exception of a fully enclosed electric heater/defroster core on those vehicles so equipped. an "advanced design battery would be located in the fuel tank space under the load floor. Hybrid vehicles would have a small, gasoline-fueled engine/alternator assembly mounted under the load floor. A hydraulic/regenerative braking system would be employed. "Limited testing" of converted Escorts indicates that the Ecostar continues to meet the EEC/ECE regulations.

Differences between U.S. and European standards, as well as the increased vehicle weight would result in noncompliances with the U.S. standards. However, in Ford's view, these noncompliances are minor in nature and would not unreasonably degrade the safety of the vehicle.

The standards, or portions thereof, from which Ford requests a 2-year exemption, are:

1. Standard No. 101 *Controls and Displays*

2. Standard No. 105 *Hydraulic Brake Systems*

S5.2.3 of Standard No. 101 and S5.3.5(b) of Standard No. 105 require a brake warning light labeled "BRAKE". The Ecostar uses the ISO brake symbol instead. Neither the heating/defrosting/air conditioning fan switch, nor the horn control, is identified as required by Standard No. 101, although the horn control is conventionally located in the center of the steering hub, and its size, shape, and location should make its function obvious to most operators. The fan switch is located with the other heating/defrosting/air conditioning controls in the center of the instrument panel. The fan speed markings (0, I, II, III), combined with location of the fan control between the temperature control and the air distribution control, have proven adequate to identify the function of the fan control switch to a European multilingual customer base without the addition of the fan ISO symbol.

In addition, some hybrid Ecostars use the ISO oil can symbol to indicate low oil level, rather than low oil pressure. Ford believes that it is appropriate to use the symbol to indicate low oil level on vehicles that do not have a pressurized internal combustion lubrication system.

Finally, certain right hand drive models to be tested by the U.S. Postal Service do not meet the requirement of S5.3.3 of Standard No. 101 for variable illumination of the displays. The right hand drive vehicle model was designed to meet only European regulations which do not have an adjustability requirement. The interest of the Postal Service came too late in the development process to add adjustment of display illumination, as Ford found there was no available space to package a dimming control without a major change to the instrument panel and wiring system. Ford believes that the fixed level of illumination provided raises no daylight or night vision issues. Only a minimal number of vehicles, six in all, would be covered by the exemption requested.

3. *Standard No. 106—Brake Hoses*

The brake hoses will not be labeled and certified according to SF.2 of the standard. However, they "appear to meet the design and performance requirements" of the standard.

4. *Standard No. 108—Lamps, Reflective Devices, and Associated Equipment*

The headlamps on the Ecostar meet European and not U.S. requirements for beam pattern photometrics. Further, the vehicles would not be equipped with side marker lamps.

Ford argues that exemptions from the photometric requirements will not unduly degrade the safety of the vehicles because the only difference is that the European beam pattern does not provide the lighting above the horizontal that U.S. headlamps provide to illuminate passive and reflectorized overhead signs. This should not have adverse safety implications because the limited fleet of Ecostars will be operated in urban areas with generally high nighttime ambient lighting. Although the Ecostars do not have front and rear side marker lamps, the taillamps "are very visible from the side of the vehicle, although they probably do not meet all of the Standard 108 detailed photometric requirements for side marker lamps."

5. *Standard No. 120—Tire Selection and Rims for Motor Vehicles Other Than Passenger Cars*

As permitted by S5.1.1 of Standard No. 120, Ford plans to use a passenger car tire on its "light truck" Ecostar, specifically, a tire that has been developed especially for use on electric vehicles. The tire will meet Standard No. 109's requirements, except for maximum allowable inflation pressure. The pressure will be 350 Kpa (51 psi). Recommended tire pressure will be 50 psi for both front and rear tires. The load rating will be based on an inflation pressure of 240 Kpa (35 psi), then derated by 10% as specified by S5.1.2. Ford notes that both the Rubber Manufacturers Association and the European Tyre and Rim Technical Organization have petitioned NHTSA for rulemaking to amend Standard No. 109 to include a maximum tire pressure of 350 Kpa.

6. *Standard No. 115—Vehicle Information Number (VIN)*

Without being specific, Ford states that the VIN "may not meet certain U.S. requirements." It notes that any recall would be facilitated through Ford's retention of title to the vehicles.

7. *Standard No. 204—Steering Column Rearward Displacement*

Frontal barrier tests indicate that "some versions of the experimental Ecostar, particularly the hybrid-electric vehicles equipped with internal combustion engines," may not meet the requirements of this standard because of the added weight of the internal combustion engine. However, an Ecostar tested at a weight similar to the Standard No. 204 test weight met the displacement criterion. Although that test is an insufficient basis upon which to certify compliance of the hybrid vehicles, any deviation from compliance by the hybrids is likely to be small. Considering the Ford intends to produce only 26 hybrid vehicles, "the vehicle operating characteristics, and the expected operating pattern of these vehicles, Ford believes that the steering columns of these vehicles would not represent any meaningful degradation in operating safety."

8. *Standard No. 207—Seating Systems*

9. *Standard No. 210—Seat Belt Assembly Anchorages*

Seats, seat anchorages, and seat belt anchorages "meet U.S. anchorage strength specifications when tested by the European strength test procedure, but may not meet when tested with the longer loading and holding periods of the U.S. test procedure." However, "seats and safety belts that meet the EEC/ECE strength test have proven to be very effective over many years of highway experience."

10. *Standard No. 208—Occupant Crash Protection*

Paragraph S4.6.1 requires that instrumented dummies meet various criteria in 30 mph frontal barrier crashes. Ford has not tested the Ecostar with instrumented dummies. The Ecostar, however, is derived from the European Escort car and its panel delivery van, both of which have been designed to meet Standard No. 208's dummy criteria. Further, the electric vehicle modifications to the van structure have been designed to maintain crash integrity, although tests indicate that the heaviest versions may not meet U.S. standards for steering column displacement and windshield zone intrusion.

Ford believes that the Ecostar may be able to meet requirements of Standard No. 208 that differ from EEC/ECE requirements (e.g., belt contact force, latchplate access, and retraction) but it has no plans to conduct testing because of "our inability to certify compliance" with other sections of Standard No. 208, especially S4.6.1.

In addition, the European restraint system does not have the audible seat belt reminder, as required by S7.3.

Standard No. 208 also requires that vehicles be equipped with seat belt assemblies that conform to Standard No. 209. Ford states that the belts may not have the marking required by S4.1(j) but meet all other requirements.

11. Standard No. 212—Windshield Mounting

A frontal barrier impact of a maximum weight Ecostar showed a windshield retention of 73.4 percent, a minor deviation from the required minimum of 75 percent. However, retention was not measured until about 2 months after the test, following removal and storage of the vehicle. Thus, Ford is unsure whether the hybrid Ecostar conforms, but that it appears that most Ecostars will.

12. Standard No. 216—Roof Crush Resistance

This standard becomes effective for light trucks beginning September 1, 1993. Ford has not tested the Ecostar for compliance with the standard, and believes that assembly of most Ecostars will be completed by then. In its comments to the notice of proposed rulemaking on extension of the standard, Ford raised the issue of inapposite test platen placement, which remains unresolved. Because Ford does not know how the agency would conduct a test on the Ecostar, it cannot judge the complaince status of its vehicle.

13. Standard No. 219—Windshield Zone Instrusion

The hybrids may also not comply with Standard No. 219, though "[l]imited testing indicates that the electric Ecostar probably meets EEC/ECS requirements." The frontal barrier tests were not performed primarily to determine compliance with Standard No. 219, and hence did not use the styrofoam form on the windshield to determine intrusion into the windshield zone. The test of the Hybrid Ecostar showed light contact between the hood and the lower portion of the windshield, and thus Ford could not certify compliance without further testing. The contact noted was "so near the lower edge of the windshied that the contacted area is quite unlikely to be approached by an occupant's head in a frontal collision".

14. Standard No. 301—Fuel system Integrity

Rear structural modifications will be made to protect fuel system components of the hybrid-electric vans and the electric vans equipped with fuel-fired heater/defrosters. Tests conducted to date indicate that the Ecostar would probably meet the front (S6.1) and rear (S6.2) impact criteria, although the tests were conducted without dummies. However, its limited test program is inadequate "to certify that all versions of the Ecostar meet the rear impact requirements of S6.2, the lateral impact requirements of S6.3, or the static rollover requirements of S6.4 after rear or lateral impact."

Not all the Ecostars are equipped with fuel systems, so an exemption would cover only about half the Ecostars. About 25 percent of the vehicles will be hybrid-electric vehicles that are to be equipped with small gasoline powered engines to extend their driving range. Another 25 percent will be electric vehicles equipped with diesel-fuel-fired heater/defroster systems. Ford has no reason to believe that the vehicles would fail to meet the lateral impact requirements. Exemptions from S6.2, S6.3, and S6.4 would not degrade safety "because of the excellent performance of the fuel system in front and rear development crash tests and the use of widely accepted design and production practices for protecting the fuel system from lateral impacts."

Ford argues that an exemption would be in the public interest because of their potential reduction in emissions, as well as the requirements of some States that manufacturers sell a percentage of zero-emission motor vehicles by the 1998 model year. Half the Ecostars tested will be zero-emission vehicles. To provide the best possible vehicles, Ford must " invent and refine" technology for such vehicles, and an exemption would allow field testing and demonstration of electric and hybrid-electric vehicles equipped with advanced battery and electronic technologies. A principal issue to be resolved with the half of the Ecostar fleet that is not composed of zero-emission vehicles is to determine whether the emission standards for an ultra-low emission vehicle can practicably be met, although the emission levels of these Ecostars are well below the current limits established under the Clean Air Act.

A temporary exemption would also be consistent with the objectives of the National Traffic and Motor Vehicle Safety Act in Ford's view because the Ecostar provides a level of safety substantially equivalent to that required by the safety standards.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, NHTSA, room 5109, 400 Seventh Street, SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: February 8, 1993.

Authority: 15 U.S.C. 1410; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: January 4, 1993.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 93–282 Filed 1–6–93; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF THE TREASURY

Office of the Secretary

[Supplement to Department Circular—Public Debt Series—No. 40–92]

Treasury Notes, Series AH–1994

Washington, December 23, 1992.

The Secretary announced on December 22, 1992, that the interest rate on the notes designated Series AH–1994, described in Department Circular—Public Debt Series—No. 40–92 dated December 16, 1992, will be 4⅝ percent. Interest on the notes will be payable at the rate of 4⅝ percent per annum.

Marcus W. Page,

Fiscal Assistant Secretary.

[FR Doc. 93–284 Filed 1–6–93; 8:45 am]

BILLING CODE 4810–40–M

[Supplement to Department Circular—Public Debt Series—No. 41–92]

Treasury Notes, Series U–1997

Washington, December 24, 1992.

The Secretary announced on December 23, 1992, that the interest rate on the notes designated Series U–1997, described in Department Circular—Public Debt Series—No. 41–92 dated December 16, 1992, will be 6 percent. Interest on the notes will be payable at the rate of 6 percent per annum.

Marcus W. Page,

Fiscal Assistant Secretary.

[FR Doc. 93–285 Filed 1–6–93; 8:45 am]

BILLING CODE 4810–40–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 proposals 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 title of the information collection, and the Department form number(s), if applicable; (2) a description of the need and its use; (3) who will be required or asked to respond; (4) an estimate of the total annual reporting hours, and recordkeeping burden, if applicable; (5) the estimated average burden hours per respondent; (6) the frequency of response; and (7) an estimated number of respondents.

ADDRESSES: Copies of the proposed information collections and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233–3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395–7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer.

Dated: December 30, 1992.

By direction of the Secretary.

Frank E. Lalley,

Associate Deputy, Assistant Secretary for Information, Resources Policies and Oversight.

1. Notice of Past Due Payment, VA Form 29–389e

2. 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 collected is used to determine the insured's eligibility for continued protection.

3. Individuals or households

4. 484 hours

5. 15 minutes

6. On occasion

7. 1,936 respondents

Extension

1. Request to Creditor Regarding Applicant's Indebtedness, VA Form Letter 26–250

2. The form letter is used to obtain credit information from landlords and other creditors of veteran-applicants for guaranteed and direct loans, potential purchasers of VA-acquired properties, and potential assumers of guaranteed and direct loans to determine applicant's eligibility for the loan.

3. Individuals or households—Businesses or other for-profit—Small businesses or organizations

4. 15,833 hours

5. 10 minutes

6. On occasion

7. 95,000 respondents

Extension

1. Request for Postponement of Offsite or Exterior Onsite Improvements—Home Loan, VA Form Letter 26–1847

2. The form serves as the lender's and veteran's request for guaranty of home loan for which offsite or exterior onsite improvements are incomplete to permit the veteran's occupancy of the property.

3. Individuals or households—Businesses or other for-profit—Small businesses or organizations

4. 2,500 hours

5. 30 minutes

6. On occasion

7. 5,000 respondents

[FR Doc. 93–302 Filed 1–6–93; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 4
Thursday, January 7, 1993

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL 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 the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10:00 a.m. on Tuesday, January 12, 1993, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous meetings.

Reports of actions approved by the standing committees of the Corporation and by officers of the Corporation pursuant to authority delegated by the Board of Directors.

Discussion Agenda:

Memorandum and resolution re: Proposed amendments to Part 362 of the Corporation's rules and regulations, entitled "Activities and Investments of Insured State Banks," which would require insured state banks to obtain the prior consent of the Corporation before directly, or indirectly through a subsidiary, engaging "as principal" in any activity that is not permissible for a national bank.

Memorandum and resolution re: Proposed amendments to Part 333 of the Corporation's rules and regulations, entitled "Extension of Corporate Powers," which would eliminate section 333.3, which makes certain prohibitions applicable to state chartered savings associations applicable to state banks that are members of the Savings Association Insurance Fund.

Memorandum and resolution re: Proposed amendments to the Corporation's rules and regulations, which would eliminate Part 332, entitled "Powers Inconsistent with Purposes of Federal Deposit Insurance Law."

Memorandum and resolution re: Final amendments to Part 325 of the Corporation's rules and regulations, entitled "Capital Maintenance," which would allow limited amounts of mortgage servicing rights and purchased credit care relationships to be recognized for regulatory capital purposes.

Memorandum re: Information Resources Management Plan.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, DC.

The FDIC will provide attendees with auxiliary aids (e.g., sign language interpretation) required for this meeting. Those attendees needing such assistance should contact Llauger Valentin, Equal Employment Opportunity Manager, at (202) 898–6745 (Voice); (202) 898–3509 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898–6757.

Dated: January 5, 1993.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 93–441 Filed 1–5–93; 2:49 pm]

BILLING CODE 6714–01–M

FEDERAL ELECTION COMMISSION

* * * * *

DATE AND TIME: Tuesday, January 12, 1993 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.

Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

DATE AND TIME: Thursday, January 14, 1993 at 10 a.m.

PLACE: 999 E Street NW., Washington, DC (ninth floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes

Title 26 Certification Matters

Advisory Opinion 1992–42: Ms. Arlene M. Willis of Lewis for Congress Committee.

Legislative Recommendations, 1993 (continued from the meeting of January 7, 1993)

Routine Administrative Matters

* * * * *

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone: (202) 219–4155.

Delores Hardy,

Administrative Assistant.

[FR Doc. 93–452 Filed 1–5–93; 3:55 pm]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

TIME AND DATE: 10 a.m.—January 13, 1993.

PLACE: Main Hearing Room—800 North Capitol Street, NW., Washington, DC 20573–0001.

STATUS: Part of the meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTER(S) TO BE CONSIDERED:

Portion open to the public:

1. Docket No. 92–33—Marine Terminal Facilities Agreements—Exemption—Consideration of comments.
2. Docket No. 92–37—Financial Responsibility for Non-Vessel-Operating Common Carriers—Consideration of comments.

Portion closed to the public:

1. Trans-Atlantic Agreement Rate Activity.
2. Docket No. 91–17—*Consumer Electronics Shippers Associations, Inc. v. ANERA*—Consideration of the record.
3. Special Docket No. 2306—Application of Star Shipping A/S (d.b.a. Atlanticargo) for the Benefit of Economy Freight Services Ltd.—Review of Initial Decision.

CONTACT PERSON FOR MORE INFORMATION: Joseph C. Polking, Secretary, (202) 523–5725.

Joseph C. Polking,

Secretary.

[FR Doc. 93–380 Filed 1–5–93; 11:57 am]

BILLING CODE 6730–01–M

NATIONAL SCIENCE BOARD EXECUTIVE COMMITTEE

DATE AND TIME:

January 15, 1993 8:30 a.m. Open Session.

January 15, 1993 8:35 a.m. Closed Session

January 15, 1993 9:05 a.m. Open Session

PLACE: The Franklin Institute, Benjamin Franklin Parkway at 20th Street, Philadelphia, PA 19103–1194.

STATUS: Part of this meeting will be open to the public. Part of this meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Friday, January 15, 1993.

Open Session (8:30 a.m.–8:35 a.m.)

1. Approval of Minutes, November Executive Committee Meeting

Closed Session (8:35 a.m.–9:05 a.m.)

2. Future NSF Budget

Open Session (9:05 a.m.–4:00 p.m.)

3. Chairman's Items
4. Director's Items
5. Policy Environment
6. Report of the NSB Commission on the Future of the NSF
7. NSB Issues/Actions for the Coming Year
8. NSF Actions and Planning
9. Adjourn

Marta Cehelsky,

Executive Officer.

[FR Doc. 93–413 Filed 1–5–93; 1:57 pm]

BILLING CODE 7555–01–M

Corrections

Federal Register
Vol. 58, No. 4
Thursday, January 7, 1993

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Docket No. FV-92-060IFR]

Kiwifruit Grown in California; Relaxation of Quality Requirements

Correction

In rule document 92-22043 beginning on page 41853 in the issue of Monday, September 14, 1992, make the following correction:

§ 920.302 [Corrected]

On page 41854, in the second column, in § 920.302(b)(1), in the eighth line, after "misshapen" insert "and an additional tolerance of 7 percent is provided for kiwifruit that is "badly misshapen." "

BILLING CODE 1505-01-D

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1191

[Docket No. 92-2]

RIN 3014 AA12

Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; State and Local Government Facilities

Correction

In proposed rule document 92-30559 beginning on page 60612 in the issue of Monday, December 21, 1992, make the following corrections:

1. On page 60612, in the third column, in the fourth paragraph, in the ninth line, "FR 38174" should read "56 FR 38174".

2. On page 60613, in the first column, in the third footnote, in the last line, "airport terminal" should read "airport passenger terminal".

3. On page 60619, in the first column, in the first full paragraph, in the eighth line, "what" should read "that".

4. On page 60620, in the first column, in the second line, "and (3) and also contain" should read "and (3) also contain".

5. On page 60629, in the first column, in the heading, *"11.90"* should read *"11.9"*.

6. On the same page, in the same column, in the first full paragraph, in the fifth line, "comply" should read "complying".

7. On the same page, in the same column, in the 2nd full paragraph, in the 12th line, "this" should read "This".

8. On the same page, in the same column, in the 3rd full paragraph, in the 10th line, "trail" should read "trial".

9. On the same page, in the second column, in the first full paragraph, in the fourth line, "trail" should read "trial".

10. On page 60631, in the third column, in the first full paragraph, in the last line, "female minimum housing units" should read "female minimum and maximum housing units".

11. On page 60637, in the 3rd column, in the 14th line, "shred" should read "shared".

12. On page 60639, in the second column, in the second full paragraph, in the last line, "by" should read "for".

13. On page 60645, in the first column, in the first full paragraph, in the seventh line, "1:12," should read "1:12."

14. On page 60646, in the 2nd column, in the 4th full paragraph, in the 11th line, "As population," should read "As a population,".

BILLING CODE 1505-01-D

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064-AA37, 3064-AA96, 3064-AB14

Assessments

Correction

In rule document 92-23514 beginning on page 45263 in the issue of Thursday, October 1, 1992, make the following corrections:

§ 327.3 [Corrected]

1. On page 45285, in the first column, in § 327.3(d)(i)(B)*(1)*, in the fourth line, "of" should read "for".

§ 327.7 [Corrected]

2. On page 45286, in the first column, in § 327.7(a)(1)(ii)(A), in the second line, "paid by the bank" should read "paid by a bank".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Office of Surface Mining and Reclamation

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

Correction

In notice document 92-30240 appearing on page 59126 in the issue of Monday, December 14, 1992, in the third column, the text from "*Abstract:*" through "*Estimated Completion Time:* 16 mins" was printed incorrectly. It should read as follows:

"*Abstract:* This Part requires the regulatory authority to conduct periodic inspections of coal mining activities, and prepare and maintain inspection reports for public review. This information is necessary to meet the requirements of the Surface Mining Control and Reclamation Act of 1977.
Bureau Form Number: None
Frequency: Monthly
Description of Respondents: State Regulatory Authorities
Estimated Completion Time: 4 hours
Annual Responses: 170,580
Annual Burden Hours: 622,500"

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

Correction

In notice document 92-30239 appearing on page 59126 in the issue of Monday, December 14, 1992, the text

from "*Abstract:*" through "*Annual Burden Hours:* 622,500" was printed incorrectly. It should read as follows:

"*Abstract:* In order to ensure compliance with 30 CFR part 870, a quarterly report is required of coal produced for sale, transfer or use nationwide. Individual reclamation fee payment liability is based on this information.

Bureau Form Number: OSM–1

Frequency: Quarterly

Description of Respondents: Coal mine and coal preparation plant operators

Annual Responses: 15,000

Annual Burden Hours: 4,089

Estimated Completion Time: 16 mins"

BILLING CODE 1505–01–D

federal register

Thursday
January 7, 1993

Part II

Environmental Protection Agency

40 CFR Part 61
National Emission Standards for Hazardous Air Pollutants; Benzene Waste Operations; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[AD–FRL–4534–2]

National Emission Standards for Hazardous Air Pollutants; Benzene Waste Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is clarifying widely misunderstood provisions to the national emission standards for hazardous air pollutants (NESHAP) for benzene emissions from benzene waste operations, subpart FF of 40 CFR part 61. Sources affected by subpart FF of this part include chemical manufacturing plants, coke by-product recovery plants, petroleum refineries, and facilities at which waste management units are used to treat, store, or dispose of waste generated by chemical manufacturing plants, coke by-product recovery plants, or petroleum refineries.

The final amendments clarify points on which there has been confusion and provide additional options for compliance that give owners and operators increased flexibility in meeting the requirements of the rule while still meeting the NESHAP goals for health risk protection.

DATES: *Effective Date:* January 7, 1993.

Judicial Review. Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of the clarifying amendments to the NESHAP is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit on or before March 8, 1993. Under section 307(b)(2) of the CAA, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by the EPA to enforce these requirements. Judicial review is not available for aspects of subpart FF that are not addressed by today's amendments.

ADDRESSES: *Docket.* Information related to the development of the amendments to subpart FF promulgated today is contained in categories XI through XIV of Docket No. A–89–06. The docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at the EPA's Air Docket Section, Waterside Mall, room 1500, 1st Floor, 401 M Street, SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For information on the rule amendments, contact Robert B. Lucas, Chemicals and Petroleum Branch (MD–13), telephone (919) 541–0884 or Gail Lacy, Standards Development Branch (MD–13), telephone (919) 541–5261, Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711. For information on the waiver policy for Subpart FF, contact Eric Crump, Chemicals and Petroleum Branch (MD–13), telephone (919) 541–5032, Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. Background.
II. Overview of Final Rule Clarifications and Implementation.
III. Facility Applicability.
IV. Control Requirements.
V. Additional Exemption for Small Benzene Quantity Wastes.
VI. Alternative Compliance Options.
VII. Monitoring, Recordkeeping, and Reporting.
VIII. Policy for Granting Waivers of Compliance.
IX. General.
X. Administrative Requirements.

I. Background

On March 7, 1990 (55 FR 8292), the EPA promulgated under section 112 of the Clean Air Act (as it was written prior to the Clean Air Act Amendments of 1990), 42 U.S.C. 7412, NESHAP controlling emissions of benzene to the ambient air from waste operations (subpart FF of 40 CFR part 61). The NESHAP for benzene waste operations is applicable to owners or operators of chemical manufacturing plants, coke by-product recovery plants, and petroleum refineries. In addition, this subpart applies to owners and operators of facilities at which waste management units are used to treat, store, or dispose of waste generated by chemical plants, coke by-product recovery plants, or petroleum refineries.

Due to widespread confusion among affected industries concerning key provisions of the rule, the EPA issued a stay of effectiveness of subpart FF on March 5, 1992 (57 FR 8012). The stay was to remain in effect until the EPA took final action on clarifying amendments to subpart FF. Clarifying amendments to the rule were also proposed on March 5, 1992. The EPA agreed to take final action on these amendments or before December 1, 1992 in a settlement agreement filed in connection with litigation on subpart FF. See *API* v. *EPA*, No. 90–1238 (D.C. Circuit) (Settlement Agreement).

With today's notice, the EPA is promulgating clarifying amendments to subpart FF and removing the stay. In accordance with section 112(q) of the Clean Air Act, as amended in 1990, these amendments are being promulgated under the authority of the Clean Air Act prior to enactment of the Clean Air Act Amendments of 1990. They are intended to clarify existing provisions of subpart FF and to provide additional flexibility to owners and operators who must comply with the rule while still meeting the NESHAP goals for health risk protection.

The comment period on the proposed clarifying amendments was from March 5, 1992 to May 4, 1992. Thirty-three comment letters were received. The commenters included companies affected by the rule, trade associations, and an environmental group. Most comment letters contained multiple comments. Commenters generally supported the proposed amendments, although many offered specific criticisms and suggested changes. The EPA considered all comments on the proposed rule amendments in developing the final amendments promulgated today.

In the March 5, 1992 notice of proposed rulemaking, the EPA requested specific comments on potential alternative structures for the rule that would encourage reclamation and recycling without compromising the NESHAP risk protection goals. To inform the affected public of the suggested alternative rule structures and major rule clarifications being considered, the EPA held a series of meetings, between proposal and promulgation of the rule amendments, with industry and an environmental group. A written record of each meeting was placed in the rulemaking docket for subpart FF. During and following these meetings, additional comments were submitted on the major rule clarifications and alternative rule structures. These comments were also considered by the EPA in developing the final rule amendments.

The clarifying amendments to subpart FF that are being promulgated today are discussed below. Comments received on the proposed amendments and the EPA's responses to those comments are also discussed.

Some commenters submitted comments on aspects of the original rule that were unaffected by the proposed amendments. These comments are outside the scope of the rulemaking for

the proposed amendments. Therefore, these comments, although mentioned, are not addressed in this rulemaking.

II. Overview of Final Rule Clarifications and Implementation

The EPA proposed clarifying amendments to several provisions of subpart FF to resolve confusion. Several clarifications related to facility applicability including: (1) Clarifying which wastes are included in the calculation of total annual benzene quantity in all aqueous waste streams (TAB); (2) elaboration on the definition of point of waste generation; and (3) making clear that waste treatment cannot be used to lower facility TAB. Other proposed amendments included a 1.0 megagram per year (Mg/yr) of benzene exemption from controls for small quantity benzene wastes, a requirement that facilities prepare and implement a maintenance turnaround plan, and other miscellaneous clarifications. Comments were specifically requested on the need for a maintenance turnaround plan, the risks associated with organic wastes, and on possible alternative structures for the rule that would encourage recycling and reclamation while still meeting the NESHAP risk protection goals.

The EPA carefully considered comments received on the proposed clarifying amendments, and has made several changes in the final rule. These changes include the following:

(1) Raising the proposed 1.0 Mg/yr of benzene exemption to 2.0 Mg/yr of benzene, and removing the proposed restrictions on which wastes are eligible for this exemption;

(2) Deleting the requirement for a maintenance turnaround plan;

(3) Adding an elective option for averaging the benzene in process unit turnaround wastes in the calculation of facility TAB;

(4) Establishing separate control requirements based on containment controls for certain organic wastes that are managed in tanks; and

(5) Including an additional compliance option for facilities that are above the 10 Mg/yr applicability threshold.

Other more minor changes were also made based on comments received. All changes made to the clarifying amendments between proposal and promulgation are discussed in detail beginning in section III of this preamble.

Facilities subject to the rule are required to be in compliance with all provisions of the amended rule within 90 days from today, unless a waiver of compliance is obtained under §§ 61.10 and 61.11 of the General Provisions to 40 CFR part 61. Additional information on the policy for granting waivers of compliance for subpart FF, as amended, is discussed in section VIII of this preamble. Detailed guidance on the waiver policy is provided in a separate document, "Benzene Waste Operations—NESHAP Waiver Guidance." No waiver of compliance issued will extend beyond 2 years from today's date.

All facilities subject to Subpart FF are required to submit a report that summarizes the regulatory status of each waste stream covered by the rule to the appropriate EPA regional office or delegated State or local agency. A facility that has previously submitted this report to the EPA or to the delegated State or local agency and, after reviewing the clarifying amendments promulgated today, believes that the previous report is accurate, may submit a statement to this effect rather than resubmitting the entire previous report.

In an advance notice of proposed rulemaking (ANPR), the EPA is announcing the intent to propose an additional compliance option, based on site-specific risk assessment, for public comment. Facilities that may want to utilize this alternative compliance option if it is added to the rule are eligible to apply for a waiver of compliance. Additional information on waivers of compliance for facilities that may want to utilize site-specific risk assessment as a compliance option is presented in section VIII of this preamble.

III. Facility Applicability

Subpart FF is applicable to petroleum refineries, chemical plants, and coke by-product recovery facilities. It also is applicable to treatment, storage, and disposal facilities (TSDF) that receive wastes from petroleum refineries, chemical plants, and coke by-product recovery facilities.

The calculation of TAB determines whether a facility is subject to the control requirements of the rule. A facility at or above the TAB threshold in the rule of 10 Mg/yr is required to control each benzene waste stream at the facility or demonstrate that the waste stream meets a criterion in the rule for exemption from control. A facility with a TAB below 10 Mg/yr is only subject to the rule's reporting and recordkeeping provisions, unless the facility receives a waste from offsite that must be controlled to meet subpart FF, in which case that waste must be controlled.

Following promulgation of subpart FF on March 7, 1990, it was evident that many members of the regulated community were either confused about or had misunderstood the EPA's intent on how the applicability of control requirements in the rule to facilities should be determined. Given the critical importance of this determination of facility applicability, the EPA proposed amendments in the March 5, 1992 notice to clarify how facility applicability is determined. Comments received on the proposed clarifications related to facility applicability, and the EPA's responses to them, are discussed in the following sections.

A. Wastes Included in the TAB Calculation to Determine Applicability of Control Requirements

The proposed amendments sought to clarify the EPA's general intent that the benzene in all aqueous wastes and wastes that become aqueous be included in the TAB calculation. To resolve prior confusion, discussion in the preamble and proposed clarifying language in the regulation specifically stated that the following wastes are among those whose benzene should be included in the calculation of facility TAB: Organic wastes that become aqueous (i.e., are mixed with water or other aqueous wastes such that the water content of the waste exceeds 10 percent); materials subject to subpart FF that are sold; and wastes that may be exempted from control under the rule based on low benzene concentration, low benzene quantity, or low total waste quantity.

The proposed amendments also included a clarification to address how wastes generated on an infrequent basis, such as wastes from process unit turnarounds, are counted in the TAB calculation. Under the proposed clarifications, these wastes would have been counted in a facility's TAB for the year in which they are generated.

To avoid creating a disincentive for facilities to undertake voluntary remediation activities, the proposal included an exception for remediation wastes. The proposed clarification would exclude these wastes from the facility TAB calculation but require that they are subject to control if the facility TAB is 10 Mg/yr or greater. Thus, the benzene content of remediation wastes would not affect whether a facility is subject to the control requirements of the rule.

Industry representatives commented on several aspects of the proposed clarifications related to facility applicability. After consideration of these comments, the EPA is proceeding with all of the clarifications as proposed with the exception of the proposed language for process unit turnarounds.

The final amendments allow facilities to average the benzene in wastes generated by process unit turnarounds in the calculation of TAB. Further discussion of the comments received and the EPA's responses is presented below.

Materials Subject to Subpart FF That Are Sold

One commenter claimed that the EPA had created additional confusion with the proposed clarification in § 61.342(a)(2) that the benzene in a material subject to subpart FF that is sold is included in the calculation of TAB if the material meets the definition of a waste and has an annual average water content greater than 10 percent. The commenter further states that with this proposed change, the EPA has raised questions concerning the status of materials that have never been regarded as wastes.

It has always been the EPA's intent that if a material meets the definition of a waste in the rule, then the benzene in that material should be included in the calculation of TAB based on its benzene content at the point of generation. The purpose of the proposed amendment was to clarify more specifically that the act of selling a material does not, by itself, mean that the material is not subject to subpart FF. The definition of waste in the rule is intentionally broad and does not differentiate between materials based on their ultimate end use. This is because any material containing benzene that meets the rule's definition of waste has the potential to be a source of benzene emissions. Further, materials that meet the definition of waste are generally not subject to other rules that limit benzene air emissions.

Although not explicitly stated by the commenter, the EPA sees two potential concerns by industry associated with materials subject to Subpart FF that are sold. One concern might be that including the benzene in these materials in facility TAB causes facilities otherwise below 10 Mg/yr to exceed this TAB threshold for the applicability of subpart FF control requirements. However, the commenter gave no indication to what extent this may be a problem.

A second potential concern might be from the perspective of facilities with TAB's above 10 Mg/yr. The owners or operators of these facilities may not understand the control requirements at the generator site and at the site receiving them for materials that are sold. Since these materials are potential sources of benzene emissions, the EPA has always intended that they be controlled as are other materials that meet the definition of waste in subpart FF. At the generator site, these materials must be managed in units equipped with emission controls prior to shipment offsite as specified in the rule. As required under § 61.342(f), the generator is required to include with each shipment offsite of waste, a notice stating that the waste must be managed and treated in accordance with the requirements of subpart FF. In the case of materials that are sold, the receiving site may be purchasing them for input to another process as a raw material. In that case, at the receiving site, materials subject to subpart FF would have to be managed in units meeting the subpart FF requirements for benzene air emission control up to the point the materials reenter a process; at the process reentry point the sold materials would no longer be subject to subpart FF. In meetings following the proposal of the clarifying amendments, the EPA asked for additional supporting information from industry to indicate the extent of concern regarding materials subject to subpart FF that are sold and to aid in evaluating the impact of the proposed clarification. No additional information has been received by the EPA.

Without additional information submitted to support the comment on materials subject to subpart FF that are sold, the EPA is not persuaded that these wastes should be excluded from the rule or the TAB calculation. Therefore, the promulgated clarification is unchanged from proposal.

Remediation Activities

The EPA received comments from industry in support of and in opposition to the proposed clarification on remediation wastes. Those supporting the proposed amendments believed that the EPA had correctly recognized that without this clarification, there would be a disincentive for facilities to undertake voluntary remediation activities. Those opposing the proposed clarification objected to inclusion of these wastes in the rule at all. One commenter argued that remediation wastes are already controlled under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and thus should not be controlled by subpart FF. Another commenter claimed that the control requirement for remediation wastes would create a disincentive to conduct remediation activities and that solid waste remediation (e.g., contaminated soils) should be removed from the scope of the rule because control of these wastes is best left to the regulatory agency directing the cleanup, and because these wastes may require controls and equipment dissimilar to the controls discussed in the rule. The commenter noted that few solid waste remediation activities are voluntary, citing RCRA and CERCLA as statutes driving many such remediation activities.

The EPA disagrees with the commenters opposed to the proposed clarification. While the EPA believes it is reasonable to exclude the benzene in remediation wastes from facility applicability determination (in order not to create a disincentive for voluntary remediation actions), there is a strong rationale to control these wastes at a facility to which the control requirements apply. Materials generated by remediation actions fall within the definition of waste in the rule and can contain significant amounts of benzene. In general, these materials would be expected to be managed with other wastes at a facility. If these materials were excluded from the control requirements of the rule, benzene air emissions from remediation actions could be left uncontrolled, resulting in the remediation activity transferring benzene contamination from another media into the air. Consequently, the EPA believes that at facilities with a TAB above the control threshold in the rule of 10 Mg/yr, wastes from remediation activities should be subject to the control requirements of the rule as are other wastes containing benzene.

The EPA also disagrees that the proposed change would create a disincentive for facilities to undertake remediation activities. To the contrary, by proposing that the benzene in remediation wastes not be included in the TAB calculation, the proposed change would remove the potential disincentive in the original rule for a facility with a TAB below 10 Mg/yr to undertake voluntary remediation actions. That the proposed change would accomplish this is supported by some commenters. Further, to the extent that benzene emissions from these wastes are controlled by CERCLA or RCRA, no additional effort would be required under subpart FF. For these reasons, remediation wastes are excluded from TAB, but are subject to the control requirements of the rule. At facilities whose TAB's are at or above 10 Mg/yr, remediation wastes are subject to the rule's control requirements in the same manner as any other wastes.

Regarding the types of controls needed for soil remediation wastes, the EPA believes that these wastes can be managed and treated in units that meet

the control requirements of subpart FF. The rule does not apply to the act of excavating benzene-contaminated soil, a point perhaps misunderstood by the commenter. However, after the contaminated soil is excavated, it then meets the definition of a waste, and is subject to the rule. Once excavated, waste containing 10 ppmw or greater benzene is required to be handled in waste management units (e.g., containers) for which the controls specified in the rule are applicable and appropriate. The treatment requirement in the rule is a performance standard (i.e., reduce concentration of benzene in the waste to below 10 ppmw, or by 99 percent) and does not specify the method of treatment. Methods such as solvent extraction and thermal treatment are demonstrated technologies that are available to meet this performance standard for soil remediation wastes. The requirement in subpart FF for the control of air emissions from a treatment technology that is used is also a performance standard (reduce organic emissions by 95 percent or benzene by 98 percent). This level of control has been demonstrated to be achievable and is comparable to what is required for the control of air emissions from treatment units permitted under the RCRA.

One company asked whether the benzene in a remediation waste that is sent offsite to a TSDF is counted towards the TAB of the TSDF. The benzene in all wastes (including remediation wastes) received by a TSDF from chemical plants, petroleum refineries, and coke by-product recovery plants and that contain 10 percent or greater of water count towards the TAB of the TSDF. This is discussed further in section III.C of this preamble.

Infrequently Generated Wastes

The proposed rule amendments included a clarification that the benzene in waste streams generated on an infrequent basis, such as wastes from process unit turnarounds (also referred to as maintenance turnarounds) that occur only once every 2 to 5 years or less frequently, is counted in the TAB calculation for the year in which the wastes are generated. The proposed clarification specifically stated that the benzene in these wastes is not averaged over the time period between occurrences of the activities that generate the wastes. The EPA received a number of comments on this proposed clarification.

Most of the comments received on this proposed clarification addressed process unit turnaround wastes. Commenters specifically opposed the proposed inclusion of the benzene in process unit turnaround wastes in the TAB calculation for the year in which the waste is generated. The concern expressed by commenters was that, because of the potentially significant amount of benzene in process unit turnaround wastes, the proposed clarification could cause facilities with a TAB otherwise below 10 Mg/yr to go above this level in the year that process unit turnaround occurs.

One commenter cited an example where wastes containing 2.5 tons of benzene were generated during process unit turnaround at a facility with a TAB that in other years is just below 10 Mg/yr. In this situation, process unit turnaround wastes would trigger applicability of the control requirements of the rule to all wastes at the facility, but only in the years that process unit turnaround occurs. As a remedy for this, commenters suggested that the EPA allow the averaging of infrequently generated wastes in the TAB calculation over the period between occurrences.

The EPA agrees with commenters that the clarification as proposed would create the potential for a facility to exceed the 10 Mg/yr TAB threshold only in those years when a process unit turnaround occurs. Previously, the EPA was not aware of the extent to which the benzene in process unit turnaround wastes could influence the applicability of control requirements at facilities subject to the rule. Based on the comments received, it is clear that the proposed clarification would substantially impact some smaller facilities, requiring them to purchase and install controls for use only in years in which process unit turnaround occurs or face penalties for noncompliance in those years. This is not the EPA's intent.

The EPA considers the suggestion made by commenters that, for the purpose of the TAB calculation, the benzene in intermittently generated wastes be averaged over the period between occurrences to be a reasonable one for process unit turnaround wastes generated as infrequently as once every 2 years or longer. Consequently, the final rule clarifications include an elective option in § 61.355(b)(4) for averaging the benzene in process unit turnaround wastes in the calculation of facility TAB. To compute a yearly contribution to facility TAB under this option, the benzene in process unit turnaround wastes generated during the most recent turnaround is divided by the period of time between the two most recent turnarounds. A facility selecting this approach will report an annual contribution to facility TAB for the process unit regardless of whether the unit had a turnaround in the reporting year. If turnaround occurs separately for individual process units within a facility, the annual contribution to facility TAB shall be computed separately for each process unit.

For example, assume there is a process unit for which turnaround occurred in 1988 and in 1991, and the facility does not anticipate turnaround again until 1995. In 1993, the first year of compliance with the amended rule, the annual contribution to TAB from turnaround of the process unit would be the benzene quantity from the 1991 turnaround divided by three (because the period from 1988 to 1991 covers three years). This same value would be used in the calculation of TAB for 1994 and 1995. If the process unit turns around again in 1995, as anticipated, the value would change in 1996 to be the quantity generated from the 1995 turnaround divided by four (4-years between 1991 and 1995). Subsequent TAB calculations would use this value until the next turnaround of the process unit.

Owners and operators are not required to average process unit turnaround wastes. For most facilities, it will simplify the TAB calculation to record the benzene in process unit turnaround wastes only in the year that a turnaround occurs. The option of averaging the benzene in process unit turnaround waste is expected to be elected by a facility whose TAB is just below 10 Mg/yr and where the benzene in process turnaround waste could cause the facility to exceed 10 Mg/yr in the year that turnaround occurs if averaging were not allowed. A facility with a TAB significantly below 10 Mg/yr is not likely to average the benzene in process unit turnaround waste unless averaging is necessary to maintain the facility TAB below 10 Mg/yr. Facilities whose TAB is above 10 Mg/yr based on the benzene in wastes other than process unit turnaround wastes, are not likely to elect this option.

Commenters also requested that wastes associated with process upsets should be excluded from the TAB calculation. No information was supplied by the commenters on the possible magnitude of the benzene in these wastes or the potential impact of these wastes on facility applicability determinations. Without such information, the EPA has no basis for assessing the impact on benzene emissions and risk basis for assessing the impact on benzene emissions and risk if these wastes were excluded. Consequently, these wastes are covered by the rule and must be included in a

facility's TAB calculation if the waste contains greater than 10 percent water, or is mixed with water or other wastes at any time and has an annual average water content over 10 percent. Further, since process upsets are random events that do not occur at predictable intervals (as do process unit turnarounds), the development of a methodology whereby the benzene in these wastes could be averaged in the calculation of TAB is not appropriate. Therefore, the benzene in a waste generated by a process upset must be included in the facility's TAB calculation in the year the waste is generated.

B. Clarifications on Point of Waste Generation

Subpart FF requires that the characteristics of waste streams at their "point of generation" be used for the purposes of calculating a facility's TAB, which in turn determines applicability of Subpart FF control requirements to a facility. For a limited number of facilities that are subject to the rule, in particular for those whose TAB is just below or above 10 Mg/yr, the definition of the point of generation of waste streams can affect facility applicability.

Due to confusion over the rule's original language related to point of generation, the EPA proposed to simplify the definition of point of generation in § 61.341 and also clarify in §§ 61.355 (b) and (c) where waste quantity and flow-weighted annual benzene concentration are determined for the purpose of calculating TAB. Comments received on these proposed changes are discussed below.

Definition of Point of Generation

The proposed definition of point of generation in § 61.341 focused on the difference between process and waste management units and emphasized that the point of waste generation is before any waste treatment. Numerous comments were received on the proposed definition.

Several commenters argued that the point of generation should be where a waste is first exposed to the atmosphere. These commenters claimed that relating the point of generation to the point of exposure to the atmosphere was essential to simplifying applicability of the rule and promoting recycling and source reduction of wastes.

The EPA explained in the preamble to the proposed rule amendments that its intent in specifying the point of generation was (1) to establish the true emission potential of a stream, prior to any losses that occur through volatilization to the atmosphere and prior to any waste treatment, and (2) to have affected facilities calculate their TAB in a manner consistent with the EPA's intended structure for the rule; that is, consistent with how the EPA determined which facilities should be controlled to meet the NESHAP risk goals. To adopt the commenters' suggestion would be contrary to these stated intentions for the rule as originally structured. A definition entirely based on where waste is exposed to the atmosphere would allow waste treatment as a means of reducing facility TAB. If this were allowed, facilities could simply treat wastes such that facility TAB was lowered to just below 10 Mg/yr, thereby avoiding the control requirements of the rule. Further, there would be no assurance that treatment processes would be controlled for benzene air emissions. As discussed in the proposal preamble, this was not the EPA's intent in the original rule structure and may not achieve the NESHAP risk goals (see 57 FR 8021 and 8022). Therefore, the EPA has not adopted the commenters suggested definition of point of generation for the original rule structure.

Moreover, the purpose for these amendments is to clarify the original intent of the rules with respect to the point of waste generation. If this rulemaking was just being initiated, the EPA may have considered a different regulatory approach to meet the NESHAP risk policy goals.

However, as discussed in section VI of this preamble, the EPA has included in the final rule amendments an additional compliance option for facilities subject to the control requirements of subpart FF (i.e., those facilities with TAB's above 10 Mg/yr). This option is being promulgated specifically in response to commenters who requested an additional compliance option that would further promote reclamation and recycling of wastes at facilities affected by the rule and that must install controls. Under this option, a facility owner or operator may selectively manage wastes such that the mass of benzene in wastes after management in units equipped with air emission controls (or after treatment in devices equipped with air emission controls), plus the mass of benzene in wastes not managed in controlled units (at their point of generation) is less than 6 Mg/yr (see section VI of this preamble). For waste streams that are managed from their point of generation in units controlled at least to the level required by the rule or that are treated to reduce benzene, the benzene quantity is determined before the waste enters the first unit uncontrolled for air emissions. Thus, this option does, in effect, allow compliance with the rule for controlled waste streams to be determined based on the characteristics of the waste at the point where it is first exposed to the atmosphere.

One commenter stated that rarely is there a "bright line" between equipment that is integral to a process and equipment that is nonintegral in refinery processes. The commenter expressed concern about how the EPA would make case-by-case decisions on integral versus nonintegral equipment and whether these decisions would be published. Other commenters described site-specific equipment configurations claimed to be processes that promote resource recovery and requested that the EPA clarify the location of the point of generation for these configurations.

The EPA believes that through the definitions of waste, waste management unit, and point of generation, the rule provides adequate direction to determine the distinction between a waste management unit and a process unit. The definition of waste determines which materials at a facility comes under potential coverage by subpart FF. Which facilities are subject to the control requirements of subpart FF, and which waste streams must be controlled at those facilities is determined based on the characteristics of waste streams at their point of generation. The point of generation of a stream is after it has left a process and prior to handling or management in a unit that is not integral to the process, including prior to processes that promote resource recovery.

In general, and as discussed in the proposal preamble, the distinction between what is a waste management unit and what is a process unit is based on the material managed in the unit (see 57 FR 8020). If the material meets the definition of waste in the rule, then the unit is a waste management unit and the point of generation would be at a location prior to where the waste enters this unit. This is a primary criterion for distinguishing waste management units from process units for the purposes of subpart FF.

In limited situations, a material may meet the definition of a waste, but because it never leaves a process unit component, there may not be a point for that material that technically meets the definition of point of generation in the rule. This may be the case where materials are recycled within a process (e.g., product distillation reflux streams) or where materials are directly hardpiped from one process to another without accumulation, storage, or treatment. If a material never leaves a process, it is not covered by the rule,

even though it may meet the definition of waste. The burden, however, will be on owners and operators to demonstrate that the material does not leave the process, and that units claimed to be process units are, in fact, integral to the process. Additional discussion on materials recycled to a process or within a process is presented in section III.E of this preamble.

Where site-specific determinations on the point of generation are requested, they will be made by the EPA regional offices and delegated State and local agencies consistent with the final rule amendments. Regions, States, or local agencies that get applicability determinations that may be precedent setting or have nationwide importance will work with the EPA Headquarters in making the determinations. The EPA Headquarters will then distribute these determinations to other EPA regional offices, and State and local agencies as appropriate.

Listed Exceptions in § 61.355 for Sour Water Streams and Wastes at Coke By-Product Plants

The proposed rule amendments, clarify that for the purpose of a facility's TAB calculation, all determinations of waste stream annual quantity and benzene concentration are made at the point of generation with three exceptions. The listed exceptions are for wastes at coke by-product recovery plants handled in units subject to subpart L of 40 CFR part 61, sour water streams treated in sour water strippers, and wastes received by a TSDF from offsite. Due to the special circumstances explained in the proposal preamble, the quantity and benzene concentration of these wastes are determined at a location different from the point of generation (and described in §§ 61.355 (b) and (c) of the proposed rule amendments).

Several commenters supported this proposed clarification. One commenter asked the EPA to accord natural gas strippers and other strippers inherently controlled for air emissions the same status in the rule as sour water strippers. The EPA does not believe that the exception should apply to natural gas and other strippers.

In general, in the analysis performed to support subpart FF, the EPA evaluated waste streams based on their benzene content at the point of generation, and prior to any waste treatment. Certain exceptions were made, however, based on unique circumstances.

Although sour water strippers are considered by the EPA to be waste treatment devices, the benzene content of each sour water stream treated in a sour water stripper was assumed in the analysis based on its benzene concentration at the exit of the stripper. This is because information supplied to the EPA by industry at the time the analysis was performed was for the characteristics of waste streams at the exit of sour water strippers. The analysis showed that for these streams, assuming benzene content at the exit of the stripper, and assuming inherent control for air emissions of the treatment device, the NESHAP risk protection goals would be met. This was explained in the preamble to the proposed amendments (see 57 FR 8021). Similar assumptions could not be made for other strippers based on the limited information available at the time of the analysis. Further, the application of sour water strippers is limited to the treatment of sour water streams, not any waste containing benzene.

For these reasons, the EPA considers sour water strippers to be unique relative to other treatment devices, not comparable to natural gas strippers and other strippers inherently controlled for air emissions. To accord natural gas strippers and other strippers the same status in the rule as sour water strippers would imply a general allowance of waste treatment as a means of lowering facility TAB. As discussed in the notice of proposed rulemaking for the clarifying amendments, this is clearly not the EPA's intention. Generically allowing waste treatment to lower facility TAB would be inconsistent with the EPA's intended rule structure in a way that could jeopardize attainment of the NESHAP risk protection goals for several reasons. For example, if waste treatment were generically allowed to lower TAB such that a facility is no longer subject to the control requirements of the rule, there would be no assurance that the treatment process was controlled for air emissions, there would be no control of benzene emissions from organic wastes, and facilities could treat wastes such that facility TAB was lowered only to 10 Mg/yr. All of these results would be inconsistent with the EPA's intended structure for the rule. Based on this, the commenter's suggestion was not adopted in the final rule amendments. It should be pointed out, however, that natural gas strippers and other strippers inherently controlled for air emissions are likely in compliance with the control requirements of the rule for those sources, although other waste management sources at the same facility may require additional control.

C. Applicability of the Rule to TSDF

The preamble to the proposed amendments described how control of wastes received by TSDF from chemical plants, petroleum refineries, and coke by-product recovery plants can be required under the rule in two ways (see 57 FR 8021). Control of these wastes is required at the TSDF if either (1) the TAB calculated for the TSDF is 10 Mg/yr or greater (based on the characteristics of the wastes at the point they enter the TSDF), or (2) if the waste would have been required to be controlled to meet the rule by the generator if it had not been shipped offsite (i.e., the generator's TAB is 10 Mg/yr or greater and the waste contains 10 ppmw or more of benzene).

Although no changes were proposed to the specific rule requirements that address the shipment of wastes offsite in the second case, comments were received that the "need to control" a waste should not accompany the waste when it is shipped from a generator with a TAB of 10 Mg/yr to a TSDF with a TAB below 10 Mg/yr. Two commenters specifically stated that this could restrict the number of TSDF willing to accept refinery wastes.

It is the EPA's intent that wastes generated by any facility subject to the rule with a TAB of 10 Mg/yr or greater be controlled, regardless of whether the waste is sent offsite or not. Consistent with this intent, the rule requires that wastes sent to any offsite facility (including TSDF) by a generator with a TAB of 10 Mg/yr continue to be subject to the control requirements of subpart FF until they are treated to the level required by the rule or they reenter a process at the offsite facility.

Dispersal of wastes to offsite facilities where controls may not be required is not an acceptable means of reducing the potential health risks associated with these wastes for two reasons. First, if the "need to control" a waste did not go with it when it is shipped offsite as suggested by the commenters, this could lead to the distribution of significant quantities of benzene wastes to uncontrolled facilities (e.g., to TSDF's with TAB's significantly below 10 Mg/yr currently). This would result in an increase in benzene emissions and risk and conflict with the NESHAP risk protection goal of minimizing the population at a risk of greater than one in one million.

Secondly, there would be no guarantee that potential benzene emissions and risk would actually be dispersed. For example, even if a TSDF were under separate ownership, it could be located contiguous to a facility

generating the waste. In this case, "offsite" may simply be across the street. For these reasons, the final rule as amended still requires wastes shipped to a TSDF from a generator with a TAB of 10 Mg/yr to be controlled at the TSDF, even when the TSDF's TAB is below 10 Mg/yr.

As mentioned earlier, a question was raised after proposal of the rule amendments as to whether the benzene in a remediation waste that is sent offsite to a TSDF is counted towards the TAB of the TSDF. The benzene in all wastes (including remediation wastes) that are received by a TSDF from chemical plants, petroleum refineries, and coke by-product recovery plants and that contain greater than 10 percent water or that are mixed with water or other wastes and have over 10 percent water content count towards the TAB of the TSDF. The benzene in remediation wastes generated offsite are not excluded from the calculation of TAB (see § 61.342 (a) (3)) for a TSDF or any other facility subject to the rule (although it is still not included in the TAB for the generator site) for two reasons.

First, the objective in excluding remediation wastes from facility TAB is to remove the potential influence that concern over facility applicability might have on a facility owner or operator's decision whether or not to undertake a voluntary remediation action. That is, would the benzene in remediation wastes, if generated, cause facility TAB to go from below 10 Mg/yr to above 10 Mg/yr, triggering the possible need for controls? This consideration does not apply to facilities receiving wastes from offsite where the owners are not making decisions on whether to generate wastes.

Second, if the benzene in remediation wastes were excluded from the TAB calculation at a TSDF, there would be no limit on the amount of remediation wastes that could be received before facility controls would be required. This could potentially result in an unacceptable increase in the maximum individual risk or the population exposure. (As explained in section III.C of this preamble, however, any waste that is subject to the control requirements of the Subpart at a generator site must also be controlled if sent to a TSDF, regardless of the TAB of the TSDF.) Thus, under the final rule amendments, if remediation wastes are sent offsite to a TSDF or other facility, the benzene in these wastes does count towards the TAB of the TSDF.

D. Wastes Exempt From the Rule

The EPA proposed to remove confusion over what wastes are exempt from the rule by removing paragraph (c)(3) of § 61.340. This section identified intermediate and product distillation reflux streams as examples of materials that could meet the definition of waste but are not subject to subpart FF because they are not discharged from a process. This section had caused confusion and, in the EPA's view is unnecessary since other provisions in the rule clearly indicate that materials that never leave a process are not subject to the rule. A commenter objected to the complete removal of § 61.340(c)(3), claiming that if it is removed, the EPA will be bringing streams under the rule that would have been exempt.

The EPA considered this comment but is proceeding with the deletion of § 61.340(c)(3). The exemption in this section was originally designed to apply to a narrow population of wastes that included primarily intermediate and product reflux streams, but the examples provided in the rule had been misinterpreted by some affected facilities to mean that a wider population of wastes were not subject to the rule. The EPA believes that the focus in determining which materials are subject to the rule such as identified in the commenters example should be on the definition of waste. Under this definition, waste means "any material resulting from industrial, commercial, mining, or agricultural operations, or from community activities that is discarded or is being accumulated, stored, or physically, chemically, thermally, or biologically treated prior to being discarded, recycled or discharged."

The prior wording of § 61.340(c)(3) was unclear in that it did not adequately tie the status of materials under subpart FF to the definition of waste in the rule, and as such, led some to believe that even if a material were accumulated or stored prior to waste treatment, it might be exempt from the rule. A proper focus on the definition of waste makes § 61.340(c)(3) in the original rule unnecessary. Applying the test of whether a material is accumulated, stored, or treated prior to being discharged or recycled will resolve uncertainty about the status of a material under subpart FF in most cases.

Examples provided by commenters reinforced the need to clarify coverage of the rule in a more general way than through the limited examples previously provided in § 61.340(c)(3). For instance, a refinery example cited by one commenter was overhead condensate from a distillation column that is recycled in enclosed piping to the crude desalter. This operation is not integral to the process. However, it is an example of voluntary direct recycle from one process to another (i.e., the material never leaves the process). As discussed in the next section, if a material never leaves a process, it is not within the scope of subpart FF.

E. Materials Recycled to a Process or Within a Process

The proposal included a revision to § 61.342(c)(1)(iii) to clarify the EPA's intent that waste streams that are recycled be managed and treated according to the requirements in § 61.342(c) up to the point that the waste reenters the process, including entry to a tank used for the storage of production process feed, product, or product intermediates. Commenters did not specifically object to this proposed clarification, but stated that further rule language was needed to clarify that materials recycled within a process or directly to another process are outside the scope of subpart FF. One commenter claimed that in the preamble to the proposed rule amendments, the EPA had indicated that recycled or reclaimed materials that are recycled within a process or directly recycled to another process are not within the scope of the rule. This commenter believes that similar language should be added to the regulation in order that there be a clear understanding on this point by both enforcement officials and the regulated community.

After consideration of these comments, the EPA believes that further clarification in the rule on materials recycled within a process or directly to another process is unnecessary. In the preamble to the proposed rule amendments, the EPA stated that "recycled or reclaimed materials will generally be subject to subpart FF unless they are recycled within a process or are directly recycled to another process." The basis for this statement was not the EPA's intent that materials recycled within a process or directly recycled to another process should by definition be exempt from the rule, but an assumption by the EPA that these materials generally would not meet the definition of waste in the rule.

To meet the definition of waste in the rule, a material must either be discarded or accumulated; stored, or physically, chemically, thermally, or biologically treated prior to being discarded, recycled or discharged. The test for whether materials recycled within a process or that are recycled directly to

another process are subject to the rule is whether they are accumulated, stored, or treated prior to recycling: If they are, they are subject to the rule.

F. Definition of Waste

Although the EPA did not propose to amend the definition of waste in the original rule, several commenters suggested that the EPA take action on this. Commenters criticized the definition of waste in the rule as overly broad, discouraging pollution prevention, and covering non-waste materials. Two commenters objected to the EPA's use of spent caustic in the proposal preamble, stating that it is not always a waste. One commenter requested that the EPA redefine waste to reflect the end use of a material.

As noted, the EPA did not propose any change to the definition of waste in the original rule. The definition of waste that was promulgated in the original rule was the same as proposed on September 14, 1989 (54 FR 38083). The EPA responded to comments on the proposed definition of waste in the notice of final rulemaking issued on March 7, 1990 (see 55 FR 8318). Therefore, comments on the definition of waste in the rule that were received following publication of the proposed rule amendments are outside the scope of this rulemaking.

Regarding spent caustic, the EPA acknowledges that this material is not always subject to subpart FF. In the example presented in the proposal preamble, it was assumed that spent caustic met the definition of waste. If spent caustic does not meet the definition of waste in the rule, then it is not subject to subpart FF.

IV. Control Requirements

Several comments were received on proposed clarifying amendments affecting control requirements that apply at facilities with TAB's of 10 Mg/yr or greater. These comments and the EPA's responses are discussed below.

A. Control Requirements for Organic Wastes

A clarification to § 61.342(c)(1) was proposed to reflect the EPA's intent that all wastes (that contain benzene at a concentration of 10 ppmw or more and do not meet other exemption criteria) at a facility with a TAB of 10 Mg/yr or more are subject to the control requirements of the rule. For the purpose of the TAB calculation, aqueous wastes are those containing 10 percent or more total water and nonaqueous (i.e., organic) wastes are those containing less than 10 percent total water. Only the benzene in aqueous wastes counts towards facility TAB. Once it is determined that a facility must install controls, the original rule made no distinction between aqueous and organic wastes. The same level of control was required for all wastes except those containing less than 10 ppmw benzene or those meeting other criteria for exemption from controls. In the proposal preamble, the EPA specifically solicited comments on the risks associated with organic waste streams.

The EPA did not propose that the benzene in organic wastes be included in facility TAB, a point apparently misunderstood by one commenter. Rather, language was included in § 61.342(a) of the proposed amendments to clarify the EPA's original intent that the benzene in organic wastes that become aqueous during waste management are included in TAB. If organic wastes are not mixed with water or with other wastes such that they become aqueous, the benzene in them is not included in TAB and, therefore, does not affect determinations of which facilities are subject to the control requirements in the rule.

Several comments were received on the need to control organic wastes and the level of control required. Most of the commenters requested that the EPA raise the threshold level for control for organic wastes in the final rule to 1,000 ppmw (i.e., not require controls for organic wastes containing benzene below this concentration level). This request was based on the commenters' assertion that the emission potential of benzene dissolved in organic waste is much lower than the emission potential of benzene dissolved in aqueous waste. One commenter presented calculations on the basis of which it was suggested that the control level concentration for organic wastes could be raised to 1,000 ppmw with no increase in emissions. Another commenter argued that organic wastes are already adequately controlled under the RCRA and that control by subpart FF was redundant.

The EPA has always acknowledged that when benzene is dissolved in organics, it is much less volatile than benzene in aqueous waste at the same concentration. This is a major reason why the benzene in organic wastes that are not mixed with aqueous wastes is excluded from the TAB calculation in the rule. However, the benzene in organic wastes can contribute to benzene emissions and risk, and further, if organic wastes are not controlled at facilities with TAB's at or above 10 Mg/yr, attainment of the NESHAP risk goals could be jeopardized. Therefore, the EPA concluded that organic wastes should not be excluded from control at facilities with TAB's at or above 10 Mg/yr. The rule promulgated on March 7, 1990 reflected this conclusion.

In the preamble to the final rule in the March 7, 1990 **Federal Register** notice, the EPA also responded to commenters on the original proposed rule (proposed on September 14, 1989) who had commented that other regulations promulgated under the Clean Air Act and other Federal statutes (including the RCRA) already adequately controlled benzene emissions from waste operations. In its response, the EPA explained in detail why existing regulations are not adequate for controlling benzene emissions from benzene waste operations (see 45 FR 8321, March 7, 1990). These reasons are still valid.

After reviewing information submitted by commenters on the proposed rule amendments and other information, the EPA still believes, as discussed below, that organic wastes can be a source of significant benzene emissions and risk and, therefore, should be subject to control at facilities above the threshold for applicability of controls. In addition to the concentration of benzene in a waste and its volatility in that medium, potential benzene emissions and risk are also affected by the quantity of the waste and the manner in which the waste is managed. Commenters did not address these factors.

Although no information on the quantity of organic wastes managed at facilities subject to subpart FF was submitted by commenters on the proposed rule amendments, information supplied by facilities to comply with the reporting requirements of the original rule (in § 61.357) suggests that the quantities of organic wastes, and the benzene contained in them, may be substantial. For example, in a report summarizing the regulatory status of each waste stream submitted as required in § 61.357(a) of the original rule, one facility reported over 42,000 Mg of slop oil containing less than 10 percent total water. The average benzene reported for this organic waste was 500 ppmw, which yields an annual benzene quantity of 21 Mg/yr. Another facility reported a waste that was 19 percent benzene with a benzene quantity of almost 20 Mg/yr.

With these large amounts of benzene in organic wastes, it is critical that they be properly managed or else significant benzene emissions may result. If they are managed in covered tanks, benzene emissions can be minimal. However, if at some point the wastes are managed in tanks, aerated units, or heated units (for

example, to break emulsions) that are uncontrolled for air emissions, the benzene emissions would be much higher than if the waste is managed only in covered tanks. In addition, if the waste is splash loaded into open containers several times before final disposition or recycle, much of the benzene could be emitted.

Once a facility is subject to the control requirements of the rule on the basis of the benzene in their aqueous wastes, organic wastes are also subject to control. Organic wastes are eligible for the exemption from control promulgated in today's final rule amendments for wastes containing up to a total of 2.0 Mg/yr of benzene. However, because the potential benzene emissions and risk associated with organic wastes in certain waste management scenarios could be significant, the EPA continues to believe that organic wastes not meeting other exemption criteria in the rule should be controlled for air emissions.

At the same time, the EPA also believes that due to the acknowledged lower volatility of benzene contained in organic wastes, the level of control required for organic wastes does not need to match the level of control required for aqueous wastes. The EPA considered the suggestion by commenters to establish a control threshold specifically for organic wastes based on a benzene concentration of 1,000 ppmw. However, this suggestion puts no limit on the quantity of wastes below the control threshold or on how these wastes are managed. Consequently, if this suggestion were adopted, there could be no assurance that potential benzene emissions would be limited below a level that would not jeopardize attainment of the NESHAP risk goals. On this basis, the commenters' suggestion was rejected.

As an alternative, the EPA has retained the concentration threshold for control for all wastes at 10 ppmw benzene, but has established separate control requirements for organic wastes that have not been mixed such that they become aqueous. Considering the lower volatility of benzene contained in organic wastes and the typical fate of these wastes (generally returned to a process or incinerated), the EPA has determined that controls that suppress benzene emissions are adequate for organic wastes.

Organic wastes are managed primarily in tanks and containers. The existing requirements in the rule for containers are for covers only (unless treatment occurs in the container, in which case a closed-vent system and control device are also required) and, therefore, no change is necessary. For tanks, however, the original rule required a fixed-roof plus a closed-vent system and control device (or the alternative controls for tanks described in § 61.351). Based on the considerations discussed above, the final rule amendments promulgated today include separate requirements for tanks in which organic wastes are managed. These separate requirements, in § 61.343(b) of the amended rule, specify that under certain conditions, a tank in which organic wastes are managed need only be equipped with a fixed roof. The vapor pressure and tank size cutoffs from the new source performance standards for volatile organic liquids in storage tanks (subpart Kb of 40 CFR part 60) have also been adopted in § 61.343(b) as additional eligibility criteria for the less stringent control requirements for tanks. For tanks above these size and vapor pressure cutoffs, the control requirements in the originally promulgated subpart FF are reasonable and typical. Most organic wastes will have vapor pressures below the specified limits or be managed in tanks smaller than the size cutoffs. Therefore, the vapor pressure and tank size cutoffs should not limit the utility of this new provision.

The new provisions for the management of organic wastes in tanks also include language that limits the conditions under which tank venting to the atmosphere may occur (see § 61.343(b)(3)). This language, in effect, means that tanks in which wastes are agitated, treated, or heated must also be equipped with a closed-vent system and control device.

B. Alternative Control Devices

Two comments were received on the proposed amendments to § 61.349 regarding alternative control devices. The original rule (§ 61.349(a)) specified requirements for closed-vent systems and control devices used to comply with the rule's control requirements. Requirements were specified for enclosed combustion devices, vapor-recovery systems, and flares. The EPA proposed to amend this section to allow owners and operators to use alternative control devices, provided that it is demonstrated, prior to the installation of the alternative device, that it will achieve 95 percent control of organic compounds or 98 percent control of benzene.

One commenter supported the proposed amendment as a positive one that would provide flexibility and provide a means to make the rule more cost effective. However, this and another commenter were also concerned that the language of proposed § 61.349(a)(2)(iv)(E) could be interpreted to mean that an alternative control device could not be operated until approval was received from the EPA Administrator. The commenters claimed this interpretation could discourage use of this provision and the development of innovative controls. The commenters suggested options to limit the time available to the Administrator for approval or denial of an alternative device or to allow operation of an alternative control device during the approval period, with the risk that if approval is denied, a facility may be cited for violation for the period it operated the device.

It is the EPA's intent that the performance of an alternative control device be demonstrated and that information documenting that a device will meet the requirements of the rule be submitted before it is installed and operated.

If facilities were prohibited from installing and operating alternative control devices before approval is received from the Administrator, the EPA agrees that owners and operators could be discouraged from attempting to develop and use alternative control devices. However, this is not the case. After the documentation has been submitted to the EPA, the owner or operator may install and operate the device before receiving the EPA's approval. Nevertheless, the owner or operator may be subject to enforcement action beginning from the time the control device began operation. For example, if the EPA disapproves of the device, the facility may be cited for violation for the period it operated the device. Even if the EPA approves of the use of the device, an owner or operator may not have operated the device in accordance with § 61.349 for a portion of the time period before approval was granted. In such a case, the EPA may cite the facility for a violation during that period.

The EPA considered placing a limit in the rule on the time available to the EPA to review information submitted on alternative control devices and to issue approval or denial. However, the review of each device proposed will be different, and the level and complexity of information that will be submitted to document performance cannot be predicted. For this reason, the EPA concluded that it is not reasonable to limit the amount of time available to the EPA to review the information submitted and to issue approval or denial.

The EPA does not, however, want concern about the possible time

required to receive approval from the EPA to discourage the development of alternative control devices that will meet or exceed the performance requirements of the rule. This was the EPA's original intent, but apparently, it was unclear in the language proposed. Therefore, the EPA has included language in the rule that will allow owners and operators at their risk to install and operate alternative control devices, pending approval by the Administrator, provided information and data on the device have been submitted as required by the rule. If an owner or operator chooses to install and operate an alternative control device prior to receiving approval and the EPA determines that the control device did not achieve the emission limitations or was not properly operated, the owner or operator may be cited for noncompliance with subpart FF during the period after the compliance date that the device was operated.

C. Other Comments on Control Requirements

The EPA received comments on the proposed amendment to §61.349(a)(1)(ii) that would allow, as an alternative to flow indicators required in the original rule, the use of car-seals to indicate the position of any valves that might be used to divert the flow of emissions from a control device. One commenter supported the proposed amendment, and suggested that small connections (e. g., low-point drains and high-point bleeds) on the closed-vent system be excluded from requirements for flow indicators, car-sealed valves, and recordkeeping. Another commenter suggested plugging, capping, or blinding as an alternative to car-sealed valves for some vents and drains installed for maintenance around control devices.

The EPA believes that it is essential that air pollution control systems installed to meet the rule be equipped such that it can easily be determined if emissions are being routed to a control device. Any opening that allows emissions to by-pass a control device for an extended period of time can be a potential source of significant air emissions. It is the EPA's intent that routine opening of potential avenues of control device by-pass be prevented and monitored. It should be pointed out, however, that not all openings are prevented. Openings such as emergency venting of pressure relief devices are permitted to prevent physical damage to the closed-vent system and control device. Opening of low-point drains as described by the commenter would also be allowed as long as the drain does not permit diversion of the vent stream away from the control device.

Flow indicators and car-sealed valves provide easily observable visual evidence that control systems are not being by-passed, are widely used in industry, and are required in other NESHAP. These devices also provide recordable evidence that emissions may be escaping, whereas plugs and caps can be removed with no evidence visible that emissions are actually escaping. Although plugging and capping can be effective in controlling fugitive emissions that result from equipment leaks when used in combination with valves, the commenters do not make a strong argument why these would be as effective as flow indicators or car seals in demonstrating the integrity of a closed-vent system, especially without the valve before the cap or plug. For these reasons, §61.349(a)(1)(ii) is not changed from proposal.

The EPA also received comments on the need for dilution air to prevent explosive mixtures in the headspace of waste management units. The EPA agrees with the commenters and the final rule has been amended to allow the addition of dilution air into waste management units that are maintained at less than atmospheric pressure. Facilities must do annual monitoring to demonstrate no detectable emissions from the opening. Also, the pressure must be monitored continuously to ensure that the pressure remains below atmospheric pressure.

One commenter asked the EPA to recognize that there are equipment cleaning and waste removal activities that are not feasible to control, and requested that these be excluded from the control requirements of the rule. Examples cited were routine pipe, strainer, and equipment cleaning; and tank and vessel cleaning.

When tanks and other equipment are opened for cleaning, the emissions from the tank opening are not covered by subpart FF. However, cleaning activities generate wastes subject to subpart FF. If the wastes have 10 ppmw or greater benzene, then the wastes must be controlled and treated in accordance with the rule. To simply exempt these wastes from control without any cap that would limit potential emissions would jeopardize attainment of the NESHAP risk goals. Therefore, these activities are not, by definition, exempted from the control requirements of the rule.

However, the EPA has included an option in the rule amendments promulgated today, as described in the next section of this preamble, that is specifically designed to provide an option for facilities to exclude from control wastes that contain benzene in small quantities, such as those cited by the commenter. Under this option, in §61.342(c)(3), owners and operators may exclude wastes containing up to a total of 2.0 Mg/yr of benzene from the control requirements of the rule. There are no limits on which wastes are eligible. The EPA believes that with this option, and other compliance options provided in the rule as amended, owners and operators have flexibility in deciding which waste streams to control while the EPA limits the maximum possible emissions.

Since proposal of the clarifying rule amendments, questions have been submitted to the EPA concerning the definition of "water seal controls" in §61.341 of the rule. Water seal controls are identified as acceptable controls for drains and junction boxes in the alternative standards for individual drain systems specified in §61.346(b).

In the original rule, "water seal controls" is defined as "a seal pot, p-leg trap, or other type of trap filled with water that has a design capacity to create a water barrier between the sewer line and the atmosphere." The EPA has been asked if the examples cited in this definition are the only acceptable types of water seal controls. Other potential types of water seal controls identified by questioners were flooded sewers and baffle plates on junction boxes that extend to below the liquid surface.

The objective of the controls specified for drains and junction boxes in an individual drain system is to isolate them such that the free flow of vapors within the system is prevented. The examples cited in the original definition of water seal controls in the rule were not intended to be limiting. Other types of seals that achieve this objective are also acceptable. More specifically, flooded sewers are an acceptable control technique for individual drains and junction boxes, provided that the liquid level in the seal is maintained in the vertical leg of the drain. A baffle plate is an acceptable control for a junction box, provided each plate extends below the liquid level. In the final rule amendments, additional examples of acceptable controls have been added to the definition of water seal controls in §61.341 to clarify this point. It is also clarified that for all water seals for drains, the water level must be maintained in the vertical leg of the trap for it to be considered a water' seal.

V. Additional Exemption for Small Benzene Quantity Wastes

Numerous commenters addressed the proposed additional option for

exempting wastes that contain small quantities of benzene from the control requirements of the rule. The EPA proposed (in § 61.342(c)(3)) that wastes containing a total of up to 1.0 Mg/yr of benzene, on an annual basis, could be exempted from control, with certain restrictions. The proposed restrictions on the use of this exemption option were that (1) the annual quantity of benzene in any waste stream exempted under this provision, except for process wastewater, could not exceed 25 kilograms per year (kg/yr); (2) if this option were elected by a facility, it would be as an alternative to the low-flow or mass quantity cutoffs for process wastewater in § 61.342(c)(3); and (3) tank drawdown and wastes from purging prior to sampling ("sample purge") would not be eligible for the proposed exemption.

In general, commenters supported the concept of providing an additional option in the rule for exempting small benzene quantity wastes from control. However, numerous commenters objected to the proposed limits on the use of the option. Commenters also requested that the EPA raise the amount of benzene that can be exempted from 1.0 to 2.0 Mg/yr. Some commenters argued that there should be no limit on either the quantity or type of streams that could qualify for the exemption, as long as the cap on the total amount of benzene was not exceeded. Other commenters specifically requested that the restrictions placed on tank drawdown and sample purge be removed. One commenter suggested that tank drawdown should not be excluded from the proposed exemption option if the tank drawdown were equipped with an oil/water monitoring device that can detect the presence of hydrocarbon in the water phase and automatically close the tank draw. Some commenters requested additional clarifying language in the regulation on which wastes would not be excluded from the proposed option.

After reviewing the comments submitted, the EPA has concluded that providing an additional option for exempting small benzene quantity wastes from the control requirements of the rule is still appropriate. However, in the final rule amendments, several changes have been made to the proposed exemption option based both on an assessment of the comments and on concerns the EPA has related to the tracking of wastes exempted under this provision. These are discussed below.

Specifically, the 25 kg per stream quantity limit and the exclusion of tank drawdown and sample purge from eligibility in the proposed exemption provisions have been removed. The cap on total benzene that may be exempted has also been raised to 2.0 Mg/yr.

The EPA's intent in proposing the additional exemption option was to expand the range of options available to owners and operators in seeking the most cost effective control strategy at each facility that must install controls to comply with the rule. In developing the proposed amendments, concerns related to tank drawdown and sample purge led the EPA to propose that these wastes would not be eligible for the new small quantity benzene exemption. Specifically, the volume and benzene content of waste streams generated through tank drawdown are highly dependent on the techniques of individual operators, making the monitoring of compliance by enforcement agencies difficult for these streams. Sample purge is required to be controlled under certain conditions by other NESHAP applicable to facilities also subject to subpart FF, and the EPA did not want to imply that the requirements of other standards would be overridden by allowing sample purge to be excluded from control under subpart FF.

Commenters argued forcefully that the restrictions proposed on use of the exemption option and the 1.0 Mg/yr of benzene proposed cap could severely limit its utility. After weighing these arguments against the EPA's earlier concerns, as discussed below, the EPA concluded that to accomplish its goal of providing a viable additional option for exempting small benzene quantity wastes, there should be no limits on which waste streams are eligible for the exemption. Further, a reevaluation of the cap indicated that the NESHAP risk goals would still be met if the cap were raised to 2.0 Mg/yr. The increase to 2.0 Mg/yr does allow benzene emissions to increase but it would not allow any facility to exceed one in ten thousand and it still results in significant reductions in population exposed to greater than one in one million risk. Thus, in the final rule amendments, any stream is eligible as long as the total benzene in all streams exempted under this provision is less than 2.0 Mg/yr.

As in the proposal, however, if this option were elected by a facility, the facility would not also be able to take advantage of the low-flow or mass quantity cutoffs for process wastewater in § 61.342(c)(3). Further, any facility electing to comply with the alternative compliance option for the rule would not also be able to exempt streams from control under the small quantity exemption options (please see section VI of this preamble).

Although the restrictions proposed for the exemption option have been removed in the final rule amendments, the EPA remains concerned about the potential for facilities to underestimate the quantity of benzene in an exempted stream. Incorrect determinations could cause the actual risk to be higher than the risk associated with 2.0 Mg/yr if the incorrect determinations result in greater than 2.0 Mg/yr of benzene in exempted wastes.

This is of particular concern for tank drawdown. As mentioned previously, the quantity of tank drawdown waste generated during each tank water draw and the benzene content of this waste is determined by individual operators and can be highly variable. Further, tank drawdown can be a multiple phase waste, making determination of the average benzene concentration difficult and subject to error. These factors make the quantity and benzene concentration of tank drawdown highly variable and difficult to predict. This creates a significant potential for the benzene in these wastes to be severely underestimated by facilities. Although less variable than tank drawdown, the quantity and benzene concentration of other small quantity wastes can also be difficult to predict.

Due to the variability in tank drawdown, the difficulty inherent in estimating the benzene content of these and other small quantity wastes, and without the restrictions on use of the option that were in the proposal, the EPA believes that it is critical that wastes exempted under this option be tracked separately and be easily identifiable by enforcement agencies. Facilities subject to subpart FF generally must already identify and characterize all benzene-containing waste streams in order to prepare the initial and annual reports required by the rule summarizing the regulatory status of each waste stream. For the purpose of tracking wastes exempted under § 61.342(c)(3), this general requirement has been clarified in the final rule amendments to specify that waste streams exempted under § 61.342(c)(3) must be separately identified in these reports. Further, the mass of benzene in these streams must be separately totaled to demonstrate compliance with the 2.0 Mg/yr benzene limit. Finally, although owners and operators are still allowed to use knowledge of the waste to estimate the concentration of benzene in these streams, it is clarified in the rule that the Administrator may require measurements to verify estimated concentrations in the case of disputes.

Due to the concerns the EPA has about tank drawdown, the suggestion by

a commenter to require a device that would automatically shut off tank draw when organic material is detected was considered. A device such as this could minimize the amount of tank drawdown waste generated by eliminating the potential for operator error. The EPA did not, however, adopt this suggestion. While at least one facility has found shut-off devices helpful in controlling tank drawdown, these devices are not widely demonstrated to be technically feasible. In addition, the cost of equipping all tanks that must be controlled under this rule with these devices may be prohibitive. Consequently, the commenter's suggestion was not adopted in the final rule amendments.

It should be noted that although the exemption option in the final rule amendments contains no restrictions on which streams may be exempted under this provision, this does not override the requirements of other NESHAP that may require control of specific streams. In particular, subpart L, applicable to coke by-product recovery facilities, and subpart J, applicable to equipment leaks of benzene, contain requirements to control benzene emissions during sampling that apply under conditions specified in those standards.

VI. Alternative Compliance Options

In the March 5, 1992 notice of proposed rulemaking, the EPA specifically solicited suggestions from the public for other structures for the rule, including supporting information, that would encourage reclamation and recycling without compromising attainment of the NESHAP risk protection goals (57 FR 8022). The EPA stated that any rule structures suggested would be considered as an alternative compliance option to the structure of the rule originally promulgated on March 7, 1990.

In the notice of proposal, the EPA set forth several criteria that must be met for suggested alternative rule structures to be considered. First, the supporting information submitted must clearly describe the suggested structure and level of protection it would provide. Secondly, any structure suggested should address the benzene emission concerns including, but not limited to, characterizing and assuring adequate control of the benzene emissions that would result from aqueous waste treatment processes, nonaqueous wastes, treatment residuals, or materials sold offsite. Thirdly, the structure should be generic in that it should be able to be applied at any facility and result in achievement of the NESHAP risk protection goals. The proposal specifically stated that the EPA was not seeking suggestions for structures based on site-specific control or risk protection. The last criterion for suggested structures was that any structure suggested should be one that can be developed and evaluated for the level of protection it provides within the timeframe of this rulemaking.

A. Compliance Options Suggested by Commenters

In response to the EPA's request in the notice of proposal, several alternative compliance options were suggested by commenters. Four general types of options were suggested. These can generally be described as (1) site-specific risk assessment, (2) emissions averaging, (3) a structure based on other existing rules that would not require calculation of TAB, and (4) treat to a target benzene quantity in waste. The suggestions made by commenters are referred to as compliance options rather than alternative rule structures because they would not change the fundamental way that facilities become subject to the control requirements in the rule, but rather would provide an alternative way to comply with these requirements.

There were also commenters who argued that the EPA should not promulgate any alternative compliance options, but require all facilities subject to the rule to comply with the rule as originally structured. These commenters contend that for the EPA to provide a more cost effective compliance option at this time would reward those facilities that did not meet the original schedule for compliance and penalize those facilities that did comply on schedule with the original rule by putting them at a competitive disadvantage.

After consideration of these comments and additional analysis, the EPA determined that a treat to a target benzene quantity compliance option would best meet the criteria set forth in the notice of proposal. Consequently, an alternative compliance option of this type is included in the final rule amendments promulgated today. A brief discussion of each compliance option suggested by commenters, and the rationale for selecting the compliance option promulgated today, is presented below.

As noted earlier, the EPA is publishing an ANPR in the **Federal Register** announcing the EPA's intent to propose for public comment an additional compliance option based on site-specific risk assessment.

Site-Specific Risk Assessment

Several commenters suggested that the EPA should allow any facility above the facility control applicability threshold of 10 Mg/yr TAB to conduct a site-specific risk assessment to demonstrate either that controls were not needed or that controls less than mandated by the rule would meet the NESHAP risk goals. Although suggested by several commenters, site-specific risk assessment as an alternative compliance option does not meet two of the criteria set forth in the March 5, 1992 notice of proposed rulemaking. As noted earlier, the EPA's solicitation of suggestions for alternative rule structures specifically stated that the EPA was not seeking suggestions for structures based on site-specific control or risk protection. The suggestion of site-specific risk assessment as an alternative compliance option clearly does not meet this criterion. Further, it was stated in the March 5, 1992 notice of proposed rulemaking that any structure suggested should be one that could be developed within the timeframe of this rulemaking (i.e., by today's date). Due to the need to resolve risk assessment policy issues and to prepare guidance for both facilities and regulatory agency personnel on how to conduct and evaluate risk assessments for benzene waste sources, the development of an alternative compliance option for subpart FF involving site-specific risk assessment would have been impossible within the timeframe of this rulemaking. For these reasons, site-specific risk assessment was not considered by the EPA as a viable alternative compliance option to be included in the rule amendments promulgated today.

Emissions Averaging

Three commenters suggested that control strategies involving benzene emissions averaging, or "bubbling," across all benzene emission sources at a facility, be allowed by the EPA as a compliance option for subpart FF. Commenters contend that at some facilities, reductions in benzene emissions from sources not covered by subpart FF (e.g., process vents or vehicles) can be achieved at less cost than controlling low-flow, low-concentration benzene waste streams. Further, commenters argue that the EPA should not be concerned about which sources at a facility are controlled if the total benzene emission reduction achieved at the entire facility is equivalent to what would have been achieved with controls as specified in the rule for benzene waste sources.

One suggestion made by commenters to implement emissions averaging is for the EPA not to change the language of § 61.353 of the rule, "Alternative Means of Emission Limitation," as proposed in

the March 5 notice. Commenters contend that without the proposed change, the EPA may approve emissions averaging strategies under this section. Emissions averaging was also indirectly suggested by other commenters who criticized the proposed change to § 61.353 as limiting consideration of emissions to those "from the source."

The EPA does not view emissions averaging as suggested by commenters to be a viable candidate for promulgation at this time as an alternative compliance option for subpart FF. Similar to the compliance option based on site-specific risk assessment suggested by other commenters, emissions averaging does not meet the criteria set forth for an alternative rule structure for subpart FF in the March 5 notice. Emissions averaging is also an inherently site-specific compliance option that would require consideration and analysis by the EPA of proposals from facilities on a case-by-case basis, with each proposal based on the unique characteristics of benzene emission sources at individual plants. Further, some commenters suggest that they be allowed to control benzene emissions from sources outside of the scope of applicability of this rule as an alternative to controlling some benzene waste sources. This raises regulatory and other issues that cannot be resolved within the timeframe of the current rulemaking. For these reasons, the EPA did not select emissions averaging as an alternative compliance option for subpart FF at this time.

The change proposed to § 61.353 by the EPA was to correct an inadvertent omission of language that would make this section consistent with the language of the General Provisions to part 61. Based on the decision not to adopt emissions averaging as an alternative compliance option for Subpart FF at this time, § 61.353 is promulgated in today's rule amendments as proposed.

Compliance Option Based on Other Existing Rules That Would Not Require Calculation of TAB

One commenter suggested an alternative compliance option incorporating the requirements of other new source performance standards (NSPS) and NESHAP, that, if elected by a facility, would not require a facility to perform or document the calculation of TAB. This commenter claimed that the control requirements of subpart Kb of part 60, and subparts Y, V, and BB of part 61 would, for example, provide adequate emissions limitation if also applied to low-concentration benzene waste streams. The commenter provided detailed regulatory language to implement this suggestion and contended that this alternative compliance option would be widely used by industry and would result in equal or better emissions reduction at a much lower cost to both industry and government agencies as a result of more uniform regulatory provisions.

For several reasons, the EPA did not adopt this suggested alternative compliance option in the final rule promulgated today. One of the criteria set out in the proposal notice is not met in that the commenter provided no estimates of benzene emissions and risk associated with the suggested alternative, and not enough information was submitted for the EPA to make these estimates. There are substantive differences in the technical requirements in the suggested regulatory language provided by the commenter as compared to the requirements in subpart FF (and in the proposed amendments) that could jeopardize attainment of the NESHAP risk protection goals. For example, the regulatory language suggested by the commenter exempts from control all waste streams that contain less than 10 kg/yr of benzene, with no cap on total mass of benzene exempted.

Also, there are no requirements in the suggested regulatory language that facilities keep records of the quantity and benzene concentration individual waste streams or of how wastes are managed. The EPA views the identification and tracking of wastes through proper recordkeeping as an essential element of the original rule and of any alternative compliance option. The need to keep records of wastes subject to the rule is particularly critical for wastes claimed to be exempt from control by owners and operators on the basis of low benzene concentration, benzene quantity, or under other compliance options provided in the rule. Without recordkeeping requirements to identify, characterize, and track the management of these wastes, there can be no assurance that the requirements of the rule are met.

The EPA disagrees that other NSPS and NESHAP provide adequate emission limitation for waste streams. Although many aspects of the control requirements of subpart FF are very similar to the control requirements of other rules, there are distinct differences in the sources and materials covered by each rule that warrant separate standards. This was discussed in the EPA's response to a similar comment submitted when subpart FF was originally proposed (see 55 FR 8321, March 7, 1990).

Although the commenter claimed that the suggested alternative compliance option would be widely used, there was no evidence supplied supporting this contention. Based on the considerations discussed above, and given the time and resources that would be required to evaluate all elements of the commenter's suggested regulatory language, the EPA did not adopt this commenter suggested alternative compliance option in the final rule amendments.

One motivation for the commenter's suggested alternative appears to be to avoid the calculation of TAB. The EPA does not view the requirement that TAB be calculated by sources affected by the rule as overly burdensome. As described in § 61.355, direct measurement of flow rate and benzene concentration of waste streams is not required, although it is acceptable. For example, the flow rate of wastes through a waste management unit can be determined based on the unit's maximum design capacity, and the concentration of benzene in a waste stream can be determined based on knowledge of the waste. Further, the initial calculation of TAB should have already been completed by facilities since its promulgation on March 7, 1990. The amendments promulgated today do not substantively change the way TAB is calculated. Therefore, the resubmission of the TAB calculation and the periodic update of the TAB calculation by facilities as required in today's final rulemaking should require minimal additional expenditures beyond what is required to characterize changes since the last update.

Treat to a Target Benzene Quantity

Four commenters suggested that the rule should include an alternative under which facilities could treat only those streams necessary to lower the total benzene in waste to a specified target level. Three commenters, without providing any details of how such an option would be implemented, suggested that the target level should be 10 Mg/yr, the same as the TAB threshold in the rule for facility control.

In the most detailed description of an alternative compliance option of this type, one commenter suggested that only the benzene in wastes not recycled or recovered should be counted in the calculation of TAB. Materials sent offsite for recycling or resale would also not count towards facility TAB provided that these wastes were not exposed to the atmosphere. Coupled with the TAB calculation that would exclude recycled, recovered, or resold materials, this commenter suggested that the facility applicability threshold be

lowered to 6 Mg/yr in the alternative compliance option. The commenter claims that his suggested compliance option would encourage pollution prevention approaches and estimates that typically 40 percent of the benzene waste contained in refinery waste streams is technologically capable of being reclaimed or recycled.

The EPA agrees that an alternative compliance option based on a target benzene quantity would encourage recycling and reclamation. Further, it meets the criteria set out in the March 5 notice for an alternative structure. However, there are two concerns about the specifics of the suggestions made by commenters. First, as noted above, some commenters suggested that the target level should be equal to the facility threshold control level, based on TAB, of 10 Mg/yr. The EPA stated in the preamble to the proposed rule amendments published on March 5, 1992, and in the preamble to the final rule issued March 7, 1990, that the 10 Mg/yr control threshold was not intended to be a target level, and that a target level, if established, would need to be less than 10 Mg/yr to guarantee attainment of the NESHAP risk protection goals.

Second, the descriptions of the treat to a target alternatives suggested by some of the commenters imply that if a facility met the target level, then it would not be subject to the monitoring, reporting, and recordkeeping provisions of the rule. Facilities would, in effect, be able to "treat out" of the rule. Because facilities above the 10 Mg/yr TAB control threshold level have been identified as potentially not meeting the NESHAP risk protection goals if controls are not installed, operated, and maintained properly, the EPA believes that all facilities subject to control requirements should also be subject to monitoring, reporting, and recordkeeping requirements.

Based on the considerations described above, the EPA has developed and included in the final rule amendments promulgated today an alternative compliance option based on treatment to a target benzene quantity. The proposal solicited alternative compliance options that would encourage reclamation and recycling. This structure is conceptually based on responses of commenters to that solicitation, with specific variations to address concerns of the EPA.

B. Description of Alternative Compliance Option Selected by the EPA for Promulgation

As discussed above, the EPA selected treat-to-a-target benzene quantity as the format for an alternative compliance option. This compliance option is available to facilities who are subject to the control requirements of the rule. To demonstrate compliance under this new alternative, a facility determines its benzene quantity. The facility benzene quantity is determined by summing the mass of benzene in all aqueous wastes subject to the rule at the point where each waste first enters a waste management unit that is not controlled for air emissions to at least the same degree required by §§ 61.343 through 61.348(a). The benzene in wastes that are aqueous at their point of generation and the benzene in wastes that become aqueous through mixing are included in the target benzene quantity. Wastes that are organic (and remain organic) must be managed in controlled units under this option. The facility target benzene quantity alternative compliance option is an alternative within the general standards. A facility choosing this option is not allowed to use the process wastewater exemption or the 2.0 Mg/yr small benzene quantity exemption.

To determine the target benzene quantity level for this alternative, the EPA used the same modeling and exposure analysis performed to support development of the original rule. The analysis indicated that a target benzene quantity of 6.0 Mg/yr, even under reasonable worst-case assumptions, would meet the NESHAP goals for maximum individual risk and total population risk.

In the final rule amendments, the alternative compliance option is set forth in § 61.342(e). Under this provision, the owner or operator may choose to control or treat any combination of aqueous waste streams that contain benzene provided that the target benzene quantity is maintained below 6.0 Mg/yr. Organic wastes are required to be managed in units controlled for benzene air emissions as they would be without the target benzene quantity alternative compliance option.

The rule specifies that under this alternative compliance option, the target benzene quantity is calculated by summing the mass of benzene in all waste streams managed in units that do not comply with §§ 61.343 through 61.348(a). The mass of benzene is determined at the point of generation for a waste stream if the first unit in which the waste is managed is not equipped with air emission controls as specified in the rule. If the first unit after the point of generation is controlled, the mass of benzene in each waste stream is determined at a point before the waste enters the first unit that is not controlled for benzene air emissions in accordance with §§ 61.343 through 61.348(a).

The EPA recognizes that in some waste management scenarios, wastes may be mixed in ways that could result in multiple counting of benzene in the determination of the target benzene quantity. For example, where controlled and uncontrolled wastes are combined in a controlled unit and then later managed in an uncontrolled unit, the benzene quantity determined in the resultant stream would contain benzene previously counted toward the target benzene quantity, since, as described in this example, some of the wastes were managed in uncontrolled units prior to combination. In this situation, the final rule requires that the total benzene quantity in the combined stream be determined to count towards the target benzene quantity. However, if this approach results in a benzene quantity that exceeds the 6.0 Mg/yr target benzene quantity, and a portion of the benzene has previously been included in the benzene quantity, the benzene quantity determined for the combined stream may be corrected to not double count the portion of the benzene that had been counted previously. In this correction, losses of benzene due to emissions, removal, or destruction in management units prior to the determinations for the combined streams shall be calculated and considered in the target benzene quantity. All calculations must be documented.

Similar to the determination of facility TAB, the benzene in all materials that meet the definition of waste in the rule and that contain 10 percent or more of water (or that are combined with other streams such that they contain 10 percent or more of water) must be included in the target benzene quantity determination except for those materials exempted from all aspects of subpart FF in § 61.340(c). Wastes transferred offsite must also be included in the target benzene quantity determination. For the purpose of determining the target benzene quantity, the benzene in an aqueous waste managed entirely in units uncontrolled for air emissions is counted at the waste's point of generation. The benzene in an aqueous waste managed in units equipped with air emission controls is counted at the point where the waste enters the first waste management unit not controlled for air emissions to the level required by the applicable control requirements of §§ 61.343 through 61.348(a). The benzene in an aqueous waste that is treated to reduce benzene is counted after the treatment device when the

waste first enters a unit not controlled to the level required by §§ 61.343 through 61.348(a), provided that the treatment device and the units in which the waste is managed prior to treatment are controlled for air emissions. If each waste stream entering an enhanced biodegradation unit is less than 10 ppmw on a flow-weighted annual average basis and all prior units are controlled, then the benzene entering the enhanced biodegradation unit is not included in the determination.

Organic wastes (i.e., those containing less than 10 percent water) are not included in the target benzene quantity unless they are mixed with other materials such that they become aqueous. For example, the benzene in an organic waste managed in a wastewater system not controlled to the level required by §§ 61.343 through 61.348(a) where the waste becomes mixed with aqueous waste is included in the target benzene quantity based on the benzene content of the waste at its point of generation or if an organic waste is managed in controlled units, where the waste enters the first unit not controlled to the level required by §§ 61.343 through 61.348(a).

However, the control requirements for organic wastes that remain organic during waste management are still applicable under this alternative. That is, organic wastes containing 10 ppmw or greater of benzene must be managed in units equipped with air emission controls to the level required by subpart FF. Further, an owner or operator who selects this alternative compliance option may not also take advantage of any other compliance option in the rule under which wastes may be exempted from control such as the option for exempting wastes containing up to 2.0 Mg/yr of benzene in § 61.342(c)(3).

There are three key differences in how the benzene quantity is determined under the new alternative compliance option as opposed to how facility TAB is determined. First, as already mentioned under the target benzene quantity alternative compliance option, if a waste stream is continuously managed beyond the point of generation in waste management or treatment units equipped with air emission controls, benzene concentration and quantity are not determined at the waste's point of generation, as would be done for TAB, but at a point before the waste enters the first unit not controlled to the level required by §§ 61.343 through 61.348(a). Second, the benzene in remediation wastes, which is not included in TAB, is included in the target benzene quantity determination. Third, the benzene in process unit turnaround wastes, which may be averaged over the period between turnarounds in the calculation of TAB, is included in the target benzene quantity determination in the year in which the wastes are generated.

Remediation wastes are not included in the calculation of TAB to not discourage voluntary remediation actions by facilities whose TAB's are below 10 Mg/yr by not subjecting them to the control requirements of the rule. Since treatment to lower TAB is not allowable, these facilities have no options that would keep the remediation wastes from possibly affecting facility applicability.

In contrast, the target benzene quantity alternative compliance option is an optional means of compliance available to facilities determined to be subject to the control requirements of the rule. Facilities have flexibility to take actions (such as treating wastes) that affect the calculation of the benzene quantity that they do not have with TAB. Due to the flexibility available under the target benzene quantity alternative compliance option, the EPA believes it is appropriate that the benzene in all aqueous wastes, including the benzene in aqueous remediation wastes, be included in the benzene quantity.

Similarly, the benzene in process unit turnaround wastes may be averaged over the period between turnarounds in the calculation of TAB due to a facility applicability concern, namely to reduce the impact on small facilities whose TAB would go above 10 Mg/yr only in years that turnaround occurs if averaging were not allowed. With the flexibility provided under the target benzene quantity option, a facility may treat process unit turnaround wastes if necessary to keep its benzene quantity below 6.0 Mg/yr. Considering this flexibility, the EPA sees no need to provide an averaging option for process unit turnaround wastes under the target benzene quantity alternative compliance option.

A facility that selects the target benzene quantity alternative compliance option must also account for wastes that are sent offsite. The benzene in wastes sent offsite that contain 10 percent or more of water at their point of generation counts towards the target benzene quantity of the facility from which the waste is transferred (e.g., the generating facility). The benzene quantity of these wastes is determined at the point before the waste enters the first unit that is not controlled according to §§ 61.343 through 61.348(a). This point may be at the offsite facility provided that documentation of the benzene quantity is obtained from the offsite facility and the documentation also indicates that the waste is managed in controlled units up to the point the benzene quantity is determined. The benzene in wastes that are input to another process at an offsite facility may be counted as zero in the determination of target benzene quantity for the generating facility, provided the waste is managed in units controlled according to §§ 61.343 through 61.348(a) prior to reentering a process and documentation is obtained. A generating facility without documentation from the offsite facility determines benzene quantity of these wastes at the point where the waste leaves the generating facility, assuming the waste is managed in units controlled according to §§ 61.343 through 61.348(a) up to that point. All organic wastes sent offsite must also be controlled at the receiving facility in units that meet subpart FF control requirements, and documentation of these controls must be obtained by the generating facility.

Similar to the notification requirements in the rule for other wastes required to be controlled under subpart FF that are sent offsite, the rule requires the generator to include, with each shipment of waste that must be controlled under the target benzene quantity alternative compliance option, a notice to the receiving facility indicating that the waste is subject to subpart FF and how it must be controlled at the offsite facility.

The target benzene quantity alternative compliance option is also available to a TSDF that is subject to the control requirements of subpart FF because the facility has a TAB of 10 Mg/yr or greater. However, any wastes received by the TSDF that have been designated for control under a generator's compliance plan under §§ 61.342(e) or (f) are not eligible for less stringent control at the TSDF under the target benzene quantity compliance option.

As noted earlier, the EPA held several meetings following proposal of the clarifying amendments to discuss possible alternative compliance options for subpart FF with representatives of individual companies, trade associations, and an environmental group. At these meetings, the EPA presented a tentative description of the target benzene quantity alternative compliance option.

Following these meetings, members of industry suggested that streams containing less than 10 ppmw benzene not be included in the determination of benzene quantity. However, no information was submitted on the total

mass of benzene in these streams, or on their impact on their contribution to facility benzene emissions and risk.

The EPA intended that the target benzene quantity alternative compliance option encompass all waste streams managed at a facility, including those containing less than 10 ppmw of benzene. This provides the maximum degree of flexibility to owners and operators in choosing a compliance approach while still limiting benzene emission to ensure that the NESHAP risk goals will be met. For example, an owner or operator may find that it is more cost effective to treat certain high volume waste streams containing less than 10 ppmw benzene than controlling numerous other low volume streams, such as maintenance wastes, containing higher concentrations of benzene. The target benzene quantity alternative compliance option would allow this.

Further, the benzene in all waste streams, including the benzene in less than 10 ppmw benzene streams, was counted towards the benzene quantity in the analysis that identified 6.0 Mg/yr as a target benzene quantity level that would meet the NESHAP risk goals. If streams containing less than 10 ppmw of benzene were to be excluded from the target benzene quantity, the target level would be substantially lower than 6.0 Mg/yr to ensure that the NESHAP risk protection goals would be met. For these reasons, the benzene in waste streams with less than 10 ppmw benzene must be included in benzene quantity as it is determined under the final rule amendments.

VII. Monitoring, Recordkeeping, and Reporting

Comments were received on specific monitoring, recordkeeping, and reporting requirements included in the proposed clarifying amendments. In addition, general comments on the reporting and recordkeeping burden associated with the entire rule were received. These comments and the EPA's responses are presented below.

A. Proposed Clarification on Monitoring Requirement for Wastewater Treatment Systems

In the March 5, 1992 notice, the EPA proposed that § 61.354(b) of the rule be changed to require that the flow rate and benzene concentration of each stream entering the first unit not controlled for air emissions (an "exempt unit") be continuously monitored, except for biodegradation units. For each enhanced biodegradation unit that is the first exempt unit in a treatment train, it was proposed that the benzene concentration of waste streams entering the unit be continuously monitored. These changes were proposed to make the § 61.354(b) monitoring requirements consistent with the control requirements for wastewater treatment systems complying with § 61.348(b). Section 61.354(b) in the original rule required monitoring of the flow rate of each wastewater stream exiting the wastewater treatment system. The EPA's intent, as explained in the preamble to the proposed clarifying amendments, was that monitoring be conducted of both the flow rate and benzene concentration of streams entering the first exempt unit, and of the benzene concentration of streams entering enhanced biological treatment units.

Numerous commenters objected to the proposed change to § 61.354(b). Many commenters stated that the continuous monitoring of benzene in waste streams is unduly expensive. Cost estimates cited by commenters ranged from $300,000 capital costs for an entire plant to over $350,000 for each waste stream. One commenter estimated that between 10 and 40 analyzers would be necessary at the typical refinery, resulting in annual costs ranging from $3.5 million to $14 million for continuous benzene monitoring at a single facility.

Some commenters argued that monitoring requirements were unnecessary. Others suggested that other less frequent techniques, such as periodic grab sampling, would provide information comparable to continuous monitors.

After an evaluation of the comments received and further investigation, the EPA has revised the monitoring requirements for wastewater treatment systems in § 61.354(b) in the final rule amendments. Monitoring of the flow rate and benzene concentration of the streams entering the first exempt unit is required, as well as monitoring of the benzene concentration of the streams entering an enhanced biological treatment unit. However, the proposed requirement for continuous monitoring has been deleted. Instead, monthly determinations are required.

Since compliance with the wastewater treatment system provisions of § 61.348(b) is based on a determination of the total mass of benzene in streams entering exempt units, and the benzene concentration of streams entering both exempt units and enhanced biological treatment units, the EPA believes that monitoring of these parameters is reasonable and appropriate. Although compliance is based on annual flow rates and annual average benzene concentration of streams managed in the wastewater treatment system, monitoring of these parameters on a more frequent basis will track fluctuations in flow rate and concentration. Data obtained through this monitoring will provide an early indication of whether compliance will be achieved on an annual basis and allow owners and operators to make changes in process or waste management operations if necessary.

Although, for these reasons, the EPA believes that monitoring is reasonable and appropriate, further investigation of the cost of continuous monitoring systems led the EPA to agree with commenters that the costs of these systems outweigh the benefits for the purposes of this rule. Vendor estimates obtained by the EPA of the capital cost of a system to continuously monitor benzene concentration ranged from $40,000 to $125,000 per stream monitored. In addition to the initial cost of the system, maintenance costs can be significant. For example, the EPA estimates that the annual costs of the weekly calibration required could be about $10,000 per monitoring device. While these costs are lower than those estimated by commenters, the EPA considers these costs to be high when compared to other available options.

The EPA believes that for the purposes of monitoring compliance with § 61.348(b), monthly determinations of benzene concentration and flow rate are adequate. Units that are expected to be exempt from control are likely to be near the end of the wastewater treatment system, after the mixing of many waste streams and management in units that tend to dampen out variation in flow and concentration. Therefore, frequent fluctuation in the benzene concentration is not expected. This sampling frequency is consistent with the requirements contained in § 61.354(a) for monitoring the effluent from waste treatment systems. Therefore, in the final rule amendments, § 61.354(b) requires monthly monitoring using grab sampling to determine benzene concentration and the procedures of § 61.355(b) to determine flow rate.

Some comments on the monitoring requirements for wastewater treatment systems complying with § 61.348(b) suggested misunderstanding of the EPA's intent. For example, many commenters focused only on the need to monitor benzene concentration. These commenters are reminded that under § 61.348(b), there are two criteria that must be met before a waste management unit is exempt from control. A unit does not have to be equipped with benzene air emission controls if (1) the benzene content of each stream entering the unit

is less than 10 ppmw benzene on a flow-weighted annual average basis, and (2) the total annual benzene quantity contained in all waste streams managed in exempt units in the wastewater treatment system is less than 1 Mg/yr. To determine if the second criterion is met, the flow rate of streams must be estimated and hence the need to monitor this parameter as well as benzene concentration.

Misunderstanding is also evident in comments made on the number of waste streams that must be monitored, and on the costs associated with monitoring these streams. Wastewater treatment systems typically are comprised of a combination of waste management units (e.g., oil/water separators, DAF units, equalization basins, activated sludge tanks, and clarifiers) configured in series to form a wastewater treatment train. Facilities typically have one treatment train, although larger plants may have two parallel trains. Prior to entering a wastewater treatment system, individual wastewater streams are normally combined to facilitate treatment in a treatment train. The intent of proposed § 61.354(b) is to monitor the benzene concentration and flow of this combined wastewater stream at the point where it enters the first exempt unit in a treatment train. This requirement should require a limited number of monitoring devices. Commenters who claimed that many streams would have to be monitored apparently misinterpreted § 61.354(b) to mean that the flow and benzene concentration of each waste stream that is eventually combined and managed in an exempt unit in a wastewater treatment system must be monitored at its point of generation. This is not a correct interpretation of the rule. Monitoring of the combined stream at the point where it enters an exempt unit is what is intended.

B. Maintenance Turnaround Plan

In the notice of proposal, the EPA asked for comments on several aspects of the proposed requirement for a maintenance turnaround plan in § 61.356(m) (see 57 FR 8023).

Several commenters argued that because maintenance turnaround wastes were already subject to the control requirements of the rule at facilities with a TAB of 10 Mg/yr or greater, the requirement for a plan to minimize air emissions from maintenance turnaround wastes at these facilities was redundant and unnecessary. The recordkeeping burden associated with preparing a plan was criticized as excessive by some commenters who requested a reduction in the level of detail required. One commenter said that the language of the proposal preamble suggested that a separate plan would be required for each turnaround and asked that it be clarified that a single generic plan was required at a facility.

Many commenters asked that the proposed requirement that the maintenance turnaround plan be in the plant operating record by the effective date of the rule amendments be modified such that the plan was not required until 60 to 90 days before turnaround actually occurs. One commenter supported the need for a maintenance turnaround plan in conjunction with a suggested alternative compliance option.

The maintenance turnaround plan, as proposed, has been interpreted to apply to benzene emissions generated during activities associated with process unit turnarounds. However, subpart FF is intended to apply only to the wastes generated by process unit turnarounds. The EPA considers the turnaround activities, even though they generate the wastes, to be part of process unit operations, rather than waste management operations.

The EPA considered all of the comments on the turnaround plan and has deleted the plan from the requirements. Because wastes generated during a turnaround are subject to the requirements of the rules, there is an incentive for facilities to minimize the amount of wastes generated. Wastes that are generated must be accounted for in the TAB determination. Further, not all wastes generated during turnarounds require control due to the small quantity exemptions and the alternative compliance option. Finally, there appears to be some confusion over the scope of the plan. For these reasons, the EPA has deleted the requirement for the process unit turnaround plan in the final rule amendments.

C. Other Comments on Monitoring, Reporting, and Recordkeeping

Comments were also received on other aspects of the monitoring, reporting, and recordkeeping requirements of the rule. These are discussed below.

Several comments were received on the monitoring, reporting, and recordkeeping requirements associated with wastes that are sent offsite by a generator to a TSDF. One commenter stated that no rationale had been presented by the EPA for requiring the generator to include a notice with wastes shipped offsite that they must be managed and treated to meet subpart FF. Another commenter claimed that the inspection, monitoring, recordkeeping and reporting requirements will be a heavy burden for handlers of a large number of containers such as drums that are filled once and then sent to a TSDF. This commenter proposed an alternative that would allow initial monitoring of containers for detectable emissions after the containers are filled. Containers certified to have no detectable emissions would be labeled as such. No additional monitoring or inspection of these containers would be required until the containers were reopened.

These comments are outside of the scope of the proposed clarifying amendments. Further, they are not questions for clarification; rather they are requests to change the original rule requirements.

Commenters noted that § 61.357(d)(1) in the proposed amendments requiring a compliance certification "within 90 days after March 5, 1992" was in error. The proposed language of this section should have read "within 90 days after (date of promulgation of clarifying amendments)." A notice was issued by the EPA on May 20, 1992 (57 FR 21368) to correct this error.

One commenter suggested that if there have been no changes to a report previously submitted that summarizes the regulatory status of each waste stream (as described in proposed § 61.357(a)) then only a statement that the previous report is still valid should be required, rather than the submission of a copy of the previous report. The EPA agrees with the commenter on this point and § 61.357 has been amended as suggested.

One commenter stated that there should be no reporting requirements for facilities that do not have any benzene in process or waste materials. The EPA views the reporting requirements in the rule for these facilities as minimal and necessary. Chemical plants, petroleum refineries, coke by-product recovery plants, and TSDF that receive wastes from these industries are subject to subpart FF. Under § 61.357(a), a facility subject to subpart FF that has no benzene onsite in wastes, products, by-products, or intermediates is required to submit only a statement to this effect. The EPA believes that this minimal reporting is necessary to identify all plants potentially subject to the rule and to differentiate those facilities that must install controls from those that do not have to install controls. Therefore, there is no change to this requirement from proposal.

Two comments were received by the EPA on recordkeeping and reporting requirements promulgated in the original rule for subpart FF, although

the EPA did not propose changes to these requirements in the clarifying rule amendments. Commenters requested that the EPA consider the overlap of recordkeeping and reporting requirements under subpart FF with recordkeeping and reporting requirements under the new standards developed under Section 112 of the Clean Air Act as amended in 1990, including, in particular, the proposed NESHAP for Source Categories: Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry and Seven Other Processes NESHAP. One commenter recommended specifically that the EPA require reporting for subpart FF on a semiannual basis to be consistent with the new operating permit program requirements (57 FR 32250).

In the clarifying amendments, the EPA did not propose any change to the recordkeeping and reporting requirements of the original rule. These requirements were proposed on September 14, 1989, and opportunity for public comment occurred at that time. The EPA responded to comments on the proposed recordkeeping and reporting requirements in the notice of final rulemaking issued on March 7, 1990 (see 55 FR 8318). Therefore, these comments on the original recordkeeping and reporting requirements are outside the scope of this rulemaking. However, one of the commenters requested corrections of some errors in the cross-referencing in the rule requirements and also suggested minor changes. The EPA made the suggested corrections and minor changes to the recordkeeping and reporting requirements and they do not change the burden associated with the recordkeeping and reporting.

One commenter claimed that hundreds of hours per year per response would be required to collect information necessary to comply with the reporting and recordkeeping requirements of subpart FF as opposed to the EPA's estimate of 11.9 hours per response. This commenter claimed that additional review is called for under the Paperwork Reduction Act.

The estimate of 11.9 hours per response presented in the preamble to the proposed clarifying amendments is for the information collection requirements in the proposed amendments, and not for the information collection requirements of the entire rule. The information collection requirements of the original rule were approved by the Office of Management and Budget at the time the original rule was promulgated. Based on changes to the clarifying amendments since proposal, the public reporting burden for the rule amendments has been reestimated and is presented in the next section of this preamble.

VIII. Policy for Granting Waivers of Compliance

Owners and operators of existing sources subject to a NESHAP promulgated under the Clean Air Act prior to the 1990 Clean Air Act Amendments must be in compliance with the rule within 90 days of the rule's effective date, unless a waiver of compliance is granted by the Administrator. The period for a waiver may not exceed 2 years beyond the effective date of the rule. For a NESHAP, the effective date is the date of promulgation in the **Federal Register**.

To resolve confusion about subpart FF, the EPA chose to stay the effectiveness of the rule while clarifying amendments were developed. The effective date for the amended rule is today's date, and existing sources must be in compliance within 90 days of today's date unless a waiver of compliance is granted by the Administrator.

The owner or operator of an existing source unable to come into complete compliance with the NESHAP for existing waste operations within 90 days of the effective date of this rule may apply for a waiver of compliance in accordance with the procedures described in 40 CFR §§ 61.10 and 61.11. One requirement of those provisions is to demonstrate that the additional time is necessary for the installation of controls. In addition, as the EPA stated in the March 5, 1992 proposal, the EPA believes that it is essential that the risk to human health from benzene emissions be mitigated. The EPA believes that the best way to mitigate the benzene emission reductions that will be lost due to delayed compliance during the waiver period is to reduce benzene emissions elsewhere at the facility. However, in some instances it may not be technically or economically feasible to achieve such benzene emission reductions. Accordingly, in the preamble to the proposed rule, the EPA indicated that it would consider various other types of environmentally beneficial activities that could be credited (on a discounted basis) towards the mitigation goal. In the preamble to the proposed rule amendments, the EPA set forth a hierarchy of activities (see 57 FR at 8026).

One commenter objected to the broad degree of available mitigation options. The commenter expressed concern over the ability of the EPA to determine whether the mitigation made up for the lost benzene emission reductions where the mitigation included emission reduction of nonhazardous air pollutants, nonair emission reductions and nonquantifiable pollution reduction projects. The commenter requested that only benzene emissions be credited for mitigation or at least that mitigation be limited to reductions of other hazardous air pollutants with a weighting factor included.

The EPA understands the concern about the uncertainty in equating one type of emissions reduction with a reduction of another pollutant or in another media, and, as a result, the final mitigation policy is somewhat narrower than outlined in the proposed rule.

It remains the EPA's policy that a source should seek to reduce other benzene emissions first, where such reductions are technically and economically feasible. However, because of (1) the unique nature of this rule; (2) the efforts made thus far by sources seeking to comply with the benzene waste NESHAP; (3) the relatively short period of time that remains for submitting waiver applications; (4) the conditions for granting a waiver are more restrictive than announced in the proposal notice; and (5) the departure set forth herein is consistent with efforts to resolve litigation brought by both environmental and industry parties, the EPA is providing opportunities to achieve the mitigation goal through projects involving the reductions of pollutants other than benzene when projects to reduce benzene emissions are not technically and economically feasible.

Thus, the EPA has determined that a source seeking a waiver must determine and achieve its mitigation objective as follows. First, the source must determine the additional amount of benzene emissions that will be emitted to the air from emission points subject to subpart FF as compared with the emissions expected if the source complied with that standard without a waiver. Second, the source must multiply that amount by 1.5. This quantity, expressed in kilograms, becomes the source's mitigation goal. Then a source must identify how it will achieve that goal.

The EPA will continue to give the highest priority to obtaining reductions of other benzene air emissions to meet this mitigation goal. Thus, a source must include in its waiver application all emission reduction projects for benzene, where it is technically and economically feasible to achieve such benzene reductions. If a source undertakes a benzene project (having determined it to

be technically and economically feasible based on the benzene reductions to be achieved) that also achieves coincidental reductions of other hazardous air pollutants (HAP's) or volatile organic compounds (VOC's), the source may include as a mitigation credit those coincidental reductions on a discounted basis as described below.

If a source demonstrates that there are no other technically and economically feasible projects to reduce benzene emissions and that as a result of those projects it still cannot achieve its mitigation goal, the EPA will accept additional projects supplying reductions of other HAP's listed under section 112 of the Clean Air Act as amended in 1990 at a ratio of 1.1 kilograms of other such pollutants per kilogram of the source's unmet mitigation goal.

If a source demonstrates that emission reduction projects supplying sufficient reductions of other NAP's are not available, the EPA will accept additional projects resulting in reductions of VOC's, at a ratio of 2.2 kilograms of such pollutant per kilogram of the source's unmet goal.

Mitigation may not be credited if the reduction is to meet any other regulatory requirement. However, if a source achieves early compliance with some future regulatory requirement, it can be credited with the reductions which occur up to the time the requirement goes into effect.

Finally, the EPA will consider waiver applications for up to three projects involving reductions of sulfur oxides (SO_x), if the sources seeking these reductions demonstrate that adequate reductions of benzene, other NAP's, and VOC's are not available at their facilities. These sources must provide at least 2.2 kilograms of SO_x for each kilogram of credit towards the mitigation goal. The EPA believes it is appropriate to consider these projects in this case only because the planning for these projects may already be far advanced, and it may not be feasible for such sources to develop other mitigation projects in time to apply for a waiver.

The EPA is adopting the mitigation principles set forth above for this rule because of the reasons outlined above. The interpollutant provisions of this action do not establish any precedent for future actions.

For subpart FF, the EPA believes the waiver policy described in the March 5, 1992 notice of proposed rulemaking is a legitimate exercise of the Administrator's discretionary authority to grant waivers of compliance under section 112 of the CAA. This policy was discussed in the preamble to provide information to potential waiver applicants and not to indicate that the policy was part of the proposed rule amendments proposed for comment. The only requirement related to waiver applications in the proposed rule amendments was that waiver applicants include, with their applications under § 61.10, a plan that is an enforceable commitment to obtain environmental benefits to mitigate the benzene emissions that result from delayed compliance. This requirement is retained in the final rule. The criteria for judging whether an application for a waiver of compliance for subpart FF is acceptable have been established by the Administrator under his discretionary authority for granting waivers. These criteria are fully explained in the waiver guidance document prepared since proposal of the rule, as discussed in the following section.

A. Waiver Application and Review Process

A number of other comments addressed issues related to the waiver. Several commenters urged the EPA to make the waiver application and review process simple and expeditious. Some suggested that the rule require the EPA to make determinations within 30 or 45 days of receipt of an application. One commenter stated that the EPA had failed to substantively describe the waiver process. Another commenter urged the EPA to solicit industry comment during development of waiver guidance and to release the guidance as soon as possible.

The general waiver application and review process for NESHAP was previously established in §§ 61.10 and 61.11 of the General Provisions to part 61. Due to the special circumstances of subpart FF, and to expedite the application and review process for waivers under subpart FF, the EPA prepared a draft guidance document, "Benzene Waste Operations—NESHAP Waiver Guidance Document." This guidance document describes the waiver application and review process, articulates the policy to be followed by the EPA in reviewing waiver applications for subpart FF, and describes in detail the information that should be included in a waiver application for this rule, with examples provided. The draft guidance document was circulated to trade associations representing companies affected by subpart FF (including the commenter who stated that the EPA had failed to substantively describe the waiver process), and an environmental group for comment on the document's clarity and readability. The document will soon be published and made available to the public. The basic principles to be included in the document were outlined above. The EPA believes that this guidance document, plus the general procedures already established in §§ 61.10 and 61.11, will expedite the process for waiver approval to the extent possible for this rule. The EPA or the delegated authority will make every effort to review promptly all waiver applications. However, the EPA will not limit in advance the amount of time available for review as suggested by commenters because the EPA cannot anticipate with certainty such variables as the complexity of each application received (related to site-specific factors) and the number of applications that may be received by an individual EPA regional office or delegated authority.

One commenter asked the EPA to consider a less onerous, less detailed demonstration for granting a waiver of several additional months in cases where the control equipment is operating, but the monitoring, recordkeeping, and other procedural requirements are not yet in place.

The EPA believes that a situation in which a facility is able to be in compliance with all of the control requirements but is not able to comply with the monitoring and recordkeeping requirements is unlikely. However, if this situation were to arise, there is no reason to make the waiver application different. The basic information required relates to how and when the facility will be in compliance. The mitigation plan is based on the estimated benzene emissions that will be lost due to delayed compliance. In the situation described by the commenter, few, if any, benzene emissions may be required to be mitigated.

B. Mitigation Requirements

Several comments were received related to the proposed requirement that facilities submit, with a waiver application, a plan that is an enforceable commitment to obtain environmental benefits to mitigate the benzene emissions that result from extending the compliance date. One commenter argued that the waiver policy should not require offsetting mitigation actions because this requirement would penalize facilities that are taking additional time to implement comprehensive multimedia compliance programs. Finally, a commenter specifically supported allowing reductions of other pollutants and non-air media actions to count towards a facility's mitigation goal and pointed to other rules that require control of sources of benzene (other than benzene

waste sources) at coke by-product recovery plants, thus limiting the opportunity to reduce benzene air emissions from other sources at these facilities.

The granting of waivers of compliance by the EPA Administrator is discretionary. That is, the Administrator may grant a waiver of compliance, but is not obligated to do so. Nothing in the language of the statute limits the EPA's ability to make the granting of waivers for a particular rule conditional on terms that the Administrator, in his sole judgement, determines to be necessary for that rule.

One commenter, also a litigant on subpart FF, contends that they should not be required to provide for mitigating environmental benefits because their settlement agreement makes no mention of such a requirements. The commenter also contends that the waiver policy is inconsistent with the settlement statement that compliance waivers will be on a refinery-by-refinery basis.

The EPA disagrees with the commenter's contentions. The settlement agreement to which the commenter refers in no way precludes a requirement that the commenter (or any other source) obtain mitigating environmental benefits if it seeks a waiver of compliance following promulgation of the amendments to clarify 40 CFR part 61, subpart FF. Nor does it preclude any other condition of the waiver. The criteria and requirements for seeking a waiver will apply to all applicants. The settlement agreement merely provides that when considering whether to grant a waiver, it will not penalize the commenter for its good faith belief that its refinery was not subject to the standard when it was promulgated in 1990. Requiring it to obtain mitigation for the benzene emissions that will be lost during the pendency of the waiver period is not a penalty for the source not achieving compliance by March 1992; rather, it is a condition for a waiver beyond the new effective date of the revised subpart FF standard.

The settlement agreement addresses the question of whether the EPA would find that an applicant is making every effort to comply with the standard but that it is unable to comply by the compliance date where it did not make any effort from March 1990 to December 1991 because it did not think it was covered by the rule. The settlement agreement made clear that the EPA would not penalize the commenter because prior to the signing of the settlement it believed that it was not subject to the standard. It did not purport to provide the commenter special treatment vis-a-vis all other sources with respect to the requirement to undertake mitigation to make up for the benzene emissions lost if a waiver is granted.

Finally, the waiver policy is not inconsistent with the statement that the waiver applications will be considered on a refinery-by-refinery basis. In 1990, when the EPA promulgated subpart FF, it granted a 2-year compliance waiver to all sources affected by the rule. It did not require each source individually to make the demonstration of need for a waiver as required by 40 CFR 61.10. In contrast, the EPA wanted to make clear that this time it would not issue a generic waiver. Rather, each source seeking a waiver must file its own request for a waiver; each application will be considered on its own merits. The language cited by the commenter can in no way be read to suggest that there would be different criteria for waivers for different sources or that some sources would not be required to provide mitigating environmental benefits.

One commenter contends that the EPA lacks the statutory and regulatory authority to require waiver applicants to provide mitigating environmental benefits in the absence of a finding that such conditions are necessary to protect the health of persons from imminent endangerment.

Section 112(c)(1)(B) of the Clean Air Act (CAA), prior to passage of the Clean Air Act Amendments of 1990, provides that the Administrator may grant a waiver if he finds additional time is necessary for installation of controls and that "steps will be taken to assure that the health of persons will be protected from imminent endangerment." The regulations implementing this statutory waiver provision further provide that the Administrator may "[s]pecify any additional conditions which the Administrator determines necessary * * * to assure protection of the health of persons during the waiver period" (40 CFR 61.11(a) (4)).

This regulatory provision is very broad and affords the Administrator wide discretion in granting waivers. Waivers themselves are available at the discretion of the Administrator; no source is entitled to a waiver. The EPA believes this broad regulatory authority affords the Administrator the discretion to condition a waiver on an assurance that the source will undertake activities to benefit the environment and to protect human health. The mitigation policy that seeks, in the first instance, to obtain other benzene air reductions, is an effort to effectuate the waiver provisions in 40 CFR 61.11.

The opportunity to mitigate, and thereby protect human health and the environment, by reducing pollutants other than benzene air emissions, was an effort to provide a source an opportunity to satisfy the conditions of 40 CFR 61.11 where it was not feasible to othervise reduce benzene emissions at a particular facility.

C. Special Requirements for Waiver Applicants Awaiting Development of a Compliance Option Based on Site-Specific Risk Assessment

As previously noted, the EPA is planning to propose an additional compliance option for subpart FF based on site-specific risk assessment. Owners or operators who plan to use this option, if it becomes available, are eligible to apply for waivers of compliance. The EPA plans to take final action on the additional compliance option by August 1993.

Mitigation goals and credits under the waiver policy must be calculated based on a plan to comply with subpart FF, as amended by today's final rulemaking, and not based on using the alternative compliance option. If an additional compliance option is promulgated, facilities may modify the enforceable commitment to reduce the mitigation goal, based from that date forward on lost benzene emission reductions under the new compliance option. However, the goal for mitigation of lost benzene emission reductions, based on the amended rule promulgated today, that occurred prior to the effective date of the new compliance option, shall not change.

Waiver applications by applicants awaiting the development of an additional compliance option should reflect a two-phase compliance path. The first phase would outline how compliance will be achieved with a site-specific risk assessment-based compliance option. In the first phase of the waiver application, the applicant shall demonstrate how, and on what schedule, compliance under this option would be expeditiously achieved. This phase of the compliance path would not have to show installation of control equipment necessary for compliance with §§ 61.343 through 61.349 of subpart FF, if that control equipment would not be required under a compliance option based on site-specific risk assessment.

The second phase of the compliance plan shall document, how the applicant will comply with §§ 61.343 through 61.349 of subpart FF, as amended by today's final rulemaking. This compliance path would then be implemented by the applicant if a

compliance option based on site-specific risk assessment is not promulgated (presently final action is scheduled for August 1993, as discussed above).

Finally, applicants awaiting development of an additional compliance option for subpart FF should recognize that they will not receive additional time beyond the waiver period for compliance, and that waiver period shall not extend more than 2 years beyond the effective date of today's amended rule.

IX. General

A variety of comments in addition to those discussed in previous sections were received in response to the proposal of clarifying amendments to subpart FF. These additional comments, and the EPA's responses are discussed below.

A. Risk Assessment Supporting the Original Rule

Many comments were received criticizing the EPA's risk assessment that was performed to support development of the original rule promulgated on March 7, 1990. This risk assessment had been performed to demonstrate both that the original rule was necessary and that the NESHAP risk protection goals would be met under the final rule. Several commenters claimed that the original analysis was flawed because the model used grossly overstates emissions and risk. Some commenters stated that benzene emission estimates for specific sources were overestimated in the analysis. These commenters stated that the risk assessment should be redone using more recent exposure models developed by the EPA and incorporating more site-specific information. A few commenters had performed their own risk assessments for several facilities and claimed that the results showed controls were not needed to the level required by the rule.

These commenters incorrectly assumed that with the proposal of clarifying amendments to subpart FF, the EPA was reopening the entire rule, and the original analyses supporting it, to further public comment and possible change. To the contrary, the amendments proposed were narrow in scope, designed to clarify only those specific points on which there had been confusion following promulgation of the original rule. They also were designed to provide additional flexibility to owners and operators who must comply with the control requirements of the rule.

The appropriate time for comments concerning the technical basis of the original rule was following proposal of the rule on September 14, 1989 (54 FR 38083). The need for the controls required by the rule was discussed in the preamble to the proposed rule and the technical analyses supporting the proposed rule were placed in the docket prior to proposal and were available for public review. Comments received on the need for the rule and the analyses supporting the rule were carefully considered, and changes in the analyses and the rule were made as appropriate before promulgation of the final rule on March 7, 1990.

In the notice of final rulemaking, the EPA presented thorough and extensive responses to comments on the risk assessment methodology used to evaluate sources of benzene wastes and other sources of benzene emissions (see 55 FR 8301 to 8307). The proposal of clarifying amendments does not reopen those parts of the rule unaffected by the amendments (and the technical analyses supporting them) for public comment.

B. Costs of Controls

Several comments were received claiming that the EPA had understated the costs of the benzene waste NESHAP. Commenters stated that the capital cost of complying with the rule is several billion dollars based on industry surveys. Because of this, commenters say the benzene waste NESHAP is a major rule and that a Regulatory Impact Analysis (RIA) must be performed. One commenter stated that this rule is a prime candidate for review under the President's regulatory review initiative.

As discussed earlier, the proposal of clarifying amendments to subpart FF did not reopen the entire rule for public comment. While it is possible that the EPA may have underestimated the cost of complying with subpart FF as originally promulgated, it is also possible that facilities may be overstating the cost of compliance. Many facilities subject to subpart FF are implementing multi-media compliance strategies designed to meet the requirements of many regulations to control pollution, including subpart FF. The EPA believes that these facilities, in some cases, may be overstating the portion of total compliance costs that are attributable to subpart FF.

Under Executive Order 12291, an RIA is required if the economic impacts of a rulemaking would exceed $100 million. The rule amendments clarify, but do not change, the basic requirements of the rule. Therefore, there is no additional compliance cost associated with the rule amendments. The clarifying amendments promulgated today include additional options for compliance. The additional options provided would reduce the cost of complying with subpart FF at some facilities. Hence, any impact of the rule amendments on the costs of complying with subpart FF would be to reduce compliance costs.

The EPA therefore believes that the costs associated with the rule amendments do not exceed the $100 million threshold, the amendments will not significantly increase process or production costs, and the amendments will not cause significant adverse effects on domestic competition, employment, investment, productivity, innovation, or competition in foreign markets. Consequently, the rule amendments do not constitute a major rule and an RIA is not required.

Further, the EPA also views the rule amendments as consistent with the President's regulatory review initiative. A primary objective of the regulatory review initiative is to improve the clarity of regulations. The amendments to subpart FF are designed to clarify provisions of the original rule and, therefore, are consistent with this objective. The amendments are also consistent with the regulatory review initiative in that they provide additional options for compliance that (1) may be more cost-effective for some facilities; (2) encourage recycling, reclamation, and pollution prevention, and (3) encourage comprehensive multi-media compliance programs.

C. Legal Aspects

One commenter, a trade association, contends that it and its members' companies will have the right to obtain full judicial review of the total NESHAP when the final rule is issued.

The commenter is incorrect in this assertion. The assertion is without foundation in the law. The Clean Air Act limits the right to petition for judicial review of a rule to a 60-day period following publication of the final rule in the **Federal Register:**

> Any petition for review under this subsection must be filed within 60 days from the date notice of such promulgation, approval, or action appears in the **Federal Register**, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within 60 days after such ground arise.

CAA, § 307(b)(1), 42 U.S.C. 7607(b)(1).

The notice of proposed rulemaking issued on March 5, 1992 states throughout that it only proposes clarifying amendments and minor revisions to limited provisions of

subpart FF. The entire basis of the rule was not reopened. If commenters objected to the aspects of the rule when it was promulgated, then they had the opportunity to file a petition for review at that time. By making minor amendments to a few provisions of 40 CFR part 61, subpart FF, the EPA does not override the directives of section 307(b) and reopen the entire rule. Moreover, the one petitioner that did challenge the final rule negotiated a settlement agreement whereby the EPA committed to propose the clarifying changes set forth in the March notice. By issuing a final rule today that is consistent with those changes, the EPA has satisfied its obligations with respect to the settlement agreement. As a result, the petitioner, by terms of the settlement agreement, has committed to dismiss its original petition for review.

One commenter stated that the EPA may not apply these amendments to sources that already expended efforts to comply with the rule if the company used a good faith interpretation of the rules in developing its compliance plan. This commenter asked the EPA to provide a "grandfather" exemption from the amended rule for facilities that spent money in good faith and complied with the original rule by March 7, 1990. The commenter contends that under the holding of *United States* v. *Narragansett Improvement Company*, 571 F. Supp. 688 (D.R.I. 1983) it would be unlawful to apply the proposed amendments (once made final) to its facility.

The EPA commends the commenter for its efforts to achieve timely compliance with requirements of subpart FF when it was promulgated in 1990. Moreover, the EPA recognizes that there was substantial confusion about certain provisions of the rule following its promulgation. Indeed, as the EPA noted at the time it proposed clarifying amendments, the amendments were to help reduce the confusion. The intent and scope of the rule, however, remain essentially the same. The amendments promulgated today become part of the subpart FF requirements. Unless a source receives a waiver of compliance pursuant to 40 CFR 61.10 and 61.11, it must comply with the provisions of subpart FF, as amended, within 90 days of the effective date.

The application of these rules to an affected facility is not precluded by the decision on *United States* v. *Narragansett, supra*. In *Narragansett*, the court held that a regulation defining when certain reconstruction activity was subject to a new source performance standard could not apply to activity undertaken before the EPA had issued the regulation. In this situation, the EPA would not be seeking to retroactively apply the amended rule to the source. The source need only comply with the amended standard on the new compliance date. In *Narragansett*, the determination of whether a source was new was based on a one-time determination, which is made at the time the construction activity occurs. All the court said in *Narragansett* was that the regulations on the book at the time the facility undertook its construction activity was determinative of whether the source was new. Thus, subsequently promulgated regulations could not alter the determination of whether a particular activity triggered new source applicability. Here the EPA is not saying that the source should be in compliance with the revised standards as of the original compliance date of March 1992. Rather, the source must be in compliance with the amended rule as of the new compliance date.

Further, as stated in the March 5, 1992 notice of proposed rulemaking, the amendments do not change the basic requirements of subpart FF. Rather, they clarify the EPA's original intent on those provisions of the original rule where confusion was evident. By staying the rule while clarifying amendments were proposed and promulgated, the EPA provided additional time for facilities who did misinterpret the original rule to come into compliance. Facilities that correctly understood and complied with the requirements of the original rule previously should be in compliance with the amended rule.

D. Compliance Aspects

One commenter suggested that the EPA amend the proposal to extend the compliance date for the amended rule to March 1994 or to 1 year after the final amended rule is promulgated, whichever is later. This commenter said that this would prevent facilities from installing needless controls while uncertainty on the final rule still exists. Another commenter asked the EPA to announce that it will allow sufficient time for compliance after the final amended rule is issued to allow the use of possible alternative approaches.

The compliance time available to existing facilities following promulgation of a NESHAP under the Clean Air Act prior to the 1990 Clean Air Act Amendments is established by law as 90 days from the effective date of a rule, unless a waiver of compliance is obtained (see section 112(c)(1)(B) of the Clean Air Act as amended in 1977). The effective date of a NESHAP is the date of promulgation.

Subpart FF was originally promulgated on March 7, 1990. The original rule provided a blanket waiver of compliance to facilities such that controls were to be installed no later than March 7, 1992. Prior to March 7, 1992, subpart FF was stayed pending final action by the EPA on clarifying amendments to the rule. In a settlement agreement with litigants on subpart FF, the EPA committed to taking final action on clarifying amendments to the rule by December 1, 1992.

Given that the effectiveness of subpart FF was stayed until final action was taken on the clarifying amendments proposed March 5, 1992, the EPA does not believe that there is the need to take the unusual step of issuing a blanket waiver of compliance for subpart FF as amended. Therefore, the compliance date for the amended rule is 90 days from today's date unless a waiver of compliance is obtained. Applications for waivers of compliance will be considered on a case-by-case basis by the Administrator according to §§ 61.10 and 61.11 of the General Provisions to 41 CFR part 61.

Finally, a commenter stated that if the TAB of a facility goes below the control threshold of 10 Mg/yr in the future, the facility should only be required to continue to comply with the rule provisions for facilities with comparable TAB's (i.e., below 10 Mg/yr).

The EPA agrees with this comment. If, at some point in the future, a facility's TAB (as determined according to the rule) is reduced to below 10 Mg/yr, then the facility would no longer be subject to the control requirements of the rule, but must continue to comply with the reporting and recordkeeping requirements. This was allowed in the original rule and is still allowed under the amended rule. The commenter is reminded, however, that while means such as benzene waste minimization are acceptable to reduce facility TAB, waste treatment is not acceptable to reduce TAB.

E. Points for Sampling and Analysis

One commenter claimed that the proposed rule language could cause confusion on where the benzene concentration of treated waste streams should be determined. This commenter asked that it be stated in the rule that if the treatment standards of § 61.348(a) are met, then the determination is made at the exit of the treatment process.

The EPA agrees with the commenter on this point. It is the EPA's intent that, for the purpose of demonstrating compliance with the standards for treatment processes in § 61.348(a), benzene concentration should be

determined at the exit of the treatment process. This regulatory language can be found in § 61.355(d).

Another commenter recommended that the rule provide flexibility on sampling locations for waste streams at a plant already determined to have a TAB above 10 Mg/yr. The commenter cited cases where, due to safety concerns, it was preferable to sample at a common collection point to which wastes had been hardpiped, rather than at the point of generation.

Although it is not clear from the comment what the purpose for the sampling described is (e.g., to compute TAB or demonstrate that a stream contains less than 10 ppmw benzene and, therefore does not have to be controlled), the EPA believes that the rule provides the flexibility that the commenter is recommending. To calculate TAB for a facility requires that the annual mass of benzene in each waste stream at its point of generation be estimated. The mass of benzene in each stream is estimated through a determination of benzene concentration and waste quantity. The determination of benzene concentration and waste quantity through direct measurement at the point of generation is not required by the rule for the purpose of estimating facility TAB, but is an acceptable option.

To determine waste quantity, historical records or the maximum design capacity of the waste management unit handling the waste may also be used (see §§ 61.355(b) (5) through (7)). To determine benzene concentration (for TAB or for other purposes), use of knowledge of the waste is acceptable (see § 61.355(c)(2)). Direct measurement of benzene concentration at a location other than the point of generation may be used to support a determination based on knowledge of the waste.

Facilities acknowledging that they are above the 10 Mg/yr threshold for the applicability of control requirements will not be expected to document their estimate of TAB as rigorously as those who are claiming they are below 10 Mg/yr and therefore do not need to apply controls. However, facilities claiming that either the entire facility or individual waste streams within the facility are exempt based on the results of sampling of waste streams at locations other than their point of generation will be expected to document that benzene concentration has not been reduced through dilution or volatilization.

In case of disputes, the Administrator may require direct measurement of waste characteristics at the point of generation. However, in cases where facility applicability is not an issue (i.e., at facilities over 10 Mg/yr on the basis of other streams), evidence such as that suggested by the commenter would likely be acceptable to support a TAB calculation.

Finally, a commenter requested that the rule specify that a Method-27 leak test is an acceptable alternative to Method 21 for trucks and rail cars.

Under § 61.345, the cover and all openings of containers in which benzene-containing wastes subject to the control requirements of the rule are managed must be designed to operate with no detectable emissions as indicated by an instrument reading of less than 500 ppmv above background, initially and thereafter at least once per year by the methods specified in § 61.355(h) of the rule. Section 61.355(h) specifies EPA Reference Method 21. Section 61.355(h) was not affected by the proposed amendments and, therefore, it was not appropriate for the EPA to change this section in the final rule without proposal and comment. However, an owner or operator may request that the Administrator approve the use of an alternative method under § 61.13 of the General Provisions to 40 CFR part 61.

F. Requests for Site-Specific Clarifications

Two comments were received requesting determinations on how the rule would apply to their specific facilities. One commenter requested clarification of the definition of "petroleum refinery" as it applied to the commenter's facility. Another commenter requested a determination on how the rule would apply to part of a coke by-product recovery plant that is under separate ownership from the coke oven and the rest of the by-product recovery plant, where materials (including wastes) are hard piped between them.

The EPA considers these requests for site-specific determinations on the applicability of subpart FF to be outside of the scope of this rulemaking. Determinations on the applicability of the final rule to specific facilities will be made by the EPA Regional offices or delegated State or local agencies. Requests for site-specific clarifications should, therefore, be directed to the appropriate EPA Regional Office or delegated State or local agency.

X. Administrative Requirements

A. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in subpart FF under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0183. The OMB approved the requirement in the proposed clarifying amendments for a compliance waiver, but did not approve the proposed requirement for a maintenance turnaround plan. The promulgated rules do not include the requirement for a maintenance turnaround plan for the reasons stated in section VII. B. of this preamble.

The public reporting burden for the compliance waiver is estimated to be a one time burden of 15 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch (PM–223Y); U.S. Environmental Protection Agency; 401 M St., SW.; Washington DC 20460; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the EPA to consider potential impacts of regulations on small business "entities." If a preliminary analysis indicates that a regulation would have a significant economic impact on 20 percent or more of small entities, then a Regulatory Flexibility Analysis must be prepared.

The amendments to 40 CFR part 61, subpart FF, are intended to clarify the rule and will not affect the number of facilities subject to the rule or the controls that must be installed to comply. I therefore certify that this rule will not have significant economic impact on a substantial number of small entities.

C. Docket

The docket is an organized and complete file of all the information submitted to or otherwise considered by the EPA in the development of this rulemaking. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated revisions, and the EPA's responses to significant

comments, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review [Section 307(d)(7)(A)].

D. Executive Order 12291

Under Executive Order 12291, the EPA is required to judge whether this regulation is a "major rule" and therefore subject to certain requirements of the Order. The EPA has determined that the clarifying amendments to subpart FF would result in none of the adverse economic effects set forth in section I of the Order as grounds for finding a regulation to be a "major rule." The EPA does not believe these amendments to the regulation are major because the economic effects of the amendments do not meet the $100-million threshold, the amendments will not significantly increase process or production costs, and the amendments will not cause significant adverse effects on domestic competition, employment, investment, productivity, innovation, or competition in foreign markets.

The EPA has not conducted a RIA of this regulation because this action does not constitute a major rule.

List of Subjects in 40 CFR Part 61

Air pollution control, Arsenic, Asbestos, Benzene, Beryllium, Coke oven emissions, Hazardous substances, Intergovernmental relations, Mercury, Radionuclides, Reporting and recordkeeping requirements, Vinyl chloride, Volatile hazardous air pollutants.

Dated: December 1, 1992.

William K. Reilly,

Administrator.

For the reasons set out in the preamble, title 40, chapter 1, part 61 of the Code of Federal Regulations is amended as follows:

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

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

§ 61.340 [Removed]

2. In § 61.340, paragraph (c)(3) is removed.

3. Section 61.341 is amended by revising the definitions for "point of waste generation" and "water seal controls," and by adding definitions in alphabetical order to read as follows:

§ 61.341 Definitions.

* * * * *

Car-seal means a seal that is placed on a device that is used to change the position of a valve (e.g., from opened to closed) in such a way that the position of the valve cannot be changed without breaking the seal.

* * * * *

Flow indicator means a device which indicates whether gas flow is present in a line or vent system.

* * * * *

Maximum organic vapor pressure means the equilibrium partial pressure exerted by the waste at the temperature equal to the highest calendar-month average of the waste storage temperature for waste stored above or below the ambient temperature or at the local maximum monthly average temperature as reported by the National Weather Service for waste stored at the ambient temperature, as determined:

(1) In accordance with § 60.17(c); or

(2) As obtained from standard reference texts; or

(3) In accordance with § 60.17(a)(37); or

(4) Any other method approved by the Administrator.

* * * * *

Point of waste generation means the location where the waste stream exits the process unit component or storage tank prior to handling or treatment in an operation that is not an integral part of the production process, or in the case of waste management units that generate new wastes after treatment, the location where the waste stream exits the waste management unit component.

* * * * *

Process unit turnaround means the shutting down of the operations of a process unit, the purging of the contents of the process unit, the maintenance or repair work, followed by restarting of the process.

Process unit turnaround waste means a waste that is generated as a result of a process unit turnaround.

* * * * *

Sour water stream means a stream that:

(1) Contains ammonia or sulfur compounds (usually hydrogen sulfide) at concentrations of 10 ppm by weight or more;

(2) is generated from separation of water from a feed stock, intermediate, or product that contained ammonia or sulfur compounds; and

(3) requires treatment to remove the ammonia or sulfur compounds.

Sour water stripper means a unit that:

(1) Is designed and operated to remove ammonia or sulfur compounds (usually hydrogen sulfide) from sour water streams;

(2) has the sour water streams transferred to the stripper through hard piping or other enclosed system; and

(3) is operated in such a manner that the offgases are sent to a sulfur recovery unit, processing unit, incinerator, flare, or other combustion device.

* * * * *

Water seal controls means a seal pot, p-leg trap, or other type of trap filled with water (e.g., flooded sewers that maintain water levels adequate to prevent air flow through the system) that creates a water barrier between the sewer line and the atmosphere. The water level of the seal must be maintained in the vertical leg of a drain in order to be considered a water seal.

4. Section 61.342 is amended by revising paragraphs (a), (b), (c)(1) introductory text, (c)(1)(iii), (c)(2), (c)(3), and (d) introductory text; by redesignating paragraphs (e), (f), and (g) as (f), (g), and (h); and by adding paragraph (e) to read as follows:

§ 61.342 Standards: General.

(a) An owner or operator of a facility at which the total annual benzene quantity from facility waste is less than 10 megagrams per year (Mg/yr) shall be exempt from the requirements of paragraphs (b) and (c) of this section. The total annual benzene quantity from facility waste is the sum of the annual benzene quantity for each waste stream at the facility that has a flow-weighted annual average water content greater than 10 percent or that is mixed with water, or other wastes, at any time and the mixture has an annual average water content greater than 10 percent. The benzene quantity in a waste stream is to be counted only once without multiple counting if other waste streams are mixed with or generated from the original waste stream. Other specific requirements for calculating the total annual benzene waste quantity are as follows:

(1) Wastes that are exempted from control under §§ 61.342(c)(2) and 61.342(c)(3) are included in the calculation of the total annual benzene quantity if they have an annual average water content greater than 10 percent, or if they are mixed with water or other wastes at any time and the mixture has an annual average water content greater than 10 percent.

(2) The benzene in a material subject to this subpart that is sold is included in the calculation of the total annual benzene quantity if the material has an annual average water content greater than 10 percent.

(3) Benzene in wastes generated by remediation activities conducted at the facility, such as the excavation of contaminated soil, pumping and treatment of groundwater, and the recovery of product from soil or groundwater, are not included in the calculation of total annual benzene

quantity for that facility. If the facility's total annual benzene quantity is 10 Mg/yr or more, wastes generated by remediation activities are subject to the requirements of paragraphs (c) through (h) of this section. If the facility is managing remediation waste generated offsite, the benzene in this waste shall be included in the calculation of total annual benzene quantity in facility waste, if the waste streams have an annual average water content greater than 10 percent, or if they are mixed with water or other wastes at any time and the mixture has an annual average water content greater than 10 percent.

(4) The total annual benzene quantity is determined based upon the quantity of benzene in the waste before any waste treatment occurs to remove the benzene except as specified in § 61.355(c)(1)(i) (A) through (C).

(b) Each owner or operator of a facility at which the total annual benzene quantity from facility waste is equal to or greater than 10 Mg/yr as determined in paragraph (a) of this section shall be in compliance with the requirements of paragraphs (c) through (h) of this section no later than 90 days following the effective date, unless a waiver of compliance has been obtained under § 61.11, or by the initial startup for a new source with an initial startup after the effective date.

(1) The owner or operator of an existing source unable to comply with the rule within the required time may request a waiver of compliance under § 61.10.

(2) As part of the waiver application, the owner or operator shall submit to the Administrator a plan under § 61.10(b)(3) that is an enforceable commitment to obtain environmental benefits to mitigate the benzene emissions that result from extending the compliance date. The plan shall include the following information:

(i) A description of the method of compliance, including the control approach, schedule for installing controls, and quantity of the benzene emissions that result from extending the compliance date;

(ii) If the control approach involves a compliance strategy designed to obtain integrated compliance with multiple regulatory requirements, a description of the other regulations involved and their effective dates; and

(iii) A description of the actions to be taken at the facility to obtain mitigating environmental benefits, including how the benefits will be obtained, the schedule for these actions, and an estimate of the quantifiable benefits that directly result from these actions.

(c) * * *

(1) For each waste stream that contains benzene, including (but not limited to) organic waste streams that contain less than 10 percent water and aqueous waste streams, even if the wastes are not discharged to an individual drain system, the owner or operator shall:

* * * * *

(iii) Each waste management unit used to manage or treat waste streams that will be recycled to a process shall comply with the standards specified in §§ 61.343 through 61.347. Once the waste stream is recycled to a process, including to a tank used for the storage of production process feed, product, or product intermediates, unless this tank is used primarily for the storage of wastes, the material is no longer subject to paragraph (c) of this section.

(2) A waste stream is exempt from paragraph (c)(1) of this section provided that the owner or operator demonstrates initially and, thereafter, at least once per year that the flow-weighted annual average benzene concentration for the waste stream is less than 10 ppmw as determined by the procedures specified in § 61.355(c)(2) or § 61.355(c)(3).

(3) A waste stream is exempt from paragraph (c)(1) of this section provided that the owner or operator demonstrates initially and, thereafter, at least once per year that the conditions specified in either paragraph (c)(3)(i) or (c)(3)(ii) of this section are met.

(i) The waste stream is process wastewater that has a flow rate less than 0.02 liters per minute or an annual wastewater quantity of less than 10 Mg/yr; or

(ii) All of the following conditions are met:

(A) The owner or operator does not choose to exempt process wastewater under paragraph (c)(3)(i) of this section,

(B) The total annual benzene quantity in all waste streams chosen for exemption in paragraph (c)(3)(ii) of this section does not exceed 2.0 Mg/yr as determined in the procedures in § 61.355(j), and

(C) The total annual benzene quantity in a waste stream chosen for exemption, including process unit turnaround waste, is determined for the year in which the waste is generated.

(d) As an alternative to the requirements specified in paragraphs (c) and (e) of this section, an owner or operator of a facility at which the total annual benzene quantity from facility waste is equal to or greater than 10 Mg/yr as determined in paragraph (a) of this section may elect to manage and treat the facility waste as follows:

* * * * *

(e) As an alternative to the requirements specified in paragraphs (c) and (d) of this section, an owner or operator of a facility at which the total annual benzene quantity from facility waste is equal to or greater than 10 Mg/yr as determined in paragraph (a) of this section may elect to manage and treat the facility waste as follows:

(1) The owner or operator shall manage and treat facility waste with a flow-weighted annual average water content of less than 10 percent in accordance with the requirements of paragraph (c)(1) of this section; and

(2) The owner or operator shall manage and treat facility waste (including remediation and process unit turnaround waste) with a flow-weighted annual average water content of 10 percent or greater, on a volume basis as total water, and each waste stream that is mixed with water or wastes at any time such that the resulting mixture has an annual water content greater than 10 percent, in accordance with the following:

(i) The benzene quantity for the wastes described in paragraph (e)(2) of this section must be equal to or less than 6.0 Mg/yr, as determined in § 61.355(k). Wastes as described in paragraph (e)(2) of this section that are transferred offsite shall be included in the determination of benzene quantity as provided in § 61.355(k). The provisions of paragraph (f) of this section shall not apply to any owner or operator who elects to comply with the provisions of paragraph (e) of this section.

(ii) The determination of benzene quantity for each waste stream defined in paragraph (e)(2) of this section shall be made in accordance with § 61.355(k).

5. Section 61.343 is amended by revising the first sentence of paragraph (a) introductory text; by redesignating paragraphs (b) and (c) as (c) and (d); by adding paragraphs (a)(1)(i)(C) and (b); and by revising newly redesignated paragraph (c) to read as follows:

§ 61.343 Standards: Tanks.

(a) Except as provided in paragraph (b) of this section and in § 61.351, the owner or operator shall meet the following standards for each tank in which the waste stream is placed in accordance with § 61.342 (c)(1)(ii). * * *

(1) * * *

(i) * * *

(C) If the cover and closed-vent system operate such that the tank is maintained at a pressure less than atmospheric pressure, then paragraph (a)(1)(i)(B) of this section does not apply to any opening that meets all of thefollowing conditions:

(1) The purpose of the opening is to provide dilution air to reduce the explosion hazard;

(2) The opening is designed to operate with no detectable emissions as indicated by an instrument reading of less than 500 ppmv above background, as determined initially and thereafter at least once per year by the methods specified in § 61.355(h); and

(3) The pressure is monitored continuously to ensure that the pressure in the tank remains below atmospheric pressure.

* * * * *

(b) For a tank that meets all the conditions specified in paragraph (b)(1) of this section, the owner or operator may elect to comply with paragraph (b)(2) of this section as an alternative to the requirements specified in paragraph (a)(1) of this section.

(1) The waste managed in the tank complying with paragraph (b)(2) of this section shall meet all of the following conditions:

(i) Each waste stream managed in the tank must have a flow-weighted annual average water content less than or equal to 10 percent water, on a volume basis as total water.

(ii) The waste managed in the tank either:

(A) Has a maximum organic vapor pressure less than 5.2 kilopascals (kPa) (0.75 pounds per square inch (psi));

(B) Has a maximum organic vapor pressure less than 27.6 kPa (4.0 psi) and is managed in a tank having design capacity less than 151 m^3 (40,000 gal); or

(C) Has a maximum organic vapor pressure less than 76.6 kPa (11.1 psi) and is managed in a tank having a design capacity less than 75 m^3 (20,000 gal).

(2) The owner or operator shall install, operate, and maintain a fixed roof as specified in paragraph (a)(1)(i).

(3) For each tank complying with paragraph (b) of this section, one or more devices which vent directly to the atmosphere may be used on the tank provided each device remains in a closed, sealed position during normal operations except when the device needs to open to prevent physical damage or permanent deformation of the tank or cover resulting from filling or emptying the tank, diurnal temperature changes, atmospheric pressure changes or malfunction of the unit in accordance with good engineering and safety practices for handling flammable, explosive, or other hazardous materials.

(c) Each fixed-roof, seal, access door, and all other openings shall be checked by visual inspection initially and quarterly thereafter to ensure that no cracks or gaps occur and that access doors and other openings are closed and gasketed properly.

* * * * *

6. Section 61.344 is amended by redesignating paragraph (a)(1)(i)(C) as (a)(1)(i)(D), and by adding paragraph (a)(1)(i)(C) to read as follows:

§ 61.344 Standards: Surface impoundments.

(a) * * *

(1) * * *

(i) * * *

(C) If the cover and closed-vent system operate such that the enclosure of the surface impoundment is maintained at a pressure less than atmospheric pressure, then paragraph (a)(1)(i)(B) of this section does not apply to any opening that meets all of the following conditions:

(1) The purpose of the opening is to provide dilution air to reduce the explosion hazard;

(2) The opening is designed to operate with no detectable emissions as indicated by an instrument reading of less than 500 ppmv above background, as determined initially and thereafter at least once per year by the methods specified in § 61.355(h) of this subpart; and

(3) The pressure is monitored continuously to ensure that the pressure in the enclosure of the surface impoundment remains below atmospheric pressure.

* * * * *

7. Section 61.345 is amended by revising paragraphs (a)(1)(ii), (a)(2), and (a)(3) introductory text; and by adding paragraph (a)(4) to read as follows:

§ 61.345 Standards: Containers.

(a) * * *

(1) * * *

(ii) Except as provided in paragraph (a)(4) of this section, each opening shall be maintained in a closed, sealed position (e.g., covered by a lid that is gasketed and latched) at all times that waste is in the container except when it is necessary to use the opening for waste loading, removal, inspection, or sampling.

(2) When a waste is transferred into a container by pumping, the owner or operator shall perform the transfer using a submerged fill pipe. The submerged fill pipe outlet shall extend to within two fill pipe diameters of the bottom of the container while the container is being loaded. During loading of the waste, the cover shall remain in place and all openings shall be maintained in a closed, sealed position except for those openings required for the submerged fill pipe, those openings required for venting of the container to prevent physical damage or permanent deformation of the container or cover, and any openings complying with paragraph (a)(4) of this section.

(3) Treatment of a waste in a container, including aeration, thermal or other treatment, shall be performed by the owner or operator in a manner such that whenever it is necessary for the container to be open while the waste is being treated, the container is located under a cover (e.g. enclosure) with a closed-vent system that routes all organic vapors vented from the container to a control device, except for cover and closed-vent systems that meet the requirements in paragraph (a)(4) of this section.

* * * * *

(4) If the cover and closed-vent system operate such that the container is maintained at a pressure less than atmospheric pressure, the owner or operator may operate the system with an opening that is not sealed and kept closed at all times if the following conditions are met:

(i) The purpose of the opening is to provide dilution air to reduce the explosion hazard;

(ii) The opening is designed to operate with no detectable emissions as indicated by an instrument reading of less than 500 ppmv above background, as determined initially and thereafter at least once per year by methods specified in § 61.355(h); and

(iii) The pressure is monitored continuously to ensure that the pressure in the container remains below atmospheric pressure.

* * * * *

8. Section 61.346 is amended by adding paragraph (a)(1)(i)(C) to read as follows:

§ 61.346 Standards: Individual drain systems.

(a) * * *

(1) * * *

(i) * * *

(C) If the cover and closed-vent system operate such that the individual drain system is maintained at a pressure less than atmospheric pressure, then paragraph (a)(1)(i)(B) of this section does not apply to any opening that meets all of the following conditions:

(1) The purpose of the opening is to provide dilution air to reduce the explosion hazard;

(2) The opening is designed to operate with no detectable emissions as indicated by an instrument reading of less than 500 ppmv above background, as determined initially and thereafter at

least once per year by the methods specified in § 61.355(h); and

(3) The pressure is monitored continuously to ensure that the pressure in the individual drain system remains below atmospheric pressure.

* * * * *

9. Section 61.347 is amended by adding paragraph (a)(1)(i)(C) to read as follows:

§ 61.347 Standards: Oil-water separators.

(a) * * *

(1) * * *

(i) * * *

(C) If the cover and closed-vent system operate such that the oil-water separator is maintained at a pressure less than atmospheric pressure, then paragraph (a)(1)(i)(B) of this section does not apply to any opening that meets all of the following conditions:

(1) The purpose of the opening is to provide dilution air to reduce the explosion hazard;

(2) The opening is designed to operate with no detectable emissions as indicated by an instrument reading of less than 500 ppmv above background, as determined initially and thereafter at least once per year by the methods specified in § 61.355(h); and

(3) The pressure is monitored continuously to ensure that the pressure in the oil-water separator remains below atmospheric pressure.

* * * * *

10. Section 61.348 is amended by adding a new sentence at the end of paragraph (a)(5); by revising the introductory text of paragraphs (b) and (e); by redesignating paragraphs (f) and (g) as (e)(1) and (e)(2); by adding paragraph (e)(3); and by redesignating paragraphs (h) and (i) as (f) and (g).

§ 61.348 Standards: Treatment Processes.

(a) * * *

(5) * * * These provisions apply to above-ground wastewater treatment systems as well as those that are at or below ground level.

(b) Except for facilities complying with § 61.342(e), the owner or operator that aggregates or mixes individual waste streams as defined in paragraph (a)(5) of this section for management and treatment in a wastewater treatment system shall comply with the following requirements:

* * * * *

(e) Except as specified in paragraph (e)(3) of this section, if the treatment process or wastewater treatment system unit has any openings (e.g., access doors, hatches, etc.), all such openings shall be sealed (e.g., gasketed, latched, etc.) and kept closed at all times when waste is being treated, except during inspection and maintenance.

* * * * *

(3) If the cover and closed-vent system operate such that the treatment process and wastewater treatment system unit are maintained at a pressure less than atmospheric pressure, the owner or operator may operate the system with an opening that is not sealed and kept closed at all times if the following conditions are met:

(i) The purpose of the opening is to provide dilution air to reduce the explosion hazard;

(ii) The opening is designed to operate with no detectable emissions as indicated by an instrument reading of less than 500 ppmv above background, as determined initially and thereafter at least once per year by the methods specified in § 61.355(h); and

(iii) The pressure is monitored continuously to ensure that the pressure in the treatment process and wastewater treatment system unit remain below atmospheric pressure.

* * * * *

. Section 61.349 is amended by revising paragraphs (a)(1)(ii), (a)(2)(i)(B), (a)(2)(ii), and (e); and by adding paragraphs (a)(1)(iv), and (a)(2)(iv) to read as follows:

§ 61.349 Standards: Closed-vent systems and control devices.

(a) * * *

(1) * * *

(ii) Vent systems that contain any bypass line that could divert the vent stream away from a control device used to comply with the provisions of this subpart shall install, maintain, and operate according to the manufacturer's specifications a flow indicator that provides a record of vent stream flow away from the control device at least once every 15 minutes, except as provided in paragraph (a)(1)(ii)(B) of this section.

(A) The flow indicator shall be installed at the entrance to any bypass line that could divert the vent stream away from the control device to the atmosphere.

(B) Where the bypass line valve is secured in the closed position with a car-seal or a lock-and-key type configuration, a flow indicator is not required.

* * * * *

(iv) For each closed-vent system complying with paragraph (a) of this section, one or more devices which vent directly to the atmosphere may be used on the closed-vent system provided each device remains in a closed, sealed position during normal operations except when the device needs to open to prevent physical damage or permanent deformation of the closed-vent system resulting from malfunction of the unit in accordance with good engineering and safety practices for handling flammable, explosive, or other hazardous materials.

(2) * * *

(i) * * *

(B) Achieve a total organic compound concentration of 20 ppmv (as the sum of the concentrations for individual compounds using Method 18) on a dry basis corrected to 3 percent oxygen; or

* * * * *

(ii) A vapor recovery system (e.g., a carbon adsorption system or a condenser) shall recover or control the organic emissions vented to it with an efficiency of 95 weight percent or greater, or shall recover or control the benzene emissions vented to it with an efficiency of 98 weight percent or greater.

* * * * *

(iv) A control device other than those described in paragraphs (a)(2) (i) through (iii) of this section may be used provided that the following conditions are met:

(A) The device shall recover or control the organic emissions vented to it with an efficiency of 95 weight percent or greater, or shall recover or control the benzene emissions vented to it with an efficiency of 98 weight percent or greater.

(B) The owner or operator shall develop test data and design information that documents the control device will achieve an emission control efficiency of either 95 percent or greater for organic compounds or 98 percent or greater for benzene.

(C) The owner or operator shall identify:

(1) The critical operating parameters that affect the emission control performance of the device;

(2) The range of values of these operating parameters that ensure the emission control efficiency specified in paragraph (a)(2)(iv)(A) of this section is maintained during operation of the device; and

(3) How these operating parameters will be monitored to ensure the proper operation and maintenance of the device.

(D) The owner or operator shall submit the information and data specified in paragraphs (a)(2)(iv) (B) and (C) of this section to the Administrator prior to operation of the alternative control device.

(E) The Administrator will determine, based on the information submitted

under paragraph (a)(2)(iv)(D) of this section, if the control device subject to paragraph (a)(2)(iv) of this section meets the requirements of § 61.349. The control device subject to paragraph (a)(2)(iv) of this section may be operated prior to receiving approval from the Administrator. However, if the Administrator determines that the control device does not meet the requirements of § 61.349, the facility may be subject to enforcement action beginning from the time the control device began operation.

* * * * *

(e) The Administrator may request at any time an owner or operator demonstrate that a control device meets the applicable conditions specified in paragraph (a)(2) of this section by conducting a performance test using the test methods and procedures as required in § 61.355, and for control devices subject to paragraph (a)(2)(iv) of this section, the Administrator may specify alternative test methods and procedures, as appropriate.

* * * * *

12. Section 61.353 is amended by revising paragraph (a) to read as follows:

§ 61.353 Alternative means of emission limitation.

(a) If, in the Administrator's judgment, an alternative means of emission limitation will achieve a reduction in benzene emissions at least equivalent to the reduction in benzene emissions from the source achieved by the applicable design, equipment, work practice, or operational requirements in §§ 61.342 through 61.349, the Administrator will publish in the **Federal Register** a notice permitting the use of the alternative means for purposes of compliance with that requirement. The notice may condition the permission on requirements related to the operation and maintenance of the alternative means.

* * * * *

13. Section 61.354 is amended by revising paragraphs (a)(1), (b), (c)(6)(i), (c)(7)(i), (c)(8), and (d) and by adding paragraphs (c)(9), (f), and (g) to read as follows:

§ 61.354 Monitoring of operations.

(a) * * *

(1) Measure the benzene concentration of the waste stream exiting the treatment process complying with § 61.348(a)(1)(i) at least once per month by collecting and analyzing one or more samples using the procedures specified in § 61.355(c)(3).

* * * * *

(b) If an owner or operator complies with the requirements of § 61.348(b), then the owner or operator shall monitor each wastewater treatment system to ensure the unit is properly operated and maintained by the appropriate monitoring procedure as follows:

(1) For the first exempt waste management unit in each waste treatment train, other than an enhanced biodegradation unit, measure the flow rate, using the procedures of § 61.355(b), and the benzene concentration of each waste stream entering the unit at least once per month by collecting and analyzing one or more samples using the procedures specified in § 61.355(c)(3).

(2) For each enhanced biodegradation unit that is the first exempt waste management unit in a treatment train, measure the benzene concentration of each waste stream entering the unit at least once per month by collecting and analyzing one or more samples using the procedures specified in § 61.355(c)(3).

(c) * * *

(6) * * *

(i) A monitoring device equipped with a continuous recorder to measure either the concentration level of the organic compounds or the concentration level of benzene in the exhaust vent stream from the condenser; or

* * * * *

(7) * * *

(i) A monitoring device equipped with a continuous recorder to measure either the concentration level of the organic compounds or the benzene concentration level in the exhaust vent stream from the carbon bed; or

* * * * *

(8) For a vapor recovery system other than a condenser or carbon adsorption system, a monitoring device equipped with a continuous recorder to measure either the concentration level of the organic compounds or the benzene concentration level in the exhaust vent stream from the control device.

(9) For a control device subject to the requirements of § 61.349(a)(2)(iv), devices to monitor the parameters as specified in § 61.349(a)(2)(iv)(C).

(d) For a carbon adsorption system that does not regenerate the carbon bed directly on site in the control device (e.g., a carbon canister), either the concentration level of the organic compounds or the concentration level of benzene in the exhaust vent stream from the carbon adsorption system shall be monitored on a regular schedule, and the existing carbon shall be replaced with fresh carbon immediately when carbon breakthrough is indicated. The device shall be monitored on a daily basis or at intervals no greater than 20 percent of the design carbon replacement interval, whichever is greater. As an alternative to conducting this monitoring, an owner or operator may replace the carbon in the carbon adsorption system with fresh carbon at a regular predetermined time interval that is less than the carbon replacement interval that is determined by the maximum design flow rate and either the organic concentration or the benzene concentration in the gas stream vented to the carbon adsorption system.

* * * * *

(f) Owners or operators using a closed-vent system that contains any bypass line that could divert a vent stream from a control device used to comply with the provisions of this subpart shall do the following:

(1) Visually inspect the bypass line valve at least once every month, checking the position of the valve and the condition of the car-seal or closure mechanism required under § 61.349(a)(1)(ii) to ensure that the valve is maintained in the closed position and the vent stream is not diverted through the bypass line.

(2) Visually inspect the readings from each flow monitoring device required by § 61.349(a)(1)(ii) at least once each operating day to check that vapors are being routed to the control device as required.

(g) Each owner or operator who uses a system for emission control that is maintained at a pressure less than atmospheric pressure with openings to provide dilution air shall install, calibrate, maintain, and operate according to the manufacturer's specifications a device equipped with a continuous recorder to monitor the pressure in the unit to ensure that it is less than atmospheric pressure.

14. Section 61.355 is amended by revising paragraphs (a)(1) introductory text, (a)(1)(i), (a)(1)(ii), (a)(2), (a)(3), (b), (c) introductory text, the first sentence of (d), (e)(3), (e)(4), (f)(3), the first sentence of (g), (i) introductory text, (i)(3) introductory text, (i)(3)(ii)(C), (i)(3)(iii), (i)(3)(iv), and (i)(4); by adding paragraph (a)(6); by redesignating paragraphs (c)(1) and (c)(2) as (c)(2) and (c)(3) respectively; by adding (c)(1) and a new sentence to the end of the newly redesignated paragraph (c)(2); and by adding paragraphs (j) and (k) to read as follows:

§ 61.355 Test methods, procedures, and compliance provisions.

(a) * * *

(1) For each waste stream subject to this subpart having a flow-weighted annual average water content greater

than 10 percent water, on a volume basis as total water, or is mixed with water or other wastes at any time and the resulting mixture has an annual average water content greater than 10 percent as specified in § 61.342(a), the owner or operator shall:

(i) Determine the annual waste quantity for each waste stream using the procedures specified in paragraph (b) of this section.

(ii) Determine the flow-weighted annual average benzene concentration for each waste stream using the procedures specified in paragraph (c) of this section.

* * * * *

(2) Total annual benzene quantity from facility waste is calculated by adding together the annual benzene quantity for each waste stream generated during the year and the annual benzene quantity for each process unit turnaround waste annualized according to paragraph (b)(4) of this section.

(3) If the total annual benzene quantity from facility waste is equal to or greater than 10 mg/yr, then the owner or operator shall comply with the requirements of § 61.342 (c), (d), or (e).

* * * * *

(6) The benzene quantity in a waste stream that is generated less than one time per year, except as provided for process unit turnaround waste in paragraph (b)(4) of this section, shall be included in the determination of total annual benzene quantity from facility waste for the year in which the waste is generated unless the waste stream is otherwise excluded from the determination of total annual benzene quantity from facility waste in accordance with paragraphs (a) through (c) of this section. The benzene quantity in this waste stream shall not be annualized or averaged over the time interval between the activities that resulted in generation of the waste, for purposes of determining the total annual benzene quantity from facility waste.

(b) For purposes of the calculation required by paragraph (a) of this section, an owner or operator shall determine the annual waste quantity at the point of waste generation, unless otherwise provided in paragraphs (b) (1), (2), (3), and (4) of this section, by one of the methods given in paragraphs (b) (5) through (7) of this section.

(1) The determination of annual waste quantity for sour water streams that are processed in sour water strippers shall be made at the point that the water exits the sour water stripper.

(2) The determination of annual waste quantity for wastes at coke by-product plants subject to and complying with the control requirements of §§ 61.132, 61.133, 61.134, or 61.139 of subpart L of this part shall be made at the location that the waste stream exits the process unit component or waste management unit controlled by that subpart or at the exit of the ammonia still, provided that the following conditions are met:

(i) The transfer of wastes between units complying with the control requirements of subpart L of this part, process units, and the ammonia still is made through hard piping or other enclosed system.

(ii) The ammonia still meets the definition of a sour water stripper in § 61.341.

(3) The determination of annual waste quantity for wastes that are received at hazardous waste treatment, storage, or disposal facilities from offsite shall be made at the point where the waste enters the hazardous waste treatment, storage, or disposal facility.

(4) The determination of annual waste quantity for each process unit turnaround waste generated only at 2 year or greater intervals, may be made by dividing the total quantity of waste generated during the most recent process unit turnaround by the time period (in the nearest tenth of a year) between the turnaround resulting in generation of the waste and the most recent preceding process turnaround for the unit. The resulting annual waste quantity shall be included in the calculation of the annual benzene quantity as provided in paragraph (a)(1)(iii) of this section for the year in which the turnaround occurs and for each subsequent year until the unit undergoes the next process turnaround. For estimates of total annual benzene quantity as specified in the 90-day report, required under § 61.357(a)(1), the owner or operator shall estimate the waste quantity generated during the most recent turnaround, and the time period between turnarounds in accordance with good engineering practices. If the owner or operator chooses not to annualize process unit turnaround waste, as specified in this paragraph, then the process unit turnaround waste quantity shall be included in the calculation of the annual benzene quantity for the year in which the turnaround occurs.

(5) Select the highest annual quantity of waste managed from historical records representing the most recent 5 years of operation or, if the facility has been in service for less than 5 years but at least 1 year, from historical records representing the total operating life of the facility;

(6) Use the maximum design capacity of the waste management unit; or

(7) Use measurements that are representative of maximum waste generation rates.

(c) For the purposes of the calculation required by §§ 61.355(a) of this subpart, an owner or operator shall determine the flow-weighted annual average benzene concentration in a manner that meets the requirements given in paragraph (c)(1) of this section using either of the methods given in paragraphs (c)(2) and (c)(3) of this section.

(1) The determination of flow-weighted annual average benzene concentration shall meet all of the following criteria:

(i) The determination shall be made at the point of waste generation except for the specific cases given in paragraphs (c)(1)(i)(A) through (D) of this section.

(A) The determination for sour water streams that are processed in sour water strippers shall be made at the point that the water exits the sour water stripper.

(B) The determination for wastes at coke by-product plants subject to and complying with the control requirements of §§ 61.132, 61.133, 61.134, or 61.139 of Subpart L of this part shall be made at the location that the waste stream exits the process unit component or waste management unit controlled by that subpart or at the exit of the ammonia still, provided that the following conditions are met:

(*1*) The transfer of wastes between units complying with the control requirements of Subpart L of this part, process units, and the ammonia still is made through hard piping or other enclosed system.

(*2*) The ammonia still meets the definition of a sour water stripper in § 61.341.

(C) The determination for wastes that are received from offsite shall be made at the point where the waste enters the hazardous waste treatment, storage, or disposal facility.

(D) The determination of flow-weighted annual average benzene concentration for process unit turnaround waste shall be made using either of the methods given in paragraph (c)(2) or (c)(3) of this section. The resulting flow-weighted annual average benzene concentration shall be included in the calculation of annual benzene quantity as provided in paragraph (a)(1)(iii) of this section for the year in which the turnaround occurs and for each subsequent year until the unit undergoes the next process unit turnaround.

(ii) Volatilization of the benzene by exposure to air shall not be used in the

determination to reduce the benzene concentration.

(iii) Mixing or diluting the waste stream with other wastes or other materials shall not be used in the determination—to reduce the benzene concentration.

(iv) The determination shall be made prior to any treatment of the waste that removes benzene, except as specified in paragraphs (c)(1)(i)(A) through (D) of this section.

(v) For wastes with multiple phases, the determination shall provide the weighted-average benzene concentration based on the benzene concentration in each phase of the waste and the relative proportion of the phases.

(2) * * * when an owner or operator and the Administrator do not agree on determinations of the flow-weighted annual average benzene concentration based on knowledge of the waste, the procedures under paragraph (c)(3) of this section shall be used to resolve the disagreement.

* * * * *

(d) An owner or operator using performance tests to demonstrate compliance of a treatment process with § 61.348 (a)(1)(i) shall measure the flow-weighted annual average benzene concentration of the waste stream exiting the treatment process by collecting and analyzing a minimum of three representative samples of the waste stream using the procedures in paragraph (c)(3) of this section. * * *

(e) * * *

(3) The mass flow rate of benzene entering the treatment process (E_b) shall be determined by computing the product of the flow rate of the waste stream entering the treatment process, as determined by the inlet flow meter, and the benz ene concentration of the waste stream, as determined using the sampling and analytical procedures specified in paragraph (c)(2) or (c)(3) of this section. Three grab samples of the waste shall be taken at equally spaced time intervals over a 1-hour period. Each 1-hour period constitutes a run, and the performance test shall consist of a minimum of 3 runs conducted over a 3-hour period. The mass flow rate of benzene entering the treatment process is calculated as follows:

$$E_b = \frac{K}{n \times 10^6} \left[\sum_{i=1}^{n} V_i \, C_i \right]$$

Where:

E_b=Mass flow rate of benzene entering the treatment process, kg/hour.

K=Density of the waste stream, kg/m³.

V_i=Average volume flow rate of waste entering the treatment process during each run i, m³/hour.

C_i=Average concentration of benzene in the waste stream entering the treatment process during each run i, ppmw.

n=Number of runs.

(4) The mass flow rate of benzene exiting the treatment process (E_a) shall be determined by computing the product of the flow rate of the waste stream exiting the treatment process, as determined by the outlet flow meter or the inlet flow meter, and the benzene concentration of the waste stream, as determined using the sampling and analytical procedures specified in paragraph (c)(2) or (c)(3) of this section. Three grab samples of the waste shall be taken at equally spaced time intervals over a 1-hour period. Each 1-hour period constitutes a run, and the performance test shall consist of a minimum of 3 runs conducted over the same 3-hour period at which the mass flow rate of benzene entering the treatment process is determined. The mass flow rate of benzene exiting the treatment process is calculated as follows:

$$E_a = \frac{K}{n \times 10^6} \left[\sum_{i=1}^{n} V_i \, C_i \right]$$

Where:

E_a=Mass flow rate of benzene exiting the treatment process, kg/hour.

K=Density of the waste stream, kg/m³.

V_i=Average volume flow rate of waste exiting the treatment process during each run i, m³/hour.

C_i=Average concentration of benzene in the waste stream exiting the treatment process during each run i, ppmw.

n=Number of runs.

* * * * *

(f) * * *

(3) The mass flow rate of benzene entering the combustion unit shall be determined by computing the product of the flow rate of the waste stream entering the combustion unit, as determined by the inlet flow meter, and the benzene concentration of the waste stream, as determined using the sampling procedures in paragraph (c)(2) or (c)(3) of this section. Three grab samples of the waste shall be taken at equally spaced time intervals over a 1-hour period. Each 1-hour period constitutes a run, and the performance test shall consist of a minimum of 3 runs conducted over a 3-hour period. The mass flow rate of benzene into the combustion unit is calculated as follows:

$$E_b = \frac{K}{n \times 10^6} \left[\sum_{i=1}^{n} V_i \, C_i \right]$$

Where:

E_b=Mass flow rate of benzene into the combustion unit, kg/hour.

K=Density of the waste stream, kg/m³.

V_i=Average volume flow rate of waste entering the combustion unit during each run i, m³/hour.

C_i=Average concentration of benzene in the waste stream entering the combustion unit during each run i, ppmw.

n=Number of runs.

* * * * *

(g) An owner or operator using performance tests to demonstrate compliance of a wastewater treatment system unit with § 61.348(b) shall measure the flow-weighted annual average benzene concentration of the wastewater stream where the waste stream enters an exempt waste management unit by collecting and analyzing a minimum of three representative samples of the waste stream using the procedures in paragraph (c)(3) of this section. * * *

* * * * *

(i) An owner or operator using a performance test to demonstrate compliance of a control device with either the organic reduction efficiency requirement or the benzene reduction efficiency requirement specified under § 61.349(a)(2) shall use the following procedures:

* * * * *

(3) The mass flow rate of either the organics or benzene entering and exiting the control device shall be determined as follows:

* * * * *

(ii) * * *

(C) The organic concentration or the benzene concentration, as appropriate, in the vent stream entering and exiting the control shall be determined using Method 18 from Appendix A of 40 CFR part 60.

(iii) The mass of organics or benzene entering and exiting the control device during each run shall be calculated as follows:

$$M_{aj} = K\ V_{aj} \left[\sum_{i=1}^{n} C_{ai}\ MW_i \right] (10^{-6})$$

$$M_{bj} = K\ V_{bj} \left[\sum_{i=1}^{n} C_{bi}\ MW_i \right] (10^{-6})$$

Where:

M_{aj}=Mass of organics or benzene in the vent stream entering the control device during run j, kg.

M_{bj}=Mass of organics or benzene in the vent stream exiting the control device during run j, kg.

V_{aj}=Volume of vent stream entering the control device during run j at standard conditions, m^3.

V_{bj}=Volume of vent stream exiting the control device during run j at standard conditions, m^3.

C_{ai}=Organic concentration of compound i or the benzene concentration measured in the vent stream entering the control device as determined by Method 18, ppm by volume on a dry basis.

C_{bi}=Organic concentration of compound i or the benzene concentration measured in the vent stream exiting the control device as determined by Method 18, ppm by volume on a dry basis.

MW_i=Molecular weight of organic compound i in the vent stream or the molecular weight of benzene, kg/kg-mol.

n=Number of organic compounds in the vent stream; if benzene reduction efficiency is being demonstrated, then n=1.

K=Conversion factor for molar volume=0.0416 kg-mol/m^3 (at 293°K and 760 mm Hg).

10^{-6}=Conversion from ppm, ppm^{-1}.

(iv) The mass flow rate of organics or benzene entering and exiting the control device shall be calculated as follows:

$$E_a = \left(\sum_{j=1}^{n} M_{aj} \right) / T$$

$$E_b = \left(\sum_{j=1}^{n} M_{bj} \right) / T$$

Where:

E_a=Mass flow rate of organics or benzene entering the control device, kg/hour.

E_b=Mass flow rate of organics or benzene exiting the control device, kg/hour.

M_{aj}=Mass of organics or benzene in the vent stream entering the control device during run j, kg.

M_{bj}=Mass of organics or benzene in vent stream exiting the control device during run j, kg.

T=Total time of all runs, hour.

n=Number of runs.

(4) The organic reduction efficiency or the benzene reduction efficiency for the control device shall be calculated as follows:

$$R = \frac{E_a - E_b}{E_a} \times 100$$

Where:

R=Total organic reduction efficiency or benzene reduction efficiency for the control device, percent.

E_a=Mass flow rate of organics or benzene entering the control device, kg/hr.

E_b=Mass flow rate of organics or benzene exiting the control device, kg/hr.

(j) An owner or operator shall determine the benzene quantity for the purposes of the calculation required by § 61.342 (c)(3)(ii)(B) according to the provisions of paragraph (a) of this section, except that the procedures in paragraph (a) of this section shall also apply to wastes with a water content of 10 percent or less.

(k) An owner or operator shall determine the benzene quantity for the purposes of the calculation required by § 61.342(e)(2) by the following procedure:

(1) For each waste stream that is not controlled for air emissions in accordance with §§ 61.343. 61.344, 61.345, 61.346, 61.347, or 61.348(a), as applicable to the waste management unit that manages the waste, the benzene quantity shall be determined as specified in paragraph (a) of this section, except that paragraph (b)(4) of this section shall not apply, i.e., the waste quantity for process unit turnaround waste is not annualized but shall be included in the determination of benzene quantity for the year in which the waste is generated for the purposes of the calculation required by § 61.342(e)(2).

(2) For each waste stream that is controlled for air emissions in accordance with §§ 61.343. 61.344, 61.345, 61.346, 61.347, or 61.348(a), as applicable to the waste management unit that manages the waste, the determination of annual waste quantity and flow-weighted annual average benzene concentration shall be made at the first applicable location as described in paragraphs (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section and prior to any reduction of benzene concentration through volatilization of the benzene, using the methods given in (k)(2)(iv) and (k)(2)(v) of this section.

(i) where the waste stream enters the first waste management unit not complying with §§ 61.343, 61.344, 61.345, 61.346, 61.347, and 61.348(a) that are applicable to the waste management unit,

(ii) For each waste stream that is managed or treated only in compliance with §§ 61.343 through 61.348(a) up to the point of final direct discharge from the facility, the determination of benzene quantity shall be prior to any reduction of benzene concentration through volatilization of the benzene, or

(iii) For wastes managed in units controlled for air emissions in accordance with §§ 61.343, 61.344, 61.345, 61.346, 61.347, and 61.348(a), and then transferred offsite, facilities shall use the first applicable offsite location as described in paragraphs (k)(2)(i) and (k)(2)(ii) of this section if they have documentation from the offsite facility of the benzene quantity at this location. Facilities without this documentation for offsite wastes shall use the benzene quantity determined at the point where the transferred waste leaves the facility.

(iv) Annual waste quantity shall be determined using the procedures in paragraphs (b)(5), (6), or (7) of this section, and

(v) The flow-weighted annual average benzene concentration shall be determined using the procedures in paragraphs (c)(2) or (3) of this section.

(3) The benzene quantity in a waste stream that is generated less than one time per year, including process unit turnaround waste, shall be included in the determination of benzene quantity as determined in paragraph (k)(6) of this section for the year in which the waste is generated. The benzene quantity in this waste stream shall not be annualized or averaged over the time interval between the activities that resulted in generation of the waste for purposes of determining benzene quantity as determined in paragraph (k)(6) of this section.

(4) The benzene in waste entering an enhanced biodegradation unit, as defined in § 61.348(b)(2)(ii)(B), shall not be included in the determination of benzene quantity, determined in paragraph (k)(6) of this section, if the following conditions are met:

(i) The benzene concentration for each waste stream entering the enhanced biodegradation unit is less than 10 ppmw on a flow-weighted annual average basis, and

(ii) All prior waste management units managing the waste comply with §§ 61.343, 61.344, 61.345, 61.346, 61.347 and 61.348(a).

(5) The benzene quantity for each waste stream in paragraph (k)(2) of this section shall be determined by multiplying the annual waste quantity of each waste stream times its flow-weighted annual average benzene concentration.

(6) The total benzene quantity for the purposes of the calculation required by § 61.342(e)(2) shall be determined by adding together the benzene quantities determined in paragraphs (k)(1) and (k)(5) of this section for each applicable waste stream.

(7) If the benzene quantity determined in paragraph (6) of this section exceeds 6.0 Mg/yr only because of multiple counting of the benzene quantity for a waste stream, the owner or operator may use the following procedures for the purposes of the calculation required by § 61.342(e)(2):

(i) Determine which waste management units are involved in the multiple counting of benzene;

(ii) Determine the quantity of benzene that is emitted, recovered, or removed from the affected units identified in paragraph (k)(7)(i) of this section, or destroyed in the units if applicable, using either direct measurements or the best available estimation techniques developed or approved by the Administrator.

(iii) Adjust the benzene quantity to eliminate the multiple counting of benzene based on the results from paragraph (k)(7)(ii) of this section and determine the total benzene quantity for the purposes of the calculation required by § 61.342(e)(2).

(iv) Submit in the annual report required under § 61.357(a) a description of the methods used and the resulting calculations for the alternative procedure under paragraph (k)(7) of this section, the benzene quantity determination from paragraph (k)(6) of this section, and the adjusted benzene quantity determination from paragraph (k)(7)(iii) of this section.

15. Section 61.356 is amended by redesignating paragraph (b)(4) as (b)(6); by revising newly redesignated (b)(6); by adding paragraphs (b)(4) and (b)(5); by revising paragraph (b)(2), (c), (d), (e)(2), and the introductory text of (f)(2); by removing (f)(2)(i); by redesignating paragraph (f)(2)(ii) as (f)(2)(i); by revising newly redesignated paragraphs (f)(2)(i) introductory text and (f)(2)(i) (E) through (G); by adding paragraph (f)(2)(i)(H); by redesignating (i)(4) as (i)(5); by adding paragraph (i)(4); by revising paragraphs (j)(3), (j)(6), (j)(8), (j)(9), and (j)(11); and by adding paragraphs (j)(12), (m), and adding and reserving paragraph (f)(2)(ii) to read as follows:

§ 61.356 Recordkeeping requirements.

* * * * *

(b) * * *

(2) For each waste stream exempt from § 61.342(c)(1) in accordance with § 61.342(c)(3), the records shall include:

(i) All measurements, calculations, and other documentation used to determine that the continuous flow of process wastewater is less than 0.02 liters per minute or the annual waste quantity of process wastewater is less than 10 Mg/yr in accordance with § 61.342(c)(3)(i), or

(ii) All measurements, calculations, and other documentation used to determine that the sum of the total annual benzene quantity in all exempt waste streams does not exceed 2.0 Mg/yr in accordance with § 61.342(c)(3)(ii).

* * * * *

(4) For each facility where waste streams are controlled for benzene emissions in accordance with § 61.342(e), the records shall include for each waste stream all measurements, including the locations of the measurements, calculations, and other documentation used to determine that the total benzene quantity does not exceed 6.0 Mg/yr.

(5) For each facility where the annual waste quantity for process unit turnaround waste is determined in accordance with § 61.355(b)(5), the records shall include all test results, measurements, calculations, and other documentation used to determine the following information: identification of each process unit at the facility that undergoes turnarounds, the date of the most recent turnaround for each process unit, identification of each process unit turnaround waste, the water content of each process unit turnaround waste, the annual waste quantity determined in accordance with § 61.355(b)(5), the range of benzene concentrations in the waste, the annual average flow-weighted benzene concentration of the waste, and the annual benzene quantity calculated in accordance with § 61.355(a)(1)(iii) of this section.

(6) For each facility where wastewater streams are controlled for benzene emissions in accordance with § 61.348(b)(2), the records shall include all measurements, calculations, and other documentation used to determine the annual benzene content of the waste streams and the total annual benzene quantity contained in all waste streams managed or treated in exempt waste management units.

(c) An owner or operator transferring waste off-site to another facility for treatment in accordance with § 61.342(f) shall maintain documentation for each offsite waste shipment that includes the following information: Date waste is shipped offsite, quantity of waste shipped offsite, name and address of the facility receiving the waste, and a copy of the notice sent with the waste shipment.

(d) An owner or operator using control equipment in accordance with §§ 61.343 through 61.347 shall maintain engineering design documentation for all control equipment that is installed on the waste management unit. The documentation shall be retained for the life of the control equipment. If a control device is used, then the owner or operator shall maintain the control device records required by paragraph (f) of this section.

(e) * * *

(2) If engineering calculations are used to determine treatment process or wastewater treatment system unit performance, then the owner or operator shall maintain the complete design analysis for the unit. The design analysis shall include for example the following information: Design specifications, drawings, schematics, piping and instrumentation diagrams,

and other documentation necessary to demonstrate the unit performance.

* * * * *

(f) * * *

(2) If engineering calculations are used to determine control device performance in accordance with § 61.349(c), then a design analysis for the control device that includes for example:

(i) Specifications, drawings, schematics, and piping and instrumentation diagrams prepared by the owner or operator, or the control device manufacturer or vendor that describe the control device design based on acceptable engineering texts. The design analysis shall address the following vent stream characteristics and control device operating parameters:

* * * * *

(E) For a condenser, the design analysis shall consider the vent stream composition, constituent concentration, flow rate, relative humidity, and temperature. The design analysis shall also establish the design outlet organic compound concentration level or the design outlet benzene concentration level, design average temperature of the condenser exhaust vent stream, and the design average temperatures of the coolant fluid at the condenser inlet and outlet.

(F) For a carbon adsorption system that regenerates the carbon bed directly on-site in the control device such as a fixed-bed adsorber, the design analysis shall consider the vent stream composition, constituent concentration, flow rate, relative humidity, and temperature. The design analysis shall also establish the design exhaust vent stream organic compound concentration level or the design exhaust vent stream benzene concentration level, number and capacity of carbon beds, type and working capacity of activated carbon used for carbon beds, design total steam flow over the period of each complete carbon bed regeneration cycle, duration of the carbon bed steaming and cooling/drying cycles, design carbon bed temperature after regeneration, design carbon bed regeneration time, and design service life of carbon.

(G) For a carbon adsorption system that does not regenerate the carbon bed directly on-site in the control device, such as a carbon canister, the design analysis shall consider the vent stream composition, constituent concentration, flow rate, relative humidity, and temperature. The design analysis shall also establish the design exhaust vent stream organic compound concentration level or the design exhaust vent stream benzene concentration level, capacity of carbon bed, type and working capacity of activated carbon used for carbon bed, and design carbon replacement interval based on the total carbon working capacity of the control device and source operating schedule.

(H) For a control device subject to the requirements of § 61.349(a)(2)(iv), the design analysis shall consider the vent stream composition, constituent concentration, and flow rate. The design analysis shall also include all of the information submitted under § 61.349 (a)(2)(iv).

(ii) [Reserved]

* * * * *

(i)* * *

(4) If measurements of waste stream benzene concentration are performed in accordance with § 61.354(b), the owner or operator shall maintain records that include the date each test is performed and all test results.

* * * * *

(j)* * *

(3) Periods when the closed-vent system and control device are not operated as designed including all periods and the duration when:

(i) Any valve car-seal or closure mechanism required under § 61.349(a)(1)(ii) is broken or the by-pass line valve position has changed.

(ii) The flow monitoring devices required under § 61.349(a)(1)(ii) indicate that vapors are not routed to the control device as required.

* * * * *

(6) If a boiler or process heater is used, then the owner or operator shall maintain records of each occurrence when there is a change in the location at which the vent stream is introduced into the flame zone as required by § 61.349(a)(2)(i)(C). For a boiler or process heater having a design heat input capacity less than 44 MW, the owner or operator shall maintain continuous records of the temperature of the gas stream in the combustion zone of the boiler or process heater and records of all 3-hour periods of operation during which the average temperature of the gas stream in the combustion zone is more than 28°C below the design combustion zone temperature. For a boiler or process heater having a design heat input capacity greater than or equal to 44 MW, the owner or operator shall maintain continuous records of the parameter(s) monitored in accordance with the requirements of § 61.354(c)(5).

* * * * *

(8) If a condenser is used, then the owner or operator shall maintain records from the monitoring device of the parameters selected to be monitored in accordance with § 61.354(c)(6). If concentration of organics or concentration of benzene in the control device outlet gas stream is monitored, then the owner or operator shall record all 3-hour periods of operation during which the concentration of organics or the concentration of benzene in the exhaust stream is more than 20 percent greater than the design value. If the temperature of the condenser exhaust stream and coolant fluid is monitored, then the owner or operator shall record all 3-hour periods of operation during which the temperature of the condenser exhaust vent stream is more than 6 °C above the design average exhaust vent stream temperature, or the temperature of the coolant fluid exiting the condenser is more than 6 °C above the design average coolant fluid temperature at the condenser outlet.

(9) If a carbon adsorber is used, then the owner or operator shall maintain records from the monitoring device of the concentration of organics or the concentration of benzene in the control device outlet gas stream. If the concentration of organics or the concentration of benzene in the control device outlet gas stream is monitored, then the owner or operator shall record all 3-hour periods of operation during which the concentration of organics or the concentration of benzene in the exhaust stream is more than 20 percent greater than the design value. If the carbon bed regeneration interval is monitored, then the owner or operator shall record each occurrence when the vent stream continues to flow through the control device beyond the predetermined carbon bed regeneration time.

* * * * *

(11) If an alternative operational or process parameter is monitored for a control device, as allowed in § 61.354(e) of this subpart, then the owner or operator shall maintain records of the continuously monitored parameter, including periods when the device is not operated as designed.

(12) If a control device subject to the requirements of § 61.349(a)(2)(iv) is used, then the owner or operator shall maintain records of the parameters that are monitored and each occurrence when the parameters monitored are outside the range of values specified in § 61.349(a)(2)(iv)(C), or other records as specified by the Administrator.

* * * * *

(m) If a system is used for emission control that is maintained at a pressure less than atmospheric pressure with openings to provide dilution air, then

the owner or operator shall maintain records of the monitoring device and records of all periods during which the pressure in the unit is operated at a pressure that is equal to or greater than atmospheric pressure.

* * * * *

16. Section 61.357 is amended by revising paragraphs (a) introductory text and (a)(4); by adding a new sentence at the end of paragraph (c) and a new sentence at the end of paragraph (d)(2); by removing paragraph (d)(4); by redesignating paragraph (d)(3) as (d)(4); by adding paragraph (d)(3); by redesignating paragraphs (d)(5), (d)(6) and (d)(7) as (d)(6), (d)(7) and (d)(8) respectively; by redesignating the newly redesignated paragraph (d)(7)(iii) as (d)(7)(iv); by adding paragraphs (d)(5), (d)(7)(iii), (d)(7)(iv)(J) and (d)(7)(V); and by revising paragraph (d)(1), the newly redesignated paragraphs (d)(4)(iii), (d)(7)(iv)(D) and (d)(8) to read as follows:

§ 61.357 Reporting requirements.

(a) Each owner or operator of a chemical plant, petroleum refinery, coke by-product recovery plant, and any facility managing wastes from these industries shall submit to the Administrator within 90 days after January 7, 1993, or by the initial startup for a new source with an initial startup after the effective date, a report that summarizes the regulatory status of each waste stream subject to § 61.342 and is determined by the procedures specified in § 61.355(c) to contain benzene. Each owner or operator subject to this subpart who has no benzene onsite in wastes, products, by-products, or intermediates shall submit an initial report that is a statement to this effect. For all other owners or operators subject to this subpart, the report shall include the following information:

* * * * *

(4) The information required in paragraphs (a) (1), (2), and (3) of this section should represent the waste stream characteristics based on current configuration and operating conditions. An owner or operator only needs to list in the report those waste streams that contact materials containing benzene. The report does not need to include a description of the controls to be installed to comply with the standard or other information required in § 61.10(a).

* * * * *

(c) * * * If the information in the annual report required by paragraphs (a)(1) through (a)(3) of this section is not changed in the following year, the owner or operator may submit a statement to that effect.

(d) * * *

(1) Within 90 days after January 7, 1993, unless a waiver of compliance under § 61.11 of this part is granted, or by the date of initial startup for a new source with an initial startup after the effective date, a certification that the equipment necessary to comply with these standards has been installed and that the required initial inspections or tests have been carried out in accordance with this subpart. If a waiver of compliance is granted under § 61.11, the certification of equipment necessary to comply with these standards shall be submitted by the date the waiver of compliance expires.

(2) * * * If the information in the annual report required by paragraphs (a)(1) through (a)(3) of this section is not changed in the following year, the owner or operator may submit a statement to that effect.

(3) If an owner or operator elects to comply with the requirements of § 61.342(c)(3)(ii), then the report required by paragraph (d)(2) of this section shall include a table identifying each waste stream chosen for exemption and the total annual benzene quantity in these exempted streams.

(4) * * *

(iii) For each process wastewater stream identified as being controlled for benzene emissions in accordance with the requirements of this subpart, the table shall report the following information for the process wastewater stream as determined at the exit to the treatment process: Annual waste quantity, range of benzene concentrations, annual average flow-weighted benzene concentration, and annual benzene quantity.

(5) If an owner or operator elects to comply with the alternative requirements of § 61.342(e), then the report required by paragraph (d)(2) of this section shall include a table presenting the following information for each waste stream:

(i) For each waste stream identified as not being controlled for benzene emissions in accordance with the requirements of this subpart; the table shall report the following information for the waste stream as determined at the point of waste generation: annual waste quantity, range of benzene concentrations, annual average flow-weighted benzene concentration, and annual benzene quantity;

(ii) For each waste stream identified as being controlled for benzene emissions in accordance with the requirements of this subpart; the table shall report the following information for the waste stream as determined at the applicable location described in § 61.355(k)(2): Annual waste quantity, range of benzene concentrations, annual average flow-weighted benzene concentration, and annual benzene quantity

* * * * *

(7) * * *

(iii) If a treatment process or wastewater treatment system unit is monitored in accordance with § 61.354(b), then each period of operation during which the flow-weighted annual average concentration of benzene in the monitored waste stream entering the unit is equal to or greater than 10 ppmw and/or the total annual benzene quantity is equal to or greater than 1.0 mg/yr.

(iv) * * *

(D) Each 3-hour period of operation during which the average concentration of organics or the average concentration of benzene in the exhaust gases from a carbon adsorber, condenser, or other vapor recovery system is more than 20 percent greater than the design concentration level of organics or benzene in the exhaust gas.

* * * * *

(J) Each 3-hour period of operation during which the parameters monitored are outside the range of values specified in § 61.349(a)(2)(iv)(C), or any other periods specified by the Administrator for a control device subject to the requirements of § 61.349(a)(2)(iv).

(v) For a cover and closed-vent system monitored in accordance with § 61.354(g), the owner or operator shall submit a report quarterly to the Administrator that identifies any period in which the pressure in the waste management unit is equal to or greater than atmospheric pressure.

(8) Beginning one year after the date that the equipment necessary to comply with these standards has been certified in accordance with paragraph (d)(1) of this section, the owner or operator shall submit annually to the Administrator a report that summarizes all inspections required by §§ 61.342 through 61.354 during which detectable emissions are measured or a problem (such as a broken seal, gap or other problem) that could result in benzone emissions is identified, including information about the repairs or corrective action taken.

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§ 61.359 [Removed]

17. Section 61.359 is removed and reserved.

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Thursday
January 7, 1993

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 227

Threatened Fish and Wildlife; Listing of the Gulf of Maine Population of Harbor Porpoise as Threatened; Proposed Rule

Endangered Fish and Wildlife: Gray Whale; and Listing Endangered and Threatened Species: Northern Offshore Spotted Dolphin; Notices

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 227

[Docket No. 921232-2332]

Threatened Fish and Wildlife; Listing of the Gulf of Maine Population of Harbor Porpoise as Threatened under the Endangered Species Act (ESA)

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

ACTION: Proposed rule.

SUMMARY: NMFS was petitioned to list the Gulf of Maine (GME) population of harbor porpoise as threatened under the ESA due, primarily, to the level of incidental bycatch of harbor porpoise in the GME sink-gillnet fishery. The best available scientific information indicates that the incidental bycatch of harbor porpoise in this fishery is unsustainable. Furthermore, regulations or other provisions to reduce or limit the level of incidental bycatch by this fishery do not exist. Based on this information, and the criteria established by the ESA, NMFS has determined that the petitioned action is warranted. NMFS, therefore, proposes that the GME harbor porpoise population be listed as threatened under the ESA. The GME population includes all harbor porpoise whose range extends throughout waters of eastern North America from (and including) the Bay of Fundy (BOF), Nova Scotia south to eastern Florida.

DATES: Comments and information must be received by April 7, 1993. Requests for public hearings must be received by February 22, 1993.

ADDRESSES: Comments should be addressed to the Director, Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Michael Payne, NOAA/NMFS, Office of Protected Resources, 1335 East-West Highway, Silver Spring, MD 20910 (303/713-2322).

SUPPLEMENTARY INFORMATION:

Background

The GME is bounded on the west by the coastline of the northeastern United States, and on the northeast by the Bay of Fundy (BOF) and Nova Scotia, Canada. There has been incidental catch of harbor porpoise in GME gillnet fisheries for a number of years. Gilbert and Wynne (1983, 1984, 1985, 1988) provided early reports regarding the incidental take of harbor porpoise and other marine mammals. Because of the bycatch of harbor porpoise, the multispecies sink-gillnet fishery in the GME (and adjacent waters) was classified as a Category I fishery under section 114 of the Marine Mammal Protection Act (MMPA) (54 FR 16072, April 20, 1989). Under the 1988 amendments to the MMPA a Category I fishery involves "frequent incidental takes of marine mammals." To determine the extent of the harbor porpoise bycatch by the sink-gillnet fishery in the GME, NMFS initiated an observer program in August 1989 (Payne, Power and Yustin 1990; Power and Drew 1991). NMFS has also conducted field studies to determine the best methods to assess the abundance of GME harbor porpoise (Polacheck and Thorpe 1990; Polacheck 1991a, 1991b; Polacheck and Smith 1989).

Harbor porpoise bycatch data collected by observers between August 1989 and July 1990 were reported at a NMFS/International Whaling Commission (IWC) workshop, October 22-25, 1990 (IWC 1991). The data indicated that the rate of harbor porpoise bycatch in the gillnet fishery was large relative to available estimates of harbor porpoise abundance in the GMW. On February 12, 1991, NMFS announced that a status review of harbor porpoise throughout their North American range would be conducted and requested information pertaining to the species (56 FR 5684).

On September 18, 1991, NMFS received a petition from the Sierra Club Legal Defense Fund on behalf of the International Wildlife Coalition and 12 other organizations to list the GME harbor porpoise population as "threatened" under the ESA. NMFS determined that the petition presented substantial information that the petitioned action may be warranted (56 FR 65044, Dec. 13, 1991). To ensure that the status review was comprehensive and based on the best available scientific data, NMFS again solicited information and comments regarding the status of the harbor porpoise, this time focusing only on the GME. This review was conducted in conjunction with the status review initiated by NMFS on February 12, 1991. Comments regarding the petition were accepted by NMFS until February 11, 1992.

NMFS convened a workshop on May 5-8, 1992, to evaluate the status of the GME harbor porpoise and adjacent populations (as described in Gaskin 1984) in eastern North America (NMFS 1992a). Information was reviewed on population structure, reproductive rates, population size, and levels of bycatch for each of the populations considered. Workshop participants reached conclusions regarding the status of harbor porpoise populations in eastern North America based on information pertaining to: (1) Removals relative to population size; (2) adequacy of existing regulations; and (3) the ecological role of the species in the GME. The information received during the comment periods mentioned above, and the results of the harbor porpoise workshop, provided the scientific information necessary to complete the status review (NMFS 1992a) and respond to the petition.

Comments Received

NMFS received comments on both the February 12, 1991, notice initiating a status review of harbor porpoise throughout U.S. waters, and the December 13, 1991, notice of receipt of the petition to list the harbor porpoise in the GME as threatened under the ESA. NMFS received information regarding the status of the harbor porpoise in the GME and BOF regions from individuals at the following organizations: National Fisheries Institute, Washington, DC; New England Aquarium, Boston, Mass; members of the New England Harbor Porpoise Working Group; Manomet Bird Observatory, Marine Mammal and Seabird Studies, Manomet, Mass; Center for Marine Conservation, Washington, DC; New England Gillnetters Association, Marshfield, Mass; Marine Gillnetters Association, Stonington, Maine; South Carolina Association for Marine Mammal Protection, Myrtle Beach SC; International Wildlife Coalition, N. Falmouth, Mass.; Woods Hole Oceanographic Institute, Woods Hole, Mass.; Center for Coastal Studies, Provincetown, Mass; National Aquarium in Baltimore, Md.; South Shore Gillnetters Association, Norwell, Mass.; and New Hampshire Commercial Fishermens Association, Rye, NH.

Comment: One comment referred to the petition as inappropriate in light of the most recent data on harbor porpoise abundance estimates released by NMFS (the abundance estimates available in Smith *et al.* (1991)).

Response: The comment cited only the preliminary abundance estimate, which was a result of analyses of sighting data from the 1991 harbor porpoise surveys (see Listing Procedures: B in this preamble). However, the commenter did not consider the revised estimate of incidental take, which was also discussed in Smith *et al.* (1991). Both of these estimates were greater than the earlier estimates that were cited in the petition, and both were considered

preliminary. The ratio of the estimated incidental take to estimated population size used in this proposed rule (at NMFS 1992a) supports NMFS' determination that the petition is warranted (see Listing Procedures: B in this preamble).

Comment: One commenter asserted that the primary basis for the petition "is the alarming level of fishery kill to which the Gulf of Maine/Bay of Fundy population is subject." The commenter went on to note that the petition arrived at a figure of 1,530 harbor porpoise killed annually incidental to gillnet fishing in the GME. This figure was based on a study that included interviewing fishermen in 1987 to determine the average annual kill per boat. This figure was then multiplied by the number of vessels registered in the sink-gillnet fishery as part of the Interim Exemption for Commercial Fisheries. Although the exact number of active (as opposed to registered) gillnetters is not known, the commenter suggested that the level of effort was overestimated and that the estimate of bycatch was overestimated as well.

Response: NMFS was required to determine whether the petition presented substantial information indicating that listing may be warranted prior to the analyses of sighting data collected during the dedicated harbor porpoise survey conducted in the summer of 1991. Analyses of the data from these surveys have resulted in the best available estimate of harbor porpoise abundance in the GME (NMFS 1992a). The population estimates used in the petition ranged from approximately 3,000 to 15,000 (estimates from Gaskin *et al.* 1985; and Kraus, Gilbert and Prescott 1983). These estimates were considered by many likely to underestimate the true abundance of harbor porpoise in the GME to some unknown degree.

The petition also preceded the completion of analyses on the level of bycatch of harbor porpoise associated with gillnets in the sink-gillnet fishery. The mortality considered by the petitioners ranged from 280–800 per year (from Polacheck 1989) to approximately 1,000 per year (from Kraus 1990). The bycatch estimate used by the petitioners was based, at least in part, on the 1989–1990 data collected during a systematic observer program initiated by NMFS to determine the number of harbor porpoise taken in the GME.

Comment: Several comments addressed the issue of fishing effort as it relates to a bycatch estimator. The commenters maintained that total bycatch cannot be estimated by extrapolation using the estimates of total effort due to the seasonality of the fishery or biases in the database. One commenter suggested that the estimate of fishing effort used by the petitioners to extrapolate a total kill was too large.

Another commenter focused on trends in the gillnet fishery effort. The petition stated that "recent trends in fishery effort suggest that these numbers cannot be expected to slacken off anytime in the near future." The commenter replied that this is not true, and cited the development of a groundfish management plan by the New England Fishery Management Council (NEFMC) which may propose a 50-percent reduction in fishing effort in the GME. Therefore, the commenter continued, in 1992 there will likely be a marked decrease in gillnetting effort due to the effort reduction plans.

Response: Most gillnet fishery effort is recorded in a NEFSC weighout database, and several measures of fishing effort that can be used for estimating total bycatch of harbor porpoise are included in the database. The petitioners used the number of days fished (trip-based estimator) to determine fishing effort. There are, however, as mentioned by the commenters biases inherent in the weighout data (Bisack and Dinardo 1991; Bisack 1992b) which affect this estimator. these biases were addressed at the Thirteenth Northeast Regional stock Assessment Workshop (NMFS 1992b). Based on discussion at the Stock Assessment Workshop, Bisack (1992a) considered two effort estimators from the weighout database, trips (days absent) and landings (bycatch per total fish landed), to calculate estimates of harbor porpoise bycatch in the GME (see Listing Procedures: B in this preamble). NMFS concluded that total landings in the sink-gillnet fishery are more completely and accurately monitored than is fishing effort based on trips (the number of days absent) (NMFS 1992b), and is therefore a better indicator of effort than that used by the petitioners.

Several management plans are being considered that may decrease overall fishing effort throughout the GME in an attempt to rebuild selected fish stocks. At this time it is not known what plan may be implemented, or to what extent any plan will impact the gillnet fishery, or how it might result in a shift of the gillnet effort into other portions of the harbor porpoise range. It is also not clear whether measures used to reduce fishery effort in an attempt to rebuild fish stocks will also reduce the bycatch of harbor porpoise in the GME. Therefore, given the best information available at this time, it is not reasonable to predict the level of effort that will occur in the GME during the next few years, or the effect any plan will have on the bycatch of harbor porpoise.

Comment: Several commenters mentioned and supported the activities of the Harbor Porpoise Working Group, which has been meeting regularly since 1990. the group membership consists of gillnet fishermen throughout New England coastal states, NMFS and NEFMC representatives, environmental organizations, and several biologists from non-governmental organizations who have studied the biology and fishery-interaction issues of harbor porpoise throughout the GME and BOF areas. This group has made an effort to encompass all concerned parties. The group has been working to provide accurate information for the NMFS status review, and workable solutions to the problem of harbor porpoise incidental take in GME gillnets.

Response: NMFS supports the activities of the working group and has been an active participant. NMFS has used the working group meetings as a forum to discuss all issues related to harbor porpoise and the sink-gillnet fishery in the GME.

Determination of "Species" under the ESA

To consider the GME harbor porpoise population for listing, it must qualify as a "species" under the ESA. Section 3(15) of the ESA defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Although this definition of "species" under the ESA is in part a legal interpretation, species and populations are biological concepts that must be defined on the basis of the best scientific data available (NMFS has adopted a policy to determine whether stocks of Pacific salmon can be considered a species under the ESA (described at 56 FR 58612, Nov. 20, 1991 and at Waples 1991). However this policy was specific to Pacific salmon and not of general applicability to other species. NMFS has not adopted a similar policy for marine mammals).

NMFS uses all available lines of evidence regarding the population structure of harbor porpoise in the western North Atlantic, recognizing the limitations of each and taking advantage of the complementary nature of the different types of information. Some of the factors which have been used in making population determinations are distribution and migration patterns; isolation at the time of reproductive

activity; potential geographical and oceanographic barriers (e.g. broad stretches of open ocean) which may limit genetic exchange; the distribution of known prey; and pollutant and parasite loads (Gaskin 1984; Dizon *et al.* 1992).

Based on the best available information, NMFS issues this proposed determination that the GME harbor porpoise population qualifies as a "species" as defined by the ESA and is, therefore, eligible for listing as threatened. The bases for this determination are provided below.

Distribution of Harbor Porpoise in the North Atlantic

The harbor porpoise is confined to the Northern Hemisphere, and Gaskin (1984) suggested that there were three isolated, populations: (1) A North Pacific population; (2) a Black Sea-Sea of Azov population; and (3) a North Atlantic population. Yurick and Gaskin (1977) presented evidence for western and eastern regional populations of harbor porpoise in the North Atlantic, and Gaskin (1984) suggested that smaller, functional population units occur within each of these regions. Gaskin (1984) divided the western North Atlantic region into the following four populations: (1) West Greenland; (2) Eastern Newfoundland-Western Davis Strait; (3) St. Lawrence Estuary; and (4) Southern Nova Scotia-North Carolina.

The largest concentrations of the Southern Nova Scotia-North Carolina population occur during summer in the BOF and the northern GME. The petitioner referred to this population as the Gulf of Maine/Bay of Fundy, or more simply, the Gulf of Maine population. NMFS will use the petitioner's language and refer to harbor porpoise that occur throughout waters of eastern North America from (and including) the Bay of Fundy (BOF), Nova Scotia south to eastern Florida, but whose greatest concentrations occur in the GME and BOF, as the "GME" population.

Seasonal Distribution of the GME Population of Harbor Porpoise

Available sighting data indicate that GME harbor porpoise are highly mobile, with strong seasonal north/south movements throughout shelf waters of the BOF and the northeastern United States (CeTAP 1982; Payne, Power and Yustin 1990).

The greatest density of harbor porpoise occurs during late summer in a "high-density" area north of 43°N. latitude in the northern GME/BOF. Between the putative GME population and the adjacent populations of porpoise, there is a distinct density gradient during later summer which decreases rapidly from the high-density areas of the northern GME and BOF to near-zero density around the southern tip of Nova Scotia north to Cape Breton, Nova Scotia.

By late autumn, most harbor porpoise in this population migrate south from the BOF towards the lower GME. The winter distribution of the GME population of harbor porpoise is poorly known. There are records of winter strandings from New England to Cape Hatteras, and rarely to Florida (Polacheck and Wenzel 1990). Limited sighting and bycatch data also indicate a population that is dispersed in shelf waters south to at least North Carolina. Although strandings occur south of Cape Hatteras during winter, the available information indicates that the southern limit to large concentrations of harbor porpoise is Cape Hatteras, North Carolina.

The number of harbor porpoise sightings in the southern GME increases in spring (CeTAP 1982). Sightings between April and June in the southern GME indicate that the animals are moving in a northerly direction—further evidence that a large percentage of the GME population winters south of the GME. The distribution of porpoise sightings shifts from the southern GME in spring, to the northern GME/BOF by mid- to late summer (CeTAP 1982).

Evidence of Reproductive Isolation

Periods of reproductive activity for cetacea species can be inferred, generally, from direct observations of mating behavior, from the distribution of the annual peak of births, and from studies of the state of the testes of adult males (Gaskin *et al.* 1984). Throughout the North Atlantic, harbor porpoise mate and give birth from May to August (Fisher and Harrison 1970; Harrison 1970; Gaskin *et al.*, 1984; Read 1990a). Evidence that the reproductive activity in the GME is seasonal and does not occur during other periods of the year was provided by Gaskin *et al.* (1984), who demonstrated that seminiferous tubule diameter and the percentage of tubules containing sperm declined between July and September. This indicates a seasonal cycle of spermatogenesis in the GME, and agrees with data presented by Fisher and Harrison (1970), who concluded that testicular activity in North Atlantic harbor porpoise increased from May onwards (reaching a peak in the latter half of July), and then decreased dramatically by mid-August. Decreasing testicular volume from July through September was considered further evidence of the existence of an annual reproductive cycle in the male harbor porpoise (Gaskin *et al.*, 1984). Female harbor porpoise also display significant reproductive seasonality in the timing of ovulation (late June through early August) (Read 1990a). Generally, therefore, peak reproduction activity (and genetic exchange) does not occur outside the summer range of the harbor porpoise, where populations are most discrete.

The summer arrival times within all of the four proposed populations in the western North Atlantic coincide closely with each other (mother-calf pairs begin to arrive in the BOF coastal waters in June, or rarely in late May). This also indicates that, while more than one population of harbor porpoise may occur seasonally in the GME, the likelihood of these populations mixing during the period of greatest reproductive activity is thought to be very low, and supports the population structure in the western North Atlantic characterized by Gaskin (1984).

Each of these population concentrations has large areas of zero or near-zero harbor porpoise density between them at this time of the year. Although these "density troughs" (Dizon *et al.*, 1992) imply a high degree of segregation and an extremely limited exchange rate, it cannot be ruled out that some interchange may occur, and this population cannot be considered completely allopatric. However, reproductive isolation does not have to be absolute for a population to be considered distinct (FR 56 58612, Nov. 20, 1991). Considering (1) the limited seasonality of peak reproductive activity, and (2) the average distance and "density troughs" that segregate the northwest Atlantic into obvious, discrete reproductive groupings during peak reproductive activity, the degree of genetic exchange between the harbor porpoise population in the GME, and adjacent populations, is considered to be minimal.

Evidence of Site-Fidelity (Population) Between Years

Gaskin, Smith and Watson (1975), Read and Gaskin (1985) and Gaskin *et al.* (1985) found no evidence that harbor porpoise caught and radio-tagged in the western BOF range into adjacent waters (such as the GME and southwest Nova Scotia) during the summer months. Gaskin and Watson (1985) determined that recognizable animals returned each year to re-establish "specific ranges in virtually the same locations in the western BOF each summer."

Those authors were able to resight individual animals during the summers of 1973–1975 and in 1977. Gaskin and Watson (1985) suggested that possible "home-ranges" in harbor porpoise should not be surprising. Similar patterns, although sometimes on very different geographical scales, have been recorded for other species of small cetaceans.

It is also worth noting that three recognizably marked females studied by Watson (1976) in the Fish Harbour region (western BOF) not only returned several years in succession (3 years, 2 years and 2 years), but in each year had newborn calves with them.

These demonstrated "specific ranges" and annual returns by individual harbor porpoises in the BOF further suggest geographic isolation (therefore reproductive isolation) between the GME population and other porpoise in the western North Atlantic during the peak reproductive season.

Population Response Data

A self-sustained population's life histories may be modified through density-dependent responses to over-exploitation. Such responses have been used to distinguish populations. Read and Gaskin (1988) demonstrated significant differences between the frequency distribution of body lengths of porpoises retrieved from gillnets during 1981–1986, and of porpoises collected in 1969–1973 by Smith *et al.* (1983). The observed changes had two main components: An increase in the length of calves from the earlier collection to the 1980s, and an absence of large animals during the 1980s. The increased mean calf length could have been caused by increased prey resources, concomitant with a decline in local density, allowing females to invest more energy in their offspring during pregnancy and/or lactation, resulting in larger calves. The authors concluded that the observed differences between the gillnet samples in the 1980s and samples collected from 1969–1973 reflected real changes in body size that have occurred in the population between the sampling periods. The authors further suggested that sustained incidental mortality from gillnets makes it unlikely that porpoises lived long enough to reach large sizes, and population resilience to exploitation is limited (female harbor porpoise in the 1969–1973 sample reached sexual maturity at age 4, and few animals lived more than 7 years, Gaskin and Blair 1977).

It was recognized by Read and Gaskin (1988) that gillnets possibly catch certain size classes of porpoises and do not catch small or large animals. Therefore Read and Gaskin also examined a small sample of porpoise caught in herring weirs during the two different time periods. The frequency distributions of body length of porpoises captured in herring weirs in 1981–1986 and in 1969–1973 were also significantly different, further suggesting that the differences observed in samples from the gillnets reflected real changes in the population.

The May 1992 harbor porpoise assessment workshop discussed these data and suggested that harbor porpoise abundance in the BOF could have been reduced by incidental catches, or other factors, leading to an increased per-capita food consumption (as suggested by Read and Gaskin 1988); or that changes in prey biomass may have led to an increase in per-capita food consumption, regardless of the trajectory of the porpoise population.

Contaminants

Nearshore marine mammals such as pinniped and small cetaceans are long-lived and feed high on the food chain; therefore they tend to accumulate chlorinated hydrocarbons in their blubber layers which serve as stable repositories for these lipophilic contaminants (Calambokidis and Barlow 1991). As such, pollutant ratios in the blubber of coastal marine mammals are useful as indicators of population or regional discreteness, and useful in evaluating the extent of movement and interchange between regions.

Calambokidis and Barlow (1991) found very strong pollutant ratio gradients with latitude in harbor porpoise from the west coast of the United States. Because chlorinated hydrocarbons accumulate over long periods of time (the entire lifespan of male harbor porpoise), the authors inferred, based on the significant differences in levels of pollutants in the blubber samples by region, that most harbor porpoises remain in a region for extended periods, if not most of their lives. This implies long-term geographical and genetic isolation from other porpoise from other regions. If the population(s) were panmictic (randomly mixed), homogeneous pollutant ratios between samples from all areas should exist.

Gaskin (1984) used the lack of any significant differences in mercury and polychlorinated biphenyl levels in animals from different parts of the GME and BOF (data at Gaskin 1982; Gaskin, Frank and Holdrinet 1983), combined with data on the migration patterns and movements of radio-tagged porpoise in the BOF, to suggest that the harbor porpoise from the BOF, south into U.S. waters, represented a single, functional population unit.

Genotypic Data

Evidence obtained from genetic methods is often considered by resource managers as the most unequivocal means for differentiating species and their intraspecific population structure. The mitochondrial genome (mtDNA) exhibits several features that make it particularly useful for comparing closely related taxa: (1) It is inherited maternally (Brown, George and Wilson 1979) and does not undergo recombination during replication, thus allowing for clearer inferences of phylogenetic relationships; (2) the lack of recombination allows mtDNA genotypes to persist through generations without disruption; and (3) mtDNA evolves faster than nuclear DNA (Brown, George and Wilson 1979), which means that differences among local populations leading to population differentiation will accumulate more rapidly, allowing for higher resolution in the differentiation of recently diverged taxa. These features have made the analysis of mtDNA, through DNA sequencing and restriction fragment length polymorphism (RFLP) studies, a powerful tool for determining patterns of geographic variation in natural populations (Advise *et al.* 1987; Slatkin and Maddison 1989; Stoneking *et al.* 1990; Thomas *et al.* 1990).

Recent comparisons of the mtDNA of harbor porpoise from different areas were presented at the May 1992 workshop. Rosel (1992) presented the results of sequencing the mtDNA from samples taken from the eastern and western North Atlantic. This analysis could not detect population differentiation between eastern and western North Atlantic populations. Wang, Gaskin and White (1992) presented preliminary results from RFLP analysis to assess the levels of mtDNA differentiation between three of the putative populations (eastern Newfoundland, Gulf of St. Lawrence, and the GME) in the western North Atlantic. The amount of genetic diversity found within each of the populations was greater than that found between populations (i.e. the analyses did not detect differences between the putative populations). Thus, results of genetic analyses obtained thus far do not support reproductive isolation between the population structure proposed by Gaskin (1984).

Due to limitations in the interpretation of the genetic analyses, however, the inability to detect genetic differences among these groups does not

rule out the possibility that they are distinct populations. Where genetic barriers are "leaky" (no more than a few individuals per generation) mtDNA genomes can rapidly penetrate neighboring populations, independent of the adaptive chromosomal genome (Ferris *et al.* 1983). These mtDNA genomes are considered neutral, and not selectively removed from the population. The presence of these foreign genomes may argue for the presence of "homogenizing" gene flow and lumping the separate population as one stock, when they may be separate stocks.

Dowling *et al.* (1992) further stated that the failure to find diagnostic molecular charactistics among distinct forms does not necessarily imply conspecificity, but rather indicates that the available genetic data (typically representing only a small fraction of the genome) do not allow rejection of the null hypothesis (i.e., no difference). Read (at the May 1992 workshop) noted that a preliminary study using protein electrophoresis failed to differentiate *P. phocoena* from *P. spinipinnis*. Speciation could conceivably result from very few genetic changes (or even one); therefore, levels of genetic divergence alone are not valid measures of specific status. Dowling *et al.* (1992) further suggested that it is important to realize that two adjacent forms (or, in this case, populations of harbor porpoise) should not be discriminated against because of their lack of genetic "purity." The dismissal of distinct entities (i.e., forms, or populations) due solely to lack of "purity" or apparent lack of genetic devergence is unacceptable (Dowling *et al.* 1992).

Dizon *et al.* (1992) described four operational categories of populations based on the degree of response to differential selection likely to have occurred in one population relative to another. Under their scheme, differences found in demographic, morphological, or mtDNA measures are taken to be proxies indicating that selection (potential gene flow) may be operating differentially on one population relative to another. Their categories I–IV represent gradients from the easiest situation demonstrating separate populations (category I-allopatric populations with significant genetic differences) to a situation where there are no geographical barriers between populations, there is considerable intermixing on the breeding range, and the potential for extensive gene interchange is great (category IV). The latter category demonstrates the weakest evidence for differentiation between populations.

Following the classification criteria considered by Dizon *et al.*, harbor porpoise in the GME most closely resemble a Category III population (i.e., there is strong geographic partitioning at the reproductive season indicating reproductive isolation to some degree; however, the geographically separated assemblages are characterized by little or no genetic differentiation). Dizon *et al.* suggested that a Category III population should be considered and managed separately due, at a minimum, to the geographic partitioning of the breeding assemblages.

Participants at the harbor porpoise workshop also recognized that, even though rates of exchange between harbor porpoise in the northwest Atlantic may be great enough to eliminate genetic differences, groups could still be sufficiently distinct to justify management as separate stocks or populations (NMFS 1992a). Recent separation or very low levels of mixing would hamper attempts to detect genetic differences. Therefore, participants at the May 1992 workshop suggested that Gaskin's proposed population structure of the northwest Atlantic be used as the working hypothesis (NMFS 1992a).

Although the direct genetic evidence for consideration of the GME harbor porpoise as a distinct population is inconclusive, all other lines of biological evidence strongly support a species status recognition under the ESA. Seasonal movements into the northern GME/BOF during summer, the known summer reproductive periodicity and spatial segregation from other conspecific groups at that time, and the subsequent dispersal during late fall and winter from the GME south to at least North Carolina, strongly suggests a unified, single breeding assemblage. The best scientific information available indicate that the viability of harbor porpoise in shelf waters of the eastern U.S. is dependent upon harbor porpoise in the GME and BOF. Therefore, based on this information, NMFS proposes that the harbor porpoise that occur in the GME and BOF represent a distinct population, and therefore a "species" under section 3(15) of the ESA.

Listing Procedures: Summary of Factors Affecting the Species

Section 3 of the ESA (16 U.S.C. 1532(19)) defines a threatened species as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

To determine whether a species should be listed as endangered or threatened, section 4(a)(1) of the ESA (16 U.S.C. 1533(a)(1)) sets forth the following five criteria:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

A. *The Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range:* Although the nearshore habitat of this species along the eastern U.S. coastline is potentially threatened with destruction or physical modification (see E. of this preamble), there is no evidence that such modification or destruction to date has contributed to a decline of harbor porpoise in the GME.

There is no evidence that the range of this subspecies has changed significantly (see E. of this preamble), or has contributed to a decline of harbor porpoise in the GME.

B. *Overutilization for commercial, recreational, scientific, or educational purposes:* Information on the bycatch of harbor porpoise in the GME has been obtained from several sources throughout the 1980s. Some of this information has been from scientific, but not systematic surveys. Gilbert and Wynne (1988) documented relative levels of marine mammal bycatch (including harbor porpoise) in GME fisheries. These data were used by NMFS to classify the GME sink-gillnet fishery as a Category I fishery (54 FR 16072, April 20, 1989). However, due to an inability to place observers systematically aboard domestic fishing vessels prior to the implementation of section 114(f) of the MMPA, it was not possible, until recently, to obtain the temporal and spatical sampling required for a reliable estimate of harbor porpoise bycatch in GME fisheries from rate-of-take data such as that collected by Gilbert and Wynne.

Vessels operating in a Category I fishery are required, under section 114(e) of the MMPA, to take onboard an observer to obtain information on the species and number of marine mammals taken incidental to the fishery. This latter requirement has been implemented in the GME multispecies sink-gillnet fishery through the NMFS/NEFSC Sea Sampling Program (SSP).

(i) Observer Effort

The SSP observer effort has been allocated by month and NMFS fishery statistical areas within the GME, based

on the total number of days that fishing vessels were absent from port (as indicated in the NEFSC weighout database) for the previous year (Power and Drew 1991; Bisack 1992a). Bisack (1992a) partitioned the GME into a northern component (NMFS statistical areas 511 and 512) and a southern component (statistical areas 513–515). Most of the sink-gillnet fishery effort (based on the weighout database) in the GME occurs in these statistical areas.

(ii) Bycatch Estimators From Weighout Database

The porpoise rate-of-take information collected by SSP observers needs to be combined with some measure of total fishing effort to calculate a total bycatch for the GME. Several measures of fishing effort that can be used for estimating total bycatch are available in the weighout database. Smith *et al.* (1991) presented preliminary estimates of bycatch based on the product of the mean bycatch rate per fishing trip from the SSP database and the total number of fishing trips in the sink-gillnet fishery as estimated by NEFSC port agents and recorded in the weighout database (i.e. a trip-based effort indicator). There are, however, biases inherent in the weighout data (Bisack and DiNardo 1991; Bisack 1992b). These were discussed at the Thirteenth Northeast Regional Stock Assessment Workshop (NMFS 1992b). It is known, for example, that for some vessels, the number of days absent or days at sea (trip estimator) are underestimated in the weighout data. Vessels under 5 tons represent one-third of the weighout trips, but they cannot be tracked in the database; therefore, little information is available about the number of these participating vessels and the association between the number of days absent and total fishing effort (Bisack and DiNardo 1991). Also, the weighout database is intended to provide catch data through port interviews with the fishermen. The amount of interview effort from the northern GME reported in the weighout database has not been adequate and significantly underestimates the amount of fishing effort in that region. Since total effort estimates from the weighout database are needed to estimate marine mammal bycatch, the bycatch estimates may be downwardly biased as a result of underestimating effort in northern GME ports (Bisack and DiNardo 1991).

An alternative method of estimating total bycatch of harbor porpoise killed in the fishery from the weighout data could be determined based on the number of harbor porpoise taken per ton of fish landed (based on SSP sampling data), expanded by the total tons of fish landed from the weighout database (i.e. a landings estimator). The participants of the Stock Assessment Workshop (NMFS 1992b) suggested that estimates of total landings in the grillnet fishery are more accurate than estimates of total fishing effort.

(iii) Estimates of Harbor Porpoise Bycatch in the GME

The present estimates are based on data collected from June 1989 through the second half of 1991. SSP observers reported 67 harbor porpoise taken by gillnet vessels from June 1989, through 1991. Most (58/67) of the harbor porpoise bycatch occurred in the southern GME, primarily from October through May (fall and winter, Bisack 1992). In the northern GME, the bycatch occurred primarily in the summer and fall (Table 1). The timing and location of takes are consistent with known seasonal movements of harbor porpoise between the southern GME and the northern GME/BOF.

There were no harbor porpoise takes reported during the summers of 1989 or 1990 (Table 1). During these periods the distribution of sampling effort was often disjunct with the known distribution of harbor porpoise (i.e., SSP observers were allocated to the southern GME at a time when harbor porpoise were primarily in the northern GME (Payne, Power and Yustin 1990). It is only since June 1991, when SSP effort increased throughout the GME, that statistically reliable bycatch estimates can be made for all regions and seasons within the GME (Bisack 1992b).

The bycatch estimates using trips and landings as estimators are similar, except in the fall of 1990 and the winters of 1990 and 1991 (Table 2). During these periods, the bycatch estimates using landings as the effort estimator were substantially higher than the trip-based estimates (NMFS 1992a). The differences in the trip-based and landings-based estimates could be due to several known difficulties with the databases (discussed previously, and in DiNardo and Bisack 1991; Bisack 1992b).

Given the recommendations of the Stock Assessment Workshop participants that estimates of total landings in the gillnet fishery are more accurate than estimates of total fishing effort, a landings-based bycatch estimator is considered more accurate than one based on total fishing effort. The best estimate of the average annual bycatch of harbor porpoise in the entire GME gillnet fishery (northern and southern GME) is 2,000 (95 percent confidence interval (CI)=1,200–2,800) (Bisack 1992a). The landings-based estimates ranged from 2,396 to 1,672 for 1990 and 1991, respectively (NMFS 1992a). The 95-percent CI in 1990 ranged from 1,600 to 3,500, and in 1991 from 1,100 to 2,500 (NMFS 1992a)

These estimates are not likely to be biased upward because landings were overestimated. Landings would only be overestimated if there were incorrect gear assignments, that is, if other gear types were recorded as sink gillnet gear. It is more likely that sink gillnet gear has been incorrectly assigned to other gear types (Bisack 1992b), which would result in trips and landings being underestimated; therefore, bycatch would also be underestimated.

TABLE 1.—ANNUAL SEA SAMPLING (SSP) TRIPS, TOTAL OBSERVED HARBOR PORPOISE BYCATCH, WEIGHOUT (WO) TRIPS, AND WO LANDINGS (TONS) BY YEAR AND SEASON (SUMMER, FALL AND WINTER) FOR THE NORTHERN GULF OF MAINE (UPPER) THE SOUTHERN GULF OF MAINE (LOWER).

[Northern Gulf of Maine]

Year	Season	SSP trips	Porpoise bycatch	WO trips	WO landings
1989	S	2	0	888	1641
	F	1	0	378	528
	W	2	0	154	186
1990	S	6	0	856	1269
	F	2	1	433	392
	W	2	0	235	215
1991	S	91	5	1033	1975
	F	33	3	429	668

[Southern Gulf of Maine]

Year	Season	SSP trips	Porpoise bycatch	WO trips	WO landings
1989	S	7	0	2158	4945
	F	1	0	3821	6214
	W	56	9	3082	2916
1990	S	21	0	3602	7669
	F	36	7	3848	5564
	W	36	10	2693	2229
1991	S	325	2	2871	5483
	F	326	30	3055	3005

TABLE 2.—ESTIMATED BYCATCH (K) AND STANDARD DEVIATION OF THE ESTIMATE (SD) WITH TRIPS AND LANDINGS AS AN ESTIMATOR BY REGION AND SEASON.

Year	Season	Trip Estimator				Landings Estimator			
		N. GME		S. GME		N. GME		S. GME	
		K	SD	K	SD	K	SD	K	SD
1989	S								
	F			372	170			337	174
	W			495	217			1264	159
1990	S								
	F	217	216	748	298	87	400	1045	347
	W			748	294			1201	331
1991	S	57	28	18	17	65	28	19	17
	F	39	209	281	56	48	22	339	61

It should be re-emphasized that the incidental bycatch estimates are only for the multispecies sink-gillnet fishery in the GME. The harbor porpoise bycatch estimates do not include known bycatch from this population that also occurs in the BOF, and in U.S. waters below the GME (during the winter-spring) by other gillnet fisheries.

(iv) Estimate of Bycatch in the BOF

Harbor porpoise from the GME population are taken incidentally by several fisheries in the BOF.

The size of the gillnet fleet in the western BOF, and the level of porpoise bycatch, remained relatively stable between 1986 and 1989, when approximately 100 porpoises were reported killed each summer in the groundfish gillnet fishery (Read and Gaskin 1988, 1990). Incidental takes of harbor porpoise are also likely to occur in the eastern BOF but have not been quantified (NMFS 1992a).

Smith, Read and Gaskin (1983) also estimated that approximately 70 porpoises are trapped each summer in herring weirs in the western BOF, and that, on average, approximately 27 die annually as a result of entrapment. Small numbers of harbor porpoises are also taken in herring weirs scattered along southwestern Nova Scotia (Smith, Read and Gaskin 1983).

Based largely on the magnitude of the incidental take in the western BOF gillnet fishery, and changes in local density and life history parameters of harbor porpoise in that region, the harbor porpoise was listed as a threatened species by the Committee on the Status of Endangered Wildlife in Canada (Gaskin 1989).

(v) Other Harbor Porpoise Bycatch in U.S. Waters

Harbor porpoise takes in the sink-gillnet fishery south of the GME have also been reported in the SSP database, but not considered in this estimate of total bycatch for the GME. There is increasing evidence that harbor porpoise have been taken incidental to gillnet fisheries for anadromous fish species, such as herring and shad, in coastal southern New England/Mid-Atlantic waters (south of the GME), winter through spring (57 FR 1900, Jan. 16, 1992). Fourteen harbor porpoises, some of which had net marks and full stomachs (characteristics indicative of gillnet mortality) washed up on New Jersey beaches in the spring of 1991, in the vicinity of shad gillnets (57 FR 1900, Jan. 16, 1992). Increased enforcement inquiries in southern New Jersey in late March, 1991, resulted in reports from coastal gillnet fishermen of two lethal and two live takes in the shad gillnet fishery in that area. During this same time period six harbor porpoises also stranded on Virginia beaches, including four with net marks on the leading edge of the flukes and dorsal fins. The first was found the day after the opening of the Virginia nearshore gillnet fishery for shad. Harbor porpoises have also been taken in shad gillnets in the Chesapeake Bay (57 FR 1900, Jan. 16, 1992).

The magnitude of the bycatch in these coastal and nearshore gillnet fisheries is not known. Observer coverage of the sink-gillnet fleet in southern New England only started in August 1992, and therefore, insufficient data are available to estimate the total extent of this bycatch.

(vi) Harbor Porpoise Abundance

Field and analytical experiments to determine the best method of assessing harbor porpoise abundance in the GME have been conducted by the NEFSC since 1988 (Polacheck and Thorpe 1990; Polacheck 1991a, 1991b; Polacheck and Smith 1990). Previous harbor porpoise surveys or abundance estimates (Gaskin 1977; Prescott *et al.* 1981; CeTAP 1982; Kraus, Gilbert and Prescott 1983; Gaskin *et al.* 1985) provided survey coverage for only a limited part of the range of the harbor porpoise, and resulted in minimum abundance estimates, which are considered dated and inadequate. During July and August 1991, NMFS conducted sighting surveys in the offshore waters of the GME/lower BOF/southern Scotian Shelf (Palka 1992a), and GME inshore waters (Read and Kraus 1992). Preliminary estimates from these surveys were presented by Smith *et al.* (1991). Several commenters referred to these estimates in their comments to NMFS regarding the petition to list GME harbor porpoise as threatened under the ESA. These estimates were considered preliminary by NMFS in that further review of the data was needed to confirm the following areas of uncertainty:

(a) Two teams of observers were used in the offshore survey. Each team

searched simultaneously for harbor porpoise, but recorded all sightings separately (Palka and Potter 1992). The use of two observer teams allowed abundance to be estimated in several manners (Palka 1992a, 1992b; NMFS 1992a). The sighting data for the two observer teams were combined to calculate a 1991 estimate (following a technique described at Butterworth and Borchers 1988), correcting for the fraction of the sightings missed by both teams. An uncertainty in the number of duplicative sightings between the two observer teams needed to be further addressed.

(b) The preliminary estimates assumed the density of porpoise in nearshore areas to be the same as the density of porpoise immediately offshore. Rather than assuming that the densities were the same in the two areas, the participants at the May 1992 workshop suggested a different and perhaps better approach. The participants suggested using the measured ratio of porpoises seen in the two areas as an estimate of density in the nearshore area (NMFS 1992a).

(c) Finally, previous survey data suggested that these animals avoid research vessels, at least at close ranges. The distributions of observed swimming directions indicated that harbor porpoise were reacting to the vessel prior to (Palka 1992c) and after (Polacheck and Thorpe 1990) being observed. Significant bias can be introduced into density estimates if animals react to a survey vessel (Polacheck and Thorpe 1990). However, there was no indication from the distribution of perpendicular sighting distances to the harbor porpoises that they were avoiding the survey vessel. Given available data, the workshop participants concluded that it was impossible to assess the effect of animal movement in reaction to the vessel on abundance estimates (NMFS 1992a).

Detailed descriptions of the survey methodology and the sighting data analyses used in the 1991 surveys are provided in Palka (1992 a, b, c, d), Palka and Potter (1992) and Read and Kraus (1992). Participants at the 1992 workshop agreed that the 1991 harbor porpoise survey provided reliable density estimates using the best available survey techniques (NMFS 1992a). Methods of estimating confidence limits around the abundance estimate are also provided in Palka (1992a) and NMFS (1992a). The average abundance estimate produced from the 1991 survey, 45,000 (95-percent CI: 23,000–80,000), is considered the best estimate of the GME harbor porpoise population.

(vii) Harbor Porpoise Productivity versus Bycatch in the GME

Woodley and Read (1991) used demographic models to evaluate the effects of different rates of incidental removal of animals from the harbor porpoise population in the GME/BOF. Woodley and Read (1991) estimated the potential intrinsic rate of increase (r_{max}) of the GME harbor porpoise population using empirical data on reproductive rates (at Read 1990c) and several hypothetical survival schedules. Survival schedules were calculated to maximum ages of 12 and 15 years using estimates of natural mortality combined with the following rates of incidental mortality: 0.0183, 0.0352, 0.0523, and 0.1006. The incidental mortality rates were estimated assuming that the proportion of all age classes of porpoise greater than age 0 are equally affected by incidental mortality, and by calculating ratios from estimates of bycatch to total population size. The range of the bycatch to abundance ratios calculated by Woodley and Read (1991) is identical to the range of the 95 percent CI values around the average bycatch to abundance ratios in the GME using the results of bycatch data presented in Bisack (1992a), and abundance estimates from Palka (1992a) (the 95-percent CI values around the bycatch to abundance ratio range from 0.018 to 0.109 (NMFS 1992a).

The model used by Woodley and Read (1991) incorporates the best available scientific information on the range of life history parameters of harbor porpoise in the GME and BOF, and has resulted in the best available estimate of maximum net productivity for harbor porpoise in the GME. Woodley and Read (1991) found that the model population could not sustain levels of incidental mortality greater than 0.04. At the two higher levels of incidental mortality (0.0523 and 0.1006), only negative population growth rates were possible (i.e., population could only decrease). Woodley and Read concluded, in agreement with Barlow (1986), that harbor porpoises have a limited capacity for population increase, and cannot sustain even moderate levels of incidental mortality.

The IWC reviewed net reproductive rates of harbor porpoise and related species in an attempt to place an upper limit on the range of R_{max}. Theoretical upper limits to phocoenid R_{max} have approached 10 percent (IWC 1990; Barlow and Boveng 1991); therefore R_{MNPL} could theoretically approach 0.05. It should be re-emphasized, however, that the IWC Committee concluded that "it had no firm basis" for estimating a net reproductive rate for harbor porpoise, and none of the calculated estimates of R_{max} for any phocoenid population have been as large as 10 percent (IWC 1990). Barlow and Boveng (1991) envisioned the primary use of their modeling efforts as exploratory, and recommended that their approach (and the resulting survival parameters) not be used for estimating the actual growth rates for any population.

The IWC (1990) concluded that any estimate of acceptable harvest and incidental take rates of harbor porpoise should be conservative, i.e., lower than half of the estimated value of the maximum rate of increase. Therefore, r_{max} values in the range of 4 percent per year indicate a porpoise population that could possibly sustain a level of incidental take that approaches, but does not exceed, 2 percent of the population estimate. Annual human-induced mortality exceeding two percent is not considered sustainable for other species of small cetaceans (MMC 1979, reviewed by Hammond 1991).

(C) *Disease or predation:* There is no indication from stranding data, or tissue analyses from harbor porpoises taken in gillnets, that disease has had an impact on harbor porpoise in the GME. Likewise, harbor porpoise are known to be preyed upon by sharks and killer whales. However, killer whales are not common enough in the GME/BOF to have a measurable effect on the abundance of porpoise, and there is no evidence that shark predation has contributed to the decline of harbor porpoise in the GME.

Harbor porpoise in the GME are know to carry high levels of heavy metals and organochlorines in their tissues (Gaskin, Holdrinet and Frank 1982). Of particular concern are the polychlorinated biphenyls (PCBs) and their lipophilic organichlorines found in harbor porpoise (Gaskin, Holdrinet and Frank 1982; Gaskin, Frank and Holdrinet 1983). These organochlorine residues are known to be mobilized and transferred from adult females to their calves during lactation (Gaskin *et al.* 1982). However, at the present time, the presence of these contaminants in harbor porpoise tissues does not appear to pose a serious threat to this population (Read and Kraus 1991).

(D) *The inadequacy of existing regulatory mechanisms:* One of the strongest recommendations from the May 1991 harbor porpoise assessment workshop was that the present level of bycatch of porpoise in the GME sink-gillnet fishery needs to be reduced. The 1988 Amendments to the MMPA, as

amended, established the Marine Mammal Exemption Program (MMEP). The MMEP allows commercial fisheries to take harbor porpoise without a timely mechanism for control. However, the amendments do not contain emergency provisions that can be employed. It was indicated at the harbor porpoise assessment workshop that the harbor porpoise bycatch levels may not appropriately be considered an "emergency" at this time. However, the workshop results did determine that the bycatch levels may "have a significant adverse impact over a period of time longer than one year". Therefore, independent of the ESA, NMFS is proceeding under section 114(g)(3) of the MMPA to address the bycatch problem. Pursuant to the MMPA, NMFS requested that the New England Fishery Management Council (NEFMC) introduce measures in Amendment 5 to the Northeast Multispecies Fishery Management Plan (FMP) that will reduce harbor porpoise mortality to acceptable levels.

The NEFMC is considering proposals to amend the FMP to reduce fishing to levels that would allow selected stocks of groundfish to recover. One of the proposals being considered is a reduction in fishing effort through reductions in allowable fishing time. For vessels participating in the gillnet fishery, the NEFMC has proposed that gillnets be removed from the water for specific periods of time. The NEFMC will also request comment on a proposal that would allow changes to this management measure in subsequent years. This seconds proposal would allow for annual review of more recent information on areal and seasonal distributions of harbor porpoise and possible measures to mitigate their takings. It is envisioned that this process will be able to respond in a more timely fashion to new information or increased understanding of the interactions of marine mammals and this fishery. Public hearings are planned for both proposals early in 1993. After receipt of public comment, the NEFMC will determine what measures are to be included in amendment 5, then submit the amendment to them for submission to the Secretary for approval. Further data regarding the species status, and the final amendment 5 measures will be considered in the decision for final listing.

The FMP restrictions may not address bycatch in state-regulated fisheries/state waters. However, under section 114(g)(3), NMFS could request the states to take such action within their authority (such as imposing restrictions on state-regulated fisheries) as it considers necessary to mitigate the bycatch.

NMFS could also, pursuant to section 114(g)(2) of the MMPA, consult with NEFMC and state fishery managers to prescribe emergency regulations to prevent, to the maximum extent possible, any further taking of harbor porpoise. Such emergency regulations must also, to the maximum extent possible, avoid interfering with existing state or regional FMPs. While this option would provide immediate relief to harbor porpoise in the GME, it would only be a temporary solution since emergency regulations promulgated under section 114(g)(2) would be effective for only 180 days or until the end of the fishing season, whichever is earlier. Further, the results of the harbor porpoise assessment workshop indicate that the situation may not appropriately be considered an "emergency."

(E) *Other natural or manmade factors affecting its continued existence:* Although incidental catches in gillnet fisheries are believed to pose the greatest threat to harbor porpoises in the GME, Read and Kraus (1991) listed several other factors that may influence this population, including the following: Loss of habitat (see A. in this preamble), coastal pollution and environmental pollution (see C. in this preamble), and competition with fisheries for prey resources.

The most important prey of harbor porpoises in the GME/BOF is Atlantic herring (Smith and Gaskin 1974; Recchia and Read 1989). Between 1967 and 1976, there was a 75-percent reduction in herring biomass on Georges Bank (Sissenwine, Overholtz and Clark 1984), and in 1977 the commercial fishery for herring failed completely. There was virtually no evidence of a Georges Bank herring population between 1977–1983, despite considerable sampling by research vessels during that period. Kenney *et al.* (1991) suggested that, in response to the complete collapse of a Georges Bank herring stock, harbor porpoise may have shifted their distribution nearshore during the early 1980s, away from Georges Bank. Such a response to a human-induced prey depletion might result in local increases in harbor porpoise abundance, an increased density in areas of the GME and BOF where reduced prey are concentrated, and increased opportunities for fishery-harbor porpoise interactions in the GME and BOF.

Connor (1971) and Ulmer (1977) reported harbor porpoise (in small groups) in the summer months (during the 1940s) in lower New York Bay. It is difficult to determine what "a small number" implies; however, harbor porpoise, at present, are rarely observed outside the northern GME and BOF during summer. Therefore, it does seem possible that the distribution and seasonal occurrence of harbor porpoise have shifted in recent decades. Although cause and effect can rarely be demonstrated, such a seasonally reduced sighting distribution may be precipitated by a change in the availability of prey.

Recent fishery conservation measures are allowing herring stocks to recover from previous low levels, and fishing pressure on these stocks is currently light. Therefore, there is no evidence at this time that harbor porpoises are affected by prey densities.

Vessel traffic has also been documented to have a negative impact on harbor porpoise behavior. Flaherty and Stark (1982) suggested that harbor porpoise abandoned areas of the Washington coastline because of vessel traffic. Polacheck and Thorpe (1991) demonstrated ship avoidance to a research vessel by harbor porpoise in the GME. If ship avoidance were a widespread phenomenon, harbor porpoises might be expected to abandon areas of heavy vessel activity in the GME. Most of the summer range of the GME population occurs in areas of light vessel traffic, and it is unlikely that porpoise are affected by vessel traffic at this time. During the winter and spring, the distribution shifts into the southern GME and adjacent southern New England waters. It is during this period that porpoise behavior may be influenced by increased vessel traffic. The petitioners have demonstrated that vessel traffic has increased in the GME in recent years. However, it is not known to what extent, if any, this increased vessel density has affected harbor porpoise in the GME.

Determination

Based on the assessment of available scientific information, NMFS proposes that harbor porpoise in the GME is a "species" under the ESA.

The best estimate of the average annual bycatch of harbor porpoise in the entire GME gillnet fishery (northern and southern GME) is a minimum of 2,000 (95-percent CI=1,200–2,800) (Bisack 1992a). This estimate is based only on data for the multispecies sink-gillnet fishery in the GME, and does not include known bycatch from this population which occurs in the BOF, or in U.S. waters below the GME (during the winter-spring range of the GME harbor porpoise population).

The best estimate of the size of the GME harbor porpoise population from

the 1991 survey is 45,000. Therefore, the minimum bycatch of the GME population is approximately 4.5 percent of the best estimate of its abundance.

Harbor porpoises have a limited capacity for population increase, and are unlikely to sustain even moderate levels of incidental mortality. The best available estimate of maximum net productivity (r_{max}) for harbor porpoise in the GME does not exceed 4 percent (Woodley and Read 1991). At greater levels of incidental take, the population will likely decline. The IWC (1990) believes that any estimate for acceptable harvest and/or incidental take rates of harbor porpoise should be conservative, i.e., lower than half of the estimated value for r_{max}. Therefore, r_{max} values in the range of 4 to 5 percent per year indicate a porpoise population that could sustain a level of incidental take no greater than 2 percent of the population estimate. NMFS believes that annual human-induced mortality exceeding this value for other species of small cetaceans is unsustainable. The best available information indicates that the bycatch of the GME population of harbor porpoise must be reduced by more than 50 percent to be sustained by the present GME population. This includes a reduction in bycatch by the GME multispecies sink-gillnet fishery as well as the southern New England/Mid-Atlantic gillnet fisheries for herring, shad and other coastal species. At present the extent of bycatch in the gillnet fisheries is considered a threat to the continued existence of the GME harbor porpoise. NMFS concludes that the GME population of harbor porpoise is likely to become endangered within the foreseeable future throughout all or a significant portion of its range and determines that the petitioned action is warranted. NMFS, therefore, proposes to list the GME population of harbor porpoise as threatened under the ESA.

Proposed Protective Regulations

Until more comprehensive regulatory or other action can be implemented to reduce sources of harbor porpoise mortality (e.g., bycatch), NMFS is proposing to adopt the ESA section 9 prohibitions applicable to endangered species to prohibit taking, interstate commerce, possession, sale, receipt, transport, or shipping of harbor porpoises. Generally, then, the prohibitions of § 9 that are applicable to endangered species would be applicable to harbor porpoises, with certain exceptions.

NMFS is proposing to adopt the following exceptions to the general prohibitions: (1) Taking of harbor porpoise incidental to commercial fishing operations if the incidental takings are consistent with the following bycatch reduction program; (2) taking in a humane manner (including euthanasia) by federal, state and local officials and employees, and others designated by the Assistant Administrator pursuant to § 112(c) of the MMPA, in the course of their official duties; and (3) taking for purposes of scientific research pursuant to § 104 of the MMPA and § 10 of the ESA. These exceptions are more fully discussed below.

Exceptions—Commercial fishing: Under this proposed rule, the general prohibitions would not apply to the taking of harbor porpoise incidental to commercial fishing operations if the take complies with the harbor porpoise bycatch reduction program. NMFS is proposing to adopt a bycatch reduction program aimed at progressively reducing total harbor porpoise bycatch in all gillnet fisheries, including bycatch from other gillnet fisheries that impact this population outside the GME. Programs to reduce bycatch must be initiated within the next 18 months with a goal of reducing bycatch to an amount not exceeding 2 percent of the best estimate of population abundance within a period of time not to exceed 4 years beginning in 1993. This would require, at a minimum, a reduction in incidental take in the GME by at least 50 percent of the present take level. To achieve the necessary reduction in bycatch, protective regulations need to be implemented. NMFS is considering area closures, seasonal restrictions, incidental take allocations and other measures to reduce bycatch. Comments are specifically requested concerning the best management measures to achieve the bycatch reduction goal. Since takings incidental to commercial fishing operations would not be prohibited by this rule, separate incidental take authorization pursuant to Sections 7(b)(4) or 10(a)(1)(B) of the ESA would not be required.

In order to monitor the bycatch, the Assistant Administrator of Fisheries (Assistant Administrator) may require the placement of an observer on any gillnet fishing vessel operating in U.S. waters in order to conserve a species listed under the ESA. Therefore, NMFS may notify owners and operators of gillnet vessels operating within the known range of the Gulf of Maine population of harbor porpoise that they must carry a NMFS-approved observer on board such vessel(s) if requested to do so. If the observer data indicate a need, the Assistant Administrator may take actions including, but not restricted to, the issuance of emergency rules to establish closed areas from further fishing, the allocation of the "incidental take" among NMFS statistical areas, or other actions(s) to ensure that commercial fishing operations do not jeopardize the continued existence of the species. NMFS is also requesting comments and recommendations concerning the implementation and seasonal timing of an observer program to monitor bycatch of the GME population of harbor porpoise throughout their range, specifically in Southern New England and Mid-Atlantic coastal waters south to Cape Hatteras, North Carolina.

Official Activities—Under this proposed rule, the general prohibitions would not apply to the taking of harbor porpoises by federal, state or local government officials or employees, or persons designated by the Assistant Administrator under section 112(c) of the MMPA, in the course of their duties as officials, employees or designees, if the taking is for the protection or welfare of the harbor porpoise, is for the protection of the public health or welfare, or the non-lethal removal of nuisance animals. Any such taking would have to be done humanely, which could include euthanasia in some cases. The primary purpose of this exception to the general prohibitions is to provide for the activities of Marine Mammal Stranding Networks, which perform important services in rescuing and rehabilitating stranded marine mammals. In cases where it is determined that stranded harbor porpoises cannot be saved, euthanasia would be authorized. This exception also provides flexibility for responding to unlikely situations where a dead or diseased harbor porpoise could be considered a threat to the public health or welfare, or where harbor porpoises are perceived as public nuisances. It should be stressed, however, that this exception is not intended to authorize lethal takes or harassment of harbor porpoises to stop or dissuade them from interfering with commercial fishing operations.

Permits—Finally, under this proposed rule, the general prohibitions would not preclude scientific research currently authorized under section 104 of the MMPA for a period of one year following final listing of harbor porpoise as threatened. After that one year period, a scientific research permit or a permit to enhance the propagation or survival of the species issued pursuant to section 10 of the ESA would be required. Takes of harbor porpoise incidental to other lawful activities may also be authorized under section 10.

Critical Habitat

NMFS has not completed the analysis necessary for the designation of critical habitat, but has decided to proceed with the proposed listing determinations now and to proceed with the designation of critical habitat in a separate rulemaking. NMFS believes that this action is consistent with the intent of the 1982 amendments to the ESA: "The Committee feels strongly, however, that where the biology relating to the status of the species is clear, it should not be denied the protection of the Act because of the inability of the Secretary to complete the work necessary to designate critical habitat" (H. Report No. 567, 97th Congr., 2nd Sess. 19, 1982).

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Classification

The 1982 amendments to the ESA (Pub. L. 97–304), in section 4(b)(1)(A), restricted the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus*, 657 F. 2d 829 (6th Cir., 1981), these decisions are excluded from the requirements of the National Environmental Policy Act.

The Conference Report on the 1982 amendments to the ESA notes that economic considerations have no relevance to determinations regarding the status of species, and that E.O. 12291 economic analysis requirements, the Regulatory Flexibility Act, and the Paperwork Reduction Act are not applicable to the listing process. Similarly, listing actions are not subject to the requirements of E.O. 12612, or the President's Memorandum of January 28, 1992.

List of Subjects in 50 CFR Part 227

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

Dated: December 30, 1992.

William W. Fox, Jr.,

Assistant Administrator, Fisheries.

For the reasons set out in the preamble, 50 CFR part 227 is proposed to be amended as follows:

PART 227—THREATENED FISH AND WILDLIFE

1. The authority citation for part 227 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

2. In § 227.4, new paragraph (i) is added to read as follows:

§ 227.4 Enumeration of threatened species.

* * * * *

(i) Gulf of Maine (GME) population of harbor porpoise *(Phocoena (phocoena))*. The GME population includes all harbor porpoise whose range extends throughout waters of eastern North America from (and including) the Bay of Fundy (BOF), Nova Scotia south to eastern Florida.

3. A new § 227.13 is added to subpart B to read as follows:

§ 227.13 Gulf of Maine harbor porpoise.

(a) *Prohibitions.* The prohibitions of section 9 of the Act (16 U.S.C. 1538) relating to endangered species apply to the threatened species of harbor porpoise listed in § 227.4(i) of this part, except as provided in paragraph (b) of this section.

(b) *Exceptions*—(1) General exceptions. The exceptions of section 10 of the Act (16 U.S.C. 1539) and other exceptions under the Act relating to endangered species, and the provisions of regulations issued under the Act relating to endangered species (such as 50 CFR part 222, subpart C—Endangered Fish or Wildlife Permits) also apply to the threatened population of harbor porpoise listed in § 227.4(i) of this part, except as otherwise provided in subsections (b)(2), (b)(3) and (b)(4). This section supersedes other restrictions on the applicability of 50 CFR part 222, including, but not limited to, the restrictions specified in §§ 222.2(a) and 222.22(a).

(2) Official activities—The prohibitions of paragraph (a) of this section do not restrict a Federal, state or local government official, his or her designee, or other person authorized by the Assistant Administrator pursuant to regulations at 50 CFR part 216, subpart C, who is acting in the course of official duties, from taking a harbor porpoise in a humane manner, including euthanasia, if the taking is for the protection or welfare of the animal, the protection of the public health and welfare, or the nonlethal removal of nuisance animals.

(3) Permits—The prohibitions of paragraph (a) of this section do not apply to scientific research activities authorized pursuant to section 104 of the Marine Mammal Protection Act and regulations at 50 CFR part 216, subpart D—Special Exceptions, for a period of one year from the final listing of the GOM harbor porpoise as threatened. After that period, such activities must be authorized by the Assistant Administrator in accordance with and subject to the provisions of 50 CFR part 222, subpart C—Endangered Fish or Wildlife Pemits.

(4) Commercial fishing exemptions. The prohibitions of paragraph (a) of this section, insofar as they relate to the taking of harbor porpoise incidental to commercial fishing operations, do not apply to incidental takings that are consistent with the by-catch reduction program under paragraph (3)(c). Intentional lethal taking of harbor porpoise for any reason is not authorized under this paragraph (b)(4).

(c) *Bycatch Reduction Program.* The bycatch reduction program will progressively reduce total harbor porpoise bycatch in all gillnet fisheries, including bycatch from other gillnet fisheries that impact this population throughout U.S. waters outside the Gulf of Maine, to an amount not exceeding 2 percent of the best estimate of population abundance within a period of time not to exceed 4 years from the effective date of this section.

(1) Bycatch Reduction Program Methodology. [Reserved].

(2) Observer Requirements. [Reserved].

[FR Doc. 93–39 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–22–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 921233–2333]

Endangered Fish and Wildlife; Gray Whale

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

ACTION: Notice of determination.

SUMMARY: Under the Endangered Species Act (ESA), NMFS has determined that the eastern North Pacific (California) stock of gray whale should be removed from the List of Endangered and Threatened Wildlife (the List). This determination is based on evidence showing that this stock has recovered to near its estimated original population size and is neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range. NMFS believes that the western Pacific gray whale stock, which is geographically isolated from the eastern stock, has not recovered and should remain listed as endangered. In accordance with section 4(a)(2)(B) of the ESA, NMFS is recommending that the Department of the Interior implement this action by amending the List accordingly.

EFFECTIVE DATE: This determination is effective on January 7, 1993.

ADDRESSES: Copies of the references used in this document are available from: Office of Protected Resources, National Marine Fisheries Service, 1331 East-West Highway, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth R. Hollingshead, Office of Protected Resources, NMFS, at (301) 713–2055.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) is administered jointly by the U.S. Fish and Wildlife Service (FWS), Department of the Interior, and NMFS. NMFS has jurisdiction over most marine species and makes determinations under section 4(a) of the ESA as to whether the species should be listed as endangered or threatened. The FWS maintains and publishes the List of Endangered and Threatened Wildlife (the List) in 50 CFR part 17 for all species determined by NMFS or FWS to be endangered or threatened. A list of threatened and endangered species under the jurisdiction of NMFS is contained also in 50 CFR 227.4 and 50 CFR 222.23(a), respectively.

Section 4(c)(2) of the ESA requires that, at least once every 5 years, a review of the species on the List be conducted to determine whether any species should be (1) removed from the List; (2) changed in status from an endangered species to a threatened species; or (3) changed in status from a threatened species to an endangered species. NMFS completed its first 5-year review on the status of endangered whales in 1984 (Breiwick and Braham 1984). Based upon that status review, NMFS concluded that although no longer in danger of extinction, because of limited calving grounds and coastal habitat which is being subjected to increasing development, the eastern Pacific gray whale (*Eschrichtius robustus*) stock should not be delisted but should be upgraded to threatened (49 FR 44774, November 9, 1984). No further action was taken, however.

On January 3, 1990 (55 FR 164), NMFS announced that it was conducting status reviews on certain listed species (including the gray whale) under its jurisdiction, and solicited comments and biological information. That status review was completed and made available to the general public on June 27, 1991 (56 FR 29471). The **Federal Register** notice also stated that NMFS intended to publish a proposed determination that the listing status of the eastern North Pacific population of gray whale should be changed. That proposed determination and rule was completed and published in the **Federal Register** on November 22, 1991 (56 FR 58869).

In the proposed rule, NMFS gave notice that the comment period would close on January 21, 1992. However, as provided under section 4(b)(5)(E) of the ESA, NMFS received and accepted a request for a public hearing on the proposal (57 FR 3040, January 27, 1992). Public hearings were held in Silver Spring, Maryland, on February 14, 1992 and Long Beach, California on February 25, 1992. The comment period was extended until March 6, 1992 (57 FR 2247, January 21, 1992) in order to allow the public sufficient time to attend the hearings and complete their written comments.

Petition

Coincident with completion of the status review (but prior to its availability to the public), under section 4(c)(2) of the ESA and after work was initiated on the proposed determination and rule, the Secretary of Commerce (Secretary) received, on March 7, 1991, a petition from the Northwest Indian Fisheries Commission and others, which requested, under section 4(b)(3)(A) of the ESA, the removal of the eastern stock of the North Pacific gray whale from the ESA. On March 27, 1991, the Under Secretary for Oceans and Atmosphere, NOAA, acknowledged, the petition and NMFS began a review to determine whether the petition presented "substantial scientific or commercial information" that would support such an action.

NMFS completed that review and made a determination on December 10, 1991 (56 FR 64498), that the petition presented substantial information indicating that the requested action was warranted. The notice stated, however, that, because the status review had been completed, published, and made available to the general public, it had been determined that conducting another status review under section 4(b)(3)(A) would be duplicative and unnecessary. The notice concluded that the November 22, 1991, proposal could be accepted as the finding action required by section 4(b)(3)(B) for petitions found to contain substantial information.

Comments and Responses

During the 104-day comment period, NMFS received 103 letters and 612 photocopied form letters from the general public, all either opposing the delisting or recommending upgrading the status to threatened. Most of those commenting stated they opposed changing the status of the gray whale because of increased coastal pollution and development and boating activities. Oil and gas development, an increase in pressure to resume whaling, and "low genetic diversity" were other reasons given to oppose the proposed action.

In addition to the above, 30 letters were received within the comment period that substantially discussed the science upon which the proposal was based. Letters were received from the Governments of Canada, Russia and Mexico. Although all three governments chose not to comment on the internal decisions of another nation, the Government of Mexico submitted comments on behalf of its fisheries agency. These comments are addressed below. Comments and recommendations were received from the Marine Mammal Commission (MMC) on May 15, 1992. As provided by section 202(d) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*), NMFS will respond in detail to the MMC's specific recommendations by a separate letter. However, their

comments and recommendations and the comments of others are discussed below.

General Comments: Population Estimates

Comment: Two commenters questioned the accuracy of the population estimates given in the proposed rule, in particular the difference in population estimates between the United States and those supplied by the Government of Mexico in its submitted comments.

Response: The Mexican estimate of 15,000 (± 2,000) was obtained through aerial surveys of Mexican waters and is contained in a document submitted to the International Whaling Commission (IWC) Scientific Committee on the Assessment of Gray Whales. As the Document analyzed only raw data, the IWC Committee concluded it was not valid for indexing either abundance or trends (IWC 1990). In addition, the Mexican surveys, while limited to the breeding grounds, did not include all breeding lagoons and offshore waters. There was general agreement among scientists at the IWC meeting that the shore censuses along the migratory route are at present the appropriate way to estimate absolute abundance for this stock (IWC 1990). Reilly (1984) provides a more detailed explanation of the methods, assumptions and biases encountered with both aerial surveys and shore censuses of gray whales.

Comment: Two commenters noted that the U.S. population estimate for the eastern Pacific stock of gray whales is over 4 years old. They recommended that no action should be taken until new population estimates are made.

Response: The population estimate used in the proposed rule (21,113 (± 688) was made in 1987/88. Although a revision of the 1987/88 estimate was presented at the 1992 IWC meeting (*i.e.* 23,859, CV=0.0536, 95% CI 21,500–26,500), a stock size of 21,113 has been accepted by the IWC as the best estimate available (IWC 1990). That latter number is accepted also by NMFS as the best estimate available for the population size in 1987/88. Considering that previous population estimates indicated that the stock has been increasing at a rate of 3.2 percent (± 0.5 percent) annually between 1967 and 1988 (IWC 1990), it is considered neither necessary nor appropriate, to delay the action in order to accrue more data on the population. Monitoring required by section 4(g) of the ESA will include biennial surveys to continue the assessment of the stock and emergency provisions that could be imposed if the stock declined precipitously.

Comment: Several commenters questioned NMFS' estimate that carrying capacity was in the range of 24,000 animals. Three commenters cited Reilly (in press) indicating that the carrying capacity may be as high as 35,000 which would affect the NMFS calculation that the population was about 88 percent of carrying capacity.

Response: The recent paper by Reilly was not available prior to completion of the proposed rule. The status review in this final determination has been modified to address the carrying capacity issue.

General Comments: Consideration as a Species Under the ESA

Comment: One commenter questioned the accuracy of the statement that there are two stocks in the Pacific Ocean and stated that unless it can be demonstrated that the populations are separate, then the western stock remains vulnerable as recolonization is dependent upon the eastern stock. Therefore, protection of the eastern stock is required. The commenter recommended that NMFS conduct photo-identification and skin biopsy studies to determine "the degree of isolation and/or possible genetic exchange between these two stocks."

Response: Section 4 of the ESA provides for listing (and therefore delisting) at different evolutionary levels (i.e., species, subspecies, or "distinct population segment") on the basis of the best scientific and commercial data available. For the reasons detailed below, NMFS concludes that the best available scientific evidence supports the finding that the stocks are geographically and reproductively isolated (see for example, IWC 1990). The basis for determining stock discreetness for gray whales was fully addressed in the proposed rule and continued in this determination. However, it should be recognized that as the western stock of gray whales will remain listed under the ESA and as gray whales will remain protected also under the MMPA and the International Convention on the Regulation of Whaling, implementation of this action will not affect the ability of the eastern Pacific stock to repopulate the western Pacific if research later were to demonstrate that the two stocks are in fact a single stock. The research proposed by the commenter, while useful, is neither necessary prior to implementing this action, as populations do not need to be totally isolated genetically in order to be listed or delisted, nor assured of success considering the extremely low numbers of the western Pacific stock sighted in recent years. However, NMFS scientists will strongly encourage their Russian counterparts at IWC to collect and analyze appropriate samples from gray whales stranded in and around the Sea of Okhotsk for comparison with whales in their harvest. U.S. scientists plan to collect skin biopsy samples as part of the marine mammal stranding program and these samples will be available for comparison with any biopsy samples taken by Russia.

Comment: One commenter at the Silver Spring, Maryland, hearing objected to removing the eastern stock of gray whales from the List until the stock outgrows its (food) resources enough to trigger an expansion into its former range (i.e., the western North Pacific and Atlantic Oceans).

Response: As the proposal indicated, there are three distinct stocks of gray whales. One is extinct, a second near extinction and the third, the eastern Pacific stock, has recovered and is close to carrying capacity. Physical barriers (*e.g.* summer ice limits) prevent the eastern Pacific stock of gray whales from recolonizing habitat of the extinct Atlantic Ocean stock. It is also possible that a physical oceanographic barrier along the Kamchatka coast discourages intermingling of eastern and western Pacific stocks. To wait, as the commenter suggests, until these barriers are breached before removing the eastern Pacific stock from the List is not practical and is not required by section 4 of the ESA, which provides for listing (and therefore delisting) at different evolutionary levels (i.e., species, subspecies, or "distinct population segment").

General Comments: Use of Personnel

Comment: Two commenters were concerned that NMFS was spending time on this proposal that would be better utilized in listing species and designating critical habitats.

Response: NMFS is required under section (4)(c)(2) of the ESA, at least once every 5 years, to review the status of the species on the List to determine whether any species status warrants change. NMFS completed this review in 1991 and, based upon that status review, and as required by section 4(c)(2)(B) of the ESA, concluded that the gray whale stock had recovered to near its estimated original population size and is neither in danger of extinction throughout all or a significant portion of its range, nor likely to become endangered again within the foreseeable future throughout all or a significant portion of its range. Based on that review, NMFS determined that the status of the eastern gray whale stock

should be changed (56 FR 29471, June 27, 1991).

Furthrmore, on March 7, 1991, the Secretary was petitioned under section 4(b)(3)(A) of the ESA to remove the eastern stock of the North Pacific gray whale from the List. Thus, NMFS has a statutory obligation to review and take appropriate action on the status of listed species and also to take appropriate action upon receipt of a petition to amend the List.

General Comments: Monitoring

Comment: Several commenters expressed concern over NMFS' monitoring program and offered suggestions on the composition of the Task force, the types of research to be carried out and coordination with appropriate foreign governments. One organization recommended that the gray whale not be delisted unless their recommended extensive research and monitoring program can be conducted. Another suggested that the monitoring program be conducted but that the stock only be upgraded to threatened status.

Response: Because they will be advising the Assistant Administrator on grants and on internal NMFS research on gray whales, including budgetary actions, the gray whale task force will be composed of NMFS marine mammal scientists. The final determination has been modified to make this issue more clear. Also, some types of research suggested for NMFS to conduct, either alone or within a multilateral agreement, but as part of its monitoring program, are viewed by NMFS as not being within the scope of requirements for monitoring under section 4(g) of the ESA. For example, one commenter's suggested research would require long-term monitoring of the coastal environment of the Bering Sea (feeding grounds), central and southern California (migratory route) and Baja California (calving grounds). Such research would be prohibitively expensive, taking away funds needed elsewhere and, without establishing a control, would not likely be successful. While baseline data might prove useful in the future, a direct cause-and-effect link between environmental conditions and the health of the marine mammal stocks would be difficult to prove. NMFS believes that monitoring the eastern Pacific gray whale stock in compliance with section 4(g) of the ESA can be accomplished through biennial shore-side surveys along the California coast, and a cooperative research program with Mexico to monitor trends and abundances in the lagoons in Baja California. Additional research would be funded if, during (or after) the mandated monitoring period, the stock indicates signs of environmental stress. Additional research proposed to be conducted on gray whales (i.e., photo-identification studies on isolated subpopulations, genetic diversity studies, analysis of tissue samples for contaminants from stranded animals, etc.) that is not considered part of the described monitoring program will be required to compete with other funding requirements for marine mammal research or could be funded by other sources (e.g., MMC, Minerals Management Service (MMS), or the National Science Foundation).

General Comments: Section 7 Consultations

Comment: One commenter recommended that NMFS provide a more complete review of those biological opinions which determined that the action could result in jeopardizing gray whales and an explanation on whether the findings of those biological opinions are no longer valid based upon new information or on a reevaluation of information originally considered in the opinions. Another commenter at the Silver Spring MD hearing recommended that NMFS reexamine the biological opinion(s) which contain(s) a jeopardy determination for gray whales and to remove that finding if the gray whale is delisted.

Response: NMFS has expanded the discussion on the impacts of oil and gas activities on gray whales. NMFS has also reexamined the findings in the earlier biological opinions, and concluded that, while the cumulative impacts from oil and gas activities may have the potential to affect adversely the eastern North Pacific gray whale stock, these impacts are not likely to jeopardize its continued existence. A copy of this reanalysis is available upon request (see ADDRESSES). See also the discussion of oil and gas development under Factor (A) below.

Comments on the Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Comment: Several commenters were concerned that should the gray whale be delisted, habitat protection will be lost. On a closely related issue, several commenters were concerned about increasing development throughout the gray whales' range but particularly over tourist facilities and oil and gas development, in the coastal breeding lagoons. Two were concerned about the potential loss of benthic food sources by development in these coastal lagoons. Another was concerned about the potential loss of food resources in the Bering Sea if an oil spill were to occur.

Response: The final determination has been modified and expanded to discuss, in greater detail, habitat concerns in the Bering Sea, along the Northwest Coast migration pathway and in the coastal lagoons in Baja California. However, as the benthic resources available to gray whales appear to be minimal in the coastal lagoons, and as the feeding which does occur (see Summary of Status Review) is probably opportunistic on pelagic organisms (Nerini 1984), coastal development does not appear to constitute a significant impact on gray whale food sources in the southern grounds at this time.

Comment: Several commenters expressed concern that the proposal did not adequately address the impact of general onshore development along the California coast, including the loss of wetlands, on the gray whales. One of these commenters was also concerned about the potential for intensive coastal development along the Washington/Oregon coast, especially in the Gray's Harbor area, should offshore oil development commence.

Response: The issue of onshore coastal development is not discussed in any depth since, other than in the breeding/calving lagoons in Baja, a direct relationship between the two is largely speculative. However, as impacts from agricultural and industrial runoff and sewage may have some impacts on that portion of the stock that enters the enclosed embayments along the Pacific coasts, this impact was discussed in the proposed rule and is continued in this final determination.

Comment: Several commenters were concerned that bioaccumulation of toxic compounds in gray whales may pose jeopardy to the continued existence of the gray whale. One commenter was particularly concerned about increased strandings in Puget Sound and related them to their feeding in the "chemical soup" of the Sound.

Response: Although the November 22, 1991 proposal addressed this concern in some detail, the final determination has been updated with more recent analyses. These commenters did not dispute NMFS' findings cited in the proposed rule, and did not provide data or references, other than ancedotal, contrary to NMFS' cited research results (NMFS 1990) that chlorinated hydrocarbon and heavy metal contamination did not appear to be significant enough to cause deleterious effects to gray whales (see also Factor C: Disease or Predation). For that reason, a finding different from the one presented in the proposal is not warranted.

Comment: Some commenters were of the opinion that NMFS seriously underplayed the potential impacts from oil and gas activities, including the extent of activities along the Pacific coasts of Mexico, Canada and Russia.

Response: Although there is a possibility of joint-venture oil and gas operations between Russia and international oil companies, especially as recently reported for the Navarin Basin, no specific information is available to NMFS on scheduling of offshore oil activities off Russia, Mexico, or Canada at this time. As the commenters did not submit data supporting their contention, this issue cannot be addressed in any greater detail than was supplied in the proposal. Discussion of future oil and gas activities within U.S. waters, which was mentioned under the section 7 consultation portion of the proposal, has been moved and expanded in this part of the final determination (see the discussion under Factor (A) below). A description of present-day oil and gas activities and anticipated future events has been added to this section.

Comments on Overutilization for Commercial, Recreational, Scientific or Educational Purposes

Comment: One commenter expressed concern that delisting could lead to an increase in subsistence use of gray whales including use by the Makah Tribe for subsistence or ceremonial purposes.

Response: Native Americans in Washington, Oregon and California currently do not intentionally take gray whales. Should Native Americans in these States wish to begin taking gray whales, it would be necessary for them to gain access to the IWC's quota for subsistence takes. The IWC quota for the eastern gray whale stock is 169, which is taken by Russia for its Chukchi Natives. There is no indication from Russia that there is a need for a higher subsistence quota, although one could be authorized if documented as necessary, since the current subsistence quota is less than sustained yield (IWC 1990). More detailed information on both issues can be found elsewhere in the preamble.

Comment: One commenter was concerned that whale-watching activities might drive gray whales from critical habitat.

Response: While critical habitat has not been formally designated for gray whales, consideration of breeding, feeding, and migratory areas as important components for gray whale survival is appropriate. Whale-watching activities on the breeding grounds and along the migratory route, in addition to general recreational boating, are identified impacts on gray whales, which we readdressed in the November 22, 1991, proposal and in this action.

Comments on Disease or Predation

Comment: Two commenters were concerned that cumulative impacts from anthropogenic contaminants, biotoxins, noise, and disturbance could cause stress-induced immunosuppression resulting in non-natural mortality. One commenter was concerned that the proposed rule did not consider the potential future effects of biotoxins on gray whales.

Response: The proposed rule discussed these impacts in some detail. The conclusion was that individual and cumulative impacts, while they may have the potential to affect adversely the eastern North Pacific gray whale stock, are not likely to jeopardize its continued existence. Immunosuppression response in gray whales remains hypothetical at this time. There is no evidence outside of the captive environment that such a reaction occurs, although it is alleged to have occurred in certain odontocetes. Also, a link between biotoxins caused by phytoplankton and gray whales has not been shown to exist and at this time can be assumed to be unlikely (at least on primary feeding grounds) since gray whales, unlike previously identified impacted marine mammal species such as humpback whales and bottlenose dolphins on the U.S. East Coast, do not feed on those species of fish likely to contain the biotoxin. It bears watching whether that small portion of the population inhabiting Puget Sound becomes affected by the domoic acid outbreak in shellfish. A monk seal die-off in 1978/79 mentioned by the commenter was likely due to ciguatoxin and maitotoxin, both caused by ingesting reef fish, not a normal component of the gray whale diet.

Comments on Inadequacy of Existing Regulatory Mechanisms

Comment: Several commenters were concerned that changing the status of the gray whale could encourage other nations to request a change in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or for whaling nations or subsistence users to request the IWC to increase the quota. One commenter expressed concern that if the stock is delisted, other nations might ease their protective laws for gray whales and in this venue, NMFS should describe all applicable laws and assess their provisions.

Response: The issue of increasing the subsistence quota on gray whales has been discussed above and elsewhere in the preamble. Any actions taken under CITES or the IWC would be determined based upon the status of the gray whale stock, not by NMFS' delisting action. Under both international agreements, the status of the gray whale is subject to change depending upon a majority vote of their members independent of any action the United States takes under the ESA. The IWC, for example, establishes a gray whale quota based upon the status of the stock. The gray whale was changed from a "Protected Stock" to a "Sustained Management Stock" in 1978 on the basis that under a relatively constant harvest, the stock had apparently remained stable over a period of 11 years (IWC 1979). Recent exercises within the IWC to determine whether the stock should be reclassified as an "Initial Population Stock" (a step necessary in order for a commercial harvest quota to be established), have not been successful. The subsistence quota is set presently at 169 and there is no indication that a higher quota is warranted, although it is possible one could be authorized, since the current subsistence quota is less than sustained yield (IWC 1990). As mentioned later under the Factor, any increases in the subsistence take of the eastern stock of gray whales, by itself, is not likely to impact that stock significantly.

As stated in the proposed rule, existing national laws are considered adequate at this time and, under this Factor, it is existing regulatory measures that must be taken into account when determining impacts on a species.

While NMFS has determined that it is not necessary to publish a list of appropriate national laws and regulations and evaluate their effectiveness, the final determination has been expanded to more fully describe regulations pertaining to the protection of gray whales within their coastal lagoons.

Comment: Under this Factor, one commenter also wanted NMFS to "conduct and provide a more comprehensive assessment of present and foreseeable threats to the principal breeding lagoons, feeding grounds, and other areas of special biological importance to the species * * *" prior to making a determination that laws are adequate to protect gray whales.

Response: Although NMFS does not consider it appropriate to provide a comprehensive assessment of threats to gray whales under this Factor, such an assessment was provided under Factor A.

Comment: Several commenters were concerned that the regulatory mechanisms provided under CITES, IWC, and the MMPA could not prevent habitat degradation, or a resumption of whaling. In addition, concern was made by several reviewers over the loss of section 7 consultations if the stock was removed from the List.

Response: While section 7 consultations would cease for the gray whale if the eastern Pacific stock was removed from the List, other laws and activities would protect the coastal habitat. The final determination has been expanded to incorporate these concerns.

Comment: Several commenters recommended that if the species is delisted, NMFS establish an international conservation plan under the MMPA. One commenter recommended that this international research be conducted under multilateral treaties and agreements under the monitoring requirements of section 4 of the ESA. In addition, this commenter wanted NMFS to undertake, or cause to be undertaken, research recommended by the IWC in 1990.

Response: NMFS has included as part of its monitoring program a proposed cooperative research effort with the Government of Mexico. NMFS will also continue to conduct gray whale research under the aegis of the IWC. While cooperative research programs with other Pacific Rim nations would likely result in improved knowledge on the gray whale, implementation of an international conservation plan under the MMPA for a non-depleted species, independent of the IWC, is viewed as being neither likely to be successful, nor an efficient use of Agency resources, since other marine mammal species, including seriously depleted or endangered species, could benefit from this attention and funding. However, NMFS will continue, through participation in the IWC, to encourage other Pacific Rim nations to conduct research on gray whales, particularly the western Pacific gray whale stock, which will remain listed as endangered.

Comments on Other Natural or Man-made Factors Affecting Its Continued Existence

Comment: Several commenters were concerned that the species was reduced to such low levels early in the century that its genetic diversity is limited, which may impact the species' future viability, in particular making it more vulnerable to disease.

Response: There is no evidence that the eastern Pacific gray whale stock's genetic composition was compromised by its reduction to approximately 4–5,000 in the mid-19th century. While an analysis of skin biopsy samples from gray whales taken in harvests or strandings, for the degree of heterozygosity would be informative, and may provide some insight into the degree of severity of the harvest reduction, it is not clear that it would provide much help in determining whether the eastern North Pacific gray whale is either in danger of extinction throughout all or a significant portion of its range, or likely to again become endangered within the foreseeable future throughout all or a significant portion of its range.

Comment: One commenter expressed concern that the proposal did not adequately address the impact of commercial fisheries on gray whales, including the deterrence of high penalties under the ESA in comparison to the MMPA, the reluctance of fishermen to report "takes" of endangered and threatened species, the low observer coverage in fisheries and the relationship between the ESA and state fishery regulations.

Response: While NMFS considers the discussion on the relationship between commercial fisheries and the eastern North Pacific stock of gray whales in the proposal to be adequate, the final determination has been expanded to address these additional concerns.

Comment: One commenter recommended that the discussion of this Factor address other issues in addition to commercial fishing, including vessel traffic, whale-watching, pollution, coastal development, and other activities that may affect gray whales and their habitat.

Response: The activities mentioned by the commenter were all addressed under Factors 1 through 4 in the proposed rule and in this document as Factors A through D and need not be repeated under this Factor. NMFS recognizes that categorizing an impact within a specific Factor is not always clear. However, in order to reduce repetition of text, NMFS has chosen to discuss a specific impact in its entirety under the first Factor wherein the impact is mentioned, for example, under Factor A, discussion of the impacts of oil spills on gray whale habitat is appropriate, therefore discussion of oil impacts on the gray whale as a individual, is also discussed under this Factor rather than delaying discussion until Factor E. This also facilitates comprehension and understanding of the impact.

Status Review

The gray whale is confined to the North Pacific Ocean. Two stocks occur in the North Pacific: the eastern North Pacific or "California" stock, which breeds along the west coast of North America, and the western Pacific or "Korean" stock which apparently breeds off the coast of eastern Asia (Rice 1981). Because it uses coastal habitats extensively, the gray whale was especially vulnerable to shore-based whaling operations and both stocks were severely depleted by the early 1900s. Under legal protection since 1946, the eastern North Pacific stock has recovered to its estimated original, pre-commercial exploitation population size (Rice *et al.* 1984), but apparently remains below the ecosystem's carrying capacity for that stock (Reilly 1992).

The estimated stock size in 1987/88 (21,113 ± 688; Breiwick *et al.* 1989) is above Henderson's (1972, 1984) estimated initial (1846) stock size of 15,000–20,000, but below Reilly's (1981) estimate for carrying capacity of 24,000 gray whales. Between 1967 and 1988, the stock increased at a rate of 3.2 percent (± 0.5 percent) per year (IWC 1990; see Reilly *et al.* 1983 and Reilly 1987, for analysis of the 1967–1980 data; Rugh *et al.* 1990, for the 1985–1986 data; Breiwick *et al.* 1989, for the 1988 population estimate). Using Reilly's (1981) estimate with Breiwick *et al.*'s (1989) estimate of population size, it is likely that the gray whale population is within its optimum sustainable population (OSP) size or at about 88 percent of estimated historic carrying capacity (21,113/24,000 = 88 percent).

More recently however, Reilly (1992) stated that it is not entirely clear where the population is in relation to its current carrying capacity. He noted that if early aboriginal kills were 50 percent higher than documented, estimates of carrying capacity would range from 23,000 to about 35,000 and the population would be between 60 percent and about 90 percent of carrying capacity. However, Reilly (1992) noted also that the possible recent decline in pregnancy rates (see also IWC 1990) and possible signs of overexploitation of the benthic fauna upon which gray whales feed in the Bering and Chukchi Seas (see also Stoker 1990, IWC 1990), if verified, may be evidence that the stock is nearing the limits of its environment and therefore approaching carrying capacity. Another indication implying that the stock may be approaching carrying capacity is the increased observation of females with newborn calves in areas outside the calving

lagoons, especially during the southbound migration (Jones and Swartz 1989, Swartz 1990). Alternatively, the fact that the calving lagoons do not appear to be saturated (Swartz 1990) may indicate that gray whales continue to reoccupy their former range. However, since early calving has been observed previously (for example off Mission Bay California in 1963/64 by Gilmore and McIntyre where the birth was observed (McIntyre, pers. comm. 1991) and off Monterey California in 1974 (Sund 1975)), this may be a normal event and the calving lagoons are neither a factor limiting the increasing size of the gray whale population, nor, considering their geologically transient nature, as critical a component of the gray whale's habitat as previously assumed (see for example, Rice *et al.* 1984 and 49 FR 44774, November 8, 1984). However, data on the mortality rate of newborn calves outside the calving lagoon environment in comparison to mortality within the lagoons (approximately 5 percent) are needed to verify this hypothesis.

The eastern Pacific stock has increased in spite of increased human use of the coastal habitat (i.e., nearshore migration route where mating and calving occur), and a subsistence catch of 167 (±3.5) whales per year by the former Soviet Union during the past 30 years (calculated from data in Ivashin in press).

Most of the eastern North Pacific stock spends the summer feeding in the northern Bering and southern Chukchi Seas (Rice and Wolman 1971, Rice *et al.* 1984). In the northwestern Bering Sea, they have been noted in recent years to be extending their range west of Cape Olyutorisky on the Chukchot Peninsula. Unless this is simply an artifact of increased observation effort, gray whales may be extending their range in search of additional food resources. In the Beaufort Sea, sightings have been made of individuals as far east as long. 130°W during August (Rugh and Fraker 1981) and in the East Siberian Sea, gray whales were found along the Siberian coast as far west as 174°08′E in late September (Marquette *et al.* 1982). Berzin (1984) believes these distributions are probably limited by pack ice in the summer. Although actual timing depends upon feeding conditions and patterns of ice formation, during October and November the stock begins leaving the Chukchi Sea (Braham 1984). Moving at about 125 km/day (Braham 1984), they exit the Bering Sea through Unimak Pass, Alaska, mainly in November and December (Rugh and Braham 1979, Braham 1984, Rugh 1984). The whales migrate near shore along the coast of North America from Alaska all the way to central California (92 percent pass within 1.6 km of Cape Sarichef, Unimak Pass (Rugh 1984), and 94 percent pass within 1.6 km of the Monterey-Point Sur area of central California (Sund and O'Connor 1974)). After passing Point Conception, California, Rice *et al.* (1984) believed the majority of the animals took a more direct offshore route across the southern California Bight to northern Baja California. This route passes Santa Rosa and San Nicolas islands, the Tanner and Cortes banks and into Mexican waters (MMS 1992). Other routes include the nearshore route which follows the mainland coast of California, and the inshore route which passes through the northern Channel Island chain to Santa Catalina or San Clemente Island and on into Mexico. Bursk (1988) contends that gray whales have moved further offshore recently and Graham (1989) estimates that 14, 15, and 25 percent of the estimated population size passed west of San Clemente Island during the southbound migration in 1986/87, 1987/88 and 1988/89, respectively. Off California, southbound migrating gray whales swim at about 5.5–7.7 km/hour, and thus travel about 132–185 km per day with day and night speeds not statistically different (Pike 1962, Jones and Swartz 1987, Swartz *et al.* 1987).

Migrating gray whales are temporally segregated according to sex, age, and reproductive status (Rice and Wolman 1971). During the southward migration, the sequence of passage off California is as follows: Females in late pregnancy, followed by females that have recently ovulated, adult males, immature females, and then immature males (Rice *et al.* 1984). The earliest southbound migrants (mostly late-pregnant females) usually travel singly, whereas later migrants usually are in pods of two or more. The mean pod size through Unimak Pass is about two (Rugh 1984).

The eastern Pacific stock winters mainly along the west coast of Baja California. The pregnant females assemble in certain shallow, nearly landlocked lagoons and bays where, after a 418-day gestation period (Rice *et al.* 1981), the calves are born from early January to mid-February. The majority of gray whales in Baja California (including some cows with calves) spend the winter outside the major breeding/calving lagoons along the outer coast apparently from Bahia de Sebastian Vizcaino to Boca de las Animas. Recent research indicates that females with calves do not necessarily restrict themselves to a single lagoon, but may move between and among lagoons and the outer coast during the winter (Jones and Swartz 1984). While calving was assumed to occur only rarely during the southbound migration north of Baja California (Rice and Wolman 1971), more recently, Swartz (IWC, 1990) noted that in the Channel Islands "calves of the season comprised 13.3% of all whales counted * * *." These observations suggest that calves may be born as far north as Washington State (Jones and Swartz 1987). A few calves are also born on the eastern side of the Gulf of California at Yavaros, Sonora, and Bahia Reforma, Sinaloa, Mexico (Gilmore 1960; Gilmore *et al.* 1967).

The northbound migration begins in mid-February and continues through May with the earliest northbound migrants passing San Diego before the last of the southbound migrants (Rice *et al.* 1981). By April, the early migrating whales begin showing up in the southern Bering Sea, which they enter through Unimak Pass. This migration is completely coastal, at least to the east of central Bering Sea (Nunivak Island). Most of the animals in Alaska travel within one km of the coast, avoiding embayments, especially in the southeastern Bering Sea, and at least some apparently feed during migration (Braham 1984). However, because suitable feeding habitat is relatively uncommon south of the Bering Sea, few gray whales remain south of Unimak Pass to spend the summer along the west coast of North America in apparently isolated locations as far south as Baja California, Mexico (Nerini 1984). During the northward migration, the sequence, in two phases, is as follows: Newly pregnant females, followed by other mature females, adult males, and immature males and females Cows with calves are the last animals to leave the lagoons, and most migrate after the other whales (Rice *et al.* 1984) with a more protracted period of migration (Swartz 1990). The cow/calf phase of the spring migration generally peaks 7 to 9 weeks after the peak of the first migration phase (Poole 1984). On the northern grounds, primary feeding locations appear to be in the Chirikov Basin, the north side of the Chukchi Peninsula, nearshore waters of the western Bering Sea, and the southern capes of St. Lawrence Island (Nerini 1984). These benthic foraging areas are all underlain by dense infaunal communities of crustaceans (Nerini 1984).

The western Pacific stock formerly occupied the northern Sea of Okhotsk in the summer, as far north as Penzhinskaya Bay, and south to Akademii and Sakhalinskiy Gulfs on the west and the Kikhchik River on the east

Southbound whales migrated along the coast of eastern Asia from Tatarskiy Strait to South Korea (Rice and Wolman 1971) to winter breeding/calving grounds, which probably lie along the coast of southern China in Gwangxi and Gwangdong provinces, and around Hainan Island (Wang 1984). Until the turn of this century, another migration route led down the eastern side of Japan to winter grounds in the Seto Inland Sea, Japan (Omura 1974). The status of the western Pacific stock of gray whales is uncertain (Brownell and Chun 1977). Sightings of 24 animals in the Okhotsk Sea and nine off the tip of Kamchatka in 1983 (Blokhin *et al.* 1985, Votrogov and Bogoslovskaya 1986), and 34 in 1989 in the Okhotsk Sea (Berzin in press) suggest that the stock is small. There is no evidence that it has reoccupied its entire former range (Omura 1984) and initial stock size may have been only a few thousand (Omura 1988). Although Rice *et al.* (1984) concluded that it is likely that the stock is below a critical population size sufficient for recovery and may be almost extinct, Berzin (in press) suggests that the stock is increasing slowly.

The gray whale formerly occurred in the North Atlantic, but has been extinct there for several centuries (Mead and Mitchell 1984).

Consideration as a Species Under the ESA

The ESA defines "species" to include any subspecies of fish, wildlife, or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.

Two stocks of gray whales remain extant, both in the North Pacific Ocean: (1) The western stock, which migrates between feeding grounds in the Sea of Okhotsk and breeding/calving grounds along the South China Coast; and (2) the eastern stock, which migrates between breeding/calving grounds along the West Coast of Mexico and feeding grounds in the Bering and Chukchi Seas (Rice and Wolman 1971). These stocks appear to be significantly isolated both geographically and reproductively from each other. Recent strandings of gray whales on the Commander Islands are believed to be from the eastern stock, while gray whales reported along the Kamchatka coast are believed to be from the Okhotsk-South China population (IWC 1990). Alternatively, all strandings may be from the Korea stock (Rice 1981, IWC 1986). Since gray whales mate during their autumnal southward migration, rare vagrants would make interbreeding between the California and western Pacific population possible. However, that possibility would be greatly reduced if, as Rice (1981) believes likely, most vagrants are immature animals. The absence of sightings between the Okhotsk Sea and the Commander Islands suggests the stocks are separate (IWC 1990). Mitchell suggests that an absence of aboriginal whale hunting records along the Pacific coast of the Kamchatka Peninsula may indicate a lack of abundance of gray whales in the area and a hiatus in distribution between eastern and western stocks (IWC 1990). In addition, Yablokov and Bogoslovskaya (1984) after reanalyzing data collected by earlier investigators, found that, in addition to differences in cranial measurements indicating the Okhotsk-Korea stock to be statistically larger in size than the Chukotka-California stock, the latter stock had fewer throat grooves and a smaller number of baleen plates. These authors believe that these differences may indicate the existence of two distinct groups which may allow them to be designated as subspecies. After reviewing the data available to it, the IWC Scientific Committee on the Assessment of Gray Whales (IWC 1990) agreed that the eastern and western populations of gray whales probably represent geographically isolated stocks, although recognizing that the existing data are not conclusive.

Based on the above discussion, NMFS believes that the best scientific and commercial data available supports the determination that there are two separate stocks of gray whales in the North Pacific Ocean and that the eastern North Pacific gray whale stock can be considered a distinct population and hence a species under the ESA.

Summary of Factors Affecting the Species

Section 4(a)(1) of the ESA and the NMFS' listing regulations (50 CFR part 424) set forth procedures for listing, reclassifying or removing species. The Secretary of either the Interior or Commerce, depending upon the species involved, must determine if any species is endangered or threatened based upon any one or a combination of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or man-made factors affecting its continued existence. Under section 4(a)(2) of the ESA, if the Secretary of Commerce determines that a species under her jurisdiction should be removed from the List or changed in status from endangered to threatened, the Secretary then recommends such action to the Secretary of the Interior. If the Secretary of the Interior concurs with the action, he must implement the action by amending the List. However, if a species is removed from the List, the Secretary, under section 4(g) of the ESA, must implement a system in cooperation with the states to monitor effectively, for a period not less than 5 years, the status of the species and must use the emergency authority provisions under paragraph (b)(7) of section 4 to prevent a significant risk to the well-being of any recovered species. These factors and subsequent consultation with the Department of the Interior are discussed below.

Factor (A)—The Present or Threatened Destruction, Modification or Curtailment of Its Habitat or Range.

Two potential threats to the eastern North Pacific gray whale population are increasing vessel traffic (including whale watching activities), and industrial development (including oil and gas exploration and development), in the breeding/calving lagoons, feeding grounds, and along the migration route.

Commercial vessel traffic may result in the death of gray whales through collision or by harassment when both vessel and whale are confined to narrow passages. Heyning and Dahlheim (in press) documented 7 cases of gray whale/ship collisions; 5 in southern California, one each in Alaska and Washington. They surmised that gray whales may be unable to detect large ships in time to avoid collisions due to the size and speed of the vessels. However, because large vessels are restricted to certain travel lanes while in inshore waters (where gray whales are predominantly located) and the low period of vulnerability to large commercial vessels due to the whale's migratory nature, NMFS believes that few gray whales are killed annually by collisions with vessels.

Activities of commercial cruise boats and small pleasure craft may result in harassment of gray whales, especially in the breeding/calving lagoons in Baja California and along their migration route off California. As whale-watching activities increase rapidly in southern California and on the Baja Peninsula, harassment occurrences are increasing proportionally, particularly on weekends and holidays. Whale watching by recreational and commercial craft may negatively impact migrating gray whales by interrupting swimming patterns, altering migratory routes, and displacing cow/calf pairs from inshore waters, thereby increasing

every consumption (CMC/NMFS 1988, IWC 1990). Bursk (1988) contends that gray whales have moved further offshore recently due to whale-watching activities in southern California. Graham (1989) has noted a similar decrease in nearshore gray whales but attributed it to sea surface temperature anomalies in late 1988/early 1989. Others, such as Rice (1965), and Gilmore (1978), noted this offshore migration route earlier and Rice and Wolman (1971) considered the offshore passage to be a normal migratory route.

Vessels in the breeding/calving lagoons may cause short-term flight reactions by gray whales when the vessel is moving at high speeds or erratically, but gray whales will show little response to slow moving or anchored vessels. Gray whales have been reported to avoid vessels at ranges of roughly 0.5 km and less, with no documented responses at further distances (IWC 1990). However, Jones and Swartz (1984), in a study of gray whales in Bahia San Ignacio, found that data suggest that gray whales possess sufficient resiliency to tolerate the physical presence and activities of whale-watching vessels and skiffs and the noise produced by this level of activity without major disruption. This finding was supported by a noted increase in usage of the lagoons by gray whales, especially females with calves. Jones and Swartz (1984) believe a key factor responsible for maintaining a stable population within their study lagoon (*i.e.*, San Ignacio) was: (1) The establishment of the gray whale refuge, which provided an area free of all vessel activity to which whales could retreat and (2) the behavior of commercial whale watch operators to minimize disturbance.

Under the MMPA, gray whale harassment is considered a "take" and is prohibited. NMFS has established guidelines for whale watching in order to avoid harassment of gray whales on their migration path in U.S. waters and may implement regulations to limit approaches to marine mammals in 1993. In this regard, a proposed rule was published on August 3, 1992 (57 FR 34101) with a comment period due to expire on December 31, 1992. These regulations, if implemented, would be effective within waters under U.S. jurisdiction and for U.S. citizens except when within waters under the jurisdiction of another nation (*e.g.* Canada and Mexico). These regulations would, if implemented as proposed, establish minimum approach distances for large cetaceans (100 yards) and will require procedures to avoid disrupting the normal movement or behavior of marine mammals. It is anticipated that these regulations would strengthen protective measures for gray whales principally during migratory periods. Enforcement of these regulations will be accomplished through onboard monitoring of activities, citizen complaints and aerial and shipboard reconnaissance.

The main gray whale calving grounds in Mexico are Laguna Ojo de Liebre (Scammon's Lagoon with 53 percent of calves), Estero Soledad (12 percent), Laguna San Ignacio (11 percent) and Laguna Guerrero Negro (9 percent) in Mexico (Rice *et al.* 1984). However, the number of whales present at any one time is subject to fluctuations due to the interchange of whales between the lagoons (Jones and Swartz 1984). Minor calving areas, each with less than 6 percent of the calves, are San Juanico Bight, Bahia Magdalena, Bahia Almejas, and Bahia Santa Marina (Rice *et al.* 1981, 1984). A few calves are also born on the eastern side of the Gulf of California at Yavaros, Sonora, and Bahia Reforma, Sinola, Mexico (Gilmore 1960, Rice *et al.* 1984). Between 1972 and 1979, the Mexican Government designated three (Laguna Ojo de Liebre, Laguna Guerrero Negro, and Laguna San Ignacio) of the four major calving lagoons in Baja California as gray whale refuges. These are the lagoons that most of the U.S. tour boats and private tourists visit. The number of vessels allowed in these lagoons at any one time is limited by the Mexican Government by permit, which all commercial vessels are required to obtain, and entry into certain areas, such as the upper lagoon in Laguna Ojo de Liebre and the middle and upper lagoons in Laguna San Ignacio (Jones and Swartz 1984), is forbidden. Apparently, because of Mexico's policy of revoking permits if there are any transgressions, this system is generally self-policed effectively (Stinson 1988). However, Jones and Swartz (1984) found that in Laguna San Ignacio, where regulations limit the number of vessels to two at any one time, 3 or 4 vessels may occupy the lower lagoon for about ½ day when departing vessels overlap with arriving vessels.

To provide additional protection of gray whales within Mexican waters, the Government of Mexico is in the process of implementing its own standards for governing whale watching activities.

A second potential threat to the eastern North Pacific gray whale stock and its habitat is oil and gas exploration and development and related activities along its migration route, in the breeding/calving lagoons in Baja and in or near its feeding grounds in the Bering and southern Chukchi Seas. Oil and gas exploration, which may result in a short-term loss of habitat for gray whales through displacement by seismic and other activities, is contemplated or under way on the outer continental shelf (OCS) from California to the Beaufort Sea, and west into Russian waters of the Bering Sea throughout the migration range of this species. (In addition, other types of mineral resource development (e.g., gold mining) are under consideration within possible gray whale feeding areas in the Bering Sea). Annually, the gray whale population migrates by or through at least eight oil lease areas within U.S. waters (Rice *et al.* 1984).

Between 1964 and January 1, 1990, over 358 exploration and 692 development wells, have been drilled on the Pacific Region OCS (MMS 1992). All of the development wells and all but 31 of the exploration wells were in the Southern California Bight. In Southern California, 21 platforms have been installed and approximately 135 miles of pipeline have been laid in Federal waters. There are no platforms or pipelines in the Central California, Northern California, and Washington-Oregon OCS.

Nominal exploration and development work will continue in southern California as the number of leases has dropped dramatically to only 116 as of July 1990 (MMS 1991). MMS (1992), for its baseline studies, anticipates that in southern California, approximately 3–4 exploratory and/or delineation wells could be drilled annually, for a total of 25 wells over an eight year period. Approximately 7 development platforms (and pipelines) would be built under this scenario. It appears that only two large and ongoing development projects, the Point Arguello Field and the Santa Ynez units will be placed into production within the next 5 years (MMS 1991). Oil and gas development activities will likely result in a long-term, but considering the small amount of ocean bottom utilized by platforms and pipelines an insignificant, loss of habitat for gray whales.

In Alaska, 87 wells have been drilled, including 2 ongoing wells in the Chukchi Sea and 14 test wells. Thirty-three wells were drilled in the Gulf of Alaska, 30 in the Bering Sea, and 24 in the Arctic. None of these wells resulted in the discovery of hydrocarbons in commercially producible amounts. However, while subeconomic, eight wells demonstrated the positive hydrocarbon bearing potential of the Beaufort Sea area (MMS 1991).

At this time there does not appear to be a high degree of industry interest in the Gulf of Alaska/Cook Inlet area and unless new leases are issued, there will be little operational activity in that area in the next 5- to 10-year period (MMS 1991). Past drilling activity in the St. George, Norton and Navarin Basins has not resulted in any announced discoveries of oil or gas and leases in the North Aleutian Basin have been suspended pending completion of congressionally mandated studies. Although there may be some scattered exploratory activity on existing leases in the St. George, Norton and Navarin Basins, any production is at least 10 to 15 years away, even if a major field were to be discovered (MMS 1991). If a major field is not discovered, little activity would be expected because of the high costs involved and the unproven geologic potential of the area.

In the Chukchi Sea, it is likely that 2 to 3 exploration wells will be drilled each year for the next 5- to 10-year period contingent on results of early wells. One or more major discoveries might accelerate activity while few or no discoveries will curtail activity. While there are some significant discoveries of oil and gas in the Beaufort Sea, whether or not they are developed further may well depend on new discoveries to support the enormous costs of infrastructure to produce and transport oil and gas from Alaska (MMS 1992).

No new lease sales are proposed for Washington, Oregon, or central and northern California before 1997. In southern California no lease sales are contemplated until at least 1996, when 86 blocks in the Santa Maria Basin and Santa Barbara Channel will be considered (MMS 1991). In Alaska, two lease sales in the Beaufort Sea (1993 and 1996), two for the Chukchi Sea (1994 and 1997), two in the Bering Sea (1995 and 1996) and one each in Cook Inlet (1994) and Gulf of Alaska (1995) are proposed, although several additional sales are possible (MMS 1991).

On the winter breeding/calving grounds, oil and gas exploratory areas include sites within and adjacent to present calving and nursery areas, such as the offshore waters of Sebastian Vizcaino Bay, where seismic exploration for gas deposits took place during 1981. To date, no development activities are known to be underway but may take place in the future.

Potential impacts from oil and gas exploration and development include noise disturbance, contact with spilled oil, habitat degradation and possible loss or destruction of benthic prey populations upon which gray whales depend.

Noise disturbance to gray whales has been studied during their migrations along the California coast (Malme *et al.* 1983 and 1984) and on their breeding/calving grounds in Baja California Sur, Mexico (Dahlheim 1983, 1984; Dahlheim *et al.* 1984). Reactions of gray whales to recordings of industrial noise and to a seismic airgun source during migration have shown that avoidance behavior occurs only at relatively close ranges at decibels greater than 120 dB for continuous noise and 160–170 dB for pulsed sounds such as from airguns (Tyack 1988). Malme *et al.* (1984) for example, found a 50 percent probability of an avoidance response of 2.5 km off central California for a seismic airgun array, 1.1 km for a drillship, and 400 m for a single airgun. However, because noise from oil and gas activities occurs at frequencies that overlap gray whale calling (and assumed hearing) frequencies, they may also influence other behavior causing, for example, interference with socialization, reproductive behavior and communication. For oil and gas activities subject to U.S. jurisdiction, NOAA requires companies under an MMPA 101(a)(5) Small Take Letter of Authorization to take specified precautions to avoid disturbing whales including grays.

Reactions to industrial noises by gray whales studied in their breeding/calving grounds were more pronounced than those found off central California, including vacating the study area during the projection of industrial noises (Jones *et al.* 1991), and changes in the acoustical and observed surface behavior and distribution (Dahlheim 1988). Dahlheim (1988) found that gray whales responded to vessels and to playbacks of vessel noise by: (1) An increase in calling rates; (2) an increase in received levels of sounds; (3) an increase in frequency modulation, number of pulses per series, and repetition rates; and (4) a distinct change in movement, both away from and toward the sound source. In response to a playback of oil drilling noise, calling rates were reduced, direct movements away from the sound source were documented, milling rates decreased, and major changes in distribution and a decrease in local whale abundance were documented. Dahlheim (1988) hypothesized that gray whales engaged in acoustical communication circumvented noise in the acoustical channel by the structure and timing of their calls.

Gray whales may also be sensitive to noise disturbance on their feeding grounds and might temporarily abandon productive feeding areas if excessively disturbed. MMS (1992) estimates that seismic exploration activities off Alaska would take place from June to September, the same time period gray whales occupy their northern feeding grounds. Reliance on less-productive areas could leave the animals with insufficient body reserves for their successful migration and reproduction. However, because of the gray whale's abundance and range, (and the apparent abundance and range (one million km^2) of its primary food source in the Bering Sea), the present gray whale population could likely tolerate without significant effects the short-term and non-recurring local impacts brought on by seismic exploration (NMFS Biological Opinion for Lease Sale 100, dated December 21, 1984).

Another potential threat is the possibility of a major oil spill that would affect a large portion of the gray whale population and/or its habitat; although the temporal and spatial segregation of the stock would tend to expose different segments of the population to oil at any given time. Assuming an oil spill, caused either by a tanker accident, pipeline break, or an oil well blowout, were to occur and contact gray whales, the worst adverse impacts to whales from contact would include death or illness caused by ingestion or inhalation of oil, irritation of skin and eyes, fouling of feeding mechanisms, and reduction of food supplies through contamination or losses of food organisms. Although no data exist at this time, likely direct adverse impacts include: (1) Conjunctivitis and corneal eye inflammation leading to reduced vision and possible blindness; (2) development of skin ulcerations from existing eroded areas on the skin surface with subsequent possibility of infection; (3) compromising of tactile hairs as sensory structures; and (4) development of bronchitis or pneumonia as a result of inhaled irritants (Albert 1981). In general, however, the results of Geraci and St. Aubin (1982, 1985) and Geraci (1990) indicate that whales are likely to suffer only minor impacts if they contact oil spills, and that they are likely to recover from these effects. It is recognized that natural oil seeps have long been a part of the ecosystem that gray whales inhabit. In southern California for example, there are 54 natural seeps, with an approximate discharge of 30,000 tons (7.03×10^6 gal.) released annually in the Santa Barbara Channel alone (Fischer 1978 as cited in Neff 1990a). Studies on gray whales in

these seeps (Evans 1982), and on bottlenose dolphins in an experimental setting (Geraci 1990), although inconclusive, tend to indicate that cetaceans can detect oil on the surface. When entering oil-contaminated environs, gray whales tend to spend less time on the surface, blowing less frequently, but faster, which may be interpreted as an avoidance behavior, although more testing would be necessary to verify the observation (Geraci 1990). The inhalation of the hydrocarbon products at the water surface is believed unlikely because the breathing mechanism of the whale which prevents inhalation of water would likely also prevent inhalation of oil (Geraci and St. Aubin 1980). However, if the whales enter the immediate vicinity of a recent spill, toxic fumes could be inhaled (Dahlheim n.d.), although 50 percent of the aromatic hydrocarbons (*e.g.* toluene and benzene) evaporate within a few days of the discharge (Neff 1990a), greatly reducing the toxicity in the spill area.

Because the probable effects on whales from contacting oil include temporary fouling of baleen and toxic effects from ingestion of oil, oil spills may pose a greater problem for the gray whale on its feeding grounds than during its migration. In a laboratory study on bowhead whales (*Balaena mysticetus*), baleen plates fouled by oil had decreased filtering efficiency for at least 30 days, but 85 percent of the efficiency was restored within 8 hours (Braithwaite *et al.* 1983). Due to its coarser and shorter baleen, Geraci and St. Aubin (1982, 1985) demonstrated similar, but somewhat faster, recovery rates for gray whales. Although the toxic effects of ingesting oil remain generally unknown, Geraci and St. Aubin (1990) believe that marine mammals have the liver enzymes required to metabolize and excrete hydrocarbon compounds. This ability limits the accumulation of residues in body tissues and minimizes the probability of residual harm following a spill.

A recent computer model simulating an oil spill projected that gray whales would not contact oil in the Navarin Basin, but would contact oil in the Beaufort Sea (<=0.2% of the population), the St. George Basin (<=1.5%) and Chukchi Sea (<=0.8%). In the St. George Basin, gray whales would contact oil while navigating to and from their feeding grounds in the spring and fall, while in the Chukchi Sea, they would contact oil during summer feeding months. No more than 1.5 percent of the whales passing through Unimak Pass would contact oil. In general there was a 6.3 percent chance that at least one gray whale would encounter oil in the Bering Sea during the 30- to 40-year lifespan of an individual oil field (Neff 1990b). MMS (1992) projects the probability of one or more oil spills of 10,000 barrels or greater occurring in the gray whale areas to range from 14 percent in southern California, 21–27 percent in the Bering Sea, 18–34 percent in the Gulf of Alaska to 96 percent in the Chukchi Sea, provided commercially producible amounts of hydrocarbons are discovered and developed.

MMS (1992) gives the probabilities of one or more pipeline or platform spills of 1,000 bbl and greater, and 10,000 bbl and greater as a result of activity in the Chukchi Sea as 92 and 57 percent respectively. In addition, because Chukchi Sea oil will be transported by tanker, there is a 93 and 81 percent probability of one or more spills of 1,000 bbl or greater and one or more spills of 10,000 bbls or greater respectively occurring; although tanker spills would occur outside the Chukchi Sea area since all transport within the area will be by pipeline (MMS 1992). In areas such as the Norton, Navarin and St. George Basins, oil will be transported by tanker to shore facilities in Alaska or other West Coast states. For its base case projections, MMS (1992) predicts one tanker spill for each of these areas developed (over the 30- to 40-year life span of an oil field) but no platform or pipeline spills.

In southern California, MMS (1992) projects a single pipeline spill of 7,000 bbl will result from exploration and development activities in the Santa Maria Basin or the Santa Barbara Channel. In addition, as a result of oil and gas activities in Alaska, 3 tanker oil spills of 30,000 bbl each are projected to occur along the tanker route on the Pacific coast over the 30- to 40-year life span of an oil field: One off Washington, one off northern California and one off southern California. A northern California spill is projected by MMS to occur 80 km or more from the coast with no shore contact.

MMS (1992) anticipates that an oil spill of 10,000 bbl or greater could result in the death of a few individuals and the displacement of gray whales from areas of up to 1,500 km^2 in the Chukchi and Bering Sea feeding grounds for all or part of a season. (For comparison purposes, the Chirikov Basin is approximately 3.7×10^4 km^2).

MMS (1991) reports that out of a total of 6.2 billion barrels of OCS oil produced from 1971 through 1988, only 900 barrels were spilled from blowouts. However, this statistic excludes the Union Oil spill in Santa Barbara in January 1969. That spill resulted in a loss of about 3 million gal of oil which eventually covered 800 mi^2. Surveys conducted as a result of that spill discovered 6 gray whales stranded between January 28 and March 31, 1969. Although these counts were higher than normal, it is unclear whether this was due to the spill or to the increased survey effort (Brownell 1971).

Based upon data resulting from the exploratory wells drilled in recent years in the Bering Sea, MMS (1992) has reevaluated and lowered its estimate of the potential for discovering an exploitable field in the Bering Sea. Based upon MMS' reanalysis, NMFS has determined that the expectation of an oil well blowout occurring and impacting gray whales is low. Essentially, in order for gray whales to be seriously impacted by an oil spill due to oil and gas exploration and development activities, the following events need to occur: (1) A lease sale takes place; (2) exploratory activities determine that economically exploitable quantities of oil can be recovered; (3) development occurs which (4) results in a blowout with a significant loss of oil and (5) the spilled oil intercepts a significant portion of the gray whale population or its food source.

Oil spills, the chemicals used to break up and sink surface oil, and other anthropogenic materials from either oil platforms, (such as drilling muds, discharged materials and produced water), or shore-side discharges from industrial, residential or agricultural point and non-point sources, could also harm gray whales by reducing or contaminating their food resources. Gray whales are opportunistic feeders on a wide variety of benthic ampeliscid amphipods and other bottom dwelling organisms (Nerini 1984). Most feeding takes place between May and September in the northern waters of the Bering and Chukchi seas, especially in the Chirikov Basin. Some food consumption also occurs during migration and a small portion of the population remains south of Unimak Pass, Alaska, to exploit that resource. Little is believed consumed on the calving grounds (Nerini 1984).

The feeding strategy of gray whales could lead to ingestion of oil from oil-contaminated food, if the prey organisms accumulate petroleum hydrocarbons in their tissue, or from contaminated sediments associated with food sources. The effect of pollutants on the benthic organisms on which these whales feed is relatively unknown, but may result in either direct mortality or sublethal effects that inhibit growth, longevity and reproduction. Benthic organisms could ingest either heavy

metals or hydrocarbons which could bioaccumulate up through the food web. According to sources cited in Neff (1990a), benthic crustaceans have a well-developed mixed-function oxidase (MFO) system to eliminate petroleum hydrocarbons. If amphipods have the ability to detoxify hydrocarbons, these hydrocarbons are less likely to persist and biomagnify in the gray whale food web. Another factor inhibiting bioaccumulation may be the short life span of the amphipods (i.e. <2 years). Therefore, while gray whales probably have a low risk of ingesting petroleum hydrocarbons from their source (see also the earlier discussion on baleen fouling from sediment contamination), benthic amphipods have proven to be quite sensitive to spilled oil and are among the first animals killed after an oil spill (Neff 1990a), which could in turn affect that portion of the gray whale stock feeding in the contaminated area. If they are unable to locate alternative areas with sufficient food resources, they may have insufficient reserves to make the 8,000 km migration to southern grounds, overwintering there and returning the following spring. These animals likely would either remain in waters north of Baja California or succumb from the effects.

Because discharges of drilling muds from offshore platforms may contain heavy metals and other contaminants, all discharges from platforms are regulated by EPA under section 402 of the Clean Water Act. EPA's proposed regulations recommend zero discharges of drilling muds and cuttings and filtration of produced waters. Drilling muds, however, are relatively non-toxic and the metals associated with drilling muds are virtually unavailable for bioaccumulation by marine organisms (Neff 1987). The National Research Council (1985) concluded that the risks to most OCS benthic communities from exploratory drilling discharges are small and result primarily from physical benthic effects. Since ampeliscid amphipods predominate in disturbed bottoms (Nerini and Oliver 1983, Nerini 1984, Oliver *et al.* 1985), are highly motile, and good colonizers, and amphipod recovery is likely to take place within 1 year (Oliver *et al.* 1985), NMFS believes that the gray whale's food source is unlikely to be impacted seriously by the establishment of platforms and pipelines in the OCS.

Preliminary results from the study by NMFS (1990) on contaminants found in gray whales stranded near Puget Sound indicated that heavy metal levels appear to be too low to cause any deleterious effects. In addition, the concentrations of PCBs and DDT were very low compared to levels in other whales and are below levels known to cause impairment (NMFS 1990). More recent analyses (Varanasi *et al.* in prep.) of 22 gray whales stranded at various locations along the U.S. West Coast, which included those mentioned above, showed no apparent significant differences, between stranding sites, for chlorinated hydrocarbons in the blubber and liver. Analyses of 16 elements in liver, kidney and stomach contents of gray whales were generally low. However, high concentrations of aluminum (1,700 ±450 ppm), iron (320 ±250 ppm), manganese (23 ± 15 ppm), and chromium (3.4 ±1.3 ppm), were discovered in stomachs, although no significant differences were observed between whales stranded in Puget Sound compared to whales stranded at more pristine sites. Varanasi *et al.* (in prep.) noted that the relative proportions of these 4 elements in stranded whales were similar to the relative proportions in sediments, which is consistent with a geological source of these elements from the ingestion of sediment during feeding. The results of their study suggest that the concentrations of anthropogenic chemicals in stranded gray whales show little relation to the level of pollution at the stranding site, and further, showed that the concentrations of potentially toxic chemicals were relatively low when compared to the concentrations in marine mammals feeding on higher trophic level species, such as fish. They noted, however, the lack of data from apparently healthy gray whales limits the understanding of the susceptibility or hardiness of this species with respect to levels of anthropogenic contaminants found in tissues.

According to Brownell and O'Shea (in press), levels of organochlorine pollutants that may cause reproductive problems in other mammals are higher than those reported in baleen whales. In addition, the vast majority of the eastern Pacific gray whale stock feeds mostly in colder waters that have been less exposed to organochlorine pollutants (IWC 1990).

Coastal development and coastal and offshore industrial activities may also result in some impacts to the gray whale and its habitat. For example, in the calving lagoon of Guerrero Negro, daily dredging and vessel traffic between 1957 and 1967 for a salt extraction plant reportedly caused the whales to abandon the area. In 1967, the plant was closed and moved to Laguna Ojo de Liebre (Bryant *et al.* 1984). Six years after the dredging and barge activity in Guerrero Negro ceased, gray whales began to return to the lagoon (Gard 1974, Bryant and Lafferty 1980). Since the salt works at Laguna Ojo de Liebre appear to be an environmentally clean industry, with no adverse impacts on the biota of the lagoon (Rice *et al.* 1981), and since the whales appear to tolerate the daily salt-barge traffic and have not abandoned Laguna Ojo de Liebre, daily dredging in the confined Guerrero Negro is more likely the cause of abandonment than the vessel traffic. In addition, exploitation of phosphorus (Cordoba 1981) and the development of a large resort in and near the minor calving lagoons of Bahia Almejas and Bahia Magdalena, if constructed, may be cause for concern. Because of the scarcity of suitable isolated calving and nursery areas for gray whales and the whales' specialized feeding habits, gray whales need to be monitored to determine the effects of future coastal or shallow-water development on any critical stages of the gray whale's life cycle.

The recovery of the gray whale population has occurred concurrent with extensive OCS geophysical exploration off the California coast and other activities throughout its range, and these levels of activity are unlikely to increase significantly in the near future. NMFS, therefore, concludes that current and anticipated levels of human activities do not pose a danger of extinction to this species now or in the foreseeable future. NMFS does not rule out the possibility that parts or all of this stock and certain components of its habitat have been and/or are being stressed or that the effects will not be manifested over time as changes in productivity, mortality or distribution.

Factor (B)—Overutilization for Commercial, Recreational, Scientific or Educational Purposes

As a result of commercial whaling operations, the gray whale was severely depleted by the early 1900's. After 1946, commercial harvesting of gray whales was banned by the International Convention for the Regulation of Whaling. Between 1959 and 1969, a total of 316 gray whales were killed under Special Scientific Permits off California. (A significant amount of gray whale life history data came from these animals (see for example, Rice and Wolman 1971).)

Eskimos living on the shores of the northern Bering Sea and the Chukchi Sea have hunted whales for perhaps several thousand years. Estimated aboriginal takes of the eastern Pacific stock prior to depletion of gray whales ranged from about 156 per year (years 1600–1750) to 186 per year (years 1850–1860) with a period high of 263 per year (years 1751–1850). Subsequent declines

after 1850 were due to reductions in native populations, loss of traditional native cultures under the influence of Western society and reduction of the gray whale stock due to commercial whaling (Mitchell and Reeves 1990, IWC 1990).

In Alaska recently, the catch consists mostly of bowhead whales, with few gray whales being intentionally taken (Marquette and Braham 1992). However, on the Chukotka coast of Russia, the catch has consisted almost entirely of gray whales. Since 1969, when the aboriginal hunt ceased as a result of a large number of "struck-and-lost" whales (Yablokov *et al.* 1984), gray whales have been taken by the Russian Government for the Chukchi Eskimos using one modern catcher boat. The total aboriginal catch in Russia has averaged about 165 gray whales per year since 1967. The current catch limit set by the IWC is 179 per year, 10 of which the United States informed the IWC at the 1991 plenary session that ". . . it is not requesting and will not in future years request an allocation or use of 10 gray whales" (IWC 1992). In 1990, the Soviet Union requested a three year extension of their quota indicating that this level would satisfy local needs (IWC 1992). This authorized subsistence catch of gray whales is believed to be well below the sustainable yield estimated to be approximately 670 (95 percent confidence: 490–850; IWC 1990) and therefore is not likely to be significantly impacting the stock.

The question has arisen whether non-Alaskan natives would, in the near future, pursue traditional whaling and sealing activities. To date, only the Makah Tribe has expressed such an interest, but it is unclear at this time whether they would be interested in pursuing open-boat whaling or could satisfy subsistence and/or cultural needs by other means. For any Native American group to begin harvesting large whales, they would need to demonstrate a subsistence need and request (through the Bureau of Indian Affairs) the U.S. Commissioner to the IWC to petition that body for a portion of the subsistence quota for gray whales. Such a scenario is considered unlikely at this time.

The question of whether commercial whaling on gray whales would resume in the near future has also been raised. In order for commercial whaling to resume, the IWC would need to reclassify the gray whale as an "initial population stock" (see discussion elsewhere in the preamble), and terminate its whaling moratorium. NMFS concludes that current and anticipated uses for commercial, recreational, scientific or educational purposes do not pose a danger of extinction to this species now or in the foreseeable future.

Factor (C)—Disease or Predation

The natural mortality rate of the gray whale is low, approximately 0.056 for adults and 0.132 for juveniles (Reilly 1981). There is no information indicating that disease or predation constitutes a threat to the continued welfare of the species.

The killer whale (*Orcinus orca*) appears to be the only non-human predator on gray whales. Evidence from the necropsy of 39 gray whales that stranded on St. Lawrence Island indicated that 16 had been killed by killer whales (Fay *et al.* 1978). The mortality rate from killer whale attacks is unknown. However, the frequency of tooth scars on gray whale carcasses indicates that killer whale attacks are often not fatal.

Moderate numbers of gray whale calves strand in and near the nursery lagoons and along the southern California coast (Swartz and Jones 1983). In addition, a few adults strand every year throughout their range, but the numbers appear low compared with the size of the population (Rice *et al.* 1984). While mortality rates due to stranding cannot be calculated (Rice *et al.* 1984) stranding data may provide insights whether strandings are due to natural or anthropogenic factors.

In 1989, 29 (three possible recounts) gray whales were reported stranded in Alaska from the area from Prince William Sound to the Alaskan Peninsula and into Bristol Bay around the time of the Exxon Valdez oil spill; nine (two possible recounts) of those animals were reported stranded near the southern end of Kodiak Island, southwest and down-current of the oil spill area. While this number was significantly greater than earlier years when only six were documented between Kayak Island and Unimak Pass (Zimmerman 1989), this may be attributed to the timing of the search effort coinciding with the northern migration of gray whales augmented by the increased search effort in the oil spill area (Loughlin, in prep.). In 1990, 26 gray whales were counted off the southern end of Kodiak Island. Surveys of the other areas were not conducted that year. Although some gray whales were reported in 1989 to have oil on their baleen, apparently none had oil in the digestive tract (Moore and Clark as reported in IWC 1990). This is not unexpected considering that dead whales at sea generally float with the ventral surface up and the mouth open. The relationship between these strandings to the oil spill remains conjectural at this time.

Recent strandings reported along the Washington/Oregon coast have also been higher than the mean for the past 2 years, but as indicated in Table 1 below, not higher than historic records (AFSC stranding data). The majority of the animals stranding in Washington waters in 1990 and 1991 apparently died outside Puget Sound and were carried by currents to the outer coast of Washington and the Straits of Juan de Fuca.

NMFS concludes that disease or predation do not pose a danger of extinction to this species now or in the foreseeable future.

TABLE 1. RECENT STRANDING ALONG THE WASHINGTON/OREGON COAST

Year	Number	Year	Number	Year	Number
1983	8	1984	15	1985	2
1986	2	1987	9	1988	10
1989	4	1990	15	1991	12
1992	*3				

*To date.

Factor (D)—Inadequacy of Existing Regulatory Mechanisms

Existing laws and regulations are considered adequate for the conservation of the gray whale. Under the protection of the IWC, the MMPA and the ESA, the eastern North Pacific gray whale stock has recovered to near or above its estimated pre-commercial exploitation population size. Most of the protective measures for the gray whale would remain even without listing under the ESA. The gray whale would remain protected in the United States under the MMPA and the Whaling Convention Act, internationally under the International Convention for the Regulation of Whaling, as well as under national legislation in Canada, Mexico, and Russia, although the effectiveness of this legislation is not fully known.

Mexico has particularly detailed legislation protecting the calving lagoons from disturbance (Klinowska 1991). In 1972, 1975, and 1979 respectively, the Mexican Government designated the major calving lagoons of Laguna Ojo de Liebre, Laguna Guerrero Negro, and Laguna San Ignacio in Baja California as gray whale refuges. These refuges account for approximately 73 percent of calf productivity and are the lagoons that most of the U.S. tour boats and private tourists visit. The number of vessels allowed in these lagoons at any one time is limited by permit to two vessels at a time, and entry into the middle and upper (Ojo de Liebre and

San Ignacio) and upper (Guerrero Negro) lagoon areas is forbidden from December 15 to March 15, although as documented by Jones and Swartz (1984) at Laguna San Ignacio, compliance is not absolute. Mexico issues individual permits to each vessel which specify the number of days a vessel may remain within the lagoon, the number of passengers it may carry, the number of skiffs it may launch and the kinds of activities permitted, such as whale watching, shore exploration, etc. (Jones and Swartz 1984). Violation of the permit requirements leads to a revocation of the permit. In order to provide additional protection for gray whales within Mexico waters, the Government of Mexico is in the process of implementing its own standards for governing whale watching activities. However, the level of enforcement in the Mexican lagoons is not fully known at this time.

Although unclassified in the "Red Book" (i.e. not listed as threatened) by the International Union for the Conservation of Nature (see Klinowska 1991), additional protection is afforded internationally under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES was created to prevent species from becoming threatened through international trade (Wells and Barzdo, 1991) and prohibits commercial trade in seriously threatened species, which are listed in CITES Appendix I. Trade in Appendix I species, such as the gray whale, may be authorized only in exceptional circumstances (*e.g.*, scientific research), and provided the import is not for commercial purposes. All international shipments must be covered by an export permit from the country of origin and an import permit from the country of destination. There is no indication that any change in the gray whale's status under CITES is contemplated by any of its members and any change in status would require a majority vote of the member nations.

In the United States, irrespective of the outcome of this action, activities that take marine mammals are prohibited unless authorized or exempted under the MMPA. The incidental take of marine mammals may be authorized in limited circumstances under an MMPA small take exemption. Oil and gas exploration activities, for example, are eligible to apply for a small take exemption under section 101(a)(5) of the MMPA. Under a Small Take Exemption, NMFS requires the oil and gas industry to take appropriate measures to minimize impacts to gray whales and to conduct exploration activities in such a way as to reduce the likelihood of adversely affecting the gray whale. The Letters of Authorization also include requirements for monitoring and reporting. For the 1991/92 exploration season, NMFS issued five Letters of Authorization (50 FR 47742, Sept. 20, 1991) but only one for the 1992/93 season. NMFS annually reviews the conditions under which these Letters are issued to ensure that gray whales, other marine mammals and their habitats remain adequately protected.

While section 7 consultations under the ESA would cease for the gray whale once the eastern stock is delisted, coastal habitat critical for the continued well-being of the gray whale would be protected within waters under the jurisdiction of the United States through other laws such as the National Environmental Policy Act, the Clean Water Act, MARPOL (the Anti-Dumping Act), the Marine Protection, Research and Sanctuaries Act, (ocean dumping), sections 10 and 404 of the Rivers and Harbors Act of 1899 and the Oil Pollution Act of 1990 which will require, among other things, double-hulled tankers within U.S. waters by 2015. Consultations will also continue under the Outer Continental Shelf Lands Act Amendments.

NFMS concludes that the anticipated regulatory mechanisms are adequate for the conservation of this species.

Factor (E)—Other Natural or Man-made Factors Affecting its Continued Existence

In addition to those man-made factors affecting the gray whale's continued existence which were discussed under Factors A and C above, gray whales are also impacted by incidental take in commercial fishing operations.

The fact that gray whales migrate in a narrow, nearshore corridor where commercial fishing activities are concentrated leads to encounters and entanglement in gear from several commercial fisheries. Norris and Prescott (1961) document entanglement in gillnets since the late 1950s. Data from the NMFS-administered stranding networks document that commercial gillnet fisheries take gray whales incidental to fishing. NMFS' Southwest Region has maintained records of reported gray whale entanglements in California gillnet fisheries since the 1984/85 migration. The number of entanglements has varied from a low of seven entanglements and no mortality during the 1985/86 migration to a high of 15 entanglements and three mortalities during the 1986/87 migration. The number of entanglements and deaths declined during the 1987/88 migration to seven entanglements and one mortality. This reduction in entanglements may have been due to regulations implemented by the State of California in the fall of 1987 that require fishermen to construct their nets so that whales can break through them and that prohibit fishing near major whale concentrations. However, no study was conducted to quantify the effectiveness of these regulations and the decline in entanglement could be due to natural variation. In 1990 and 1991, no gray whales were reported entangled in gillnet fisheries in California (Perkins and Barlow 1992).

It should be recognized that under the MMPA, the incidental taking of endangered, threatened or depleted species was illegal until 1989, making the fisherman subject to penalty. It is presumed that the potential for prosecution may lead to underreporting of incidental takings. In 1988, amendments to the MMPA authorized the incidental (but not intentional) taking of depleted species during commercial fishing operations under section 114 of the MMPA until October 1, 1993. However, under the ESA, takings of endangered species incidental to commercial fishing operations cannot be authorized under section 7 of the ESA, leaving the issue unresolved. The NMFS legislative proposal to Congress to govern fisheries after October 1, 1993 (see 56 FR 23958, May 24, 1991) proposes to authorize a limited incidental take of depleted, threatened or endangered species and to amend the MMPA to authorize takes incidental to commercial fishing activities under section 101(a)(5). Under that proposal, all provisions of the ESA would apply as well. That proposal, if implemented by law, however, would not likely result in an increase in gray whale mortality, since commercial fisheries would be regulated through seasonal, area or gear restrictions to reduce marine mammal mortality to insignificant levels approaching a zero rate. In addition, observers could be placed onboard vessels operating in any fishery that takes marine mammals and quotas would be enforced through fishery restrictions based upon observer reports.

The California Department of Fish and Game (CDF&G) observed one entangled balaenopterid (probably a minke whale) during 177 observer days spent monitoring the shark and swordfish drift net fishery in 1980. CDF&G's southern California set-net monitoring program monitored about 5 percent of the fishing effort from 1983 through 1986 and observed no gray whale entanglements (Collins *et al.* 1984, 1985, 1986; Vojkovich *et al.* 1987).

Likewise, CDF&G set-net observers in northern California reported no gray whale entanglements during monitoring of about 1 percent of the fishing effort from 1984 through 1987 (Wild 1985, 1986).

In the Pacific Northwest, gray whales have been observed entangled in salmon set-nets off northern Washington and in crab pot lines off Oregon. These entanglements are infrequent, occurring once every 1 to 3 years in the set-net fishery and once every 3 to 5 years in the crab fishery (NMFS 1991).

Heyning and Dahlheim (in press) reported on strandings and incidental takes of gray whales from Alaska to Mexico for the years 1975–1988. Gray whale strandings were examined carefully to document whether the animal had been entangled in fishing gear. Some known fishery kills of gray whales bore no evidence of entanglement after stranding, despite thorough examination (Heyning and Lewis 1990). Data from the Heyning and Lewis study suggested that (1) sexually immature animals represented 90 percent of all strandings; and (2) gray whale mortality related to fisheries interactions is likely insignificant relative to the present population size.

Minimal estimates of fisheries-related mortality for stranded gray whales ranged from 8.7 to 25.8 percent (Heyning and Dahlheim in press). None of the 20 animals documented in that report from Alaskan feeding grounds had indications of entanglement in fishing gear. In the Gulf of Alaska and Alaskan Peninsula area, four animals out of 29 (13.8 percent) that stranded were involved in fishing gear. Baird *et al.* (1990) reviewed the available information for British Columbia and found four animals out of 39 strandings (11.1 percent) were involved in fishing gear. They noted that if they included only the 15 strandings that were carefully examined, then 26.7 percent of mortalities were fisheries related.

The fisheries related mortality for Washington, Oregon and northern California are eight out of 50 (16 percent), two out of 23 (8.7 percent), and six out of 47 (12.8 percent), respectively. In southern California, more carcasses have been examined thoroughly and 25 out of 92 (25.8 percent) were mortalities related to fishing operations. Heyning and Lewis (1990) have reviewed baleen whale entanglements in this region and found that the majority of gray whale entanglements involved immature animals but not calves. Almost two-thirds of these entanglements occurred during the northbound migration.

Based upon the information acquired to date, but recognizing the scarcity of that information, NMFS concludes that gray whale mortality related to fisheries interactions is likely insignificant relative to the present population size.

NMFS concludes that there are no known or anticipated other natural or man-made factors that pose a danger of extinction to this species either now or in the foreseeable future.

Consultations under Section 7 of the ESA

A chronology of consultations with MMS on oil and gas activities and NMFS' assessed impacts on gray whales was published in the proposed rule (56 FR 58869, November 22, 1991). Please refer to that document for further information on this subject. A copy of the reanalysis of the biological opinions on the impacts of oil and gas activities, which was based on information and data described in this final determination, is available upon request (see **ADDRESSES**). See also the discussion under Factor (A) above.

Discussion

An endangered species is any species that is in danger of extinction throughout all or a signficiant portion of its range; a threatened species is any species that is likely to become an endangered species within the foreseeable future. The ESA requires that any determination that a species is endangered or threatened be made solely on the basis of the best available scientific and commercial information concerning that species relative to the five factors discussed above.

The eastern North Pacific stock of the gray whale has recovered to near or above its estimated pre-commercial exploitation population size. It is estimated to be between 60 and 90 percent of its carrying capacity and will probably continue to increase until density dependent factors slow the rate of growth. NMFS therefore believes that this stock is not currently in danger of extinction throughout all or a significant portion of its range. Moreover, even though the eastern Pacific gray whale stock inhabits coastal waters that are increasingly impacted by human activities, the stock continues to increase and, therefore, is not likely to become an endangered species again within the foreseeable future throughout all or a significant portion of its range. Based upon the assessments discussed above, NMFS believes that individual and cumulative impacts, while they may have the potential to affect adversely the eastern North Pacific gray whale stock, are not likely to jeopardize its continued existence. Therefore, NMFS believes the eastern North Pacific stock of the gray whale should be removed from the List of Endangered and Threatened Species under the ESA.

Some commenters contend that although the stock is not currently threatened, human activities have the potential to threaten the stock in the future. For the most part, they fear that the IWC may allow the resumption of commercial whaling; that oil and gas exploration either planned or under way along the continental shelf could seriously harm whales that use these coastal areas; and that potential cumulative impacts may, in the future, threaten the gray whale's survival. However, potential future threats, as opposed to actual, present-day threats, are neither sufficient to justify listing a species nor sufficient for retaining a recovered species on the List according to the factors that must be considered under the ESA. If they were, then, as noted by Brownell *et al.* (1989), "* * * the majority of the world's animals would have to be included on the List, as large numbers of species are potentially threatened by the growth of human populations, current rates of habitat destruction, and other harmful activities." NMFS believes that the increasing abundance of this stock, in close proximity to human coastal development, industrial activity and vessel traffic, suggests that this stock has the resiliency to adjust to human activities with few apparent adverse effects.

However, because the gray whale is exposed frequently to human activities, and cumulative impacts may result in some indirect effects, long-term monitoring of the status of the gray whale stock will be conducted (see Monitoring below).

Removing the eastern North Pacific gray whale stock from the List will not result in a major reduction in protection. While the protections and prohibitions of the ESA, including the consultation requirements of section 7, will cease to apply, the gray whale will remain subject to prohibitions against taking under the MMPA. Habitat concerns will continue to be addressed under several other laws. In addition, because the species also remains protected under the U.S. Whaling Convention Act and the International Convention for the Regulation of Whaling, the number of gray whales authorized to be taken for subsistence purposes will continue to be limited by the IWC.

NMFS also believes that the western Pacific gray whale stock, which is geographically isolated from the eastern

stock, has not recovered and should remain listed as endangered.

Coordination

In accordance with section 4(a)(2) of the ESA, NMFS requested the concurrence of the Department of the Interior on this proposal when it was published on November 22, 1991. Concurrence on the proposal was received in a letter dated March 4, 1992. As the FWS maintains and publishes the List in 50 CFR part 17 for all species determined by NMFS or FWS to be endangered or threatened, the FWS is encouraged to promulgate a rule amending the List by removing the "gray whale" and replacing it with the "Western Pacific (Korean) gray whale." Upon completion, NMFS will implement a rule to remove the gray whale from the list of species found in 50 CFR 222.23. NMFS encourages the FWS to take timely action on this request and will assist the FWS to the greatest extent possible.

Monitoring

Section 4(g) of the ESA requires that whenever a species is removed from the List, the Secretary must implement a system, in cooperation with the states, to monitor effectively the status of any species that has recovered to the point where the protective measures provided under the ESA are no longer necessary. This monitoring program will continue for at least 5 years and, if at any time during that period the Secretary finds that the species' well-being is at significant risk, the ESA (section 4(b)(7)) provides that emergency protective regulations must be issued to ensure the conservation of any recovered species.

As part of its monitoring program, NMFS intends to create an internal Task Group responsible for monitoring activities potentially impacting gray whales. This Task Group will consist of NMFS marine mammal scientists familiar with either gray whale biology or related subject matter and will be expected to coordinate internal research on gray whales, encourage independent research in areas not currently funded or investigated by NMFS, and serve as a quick response advisory team in the event of any catastrophic event impacting gray whales. The Task Group will also recommend to the Assistant Administrator for Fisheries, NOAA (Assistant Administrator) appropriate steps, necessary to mitigate any catastrophic event, including the reimposition of emergency protective measures. Finally, within 6 months following the conclusion of the first 5-year monitoring program, the Task Group will conduct a comprehensive "status review" of the gray whale that will be forwarded to the Assistant Administrator for approval and release to the general public for review and comment. The Task Group will review and address the comments in drafting a final report. Included in that report will be a recommendation on whether (1) to continue the monitoring program for an additional 5 years; (2) terminate the monitoring program; or (3) reconsider the status of the gray whale under the ESA. In the intervening year between the conclusion of the first 5-year monitoring program and release of the final report, NMFS will continue with its monitoring program.

Although recognizing current budgetary restraints, NMFS encourages the MMS and other Federal agencies to continue studies on gray whale distribution, abundance, and habitat use in the Bering, Chukchi, and Beaufort Seas and on the impacts of seismic exploration, offshore drilling activities, oil spills, and vessel traffic. In addition to research on gray whales conducted in the United States through independently funded sources and in Mexico by the Government of Mexico, NMFS plans to conduct the following as part of its monitoring program:

(1) Monitor the status of the gray whale and habitats essential to its survival;

(a) Conduct a biennial population assessment to include:

(i) A census of the southbound migration for comparison with historical research;

(ii) Carry out research as needed to determine any potential biases in the estimation of procedures (e.g., offshore distribution, tails of the migration, night-time migration rates);

(iii) Estimate population productivity using data obtained from (i) and (ii) above, and from life history studies, as may be appropriate, such as calf production; and

(iv) A determination of the shape of the production curve of the population—that is, the "point" or series of estimates that suggest that the population has reached its carrying capacity.

(2) Continue monitoring the level and frequency of gray whale mortality through small take and commercial fishery exemptions, stranding programs and other activities.

(3) As part of the stranding network, monitor trends in the levels of contaminants, including hydrocarbons, organochlorines, heavy metals and DDT, in gray whales by conducting bioassays of all available stranded animals.

In addition to its required monitoring program, NMFS anticipates taking the following actions to ensure the continued well-being of gray whales:

(1) Implement whale watching regulations for U.S. citizens and others within the U.S. EEZ and promote with Mexico and Canada the use of similar standards for whale watching within their waters.

(2) To the extent possible, encourage MMS to continue studies to determine the impacts of oil spills; vessel traffic, including noise; seismic exploration; and offshore drilling activities on gray whales and their benthic food resources.

(3) To the extent possible, continue and promote increased cooperative studies with Mexico to monitor habitat use and the impacts of whale watching on the Mexican breeding/calving grounds; encourage the enforcement of gray whale sanctuary regulations in Mexico; and encourage operators of U.S. whale watch vessels to observe Mexican sanctuary regulations.

(4) Continue participation in the IWC and its Subcommittee on Protected Species and Aboriginal Subsistence Whaling, in order (among other things), to coordinate research on gray whales by member nations, in particular surveys of western Pacific areas for estimating abundance of the Okhotsk stock, photo-identification studies, and DNA/carbon isotope work.

References

A copy of the references used in this document is available upon request (see ADDRESSES).

Determination

Based upon the assessments discussed above, NMFS has determined that the eastern North Pacific gray whale stock has recovered to near its estimated original population size and, while individual and cumulative impacts may have the potential to affect adversely the eastern stock, that stock is neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range. Therefore, NMFS has determined that the eastern North Pacific stock of the gray whale should be removed from the List of Endangered and Threatened Species under the ESA. NMFS has also determined that the western Pacific gray whale stock, which is geographically isolated from the eastern stock, has not recovered and should remain listed as endangered.

Dated: December 30, 1992.

William W. Fox, Jr.,

Assistant Administrator for Fisheries.

[FR Doc. 93–40 Filed 1–6–92; 8:45 am]

BILLING CODE 3510–22–M

[Docket No. 920544–2324]

Listing Endangered and Threatened Species; Northern Offshore Spotted Dolphin

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

ACTION: Notice of Determination; Status Review.

SUMMARY: NMFS determines that a proposal to list the northern offshore spotted dolphin, *Stenella attenuata*, as "threatened" under the Endangered Species Act (ESA) is not warranted at this time. This determination follows an NMFS announcement indicating that the geographic boundaries which have delineated the stock structure for spotted dolphins in the eastern Tropical Pacific (ETP) should be revised. The petition received by NMFS to list the northern offshore spotted dolphin as threatened addressed the status (abundance and fishery-induced mortality) of this stock using previously accepted geographic boundaries, and not the currently accepted boundaries for stock structure in the ETP. Changes in the stock structure indicate that the northern offshore stock of spotted dolphin as identified in the petition is no longer a valid biological or management unit. Based on the best available information, NMFS believes that the northern offshore spotted dolphin does not fall within the definition of "species" under the ESA and, therefore, is not eligible for listing under the Act.

DATES: Comments and information concerning the status of the northeastern stock and the western/southern stock of offshore spotted dolphins must be received by NMFS by February 17, 1993.

ADDRESSES: Comments can be forwarded to Dr. Michael F. Tillman, Acting Director, Office of Protected Resources, 1335 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Michael Payne, NOAA/NMFS, Office of Protected Resources, 1335 East-West Highway, Silver Spring, MD 20910 (301/713–2322).

SUPPLEMENTARY INFORMATION:

Background

On October 31, 1991, the Center for Marine Conservation (CMC) petitioned NMFS to add the northern offshore spotted dolphin (*S. attenuata*) to the U.S. List of Endangered and Threatened Wildlife as a threatened species. Under section 4(b)(3)(A) of the ESA, a determination must be made whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If a petition is found to present such information, a review of the status of the species concerned is mandated. NMFS determined that the petition presented substantial information, and that the petitioned action may be warranted (56 FR 65724, Dec. 18, 1991). To ensure a comprehensive review, NMFS solicited information and comments concerning the petition. Comments and further information on this petition were accepted by NMFS until January 17, 1992.

NMFS was also petitioned by the Defenders of Wildlife and Environmental Solutions International to designate the northern offshore spotted dolphin as threatened under the ESA on January 23, 1992. However, this petition, received by NMFS on January 29, 1992, was formally denied for the following reasons: (1) NMFS had already received the petition from CMC to designate the northern offshore spotted dolphin as threatened under the ESA, and had determined that this petition presented information indicating that listing may be warranted, and (2) the latter petition essentially duplicated the previously accepted petition. NMFS considered the information provided in the denied petition during the review and evaluation of the original petition.

At the time the original petition was received on October 31, 1991, NMFS was in the process of reviewing new scientific information regarding this species. On November 13–14, 1991, NMFS conducted a workshop on the status of ETP dolphin stocks (referred to as the Status of Porpoise Stocks (SOPS) Workshop) to review these data (DeMaster *et al.*, 1992). Two reports presented at the SOPS workshop, Dizon, Perrin and Akin (1992) (referred to by the commenters and workshop participants as SOPS–9), and Perrin *et al.* (1991) (referred to as SOPS–15), presented new information on the stock structure of ETP dolphins and are the basis for this determination.

Comments and Responses

NMFS received comments in response to the petition to list the northern offshore spotted dolphin as threatened under the ESA that addressed the following issues: Abundance and trends of the northern offshore spotted dolphin, quality of assessment data, overutilization and fishery-induced mortality, stock boundaries between the offshore populations of spotted dolphin, quality of the habitat, and regulations governing the take of dolphins in the purse-seine fishery. This notice focuses only on those comments addressing stock structure, and the definition of stock boundaries for offshore spotted dolphins, as they relate to the status of the northern offshore spotted dolphin.

Comments: The data indicating geographical separation of the northern and southern offshore spotted stocks were questioned by several commenters. One commenter cited SOPS–15 as follows: "present management units are inconsistent with patterns of cranial variation; spotted dolphin west of 120 degrees W. probably should not be pooled with those to the east as they show closer affinity with the southern offshore unit. In addition, the boundary between the northern and southern units should probably be moved north to about 5 degrees N." The commenter continued, "Perrin noted that managing both southern and western offshore spotted dolphins as one stock was consistent. He concluded that combining the southern and western areas into a single management unit should be considered provisional."

Several commenters noted that the participants of the SOPS workshop recommended that the distribution plots for each stock be updated from those prepared for the 1984 status review.

Regarding the status of ETP spotted dolphin stocks, and the question of where to draw the lines delineating the boundaries for the northern and southern offshore stocks, one of the commenters cited S.T. Buckland, a workshop participant, as follows: "Buckland commented that (1) the geographically defined management units (previous stock boundaries) are not necessarily biologically meaningful; (2) That abundance can be estimated for a management unit, but trends in abundance must often be determined by pooling stocks that are thought to mix or overlap in distribution; and (3) where quota management is considered appropriate, quotas should be established for each management unit." The commenter continued that until such time as NMFS can determine the correct boundary lines to separate the northern and southern offshore spotted dolphin stocks, no estimate of the relative abundance of either stock can be made. Further, no reliable estimates of the ratio of the current population size to historical size can be made.

To correct these deficiencies in the data and the analysis, two commenters suggested that the comment period to respond to the petitions to list the northern spotted dolphin as threatened under the ESA [or as depleted under the Marine Mammal Protection Act], should be extended for at least 6 months. Alternatively, one commenter suggested that NMFS should determine that the petitioner failed to provide substantial information indicating that the petitioned action is warranted.

Response: The documents presented at the November 1991 SOPS workshop have subsequently received further review by NMFS. Based on these studies NMFS believes that the following changes in the stock structure for spotted dolphins in the ETP are warranted:

Previous stock structure	New stock structure
northern	northeastern.
southern	western/southern.
coastal	coastal.

The petition to list the northern offshore spotted dolphin as threatened addressed the status (abundance and fishery-induced mortality) of the northern offshore spotted dolphin using previously accepted stock structure and geographic boundaries, and not the revised boundaries for the "northeastern" offshore spotted dolphin. Section 4(b)(3)(B) of the ESA requires that, after receiving a petition found to present substantial information, the Assistant Administrator for Fisheries must make a finding within 12 months that either the petitioned action is warranted and then publish a proposed regulation to implement the petitioned action, or that the petitioned action is not warranted. The ESA has no provision which allows an extension of the 12 month period following the receipt of a petition if a proposed implementing regulation cannot be published because new information results in substantial disagreement regarding the accuracy of the available data relevant to the petitioned action. Even given the recent changes in the delineation of the stock boundaries of offshore spotted dolphins, and the potential impact that such a restructuring has on the petitioned action, NMFS cannot extend the 12 month period prior to a determination to allow for additional comments, or to allow for reanalyses of the status of offshore spotted dolphins using current geographical stock boundaries.

Furthermore, section 4(b) of the ESA requires that determinations concerning listings be made solely on the best scientific and commercial data available after conducting a review of the status of the species. As a preliminary matter, and considering recent changes in the stock structure of ETP offshore spotted dolphins, the northern offshore spotted dolphin must first fit within the definition of a "species" under the ESA before it can be considered for listing.

Determination of "Species" Status Under the ESA

Section 3(15) of the ESA defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Although this definition of "species" under the ESA is in part a legal interpretation, species and populations are biological concepts that must be defined on the basis of the best scientific data available. Based on the best available information regarding the stock structure of ETP dolphins, NMFS believes that the petitioned stock (the northern offshore spotted dolphin), which was defined by now-rejected geographic boundaries, does not fall within the definition of "species" under the ESA. Therefore, the northern offshore spotted dolphin is not eligible for listing under the ESA. The basis for this determination is provided in Dizon, Perrin and Akin (1992), and Perrin *et al.* (1991).

Determination of Listing the Northern Offshore Spotted Dolphin Under the ESA

After a thorough analysis of all information available, including information and comments received in response to the notices referenced above, and based on the best available scientific information presented at the November 1991 SOPS workshop, and published since, NMFS has determined that a proposed rule to list the northern offshore spotted dolphin as threatened under the ESA is not warranted at this time. This determination is based on the interpretation of "species" under the ESA, and not the five factors considered in section 4(A)(1) of the ESA.

Conclusion

NMFS and the IATTC are re-assessing the status of ETP offshore stocks of spotted dolphin using the redefined stock boundaries. NMFS is soliciting information and comments concerning the status of the northeastern and western/southern stocks of offshore spotted dolphin to ensure that the review is complete and based on the best scientific and commercial data available. In a previous **Federal Register** notice (57 FR 40168, Sep. 2, 1992), NMFS delayed, until February 17, 1992 (6 months from the close of the comment period on the proposed rule), issuance of a final rule on whether the northeastern stock, or the western/southern stock, of offshore spotted dolphins were depleted under the MMPA. NMFS will also accept comments and information germane to the "threatened" status of these dolphin stocks until this date.

If the current status review concludes that a listing of either population of offshore spotted dolphin as threatened is warranted under the ESA, or a listing of either population of offshore spotted dolphin as depleted is warranted under the MMPA, a proposed listing will be published in the **Federal Register**.

References

DeMaster, D. P., J. E. Sisson, L. Stevensen and S. Montgomery. 1992. Report of the third and final meeting to review progress in reducing dolphin mortality in the ETP purseseine fishery for tunas. Proc. of the workshop held November 13–14, 1991 at Long Beach, California. NOAA/NMFS/SWR Admin. Rept., July 1992. 85 pp.

Dizon, A. E., W. F. Perrin and P. A. Akin. in press. Stocks of dolphins in the (*Stenella* spp. and *Delphinus delphis*) Eastern Tropical Pacific: A phylogeographic classification. *In* DeMaster, D. P. and J. E. Sisson (Eds.), Minutes from a workshop on status of porpoise stocks in the eastern tropical Pacific, with special emphasis on the period 1985–1990. NMFS SEFSC Admin. Rept. LJ–92–21. 67 pp.

Perrin, W. F., G. D. Schnell, D. J. Hough, J. W., Gilpatrick and J. V. Kashiwada. 1991. Re-examination of geographical cranial variation in the pantropical spotted dolphin, *Stenella attenuata*, in the eastern Pacific. NMFS SWRSC Admin. Rept. LJ–91–93.

Dated: December 29, 1992.

Nancy Foster,

Acting Deputy Assistant Administrator for Fisheries.

[FR Doc. 93–41 Filed 1–6–93; 8:45 am]

BILLING CODE 3510–22–M

federal register

Thursday
January 7, 1993

Part IV

Department of the Interior

National Park Service

Final Revision of National Park Service Standard Concession Contract; Notice

DEPARTMENT OF THE INTERIOR

National Park Service

Final Revision of National Park Service Standard Concession Contract

SUMMARY: The National Park Service (NPS) authorizes private businesses known as concessioners to provide necessary and appropriate visitor facilities and services in areas of the national park system. The authorizations for larger concessions primarily are in the form of standard language NPS concession contracts. NPS has amended its standard language concession contract (hereinafter the "old standard contract") in the form of a new standard concession contract (hereinafter the "new standard contract") to clarify certain provisions and to implement certain new contract terms in the public interest. NPS will utilize this form contract as a guide in its concession contracting process but each concession contract contains terms unique to it and NPS frequently alters standard provisions as needed to implement particular contract objectives. The new standard contract is set forth below.

EFFECTIVE DATE: January 7, 1993.

FOR FURTHER INFORMATION CONTACT: Lee Davis, Chief, Concessions Division, National Park Service, Washington, D.C. 20013–7127. Tele. (202) 343–3784.

SUPPLEMENTARY INFORMATION: On September 3, 1992, NPS published for public comment in the **Federal Register** proposed amendments to the old standard concession contract. The changes were proposed to implement certain aspects of the Secretary of the Interior's reform of the NPS concessions program and otherwise to make certain needed changes to the old standard contract. (See the preamble to the proposed amendments at 57 FR 40508 for a description of the premises and objectives of the Secretary's concessions reform initiative. Interested persons should also review the preambles to both the proposed and final new NPS concession regulations (56 FR 41894 and 57 FR 40496) for further information).

NPS received 61 public comments on the proposed amendments to the old standard contract, including a number of comments from environmental organizations, individual concessioners, and, the Conference of National Park Concessioners (on behalf of its membership which includes some but not all NPS concessioners). Approximately 4% of existing concessioners individually commented on the proposal. Approximately 13% of existing concessioners with concession contracts individually commented on the proposal. The substance of these comments, as well as certain changes NPS has made in its proposal, are discussed below. Additionally, NPS has made a number of clarifying, editorial and technical changes to the new standard contract as proposed consistent with its purposes.

Section-by-Section Analysis

General Comments

Several commenters have suggested that NPS reduce the size of some of the paragraphs in the new standard contract to make it easier for readers to refer to specific contractual provisions. In response to this concern NPS has broken down some of the longer paragraphs into smaller paragraphs, and renumbered these "new" paragraphs accordingly.

A few commenters discussed issues relating to NPS concession contracting regulations which were recently amended by NPS in furtherance of the objectives of the Secretary's concession reform initiative. These issues are not further discussed here as they were the subject of public comment in the adoption of the amended regulations. The amended regulations were published in final in the **Federal Register** on September 3, 1992 (57 FR 40496).

One commenter asserted that NPS has violated applicable law in publishing the proposed changes to the old standard contract as a public notice with opportunity for comment rather than as a regulation. NPS disagrees and considers that the process used to obtain public comment on its proposed changes to the old standard contract is lawful. In fact, NPS solicited public comment on the proposed changes as a matter of policy to assure a full discussion of the issues involved. It was not required by law to do so.

Several commenters urged NPS to increase the length of concession contract terms. Others supported shorter term contracts. Neither of these views deal with the substance of the new standard contract as the term of a contract is not a matter determined by the new standard contract. However, in determining the appropriate length of a concession contract, NPS takes into account various considerations. These include the need to encourage competition for concession contracts and the level of investment required by the contract. These factors necessarily vary from contract to contract.

Whereas Clauses

The new standard contract deletes the whereas clause in the old standard contract which references the concessioner's investment and risk of loss. Some commenters objected to the removal of this clause from the contract, claiming that it serves to balance the interests of concessioners against those of the government.

NPS disagrees. The clause contains language that is too specific for a standard language contract. It concerns only those concessioners that are required to make "substantial investments of capital." Moreover, the new standard contract does retain the whereas clause that reiterates the statutory obligation of the Secretary to "exercise his authority * * * in a manner consistent with a reasonable opportunity for the Concessioner to realize a profit."

Other commenters asserted that the whereas clauses should contain some acknowledgement of NPS's duty under the Concessions Policy Act (16 U.S.C. 20 et seq.) (hereinafter the "Act") to ensure that concession development is limited to that which is "necessary and appropriate for the public use and enjoyment of the parks." NPS agrees. Consistent with the Act, NPS has added the "necessary and appropriate" phrase to a whereas clause in the new standard contract.

Section 1—Term of Contract

Some commenters opposed paragraph (b) of this section, which gives the Secretary the authority to shorten the term of the contract if the concessioner does not timely complete a building and improvement program. These commenters claimed that this provision is unfair, since many of the causes for delay in the completion of a building and improvement program are beyond a concessioner's control.

NPS recognizes that in some cases concessioners may not have total control over the performance of building and improvement programs. That is why paragraph (d) of this section allows the Secretary to relieve a concessioner from its building and improvement obligations when delays in the completion of the program are determined to be beyond the concessioner's control.

One commenter asked NPS to set up procedures through which a concessioner can ask for this type of relief. NPS believes further contract language in this regard is unnecessary as paragraph (d) details the procedure to be followed to the extent necessary for contract purposes.

Section 2—Accommodations, Facilities and Services

One commenter stated that this section should state that if an Operating Plan requirement conflicts with the contract, the contract governs. NPS believes this is unnecessary as the final sentence of this section states that "such Operating Plan shall not amend or alter the material rights and liabilities of the parties to this CONTRACT."

Some commenters opposed the elimination from this section of the optional "preferential right to additional services" provision. They contended, essentially, that inclusion of this provision is necessary because it gives NPS greater control over concessions operations and serves to lessen the impact that concession operations have on park resources.

NPS disagrees with these arguments. NPS has full authority to strictly monitor concession operations and does not need this provision to achieve these purposes. The provision may be included in concession contracts where it is determined in a particular circumstance to be in the public interest. The provision was deleted because in the experience of NPS it served to impede fair competition in concession contracting.

One commenter stated that Operating Plans should include the requirement that concessioners use state-of-the-art environmental technology. NPS disagrees. NPS has adequate authority to require concessioners to adopt new technology as appropriate without including a specific contract term to this effect.

Section 3—Plant, Personnel and Rates

The new standard contract omits the following sentence from the old standard contract: "The Secretary shall exercise his decision making authority with respect to the concessioner's rates and prices in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on its operations hereunder as a whole commensurate with the capital invested and the obligations assumed."

Some commenters objected to the removal of this sentence as they consider it an appropriate limitation to place on the NPS rate approval process. However, NPS considers that the sentence distorts the meaning of the Act as Section 3(c) of the Act requires rates to be judged "primarily by comparison with those current for facilities and services of comparable character under similar conditions." The new standard contract does include a whereas clause which appropriately reflects NPS statutory responsibilities with respect to a concessioner's reasonable opportunity for profit.

One commenter suggested that the contract should prohibit concessioners from providing complimentary goods or services to government officials. NPS disagrees. This type of prohibition is more properly the subject of law or regulation independent of the concession contract. NPS, in this connection, has several requirements limiting NPS officials from accepting benefits from concessioners or other contractors.

One commenter suggested that the contract should give park superintendents "the right to direct the concessioner to dismiss any concessioner employee whose actions or judgements have proven to be inimical to the proper and lawful operation of the park or safety of visitors". NPS considers that termination of concession employment is the responsibility of the concessioner, not the NPS. However, NPS, under Section 3(b)(2) of the new standard contract, does have the ability to bring such circumstances to the attention of the concessioner for appropriate action to be taken.

One commenter contended that the new standard contract improperly describes the requirements of the Rehabilitation Act of 1973. The description of the meaning of this law has been deleted from the new standard contract to avoid any confusion in this regard.

Additionally, NPS has added language to this section to clarify that by agreeing to the concession contract, the concessioner acknowledges that its terms provide the concessioner with a reasonable opportunity for profit.

Section 4—Government Land and Improvements

One commenter considered that this section should require a specific listing of government improvements. NPS agrees. Exhibits B and C to the contract, as referenced in this section, list the parcels of land and government improvements that are assigned to the concessioner under the contract.

Section 5—Maintenance

One commenter was concerned that NPS may require concessioners to undertake major repairs under this section without providing the concessioner with any corresponding consideration. However, the first sentence of this section provides that its requirements are subject to section 4(e) of the contract. Section 4(e) requires concessioner repair expenditures to be consistent with a reasonable opportunity for a concessioner to realize a profit on its operations.

Section 7—Utilities

This section provides that if NPS is unable to provide the concessioner with utilities, the concessioner shall secure utilities at its own expense. Several commenters stated that this provision is unfair because it places a new burden—the expense of securing utilities—on concessioners. NPS disagrees with these comments. This section is substantially similar to the "Utilities" section of the old standard contract which also does not require NPS to provide utilities to the concessioner.

Several commenters opposed the requirement that upon contract termination concessioners must assign to the United States, without further compensation, any water rights they have acquired under the contract. However, the water rights relate to NPS land and are needed to fulfill NPS purposes. The concessioner obtains no permanent interest in the right under the new standard contract as a condition of the contract.

One commenter asked NPS to clarify the kinds of utility costs it will charge concessioners under this section. However, the scope of utility costs to be charged concessioners under this provision is a matter of NPS policy independent of the new standard contract.

Section 8—Accounting Records and Reports

One commenter stated that this section should require the concessioner to provide NPS with a list of the members of its Board of Directors, as well as the names and addresses of all owners and part-owners of the concession. NPS currently accomplishes this to the extent appropriate by requiring businesses to provide this information when they submit an offer for a concession contract.

NPS, in response to a comment, has amended this section to clarify that the concessioner's system of account classification must be directly related to the Concessioner Annual Financial Report form prescribed by the Secretary. Further, NPS has added a sentence to paragraph (a) of this section to clarify that concessioners earning less than $250,000 may submit financial statements that have been prepared without the involvement of an independent certified, or licensed public accountant, unless otherwise determined by the Secretary. In addition, NPS has added to this paragraph the clarifying requirement that concessioners which must have

their annual financial statements audited or reviewed are to use the accrual accounting method and include in their statements a footnote that reconciles their financial statements to their Federal income tax returns.

Section 9—Fees

Paragraph (a)(1) of this section as proposed provides that building use fees shall be adjusted annually by the Secretary to equal the fair annual value of government improvements assigned to the concessioner. Several commenters stated that it is unfair to adjust building use fees every year. NPS disagrees. This section merely requires building use fees to be reviewed annually to determine that they continue to reflect the fair annual value of park buildings. If the value has not changed, no amendments to the fees will be made. The word "shall" has been changed to "may" in the final document to reflect this intent.

One commenter stated that NPS should take into account maintenance and capital improvement obligations when setting building use fees. This is present NPS policy.

One commenter stated that franchise fees should not be reconsidered on a more frequent basis than every five years. NPS disagrees. The level of franchise fee is based on NPS's determination of the probable value of the privileges granted by the contract. As a concession operation's financial circumstances change over time, so does the probable value of the contract privileges. NPS believes that under many contracts a five year interval between fee reconsiderations is appropriate, as it is unlikely that the probable value of these contracts will dramatically change prior to the end of this five year period. Under other contracts, however, the probable value could change a great deal in two or three years, thereby warranting reconsideration. NPS notes that the reconsideration provision is a two way street. Fees may go down as well as up under its terms.

The proposed new standard contract also stated that fees "may" be reconsidered. One commenter suggested that the term "may" should be changed to "shall" since the Act requires the reconsideration of franchise fees. NPS agrees with this comment. The language in this section has been changed to provide that fees shall be reconsidered at the time intervals set forth in the contract. In reconsidering fees, however, NPS will not seek to adjust a fee that continues to reflect the probable value of a particular concession contract.

This section also provides that receipts from the sale of genuine United States Indian and native handicraft are excluded from NPS franchise fee calculations. A few commenters objected to this exclusion, which has been included in concession contracts for many years, claiming that it is no longer necessary to stimulate the sale of Indian and native handicraft. NPS disagrees with these objections. It considers that this exclusion continues to represent sound public policy.

Section 9(e) of the contract provides for advisory arbitration to resolve fee reconsideration disputes. One commenter objected to the advisory nature of this procedure. As a matter of law, however, NPS cannot allow itself to be party to a binding arbitration proceeding.

NPS, however, has clarified and made more specific the dispute resolution procedure of Section 9(e). First, instead of referring to this procedure as an "advisory arbitration", the new language refers to it as a "mediation" and includes appropriate procedural requirements in this regard. The term "mediation" is a better description of the process involved in this section, as the goal of the process is to advise, rather than bind, the Secretary. Second, to the mutual benefit of the government and concessioners, the time deadlines of this section have been streamlined to expedite the reconsideration process.

Section 10—Accounts

This section authorizes as optional provisions two types of accounts for building and improvement programs. The optional section 10(a) requires the concessioner to remit funds into a "Government Improvement Account" in consideration of the right to use and occupy government-owned buildings. The concessioner accesses this account to fund the repairs and improvements of government improvements which directly support concession services.

Optional section 10(b) requires the concessioner to remit a portion of its revenues into a "Capital Account" as partial consideration for the privileges granted under the contract. The concessioner accesses this account to fund improvements which directly support concession services.

Several commenters claimed that this section violates the Act's requirement that concessioners receive possessory interest for the improvements they make to structures on park lands as improvements funded from the accounts are not eligible for possessory interest. NPS disagrees with this contention for the reasons discussed below in connection with the general discussion of possessory interest.

For a variety of reasons, several commenters objected to using the National Park Foundation as a trustee for the funds concessioners deposit in the Section 10 accounts. NPS has eliminated this role for the National Park Foundation from the new standard contract.

Other commenters urged that Section 10 account funds should not be restricted to funding only improvements that directly support concession services. They asked that NPS make these funds available for resource protection, interpretation, research, and other park purposes. NPS, however, is required by law to restrict the use of these funds to improvements that directly support concession operations.

Another commenter suggested that NPS further define the term "routine operational maintenance." NPS disagrees with this suggestion. What is routine maintenance in one park may not be routine in another. The Maintenance Agreement allows for appropriate definition of these requirements on a case-by-case basis.

Section 11—Bond and Lien

One commenter stated that while he supports the general thrust of this provision, he would prefer it to include a "financial penalty clause" which would impose financial penalties on a party for failing to comply with the contract. NPS is presently studying this suggestion for possible future implementation.

Section 12—Termination

The terms of the new standard contract clarify the Secretary's authority to terminate or suspend operations under a concession contract. Several commenters stated that they support the general thrust of this clarification to the authority contained in the old standard contract.

Section 13—Compensation

The aspect of the new standard contract most criticized by the NPS concessioners that submitted comments is its amendment to the measure of compensation due a concessioner for possessory interest. (As noted, approximately 4% of concessioners individually commented and approximately 13% of contract concessioners commented.) The amendment, however, was supported strongly by the environmental groups which submitted comments.

The general objective of the amendment is to change, in certain circumstances, the compensation

standard for a concessioner's possessory interest in improvements it constructs from one based on the appreciated value of the improvements to our based on the actual cost to a concessioner of constructing an improvement, less depreciation. The fundamental reason for this change is to eliminate from concession contracts in the public interest an unnecessary and otherwise detrimental liability for payment of compensation to concessioners.

"Possessory interest" is the legal term for the compensable interest in real property a concessioner obtains pursuant to a concession contract when it makes capital improvements on park lands or to government buildings. Under the old standard contract, a concessioner is entitled to receive compensation for possessory interest in capital improvements it makes either in the amount of the "sound value" of the improvement or the book value of the improvement, depending on the circumstances. Sound value (referred to hereinafter as "sound value compensation") is defined generally as "reconstruction cost less depreciation," but, "not to exceed fair market value." Sound value, in effect, provides the concessioner compensation for the appreciated value of its buildings as the compensation is based on either the reconstruction cost or fair market value of a building, calculated as of the time it is transferred by a concessioner, not as of the time of construction.

The major difference in possessory interest compensation between the old and the new standard contract is that the new standard contract generally provides for a redefined "fair value" possessory interest compensation instead of sound value. (The new standard contract also changes book value to fair value in most circumstances but this is a technical change for consistency purposes as fair value, except for possible differences in depreciation schedules, generally equates to book value.)

Fair value compensation is redefined in the new standard contract as the "original construction cost of the improvement less straight line depreciation over the estimated useful life of the improvement according to Generally Accepted Accounting Principles." For NPS purposes, such useful life is not to exceed thirty years. Fair value compensation under the new standard contract provides the concessioner compensation for the improvements it makes at actual cost less depreciation, but, unlike sound value compensation, does not provide compensation for the appreciated value of concessioner improvements.

The NPS concessioners which commented individually and the Conference of National Park Concessioners objected to this amendment, contending that replacing sound value compensation with fair value compensation is detrimental and not authorized by the Act. NPS, however, after thorough examination of these views, continues to consider that the change to fair value compensation in the new standard contract is in the public interest and authorized by law. Particularly, NPS considers that the sound value possessory interest compensation provision contained in the old standard contract is no longer a prudent term to include in concession contracts for a variety of reasons, as follows: (1) Sound value compensation is an unnecessary financial liability borne directly or indirectly by the government; (2) sound value compensation inhibits fair competition in the award of concession contracts; and, (3) sound value compensation impairs the ability of NPS to undertake changes in the location and uses of concession facilities otherwise required for the preservation of park resources and their enjoyment by park visitors.

Unnecessary Financial Incentive

As stated, sound value compensation provides a concessioner with compensation for the appreciated value of the improvements it constructs in a park area. Sound value compensation, accordingly, is likely always to be a higher level of compensation than fair value as contained in the new standard contract. Depending on the circumstances under the old standard contract, either NPS or a successor concessioner has the liability to pay the concessioner sound value compensation. For example, NPS must pay sound value compensation if it requires the concessioner to remove and replace an existing facility in which it has a possessory interest, and, a successor concessioner must pay sound value compensation to the previous concessioner as a condition of receiving a concession contract which replaces one containing sound value compensation. Currently, almost all major NPS concession contracts contain sound value possessory interest provisions.

Provisions for sound value possessory interest compensation, accordingly, place direct or indirect financial burdens on the government. As such, as a matter of fiscal prudence and sound contract administration, they should be contained in concession contracts only if necessary in order to attract qualified concessioners or if they otherwise provide offsetting benefits to the government. NPS considers sound value compensation is not necessary to attract qualified concessioners for the reasons discussed below. Also, as discussed below, NPS considers that sound value compensation, rather than providing offsetting benefits to the government, has detrimental consequences to NPS.

Sound value compensation, in the abstract, is attractive to business persons as they may be expected to seek appreciation in the value of improvements they make. Based on its experience, however, NPS considers that many business persons interested in concession contracts look to the return they expect to make on the revenues of a concession operation over the term of the contract in deciding whether an investment should be made. The possibility of selling buildings at their appreciated value at the expiration of a contract is not as significant a factor. In fact, even under the old standard contract, there is no assurance that the concessioner will receive sound value compensation upon contract expiration or otherwise. For example, under the old standard contract, if the concession operation is to be discontinued upon contract expiration, the concessioner is entitled only to book value compensation.

For these reasons, NPS now does not consider that sound value compensation is needed in order to attract qualified concessioners. A prospective concessioner, of course, does seek to be assured that it will be able to recover the investment it makes in concession buildings. The fair value compensation provision included in the new standard contract achieves this objective. NPS also appreciates that continuity in concession operators is of benefit to NPS and park visitors. In certain circumstances, sound value compensation may encourage continuity in operations. However, the Act contains a specific provision to achieve this objective (the preference in renewal for existing satisfactory concessioners) and NPS considers that the detrimental aspects of sound value compensation as discussed below outweigh any benefit it may provide with respect to continuity of operations.

NPS also notes that, in its experience, lenders generally do not make decisions on loans to concessioners for construction of buildings or otherwise based on an expectation that a concessioner's buildings will appreciate in value due to increased building costs or other external market forces. Rather, lenders generally make concession loans based on an estimate that the net revenues of the business will be

sufficient to repay the loan. Possessory interest in a concession building to be constructed with borrowed funds is used as security for a loan, but, the estimated value of this security generally is based on construction cost, not on an assumption that the value of the concession building will appreciate. In this regard, as discussed above, there is, in fact, no assurance of possessory interest compensation at sound value under the old standard contract. Book value is all that is assured. Lenders presumably are aware of the terms of the old standard contract in this respect and yet frequently make loans to concessioners.

NPS considers that the fair value compensation provisions included in the new standard contract will be more than a sufficient level of compensation to attract qualified concessioners and to induce lenders to make loans to concessioners. The fair value compensation in the new concession contract is, as a practical matter, almost the functional equivalent of a government guarantee that a lender will receive security in an improvement based on actual construction cost less specified depreciation. This may be considered as better security than is obtainable in usual business circumstances as the security provided, although it has a fixed maximum amount, concomitantly has a fixed minimum amount as well. In fact, in terms of potential down-side, it may be considered as better security than sound value possessory interest compensation.

In this connection, NPS notes its recent award of a new concession contract for hotel and other facilities at Yosemite National Park, the largest concession operation in the national park system with the largest sound value possessory interest in the system. NPS, through a public solicitation under which six companies made competitive offers, was able to select a qualified new concessioner for the operations that has agreed to amortize the existing sound value compensation of the former concessioner (worth multiple millions of dollars) over a fifteen year period, and, in addition, to invest over $100 million dollars in new concession facilities. The contract does not contain sound value compensation provisions, but, rather, consistent with the new standard contract, provides fair value compensation for improvements constructed with concessioner funds and for no possessory interest in improvements constructed with funds from what are the equivalent of the new standard contract's Section 10 accounts.

NPS concessioners that commented on the new standard contract generally argued that sound value possessory interest compensation is needed in order to attract qualified concessioners. NPS disagrees for the reasons discussed above and points out that it will soon find out whether the terms of the new concession contract are such that qualified businesses generally will accept the new standard contract for park concession operations. If this does not prove to be the case, NPS will alter the new standard contract on a case-by-case basis or generally to the extent needed to procure qualified concessioners. The "marketplace" ultimately will determine the validity of the financial assumptions of the new standard contract.

Comments from concessioners also take the position that concessioners are entitled to sound value compensation under what may be characterized as the principles of free enterprise. This position is based on the proposition that in free enterprise a business person is able to sell a building it constructs for its appreciated value. However, the NPS concession contract program is hardly a free enterprise model. In fact, it contains several features benefiting existing concessioners that are not to be found in a free enterprise system, e.g., the statutory preference in renewal and the effective monopolies exercised by many concession operations with substantial possessory interest. In any event, however, the concept of fair value compensation is very much a "free enterprise" concept. Landlords in the private sector, when leasing property upon which a tenant is to make improvements, for good business reasons seek to include lease provisions that require improvements made by tenants to belong to the landlord upon lease expiration. This "free enterprise" practice is mirrored by the fair value compensation provisions of the new standard contract.

Finally, concessioners argued that the absence of sound value compensation will discourage concessioners from maintaining their buildings as they will no longer be compensated for buildings based in part on their physical condition. There is some logic to this argument, but, it boils down to the proposition that a purpose of sound value compensation is to induce concessioners to maintain their buildings properly. However, such inducement should not be needed as this obligation is otherwise contained in the concession contract, and, moreover, is a matter of good business practice if the concessioner wishes to please its customers and retain its preference in contract renewal as a satisfactory concessioner. NPS will rely on the terms of the contract and the good business sense of its concessioners to assure that concession buildings are properly maintained.

Impairing Fair Competition

Another reason to replace sound value possessory interest compensation is its negative impact on fair competition in concession contracting. By "fair" in this sense, NPS means competition for concession contract renewals under a process which encourages continuity of operations through an existing satisfactory concessioner's right of preference, but, also, which allows a competitor a reasonable opportunity to make and be awarded an offer advantageous to NPS. A balance of these interests is required under the Act. The problem presented by sound value compensation in this regard is that a prospective concessioner seeking to be awarded a contract for an existing concession operation (with a possessory interest) under the present contracting system, is, as a practical matter, required to offer to "buy a pig in a poke" when applying for the contract. This is because sound value compensation, based as it is on the estimated cost to reconstruct a building (or a building's fair market value, whichever is less), is always an unknown dollar amount until the completion of engineering studies and appraisals, and, if necessary, completion of a negotiation or binding arbitration to reconcile differing appraisals. NPS, under the terms of the old standard contract, requires a prospective new concessioner to agree to compensate the existing concessioner for applicable possessory interest at sound value, but, the prospective concessioner does not know at the time it must make this commitment what the amount will eventually turn out to be. Binding arbitration determines the final value.

Needless to say, few business persons submit offers for concession contracts in these circumstances. In fact, to the best of the institutional memory of NPS, a new concessioner has never, either before or after the passage of the Act in 1965, been awarded a concession contract in the place of an existing concessioner which sought contract renewal and had substantial possessory interest assets at the sound value level of compensation. For the most part, NPS does not receive competing offers at all, but, even if received, a competing offer may be expected to be conservative with respect to financial terms of importance to NPS in light of the unknown possessory interest purchase price the offeror faces. The incumbent concessioner, of course, is able to

submit a more favorable offer as it does not have to pay the sound value compensation or estimate the actual dollar amount.

The key elements of the Secretary's reform initiative with respect to enhancing competition in concession contracting are the amendment of NPS concession regulations, accomplished as of October 3, 1992, and the implementation of the new standard contract. Under the new regulations, it is made clear that an incumbent satisfactory concessioner is entitled to a right to meet the terms of a better offer received, but, is also required to be responsive to the contract terms as proposed by NPS. Under the new standard contract, a prospective concessioner will know in advance its liability to the incumbent concessioner for possessory interest compensation. NPS, accordingly, expects to receive more competing offers under the new regulations and new standard contract, and, expects to receive more favorable competing offers, to the ultimate benefit of the national park system.

NPS considers that the new regulations and the change to fair value compensation achieve a proper balance between the desirability of encouraging continuity of operations and the desirability of fair competition. As discussed below, satisfactory incumbent concessioners will still have substantial advantages over competitors in the award of a new concession contract but, the competitive process should no longer be a "rubber stamp" exercise.

Resource Preservation

A more subtle but very serious consequence of sound value compensation is the fact that it tends to impede the ability of NPS to make necessary changes in the types and locations of concession facilities in park areas as visitor needs and resource concerns change over time. Under sound value compensation, if NPS wishes to have a concessioner relocate a concession facility (an objective that occurs frequently in light of the prime resource locations of many major concession facilities constructed decades ago), NPS must obtain and pay the concessioner compensation in the amount of the sound value of the structures to be removed. Such compensation can be a very large and increasing sum of money, effectively making difficult or impossible what otherwise may be a necessary step in the preservation of the resources of a park area. NPS, of course, can seek to obtain appropriated funds to provide the required compensation, but, the reality of budget priorities is that funds simply are not available for all the situations where they may be needed. The shift to fair value compensation and consequent reduction in possessory interest liabilities over time will assist significantly the ability of NPS to carry out its primary mission, the preservation of park resources for their enjoyment by visitors. NPS points out that its concern with sound value possessory interest in this regard is not meant to be a criticism of NPS concessioners, most of which fully share and assist in achieving NPS resource management goals, but, merely reflects economic reality.

These are the reasons why NPS has adopted fair value compensation in the new concession contract. The proposal was supported strongly by environmental groups that commented on the proposal. However, the NPS concessioners that commented, in addition to the business concerns they expressed as discussed above, also argued that the fair value compensation provision in the new standard contract is not authorized by the Act (or, even, that it is unconstitutional as a taking of property without just compensation). NPS has reviewed these positions carefully and disagrees with them.

The general position of the concessioners which asserted a lack of legal authority for the fair value compensation provisions of the new standard contract is their view that the Act in Section 6 "requires" that compensation for possessory interest be at sound value. However, this view overlooks the fact that the Act states that compensation for possessory interest is to be at sound value "unless otherwise agreed by the parties." NPS, of course, cannot enter into a concession contract containing the fair value compensation provision unless the concessioner signing the contract also agrees to it. NPS, however, does acknowledge that the Congress, in deliberating upon the legislation which led to the Act, considered, as a matter of factual expectation, not law, that NPS would continue to include sound value compensation provisions in concession contracts, in part because of the perception of the Congress in 1965 that sound value compensation would be necessary in order to attract investment in concession operations by qualified concessioners. This perception may have been accurate in 1965, but is not considered by NPS to be the case today as discussed above. As stated, NPS considers that it will have no general difficulty in attracting qualified concessioners under the terms of the new concession contract. If it does, it will revert to sound value compensation as necessary.

In this regard, the legislative history of the Act specifically acknowledges in a number of places the continuing authority of NPS (under the "unless otherwise agreed by the parties" phrase of Section 6 of the Act and otherwise) to include possessory interest compensation in concession contracts at other than sound value. For example, Congressman Aspinall, a principal author of the legislation which became the Act, stated as follows in House floor debate (as a rebuttal to a colleague's criticism of sound value compensation):

> The Secretary is free [under Section 6] both to require the concessioner to waive any possessory interest he might otherwise have in this sort of improvement [concessioner improvements] and to adapt the valuation formula to suit the circumstances of such improvement as sees fit. (Congressional Record, September 14, 1965 at p. 22787.)

In addition to its clear authority under the Act of contract for possessory interest compensation at other than sound value, NPS also points out that there is nothing new about a provision for less than sound value possessory interest compensation in NPS concession contracts. In fact, each and every NPS concession contract entered into since passage of the Act in 1965 (with possessory interest provisions) has contained terms which limit possessory interest compensation to less than sound value in certain circumstances. For example, it has always been NPS policy under the Act and the old standard contract to provide book value compensation when a concession facility is no longer used for concession operations. In addition, NPS implemented, shortly after passage of the Act, a policy still reflected in both the old and the new standard contracts, to the effect that possessory interest compensation in government buildings improved by a concessioner is at book value. This latter policy was adopted formally in 1979 after public notice and opportunity for comment on the then new standard language concession contract.

In short, the commenters cannot reconcile their position that the Act does not authorize anything but sound value compensation with the administrative practice of NPS under the Act. In this connection, NPS also notes that all concession contracts grossing more than $100,000 are required to be submitted to Congress for a sixty day period prior to execution. In order for the commenters' to sustain the validity of their legal position, they would have to argue that Congress has chosen to ignore the fact that each and

every concession contract submitted to the Congress since 1965 (with possessory interest provisions) is illegal under the Act.

One commenter did acknowledge the "unless otherwise agreed to by the parties" phrase of section 6 of the Act. The commenter, however, tried to explain this phrase away by arguing that the phrase means that a potential concessioner for a new concession contract has a right to agree or disagree "in advance" to a contract which does not contain sound value compensation. The Act, of course, simply does not read this way. Further, it is self-evident that no one is required to apply for an NPS concession contract if he or she disagrees with the terms of the contract. In fact, it appears that this "advance agreement" legal argument, if carried to its logical conclusion, would mean that a third party somehow has a right to veto the inclusion of a less than sound value compensation provision in a concession contract which otherwise has been agreed to by both parties to the contract, NPS and the selected concessioner. NPS does not believe that the Act can be read to achieve this anomalous result.

Although NPS considers that it has legal authority to adopt the fair value compensation provision, it does not seek to deprive existing concessioners which are entitled to sound value compensation the full measure of compensation due under existing contracts or to deprive existing concessioners of a fair opportunity to apply for a new contract. In this regard, NPS will include in each concession solicitation utilizing the new standard contract its estimate, where applicable, of the value of an existing concessioner's possessory interest and require the successful applicant (if it is not the existing concessioner) to pay the existing concessioner all possessory interest compensation (including sound value and book value, as applicable) and other compensation due the existing concessioner under the expired contract. If the existing concessioner chooses to seek to continue its operations under the new contract, it will be entitled to apply for the new contract containing the fair value compensation provision, and, if it is a satisfactory concessioner, it will have a right of preference in the new contract in accordance with the Act and 36 CFR part 51.

In either circumstance, the specific amount of money to be included in the new contract with respect to existing sound value possessory interest will be calculated in accordance with the terms of the expired contract. If this amount should change as a result of a required arbitration or otherwise, NPS will make appropriate adjustments to the terms of the new contract to reflect the adjusted actual dollar value of the existing sound value compensation.

Existing concessioners may argue that it is not within the authority of NPS to propose a contract which, in effect, requires an incumbent concessioner to amortize its sound value possessory interest under its terms. NPS, however, has carefully considered this argument and considers it to be unpersuasive. In the first instance, although an existing satisfactory concessioner has a right of preference to a new contract, this right does not extend to setting the terms of a new contract with respect to possessory interest compensation or otherwise. NPS has the statutory responsibility to establish such terms in fulfillment of its obligations to preserve areas of the national park system and to provide for their enjoyment by park visitors.

In any event, however, an existing concessioner in fact has the choice under the new standard contract either to agree to the terms of the new contract as offered equally to all applicants, or, to obtain immediately the full compensation which is due under the expired contract. In this regard, NPS points out that the overall financial benefits of a new concession contract, will be, as a matter of business necessity, at least equal to the compensation due an incumbent concessioner under an expired contract, or else, no one, including the incumbent concessioner, will make a responsive offer for the new contract. NPS, to this end, will take into account in its internal decisions regarding proposed contract terms (e.g., building programs, term, franchise fees, etc.) the economic consequences of amortizing existing sound value possessory interest as required by the new standard contract. A new concessioner will not offer to pay the existing concessioner the sound value and other compensation due under the expired contract and thereafter amortize this expense as required by the new standard contract unless the terms of the new contract are considered attractive enough to warrant such payments as a matter of business judgment. In fact, the incumbent concessioner has substantial advantages over competitors in this regard because the incumbent is not required to pay cash up front for the sound value compensation (as is a new concessioner), and, the incumbent will have a better estimate of the value of the new contract because of its detailed knowledge of past expenses and revenues.

An example of this is as follows. If an existing concessioner has sound value possessory interest in the amount of $1,000,000, a fifteen year new contract proposal would state that compensation for this existing possessory interest is initially set at $1,000,000 and will decrease by one thirtieth each year of the contract. If a new concessioner is awarded this contract, it would be required to pay the existing concessioner the $1,000,000 up front (in accordance with the expired contract) and would then amortize this payment under the terms of the new contract. If an existing concessioner is awarded the contract, this amount likewise would be amortized under the terms of the new contract. At the expiration of the fifteen year contract, accordingly, one-half of the initial amount would be due the concessioner if it is not awarded a subsequent new contract. Under a subsequent new fifteen year contract, the concessioner thereunder would amortize the balance of the initial $1,000,000.

In summary, under the new standard contract, an incumbent concessioner with existing sound value possessory interest either may obtain immediate full payment for this interest, or, may seek to enter into a new concession contract which is intended through its terms to compensate the concessioner, whether a new concessioner or the existing concessioner, for the amortization of the existing possessory interest and provide, taking the amortization into account, a reasonable opportunity for profit. The existing concessioner is given the choice in this regard, and, the liability of the government thereafter to pay sound value compensation (and related detrimental consequences) is eliminated as required in the public interest.

Several commenters also questioned the validity of the optional Section 10 account provisions of the new standard contract which do not provide possessory interest in improvements constructed with funds from Section 10 accounts. As a legal matter, the Act allows for the assignment, transfer or extinguishment of possessory interest and thus the section 10 provision is lawful for the same reasons as discussed above with respect to fair value compensation. NPS also notes that commenters generally accepted the fairness of this Section 10 account limitation with respect to possessory interest. In fact, the provision is of economic benefit to concessioners as they will profit from the use of improvements constructed with funds

from the accounts which otherwise may be an expense to the concessioner under the contract (e.g., increased franchise or building use fees) without corresponding benefit.

NPS finally notes in connection with section 13 that it received a comment which stated that section 13(d) is confusing because it appears that it merely restates Section 13(d). In this regard, section 13(f) is included in the new standard contract by NPS pursuant to statutory requirements. However, section 13(d) has been modified to be consistent with the intentions of the fair value provisions of the new standard contract and statutory requirements.

Section 14—Assignment or Sale of Interests

Several commenters asserted generally that section 14 is contrary to the principles of free enterprise, as it restricts a concessioner's ability to sell its business. NPS disagrees. This provision properly allows NPS to carry out its duty of ensuring that assignees of concessions contracts are capable of conforming to NPS's policies and procedures and that the terms of a concession contract, upon transfer, will continue to reflect the probable value of the privileges granted by the contract so that the interests of the government are protected. The fundamental premise of Section 14, as reflected in both the old and new standard contracts, is that there is no inherent right to assign or sell to a third party the rights and obligations of a government contract. This concept is not new. It has been in effect since well before the passage of the 1965 Act. Section 14 as proposed has been amended to reflect the related requirements of 36 CFR part 51.

One commenter stated that NPS approval of a sale or transfer should not be unreasonably withheld. This is present NPS policy, and does not change under the new standard contract.

Section 15—Approval of Subconcession Contracts

One commenter objected to this section, claiming that the Act does not allow subconcessioners to operate concession facilities and services. NPS believes that the Act authorizes subconcessioners, and, although NPS generally discourages subconcessioners, it has allowed their operation in certain circumstances for many years.

Section 17—Procurement of Goods, Equipment and Services

One commenter urged that this section specify that if NPS determines that a diversion or concealment of profits has occurred, the concessioner is to be terminated immediately. NPS disagrees with this suggestion. All diversions or concealments are not alike. Those that are unintentional or of a minor nature may not warrant immediate termination. Others, however, may deserve this action. For this reason, NPS needs the flexibility in the language of this section to take whatever action may be appropriate in these circumstances.

The Former "Disputes" Section

Several commenters objected to the removal of the "Disputes" section from the old standard contract. They considered, essentially, that this section is necessary to protect the rights of concessioners. NPS disagrees. The "Disputes" Section was deleted from the contract because independent statutory provisions now achieve the purposes of the Disputes clause.

NPS has determined that this document is categorically excluded from the NEPA process pursuant to applicable Departmental and NPS guidelines. NPS, in light of comments received regarding the fair value compensation provision, also reviewed this document in connection with the policies and criteria of Executive Order No. 12630 and has determined, for the reasons discussed above, that this document is consistent with applicable provisions of the Executive order.

Dated: December 30, 1992.

James M. Ridenour,

Director, National Park Service.

Standard Language To Be Used, Where Applicable in Concession Contracts

United States Department of the Interior, National Park Service

_____

(Name of Concessioner)

_____

(Name of Area)

Contract No. _____
Executed _____
Covering the Period _____
Through _____

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EXHIBITS

Exhibit "A": Nondiscrimination
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Corporation

THIS CONTRACT made and entered into by and between the United States of America, acting in this matter by the Secretary of the Interior, through the Director of the National Park Service, hereinafter referred to as the "Secretary," and _____, a corporation organized and existing under the laws of the State of _____doing business as _____hereinafter referred to as the "Concessioner":

Partnership

THIS CONTRACT made and entered into by and between the United States of America, acting in this matter by the Secretary of the Interior, through the Director of the National Park Service, hereinafter referred to as the "Secretary", and _____of _____, _____, and _____of _____, partners, doing business as _____, pursuant to a partnership agreement dated _____, with the principal place of business at _____, hereinafter referred to as the "Concessioner":

Sole Proprietorship

THIS CONTRACT made and entered into by and between the United States of America, acting in this matter by the Secretary of the Interior, through the Director of the National Park Service, hereinafter referred to as the "Secretary," and _____, an

individual of _____, doing business as _____, hereinafter referred to as the "Concessioner"

Witnesseth

That whereas, *(Name of Park, Recreation Area, etc.)* (hereinafter referred to as the "Area") is administered by the Secretary to conserve the scenery and the natural and historic objects and the wildlife therein, and to provide for the public enjoyment of the same in such manner as will leave such area unimpaired for the enjoyment of future generations; and

Whereas, the accomplishment of these purposes requires that facilities and services that have been determined to be necessary and appropriate for the public use and enjoyment of the area be provided for the public visiting the area; and

Whereas, the United States has not itself provided such necessary facilities and services and desires the Concessioner to establish and operate certain of them at reasonable rates under the supervision and regulation of the Secretary; and

Whereas, pursuant to law the Secretary is required to exercise his authority hereunder in a manner consistent with a reasonable opportunity by the Concessioner to realize a profit on the operations conducted hereunder as a whole commensurate with the capital invested and the obligations assumed:

Now, Therefore, pursuant to the authority contained in the Acts of August 25, 1916 (39 Stat. 535; 16 U.S.C. 1, 2–4), and October 9, 1965 (79 Stat. 969; 16 U.S.C. 20 et seq.), and other laws supplemental thereto and amendatory thereof, the Secretary and the Concessioner agree as follows:

Sec. 1. Term of Contract (a) This Contract shall [supersede and cancel Contract No. _____ effective upon the close of business _____ 19_____, and shall][1] be for the term of _____ (_____) years from _____, 19_____,[2] [conditioned upon the Concessioner's completion of the improvement and building program set forth in subsection (b) hereof. In the event the Concessioner fails to complete this program to the satisfaction of the Secretary within the time allotted therefor, then this Contract shall be for the term of _____ (_____) years from _____.]

(b)[3] The Concessioner shall undertake and complete an improvement and building program (hereinafter "Improvement Program") costing not less than $_____ as adjusted per project to reflect par value in the year of actual construction in accordance with the appropriate indexes of the Department of Commerce's "Construction Review." It is agreed that such investment is consistent with Section 3(a) hereof. The Improvement Program shall include:

(Provide detailed description of the Improvement Program.)

(c) The Concessioner shall commence construction under the Improvement Program on or before _____ in such a manner as to demonstrate to the satisfaction of the Secretary that it is in good faith carrying the Improvement Program forward reasonably under the circumstances. After written approval of plans and specifications, the Concessioner shall provide the Secretary with such evidence or documentation, as may be satisfactory to the Secretary, to demonstrate that the Improvement Program duly is being carried forward, and shall complete and have the improvements and buildings available for public use on or before _____.

(d) The Concessioner may, in the discretion of the Secretary, be relieved in whole or in part of any or all of the obligations of the Improvement Program for such stated periods as the Secretary may deem proper upon written application by the Concessioner showing circumstances beyond its control warranting such relief.

(e) In addition to the Improvement Program described above, the Concessioner shall accomplish such additional improvement projects as may be funded from the account(s) established in Section 10 hereof.

Sec. 2. Accommodations, Facilities and Services (a) The Secretary hereby requires and authorizes the Concessioner during the term of this Contract to provide accommodations, facilities and services for the public within the Area, as follows:

(Provided detailed description of services which are required and/or only authorized to be undertaken. Broad generalizations such as "any and all facilities and services customary in such operations" or "such additional facilities and services as may be required" are not to be used. A provision stating "The Concessioner may provide services incidental to the operations authorized hereunder at the request of the Secretary" is acceptable.)

(b) The Secretary reserves the right to determine and control the nature, type and quality of the merchandise and services described herein to be sold or furnished by the Concessioner within the Area.

(c) This Contract and the administration of it by the Secretary shall be subject to the law of Congress governing the Area and rules, regulations and policies promulgated thereunder, whether now in force or hereafter enacted or promulgated, including but not limited to United States Public Health Service requirements. The Concessioner must also comply with applicable requirements promulgated by the United States Department of Labor's Occupational Safety and Health Act of 1970 (OSHA) and those provisions outlined in the National Park Service's Safety and Occupational Health Policy associated with visitor safety and health.

(d) In order to implement these requirements the Secretary, acting through the Superintendent and in consultation with the Concessioner, shall establish and revise as circumstances warrant, specific operating requirements in the form of an Operating Plan which shall be adhered to by the Concessioner. The Operating Plan established by the Superintendent shall not amend or alter the material rights and liabilities of the parties to this Contract.

Sec. 3. Plant, Personnel and Rates (a)(1) The concessioner shall maintain and operate the accommodations, facilities and services described above to such extent and in such manner as the Secretary may deem satisfactory, and shall provide the plant, personnel, equipment, goods, and commodities necessary therefor, provided that the Concessioner shall not be required to make investments inconsistent with a reasonable opportunity to realize a profit on its operations under this Contract commensurate with the capital invested and the obligations assumed. The Concessioner agrees that the terms of this Contract provide the Concessioner this reasonable opportunity to realize a profit.

(a)(2) All rates and prices charged to the public by the Concessioner for accommodations, services or goods furnished or sold shall be subject to regulation and approval by the Secretary. Reasonableness of rates and prices will be judged generally by comparison with those currently charged for comparable

[1] To be used when existing contract is to be replaced, before expiration date.

[2] To be used where there is an improvement and building program. The shortened term of contract should generally not exceed 10 years.

[3] (b), (c) and (d) Are to be used where improvement programs are included in the contract. *Note: Do not use* Sec. 1, (b), (c) or (d), if there is no building program.

accommodations, services or goods furnished or sold outside of the areas administered by the National Park Service under similar conditions, with due allowance for length of season, provision for peak loads, [average percentage of occupancy] [4] accessibility, availability and cost of labor and materials, type of patronage, and other conditions customarily considered in determining charges, but due regard may also be given to such other factors as the Secretary may deem significant.

(a)(3) The Concessioner shall require its employees to observe a strict impartiality as to rates and services in all circumstances. The Concessioner may, subject to the prior approval of the Secretary, grant complimentary or reduced rates under such circumstances as are customary in businesses of the character conducted hereunder. The Concessioner will provide Federal employees conducting official business reduced rates for lodging, essential transportation and other specified services in accordance with procedures established by the Secretary.

(b)(1) The Concessioner may be required to have its employees who come in direct contact with the public, so far as practicable, to wear a uniform or badge by which they may be known and distinguished as the employees of the Concessioner. The Concessioner shall require its employees to exercise courtesy and consideration in their relations with the public.

(b)(2) The Concessioner shall review the conduct of any of its employees whose action or activities are considered by the Concessioner or the Secretary to be inconsistent with the proper administration of the Area and enjoyment and protection of visitors and shall take such actions as are necessary to fully correct the situation.

(b)(3) The Concessioner shall, in addition to other laws and regulations which may be applicable to its operations, comply with applicable requirements of (i) Title VII of the Civil Rights Act of 1964, as well as Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, (ii) Title V, sections 503 and 504 of the Rehabilitation Act of September 26, 1973, Public Law 93–112 as amended in 1978, (iii) 41 CFR part 60–2 which prescribes affirmative action requirements for contractors and subcontractors, (iv) the Age Discrimination in Employment Act of December 15, 1967 (Pub. L. 90–202), as amended by (Pub. L. 95–256) of April 6, 1978, and (v) the Architectural Barriers Act of 1968 (Pub. L. 90–480). The Concessioner shall also comply with regulations heretofore or hereafter promulgated, relating to nondiscrimination in employment and providing accessible facilities and services to the public including those set forth in Exhibit "A" attached hereto and made a part hereof.

Sec. 4. Government Land and Improvements (a)(1) The Secretary hereby assigns for use by the Concessioner during the term of this Contract, certain parcels of land, if any (as described in Exhibit "B" hereto), and Government Improvements, if any (as described in Exhibit "C" hereto), appropriate to conduct operations hereunder.

(a)(2) The Secretary reserves the right to withdraw such assignments or parts thereof at any time during the term of this Contract if, in his judgement, (i) such withdrawal is for the purpose of enhancing or protecting area resources or visitor enjoyment or safety, or (ii) the operations utilizing such assigned lands or buildings are terminated pursuant to Section 12 hereof.

(a)(3) Any permanent withdrawal of assigned lands or Government Improvements which are essential for conducting the operation authorized hereunder will be considered by the Secretary as a termination of this Contract pursuant to Section 12 hereof. The Secretary shall compensate the Concessioner for any Possessory Interest it may have in such properties permanently withdrawn pursuant to section 13 hereof.

(b)(1) "Government Improvements" as used herein, means the buildings, structures, utility systems, fixtures, equipment, and other improvements affixed to or resting upon the lands assigned hereunder in such manner as to be part of the realty, if any, constructed or acquired by the Secretary and assigned to the Concessioner by the Secretary for the purposes of this Contract.

(b)(2) The Concessioner shall have a Possessory Interest to the extent provided elsewhere in this Contract in capital improvements (as hereinafter defined) it makes to Government Improvements (excluding improvements made from funds from any Section 10 accounts) with the written permission of the Secretary. In the event that such Possessory Interest is acquired by the Secretary or a successor concessioner at any time, the Concessioner will be compensated for such Possessory Interest pursuant to section 13 hereof.

(c) The Secretary shall have the right at any time to enter upon the lands and improvements utilized by the Concessioner hereunder for any purposes he may deem reasonably necessary for the administration of the Area.

(d) The Concessioner may construct or install upon assigned lands such buildings, structures, and other improvements as are necessary for operations hereunder, subject to the prior written approval by the Secretary of the location, plans, and specifications thereof. The Secretary may prescribe the form and contents of the application for such approval. The desirability of any project as well as the location, plans and specifications thereof will be reviewed in accordance with applicable provisions of the National Environmental Policy Act of 1969 and the National Historic Preservation Act of 1966, among other requirements.

(e) If, during the term of this Contract, a Government Improvement requires capital improvement (major repairs and/or improvements that serve to prolong the life of the Government Improvement to an extent requiring capital investment for major repair), such capital improvements shall be made by the Concessioner at its expense if consistent with a reasonable opportunity for the Concessioner to realize a profit as described above. Where capital improvements to other Government facilities which directly support the Concessioner's operations under this Contract are determined by the Secretary to be necessary for the accommodation of Area visitors, such improvements shall be made by the Concessioner at its expense unless the Secretary determines that expenditures for such improvements are inconsistent with a reasonable opportunity for the Concessioner to realize a profit as described above.

Sec. 5. Maintenance (a) Subject to section 4(e) hereof, the Concessioner will physically maintain and repair all facilities (both Government Improvements and Concessioner Improvements) used in operations under this Contract, including maintenance of assigned lands and all necessary housekeeping activities associated with such operations, to the satisfaction of the Secretary.

(b) In order to implement these requirements, the Secretary, acting through the Superintendent, shall undertake appropriate inspections, and, in consultation with the Concessioner, shall establish and revise as circumstances warrant a Maintenance Plan consisting of specific maintenance requirements which shall be adhered to by the Concessioner. However, such Maintenance Plan shall not amend or

[4] This should be used only in contracts involving lodging.

alter the material rights and liabilities of the parties to this Contract.

Sec. 6. Concessioner's Improvements (a)(1) "Concessioner Improvements," as used herein, means buildings, structures, fixtures, equipment, and other improvements, affixed to or resting upon the lands assigned hereunder in such manner as to be a part of the realty, provided by the Concessioner for the purposes of this Contract (excluding improvements made to Government Improvements and improvements made from funds in any Section 10 accounts), as follows: (i) Such improvements upon the lands assigned at the date hereof as described in Exhibit "D" hereto; and (ii) all such improvements hereafter constructed upon or affixed to the lands assigned to the Concessioner with the written consent of the Secretary.

(a)(2) Concessioner Improvements do not include any interest in the land upon which the improvements are located.

(a)(3) Any salvage resulting from the authorized removal, severance or demolition of a Concessioner Improvement or any part thereof shall be the property of the Concessioner.

(a)(4) In the event that a Concessioner Improvement is removed, abandoned, demolished, or substantially destroyed and no other improvement is constructed on the site, the Concessioner, at its expense, shall promptly, upon the request of the Secretary, restore the site as nearly as practicable to its original condition.

(b)(1) The Concessioner shall have a Possessory Interest, as defined herein, in Concessioner Improvements to the extent provided by the Contract.

(b)(2) Possessory Interest in Concessioner Improvements or Government Improvements shall not be extinguished by the expiration or other termination of this Contract, and may not be terminated or taken for public use without just compensation as determined in accordance with Section 13. Performance of the obligations assumed by the Secretary under Section 13 hereof shall constitute just compensation with respect to the taking of Possessory Interest.

(c)(1) Possessory Interest, as the term is used in this Contract, shall consist of all incidents of ownership in capital improvements made by the Concessioner, except legal title which shall be vested in the United States and subject to other limitations as set forth in this Contract. Particularly, among other matters, the existence of Possessory Interest shall not be construed to include or imply any authority, privilege, or right to operate or engage in any business or other activity, and the use or enjoyment of any structure, fixture or improvement in which the Concessioner has a Possessory Interest shall be wholly subject to the applicable provisions of this Contract and to the laws and regulations relating to the Area.

Sec. 7. Utilities (a) The Secretary may furnish utilities to the Concessioner for use in connection with the operations authorized under this Contract when available at reasonable rates to be fixed by the Secretary in his discretion. Such rates which shall at least equal the actual cost of providing the utility or service unless a reduced rate is provided for in an established policy of the Secretary in effect at the time of billing.

(b) Should the Secretary not provide such utilities, the Concessioner shall, with the written approval of the Secretary and under such requirements as the Secretary shall prescribe, secure necessary utilities at its own expense from sources outside the Area or shall install the same within the Area with the written permission of the Secretary, subject to the following conditions:

(i) Any water rights deemed necessary by the Concessioner for use of water on Federal lands shall be acquired at its expense in accordance with applicable State procedures and law. Such water rights, upon expiration or termination of this Contract for any reason shall be assigned to and become the property of the United States without compensation;

(ii) Any utility service provided by the Concessioner under this Section shall, if requested by the Secretary, be furnished to the Secretary to such extent as will not unreasonably restrict anticipated use by the Concessioner. The rate per unit charged the Secretary for such service shall be approximately the average cost per unit of providing such service; and

(iii) All appliances and machinery to be used in connection with the privileges granted in this Section, as well as the plans for location and installation of such appliances and machinery, shall first be approved by the Secretary.

Sec. 8. Accounting Records and Reports (a) The Concessioner shall maintain an accounting system whereby its accounts can be readily identified with its system of accounts classification. The Concessioner shall submit annually as soon as possible but not later than _____(_____) days after the _____day of _____a financial statement for the preceding year or portion of a year as prescribed by the Secretary, and such other reports and data, including, but not limited to, operations information, as may be required by the Secretary. Such information are subject to public release to the extent authorized by law or established policies and procedures of the Secretary. The Concessioner's system of accounts classification shall be directly related to the Concessioner Annual Report Form issued by the Secretary. If the annual gross receipts of the Concessioner are in excess of $1,000,000, the financial statements shall be audited by an independent certified public accountant or by an independent licensed public accountant certified or licensed by a regulatory authority of a State or other political subdivision of the United States on or before December 31, 1970, in accordance with the auditing standards and procedures promulgated by the American Institute of Certified Public Accountants. If annual gross receipts are between $250,000, and $1,000,000, the financial statements shall be reviewed by an independent certified public accountant or by a licensed public accountant certified or licensed by a regulatory authority of a State or other political subdivision of the United States on or before December 31, 1970, in accordance with the auditing standards and procedures promulgated by the American Institute of Certified Public Accountants. If annual gross receipts are less than $250,000, the financial statements may be prepared without involvement by an independent certified or licensed public accountant, unless otherwise directed by the Secretary.

If the Concessioner is required to have its annual financial statement (Concessioner Annual Financial Report) audited or reviewed, the Concessioner must use the accrual accounting method. In addition, it must include in its annual financial statement (Concessioner Annual Financial Report) a footnote that reconciles its annual financial statement to its Federal income tax returns.

(b) [5] Within ninety (90) days of the execution of this Contract or its effective date, whichever is later, the Concessioner shall submit to the Secretary a balance sheet as of the beginning date of the term of this Contract. The balance sheet shall be audited by an independent certified public accountant or by an independent licensed public accountant, certified or licensed by a regulatory authority of a

[5] Optional: Subsection 8(b), in its entirety, may be excluded where the Concessioner has no acquired possessory interest assets involved and no balance sheet is required.

State or other political subdivision of the United States on or before December 31, 1970. The balance sheet shall be accompanied by a schedule that identifies and provides details for all assets in which the Concessioner claims a Possessory Interest. The schedule must describe these assets in detail showing for each such asset the date acquired, useful life, cost and book value.

(c) The Secretary and Comptroller General of the United States, or any of their duly authorized representatives, shall at any time up until the expiration of five (5) calendar years after the expiration of this Contract, have access to and the right to examine any of the Concessioner's pertinent books, documents, papers, and records, including Federal and State income tax returns (collectively "documents"), and such documents of any subconcessioner related to this Contract, and, such documents of any proprietary or affiliate companies of the Concessioner.

Sec. 9. Fees For the term of this Contract, the Concessioner shall pay to the Secretary for the privileges granted herein, fees as follows:

(a)(1)[6] An annual fee for the use of Government Improvements assigned to the Concessioner, if any. Such fee and related Government Improvement shall be identified in Exhibit "C" hereto, and the fee may be adjusted annually by the Secretary to equal the fair annual value of the related Government Improvement as determined by the Secretary.

(a)(2) In addition to the foregoing, a franchise fee equal to _____ percent (_____%) of the Concessioner's gross receipts, as herein defined, for the preceding year or portion of a year.

(b) The franchise fee shall be due on a monthly basis at the end of each month and shall be paid by the Concessioner in such a manner that payment shall be received by the Secretary within 15 days after the last day of each month that the Concessioner operates. Such monthly payment shall include the annual use fee for assigned Government Improvements, as set forth in Exhibit "C" hereto, divided by the expected number of operating months, as well as the specified percentage of gross receipts for the preceding month. The payment of any additional amounts due at the end of the operating year as a result of adjustments shall be paid at the time of submission of the Concessioner's annual financial statement. Overpayments shall be offset against the following year's franchise fees due. All franchise fee payments consisting of $10,000 or more, shall be deposited electronically by the Concessioner using the Treasury Financial Communications System.

(c) An interest charge will be assessed on overdue amounts for each 30-day period, or portion thereof, that payment is delayed beyond the 15-day period provided for above. The percent of interest charged will be based on the current value of funds to the United States Treasury as published quarterly in the Treasury Fiscal Requirements Manual.

(d)(1) The term "gross receipts" as used in this Contract shall be mean the total amount received or realized by, or accruing to, the Concessioner from all sales for cash or credit, of services, accommodations, materials, and other merchandise made pursuant to the rights granted by this Contract, including gross receipts of subconcessioners as herein defined and commissions earned on contracts or agreements with other persons or companies operating in the Area, and excluding gross receipts from the sale of genuine United States Indian and native handicraft, intracompany earnings on account of charges to other departments of the operation (such as laundry), charges for employees' meals, lodgings, and transportation, cash discounts on purchases, cash discounts on sales, returned sales and allowances, interest on money loaned or in bank accounts, income from investments, income from subsidiary companies outside of the Area, sale of property other than that purchased in the regular course of business for the purpose of resale, and sales and excise taxes that are added as separate charges to approved sales prices, gasoline taxes, fishing license fees, and postage stamps, provided that the amount excluded shall not exceed the amount actually due or paid government agencies,[7] and amounts received as a result of an add-on to recover utility costs above comparable utility charges. All monies paid into coin operated devices, except telephones, whether provided by; the Concessioner or by others, shall be included in gross receipts. However, only revenues actually received by the Concessioner from coin-operated telephones shall be included in gross receipts.

(d)(2) The term "gross receipts of subconcessioners" as used in this Contract shall mean the total amount received or realized by, or accruing to, subconcessioners from all sources, as a result of the exercise of the rights conferred by subconcession contracts hereunder without allowances, exclusions or deductions of any kind or nature whatsoever and the subconcessioner shall report the full amount of all such receipts to the Concessioner within 45 days after the _____day of _____each year or portion of a year. Subconcessioners shall maintain an accurate and complete record of all items listed in Subsection (d)(1) of this Section as exclusions from the Concessioner's gross receipts and shall report the same to the Concessioner with the gross receipts. The Concessioner shall be entitled to exclude items listed in subsection (d)(1) in computing the franchise fee payable to the Secretary as provided for in subsection (a) hereof.

(e)(1) Immediately following the end of _____, _____, _____, and _____, year of this Contract, the amount and character of the franchise fees described in this Section and/or contributions to any accounts described in Section 10 hereof (Section 10 contributions) shall be reconsidered for a period of one hundred and eighty (180) days. During this reconsideration period, the Secretary or the Concessioner may propose adjustments to such franchise fees and/or section 10 contributions (which shall reflect their position as to the then current probable value of the privileges granted by this Contract based upon a reasonable opportunity for profit in relation to both gross receipts and capital invested) by mailing written notice to the other party of such proposal before the end of the reconsideration period. If no such notices are duly mailed, the reconsideration shall end and the fees and contributions shall remain the same until the occurrence of the next reconsideration period.

(e)(2) If the Secretary or the Concessioner duly makes a proposal to adjust the franchise fees and/or Section 10 contributions before the end of the reconsideration period, they shall, commencing the day after the end of the reconsideration period, undertake a good faith negotiation of the proposal. If such negotiation does not result in an agreement as to adjustments to the fees and/or contributions within sixty (60) days of its commencement, this negotiation period shall end and any adjustments determined by the Secretary as of that time shall go into effect, provided that, the Concessioner

[6] This subsection should be used if a building use fee is to be charged. If a special account is to be established under section 10(a) in lieu of a building use fee, this subsection should be deleted.

[7] Note to Preparer: This means, for example, if fishing licenses are sold, $2.00 goes to State or Federal agency, $.25 goes to Concessioner. Only $2.00 can be excluded from gross receipts, i.e. fishing license cost to user $2.00 but concessioner sells them and charges $.25 for services.

may extend this negotiation period by appealing such adjustments to the Secretary. Such appeal must be received by the Secretary within thirty (30) days after the end of the sixty day negotiation period. The appeal must be in writing and include the Concessioner's detailed position as to the validity of such adjustments to the fees and/or contributions. The Secretary, acting through a designee other than the official who determined the adjustments from which the Concessioner duly has appealed, shall consider the position of the Concessioner and related documents as appropriate, and, if applicable, the written views of the mediator as described below. The Secretary shall then make a written final determination of appropriate adjustments to franchise fees and/or Section 10 contributions consistent with the probable value to the concessioner of the privileges granted by this contract based upon a reasonable opportunity for profit in relation to both gross receipts and capital invested. This final determination, or, where applicable, a determination as to adjustments made at the end of the sixty day negotiation period described above from which the Concessioner fails to timely appeal, shall be conclusive and binding upon the parties to this Contract.

(e)(3) Adjustments to franchise fees and/or Section 10 contributions resulting from the process described herein shall be retroactive to the commencement of the applicable contract period for which a notice of reconsideration was given. Payments or contributions made in arrears shall include interest at a per cent based on the current value of funds to the United States Treasury as published quarterly in the Treasury Fiscal Requirements Manual. The adjustments shall also be effective for the remaining term of this Contract, subject to the results of any further reconsideration periods. If an adjustment to franchise fees and/or Section 10 contributions results in higher fees and/or contributions, the Concessioner will pay all back franchise fees due (with applicable interest) and make all section 10 contributions due (with applicable interest) at the time of the next regular franchise fee payment or Section 10 contribution respectively. If an adjustment results in lower fees and/or contributions, the Concessioner may withhold the difference from future franchise fee payments or Section 10 contributions until the Concessioner has recouped the overpayment. Adjustments to franchise fees and/or section 10 contributions will be embodied in an amendment to this Contract unless resulting from a determination of the Secretary without the agreement of the Concessioner in which event a copy of such determination shall be attached to this Contract and become a part hereof as if originally incorporated herein. During the pendency of the process described herein, the Concessioner shall continue to make the established franchise fee payments and/or Section 10 contributions required by this Contract.

(e)(4) In connection with an appeal to the Secretary hereunder, the Concessioner may request mediation of appropriate adjustments to franchise fees and/or Section 10 contributions by providing a written request for mediation with its appeal to the Secretary as described above. The mediation will be conducted by the American Arbitration Association (AAA) or a similar organization chosen by the Secretary and take place in Washington, DC. The purpose of the mediation shall be to provide for the Secretary's consideration during such appeal the views of the mediator as to appropriate adjustments of franchise fees and/or Section 10 contributions consistent with the probable value to the Concessioner of the privileges granted by this Contract based upon a reasonable opportunity for profit in relation to both gross receipts and capital invested. The written views of the mediator shall be provided to the Secretary within ninety (90) days of the request for mediation unless, because of extenuating circumstances, the Secretary determines that an extension of this time period is warranted. If such views are not provided within this time period (or a duly extended time period), the advisory mediation shall terminate and the Secretary shall make a determination on the appeal as if the mediation had not been requested. The Concessioner and the Secretary shall cooperate in good faith to permit the views of the mediator to be provided within the applicable time period. The Secretary and the Concessioner shall share equally the costs of the services of the mediator and the mediation organization. The views of the mediator are advisory only.

(e)(5) The mediator shall be selected by agreement between the Concessioner and the Secretary from a list provided by the mediation organization within ten (10) days of receipt. Promptly following the selection, the Secretary shall schedule a date for the mediation meeting to take place at which time the written positions of the Concessioner and the Secretary shall be presented to the mediator along with appropriate oral presentations unless advance submissions are agreed upon. The mediator shall not have the power to compel the production of documents or witnesses and shall not receive or take into account information or documents concerning positions taken by the Concessioner or the Secretary in the negotiations which preceded the request for mediation. The mediator shall consider the written submissions and any oral presentations made and provide his or her written views as described above to the Secretary within ninety (90) days of the request for mediation, or, if applicable, by the last day of a duly extended time period.

Sec. 10. Accounts [Two alternatives are presented for Section 10.]

[8] No Government Improvement or Capital Improvement Accounts are included in this Contract. [or]

(a) Government Improvement Account [9] (1) As consideration for the use and occupancy of Government Improvements herein provided, the Concessioner shall establish and manage a "Government Improvement Account." The funds in this account belong to the Concessioner, including interest earned thereon, but will be used by the Concessioner only to undertake on a project basis repairs and improvements to Government Improvements listed in Exhibit "C" to this Contract, as directed by the Superintendent in writing and in accordance with project priorities established by the Regional Director of the National Park Service. Expenditures from this account for repair and/or improvement projects in excess of $1,000,000 must receive the written approval of the National Park Service Director.

(a)(2) Projects paid for from the Government Improvement Account will not include routine, operational maintenance of facilities or housekeeping activities. Nothing in this Section shall lessen the responsibility of the Concessioner to carry out the maintenance and repair of Government Improvements as otherwise required by this Contract from Concessioner funds exclusive of funds contained in the Government Improvement Account, and, specifically, funds from such account shall not be used for the purposes of fulfilling the Concessioner's obligations under Sections 4 and 5 of this Contract. The Concessioner shall have no ownership, Possessory Interest, or other interest in improvements made

[8] This subsection should be used only when no special accounts are included in the contract.

[9] To be used in lieu of building use fee requirement in Section 9(a)(1) if a special account is to be established.

from funds from the Government Improvement Account.

(a)(3) The Concessioner shall deposit within fifteen (15) days after the last day of each month a sum equal to one-twelfth of the amount of the Government Improvement Account Allocation as established in Exhibit "C" into an interest bearing account(s) at a Federally insured financial institution(s). The account(s) shall be maintained separately from all other Concessioner funds, and, copies of monthly account statements shall be provided to the Secretary. The Concessioner shall submit annually, no later than _____ of the year following the Concessioner's accounting year, a statement reflecting total activity in the Government Improvement Account for the preceding accounting year. The statement shall reflect monthly credits, expenses by project, and the interest earned. The balance in the Government Improvement Account shall be available for projects in accordance with the account's purpose. Advances or credits to the account by the Concessioner will not be allowed. Projects will be carried out by the Concessioner as the Superintendent shall direct in writing in advance of any expenditure being made. For all expenditures made for each project from the account, the Concessioner shall maintain auditable records including invoices, billings, cancelled checks, and other documentation satisfactory to the Secretary. An interest charge will be assessed on overdue deposits for each thirty (30) day period, or portion thereof, that the deposit is delayed beyond the fifteen (15) day period provided for herein. The per cent of interest charged will be based on the then current value of funds to the U.S. Treasury as published in the Treasury Fiscal Requirements Manual.

(a)(4) Upon the expiration or termination of this Contract, or upon assignment or sale of interests related to this Contract, the unexpended balance remaining in the Government Improvement Account shall be expended by the Concessioner for approved projects, or, shall be remitted by the Concessioner to the Secretary in such a manner that payment shall be received by the Secretary within fifteen (15) days after the last day of the Concessioner's operation. Any payment consisting of $10,000 or more shall be deposited electronically by the Concessioner using the Treasury Financial Communications System. An interest charge will be assessed on overdue amounts for each thirty (30) day period, or portion thereof, that payment is delayed beyond the fifteen (15) day period provided for herein. The percent of interest charged will be based on the then current value of funds to the United States Treasury which is published quarterly in the Treasury Fiscal Requirements Manual.

(b) Capital Account (1) As partial consideration for the privileges granted by this Contract, the Concessioner shall establish a "Capital Account" by which it will undertake, on a project basis, improvements which directly support the Concessioner's operations hereunder. Funds in the Capital Account, including interest earned thereon, belong to the Concessioner but shall be used by the Concessioner only for construction of qualified improvements approved by the Superintendent in accordance with priorities established by the National Park Service Regional Director. Projects estimated to cost over $1,000,000 must be approved by the Director.

(b)(2) Improvements paid for with funds from the Capital Account will not include routine, operational maintenance of facilities or housekeeping activities. Nothing in this Section shall lessen the responsibility of the Concessioner to carry out the maintenance and repair of Government Improvements as required by Sections 4 and 5 of this Contract, or otherwise, from Concessioner funds exclusive of those funds contained in the Capital Account. Funds in the Capital Account shall not be used for purposes for which those Sections would apply. The Concessioner shall have no ownership, Possessory Interest or other interest in improvements made from Capital Account funds.

(b)(3) The Concessioner shall deposit within fifteen (15) days after the last day of each month that the Concessioner operates a sum ("SUM") equal to _____. Percent (_____%) of the Concessioner's Gross Receipts for the previous month, as defined in this Contract, into an interest bearing account(s) at a Federally insured financial institution(s). The account(s) shall be maintained separately from all other Concessioner funds and copies of monthly account statements shall be provided to the Secretary. An interest charge will be assessed on overdue deposits for each thirty (30) day period, or portion thereof, that the deposit is delayed beyond the fifteen (15) day period provided for herein. The percent of interest charged will be based on the then current value of funds to the U.S. Treasury as published in the Treasury Fiscal Requirements Manual.

(b)(4) The Concessioner shall submit annually, no later than _____, of the year following the Concessioner's accounting year a statement reflecting total activity in the Capital Account for the preceding accounting year. The statement shall reflect monthly credits, expenses by project, and the interest earned.

(b)(5) Advances or credits to the Capital Account by the Concessioner are not permitted. Projects will be carried out by the Concessioner as the Superintendent shall direct in writing and in advance of any expenditure being made. For all expenditures made for each project from Capital Account funds, the Concessioner shall maintain adaptable records including invoices, billings, canceled checks, and other documentation satisfactory to the Secretary.

(b)(6) Upon the expiration or termination of this Contract, or upon assignment or sales of interests related to this Contract, the unexpended balance remaining in the Capital Account shall be expended by the Concessioner for approved Projects, or, shall be remitted by the Concessioner to the Secretary in such a manner that payment shall be received by the Secretary within fifteen (15) days after the last day of the Concessioner's operation. Any payment consisting of $10,000 or more shall be deposited electronically by the Concessioner using the Treasury Financial Communications System. An interest charge will be assessed overdue amounts for each thirty (30) day period, or portion thereof, that payment is delayed beyond the fifteen (15) day period provided for herein. The percent of interest charged will be based on the current value of funds to the United States Treasury which is published quarterly in the Treasury Fiscal Requirements Manual.

Sec. 11. Bond and Lien. The Secretary may, in his discretion, require the Concessioner to furnish a surety bond acceptable to the Secretary conditioned upon faithful performance of this Contract, in such form and in such amount as the Secretary may deem adequate, not in excess of _____ Dollars ($_____).[10] As additional security for the faithful performance by the Concessioner of all of its obligations under this Contract, and the payment to the Government of all damages or claims that may result from the Concessioner's failure to observe such obligations, the Government shall have at all times the first lien on all assets of the Concessioner within the Area.

[10] *Note to Preparer:* If a bond is required it should not, under normal conditions, exceed the amount of franchise fees which may be due. Leave blank where there has been no past operator because no dollar amount can be determined.

Sec. 12. Termination. (a)(1) The Secretary may terminate this Contract in whole or part for default at any time and may terminate this Contract in whole or part when necessary for the purpose of enhancing or protecting Area resources or visitor enjoyment or safety.

(a)(2) Operations under this Contract may be suspended in whole or in part at the discretion of the Secretary when necessary to enhance or protect Area resources or visitor enjoyment or safety.

(a)(3) Termination or suspension shall be by written notice to the Concessioner and, in the event of proposed termination for default, the Secretary shall give the Concessioner a reasonable period of time to correct stated deficiencies.

(a)(4) Termination for default may be utilized in circumstances where Concessioner has breached any requirement of this Contract, including, but not limited to, failure to maintain and operate accommodations, facilities and services to the satisfaction of the Secretary in accordance with the Secretary's requirements hereunder.

(b) In the event of termination or expiration of this Contract, the total compensation to the Concessioner for such termination or upon expiration shall be as described in Section 13 ("Compensation") of this Contract.

(c) In the event it is deemed by the Secretary necessary to suspend operations under this Contract in whole or in part to enhance or protect Area resources or visitor enjoyment or safety, the Secretary shall not be liable for any compensation to the Concessioner for losses occasioned thereby, including but not limited to, lost income, profit, wages, or other monies which may be claimed.

(d) To avoid interruption of services to the public upon the expiration or termination of this Contract for any reason, the Concessioner, upon the request of the Secretary, shall (i) continue to conduct all operations hereunder for a reasonable period of time to allow the Secretary to select a successor concessioner, or (ii) consent to the use by a temporary operator, designated by the Secretary, of Concessioner Improvements and personal property, if any, not including current or intangible assets, used in operations hereunder upon fair terms and conditions, provided that the Concessioner shall be entitled to an annual fee for the use of such improvements and personal property, prorated for the period of use, in the amount of the annual depreciation of such improvements and personal property, plus a return on the book value of such improvements and personal property equal to the prime lending rate, effective on the date the temporary operator assumes managerial and operational responsibilities, as published by the Federal Reserve System Board of Governors or as agreed upon by the parties involved. In such circumstances, the method of depreciation applied shall be either straight line depreciation or depreciation as shown on the Concessioner's Federal income tax return.

SEC. 13. Compensation (a) Just Compensation: The compensation described in this Section shall constitute full and just compensation to the Concessioner from the Secretary for all losses and claims occasioned by the circumstances described below.

(b) Contract expiration or termination where operations are to be continued: (b)(1) If, for any reason, including Contract expiration or termination as described herein, the Concessioner shall cease to be required by the Secretary to conduct operations hereunder, or substantial part thereof, and, at the time of such event the Secretary intends for substantially the same or similar operations to be continued by a successor, whether a private person, corporation or an agency of the Government; (i) the Concessioner shall sell and transfer to the successor designated by the Secretary its Possessory Interest in Concessioner Improvements and Government Improvements, if any, as defined under this Contract, and all other tangible property of the Concessioner used or held for use in connection with such operations; and, (ii) the Secretary will require such successor to purchase from the Concessioner such Possessory Interest, if any, and such other property, and to pay the Concessioner the fair value thereof.

(b)(2) The initial fair value of any Possessory Interest in Concessioner Improvements in existence before the effective date of this Contract shall be $_____as of the effective date of this Contract. This initial fair value amount shall annually decrease by _____[11] of this amount. In the event of Contract termination or expiration, the Concessioner's right to fair value for such Possessory Interest shall be the amount not yet so decreased. The fair value of any Possessory Interest in Government Improvements in existence before the effective date of this Contract shall be the book value of the improvements as of the last day of the contract under which such Possessory Interest was obtained, subject to further reduction pursuant to the applicable depreciation schedule of such improvements.

(b)(3) The fair value of Possessory Interest in Concessioner Improvements and Government Improvements made after the effective date of this Contract shall be, unless calculated in accordance with section 13(d) hereof, the original cost of the improvements less straight line depreciation over the estimated useful life of the asset according to Generally Accepted Accounting Principles, provided, however, that in no event shall any such useful life exceed 30 years. In the event that such Possessory Interest is acquired by a successor, the successor will not be permitted to revalue such Possessory Interest, or, alter its depreciation schedule or useful life.

(b)(4) The fair value of merchandise and supplies shall be actual cost including transportation.

(b)(5) The fair value of equipment shall be its book value.

(c) Contract expiration or termination where operations are to be discontinued: If for any reason, including Contract expiration or termination as described herein, the Concessioner shall cease to be required by the Secretary to conduct operations hereunder, or substantial part thereof, and the Secretary at the time chooses to discontinue such operations, or substantial part thereof, within the Area, and/or to abandon, remove, or demolish any Concessioner Improvements, if any, then the Secretary will take such action as may be necessary to assure the Concessioner of compensation for (i) its Possessory Interest in Concessioner Improvements and Government Improvements, if any, in the applicable amount as set forth in Section 13(b) hereof; (ii) the cost to the Concessioner of restoring any assigned lands to a natural condition, including removal and demolition, (less salvage) if required by the Secretary; and (iii) the cost of transporting to a reasonable market for sale such movable property of the Concessioner as may be made useless by such determination. Any such property that has not been removed by the Concessioner within a reasonable time following such determination shall become the property of the United States without further compensation therefor.

(d) Contract Termination for Default for Unsatisfactory Performance. Notwithstanding any other provision of

[11] In usual circumstances, the amount by which possessory interest will be reduced annually will be 1/30th (i.e., over 30 years). However, as our policy is to extinguish possessory interests as quickly as possible, taking into consideration the useful life of the facilities, a shorter period of time should be established when the economic conditions permit.

this Contract to the contrary, in the event of termination of this Contract for default for failure to maintain and operate accommodations, facilities and services hereunder to the satisfaction of the Secretary in accordance with the Secretary's requirements, compensation for Possessory Interest in Concessioner Improvements, if any, except for Possessory Interest in Concessioner Improvements in existence before the effective date of this Contract, shall be as set forth in Section 13(b) hereof or at book value, whichever is less.

Sec. 14. Assignment, Sale or Encumbrance of Interests. (a) Pursuant to this section and 36 CFR part 51, the Concessioner and/or any person or entity which owns a controlling interest (as is or as may be defined in 36 CFR part 51) in a Concessioner's ownership, (collectively defined as the "Concessioner" for the purposes of this Section) shall not assign or otherwise sell or transfer responsibilities under this Contract or concession operations hereunder, or the Concessioner's assets in the concession operation, nor sell or otherwise assign, transfer or encumber (including, without limitation, mergers, consolidations, reorganizations, other business combinations, mortgages, liens or collateral) a controlling interest in such operations, this Contract, or a controlling interest in the Concessioner's ownership or assets (as is or as may be defined in 36 CFR part 51), without the prior written approval of the Secretary.

(a)(2) Such approval is not a matter of right and is further subject to the requirements of 36 CFR part 51 (as are or as may be set forth therein). The Secretary will exercise his discretion as to whether and/or under what conditions a proposed transaction will be approved in accordance with established policies and procedures.

(a)(3) Failure to comply with this provision or the procedures described herein shall constitute a material breach of this Contract for which this Contract may be terminated immediately by the Secretary without regard to the procedures for termination for default described in Section 12 hereof, and, the Secretary shall not be obliged to recognize any right of any person or entity to an interest in this Contract or to own or operate operations hereunder acquired in violation hereof.

(b) The Concessioner shall advise the person(s) or entity proposing to enter into a transaction which is subject to this Section that the Secretary shall be notified and that the proposed transaction is subject to review and approval by the Secretary. The Concession shall request in writing the Secretary's approval of the proposed transaction prior to consummation and shall promptly provide the Secretary all relevant documents related to the transaction, and the names and qualifications of the person(s) or entity involved in the proposed transaction. The relevant documents shall be as described in 36 CFR Part 51 but shall also include other documents as the Secretary may require.

(c) The Concessioner may not enter into any agreement with any entity or person except employees of the Concessioner to exercise substantial management responsibilities for operations hereunder or any part hereof without the written approval of the Secretary given at least thirty (30) days in advance of such transaction.

(d) No mortgage shall be executed, and no bonds, shares of stock or other evidence of interest in, or indebtedness upon, the rights and/or properties of the Concessioner, including this Contract, in the Area, shall be issued without prior written approval of the Secretary. Approval of such encumbrances shall be granted only for the purposes of installing, enlarging or improving, plant equipment and facilities, provided that, such rights and/or properties, including possessory interests, or evidences of interests therein, in addition, may be encumbered for the purposes of purchasing existing concession plant, equipment and facilities. In the event of default on such a mortgage, encumbrance, or such other indebtedness, or of other assignment, transfer, or encumbrance, the creditor or any assignee thereof, shall succeed to the interest of the Concessioner in such rights and/or properties but shall not thereby acquire operating rights or privileges which shall be subject to the disposition of the Secretary.

Sec. 15. Approval of Subconcession Contracts. All contracts and agreements (other than those subject to approval pursuant to Section 14 hereof) proposed to be entered into by the Concessioner with respect to the exercise by others of the privileges granted by this Contract in whole or part shall be considered as subconcession contracts and shall be submitted in advance of execution to the Secretary for his approval and shall be effective only if approved. However, agreements with others to provide vending or other coin-operated machines shall not be considered as subconcession contracts. In the event any such subconcession contract or agreement is approved the Concessioner shall pay to the Secretary within _____ days after the _____ day of _____ each year or portion of a year a sum equal to Fifty Percent (50%) of any and all fees, commissions or compensation payable to the Concessioner thereunder, which shall be in addition to the franchise fee payable to the Secretary on the gross receipts of subconcessioners as provided for in Section 9 of this contract.

Sec 16. Insurance and Indemnity. (a)(1) General. The Concessioner shall save, hold harmless, defend and indemnify the United States of America, its agents and employees for losses, damages or judgments and expenses on account of fire or other peril, bodily injury, death or property damage, or claims for bodily injury, death or property damage or any nature whatsoever, and by whomsoever made, arising out of the activities of the Concessioner, his employees, subcontractors or agents under this Contract.

(a)(2) The types and amounts of insurance coverage purchased by the Concessioner shall be approved by the Secretary.

(a)(3) At the request of the Secretary, the Concessioner shall annually, or at the time insurance is purchased, provide the Secretary with a Statement of Concessioner Insurance and Certificate of Insurance as evidence of compliance with this section and shall provide the Secretary thirty (30) days advance written notice of any material change in the Concessioner's insurance program hereunder.

(a)(4) The Secretary will not be responsible for any omissions or inadequacies of insurance coverages and amounts in the event the insurance purchased by the Concessioner proves to be inadequate or otherwise insufficient for any reason whatsoever.

(b) Property Insurance. (b)(1) The Concessioner will, in the event of damage or destruction, repair or replace those buildings, structures, equipment, furnishings, betterments and improvements and merchandise determined by the Secretary to be necessary to satisfactorily discharge the Concessioner's obligations under this Contract and for this purpose shall provide fire and extended insurance coverage on both Concessioner Improvements and Government Improvements in such amounts as the Secretary may require during the term of the Contract. Those values currently in effect are set forth in Exhibit "E" to this Contract. This exhibit will be revised at least every 3 years, or sooner, if there is a substantial increase in value.

(b)(2) Such insurance shall provide for the Concessioner and the United States of America to be named insured as their interests may appear. In the

event of loss, the Concessioner shall use all proceeds of such insurance to repair, rebuild, restore or replace Concessioner Improvements and Government Improvements, equipment, furnishings and other personal property hereunder, as directed by the Secretary. The lien provision of Section 11 shall apply to such insurance proceeds.

The Concessioner shall purchase the following additional property coverages in the amounts set forth in Exhibit "E":

1. Boiler and machinery
2. Sprinkler leakage
3. Builders' risk
4. Flood
5. Earthquake
6. Hull
7. Extension-of-coverage endorsement

(c) Additional Property Damage Requirements—Government Improvements, Property and Equipment. The following additional requirements shall apply to structures all or any part of which are Government Improvements as defined in this Contract.

(c)(1) The insurance policy shall contain a loss payable clause approved by the Secretary which requires insurance proceeds to be paid directly to the Concessioner without requiring endorsement by the United States.

(c)(2) The use of insurance proceeds for repair or replacement of Government Improvements will not alter their character as Government Improvements and, notwithstanding any provision of this Contract to the contrary, the Concessioner shall gain no Possessory Interest therein.

(d) Public Liability. (d)(1) The Concessioner shall provide Comprehensive General Liability insurance against claims occasioned by actions or omissions of the Concessioner in carrying out the activities and operation authorized hereunder.

(d)(2) Such insurance shall be in the amount commensurate with the degree of risk and the scope and size of such activities authorized herein, but in any event, the limits of liability shall not be less than ($_____) per occurrence covering both bodily injury and property damage. If claims reduce available insurance below the required per occurrence limits, the Concessioner shall obtain additional insurance to restore the required limits. An umbrella or excess liability policy, in addition to a Comprehensive General Liability Policy, may be used to achieve the required limits.

(d)(3) From time to time, as conditions in the insurance industry warrant, the Secretary reserves the right to revise the minimum required limits.

(d)(4) All liability policies shall specify that the insurance company shall have no right of subrogation against the United States of America or shall provide that the United States of America is named an additional insured.

(d)(5) The Concessioner shall also obtain the following additional coverages at the same limits as required for Comprehensive General Liability insurance unless other limits are specified below:

(1) *Product Liability*—Amount ($_____)
(2) *Liquor Legal Liability*—Amount ($_____)
(3) *Protection and Indemnity (Watercraft Liability)*—Amount ($_____)
(4) *Automobile Liability*—To cover all owned, non-owned, and hired vehicles—Amount ($_____)
(5) *Garage Liability*—Amount ($_____)
(6) *Workers' Compensation*
(7) *Aircraft Liability*—Amount ($_____)
(8) *Fire Damage Legal Liability*—Amount ($_____)
(9) Other

Sec. 17. Procurement of Goods, Equipment and Services. In computing net profits for any purposes of this Contract, the Concessioner agrees that its accounts will be kept in such manner that there will be no diversion or concealment of profits in the operations authorized hereunder by means of arrangements for the procurement of equipment, merchandise, supplies or services from sources controlled by or under common ownership with the Concessioner or by any other device.

Sec. 18. General Provisions. (a) Reference in this Contract to the "Secretary" shall mean the Secretary of the Interior, and the term shall include his duly authorized representatives.

(b) The concessioner is not entitled to be awarded or to have negotiating rights to any Federal procurement or service contract by virtue of any provision of the contract.

(c) Notwithstanding any other provision hereof, the Secretary reserves the right to provide directly or through cooperative or other non-concession agreements with non-profit organizations, any accommodations, facilities or services to Area visitors which are part of and appropriate to the Area's interpretive program.

(d) That any and all taxes which may be lawfully imposed by any State or its political subdivisions upon the property or business of the Concessioner shall be paid promptly by the Concessioner.

(e) No member of, or delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this Contract or to any benefit that may arise herefrom but this restriction shall not be construed to extend to this Contract if made with a corporation or company for its general benefit.

(f) This Contract may not be extended, renewed or amended in any respect except when agreed to in writing by the Secretary and the Concessioner.

In witness whereof, the parties hereto have hereunder subscribed their names and affixed their seals.

Dated at _____, this _____ day of 19 ____.

UNITED STATES OF AMERICA

By _____,

Regional Director, National Park Service.

Corporations

Attest:
By _____
By _____
Title _____
Date _____

_____

(Concessioner)

By _____
By _____
Title _____
Date _____

Sole Proprietorship

Witnesses:
Name _____
Address _____
Name _____
Address _____
Date _____

_____

(Concessioner)

_____

(Name)

_____

(Title)

Partnership

Witnesses as to each:
Name _____
Address _____
Name _____
Address _____

_____

(Concessioner)

_____

(Name)

_____

(Name)
Date _____

Exhibit "A"

Nondiscrimination

Section I—Requirements Relating to Employment and Service to the Public

Concession Authorization No.: _____

A. Employment: During the performance of this Contract the Concessioner agrees as follows:

(1) The Concessioner will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, national origin or disabling condition. The Concessioner will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, age, national origin or disabling condition. Such action shall include, but not be limited to, the following: Employment upgrading, demotion or transfer: recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Concessioner agrees to post in conspicuous places available to employees and applicants for employment, notices to be provided by the Secretary setting forth the provisions of this nondiscrimination clause.

(2) The Concessioner will, in all solicitations or advertisements for employees placed by or on behalf of the Concessioner, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, national origin or disabling condition.

(3) The Concessioner will send to each labor union or representative of workers with which the Concessioner has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Secretary, advising the labor union or workers' representative of the Concessioner's commitments under Section 202 of Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) Within 120 days of the commencement of a contract every Government contractor or subcontractor holding a contract that generates gross receipts which exceed $50,000 or more and having 50 or more employees shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with the affirmative action program requirement.

(5) The Concessioner will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The Concessioner will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to the concessioner's books, records, and accounts by the Secretary of the Interior and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the Concessioner's noncompliance with the nondiscrimination clauses of this Contract or with any of such rules, regulations, or orders, this Contract may be canceled, terminated, or suspended in whole or in part and the Concessioner may be declared ineligible for further Government concession contract in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The Concessioner will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontractor or vendor. The Concessioner will take such action with respect to any subcontract or purchase order as the Secretary may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the Concessioner becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Secretary, the Concessioner may request the United States to enter into such litigation to protect the interest of the United States.

B. Construction, Repair, and Similar Contracts: The preceding provisions A (1) through (8) governing performance of work under this Contract, as set out in Section 202 of Executive Order No. 11246, dated September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, shall be applicable to this Contract, and shall be included in all contracts executed by the Concessioner for the performance of construction, repair, and similar work contemplated by this contract, and for the purpose the term "Contract" shall be deemed to refer to this instrument and to contracts awarded by the Concessioner and the term "Concessioner" shall be deemed to refer to the Concessioner and to contractors awarded contracts by the Concessioner.

C. Facilities: (1) Definitions: As used herein: (i) Concessioner shall mean the Concessioner and its employees, agents, lessees, subleases, and contractors, and the successors in interest of the Concessioner; (ii) facility shall mean any and all services, facilities, privileges, and accommodations, or activities available to the general public under this Contract.

(2) The Concessioner is prohibited from: (i) publicizing facilities operated hereunder in any manner that would directly of inferentially reflect upon or question the acceptability of any person because of race, color, religion, sex, age, national origin or disabling condition; (ii) discriminating by segregation or other means against any person because of race, color, religion, sex, age, national origin or disabling condition in furnishing or refusing to furnish such person the use of any such facility.

(3) The Concessioner shall post a notice in accordance with Federal regulations to inform the public of the provisions of this subsection, at such locations as will ensure that the notice and its contents will be conspicuous to any person seeking accommodations, facilities, services, or privileges. Such notice will be furnished the Concessioner by the Secretary.

(4) The Concessioner shall require provisions identical to those stated in subsection C herein to be incorporated in all of the Concessioner's contracts or other forms of agreement for use of land made in pursuance of this Contract.

Section II—Accessibility

Title V, Section 504 of the Rehabilitation Act of 1973, as amended in 1978, requires that action be taken to assure that any "program" or "service" being provided to the general public be provided to the highest extent reasonably possible to individuals who are mobility impaired, hearing

impaired, and visually impaired. It *does not* require architectural access to every building or facility, but only that the service or program can be provided somewhere in an accessible location. It also allows for a wide range of methods and techniques for achieving the intent of the law and calls for consultation with disabled persons in determining what is reasonable and feasible.

No handicapped person shall, because a Concessioner's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subject to discrimination under any program or activity receiving Federal financial assistance or conducted by any Executive agency or by the U.S. Postal Service.

Part A—Discrimination Prohibited

A Concessioner, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of handicap:

1. Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
2. Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
3. Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;
4. Provide different or separate aids, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;
5. Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to any agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or services to beneficiaries of the recipient's program;
6. Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or
7. Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving an aid, benefit, or service.

Part B—Existing Facilities

A Concessioner shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not require a Concessioner to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

Exhibit "B"

Land Assignment

Note to Preparer: The land assignment may be described in narrative form and, if possible, should include a map showing the area(s) to be assigned.

Exhibit "C"

Government-owned Structures (Government Improvements) Assigned to

_____

(Concessioner)
Pursuant To
Concession Contract No.

Building No.	Description	Annual fee
		$

Total amount due pursuant to subsection —
Approved, effective _____
By:

Name of Concessioner

By _____
Title _____
United States of America

_____

Regional Director

_____

Region

Exhibit "D"

Pursuant to Subsection 6(a)(1)

Note to preparer: If the Concessioner has no Possessory Interest assets, put *"NONE"* on this page. You will *ALWAYS* use this EXHIBIT, either with a schedule of possessory interest assets, or with the words "NONE", but *NEVER LEAVE THIS EXHIBIT OFF THE CONTRACT.*

Exhibit "E"

Building Replacement Cost for Insurance Purposes

Concessioner:
Concession Contract No.: _____

The replacement costs set forth herein are established for the sole purpose of assuring property insurance coverage and shall not be construed as having application for any other purpose.

I. Government Buildings

Building No.	*Description*	*Insurance replacement value*[1]

II. Concessioner Buildings

Building No.	*Description*	*Insurance replacement value*[1]

[1] or "Not to be replaced," where applicable.

* * *

By _____
(Name of Concessioner)
Title _____
Date _____

United States of America

_____

Regional Director

[FR Doc. 93–89 Filed 1–6–93; 8:45 am]
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federal register

Thursday
January 7, 1993

Part V

Department of Housing and Urban Development

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 961

Public and Indian Housing Drug Elimination Program; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 961

[Docket No. R-92-1541; FR-2992-F-02]

RIN-2577-AA97

Public and Indian Housing Drug Elimination Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This rule amends 24 CFR part 961, the Public and Indian Housing Drug Elimination Program, as authorized by chapter 2, subtitle C, title V of the Anti-Drug Abuse Act of 1988 (42 U.S.C. 11901 *et seq.*), and amended by section 581 of the National Affordable Housing Act (NAHA) (approved November 28, 1990, Pub. L. 101-625) and the Housing and Community Development Act of 1992 (HCDA 1992) (Pub. L. 102-550, approved October 28, 1992). The program authorizes HUD to make grants to public housing agencies (PHAs) and Indian Housing Authorities (IHAs), for use in eliminating drug-related crime and/or the problems associated with it.

EFFECTIVE DATE: February 8, 1993.

FOR FURTHER INFORMATION CONTACT: Malcolm E. Main, Drug Free Neighborhoods Division, Office of Resident Initiatives, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., room 4118, Washington, DC 20410, telephone (202) 708-1197 or 708-3502. A telecommunications device for speech and hearing impaired persons (TDD) is available at (202) 708-0850. (These are not toll-free telephone numbers.) To obtain copies of OMB Circulars No. A-87 Cost Principles for State and local Governments or A-102 Grants and Cooperative Agreements with State and local Governments, contact: Executive Office of the President (EOP), Publications Services, 725 17th Street NW., room 2200, Washington, DC 20503 (202) 395-7332. [This is not a toll-free telephone number.]

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements contained in this final rule have been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1980. Pending approval of these requirements by OMB and the assignment of an OMB control number, no person may be subjected to a penalty for failure to comply with these information collection requirements. Upon approval by OMB, a Notice containing the OMB approval number will be published in the **Federal Register**.

Public reporting burden for the collection of information requirements contained in this final rule are estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the Preamble heading, *Other Matters*. Send comments regarding this burden estimate, or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, room 3001, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for HUD. At the end of the public comment period, the Department may amend the information collection requirements to reflect the public comments received concerning the collection of information requirements.

I. Background

The Public Housing Drug Elimination Program was first authorized by chapter 2, subtitle C, title V of the Anti-Drug Abuse Act of 1988 (42 U.S.C. 11901-11908). Implementing regulations for this program were issued by HUD at 55 FR 27598 (July 3, 1990), codified at 24 CFR 961. Applicants eligible to receive grants under this program were public housing agencies (PHAs), including Indian housing authorities (IHAs). (For the sake of convenience, IHAs and PHAs will both be referred to as HAs.)

Section 581 of the National Affordable Housing Act (NAHA) (approved November 28, 1990, Pub. L. 101-625) amended the Drug Elimination Program in a number of ways, and the Department published a proposed rule in the **Federal Register** on July 1, 1991 to implement these amendments (56 FR 30176).

Two additional amendments to the Drug Elimination Program were made by the Housing and Community Development Act of 1992 (HCDA 1992) (Pub. L. 102-550, approved October 28, 1992). One amendment would permit grants to be used to eliminate drug-related crime in housing owned by HAs that is not housing assisted under the United States Housing Act of 1937 and is not otherwise federally assisted. However, these grants are available only if two conditions are met. The housing must be located in a high intensity drug trafficking area designated pursuant to section 1005 of the Anti-Drug Abuse Act of 1988, and the HA owning the housing demonstrates that drug-related activity, and the problems associated with it, at the housing has a detrimental affect on or about the real property comprising any public or other federally assisted low-income housing. The Department intends to permit this demonstration to be made on the basis of information normally submitted in accordance with the requirements of a Notice of Funding Availability (NOFA) for this program.

The second amendment would make resident management corporations (RMCs) eligible, along with PHAs and IHAs, to receive Drug Elimination Program grants. The statutory language requires eligible RMCs to be those that are principally managing, as determined by the Department, housing developments owned by HAs. The existing rule at 24 CFR 961 and the proposed rule to amend it both included a definition of RMC, and this final rule includes the same definition. Any RMC that meets the definition and that is managing developments owned by HAs will be considered eligible to receive Drug Elimination Program grants.

The Department has determined that language to implement each of these statutory amendments may be included in this final rule without the usual notice and comment procedures because neither of the two amendments requires any new discretion to be exercised on the part of the Department.

The present Drug Elimination Program regulation at 24 CFR part 961 applies to both public and Indian housing, and this final rule does also. The requirements for both PHAs and IHAs are virtually identical, except for basic programmatic differences such as the applicability of the Indian Civil Rights Act. Relevant differences are noted in the rule, which uses the designation HA to apply to both an IHA and a PHA. There were no public comments received on the issue of separate public housing and Indian housing rules in response to the proposed rule.

II. Public Comments

The Department received a total of nine comments on the proposed rule, four of which were from housing

authorities (HAs), two each from city and state agencies, and one from a professional association. The following discussion summarizes the comments received and the Department's responses to them. In general, the Department has attempted to streamline the rule, placing emphasis on the statutory requirements. Additional, specific guidance will be provided to applicants in the annual Notices of Funding Availability (NOFAs) for the program.

Two comments questioned the definition of the term "in and around" and its effect of limiting program activities, particularly drug treatment, to activities within, or adjacent to, the physical boundaries of a public or Indian housing development. The Department has determined that this definition is appropriate to make certain that program funds and program activities are targeted to benefit, as directly as possible, public and Indian housing developments, the intended beneficiaries of the program under the authorizing statute. While it may be argued that many actions taken elsewhere would have an impact on these developments, for example, the interdiction of drugs before they can be distributed among the general population, the goals of this program are best served by focusing its resources directly upon public and Indian housing developments. The same reasoning applies to the inquiry in this comment concerning the use of program funds at sites not federally assisted. The most efficient use of program funds that will result in a consistent, beneficial impact on public and Indian housing is achieved by focusing program activities on the public or Indian housing developments themselves.

One comment asked why the definition of "controlled substance" in the proposed rule did not include alcohol, thereby excluding alcohol from being considered in the definition of "drug-related crime" and from being eligible for program funding. The authorizing statute for the Drug Elimination Program specifies the definitions of both "controlled substance" and "drug-related crime." Neither statutory definition includes alcohol and, therefore, alcohol-related problems may not be addressed in this program.

A comment suggested that the rule provide examples of model drug treatment programs and their characteristics. HUD will not be providing specific examples of programs by name, because it does not want to be interpreted as endorsing any specific program.

One comment asked why the proposed rule eliminated drug detoxification as an eligible activity, and another requested that the Department consider funding under the program for specific treatment beds/slots in detoxification, residential, and methadone treatment programs. Drug detoxification, residential, and methadone treatment programs have never been eligible, funded activities under this program. Funds for these purposes are, however, available through programs funded by the Department of Health and Human Services, which has taken the lead in this area.

There was a request for clarification in one comment of the prohibition, included in the proposed rule at § 961.10 as an ineligible activity, against using, in any way, grant funds to pay for expenses incurred in the preparation of a grant application. The Department has concluded that in some limited circumstances, grant funds would unavoidably be used, in an incidental way, in the preparation of a grant application. For example, records kept for activities funded by a grant would probably form part of the basis for a future grant application, yet it would not be argued that these record-keeping costs were not eligible for program funding. The significant factors here are that (1) the use of grant funds for grant application preparation purposes is only incidental to a current, approved program use, and (2) the grant funds are not being used retroactively to pay for expenses incurred before the funds were awarded. The final rule clarifies this issue by specifying that funding is not permitted for costs incurred prior to the effective date of the grant agreement, including, but not limited to, consultant fees for surveys related to the application or for the actual writing of the application. The underlying rationale is to maximize the use of funds for the purpose of implementing program activities.

A request was received to permit the position of a paid coordinator for volunteer tenant foot patrols under the Drug Elimination Program. The Department has considered this comment and determined that the employment of an individual to coordinate a grantee's activities is a valid and reasonable use of program funds. The final rule explicitly permits the use of program funds for a grant coordinator, who could function, for example, as the coordinator for volunteer tenant foot patrols.

One comment asked why the proposed rule, at § 961.10(b)(3), would permit the use of program funds for the acquisition of certain equipment if used primarily in the provision of additional services, but, at § 961.10(b)(6), would forbid the purchase or lease of other items including "police cars, vans, buses, motorcycles or motorbikes." Section 961.10(b)(2) of the final rule deals with the eligible program activity of "reimbursement of local law enforcement agencies for additional security and protective services." The emphasis here is on providing additional services, not equipment. It is expected that program grantees would contract for additional security and protective services with a service provider that comes completely equipped to provide the service. The exception is in the case of equipping a facility not usually available from a service provider, such as a police substation on the premises of the housing development (project) being assisted.

The prohibition at § 961.10(f)(11) of the proposed rule against using grant funds for administrative costs related to screening or evicting residents for drug-related crime prompted one commenter to ask if screening of applicants is permitted. Eviction and screening costs for either residents or applicants are not permitted under the Drug Elimination Program. The Department has determined that these activities are more appropriately a part of the routine operating expenses of public or Indian housing developments. However, Drug Elimination Program funds may be used to employ individuals to investigate drug-related crime on or about the real property comprising any public or Indian housing development and to provide evidence relating to this crime in any judicial or administrative proceeding, including eviction proceedings.

Clarification of the term "projects" as it is used in the rule was requested in one comment. The comment pointed out that "projects" was used to refer to both program activities and to a HA's buildings and facilities. In response to this comment, the final rule has been changed to read "activity" or "program" rather than "project" where the intent is to refer to plans and actions funded under a Drug Elimination Program grant. In addition, for the purposes of this rule, the term "development" is defined as having the same meaning as "project" in reference to a HA's buildings and facilities. This change in nomenclature is made to reflect current usage within the Department.

The comment also questioned whether the plan for addressing the problem of drug-related crime which must be included with every application

had to be prepared separately for each development. The plan does not have to address each of a HA's developments separately if the same activities will apply to each development, and the rule now states this. Only where program activities differ from one development to another must the applicant prepare the plan separately from each development.

Another comment on the plan objected to the apparent preference given in the proposed rule to objective data, such as crime statistics, over subjective and narrative data. As indicated above, this final version of the rule is omitting much of the detail contained in the proposed rule. HUD will provide guidance to applicants on the specifics of the plan that must be included with the application in NOFAs published for this program. However, the Department generally believes that the consistent use of objective data as identified in the proposed rule permits more valid comparisons and assessments to be made among applicants. On the other hand, it is also recognized that objective data may not be equally available to all applicants. Because of these considerations, the Department intends to permit applicants to submit relevant information, other than strictly objective data, that has a direct bearing on drug-related crime problems in the developments proposed for assistance. This option would only be permitted to the extent that objective data may not be available, or to complement objective data. If other relevant information is to be used in place of, rather than to complement, objective data, the application must indicate the reasons why objective data could not be obtained and what efforts were made to obtain it. Examples of permissible other relevant information would be included in the NOFA.

It was pointed out in one comment that the certification requirement at § 961.20(a)(5)(iv) of the proposed rule that, "the locality is meeting its obligations under the cooperation agreement with the HA, particularly with regard to law enforcement services," appears to conflict with the format of the application form (HUD Form 52353, section 4 B). The Department appreciates such observations and intends to make all references in the final rule and application forms consistent.

The suggestion was made in a comment that the selection criteria should not include any item that assesses the program after the grant period, since any projections made at the application stage would be too speculative to be used for selection purposes. This item must be included in the selection criteria because one of the statutory criteria for the selection of applications is "the extent to which the plan includes initiatives that can be sustained over a period of several years." In addition, projection is a vital component of good planning, and well-supported projections would be an indication that the program to be funded is a good investment for the future. For these reasons, the selection criteria that will be used in NOFAs for this program will require some assessment of applicants' programs beyond the grant period.

One comment suggested awarding grants that ran longer than the 24 month maximum permitted by § 961.26(f) of the proposed rule with grant agreements conditioned on future appropriations and HUD evaluations of grantee performance. The Department disagrees with this approach because it would take funds out of the competitive awards process established for this program. The amount of funding for this much-needed program is limited, and all eligible applicants should have the opportunity to compete for all of the funds that are made available in each funding cycle. An applicant whose program has been funded previously may reapply for a continuation of funding, and at that time, its program will be assessed in relation to the programs of other applicants also seeking funding.

Two comments pointed out that the rule did not implement the provisions of section 581 of NAHA that expanded the Drug Elimination Program to include federally-assisted low income housing developments (projects). As was explained in its preamble, the proposed rule only addressed the NAHA amendments that affected HAs because these were the only entities that were eligible for funding in FY 1991. The appropriation for the Program in FY 1992 and FY 1993 specifically included $10 million each for federally assisted housing, and the Department has made these funds available in separate notices.

On the issue of the time permitted for the preparation of program applications, one comment stated that the period of time from the date that a Notice of Funding Availability (NOFA) for the Drug Elimination Program is published in the **Federal Register** and the application is to be submitted to HUD should be no less than ninety days, and another comment suggested a period of no less than nine weeks. This is an issue that is not specifically addressed in either the proposed rule or the final rule. The date by which applications for funds are due is specified in the NOFA itself. It is the Department's intention to provide applicants with a reasonable amount of time in which to prepare applications within the annual funding cycle of this program.

Other Changes in the Final Rule

To provide guidance for applicants for activities such as security personnel or additional law enforcement that are required to be "over and above" services already being received, the final rule specifies the procedure for demonstrating "over and above." The application must first identify the services currently being received and then identify the increased services for which funding is sought.

To promote a more efficient use of the limited grant funds, the final rule also requires that if additional security personnel (in the form of HA police) or investigators are to be employed for a service that is also provided by a local law enforcement agency, the applicant must provide a cost analysis that demonstrates the employment of the additional HA police or investigators is more cost efficient than obtaining the service from the local law enforcement agency.

The final rule also clarifies the grant administration requirements for the Drug Elimination Program. These additions do not add any new requirements to the rule, but make explicit, for the convenience of program participants, the administrative requirements that have always applied to the program.

A definition of "problems associated with drug-related crime" has been added to the rule to convey the sense, which the Department has determined to be implicit in the authorizing statute, that this program is intended to address more than the narrowly-defined problem of "drug-related crime." "Problems associated with drug-related crime" is defined to mean the negative physical, social, educational and economic impact of drug-related crime on public housing residents, and the deterioration of the public housing environment because of drug-related crime.

Similarly, a definition of "program income" and a new paragraph in the grants administration section referencing the part 85 program income requirements have been added.

II. Other Matters

Environmental Impact

Grants under this program are categorically excluded from review under the National Environmental

Policy Act of 1969 (NEPA) in accordance with 24 CFR part 50.20(p). However, prior to an award of grant funds, HUD will perform an environmental review to the extent required by HUD's environmental regulations at 24 CFR part 50, including the applicable related authorities at 24 CFR 50.4.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule would provide grants to HAs and RMCs to eliminate drug-related crime in public and Indian housing developments. In certain instances, the HA can provide grant funds under the program to nonprofit Resident Management Corporations, Resident Councils, or Resident Organizations for certain eligible program activities. Although small entities could participate in the program, the rule would not have a significant economic impact on them.

Economic Impact

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued on February 17, 1969. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises in domestic or export markets.

Family Impact

The General Counsel, as the Designated Official for Executive Order 12606, the Family, has determined that the provisions of this rule have the potential for a positive, although indirect, impact on family formation, maintenance and general well-being within the meaning of the Order. The proposed rule would implement a program that would encourage HAs and RMCs to develop a plan for addressing the problem of drug-related crime, and to make available grants to help HAs and RMCs to carry out this plan. As such, the program is intended to improve the quality of life of public and Indian housing development residents, including families, by reducing the incidence of drug-related crime.

Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government and, therefore, the provisions of this rule do not have "federalism implications" within the meaning of the Order. The rule implements a program that encourages HAs and RMCs to develop a plan for addressing the problem of drug-related crime, and makes available grants to HAs and RMCs to help them carry out their plans. As such, the program would help HAs and RMCs combat serious drug-related crime problems in their developments, thereby strengthening their role as instrumentalities of the States. In addition, further review under the Order is unnecessary, since the rule generally tracks the statute and involves little implementing discretion.

This final rule was listed as Item No. 1250 in the Department's Semiannual Agenda of Regulations published on April 27, 1992 (57 FR 16804, 16845) under Executive Order 12291 and the Regulatory Flexibility Act.

The Public Housing Drug Elimination Program is listed in the Catalog of Federal Domestic Assistance as number 14.854.

The collection of information requirements contained in this rule have been approved by OMB for review under section 3504 (h) of the Paperwork Reduction Act of 1980. Certain sections of this rule have been determined by the Department of contain collection of information requirements. Information on these requirements is provided as follows:

Section	Number of respondents	Frequency of responses	Est. Avg. response time (in hours)	Estimated annual burden hours
961.15	800	1	64	51,200
961.18	5,000	1	1	5,000
961.28(a)	800	2	24	38,400
961.28(b)	800	1	1	800
Total reporting burden				95,400

List of Subjects in 24 CFR Part 961

Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Grant programs—low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, title 24, chapter IX, of the Code of Federal Regulations is amended by revising 24 CFR part 961, consisting of §§ 961.1 through 961.29, to read as follows:

PART 961—PUBLIC HOUSING DRUG ELIMINATION PROGRAM

Subpart A—General

Sec.

961.1 Purpose and scope.
961.3 Encouragement of resident participation.
961.5 Definitions.

Subpart B—Use of Grant Funds

961.10 Applicants and activities.

Subpart C—Application and Selection

961.15 Application selection and requirements.
961.18 Resident comments on grant application.

Subpart D—Grant Administration

961.26 Grant administration.
961.28 Periodic reports.
961.29 Other Federal requirements.

Subpart E—Reserved

Authority: 42 U.S.C. 3535(d) and 11901 et seq.

Subpart A—General

§ 961.1 Purpose and scope.

The purposes of the Public and Indian Housing Drug Elimination Program are to:

(a) Eliminate drug-related crime and the problems associated with it in and around the premises of public and Indian housing developments;

(b) Encourage HAs and RMCs to develop a plan that includes initiatives that can be sustained over a period of several years for addressing drug-related crime and/or the problems associated with it in and around the premises of public and Indian housing developments proposed for funding under this part; and

(c) Make available Federal grants to help HAs and RMCs carry out their plans.

§ 961.3 Encouragement of resident participation.

The elimination of drug-related crime and the problems associated with it in public housing developments requires the active involvement and commitment of public housing residents and their organizations. To enhance the ability of HAs to combat drug-related criminal activity in their developments, Resident Councils (RCs), Resident Management Corporations (RMCs), and Resident Organizations (ROs) will be permitted to undertake management functions specified in this part, notwithstanding the otherwise applicable requirements of 24 CFR parts 905 and 964. The Department encourages HAs to make Resident Management Corporations (RMCs), Resident Councils (RCs), and Resident Organizations (ROs) full partners in this effort.

§ 961.5 Definitions.

Act means The United States Housing Act of 1937.

Chief executive officer of a State or a unit of general local government means the elected official, or the legally designated official, who has the primary responsibility for the conduct of that entity's governmental affairs. Examples of the "chief executive officer" of a unit of general local government are: the elected mayor of a municipality; the elected county executive of a county; the chairperson of a county commission or board in a county that has no elected county executive; or the official designated pursuant to law by the governing body of the unit of general local government. The chief executive officer of an Indian tribe is the tribal governing official.

Controlled substance means a drug or other substance or immediate precursor included in schedule I, II, III, IV, or V of section 102 of the Controlled Substances Act (21 U.S.C. 802). The term does not include distilled spirits, wine, malt beverages or tobacco as those terms are defined in subtitle E of the Internal Revenue Code of 1954.

Drug intervention means a process to identify public housing resident drug users and assist them in modifying their behavior and/or refer them to drug treatment to eliminate drug abuse.

Drug prevention means a process to provide goods and services designed to alter factors, including activities, environmental influences, risks and expectations, that lead to drug abuse.

Drug-related crime means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, a controlled substance.

Drug treatment means a program for the residents of an applicant's development that strives to end drug abuse and to eliminate its negative effects through rehabilitation and relapse prevention.

Governmental jurisdiction means the unit of general local government, State, or area of operation of an Indian tribe in which the housing development administered by the applicant is located.

HUD or *Department* means the United States Department of Housing and Urban Development.

In and around means within, or adjacent to, the physical boundaries of a housing development.

Indian means any person recognized as being an Indian or Alaska Native by an Indian tribe, the Federal Government, or any State.

Indian Housing Authority (IHA) means any entity that:

(1) Is authorized to engage in or assist in the development or operation of lower income housing for Indians; and

(2) Is established either by exercise of the power of self-government of an Indian tribe independent of State law, or by operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

For the purposes of this part, the term HA includes IHA.

Indian tribe means any tribe, band, pueblo, group, community, or nation of Indians or Alaska Natives.

Local law enforcement agency means a police department, sheriff's office, or other entity of the governmental jurisdiction that has law enforcement responsibilities for the community at large, including the housing developments administered by the applicant. In Indian jurisdictions, this includes tribal prosecutors that assume law enforcement functions analogous to a police department or the BIA. More than one law enforcement agency may have these responsibilities for the jurisdiction that includes the applicant's developments.

Problems associated with drug-related crime means the negative physical, social, educational and economic impact of drug-related crime on public and Indian housing residents, and the deterioration of the public and Indian housing environment because of drug-related crime.

Program income means gross income received by a grantee and directly generated from the use of program funds. When program income is generated by an activity only partially assisted with program funds, the income shall be prorated to reflect the percentage of program funds used. Program income includes, but is not limited to: Proceeds from the disposition by sale or long-term lease of real property purchased or improved with program funds; proceeds from the disposition of equipment purchased with program funds; gross income from the use or rental of real or personal property acquired by a grantee with program funds, less costs incidental to the generation of the income; and, interest earned on funds held in a program fund account.

Project means low income housing and all necessary appurtenances developed, acquired, or assisted by a HA under the United States Housing Act of 1937 (other than under section 8). A project encompasses those buildings identified in the Annual Contributions Contract (ACC) that is executed between HUD and the HA. For the purposes of this part, the term "development" means the same as "project."

Public housing agency (PHA) means any State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) that is authorized under the United States Housing Act of 1937 (other than under section 8) to engage in or assist in the development or operation of housing for low income families and that has entered into both an Annual Contributions Contract (ACC) with HUD and a Cooperation Agreement with the local jurisdiction. For the purposes of this part, the term HA includes PHA.

Resident Council (RC) means an incorporated or unincorporated nonprofit organization or association that meets each of the following requirements:

(1) It must be representative of the residents it purports to represent;

(2) It may represent residents in more than one development or in all of the developments of an HA, but it must fairly represent residents from each development that it represents;

(3) It must adopt written procedures providing for the election of specific officers on a regular basis (but at least once every three years);

(4) It must have a democratically elected governing board. The voting membership of the board must consist of residents of the development or developments that the resident organization or resident council represents.

Resident Management Corporation (RMC) means the entity that proposes to enter into, or that enters into, a management contract with a PHA under 24 CFR part 964 in accordance with the requirements of that part, or with an IHA under 24 CFR part 905, or with an IHA in accordance with the requirements of this part. The corporation must have each of the following characteristics:

(1) It must be a nonprofit organization that is incorporated under the laws of the State or the Indian tribe in which it is located.

(2) It may be established by more than one resident organization or resident council, so long as each such organization or council:

(i) Approves the establishment of the corporation and;

(ii) Has representation on the Board of Directors of the corporation.

(3) It must have an elected Board of Directors.

(4) Its by-laws must require the Board of Directors to include representatives of each resident organization or resident council involved in establishing the corporation.

(5) Its voting members must be residents of the development or developments it manages.

(6) It must be approved by the resident council or resident organization. If there is no council or organization, a majority of the households of the development must approve the establishment of such an organization to determine the feasibility of establishing a corporation to manage the development.

(7) It may serve as both the resident management corporation and the resident council or the resident organization, so long as the corporation meets the requirements of part 964 of this chapter for a resident council or the requirements of this part for a resident organization.

Resident Organization (RO) means an incorporated or unincorporated nonprofit organization or association that meets each of the following requirements:

(1) It must be representative of the residents it purports to represent;

(2) It may represent residents in more than one development or in all of the developments of an IHA, but it must fairly represent residents from each development that it represents;

(3) It must adopt written procedures providing for the election of specific officers on a regular basis (but at least once every three years);

(4) It must have a democratically elected governing board. The voting membership of the board must consist of residents of the development or developments that the resident organization represents.

Single State Agency means an agency responsible for licensing and monitoring State or tribal drug abuse programs.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public or Indian housing agency under the United States Housing Act of 1937.

Unit of general local government means any city, county, town, municipality, township, parish, village, local public authority (including any public or Indian housing agency under the United States Housing Act of 1937) or other general purpose political subdivision of a State.

Subpart B—Use of Grant Funds

§ 961.10 Applicants and activities.

(a) *Eligible applicants.* PHAs, IHAs, and RMCs that manage developments owned by HAs are eligible applicants under this program.

(b) *Eligible activities.* An application for funding under this program may be for one or more of the following eligible activities, although an applicant may submit only one application under each Notice of Funding Availability (NOFA). In general, compensation for personnel (including supervisory personnel, such as a grant administrator or drug program coordinator, and support staff, such as counselors and clerical staff) hired for grant activities is permitted and may include wages, salaries, and fringe benefits. The following is a listing of eligible activities:

(1) *Employment of security personnel.*

(i) *Security Guard Personnel.* Contracting for security guard personnel services in the developments proposed for funding is permitted under this program.

(A) Contract security personnel funded by this program must perform services not usually performed by local law enforcement agencies on a routine basis, such as, patrolling inside buildings, providing guard services at building entrances to check for ID's, or patrolling and checking car parking lots for appropriate parking decals.

(B) Contract security personnel funded by this program must meet all relevant tribal, State or local government insurance, licensing, certification, training, bonding, or other similar requirements.

(C) The applicant, the cooperating local law enforcement agency, and the provider (contractor) of the security personnel are required, and as a part of the security personnel contract, to enter into and execute a written agreement that describes the following:

(1) The activities to be performed by the security personnel, their scope of authority, and how they will coordinate their activities with the local law enforcement agency;

(2) The types of activities that the security personnel are expressly prohibited from undertaking.

(ii) *Employment of HA Police.* Employment of additional HA police in the developments proposed for funding is permitted under this program.

(A) If additional HA police are to be employed for a service that is also provided by a local law enforcement agency, the applicant must provide a cost analysis that demonstrates the employment of HA police is more cost efficient that obtaining the service from the local law enforcement agency.

(B) Additional HA police services to be funded under this program must be over and above those that the existing HA police, if any, provides, and the tribal, State or local government is contractually obligated to provide under its Cooperation Agreement with the applying HA (as required by the HA's Annual Contributions Contract). An applicant seeking funding for this activity must first establish a baseline by describing the current level of services provided by both the local law enforcement agency and the HA police, if any (in terms of the kinds of services provided, the number of officers and equipment and the actual percent of their time assigned to the developments proposed for funding), and then demonstrate to what extent the funded activity will represent an increase over this baseline.

(C) HA police funded by this program must meet all relevant tribal, State or local government insurance, licensing, certification, training, bonding, or other similar requirements.

(D) The applicant and the cooperating local law enforcement agency are required to enter into and execute a written agreement that describes the following:

(1) The activities to be performed by the HA police, their scope of authority, and how they will coordinate their activities with the local law enforcement agency;

(2) The types of activities that the HA police are expressly prohibited from undertaking.

(2) *Reimbursement of local law enforcement agencies for additional security and protective services.*

(i) Additional security and protective services to be funded under this program must be over and above those that the tribal, State or local government is contractually obligated to provide under its Cooperation Agreement with the applying HA (as required by the HA's Annual Contributions Contract). An application seeking funding for this activity must first establish a baseline by describing the current level of services (in terms of the kinds of services provided, the number of officers and equipment and the actual percent of their time assigned to the developments proposed for funding) and then demonstrate to what extent the funded activity will represent an increase over this baseline.

(ii) Communications and security equipment to improve the collection, analysis, and use of information about drug-related criminal activities in a public housing community, such as computers accessing national, tribal, State or local government security networks and databases, facsimile machines, telephone equipment, bicycles, and motor scooters may be eligible items if used exclusively in connection with the establishment of a law enforcement substation on the funded premises or scattered site developments of the applicant. Funds for activities under this section may not be drawn until the grantee has executed a contract for the additional law enforcement services.

(3) *Physical improvements to enhance security.* (i) Physical improvements that are specifically designed to enhance security are permitted under this program. These improvements may include (but are not limited to) the installation of barriers, lighting systems, fences, bolts, locks; the landscaping or reconfiguration of common areas so as to discourage drug-related crime; and other physical improvements in public housing developments that are designed to enhance security and discourage drug-related activities.

(ii) An activity that is funded under any other HUD program, such as the modernization program at 24 CFR part 968, shall not also be funded by this program.

(iii) Funding is not permitted for physical improvements that involve the demolition of any units in a development.

(iv) Funding is not permitted for any physical improvements that would result in the displacement of persons.

(v) Funding is not permitted for the acquisition of real property.

(vi) All physical improvements must also be accessible to persons with disabilities. For example, some types of locks, buzzer systems, etc., are not accessible to persons with limited strength, mobility, or to persons who are hearing impaired. All physical improvements must meet the accessibility requirements of 24 CFR part 8.

(4) *Employment of investigators.* (i) Employment of one or more individuals is permitted under this program to:

(A) Investigate drug-related crime in or around the real property comprising any public housing development; and

(B) Provide evidence relating to any such crime in any administrative or judicial proceedings.

(ii) If one or more investigators are to be employed for a service that is also provided by a local enforcement agency, the applicant must provide a cost analysis that demonstrates the employment of investigators is more cost efficient than obtaining the service from the local law enforcement agency.

(iii) Investigators funded by this program must meet all relevant tribal, State or local government insurance, licensing, certification, training, bonding, or other similar requirements.

(iv) The applicant, the cooperating local law enforcement agency, and the investigator(s) are required, before any investigators are employed, to enter into and execute a written agreement that describes the following:

(A) The nature of the activities to be performed by the investigators, their scope of authority, and how they will coordinate their activities with the local law enforcement agency;

(B) The types of activities that the investigators are expressly prohibited from undertaking.

(5) *Voluntary tenant patrols.* (i) The provision of training, communications equipment, and other related equipment (including uniforms), for use by voluntary tenant patrols acting in cooperation with officials of local law enforcement agencies is permitted under this program. Members must be volunteers and must be tenants of the development that the tenant (resident) patrol represents. Patrols established under this program are expected to patrol for drug-related criminal activity in the developments proposed for assistance, and to report these activities to the cooperating local law enforcement agency and relevant tribal, State and Federal agencies, as appropriate. Grantees are required to obtain liability insurance to protect themselves and the members of the voluntary tenant patrol against potential liability for the activities of the patrol under this program. The cost of this insurance will be considered an eligible program expense.

(ii) The applicant, the cooperating local law enforcement agency, and the members of the tenant patrol are required, before putting the tenant patrol into effect, to enter into and execute a written agreement that describes the following:

(A) The nature of the activities to be performed by the tenant patrol, the patrol's scope of authority, and how the patrol will coordinate its activities with the local law enforcement agency;

(B) The types of activities that a tenant patrol is expressly prohibited from undertaking, to include but not limited to, the carrying or use of firearms or other weapons, nightsticks, clubs, handcuffs, or mace in the course of their duties under this program;

(C) The type of initial tenant patrol training and continuing training the members receive from the local law enforcement agency (training by the local law enforcement agency is required before putting the tenant patrol into effect);

(iii) Tenant patrol members must be advised that they may be subject to individual or collective liability for any actions undertaken outside the scope of their authority and that such acts are not covered under a HA's or RMC's liability insurance.

(iv) Communication and related equipment eligible for funding under this program shall be equipment that is reasonable, necessary, justified and related to the operation of the tenant patrol and that is otherwise permissible under tribal, State or local law.

(v) Under this program, bicycles and uniforms (caps and other clothing items that identify voluntary tenant patrol members, including patrol t-shirts and jackets) to be used by the members of the tenant patrol are eligible items.

(vi) Drug elimination grant funds may not be used for any type of financial compensation, such as wages, salaries, and stipends, for voluntary tenant patrol participants. However, the use of program funds for a grant coordinator

for volunteer tenant foot patrols is permitted.

(6) *Drug prevention, intervention and treatment programs to reduce the use of drugs.* Programs that reduce the use of drugs in and around the premises of public housing developments, including drug abuse prevention, intervention, referral and treatment programs are permitted under this part. The program should facilitate drug prevention, intervention and treatment efforts, to include outreach to community resources and youth activities, and facilitate bringing these resources onto the premises, or providing resident referrals to treatment programs or transportation to out-patient treatment programs away from the premises. Funding is permitted for reasonable, necessary and justified leasing of vehicles for resident youth and adult education and training activities directly related to "Programs to reduce the use of drugs" under this section. Alcohol-related activities/programs are not eligible for funding under this part. Notices of Funding Availability (NOFAs) published in the **Federal Register** for this program will provide more extensive guidance as to the elements that are to be included in a drug treatment program.

(7) *Resident management corporations (RMCs), resident councils (RCs) and resident organizations (ROs).* Funding under this part is permitted for HAs that receive grants to contract with RMCs and incorporated RCs and ROs to develop security and drug abuse prevention programs involving site residents. Such programs may include voluntary tenant patrol activities, drug education, drug intervention, youth programs, referral, and outreach efforts.

(8) *Continuation of current program activities.* Current or previous PHDEP grant holders may apply, on the same basis as other applicants, for grants to continue their PHDEP activities or implement other program activities. The Department will evaluate an applicant's performance under any previous Drug Elimination Program grants within the past five years. Subject to evaluation and review are the applicant's financial and program performance; reporting and special condition compliance; accomplishment of stated goals and objectives under the previous grant; and program adjustments made in response to previous ineffective performance. If the evaluation discloses a pattern under past grants of ineffective performances with no corrective measures attempted, it will result in a deduction of points from the current application. Since this is a competitive program, HUD does not guarantee continued funding of any previously funded Drug Elimination Program Grant.

(9) *HA-owned housing.* Funding may be used for the activities described in § 961.10(b) (1) through (7), to eliminate drug-related crime in housing owned by housing agencies that is not housing assisted under the United States Housing Act of 1937 and is not otherwise federally assisted, but only if:

(i) The housing is located in a high intensity drug trafficking area designated pursuant to section 1005 of the Anti-Drug Abuse Act of 1988; and

(ii) The HA owning the housing demonstrates, on the basis of information submitted in accordance with the requirements of any NOFA issued under this program, that drug-related activity, and the problems associated with it, at the housing has a detrimental affect on or about the real property comprising any public or other federally assisted low-income housing.

(c) *Ineligible activities.* Funding is not permitted under this program for any of the activities listed in this paragraph (c) or those specified as ineligible elsewhere in this part. Notices of Funding Availability (NOFAs) published under this program will provide specific guidance concerning other ineligible activities.

(1) *Joint applications are not eligible* for funding under this program.

(2) Indirect costs as defined in OMB Circular A–87 are not permitted under this program.

(3) Funding is not permitted for costs incurred before the effective date of the grant agreement, including, but not limited to, consultant fees for surveys related to the application or the actual writing of the application.

(4) Funding is not permitted for the costs (e.g., attorney's fees, court costs, etc.) related to screening or evicting residents for drug-related crime. However, investigators funded under this program may participate in judicial and administrative proceedings as provided in paragraph (b)(4)(i)(B) of this section.

Subpart C—Application and Selection

§ 961.15 Application selection and requirements.

(a) *Selection criteria.* HUD will review each application that it determines meets the requirements of this part and assign points in accordance with the selection criteria. The number of points that an application receives will depend on the extent to which the application is responsive to the information requested in Notices of Funding Availability (NOFAs) published for this program. Each application submitted for a grant under this part will be evaluated on the basis of the following selection criteria:

(1) First criterion: The extent of the drug-related crime problem in the applicant's development or developments proposed for assistance.

(2) Second criterion: The quality of the plan to address the crime problem in the developments proposed for assistance, including the extent to which the plan includes initiatives that can be sustained over a period of several years.

(3) Third criterion: The capability of the applicant to carry out the plan.

(4) Fourth criterion: The extent to which tenants, the local government and the local community support and participate in the design and implementation of the activities proposed to be funded under the application.

(b) *Plan requirement.* Each application must include a plan for addressing the problem of drug-related crime and/or the problems associated with drug-related crime on the premises of the housing for which the application is being submitted. For applications that cover more than one development, the plan does not have to address each development separately if the same activities will apply to each development. Only where program activities will differ from one development to another must the plan address each development separately.

(c) *Notice of Funding Availability.* HUD will publish Notices of Funding Availability (NOFAs) in the **Federal Register**, as appropriate, to inform the public of the availability of grant amounts under this part. NOFAs will provide specific guidance with respect to the grant process, including the deadlines for the submission of grant applications; the limits (if any) on maximum grant amounts; the information that must be submitted to permit HUD to score each of the selection criteria; the maximum number of points to be awarded for each selection criterion; the contents of the plan for addressing the problem of drug-related crime that must be included with the application; the listing of any certifications and assurances that must be submitted with the application; and the process for ranking and selecting applicants. NOFAs will also include any additional information, factors, and requirements that the Department has determined to be necessary and appropriate to provide for the implementation and administration of the program under this part.

(d) *Environmental review.* Grants under this part are categorically

excluded from review under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321), in accordance with 24 CFR 50.20(p). However, prior to an award of grant funds under this part, HUD will perform an environmental review to the extent required by HUD's environmental regulations at 24 CFR part 50, including the applicable related authorities at 24 CFR 50.4.

§ 961.18 Resident comments on grant application.

The applicant must provide the residents of developments proposed for funding under this part, as well as any RMCs, RCs, or ROs that represent those residents (including any HA-wide RMC, RC or RO), with a reasonable opportunity to comment on its application for funding under this program. The applicant must give these comments careful consideration in developing its plan and application as well as in the implementation of funded programs. Copies of all written comments submitted must be maintained by the grantee for three years.

Subpart D—Grant Administration

§ 961.26 Grant administration.

(a) *General.* Each grantee is responsible for ensuring that grant funds are administered in accordance with the requirements of this part, any Notice of Funding Availability (NOFA) issued for this program, 24 CFR part 85, applicable laws and regulations, applicable OMB circulars, HUD fiscal and audit controls, grant agreements, grant special conditions, the grantee's approved budget (SF-424A), budget narrative, plan, and activity timetable.

(b) *Grant term extensions.* (1) *Grant term.* Terms of the grant agreement may not exceed 24 months, unless an extension is approved by the local Field Office or the local HUD Office of Indian Programs. The maximum extension allowable for any grant is 6 months. Any funds not expended at the end of the grant term shall be remitted to HUD.

(2) Grantees may be granted an extension of the grant term in response to a written request for an extension stating the need for the extension and indicating the additional time required.

(3) The request must be received by the local HUD Field Office or the local HUD Office of Indian Programs prior to the termination of the grant, and requires approval by the local HUD Field Office or the local HUD Office of Indian Programs with jurisdiction over the grantee.

(4) The maximum extension allowable for any program period is 6 months. Requests for retroactive extension of program periods will not be considered. Only one extension will be permitted. Extensions will only be considered if the extension criteria of paragraph (b)(5) of this section are met by the grantee at the time the request for the extension of the deadline is submitted for approval.

(5) *Extension criteria.* The following criteria must be met by the grantee when submitting a request to extend the expenditure deadline for a program or set of programs.

(i) *Financial status reports.* There must be on file with the local HUD Field Office or the local HUD Office of Indian Programs, current and acceptable Financial Status Reports, SF-269As.

(ii) *Grant agreement special conditions.* All grant agreement special conditions must be satisfied except those conditions that must be fulfilled in the remaining period of the grant. This also includes the performance and resolution of audit findings in a timely manner.

(iii) A narrative justification must be submitted with the program extension request. Complete details must be provided, including the circumstances which require the proposed extension, and explanation of the impact of denying the request.

(6) The local HUD Field Office or the local HUD Office of Indian Programs will take action on any proposed extension request within 15 days after receipt of the request.

(c) *Duplication of funds.* To prevent duplicate funding of any activity, the grantee must establish controls to assure that an activity or program that is funded by other HUD programs, such as modernization or CIAP, or programs of other Federal agencies, shall not also be funded by the Drug Elimination Program. The grantee must establish an auditable system to provide adequate accountability for funds that it has been awarded. The grantee is responsible for ensuring that there is no duplication of funds.

(d) *Employment preference.* A PHA grantee under this program shall give preference to the employment of public housing residents, and comply with section 3 of the Housing and Urban Development Act of 1968 and 24 CFR part 135, to carry out any of the eligible activities under this part, so long as such residents have comparable qualifications and training as non-public housing residents. Except where the labor standards requirements of § 961.29(a)(1) are applicable, a public housing resident employed under this section may choose to receive compensation for his or her services either in the form of payment, as a credit to the resident's account, or as payment of back rent owed to the grantee. An IHA grantee under this program shall give preference to the employment of Indians, in accordance with 25 U.S.C. 450(e) and 24 CFR 905.165, to carry out any of the eligible activities under this part, to the greatest extent feasible. The Indian preference must be used first before any resident preference may be allowed. Except where the labor standards requirements of § 905.1109(a)(1) of this chapter are applicable, an Indian housing resident employed under this section may choose to receive compensation for his or her services either in the form of payment, as a credit to the resident's account, or as payment of back rent owed to the grantee. Voluntary tenant patrol participants are not eligible for compensation from Drug Elimination Program funds.

(e) *Insurance.* Each grantee is required to obtain adequate insurance coverage to protect itself against any potential liability arising out of the eligible activities under this part. In particular, applicants are required to assess their potential liability arising out of the employment or contracting of security personnel, law enforcement personnel, investigators, and drug treatment providers, and the establishment of voluntary tenant patrols; to evaluate the qualifications and training of the individuals or firms undertaking these functions; and to consider any limitations on liability under tribal, State or local law. Grantees are required to obtain liability insurance to protect the members of the voluntary tenant patrol against potential liability as a result of the patrol's activities under § 961.10(b)(5). Voluntary tenant patrol liability insurance costs *are eligible program expenses.* Subgrantees are required to obtain their own liability insurance.

(f) *Program income.* The requirements of 24 CFR 85.25 apply to program income as defined at § 961.5, except that program income must be used for eligible Drug Elimination Program activities.

(g) *Failure to implement program.* If the grant plan, approved budget and timetable, as described in the approved application, are not operational within 60 days of the grant agreement date, the HA must report by letter to the local Field Office or the local Office of Indian Programs the steps being taken to initiate the plan and timetable, the reason for the delay, and the expected starting date. Any timetable revisions which resulted from the delay must be included. The Field Office or the Office of Indian Programs will determine if the

delay is acceptable, approve/disapprove the revised plan and timetable and take any additional appropriate action.

(h) *Sanctions.*

(1) HUD may impose sanctions if the grantee:

(i) Is not complying with the requirements of 24 CFR part 961 or of other applicable Federal law;

(ii) Fails to make satisfactory progress toward its drug elimination goals, as specified in its plan and as reflected in its performance and financial status reports under § 961.28;

(iii) Does not establish procedures that will minimize the time elapsing between drawdowns and disbursements;

(iv) Does not adhere to grant agreement requirements or special conditions;

(v) Proposes substantial plan changes to the extent that, if originally submitted, would have resulted in the application not being selected for funding;

(vi) Engages in the improper award or administration of grant subcontracts;

(vii) Does not submit reports; or

(viii) Files a false certification, for example, in response to a certification request contained in a funding notice.

(2) HUD may impose the following sanctions:

(i) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee;

(ii) Disallow all or part of the cost of the activity or action not in compliance;

(iii) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program;

(iv) Require that some or all of the grant amounts be remitted to HUD;

(v) Condition a future grant and elect not to provide future grant funds to the grantee until appropriate actions are taken to ensure compliance;

(vi) Withhold further awards for the program or

(vii) Take other remedies that may be legally available.

§ 961.28 Periodic reports.

In accordance with 24 CFR 85.40, grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity of the grant.

(a) *Semi-annual (nonconstruction) performance reports.*

(1) In accordance with 24 CFR 85.40(b)(1)(2) and 85.50(b), grantees are required to provide the local HUD Field Office or the local Office of Indian Programs with a semi-annual performance report that evaluates the grantee's performance against its plan. These reports shall include in summary form (but are not limited to) the following: Any change or lack of change in crime statistics or other indicators drawn from the applicant's plan assessment (such as vandalism, etc.) and an explanation of any difference; successful completion of any of the strategy components identified in the applicant's plan; a discussion of any problems encountered in implementing the plan and how they were addressed; an evaluation of whether the rate of progress meets expectations; a discussion of the grantee's efforts in encouraging resident participation; a description of any other programs that may have been initiated, expanded or deleted as a result of the plan, with an identification of the resources and the number of people involved in the programs and their relation to the plan.

(2) *Reporting period.* Semi-annual performance reports (for periods ending June 30 and December 31) are due to the local HUD Field Office or the local Office of Indian Programs on July 30 and January 31 of each year. If the reports are not received by the Field Office or the local Office of Indian Programs on or before the due date, grant funds will not be advanced until the reports are received.

(b) *Final performance report.* (1) In accordance with 24 CFR 85.40(b)(1) and 85.50(b), grantees are required to provide the local HUD Field Office or the local Office of Indian Programs with a final cumulative performance report that evaluates the grantee's overall performance against its plan. This report shall include in summary form (but is not limited to) the following: any change or lack of change in crime statistics or other indicators drawn from the applicant's plan assessment (such as vandalism, etc.) and an explanation of any difference; successful completion of any of the strategy components identified in the applicant's plan; a discussion of any problems encountered in implementing the plan and how they were addressed; an evaluation of whether the rate of progress meets expectations; a discussion of the grantee's efforts in encouraging resident participation; a description of any other programs that may have been initiated, expanded or deleted as a result of the plan, with an identification of the resources and the number of people involved in the programs and their relation to the plan.

(2) *Reporting period.* The final performance report shall cover the period from the date of the grant agreement to the termination date of the grant agreement. The report is due to the local HUD Field Office or the local Office of Indian Programs within 90 days after termination of the grant agreement.

(c) *Semi-annual financial status reporting requirements.*

(1) The grantee shall provide a financial status report in accordance with 24 CFR part 85.41 (b) and (c). The grantee shall use the SF–269A, Financial Status Report-Long Form, to report the status of funds for non-construction programs. The grantee shall use SF–269A, block 12, "Remarks," to report on the status of programs, functions or activities within the program.

(2) *Reporting period.* Semi-annual (for periods ending June 30 and December 31) financial status reports (SF–269A) must be submitted to the local HUD Field Office or the local Office of Indian Programs by July 30 and January 31 of each year. If the SF–269A is not received on or before the due date by the Field Office or the local Office of Indian Programs, grant funds will not be advanced until the reports are received.

(d) *Final financial status report (SF–269A).* (1) The final report will be a cumulative summary of expenditures to date and must indicate the exact balance of unexpended funds. If any amount of grant funds owed to HUD have not been remitted by the grantee, the local Field Office or the local Office of Indian Programs shall notify the grantee, in writing, to remit the excess funds to HUD. The grantee shall remit all Drug Elimination Program funds owed to HUD, including any unexpended funds prior to or upon receipt of the notice.

(2) *Reporting period.* The final financial status report shall cover the period from the date of the grant agreement to the termination date of the grant agreement. The report is due to the local HUD Field Office or the local Office of Indian Programs within 90 days after the termination of the grant agreement.

(e) *Report submission.* The grantee shall submit all required reports to the local HUD Field Office, Attention: Director, Public Housing Division or to the local HUD Office of Indian Programs, Attention: Director, Indian Housing Division.

§ 961.29 Other Federal requirements.

Use of grant funds requires compliance with the following additional Federal requirements:

(a) Labor standards. (1) Where grant funds are used to undertake physical improvements to increase security under § 961.10(b)(3), the following labor standards apply:

(i) The grantee and its contractors and subcontractors must pay the following prevailing wage rates, and must comply with all related rules, regulations and requirements:

(A) For laborers and mechanics employed in the program, the wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a *et seq.*) to be prevailing in the locality with respect to such trades;

(B) For laborers and mechanics employed in carrying out non-routine maintenance in the program, the HUD-determined prevailing wage rate. As used in this paragraph (a), non-routine maintenance means work items that ordinarily would be performed on a regular basis in the course of upkeep of a property, but have become substantial in scope because they have been put off, and that involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Non-routine maintenance may include replacement of equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind. Work that constitutes reconstruction, a substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units is not non-routine maintenance.

(ii) The employment of laborers and mechanics is subject to the provisions of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333).

(2) The provisions of paragraph (a)(1) of this section shall not apply to labor contributed under the following circumstances:

(i) Upon the request of any resident management corporation, HUD may, subject to applicable collective bargaining agreements, permit residents of a program managed by the resident management corporation to volunteer a portion of their labor;

(ii) An individual may volunteer to perform services if:

(A) The individual does not receive compensation for the voluntary services, or, is paid expenses, reasonable benefits, or a nominal fee for voluntary services; and

(B) Is not otherwise employed at any time in the work subject to paragraphs (a)(1)(i) (A) or (B) of this section.

(b) *Nondiscrimination and equal opportunity.* The following nondiscrimination and equal opportunity requirements apply to this program:

(1) The requirements of The Fair Housing Act (42 U.S.C. 3601–19) and implementing regulations issued at 24 CFR part 100; Executive Order 11063 (Equal Opportunity in Housing) and implementing regulations at 24 CFR part 107; and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4) (Nondiscrimination in Federally Assisted Programs) and implementing regulations issued at 24 CFR part 1;

(2) The prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101–07) and implementing regulations at 24 CFR part 146, and the prohibitions against discrimination against handicapped individuals under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8;

(3) The requirements of Executive Order 11246 (Equal Employment Opportunity) and the regulations issued under the Order at 41 CFR chapter 60;

(4) The requirements of section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1701u (Employment Opportunities for Lower Income Persons in Connection with Assisted Projects); and

(5) The requirements of Executive Orders 11625, 12432, and 12138. Consistent with HUD's responsibilities under these Orders, recipients must make efforts to encourage the use of minority and women's business enterprises in connection with funded activities.

(c) *Use of debarred, suspended or ineligible contractors.* Use of grant funds under this program requires compliance with the provisions of 24 CFR part 24 relating to the employment, engagement of services, awarding of contracts, or funding of any contractors or subcontractors during any period of debarment, suspension, or placement in ineligibility status.

(d) *Flood insurance.* Grants will not be awarded for proposed activities that involve acquisition, construction, reconstruction, repair or improvement of a building or mobile home located in an area that has been identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards unless:

(1) The community in which the area is situated is participating in the National Flood Insurance Program in accordance with 44 CFR parts 59 through 79; or

(2) Less than a year has passed since FEMA notification to the community regarding such hazards; and

(3) Flood insurance on the structure is obtained in accordance with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001).

(e) *Lead-based paint.* The provisions of section 302 of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4821–4846, and implementing regulations at 24 CFR part 965, subpart H apply to activities under this program as set out below. This section is promulgated pursuant to the authority granted in 24 CFR 35.24(b)(4) and supersedes, with respect to all housing to which it applies, the requirements (not including definitions) prescribed by subpart C of 24 CFR part 35.

(1) *Applicability.* The provisions of this section shall apply to all developments constructed or substantially rehabilitated before January 1, 1978, and for which assistance under this part is being used for physical improvements to enhance security under § 961.10(b)(3).

(2) *Definitions.* The term "applicable surfaces" means all intact and nonintact interior and exterior painted surfaces of a residential structure.

(3) *Exceptions.* The following activities are not covered by this section:

(i) Installation of security devices;

(ii) Other similar types of single-purpose programs that do not involve physical repairs or remodeling of applicable surfaces of residential structures; or

(iii) Any non-single purpose rehabilitation that does not involve applicable surfaces and that does not exceed $3,000 per unit.

(f) *Conflicts of interest.* In addition to the conflict of interest requirements in 24 CFR part 85, no person, as described in paragraphs (f) (1) and (2) of this section, may obtain a personal or financial interest or benefit from an activity funded under this program, or have an interest in any contract, subcontract, or agreement with respect thereto, or the proceeds thereunder, either for himself or herself or for those with whom he or she has family or business ties, during his or her tenure, or for one year thereafter:

(1) Who is an employee, agent, consultant, officer, or elected or appointed official of the grantee, that receives assistance under the program and who exercises or has exercised any functions or responsibilities with respect to assisted activities; or

(2) Who is in a position to participate in a decision making process or gain inside information with regard to such activities.

(g) *Drug Free Workplace Act of 1988.* The requirements of the Drug-Free

Workplace Act of 1988 at 24 CFR part 24, subpart F apply to this program.

(h) *Anti-lobbying provisions under section 319.* The use of funds under this part is subject to the disclosure requirements and prohibitions of section 319 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352), and implementing regulations at 24 CFR part 87. These authorities prohibit recipients and subrecipients of Federal contracts, grants, cooperative agreements and loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan. The prohibition also covers the awarding of contracts, grants, cooperative agreements, or loans unless the recipient has made an acceptable certification regarding lobbying. Under 24 CFR part 87, applicants, recipients, and subrecipients of assistance exceeding $100,000 must certify that no Federal funds have been or will be spent on lobbying activities in connection with the assistance. However, since grantees sometimes may expect to receive additional grant funds through reallocations, all potential grantees are required to submit the certification, and to make the required disclosure if the grant amount exceeds $100,000. The law provides substantial monetary penalties for failure to file the required certification or disclosure. IHAs established by an Indian tribe as a result of the exercise of the tribe's sovereign power are excluded from the coverage of 31 U.S.C. 1352, but IHAs established under State law are not excluded from the statute's coverage.

(i) For IHAs, § 905.115 of this chapter, "Applicability of civil rights requirements", and § 905.120 of this chapter, "Compliance with other Federal requirements", of this title apply and control to the extent they may differ from other requirements of this section;

(j) *Indian preference.* Applicants are subject to the Indian Civil Rights Act (24 U.S.C. 1301), the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)), and the Indian preference rules in the IHA procurement regulations at 24 CFR 905, subpart B. These provisions require, to the greatest extent feasible, that preference and opportunities for training and employment be given to Indians and that preference in the award of subcontracts and subgrants be given to Indian Organizations and Indian Owned Economic Enterprises.

(k) *Intergovernmental Review.* The requirements of Executive Order 12372 and the regulations issued under the order at 24 CFR part 52, to the extent provided by **Federal Register** notice in accordance with 24 CFR 52.3 apply to this program.

Subpart E—[Reserved]

Dated: December 23, 1992.

Joseph G. Schiff,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 93–154 Filed 1–6–93; 8:45 am]

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federal register

Thursday
January 7, 1993

Part VI

Department of Education

34 CFR Part 682

Federal Family Education Loan Program; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 682

RIN 1840–AB41

Federal Family Education Loan Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations for the Federal Family Education Loan Program (FFELP), formerly the Guaranteed Student Loan (GSL) program (34 CFR part 682). The final regulations are needed to implement further the Secretary's Default Reduction Initiative. The effect of the regulatory change would be to require certain schools to establish one or more prescribed alternative closure plans that would offer relief to borrowers if the school terminates teaching activities in a particular program of study before students complete that program of study.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments, with the exception of § 682.600. The amendments to § 682.600 will become effective after the information collection requirements contained in that section have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register.**

See also "Compliance" under the supplementary information section.

FOR FURTHER INFORMATION CONTACT: Pat Newcombe, FFELP Section, Loans Branch, Division of Policy Development, Policy, Training, and Analysis Service, Office of Student Financial Assistance, Department of Education, 400 Maryland Avenue, SW., (room 4310, ROB #3), Washington, DC 20202–5449, Telephone (202) 708–8242. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8399 (in the Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m., Eastern time.

SUPPLEMENTARY INFORMATION:

Compliance

Each school currently participating in the FFEL program that is covered by these regulations must have a school closure plan in place no later than six months from the effective date of these regulations. A school that submits an application to participate in the FFEL program on or after the effective date of these regulations must submit its school closure plan with its application to participate in the FFEL program. A school that has an application pending to participate in the FFEL program on the effective date of these regulations must add the required school closure plan documentation to its application before the Secretary will approve it to participate in the FFEL program.

Background

On June 5, 1989, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (54 FR 24128) proposing, in part, a measure to ensure that students attending a private postsecondary school that closes have the opportunity to complete their program of study through a "teachout" arrangement. Based on the Department's review of the serious concerns about the teachout proposal raised by the commenters, the Secretary decided to issue a new NPRM that would require private postsecondary schools that offer an undergraduate nonbaccalaureate program designed to prepare students for a particular vocational, trade or career field to select and adopt one or more of several alternative approaches to deal with a potential school closing. This new NPRM was published in the **Federal Register** on September 5, 1991 (56 FR 43978). The second NPRM included a detailed discussion of the proposed changes to § 682.600, and the discussion will not be repeated here.

The regulations are needed to put in place an element of the Secretary's Default Reduction Initiative for the FFEL program. The Default Reduction Initiative was prompted when FFELP default costs in fiscal year (FY) 1988 totalled almost $1.4 billion, representing a 200 percent increase in defaults during the previous five years and approximately 40 percent of the Department's FY 1988 expenditures for the FFEL program. The default problem continues, with costs reaching $3.6 billion in FY 1991. The Secretary believes that a factor contributing to the high default rate is the large number of borrowers who are stranded by school closings. These borrowers are unable to gain employment due to an incomplete education but still owe a large FFELP debt that some feel no obligation to repay since the services paid for were not delivered. The effect of the regulatory change would be to require certain schools to establish one or more prescribed alternative closure plans that would offer relief to borrowers if the school terminates teaching activities in a particular program of study before students complete that program of study.

The most significant change to the proposed regulations is to limit the application of these regulations to schools with the greatest probability of closing. The Secretary's examination of data from FYs 1987 to 1990 reveals that private nonprofit institutions that qualify as institutions of higher education are overwhelmingly less likely to close than are proprietary postsecondary schools. The number of closed proprietary schools has increased sharply each year from 22 in FY 1987 to 187 in FY 1990 (the last full year for which data are available). During this four-year period, fewer than 1 percent (26 out of 2,641) of private nonprofit institutions that qualify as institutions of higher education participating in the FFEL program closed. By contrast, during the same period, 9.3 percent (361 out of 3,876) of participating proprietary schools closed. The majority of these school closures have not been end-of-the-term, orderly closures. During FY 1990, only seven private nonprofit institutions that qualify as institutions of higher education closed compared with 187 proprietary schools. The Department estimates the number of borrowers attending those 187 closed proprietary schools to be sixteen times greater than the number of borrowers attending the seven closed private nonprofit schools. Each year the cumulative rate has increased as the number of schools closures has increased at a faster rate than the number of participating schools; thus, based on this trend, when the FY 1991 data become available, we expect the FY 1987 through FY 1991 rate—especially for proprietary schools—to be substantially higher than the FY 1987 through FY 1990 rate. An examination of this data leads the Secretary to believe that private nonprofit postsecondary schools that qualify as institutions of higher education under 34 CFR 600.4 have a much smaller likelihood of mid-session closure than proprietary postsecondary schools, so he has exempted such schools from the requirement to have a school closure plan.

Reauthorization of the Higher Education Act of 1965, as amended by Public Law 102–325, changed the definition of *pro rata* refund as used for the Title IV student aid programs. See section 484B of the HEA. The Department's general provisions regulations for the student financial aid

programs will be amended to reflect this change in definition. Publication of the amended regulations will change the regulatory reference to *pro rata* refund in this regulation.

The purpose of these regulations is to improve the efficiency of Federal student aid programs and, by so doing, to improve their capacity to enhance opportunities for postsecondary education. Encouraging students to graduate from high school and to pursue high quality postsecondary educations are important elements of the President's AMERICA 2000 strategy to move the Nation toward achieving the National Education Goals.

The public comments received in response to the second NPRM have resulted in several changes in the regulations. A discussion of those changes follows.

Analysis of Comments and Changes

In response to the NPRM, 63 parties submitted comments on the proposed revision to § 682.600 of the regulations. Substantive issues raised by the commenters are discussed below.

Section 682.600 Agreement between an eligible school and the Secretary for participation in the Federal Family Education Loan Program

Comments: The majority of commenters favored the Secretary's proposal to require a private postsecondary school participating in the FFEL program to establish a school closure plan under which the borrower and the Federal fiscal interest would be protected if the school terminates teaching activities in a particular program before the student completes that program. However, some commenters argued that certain categories of schools should be exempted from the requirement. The commenters argued that some private postsecondary schools, particularly hospital-based nursing schools that grant diplomas and are required by State law or State Boards of Registration to complete the training of any students who begin their programs, should be exempt from the requirement that they maintain a school closure plan. The commenters cited two examples of hospital-based nursing programs that fit this criterion: (1) One State requires schools offering those programs to make provisions to protect students in the event of school closure, and (2) another State requires that a school offering such a program graduate the last class that was admitted to its program so its graduates can sit for the State licensure exam.

Some commenters believed that the scope of institutions covered by the proposed regulations was too broad. Other commenters believed that the term "private," as used in the NPRM, was not clear. For example, a commenter from a major private university noted that his school was a "private" institution under the definition in the NPRM, but the likelihood of a program being terminated before completion of a student's program of study was nonexistent.

Discussion: The Secretary agrees with the commenters that if a certain type of private school very rarely closes, that type of school should not be required to have a school closure plan. The Secretary has examined historical data from the FY 1990 FFELP guarantee agency cumulative Tape Dump files and the records from the Department's Division of Audit and Program Review to determine the probability of certain types of schools closing. The data from FYs 1987–1990 reveal that the number of closed proprietary postsecondary schools has increased sharply each year from 22 in FY 1987 to 187 in FY 1990. The annual closure rate for this type of school increased from 0.7 percent in FY 1987 to 5.6 percent in FY 1990. On the other hand, few private nonprofit institutions that qualify as institutions of higher education have closed during this period and there is no trend toward an increase in the closure rate. For each of the four years in this period, the annual closure rate was well below 1 percent for this type of school. During FY 1990, there were approximately 26 proprietary school closings for every private nonprofit institution that qualifies as an institution of higher education that closed.

Based on this data, the Secretary has concluded that private nonprofit institutions that qualify as institutions of higher education are highly unlikely to close. Therefore, the Secretary has decided that a private postsecondary school that qualifies as an institution of higher education under 34 CFR 600.4 should be exempt from the requirement to have a school closure plan. Generally, a private, nonprofit school that provides (1) a degree program, (2) at least a two-year program acceptable for full credit toward a bachelor's degree, or (3) at least a one-year training program that leads to a certificate, degree, or other recognized educational credential and prepares students for gainful employment in a recognized occupation, qualifies as an institution of higher education under 34 CFR 600.4. This category would include many hospital-based nursing programs that satisfy these requirements.

Changes: The Secretary has revised the proposed regulations to provide that a private nonprofit school that qualifies as an institution of higher education under 34 CFR 600.4 is exempt from the requirement to have a school closure plan.

Comments: Several commenters expressed concern that the NPRM mandated the creation of a school closure plan as a requirement for participation in the FFEL program. They argued that the Department should provide schools with sufficient time to develop school closure plans to submit to the Secretary before establishing the plan as a requirement.

Discussion: The Secretary agrees that schools currently participating in the FFEL program should have a reasonable period of time to develop and submit a school closure plan to the Secretary, the principal guarantee agency, and the appropriate accrediting commission. Therefore, the Secretary has decided to permit schools currently participating in the FFEL program to establish and submit school closure plans within six months from the date the regulations become effective. The Department will notify schools of the address that they should use to submit documentation concerning their plans to the Secretary and the deadline for submission. A school not currently participating in the FFEL program as of the effective date of these regulations must submit its school closure plan with its application to participate in the FFEL program. A school that has an application pending to participate in the FFEL program at the time this regulatory requirement becomes effective must add the required school closure plan documentation to its application before the Secretary will approve it to participate in the FFEL program.

Changes: A change has been made in the date school closure plans must be established and submitted. The Department will permit a school currently participating in the FFEL program to submit a school closure plan to the Secretary, its principal guarantee agency, and its accrediting agency within six months of the date the regulations become effective.

Comments: One of the options for a school closure plan permits coverage under a State-administered tuition-recovery plan. Commenters from one State pointed out that when their State recovery plan is put in place in the near future, it will be State-approved, not State-administered. These commenters asked if this plan would satisfy the regulations.

Discussion: The Secretary believes that a State-administered plan would be audited by State auditors or subject to review by the State legislature and administrators, or both and would best meet his goals of ensuring the fiscal and administrative viability of the tuition recovery plan. However, the Secretary has concluded that a State-approved plan could provide these same protections in some cases. Therefore, a State-approved plan will be acceptable under the regulations if the plan is subject to State audit or review by the State legislature and administrators and is backed by the full faith and credit of the State.

Changes: The Secretary has revised the proposed regulations to provide that a State-approved tuition recovery plan will be an acceptable school closure plan if the plan is subject to State audit or review by the State legislature and administrators and is backed by the full faith and credit of the State.

Comments: Many commenters expressed concern that several existing State tuition-recovery plans do not permit refunds to be made to anyone but the student. State plans with this requirement would not qualify to be part of approved school closure plans under the proposed regulations.

Discussion: In the case of a school closure, the Secretary believes that, to prevent student loan defaults and protect the Federal fiscal interest, FFELP refunds must be paid to the lenders on behalf of the borrowers rather than to the borrowers directly. The proposed regulations are consistent with current Department regulations that require schools to pay FFELP refunds to lenders. See 34 CFR 668.22(e), 682.606 and 682.607. Therefore, the Secretary has retained the requirement that, to qualify as an approved part of a school closure plan, a tuition-recovery plan must pay refunds to the lenders.

Changes: None.

Comments: Many commenters expressed concern that the refund amounts paid under several existing State tuition-recovery plans might not refund an amount as large as the amount calculated under the definition of a *pro rata* refund in 34 CFR 682.606(c)(1) as required by the proposed regulations.

Discussion: The Secretary wishes to ensure that a refund made under this provision is equal to or greater than the amount calculated under 34 CFR 682.606(c)(1). Therefore, any State tuition-recovery plan that results in a refund equal to or greater than what would result if the refund were calculated in accordance with 34 CFR 682.606(c)(1) would satisfy the requirement of this provision of the regulations.

Changes: The language of the regulations has been clarified to provide that an acceptable school closure plan may include coverage under a State tuition-recovery plan that mandates a refund at least as large as a *pro rata* refund as defined in 34 CFR 682.606(c)(1).

To establish a consistent standard for refunds made as a result of any option selected as a school closure plan, the Secretary has also revised the language in 34 CFR 682.600(d) (2) (ii), (iii) (B), and (v) to reflect the same level of refund provided for in revised § 682.600(d) (2) (i).

Comments: Many commenters indicated that the level of third-party financial guarantees that would be required to satisfy the school closure plan obligation was too high, would impose a financial burden on already overburdened schools, and might, in fact, trigger school closures.

Discussion: The Secretary is aware that some schools might have difficulty meeting the level of third-party financial guarantees required under the surety bond or letter of credit option. However, the Secretary believes that the requirement that the bond or letter of credit be in an amount equal to at least 50 percent of one academic year's tuition, fees, and other charges for all enrolled students on whose behalf a FFELP loan is made for the current period of enrollment is needed to protect the interests of the students and the Federal government. Moreover, since the third-party financial guarantee is only one of several options a school may select, the Secretary does not agree with the commenters that it is unduly onerous and should be modified.

Changes: None.

Comments: Many commenters stated that accrediting commissions might be prohibited legally from administering or sponsoring teachout or pooled-risk programs as proposed as part of the alternatives in the NPRM because of a possible conflict of interest that might exist in their administration of the funds.

Discussion: On the basis of interest expressed by accrediting bodies after the original NPRM was published on June 5, 1989, the Secretary included proposals in the revised NPRM that would allow a school to participate in a school closure plan administered by its accrediting agency. The Secretary understands that each accrediting agency will have to determine its legal authority to administer such a program. However, the Secretary has retained the option of accrediting-agency administration of a school closure plan for those agencies that are able to administer one.

Changes: None.

Comments: A number of commenters suggested that the regulations should require that any school closure plan offer the borrower the option of a *pro rata* refund or a teachout.

Discussion: While the Secretary supports the idea of borrower choice inherent in the commenter's proposal, comments on the original June 5, 1989 NPRM indicated that not all schools are in a position to offer students the option of a teachout. Therefore, other options for school closure plans are being offered. However, the Secretary has determined that, in some circumstances, the Federal fiscal interest should be protected by requiring that a teachout must be the primary option. For example, the Secretary believes that in the case of a school closure plan administered by a school's accrediting commission, a teachout must be made available if possible. Only if teachout is not available under these plans must the *pro rata* refund be provided.

Changes: None.

Comments: Some commenters were concerned about the information that would need to be disclosed to a "competitor" for a school to arrange for a valid teachout agreement. Questions also were raised about the potential financial liabilities faced by the teachout school taking on the educational responsibilities of the closed school.

Discussion: The Department is not mandating specific information to be included in a teachout agreement. However, the teachout school must be an eligible institution that participates in the FFEL program and the agreement itself must comply with any other applicable laws and regulations.

In general, the Department will *not* require the teachout institution to assume the liabilities of the original school relating to the administration of the FFEL program. Moreover, the Department will not include in the calculation of the teachout school's cohort default rate any defaults that might occur on loans received by students to pay the costs at the school that closed. If, however, the students receive additional loans to cover the cost of attendance at the teachout school, any subsequent defaults will be included in the teachout school's cohort default rate.

Changes: None.

Comments: Several commenters stated that the provision for *pro rata* refunds as part of a school closure plan was inadequate and proposed that the

Secretary require full refunds be paid to students in attendance at a school at the time it terminates full teaching activities.

Discussion: While the Secretary understands the argument that an incomplete vocational education is of questionable value, it is unlikely that a total refund would be available in most closure situations. Moreover, the Secretary believes that a *pro rata* refund is generally appropriate and that, in most cases, students received some benefit from the training. Nonetheless, the Secretary encourages States and accrediting agencies, when possible, to provide full refunds for students; such a plan would satisfy these regulations.

Changes: None.

Comments: Several commenters urged the Secretary to monitor compliance with these regulations.

Discussion: The Secretary agrees that it is necessary to have systematic, ongoing monitoring of compliance with these regulations once initial compliance has been established.

Changes: No change has been made to the regulations. However, the Secretary will revise current audit and institutional review guides to ensure that school compliance with this requirement is monitored systematically.

Comments: Some commenters were concerned about the requirement that teachout agreements would not be permitted between schools that have a business connection.

Discussion: The Secretary believes that a teachout arrangement between schools that share a business connection might not adequately protect student consumers. A teachout agreement with another school with which the original school has a business connection is generally of questionable value as the financial difficulties encountered by the original school also might affect the teachout school. However, the Secretary wishes to clarify that while a school may not enter into a teachout agreement with a school with whom it shares a business connection to comply with the regulations, such a school will not be prohibited from teaching out the students from the original school as part of an orderly, planned closing.

For example, some entities that own a group of "related" schools might elect to close one of the schools to continue to maintain the financial health and quality of the other schools in the group. The teachout agreement with a school with which the original school has no business connection must be in place and capable of being implemented should such a school close. However, should a "related" school elect to teach out students of the closing school, instead of the official teachout school, the Department would not prohibit such a teachout as it might be the least disruptive method for a student to complete his or her program of study.

Changes: None.

Comments: A few commenters objected to the proposal that schools selecting the teachout alternative must make the information public in their catalogs or brochures and their enrollment contracts.

Discussion: The Secretary believes that potential students should be informed of the school's plans to protect them in case of a school closure. Information regarding such an arrangement must be available in the school's catalog or its equivalent and the enrollment contract if one is used.

Changes: The Secretary has revised the regulations to allow a school to meet this requirement by briefly describing its teachout arrangement in its catalog (or equivalent) and its enrollment contract, if one is used. The description in the catalog (or equivalent), or enrollment contract, may summarize the arrangement, but a detailed description must be available to a student or potential student upon request.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed regulations and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 682

Administrative practices and procedure, Colleges and universities, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

Dated: December 24, 1992.

Lamar Alexander,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number 84.032, Guaranteed Student Loan Program and PLUS Program.)

The Secretary amends part 682 of title 34 of the Code of Federal Regulations as follows:

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

1. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071 to 1087–2, unless otherwise noted.

2. Section 682.600 is amended by redesignating paragraph (d) as paragraph (e) and adding a new paragraph (d) to read as follows:

§ 682.600 Agreement between an eligible school and the Secretary for participation in the Federal Family Education Loan Program.

* * * * *

(d)(1) A private school that does not qualify as an institution of higher education under 34 CFR 600.4, and that offers an undergraduate nonbaccalaureate program designed to prepare students for a particular vocational, trade, or career field, shall, as a condition for participation in the Federal Stafford, Federal PLUS, and Federal Supplemental Loans for Students (SLS) programs, have in effect at all times a plan, containing one or more of the elements in paragraph (d)(2) of this section, that provides for the equitable treatment of enrolled students and the Secretary in the event that the school terminates teaching activities in a particular program of study before the students complete the program of study.

(2) A school is considered to have a plan in effect that meets the requirements of this section only if its plan includes one or more of the following elements:

(i) Coverage under a State-administered tuition-recovery fund, or a State-approved tuition recovery plan that is subject to State audit or review by the State legislature or administrators and is backed by the full faith and credit of the State, that provides for payment of a refund from the fund directly to the lender that is at least as large as a *pro rata* refund, as defined in § 682.606(c)(1) of the tuition, fees, and other institutional charges assessed an enrolled student on whose behalf a Federal Stafford, Federal SLS, or Federal PLUS loan was made for the period of enrollment during which the school terminated teaching activities in a particular program of study.

(ii) A surety bond or letter of credit payable on demand to the Secretary posted by the school or another entity on behalf of the school in an amount equal to at least 50 percent of one academic year's tuition, fees, and other charges for all enrolled students on whose behalf a Federal Stafford, Federal SLS, or Federal PLUS loan will be made for the current period of enrollment at that school and that provides for the payment of a refund to lenders that is at least as large as a *pro rata* refund as defined in § 682.606(c)(1).

(iii) Coverage under a program and fund administered by the school's accrediting commission that includes—

(A) Written procedures for arranging a teachout, including the provisions in paragraph (d)(2)(iv) of this section for teachouts performed by a participating school under a teachout agreement, for enrolled students on whose behalf a Federal Stafford, Federal SLS, or Federal PLUS loan has been made who are in attendance at the school when the school terminates teaching activities in a particular program of study; and

(B) If no such teachout is provided when the school terminates teaching activities in a particular program of study, the payment of a refund at least as large as a *pro rata* refund as defined in § 682.606(c)(1) to the lender for each enrolled student on whose behalf a Federal Stafford, Federal SLS, or Federal PLUS loan was made for the period of enrollment during which the school terminated teaching activities in a particular program of study.

(iv) A teachout agreement with one or more other participating schools (the teachout school or schools) offering similar educational programs and with which the original school has no business connection that contains the following provisions:

(A) Each teachout school shall agree that, if the original school terminates its teaching activities in a particular program of study in which it enrolls a student to whom or on whose behalf a Federal Stafford, Federal SLS, or Federal PLUS loan is made for attendance at the original school, the teachout school will offer each such student enrolled in that course of study at the original school when the teaching activities are terminated a reasonable opportunity to promptly resume and complete his or her course of study, or a substantially similar course of study, in the same geographic area as that in which the original school provided the course of study.

(B) The teachout school shall agree to provide this opportunity without additional charge to the student, except that the teachout school may charge the student for periods of enrollment that the student is required to undertake to complete the course of study undertaken at the original school, as the student incurs those charges, up to the amount not yet paid by the student, that the original school would have been entitled to collect for those periods of enrollment from the student had the original school not terminated teaching activities in the program of study prior to the student's completion of the program of study.

(C) The original school shall agree that, in the event a teachout becomes necessary, it will arrange, in a timely manner, for individual notice to each student of the availability of the teachout and diligently advertise the availability of the teachout. Such arrangements may provide that the teachout notices be sent by the teachout school.

(v) Coverage under a "pooled risk" arrangement administered by the school's accrediting commission that ensures that a refund will be paid directly to the lender that is at least as large as a *pro rata* refund as defined in § 682.606(c)(1) for each enrolled student on whose behalf a Federal Stafford, Federal SLS, or Federal PLUS loan was made for the period of enrollment during which the school terminates teaching activities in a particular program of study.

(3) A school shall submit written evidence acceptable to the Secretary, its accrediting commission, and its principal guarantee agency that it has been selected and adopted an acceptable closure plan containing one or more of the elements under this paragraph. A school that selects the teachout alternative under paragraph (d)(2)(iv) of this section shall submit, as required written evidence of the teachout arrangement, a copy of its catalog or the equivalent and of its enrollment contract, both including a brief description of the teachout plan, and shall make details of such arrangement available to students and prospective students upon request.

* * * * *

[FR Doc. 93–132 Filed 1–6–93; 8:45 am]

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January 7, 1993

Part VII

Department of Education

34 CFR Part 668

Student Assistance General Provisions; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AB30

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Student Assistance General Provisions regulations to put in place a procedure for determining the immigration status of noncitizen applicants for student financial assistance under Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA). The purpose of the immigration-status confirmation procedure is to relieve substantially most institutions from the burden of manually inspecting the immigration-status documents of all noncitizen applicants for Title IV, HEA financial assistance.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register**, or later if Congress takes certain adjournments, with the exception of §§ 668.133, 668.134, and 668.135. Sections 668.133, 668.134, and 668.135 will become effective after the information collection requirements contained in those sections have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Claude Denton, General Provisions Branch, Division of Policy Development, U.S. Department of Education, 400 Maryland Avenue, SW. (Regional Office Building 3, room 4318), Washington, DC 20202–5444, Telephone (202) 708–7888. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 (in the Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m., Eastern time.

SUPPLEMENTARY INFORMATION: The Student Assistance General Provisions regulations put in place requirements that apply to all institutions that participate in the Title IV, HEA student financial assistance programs. For purposes of this subpart, the Title IV, HEA programs include the Federal Pell Grant, Federal Stafford Loan, Federal PLUS Loan, Federal Supplemental Loans for Students (SLS), State Student Incentive Grant (SSIG), Federal Perkins Loan, Federal Work-Study (FWS), and Federal Supplemental Educational Opportunity Grant (FSEOG) programs.

On April 29, 1991, the Secretary published a notice of proposed rulemaking in the **Federal Register** (56 FR 19782) with regard to the immigration-status confirmation procedure. The Secretary believes that this procedure will assure that Federal student financial assistance dollars are used to provide educational opportunities only to U.S. citizens, U.S. nationals, or noncitizens who prove that they possess an immigration status that satisfies the eligibility criteria for Title IV, HEA financial assistance set forth in 34 CFR 668.7(a) (4). Specifically, 34 CFR 668.7(a)(4)(ii) provides that a student is eligible for Title IV, HEA assistance if the student provides evidence from the U.S. Immigration and Naturalization Service (INS) that he or she is a permanent resident of the United States or is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident.

The immigration-status confirmation procedure will relieve most institutions of a substantial portion of the administrative burden currently associated with identifying the immigration status represented on immigration documents and determining whether those documents are authentic. At the same time, the procedure will reduce the potential for fraud and abuse in the Title IV, HEA programs by improving the institutions' ability to determine whether noncitizen applicants are eligible for Title IV, HEA assistance under § 668.7(a)(4)(ii).

The confirmation procedure will improve the efficiency of the Title IV, HEA programs and, by so doing, improve their capacity to enhance opportunities for postsecondary education. Encouraging students to graduate from high school and to pursue high quality postsecondary education are important elements of the President's AMERICA 2000 strategy to move the Nation toward achieving the National Education Goals.

These regulations establish procedures for institutions to use in determining the eligibility of noncitizen applicants for Title IV, HEA benefits. The term "confirmation" of immigration status as set forth in Subpart I is equivalent to the term "verification" of immigration status that commonly is used by the INS and other agencies using the INS's immigration-status verification system. The Secretary substituted the term "confirmation" in place of the INS term "verification" to avoid confusion with the process of verifying the student's Expected Family Contribution in 34 CFR 668, Subpart E. Immigration-status confirmation under Subpart I and verification under Subpart E are two separate procedures and institutions may not count confirmations under Subpart I toward the 30 percent verification ceiling mandated by section 484(f) of the Higher Education Act of 1965, as amended (HEA).

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 68 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes—and suggested changes that the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

Section 668.132 Institutional Determinations of Eligibility Based on Primary Confirmation

Comments: Several commenters supported these provisions and several others objected. Many commenters disagreed with the Secretary's contention that use of the primary confirmation process to replace determining immigration status by inspecting documents manually would reduce administrative burden on institutions. Two commenters expressed concern that some student records that successfully matched with INS data in a previous award year did not match in the current award year and questioned the need to impose secondary confirmation on institutions because of Federal data errors. Other commenters suggested that current primary confirmation performance is poor, that the INS data base is not adequately updated and maintained, and that the Secretary's claim that 80 percent of noncitizen applications would match with INS data using primary confirmation is unrealistic. Several commenters perceived a conflict in that this section prohibits institutions from requiring documentation if the message on the output document confirms the student's eligible noncitizen status, while § 668.133 of the proposed regulations requires an institution to request document and follow secondary confirmation procedures if the output document confirms the student's eligibility but the institution has conflicting information.

Discussion: The Secretary agrees with those commenters who maintain that the primary confirmation process reduces the burden on institutions. At the same time, the Secretary is aware that the percentage of primary confirmation matches was abnormally low during the 1990–91 award year because the primary confirmation system was taken out of operation for several months while the Department and INS brought the matching program into compliance with the Computer Matching and Privacy Protection Act of 1988, that became effective in January 1990. The Secretary believes that this operations hiatus explains why some applicants who matched in a previous award year did not match in the current award year. The Secretary expects that continuous operation of the matching system during the entire 1991–92 award year and thereafter should alleviate much of the concern expressed about institutional burden and the quality of the INS data base. Indeed, recent analysis of 1991–92 data reveals that the percentage of noncitizen applicants confirmed through the primary confirmation process is approximately 70 percent.

The Secretary disagrees that there is a conflict between instructions given in § 668.132(a) and § 688.133. Section 668.132(a) states that "except as provided in § 668.133(a)(1)(ii)," the institution must determine a student to be an eligible noncitizen if the institution receives an output document that confirms the student's immigration status. An institution cannot determine a student to be an eligible noncitizen in accordance with § 668.132(a) if it has conflicting information concerning the student's immigration status. Under § 668.133(a)(1)(ii), if the institution has conflicting information, the institution must obtain, from the applicant, documentation of immigration status and submit that documentation to the INS for secondary confirmation.

Changes: None.

Section 668.133 Conditions Under Which an Institution Shall Require Documentation and Request Secondary Confirmation

Comments: Several commenters protested that secondary confirmation is an INS enforcement exercise that is being inappropriately assigned to educational institutions and that exchanges of data should take place only between the student and INS. One commenter questioned why the burden of processing secondary confirmation requests should be placed on the institution when the student can obtain such information directly from INS or the Secretary's central processing system. Many commenters questioned whether the problem of citizenship fraud and abuse in the Title IV, HEA programs is serious enough to warrant mandatory secondary confirmation. Many others were concerned that secondary confirmation procedures are administratively burdensome and will delay processing of Title IV, HEA assistance for many eligible noncitizen students. Two commenters questioned why secondary confirmation is needed when the institution can make a reasonable determination of the student's eligibility using documents submitted by the student. Several commenters expressed their desire to have secondary confirmation available as an option and to be permitted to continue the current practice of determining noncitizen eligibility through a manual examination of the student's immigration-status documents. A number of commenters suggested that secondary confirmation should be required only in cases of conflicting or irreconcilable documentation. One commenter suggested that institutional confirmation of a student's immigration status be required only once during the student's enrollment at the institution. Another commenter proposed that, prior to issuing final regulations, the Secretary should conduct a study to compare the costs and benefits of the proposed regulations. Another commenter questioned how an output document could be incorrect unless the Secretary suspects inadequacies in the INS data base. One commenter questioned whether § 668.133(b)(1) is intended to prohibit the use of secondary confirmation to identify fraudulent documentation in cases where the student changes his response on the application from "eligible noncitizen" to "U.S. citizen" or "U.S. national."

Discussion: With regard to comments concerning mandatory use of secondary confirmation, the Secretary no longer has authority to prescribe regulations limiting use of this process. Section 484(h)(4)(B) of the Higher Education Act of 1965, as amended, now requires an institution to request secondary confirmation if a student's claim of eligible noncitizen status is not confirmed using primary confirmation and if that student submits documents that the institution determines constitute reasonable evidence of the student's immigration status.

The Secretary is carefully considering the suggestion of a one-time-only confirmation of the immigration status of a student during the student's enrollment at a given institution. For the 1993–94 award year, the Secretary is investigating the possible use of an automatic renewal of the primary confirmation message on the output documents of individuals having an eligible noncitizen status that is confirmed using primary confirmation.

The commenter's suggestion that a cost-benefit analysis be undertaken before putting in place these regulations is well taken. The Secretary has performed a recent analysis, as required by the Compute Matching and Privacy Protection Act of 1988, that indicates that the operational costs of this computer match to the Federal Government are $35,400, as compared to $650,000 in administrative savings to institutions that are no longer required to examine the immigration-status documents of 70% of noncitizen applicants. Secondary confirmation is not monitored at the Federal level, however, so the costs of secondary confirmation are not factored into this analysis. The Secretary must rely on information, such as that provided by the commenters, to gain a rough assessment of the total costs and benefits of this program.

The Secretary disagrees with the commenter who presumes that any possibility of conflicting information in the message on the output document is an indication that the INS data base used for primary confirmation is inadequate. The regulations recognize that the immigration status of an individual might change and that conflicts of information are inevitable when either documentation or data base information becomes outdated. Since § 668.14(f) of the existing regulations requires an institution to "identify and resolve discrepancies in the information it receives from different sources," these regulations offer the secondary confirmation process as a way of reconciling these conflicts.

The Secretary does not believe that § 668.133(b) would prohibit an institution from requesting secondary confirmation for a student who changes his or her response on an application from "eligible noncitizen" to "U.S. citizen" or to "U.S. national." If the institution has reason to believe the student's citizenship claim is incorrect or that a student's citizenship documentation may be fraudulent, the institution must obtain additional information through secondary confirmation. Furthermore, any information related to a false claim of citizenship should be referred to the appropriate authorities for investigation in accordance with § 668.14(g).

Changes: None.

Section 668.134 Institutional Policies and Procedures for Requesting Documentation and Receiving Secondary Confirmation

Comments: Several commenters suggested that establishing additional policies and procedures is overly burdensome and unwarranted. One commenter questioned why institutions were being required to establish their own policies and procedures instead of complying with guidelines already set by the Secretary. Several others commented that it is unnecessary to have a deadline for submitting documents and requested guidance concerning the actions to be taken if documents are submitted after the deadline has passed. One commenter requested that the Secretary provide institutions with sample explanations of the needed documentation. Another commenter requested clarification concerning whether the phrase "a clear explanation" means that an institution would be required to provide instructions to students in their native languages.

Discussion: The Secretary disagrees that the requirement for institutional policies and procedures is unwarranted and burdensome or that the Secretary should impose standard policies and procedures for all institutions. This section is similar to requirements set forth in § 668.53 of existing regulations, which provides guidance to institutions in establishing policies and procedures that deal with verifying information provided by a student that is used to calculate the student's eligibility for financial aid. In the same fashion, the Secretary intends to permit significant institutional discretion in designing procedures for requesting documentation and confirming a student's immigration status. For example, an institution will need to give a student written instructions that are clear and complete, but it need not interpret this provision as a requirement for the instructions to be provided in an applicant's native language. By requiring that an institution establish written policies and procedures, the Secretary seeks to ensure that the institution establishes each student's immigration status and eligibility for Title IV HEA financial assistance in an equitable and consistent manner.

To preserve as much institutional discretion as possible, the Secretary has chosen not to set arbitrary deadlines for the submission of documents. Rather, the Secretary has created parameters within which institutions may set their own deadlines. These parameters are necessary because of existing statutory requirements and practical considerations regarding the time needed to process Title IV, HEA applications. Specifically, in accordance with the Computer Matching and Privacy Protection Act of 1988, an institution must allow a student a minimum of 30 days to collect and submit documentation to the institution in support of his or her claim of eligible noncitizen status.

Sample documentation of immigration status already has been provided by the Secretary in Chapter 2 of the Federal Student Financial Aid Handbook, which is published annually. These regulations are not introducing any changes in the immigration-status documents that institutions examined in the past to determine noncitizen eligibility.

Changes: None.

Section 668.135 Institutional Procedures for Completing Secondary Confirmation

Comments: Several commenters supported the procedure. Many commenters, however, protested that the 10-business-day deadline for institutions to initiate secondary confirmation after receiving immigration-status documentation from the student is unrealistic during peak workload periods. Two commenters questioned why the regulations require institutions to comply with the 10-business-day deadline and only "expect" INS to meet its 10-business-day turnaround time to respond to requests for secondary confirmation. Two commenters questioned whether institutions are required to initiate secondary confirmation for students who applied to the institution but have not been admitted and whether the 10-business-day countdown should begin if the institution has received immigration-status documents for a student but no output document for that student. One commenter requested guidance concerning the consequences if an institution fails to meet the deadline for submitting documentation to INS.

Discussion: The Secretary does not agree that 10 business days is insufficient time to complete the request portion of the G–845 and to submit it to INS. The 10-business-day deadline represents a balance between the need for sufficient time to confirm and authenticate a student's immigration status with INS and the need to avoid undue delays in assistance to eligible students.

With regard to the comment concerning a double standard assigned to INS and institutions in complying with 10-business-day deadlines, the Secretary cannot regulate another Federal agency, but can enter into agreements with another agency stating that certain standards of performance are expected by both parties. Accordingly, the Secretary has an operational computer matching agreement in which INS has agreed to the 10-business-day turnaround time to respond to requests from institutions for secondary confirmation.

The 10-business-day deadline for institutional initiation of secondary confirmation after receiving documentation from the student applies whether or not the student has been admitted.

With regard to when the 10-business-day countdown begins, if the institution receives immigration-status documentation without an output document, an institution should not consider the 10-business-day period to begin until it has received both the student's immigration-status documents and the output document. The output document is a required component of that documentation as it contains important information related to the results of primary confirmation. The requirements in § 668.135 apply only when a student is required to undergo secondary confirmation. An institution will not be able to determine whether secondary confirmation is mandatory until the institution has received the student's output document.

Institutional penalties for missing this deadline will be consistent with program review policy to enforce all applicable regulatory provisions.

Changes: None.

Section 668.136 Institutional Determination of Eligibility That Are Not Based on Primary Confirmation

Comments: One commenter suggested that it invites abuse to have a policy permitting institutional disbursements of Title IV, HEA assistance prior to the institution obtaining a response from INS concerning secondary confirmation. Several commenters were concerned that the need to track the 15-business-day period subsequent to initiation of secondary confirmation would add to institutional burden. A number of commenters felt that any disbursement of assistance prior to obtaining a response from INS would place potential liability on the institution and, for this reason, few institutions would use this option. Several commenters expressed concern that the preamble's statement that "an INS determination of a student's immigration status * * * should precede any decision by the institution with regard to the student's

eligibility for Title IV, HEA assistance" would prevent the institution from making routine preliminary decisions about student eligibility in areas other than immigration status. Two commenters suggested that the term "sufficient documentation" in proposed § 668.136(b)(2) be clarified as "documentation that, if valid, demonstrates that the applicant is an eligible noncitizen." One commenter suggested that to avoid delays to students institutions should be allowed to telephone INS when the 15-business-day period is exceeded. Another commenter suggested that the 15-business-day period be lengthened to 20 or 30 business days to allow more time for postal delivery.

Discussion: The Secretary does not agree that provisions providing for disbursement of assistance pending receipt of INS responses to secondary confirmation requests invite abuse. An institution will continue to be responsible for making certain that noncitizen applicants provide acceptable evidence of eligible noncitizen status before disbursing Title IV, HEA assistance.

The Secretary also wishes to emphasize that these regulations do not impose liabilities on institutions for erroneous grant payments or loan disbursements to a student discovered to be ineligible as a result of secondary confirmation if the institutions can show documented evidence of immigration status that meets the requirements of § 668.7(a)(4)(ii).

The Secretary believes that the 15-business-day limitation subsequent to initiation of secondary confirmation is necessary to prevent unnecessary delays in processing the student financial aid applications of eligible noncitizens.

Contrary to one commenter's concern, the Secretary's desire to obtain an INS determination of a student's immigration status prior to the institution's determination of eligibility does not prevent an institution from engaging in an activity such as providing preliminary estimates of financial aid eligibility.

The Secretary disagrees with the commenter who requested that the proposed use of the term "sufficient documentation" be changed to "documentation that, if valid, demonstrates that the applicant is an eligible noncitizen." "Sufficient" indicates that the institution has in its possession documents with which it is able to make a decision that a student satisfies the requirements of § 668.7(a)(4)(ii). The commenter's proposed revision presupposes that the institution will determine the student to be eligible when, in fact, the institution may determine that the documents are insufficient to determine eligibility and, as a result, may deny Title IV, HEA assistance to the student.

The Secretary does not agree with the suggestion that institutions should be allowed to telephone INS to obtain status information when the 15-business-day period is exceeded. Although procedures differ somewhat among INS field offices, the Secretary recognizes that institutional access to INS by telephone has become more limited in recent years because of the large increase in immigrants and other groups seeking INS services. The Secretary wishes to cooperate with INS, to the fullest extent possible, in developing a more automated and efficient means of gaining access to information than is possible if the institution must await responses to telephone calls or inquiries by letter.

Finally, the Secretary does not agree with the suggestion that the 15-business-day period be lengthened to 20 or 30 business days. Fifteen business days, or three calendar weeks, should be the maximum amount of time allowed given INS's commitment to a 10-business-day response and the Secretary's desire not to delay assistance to eligible noncitizens undergoing secondary confirmation.

Changes: None.

Section 668.137 Deadlines for Submitting Documentation and the Consequences of Failure To Submit Documentation

Comments: One commenter sought clarification from the Secretary concerning whether this section is limited in scope to immigration-status confirmation or if it has broader application. Two commenters questioned the need for an institutionally set deadline for the student to submit immigration-status documents to the institution, and they also questioned whether the institution has the right to deny assistance if this deadline is not met. Another commenter suggested that this section is inconsistent with the Computer Matching and Privacy Protection Act of 1988, which requires a minimum period of time for the student to submit documents as a way of contesting the results of the computer matching program.

Discussion: The Secretary assures the commenter seeking clarification regarding applicability of this section that the regulations are limited in scope to institutions considering claims by students to be eligible noncitizens under § 668.7(a)(4)(ii). With regard to the need for an institutionally set deadline, the Secretary believes that the institution, which is being given responsibility for initiating secondary confirmation requests, also should be given the flexibility for setting a deadline that is consistent with its own procedures.

The Secretary does not agree with the commenter who expressed doubt that the institution has authority to deny assistance to an applicant who does not meet this deadline. The Secretary points out that § 668.60 already has given an institution similar authority when an applicant fails to provide requested documentation with regard to verification of the student's application data for purposes of calculating the student's award.

The Secretary agrees with the commenter that there is a statutory requirement setting a minimum time period for the student to submit evidence of eligible noncitizen status; it is required by section 2 of the Computer Matching and Privacy Protection Act of 1988.

Changes: Paragraph (a) is revised to allow the student a minimum of 30 days from the date the output document is submitted to the institution to submit documentation of eligible noncitizen status to the institution. Because this revision conflicts with the remainder of proposed paragraph (a) to the extent that the 30-day period would allow an applicant to submit immigration-status documents after the end of the award year or period of enrollment, the Secretary is deleting the remainder of this paragraph.

Section 668.138 Liability

Comments: Several commenters expressed concern that this section would hold institutions liable for disbursements made as a result of eligibility determinations that subsequently are found to be in error after receipt of secondary confirmation responses. One commenter requested that the Secretary explain how an institution could make an error when the immigration-status documentation satisfies existing regulations. Another commenter suggested that, since the institution would be relying on documentation supplied by the student, the student should be liable unless the institution had reason to believe the documents do not support the student's claim to be an eligible noncitizen.

Discussion: The Secretary agrees with the commenters' assertions that liability should not be imposed on the institution for the institution's erroneous determination that a student is an eligible noncitizen as long as the institution can justify a disbursement by

showing documented evidence of eligible immigration status as required by § 668.7(a)(4)(ii). The intent of this section was to impose liability on an institution that disburses Title IV, HEA assistance despite having immigration-status documentation, or an INS response to a secondary confirmation request, that does not support the student's eligibility claim.

Changes: Section 668.138(c)(3) is added to clarify the Secretary's intent concerning institutional liability.

Section 668.139 Recovery of Payments and Loan Disbursements to Ineligible Students

Comments: Two commenters suggested that § 668.139(d) be rephrased to require the institution to repay the "ineligible portion of a loan disbursement" to the lender and to notify the guarantee agency when the institution makes a disbursement to an ineligible student. These commenters suggested that the Secretary include provisions authorizing the institution to obtain the promissory note for the purpose of loan collection and that the Secretary should address repayment of interest and special allowances paid on the "ineligible portion." One commenter proposed that for Federal PLUS loans institutions should be permitted to accept a statement attesting to the eligible noncitizen status of the parent of an eligible noncitizen applicant. Another commenter requested clarification about whether loans to ineligible students could be reinsured as exempt claims as provided in § 682.405(a)(2).

Discussion: The Secretary does not agree that § 668.139(d) should be revised to assign institutions the responsibility for repaying the "ineligible portion" of a Federal Stafford, Federal SLS, or Federal PLUS loan to the lender. An institutional determination of a student's eligible noncitizen status affects the student's eligibility for all Title IV, HEA assistance. The student will be liable for repayment of the entire disbursement should the institution's determination of eligibility prove to be in error. Any discussion of repayment of a portion of the disbursement is not relevant in this situation.

The comments with regard to guarantee agency notification and refunds of interest and special allowances are valid comments and should be addressed within the context of all recipients of Title IV, HEA assistance who subsequently are determined to be ineligible. Noncitizens represent only small fraction of the population that might be affected.

The Secretary does not agree that statements of eligible noncitizen status from Federal PLUS loan parents should be accepted in lieu of actual INS immigration-status documents and believes that such statements do not provide satisfactory evidence of immigration status.

With regard to the comment concerning reinsurability, the Secretary holds the position that the amount of the disbursement to an ineligible student is not reinsured.

Changes: Paragraph (d) is revised to insert "repay" in place of "restore."

Waiver of Proposed Rulemaking

In accordance with section 431(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)) and the Administrative Procedure Act (5 U.S.C. 553), it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. Most of the changes in these final regulations were published for public comment on April 29, 1991 at 56 FR 19782. However, some of these changes are needed to conform the regulations to statutory changes made by Public Law 102–325, and public comment would have no effect on the content of these changes. Therefore, the Secretary has determined that publication of a proposed rule is unnecessary and contrary to the public interest under 5 U.S.C. 553(b)(B).

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid.

Dated: December 30, 1992.

Lamar Alexander,

Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: Supplemental Educational Opportunity Grant Program, 84.007; Stafford Loan Program, 84.032; College Work-Study Program, 84.033; Perkins Loan Program, 84.038; Income Contingent Loan Program, 84.226; Pell Grant Program, 84.063; State Student Incentive Grant Program, 84.069)

The Secretary amends part 668 of title 34 of the Code of Federal Regulations by adding a new Subpart I to read as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

* * * * *

Subpart I—Immigration-Status Confirmation

668.130 General.
668.131 Definitions.
668.132 Institutional determinations of eligibility based on primary confirmation.
668.133 Conditions under which an institution shall require documentation and request secondary confirmation.
668.134 Institutional policies and procedures for requesting documentation and receiving secondary confirmation.
668.135 Institutional procedures for completing secondary confirmation.
668.136 Institutional determinations of eligibility based on INS responses to secondary confirmation requests.
668.137 Deadlines for submitting documentation and the consequences of failure to submit documentation.
668.138 Liability.
668.139 Recovery of payments and loan disbursements to ineligible students.

Authority: 20 U.S.C. 1091, 1092, and 1094, unless otherwise noted.

* * * * *

Subpart I—Immigration-Status Confirmation

§ 668.130 General.

(a) *Scope and purpose.* The regulations in this subpart govern the responsibilities of institutions and students in determining the eligibility of those noncitizen applicants for Title IV, HEA assistance who must, under § 668.7(a)(4)(ii), produce evidence from the United States Immigration and Naturalization Service (INS) that they are permanent residents of the United States or in the United States for other than a temporary purpose with the intention of becoming citizens or permanent residents.

(b) *Student responsibility.* At the request of the Secretary or the institution at which an applicant for Title IV, HEA financial assistance is

enrolled or accepted for enrollment, an applicant who asserts eligibility under § 668.7(a)(4)(ii) shall provide documentation from the INS of immigration status.

(Authority: 20 U.S.C. 1091, 1094)

§ 668.131 Definitions.

The following definitions apply to this subpart:

Eligible noncitizen: An individual possessing an immigration status that meets the requirements of § 668.7(a)(4)(ii).

Immigration status: The status conferred on a noncitizen under the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1182.

Output document: The Student Aid Report (SAR), Electronic Student Aid Report (ESAR), other document, or automated data generated by the Department of Education's central processing system as the result of processing the data provided in an Application for Federal Student Aid or multiple data entry application.

Primary confirmation: A process by which the Secretary, by means of a matching program conducted with the INS, compares the information contained in an Application for Federal Student Aid or a multiple data entry application regarding the immigration status of a noncitizen applicant for Title IV, HEA assistance with records of that status maintained by the INS in its Alien Status Verification Index (ASVI) system for the purpose of determining whether a student's immigration status meets the requirements of § 668.7(a)(4)(ii) and reports the results of this comparison on an output document.

Secondary confirmation: A process by which the INS, in response to the submission of INS Document Verification Form G–845 by an institution, searches pertinent paper and automated INS files, other than the ASVI database, for the purpose of determining a student's immigration status and the validity of the submitted INS documents, and reports the results of this search to the institution.

(Authority: 20 U.S.C. 1091)

§ 668.132 Institutional determinations of eligibility based on primary confirmation.

(a) Except as provided in § 668.133(a)(1)(ii), the institution shall determine a student to be an eligible noncitizen if the institution receives an output document for that student establishing that—

(1) The INS has confirmed the student's immigration status; and

(2) The student's immigration status meets the noncitizen eligibility requirements of § 668.7(a)(4)(ii).

(b) If an institution determines a student to be an eligible noncitizen in accordance with paragraph (a) of this section, the institution may not require the student to produce the documentation otherwise required under § 668.7(a)(4)(ii).

(Authority: 20 U.S.C. 1091, 1094)

§ 668.133 Conditions under which an institution shall require documentation and request secondary confirmation.

(a) *General requirements.* Except as provided in paragraph (b) of this section, an institution shall require the student to produce the documentation required under § 668.7(a)(4)(ii) and request the INS to perform secondary confirmation for a student claiming eligibility under § 668.7(a)(4)(ii), in accordance with the procedures set forth in § 668.135, if—

(1) The institution—

(i) Receives an output document indicating that the student must provide the institution with evidence of the student's immigration status required under § 668.7(a)(4)(ii); or

(ii) Receives an output document that satisfies the requirements of § 668.132(a)(1) and (2), but the institution—

(A) Has documentation that conflicts with immigration-status documents submitted by the student or the immigration status reported on the output document; or

(B) Has reason to believe that the immigration status reported by the student or on the output document is incorrect; and

(2) The institution determines that the immigration-status documents submitted by the student constitute reasonable evidence of the student's claim to be an eligible noncitizen.

(b) *Exclusions from secondary confirmation.* An institution may not require the student to produce the documentation required under § 668.7(a)(4)(ii) and may not request that INS perform secondary confirmation, if—

(1) The student—

(i) Demonstrates U.S. citizen or national status; or

(ii) Demonstrates eligibility under the provisions of § 668.7(a)(4) (iii) or (iv); and

(2) The institution does not have conflicting documentation or reason to believe that the student's claim of citizenship or immigration status is incorrect.

(Authority: 20 U.S.C. 1091, 1094)

§ 668.134 Institutional policies and procedures for requesting documentation and receiving secondary confirmation.

(a) An institution shall establish and use written policies and procedures for requesting proof and securing confirmation of the immigration status of applicants for Title IV, HEA student financial assistance who claim to meet the eligibility requirements of § 668.7(a)(4)(ii). These policies and procedures must include—

(1) Providing the student a deadline by which to provide the documentation that the student wishes to have considered to support the claim that the student meets the requirements of § 668.7(a)(4)(ii);

(2) Providing to the student information concerning the consequences of a failure to provide the documentation by the deadline set by the institution; and

(3) Providing that the institution will not make a determination that the student is not an eligible noncitizen until the institution has provided the student the opportunity to submit the documentation in support of the student's claim of eligibility under § 668.7(a)(4)(ii).

(b) An institution shall furnish, in writing, to each student required to undergo secondary confirmation—

(1) A clear explanation of the documentation the student must submit as evidence that the student satisfies the requirements of § 668.7(a)(4)(ii); and

(2) A clear explanation of the student's responsibilities with respect to the student's compliance with § 668.7(a)(4)(ii), including the deadlines for completing any action required under this subpart and the consequences of failing to complete any required action, as specified in § 668.137.

(Authority: 20 U.S.C. 1091, 1092, 1094)

§ 668.135 Institutional procedures for completing secondary confirmation.

Within 10 business days after an institution receives the documentary evidence of immigration status submitted by a student required to undergo secondary confirmation, the institution shall—

(a) Complete the request portion of the INS Document Verification Request Form G–845;

(b) Copy front and back sides of all immigration-status documents received from the student and attach copies to the Form G–845; and

(c) Submit Form G–845 and attachments to the INS District Office.

(Authority: 20 U.S.C. 1091, 1094)

§ 668.136 Institutional determinations of eligibility based on INS responses to secondary confirmation requests.

(a) Except as provided in paragraphs (b) and (c) of this section, an institution that has requested secondary confirmation under § 668.133(a) shall make its determination concerning a student's eligibility under § 668.7(a)(4)(ii) by relying on the INS response to the Form G–845.

(b) An institution shall make its determination concerning a student's eligibility under § 668.7(a)(4)(ii) pending the institution's receipt of an INS response to the institution's Form G–845 request concerning that student, if—

(1) The institution has given the student an opportunity to submit documents to the institution to support the student's claim to be an eligible noncitizen;

(2) The institution possesses sufficient documentation concerning a student's immigration status to make that determination;

(3) At least 15 business days have elapsed from the date that the institution sent the Form G–845 request to the INS;

(4) The institution has no documentation that conflicts with the immigration-status documentation submitted by the student; and

(5) The institution has no reason to believe that the immigration status reported by the applicant is incorrect.

(c) An institution shall establish and use policies and procedures to ensure that, if the institution has disbursed or released Title IV, HEA funds to the student in the award year or employed the student under the Federal Work-Study Program, and the institution determines, in reliance on the INS response to the institution's request for secondary confirmation regarding that student, that the student was in fact not an eligible noncitizen during that award year, the institution provides the student with notice of the institution's determination, an opportunity to contest the institution's determination, and notice of the institution's final determination.

(Authority: 20 U.S.C. 1091, 1094)

§ 668.137 Deadlines for submitting documentation and the consequences of failure to submit documentation.

(a) A student shall submit before a deadline specified by the institution all documentation the student wishes to have considered to support a claim that the student meets the requirements of § 668.7(a)(4)(ii). The deadline, set by the institution, must be not less than 30 days from the date the institution receives the student's output document.

(b) If a student fails to submit the documentation by the deadline established in accordance with paragraph (a) of this section, the institution may not disburse to the student, or certify the student as eligible for, any Title IV, HEA program funds for that period of enrollment or award year; employ the student under the Federal Work-Study Program; or certify a Federal Stafford, Federal PLUS, or Federal SLS loan application for the student for that period of enrollment.

(Authority: 20 U.S.C. 1091, 1094)

§ 668.138 Liability.

(a) A student is liable for any SSIG, Federal SEOG, or Federal Pell Grant payment and for any Federal Stafford, Federal SLS, or Federal Perkins loan made to him or her if the student was ineligible for the Title IV, HEA assistance.

(b) A Federal PLUS loan borrower is liable for any Federal PLUS loan made to him or her on behalf of an ineligible student.

(c) The Secretary does not take any action against an institution with respect to an error in the institution's determination that a student is an eligible noncitizen if, in making that determination, the institution followed the provisions in this subpart and relied on—

(1) An output document for that student indicating that the INS has confirmed that the student's immigration status meets the eligibility requirements for Title IV, HEA assistance;

(2) An INS determination of the student's immigration status and the authenticity of the student's immigration documents provided in response to the institution's request for secondary confirmation; or

(3) Immigration-status documents submitted by the student and the institution did not have reason to believe that the documents did not support the student's claim to be an eligible noncitizen.

(d) Except as provided in paragraph (c) of this section, if an institution makes an error in its determination that a student is an eligible noncitizen, the institution is liable for any Title IV, HEA disbursements made to this student during the award year or period of enrollment for which the student applied for Title IV, HEA assistance.

(Authority: 20 U.S.C. 1091, 1094)

§ 668.139 Recovery of payments and loan disbursements to ineligible students.

(a) If an institution makes a payment of a grant or a disbursement of a Federal Perkins loan to an ineligible student for which it is not liable in accordance with § 668.138, it shall assist the Secretary in recovering the funds by—

(1) Making a reasonable effort to contact the student; and

(2) Making a reasonable effort to collect the payment or Federal Perkins loan.

(b) If an institution causes a Federal Stafford, Federal SLS, or Federal PLUS loan to be disbursed to an ineligible student or Federal PLUS loan borrower for which it is not liable in accordance with § 668.138, it shall assist the Secretary in recovering the funds by notifying the lender that the student has failed to establish eligibility under the requirements of § 682.201(d).

(c) If an institution is liable for a payment of a grant or Federal Perkins loan to an ineligible student, the institution shall restore the amount equal to the payment or disbursement to the institution's Federal Perkins loan fund or Federal Pell Grant, Federal SEOG, or SSIG amount, even if the institution cannot collect the payment or disbursement from the student.

(d) If an institution is liable for a Federal Stafford, Federal SLS, or Federal PLUS loan disbursement to an ineligible student, the institution shall repay an amount equal to the disbursement to the Federal Stafford, Federal SLS, or Federal PLUS lender and provide written notice to the borrower.

(Authority: 20 U.S.C. 1091, 1094)

[FR Doc. 93–134 Filed 1–6–93; 8:45 am]

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federal register

Thursday
January 7, 1993

Part VIII

Department of Education

34 CFR Part 99

Family Educational Rights and Privacy; Rule

DEPARTMENT OF EDUCATION

34 CFR Part 99

RIN 1880–AA54

Family Educational Rights and Privacy

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations for the Family Educational Rights and Privacy Act (FERPA). These amendments are needed to implement a disclosure provision of the Crime Awareness and Campus Security Act of 1990. Additionally, the amendments are needed to (1) reflect a change in the enforcement provisions of the existing regulations, including designation of a new review authority; and (2) incorporate a number of technical amendments. The principal change resulting from these regulations is establishment of another condition under which an institution of postsecondary education may, without prior consent, disclose information from an education record.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Ellen Campbell, Family Policy Compliance Office, Office of Human Resources and Administration, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–4605. Telephone: (202) 732–1807. Individuals who are hearing impaired may call the Federal Dual Party Relay Service at 1–800–877–8339 (in the Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m., Eastern time.

SUPPLEMENTARY INFORMATION: The current FERPA regulations allow educational agencies and institutions to disclose personally identifiable information from a student's education records without the student's consent only under certain conditions. These final regulations allow institutions of postsecondary education to disclose the results of a disciplinary proceeding conducted by the institution against an alleged perpetrator of a crime of violence to the alleged victim of that crime without the prior written consent of the alleged perpetrator. This new condition was created by section 203 of the Crime Awareness and Campus Security Act of 1990 (Public Law 101–542, title II, section 203; 20 U.S.C. 1232g(b)(6)), which amended FERPA to allow for this disclosure.

Additionally, these final regulations reflect changes in the enforcement provisions under 34 CFR part 99, subpart E. Specifically, FERPA provides that the Secretary shall designate a review board within the Department for the purpose of reviewing and adjudicating violations of FERPA. In the current regulations, the Education Appeal Board (EAB) serves as the designated review board. Because the EAB is being phased out, the Secretary designates the Office of Administrative Law Judges to act as the review board for the purpose of reviewing and adjudicating under FERPA.

Further, several amendments are included in these final regulations for reasons of clarification. A change has been made to the provision that describes the conditions under which an educational agency or institution must obtain prior consent in order to disclose information. The change will allow an educational agency or institution to disclose information from a student's education records if the parent or eligible student has provided written consent to the party seeking access to the records, rather than require that the educational agency or institution obtain written consent directly from the parent or eligible student.

These final regulations also include a definition of what is considered to be a "timely complaint" of an alleged violation of FERPA. Historically, the office designated to administer FERPA has had to determine on a case-by-case basis what it considered to be a "timely complaint." Based on this historical experience and comparison with similar limitation periods for filing complaints, the Secretary has determined that a complaint brought within 180 days of the alleged violation should be considered timely.

On August 11, 1992, at 57 FR 35964 the Secretary published a notice of proposed rulemaking (NPRM). Except for minor technical revisions, there are no differences between the NPRM and these final regulations.

Public Comment

In the NPRM the Secretary invited comments on the proposed regulations. Two parties submitted comments endorsing the proposed regulations. The only substantive comment the Secretary received suggested a change the Secretary is not legally authorized to make under the applicable statutory authority.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education, Family educational rights, Parents, Privacy, Reporting and recordkeeping requirements, Students.

Dated: December 18, 1992.

Lamar Alexander,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number does not apply.)

The Secretary amends part 99 of title 34 of the Code of Federal Regulations as follows:

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. The authority citation for part 99 is revised to read as follows:

Authority: 20 U.S.C. 1232g, unless otherwise noted.

2. Section 99.5 is amended by revising the section heading to read as follows:

§ 99.5 What are the rights of students?

* * * * *

§ 99.6 [Amended]

3. In § 99.6, paragraph (a)(5) is amended by removing "maintained" and adding, in its place, "maintained".

4. Section 99.30 is amended by revising the section heading and paragraph (a) to read as follows:

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

* * * * *

5. Section 99.31 is amended by adding a new paragraph (a)(13), revising paragraph (b), and revising the authority citation to read as follows:

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) * * *

(13) The disclosure is to an alleged victim of any crime of violence, as that term is defined in section 16 of title 18, United States Code, of the results of any disciplinary proceeding conducted by an institution of postsecondary education against the alleged perpetrator of that crime with respect to that crime.

(b) This section does not forbid an educational agency or institution to disclose, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11) and (13) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b)(1), (b)(2)(B) and (b)(6))

6. Section 99.60 is amended by revising the heading and paragraphs (a) and (c) to read as follows:

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, "Office" means the Family Policy Compliance Office, U.S. Department of Education.

* * * * *

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term "applicable program" is defined in section 400 of the General Education Provisions Act.

7. Section 99.63 is revised to read as follows:

§ 99.63 Where are complaints filed?

A person may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U. S. Department of Education, Washington, D.C. 20202–4605.

(Authority: 20 U.S.C. 1232g(g))

8. Section 99.64 is amended by adding new paragraphs (c) and (d) to read as follows:

§ 99.64 What is the complaint procedure?

* * * * *

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office extends the time limit in this section if the complainant shows that he or she was prevented by circumstances beyond the complainant's control from submitting the matter within the time limit, or for other reasons considered sufficient by the Office.

9. Section 99.65 is revised to read as follows:

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under § 99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the alleged violation; and

(2) Asks the agency or institution to submit a written response to the complaint.

(b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

10. Section 99.67 is amended by revising paragraph (a) and the authority citation to read as follows:

§ 99.67 How does the Secretary enforce decisions?

(a) If the educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may, in accordance with part E of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a compliant to compel compliance through a cease-and-desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

* * * * *

(Authority: 20 U.S.C. 1232g(f); 20 U.S.C. 1234)

[FR Doc. 93–133 Filed 1–6–93; 8:45 am]

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Federal Register

Thursday
January 7, 1993

Part IX

Department of Transportation

Federal Aviation Administration

Explosive Detection Systems; Notice

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 27026; Notice No. 92-16A]

RIN 2120-AE77

Explosive Detection Systems

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed Criteria for Certification; extension of comment period.

SUMMARY: This document announces an extension of the comment period on Notice 92-16 entitled, "Explosive Detection Systems; Proposed Criteria for Certification" (57 FR 52698; November 4, 1992). This comment period is extended from January 4, 1993, until February 4, 1993. The extension responds to the request of the Air Transport Association of America (ATA) and is needed to permit ATA, and other affected parties, additional time to develop comments responsive to Notice 92-16.

DATES: The comment period is being extended from January 4, 1993, to February 4, 1993.

ADDRESSES: As stated in Notice 92-16, comments should be mailed, in triplicate, to: Federal Aviation Administration, Office of Chief Counsel, Attention: Rules Docket (AGC-10), Docket No. 27026, 800 Independence Avenue, SW., Washington, DC 20591. All comments must be marked: "Docket No. 27026." Comments on this Notice may be examined in room 915G on weekdays, except on Federal holidays, between 8:30 a.m. and 5 p.m.

Comments that include or reference national security information or sensitive security information should not be submitted to the public docket. Such comments should be sent to the following address in a manner consistent with applicable requirements and procedures for safeguarding sensitive security information: Federal Aviation Administration, Office of Civil Aviation Security Operations, Attention: FAA Security Control Point (ACO-320A), Docket No. ACP-27026-C, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce Butterworth, Director (ACP-1), Office of Civil Aviation Security Policy and Planning, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-8058.

SUPPLEMENTARY INFORMATION: On November 4, 1992, the FAA issued Notice No. 92-16, entitled "Explosive Detection Systems; Proposed Criteria for Certification." Notice 92-16 proposed to establish criteria for the certification of explosives detection systems to screen checked baggage for international flights.

By a request dated December 1, 1992, ATA asked that the comment period be extended 60 days. Because of the technical and operational complexities of the proposed criteria, ATA indicated that it, and its member air carriers, had not completed analyzing the potential effects of the criteria proposed in Notice 92-16.

In order to give ATA and its members additional time to complete this analysis and prepare comments reflecting the knowledge gained from it, the FAA finds that it would be in the public interest to extend the comment period. The FAA finds that an extension of 30 days, however, is sufficient for careful analysis and the preparation and submission of comments to the docket. An extension until March 4 would unduly delay FAA's efforts to comply with sections 107 and 108 of the Aviation Security Improvement Act of 1990, Public Law 101-604, which require an accelerated research and development program with proper testing and certification of equipment prior to deployment. Any such comments submitted before the close of the extended comment period are likely to provide additional substantive information, which will be helpful in developing the criteria, without unduly delaying issuance of the criteria in final (or interim final) form. Accordingly, the comment period is extended to February 4, 1993, to afford all interested persons the opportunity to comment on Notice 92-16.

Issued in Washington, DC, on January 4, 1993.

O.K. Steele,

Assistant Administrator for Civil Aviation Security.

[FR Doc. 93-379 Filed 1-5-93; 12:31 pm]

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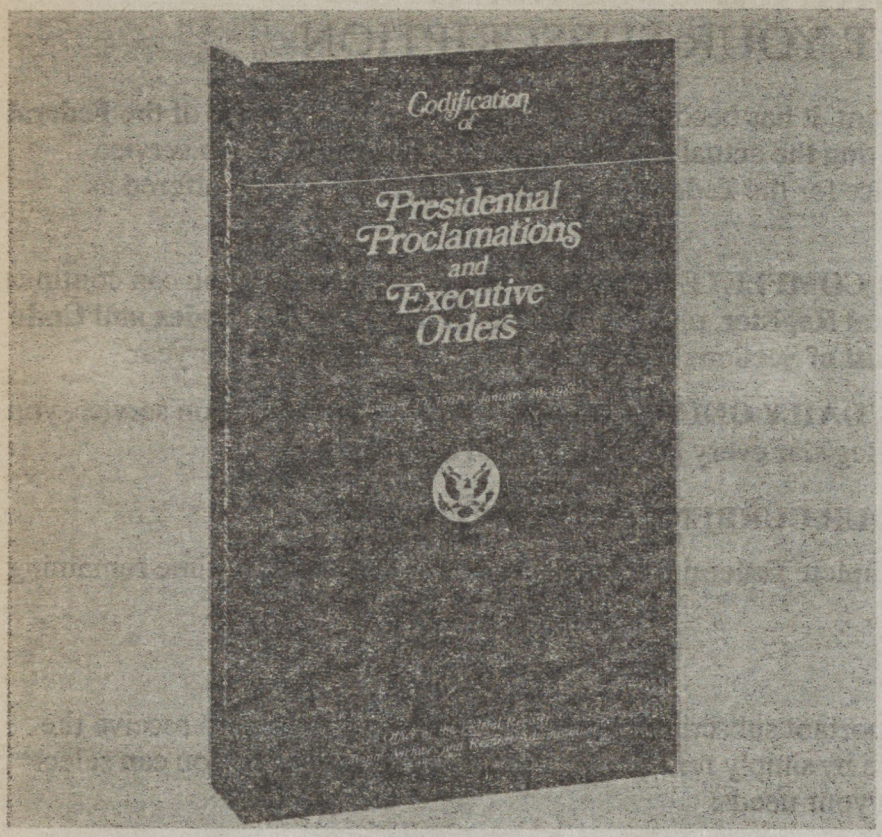

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