AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

3–31–93
Vol. 58 No. 60

federal register

Wednesday
March 31, 1993

United States
Government
Printing Office
SUPERINTENDENT
OF DOCUMENTS
Washington, DC 20402

OFFICIAL BUSINESS
Penalty for private use, $300

SECOND CLASS NEWSPAPER

Postage and Fees Paid
U.S. Government Printing Office
(ISSN 0097–6326)

3-31-93
Vol. 58 No. 60
Pages 16763-17080

federal register

Wednesday
March 31, 1993

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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.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 703

Investment and Deposit Activities

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Rule; corrections.

SUMMARY: In the **Federal Register** of October 31, 1991, beginning on page 56000, a final rule concerning part 703 (investment and deposit activities) of the NCUA Regulations was published. An inadvertent error was made in the supplementary information section of the document. This document makes the correction.

EFFECTIVE DATE: March 31, 1993.

ADDRESSES: National Credit Union Administration, 1776 G Street, NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Lisa Henderson, Staff Attorney, Office of General Counsel (202–682–9630), at the above address.

SUPPLEMENTARY INFORMATION: In final rule document 91–25926, in the issue of Thursday, October 31, 1991, the following correction to the **SUPPLEMENTARY INFORMATION** section is made:

On page 56000, third column, under the heading "Section 703.2 Definitions," delete the second sentence and substitute the following:

Although no comments were received relative to this section, the Board has determined to modify the definition of "Corporate credit union." The Board has concluded that rather than providing a specific definition of the term in this part, the definition should be tied to that provided in part 704, which governs corporate credit unions. This will enable changes to be made to the definition in part 704 without having to amend this part.

By the National Credit Union Administration Board on March 23, 1993.

Becky Baker,

Secretary of the Board.

[FR Doc. 93–7420 Filed 3–30–93; 8:45 am]

BILLING CODE 7535–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 92–NM–214–AD; Amendment 39–8516; AD 93–05–12]

Airworthiness Directives; Airbus Industrie Model A320 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Airbus Industrie Model A320 series airplanes, that requires repetitive detailed visual inspections to detect cracks in the fatigue-sensitive area around the fasteners on the wing rear spar between ribs 1 and 2, and repair, if necessary. This amendment also requires modification of the outer wing rear spar forward face which, when accomplished, constitutes terminating action for the repetitive inspections. This amendment is prompted by results of fatigue testing of the center fuselage, which revealed cracks on the wing rear spar that spread around four fasteners in a fatigue-sensitive area. The actions specified by this AD are intended to prevent reduced structural integrity of the wing.

DATES: Effective May 5, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 5, 1993.

ADDRESSES: The service information referenced in this AD may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31700 Blagnac Cedex, France. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Holt, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2140; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive (AD) that is applicable to certain Airbus Industrie Model A320 series airplanes was published in the **Federal Register** on December 11, 1992 (57 FR 58752). That action proposed to require repetitive detailed visual inspections to detect cracks in the fatigue-sensitive area around the fasteners on the wing rear spar between ribs 1 and 2, and repair, if necessary. That action also proposed to require modification of the outer wing rear spar forward face which, when accomplished, constitutes terminating action for the repetitive inspections.

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

All of the commenters support the proposed rule.

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

The FAA estimates that 51 airplanes of U.S. registry will be affected by this AD, that it will take approximately 12.5 work hours per airplane to accomplish the required actions, and that the average labor rate is $55 per work hour. Required parts will cost approximately $112 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $40,775, or $800 per airplane. This total cost figure assumes that no operator has yet accomplished the requirements of this AD.

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

implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

93-05-12 Airbus Industrie: Amendment 39-8516. Docket 92-NM-214-AD.

Applicability: Model A320 series airplanes; serial numbers 002 through 071, inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent reduced structural integrity of the wing, accomplish the following:

(a) Prior to the accumulation of 13,000 total landings, or within 1,000 landings after the effective date of this AD, whichever occurs later: Perform a detailed visual inspection to detect cracks in the left- and right-hand sides of the wing rear spar between ribs 1 and 2, in accordance with Airbus Industrie Service Bulletin A320-57-1020, dated September 5, 1991.

(1) If any crack is found, prior to further flight, repair in accordance with a method approved by the Manager, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate.

(2) If no cracks are found, repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 3,000 landings.

(b) Within 3 years after the effective date of this AD, modify the outer wing rear spar forward face between ribs 1 and 2, in accordance with Airbus Industrie Service Bulletin A320-57-1021, dated September 5, 1991.

(c) Accomplishment of the modification required by paragraph (b) of this AD constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD.

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM-113.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM-113.

(e) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(f) The inspection shall be done in accordance with Airbus Industrie Service Bulletin A320-57-1020, dated September 5, 1991. The modification shall be done in accordance with Airbus Industrie Service Bulletin A320-57-1021, dated September 5, 1991. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus Industrie, Airbus Support Division, Avenue Didier Daurat, 31700 Blagnac, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(g) This amendment becomes effective on May 5, 1993.

Issued in Renton, Washington, on March 12, 1993.

Neil D. Schalekamp,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93-7377 Filed 3-30-93; 8:45 am]

BILLING CODE 4910-13-P-M

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14 CFR Part 39

[Docket No. 92-NM-10-AD; Amendment 39-8521; AD 93-05-17]

Airworthiness Directives; Boeing Model 707/720, 727, and 737 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to Boeing Model 707/720, 727, and 737 series airplanes, that currently requires inspections of the E-F window post for cracks, and repair, if necessary. This amendment requires inspections of the E-N and F-N areas of the window post for cracks; visual inspections to determine sufficient edge margin of the reinforcement straps at al of the strap fastener holes; and repair, if necessary. This amendment is prompted by reports of cracks found in certain areas of the window post. The actions specified by this AD are intended to prevent rapid depressurization of the cabin due to cracking in the window post area.

DATES: Effective May 5, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 5, 1993.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Phil Forde, Aerospace Engineer, Seattle Aircraft Certification Office, Airframe Branch, ANM-120S, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone (206) 227-2771; fax (206) 227-1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations by superseding AD 82-08-09, Amendment 39-4364 (47 FR 17276, April 22, 1982), which is applicable to Boeing Model 707/720, 727, and 737 series airplanes, was published as a supplemental notice of proposed rulemaking (NPRM) in the Federal Register on October 26, 1992 (57 FR 48474). The action proposed to require additional inspections to include the E-N and F-N areas of the window posts to detect cracks; visual inspections to determine sufficient edge margin in the reinforcement straps at all of the strap fastener holes; and repair, if necessary.

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

One commenter supports the proposal.

One operator requests that the proposed rule be revised to require repetitive inspection intervals in terms of regular maintenance schedules instead of flight cycles. This commenter notes that the proposed intervals of 3,300 and 6,600 flight cycles would fall at times sooner than those of this operator's regular "C" check intervals. To follow the proposed compliance schedule, this operator would be required to schedule special times for the accomplishment of the inspections, and this would entail considerable additional expense. The FAA does not concur with the commenter's request to change the compliance time intervals. Fatigue damage, as addressed by this AD action, accumulates in terms of flight cycles; the repetitive inspection intervals, as proposed, represent what the FAA considers to be the maximum number of flight cycles allowable for the affected airplanes to continue to operate prior to accomplishing the required inspections without compromising safety. Since maintenance schedules vary from operator to operator, there would be no assurance that the inspections will be accomplished within that time; therefore, it would be inappropriate to state the inspection intervals in terms of maintenance checks. Under the provisions of paragraph (e) of the final rule, however, operators may apply for an adjustment of the compliance time if sufficient data is presented to the FAA to justify that such an adjustment will provide an acceptable level of safety.

Several commenters question the repetitive inspection interval specified in Item 5 of Table 3 of the proposal, which pertains to Model 737 series airplanes. Item 5 indicates that inspections should be repeated every 3,300 flight cycles for airplanes with modified window posts that have been verified to be crack-free by the use of eddy current inspections. The commenters question why this repetitive inspection interval should be shorter than that for modified window posts that have not been verified crack-free by eddy current inspections. Since the eddy current inspection is a superior method for detecting cracks, the shorter repetitive inspection interval for window posts so inspected seems unwarranted. The FAA concurs. The repetitive inspection interval of 3,300 flight cycles, which was specified in Item 5 of Table 3, was a typographical error. The correct interval is 5,500 flight cycles; the final rule has been revised to indicate this corrected interval.

One commenter requests clarification of the term "modified structure," as used throughout the notice. The commenter questions whether this term includes "production modified" structure. In response to this commenter, the FAA notes that this AD is not intended to affect "production modified" airplanes. Certain airplanes have been modified during production with an improved fastener pattern at the window post area, and are not subject to the unsafe condition addressed by this AD action. Only the airplanes listed in the service bulletins that are specified in the applicability statement of the rule are affected by the requirements of this AD.

One commenter suggests that the applicability of the proposed rule be revised so that previously repaired window posts are excluded from additional inspection. The FAA does not concur. As was explained in detail in the preamble to both the original notice and the supplemental notice, reports have verified that cracking continues to be found in areas of window posts that have been modified and/or repaired. Therefore, continued inspections of airplanes that have been so modified or repaired are warranted in order to ensure the structural integrity of the window post area.

One commenter requests clarification as to the compliance time threshold specified in Item 1 of Table 6, which pertains to Model 737 series airplanes. The proposal states that the initial inspection is required "* * * prior to the accumulation of 12,750 flight cycles." The commenter questions whether this threshold refers to flight cycles accumulated since the airplane was new, or flight cycles accumulated after the installation of the strap. The FAA responds by explaining that the threshold of 12,750 flight cycles refers to the total number of flight cycles accumulated since the airplane was new. Item 1 of Table 6 addresses airplanes that were modified in accordance with any revision through Revision 8 of Boeing Service 737–53–1023. Those revisions of the service bulletin contain procedures for installation of a strap that covers only the E–F window post area; they did not contain procedures for installing a strap that extends to the E–N window post area. Accordingly, the strap installed in accordance with these service bulletins does not cover the entire area that is prone to cracking and that is addressed by this AD. Therefore, since the entire problem area of E–N window post has not been modified on these airplanes, it is appropriate that the initial inspection be based on the total number of flight cycles of the airplane, not on the number of flight cycles since installation of the "short" strap. (Revisions 9, 10, and 11 of the service bulletin do contain procedures for installation of a strap that does extend to cover the E–N region.)

One commenter requests that Item 5 of Table 2 of the notice, which pertains to Model 727 series airplanes, should include reference to Revision 9 and 10 of Boeing Service Bulletin 727–53–0086. The commenter considers that this reference is necessary, since some airplanes previously may have been modified in accordance with those revisions. The FAA concurs. The omission of references to Revisions 9 and 10 was clearly inadvertent (reference to these revisions was included in Item 3 of Table 2 and in Item 5 of parallel Table 3). Item 5 of Table 2 of the final rule has been revised to include this reference.

The FAA has been advised that a similar omission was made in Table 6 of the notice, which pertains to Model 737 series airplanes. Items 2 and 3 of that table should have included reference to Revision 11 of Boeing Service Bulletin 737–53–1023 as a source of modification or repair. That this was clearly an inadvertent omission is demonstrated by the fact that Revision 11 was referenced in the parallel items of Table 5, which also pertains to Model 737 series airplanes. Table 6 of the final rule has been revised to include this reference.

Additionally, since issuance of the supplemental notice, the FAA has reviewed and approved Boeing Service Bulletin 2983, Revision 6, dated November 12, 1992, which pertains to Model 707/720 series airplanes. This revision is essentially identical to the previous revision, but contains certain editorial and clarifying changes. Items 3 and 5 of Table 1, and Items 2 and 3 of Table 4, as well as paragraph (d)(1), have been revised in the final rule to include reference to this revision as an additional source of service information.

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

There are approximately 1,800 Model 707/720, 727, and 737 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 1,183 airplanes of U.S. registry will be affected by this AD, that it will take

approximately 8 work hours per airplane to accomplish the required actions, and that the average labor cost will be $55 per work hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $520,520, or $440 per airplane per inspection cycle. This total cost figure assumes that no operator has yet accomplished the requirements of this AD.

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

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–4364 (47 FR 17276, April 22, 1982), and by adding a new airworthiness directive (AD), to read as follows:

93–05–17 Boeing: Amendment 39–8521. Docket No. 92–NM–10–AD. Supersedes AD 82–08–09, Amendment 39–4364.

Applicability: Applies to Model 707/720, series airplanes, listed in Boeing Service Bulletin 2983, Revision 5, dated January 31, 1991; Model 727 series airplanes listed in Boeing Service Bulletin 727–53–0086, Revision 11, dated August 8, 1991; and Model 737 series airplanes listed in Boeing Service Bulletin 737–53–1023, Revision 11, dated May 16, 1991; certificated in any category.

Compliance: Required as indicated, unless previously accomplished. To prevent depressurization as a result of failure of the control cabin window post structure, accomplish the following:

(a) Inspect the E–F window posts for cracks in accordance with the schedule set forth in Table 1, 2, or 3 of this AD, as applicable:

TABLE 1.—MODEL 707/720 E–F WINDOW POST INSPECTION

[Applicable Boeing Service Bulletin 2983]

Airplane condition	Inspection required in accordance with revision 4, 5, or 6 of service bulletin	Initial inspection not to exceed (flight cycles)	Repeat inspection interval not to not to exceed exceed (flight cycles)
1. Service Bulletin not accomplished	X-ray of E–F window post	1,650 after May 21, 1982 (effective date of AD 82–08–09), or prior to accumulation of 11,650, whichever occurs later..	3,300
2. Repaired or modified per Original Issue of Service Bulletin.	X-ray of E–F window post	1,650 after May 21, 1982, or prior to accumulating 10,000 after repair or modification, whichever occurs later.	3,300
3. Repaired or modified per Revision 1, 2, 3, 4, 5, or 6 of Service Bulletin. (Modification was accomplished without using eddy current inspection to verify structure was free of cracks.).	Close visual for cracks of external doubler and the exposed portion of the E–F window post with the #2 sliding window open.	1,650 after May 21, 1982, or prior to accumulating 16,650 after repair or modification, whichever occurs later.	3,300
4. Repaired or modified per Revision 1 of Service Bulletin.	Visual inspection for sufficient edge margin of all of the strap fastener holes.	1,650 after effective date of this AD	None
5. Modified per Revision 2, 3, 4, 5, or 6 of Service Bulletin (verified no cracks in structure using eddy current inspection described in Revision 4 or 5 of Service Bulletin).	Close visual for cracks of external doubler and the exposed portion of the E–F window post with the #2 sliding window open.	3,300 after effective date of this AD, or 24,000 after strap installation, whichever is later.	3,300

TABLE 2.—MODEL 727 E–F WINDOW POST INSPECTION

[Applicable Boeing Service Bulletin 727–53–0086]

Airplane condition	Inspection required in accordance with revision 6, 7, 8, 9, 10, or 11 of service bulletin	Initial inspection not to exceed (flight cycles)	Repeat inspection interval not to exceed (flight cycles)
1. Service Bulletin not accomplished	X-ray of E–F window post	1,650 after May 21, 1982 (effective date of AD 82–08–09), or prior to accumulating 11,650, whichever occurs later.	3,300

TABLE 2.—MODEL 727 E–F WINDOW POST INSPECTION—Continued

[Applicable Boeing Service Bulletin 727–53–0086]

Airplane condition	Inspection required in accordance with revision 6, 7, 8, 9, 10, or 11 of service bulletin	Initial inspection not to exceed (flight cycles)	Repeat inspection interval not to exceed (flight cycles)
2. Repaired or modified per Original Issue or Revision 1 of Service Bulletin.	X-ray of E–F window post	1,650 after May 21, 1982, or prior to accumulating 10,000 after repair or modification, whichever occurs later.	3,300
3. Repaired or modified per Revision 2, 3, 4, 5, 6, 7, 8, 9, 10, or 11 of Service Bulletin. (Modification was accomplished without using eddy current inspection to verify structure was free of cracks.).	Close visual for cracks of external doubler and the exposed portion of the E–F window post with the #2 sliding window open.	1,650 after May 21, 1982, or prior to accumulating 16,650 after repair or modification, whichever occurs later.	3,300
4. Repaired or modified per Revision 9 or 10 of Service Bulletin.	Visual inspection for sufficient edge margin of all of the strap fastener holes.	1,650 after effective date of this AD	None
5. Modified per Revision 2, 3, 4, 5, 6, 7, 8, 9, 10, or 11 of Service Bulletin (verified no cracks in structure using eddy current inspection described in Revision 6, 7, 8, 9, 10, or 11).	Close visual for cracks of external doubler and the exposed portion of the E–F window post with the #2 sliding window open.	3,300 after effective date of this AD, or 24,000 after strap installation, whichever occurs later.	3,300

TABLE 3.—MODEL 737 E–F WINDOW POST INSPECTION

[Applicable Boeing Service Bulletin 737–53–1023]

Airplane condition	Inspection required in accordance with revision 6, 7, 8, 9, 10, or 11 of service bulletin	Initial inspection not to exceed (flight cycles)	Repeat inspection interval not to exceed (flight cycles)
1. Service Bulletin not accomplished	X-ray of E–F window post	2,750 after May 21, 1982 (effective date of AD 82–08–09), or prior to the accumulation of 12,750, whichever occurs later.	5,500
2. Repaired or modified per Original Issue or Revision 1 or 2 of Service Bulletin.	X-ray of E–F window post	2,750 after May 21, 1982, or prior to accumulating 10,000 after repair or modification, whichever occurs later.	5,500
3. Repaired or modified per Revision 3, 4, 5, 6, 7, 8, 9, 10, or 11 of Service Bulletin. (Modification was accomplished without using eddy current inspection to verify structure was free of cracks.).	Close visual for cracks of the external doubler and the exposed portion of E–F widow post with the #2 sliding window open.	2,750 after May 21, 1982, or prior to accumulating 17,750 after repair or modification, whichever occurs later.	5,500
4. Repaired or modified per Revision 9 or 10 of Service Bulletin.	Visual inspection for sufficient edge margin of all the strap fastener holes.	2,750 after effective date of this AD	None
5. Modified per Revision 3, 4, 5, 6, 7, 8, 9, 10, or 11 of Service Bulletin (verified no cracks in structure using eddy current inspection described in Revision 6, 7, 8, 9, 10, or 11).	Close visual for cracks of the external doubler and the exposed portion of the E–F window post with the #2 sliding window open.	3,300 after effective date of this AD, or 24,000 after strap installation, whichever occurs later.	5,500

(b) Inspect the E–N window post for cracks in accordance with the schedule set forth in Table 4, 5, or 6 of this AD, as applicable:

TABLE 4.—MODEL 707/720 E–N WINDOW POST INSPECTION

[Applicable Boeing Service Bulletin 2983]

Airplane condition	Inspection required in accordance with revision 5 or 6 of service bulletin	Initial inspection not to exceed (flight cycles)	Repeat inspection interval not to exceed (flight cycles)
1. Service Bulletin not accomplished; or repaired or modified per Original Issue or Revision 1, 2, 3, or 4 of Service Bulletin.	X-ray of E–N window post	1,650 after effective date of this AD, or prior to the accumulation of 11,650, whichever occurs later.	3,300

TABLE 4.—MODEL 707/720 E–N WINDOW POST INSPECTION—Continued

[Applicable Boeing Service Bulletin 2983]

Airplane condition	Inspection required in accordance with revision 5 or 6 of service bulletin	Initial inspection not to exceed (flight cycles)	Repeat inspection interval not to exceed (flight cycles)
2. Repaired per Revision 5 or 6 of Service Bulletin (cracks in structure).	X-ray of E–N window post; and close visual of external strap.	1,650 after effective date of this AD, or prior to accumulating 16,650 after repair, whichever occurs later.	3,300
3. Modified per Revision 5 or 6 of Service Bulletin (no cracks in structure).	X-ray of E–N window post; and close visual of external strap.	3,300 after effective date of this AD, or 24,000 after strap installation, whichever occurs later.	6,600

TABLE 5.—Model 727 E–N Window Post Inspection

[Applicable Boeing Service Bulletin 727–53–0086]

Airplane condition	Inspection required in accordance with revision 9, 10, or 11 of service bulletin	Initial inspection not to exceed (flight cycles)	Repeat inspection interval not to exceed (flight cycles)
1. Service Bulletin not accomplished; or repaired or modified per Original Issue, or Revision 1, 2, 3, 4, 5, 6, 7, or 8 of Service Bulletin.	X-ray of E–N window post	1,650 after effective date of this AD, or prior to the accumulation of 11,650, whichever occurs later.	3,300
2. Repaired per Revision 9, 10, or 11 of Service Bulletin (cracks in structure).	X-ray of E–N window post; and close visual of external strap.	1,650 after effective date of this AD, or prior to accumulating 16,650 after repair, whichever occurs later.	3,300
3. Modified per Revision 9, 10, or 11 of Service Bulletin (no cracks in structure).	X-ray of E–N without post; and close visual of external strap.	3,300 after effective date of this AD, or 24,000 after strap installation, whichever occurs later.	6,600

TABLE 6.—MODEL 737 E–N WINDOW POST INSPECTION

[Applicable Boeing Service Bulletin 737–53–1023]

Airplane condition	Inspection required in accordance with revision 9, 10, or 11 of service bulletin	Initial inspection not to exceed (flight cycles)	Repeat inspection interval not to exceed (flight cycles)
1. Service Bulletin not accomplished; or repaired or modified per Original Issue, Revision 1, 2, 3, 4, 5, 6, 7, or 8 of Service Bulletin.	X-ray of E–N window post	2,750 after effective date of this AD, or prior to the accumulation of 12,750, whichever occurs later.	5,500
2. Repaired per Revision 9, 10, or 11 of Service Bulletin (cracks in structure).	X-ray of E–N window post; and close visual of external strap.	2,750 after effective date of this AD, or prior to accumulating 17,750 after repair, whichever occurs later.	5,500
3. Modified per Revision 9, 10, or 11 of Service Bulletin (no cracks in structure).	X-ray of E–N window post; visual of external strap.	5,500 after effective date of this AD, or 24,000 after strap installation, whichever occurs later.	11,000

(c) Reinspect the affected areas for cracks at intervals not to exceed those specified in the "Repeat Inspection Interval" column of the Tables of paragraphs (a) and (b) of this AD.

(d) Cracks and short edge margins must be repaired, prior to further flight, in accordance with the "Accomplishment Instructions" of the applicable service bulletin specified in paragraph (d)(1), (d)(2), or (d)(3) of this AD. After such repair, inspections must continue in accordance with the Tables of paragraphs (a) and (b) of this AD.

(1) For Boeing Model 707/720 series airplanes: Boeing Service Bulletin 2983, Revision 5, dated January 31, 1991; or Revision 6, dated November 12, 1992.

(2) For Boeing Model 727 series airplanes: Boeing Service Bulletin 727–53–0086, Revision 11, dated August 8, 1991.

(3) For Boeing Model 737 series airplanes: Boeing Service Bulletin 737–53–1023, Revision 11, dated May 16, 1991.

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(f) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(g) The repairs shall be done in accordance with Boeing Service Bulletin 2983, Revision 5, dated January 31, 1991; Boeing Service Bulletin 2983, Revision 6, dated November 12, 1992; Boeing Service Bulletin 727–53–0086, Revision 11, dated August 8, 1991; and Boeing Service Bulletin 737–53–1023, Revision 11, dated May 16, 1991; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(h) This amendment becomes effective on May 5, 1993.

Issued in Renton, Washington, on March 16, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93-7378 Filed 3-30-93; 8:45 am]

BILLING CODE 4910-13-P

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14 CFR Part 39

[Docket No. 92-NM-193-AD; Amendment 39-8523; AD 93-05-19]

Airworthiness Directives; Fokker Model F-27 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Fokker Model F-27 series airplanes, that requires a one-time visual inspection to determine whether bolts and screws of proper length have been installed in the outboard wing attachment fittings of the fuselage main frame and replacement of discrepant parts. This amendment is prompted by reports that loose or sheared bolts and screws were found in the outboard wing attachment fittings. The actions specified by this AD are intended to prevent reduced structural integrity of the wings.

DATES: Effective May 5, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 5, 1993.

ADDRESSES: The service information referenced in this AD may be obtained from Fokker Aircraft USA, Inc., 1199 North Fairfax Street, Alexandria, Virginia 22314. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mark Quam, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2145; fax (206) 227-1320.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive (AD) that is applicable to certain Fokker Model F-27 series airplanes was published in the Federal Register on December 29, 1992 (57 FR 61846). That action proposed to require a one-time visual inspection to determine whether bolts and screws of proper length have been installed in the outboard wing attachment fittings of the fuselage main frame and replacement of discrepant parts.

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

The commenter supports the proposed rule.

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

The FAA estimates that 31 airplanes of U.S. registry will be affected by this AD, that it will take approximately 7 work hours per airplane to accomplish the required actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $11,935, or $385 per airplane. This total cost figure assumes that no operator has yet accomplished the requirements of this AD.

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

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

93-05-19 FOKKER: Amendment 39-8523. Docket 92-NM-193-AD.

Applicability: Model F-27 series airplanes, serial numbers 10102 through 10259, inclusive; on which the inspection described in Service Bulletin F27/53-60 (B-156) Part II has not been accomplished; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent reduced structural integrity of the wings, accomplish the following:

(a) Prior to the accumulation of 2,700 hours time-in-service after the effective date of this AD or within 12 months after the effective date of this AD, whichever occurs earlier, perform a one-time visual inspection to determine whether bolts and screws of proper length have been installed in the outboard wing attachment fittings of the fuselage main frame at stations 7961 and 9439.5, in accordance with Fokker Service Bulletin F27/53-115, dated May 21, 1991.

(1) If any measured bolt or screw is found that protrudes more than 4.5 mm (0.177 inch) through the nut, prior to further flight, replace it with a shorter one, in accordance with the service bulletin.

(2) If no measured bolt or screw is found that protrudes more than 4.5 mm (0.177 inch) through the nut, no further action is necessary.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM-113.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM-113.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) The inspection and replacement shall be done in accordance with Fokker Service Bulletin F27/53-115, dated May 21, 1991. This incorporation by reference was

approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from Fokker Aircraft USA, Inc., 1199 North Fairfax Street, Alexandria, Virginia 22314. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on April 30, 1993.

Issued in Renton, Washington, on March 16, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93–7376 Filed 3–30–93; 8:45 am]

BILLING CODE 4910–13–P

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14 CFR Part 39

[Docket No. 92–NM–169–AD; Amendment 39–8524; AD 93–05–20]

Airworthiness Directives; McDonnell Douglas Model MD–11 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD–11 series airplanes, that requires modifying the wiring to the engine-driven hydraulic pump overtemperature switches. This amendment is prompted by a report of crossed wiring of the engine-driven hydraulic pump overtemperature switches. The actions specified by this AD are intended to prevent loss of a hydraulic system.

DATES: Effective April 30, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of April 30, 1993.

ADDRESSES: The service information referenced in this AD may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90846–1771, Attention: Business Unit Manager, Technical Publications—Technical Administrative Support, C1–L5B. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office (ACO), 3229 East Spring Street, Long Beach, California; or at the Office of the **Federal Register**, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Kuniyoshi, Aerospace Engineer, Los Angeles ACO, ANM–131L, FAA, Transport Airplane Directorate, 3229 East Spring Street, Long Beach, California 90806–2425; telephone (310) 988–5337; fax (310) 988–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model MD–11 series airplanes was published in the **Federal Register** on October 28, 1992 (57 FR 48755). That action proposed to require modifying the wiring to the engine-driven hydraulic pump overtemperature switches.

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

Several commenters support the rule as proposed.

One commenter requests that paragraph (a) of the proposal be revised to include a series of continuity checks. The commenter states that such checks would best ensure a correct wiring connection for the hydraulic pump overtemperature switches. The FAA does not concur with the commenter's request to include a series of continuity checks. Paragraph (a) of the notice specifies accomplishment of the proposed modification in accordance with McDonnell Douglas MD–11 Service Bulletin 29–16, dated August 6, 1992. The McDonnell Douglas service bulletin refers operators to Pratt & Whitney Service Bulletin PW4MD11 29–6, dated August 3, 1992, for additional service information, which includes accomplishment of a pin-to-pin continuity check. The FAA has determined that this continuity check is adequate to ensure a correct wiring connection, and that additional checks are not necessary.

One commenter requests clarification of the Discussion section of the proposal. The commenter suggests that discussion regarding the consequences of the wiring error needs to be expanded. The FAA concurs that clarification is necessary. The FAA notes that the wiring error will direct the Hydraulic System Controller (HSC) and the flight crew to recognize the wrong pump as the high temperature-producing unit. The HSC (when operating in the automatic mode) or the flight crew (when the HSC is in the manual mode) will erroneously reconfigure the hydraulic system by shutting down the good engine-driven pump, and allowing the pump producing the high temperature to continue to operate. In this situation, the loss of the hydraulic system relative to this latter pump could occur.

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

There are approximately 25 McDonnell Douglas Model MD–11 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 4 airplanes of U.S. registry will be affected by this AD, that it will take approximately 6 work hours per airplane to accomplish the required actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $1,320, or $330 per airplane. This total cost figure assumes that no operator has yet accomplished the requirements of this AD.

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

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

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

93-05-20 McDonnell Douglas: Amendment 39-8524. Docket 92-NM-169-AD.

Applicability: Model MD-11 series airplanes equipped with Pratt & Whitney Model PW4460 engines; having airplane serial numbers 48407 through 48410 inclusive, 48443 through 48448 inclusive, 48452 through 48457 inclusive, 48461, 48472 through 48475 inclusive, 48484, 48485, 48495, and 48496; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent loss of a hydraulic system, accomplish the following:

(a) Within 60 days after the effective date of this AD, modify the wiring to the engine-driven hydraulic pump overtemperature switches, in accordance with McDonnell Douglas MD-11 Service Bulletin 29-16, dated August 6, 1992.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) The modification shall be done in accordance with McDonnell Douglas MD-11 Service Bulletin 29-16, dated August 6, 1992. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90846-1771, Attention: Business Unit Manager, Technical Publications—Technical Administrative Support, C1-L5B. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office (ACO), 3229 East Spring Street, Long Beach, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on April 30, 1993.

Issued in Renton, Washington, on March 17, 1993.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93-7379 Filed 3-30-93; 8:45 am]

BILLING CODE 4910-13-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239 and 249

[Release Nos. 33-6983; 34-32042; 35-25765; 39-2303; IC-19351]

RIN 3235-AC48

Rulemaking for EDGAR System; Correction

AGENCY: Securities and Exchange Commission.

ACTION: Correction to interim rules.

SUMMARY: This document contains corrections to the interim rules that were published Thursday, March 18, 1993 (58 FR 14628). Those rules relate to the implementation of the Electronic Data Gathering, Analysis and Retrieval ("EDGAR") system.

EFFECTIVE DATE: These rules are effective April 26, 1993, except § 239.13(a)(8)(ii) and General Instruction I.A.8.(2) of Form S-3, relating to Financial Data Schedules, which are effective November 1, 1993.

FOR FURTHER INFORMATION CONTACT: James R. Budge, Office of Disclosure Policy, Division of Corporation Finance at (202) 272-2589.

SUPPLEMENTARY INFORMATION:

Background

The interim rules that are the subject of these corrections become effective on April 26, 1993 and implement mandated electronic filing on the EDGAR system for registrants whose filings are processed by the Divisions of Corporation Finance and Investment Management and for those making filings with respect to such registrants. Development and implementation of the EDGAR system was effected pursuant to section 35A of the Securities Exchange Act of 1934 (15 U.S.C. 78*ll*).

Need for Correction

As published, numbering errors in the amendatory language and the text of the regulations could cause two existing provisions to be superseded by new provisions that were intended to be additions to, not replacements for, the existing provisions. In another instance, renumbering of paragraph designations is required because of the elimination of two paragraphs.

Correction of Publication

Accordingly, the publication on March 18, 1993 of the interim rules, which were the subject of FR Doc. 93-4805, is corrected as follows:

1. On page 14628, first column, in the 9th and 10th line of the "DATES" caption, the words "Form S-3 (§ 239.13(a)(7)(i))" is corrected to read "Form S-3 (§ 239.13(a)(8)(ii))".

§ 239.13 [Corrected]

2. On page 14679, third column, the amendatory language in No. 37, "paragraph (a)(7)" is corrected to read "paragraph (a)(8)" and in the regulatory text of § 239.13, the designation of paragraph "(a)(7)" is corrected to read "(a)(8)".

§ 239.13 [Corrected]

3. On page 14679, third column, the amendatory language in No. 38, "General Instructions I.A.7." is corrected to read "General Instruction I.A.8." and on page 14680, first column, in the text of Form S-3 (§ 239.13), the designation of General Instruction "I.A.7." is corrected to read "I.A.8."

§ 249.208(a) [Corrected]

4. On page 14685, first column, the amendatory language in No. 79 is corrected to read as follows:

"79. By amending Form 8-A (§ 249.208a) by revising Instruction I and redesignating Instructions II.3 through II.8 as Instructions II.1 through II.6, to read as follows:"

Dated: March 24, 1993.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-7366 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 155 and 156

[Docket No. 77P-0090]

Tomato Concentrates, Catsup, and Tomato Juice; Definitions and Standards of Identity, Quality, and Fill of Container; Confirmation of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) amended the definitions and standards of identity for tomato products and established standards of quality and fill of container for tomato concentrates, catsup, and tomato juice. The effective date of the labeling provisions of these regulations was stayed pending their approval as information collection requirements by the Office of Management and Budget (OMB). However, because it has been established that food labeling requirements are not information collection requirements, they do not require OMB approval. Thus, FDA is confirming the effective date of these final rules.

DATES: The labeling requirements of §§ 155.191, 155.194, and 156.145 published in the **Federal Register** of January 28, 1983 (48 FR 3946) and April 17, 1984 (49 FR 15071), became effective on July 1, 1985.

FOR FURTHER INFORMATION CONTACT: Nannie H. Rainey, Center for Food Safety and Applied Nutrition (HFS-158), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-205-5007.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of January 28, 1983 (48 FR 3946), FDA issued a final rule establishing a separate standard of identity for tomato concentrates in § 155.191(a) (21 CFR 155.191(a)); updating U.S. standards of identity for tomato catsup and tomato juice in §§ 155.194(a) and 156.145(a) (21 CFR 155.194(a) and 156.145(a)), respectively; and establishing U.S. standards of quality and fill of container for tomato concentrates in § 155.191(b) and (c), catsup in § 155.194(b) and (c), and tomato juice in § 156.145(b) and (c), respectively. Based on comments received in response to the final rule, additional amendments to these standards were made in the **Federal Register** of April 17, 1984 (49 FR 15071).

FDA delayed the effective date of the labeling requirements of the standards in the final rules until those requirements, which then were thought to be information collection requirements subject to OMB approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 35), had been approved by OMB. However, food labeling requirements are not information collection requirements (see *Dole* v. *United Steel Workers of America*, 494 U.S. 26 (1990)). Therefore, OMB approval is not required for these regulations to be effective. Thus, FDA announces that the labeling provisions of §§ 155.191, 155.194, and 156.145 became effective on July 1, 1985. The other provisions of these standards were effective on that date as well (see the **Federal Register** of July 12, 1984 (49 FR 28398)).

Dated: March 25, 1993.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 93-7393 Filed 3-30-93; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

Schedules of Controlled Substances: Exempt Anabolic Steroid Products

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Interim rule and request for comments.

SUMMARY: The Drug Enforcement Administration (DEA) is designating certain preparations as exempt anabolic steroid products. This action, as part of the ongoing implementation of the Anabolic Steroid Control Act of 1990, removes certain regulatory controls pertaining to Schedule III substances from the designated entities.

DATES: *Effective Date:* March 31, 1993. Comments must be submitted on or before June 1, 1993.

ADDRESSES: Comments and objections should be submitted to the Director, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537; Attention: DEA Federal Register Representative/CCR.

FOR FURTHER INFORMATION CONTACT: Howard McClain, Jr., (Chief, Drug and Chemical Evaluation Section), 202-307-7183.

SUPPLEMENTARY INFORMATION: Section 1903 of the Anabolic Steroids Control Act of 1990 (ASCA) (title XIX of Public Law 101-647) provides that the Attorney General may exempt products which contain anabolic steroids from all or any part of the Controlled Substances Act (CSA) (21 U.S.C. 801 et seq.) if the products have no significant potential for abuse. The procedure for implementing this section of the ASCA was published by the DEA on Friday, August 30, 1991, (56 FR 42935). An order was published on Tuesday, November 24, 1992, (57 FR 55090) which identified certain products as being exempt anabolic steroid products. The purpose of this rule is to identify an additional five products which meet the exempt anabolic steroid product criteria.

The Director, Office of Diversion Control, having reviewed the applications, the recommendations of the Secretary of the Department of Health and Human Services, and other relevant information, finds that each of the products described below has no significant potential for abuse because of its concentration, preparation, mixture or delivery system.

Interested persons are invited to submit their comments in writing in regard to this interim rule.

The listing of these products in 21 CFR 1308.34 relieves persons who handle them in the course of legitimate business from the registration, records, reports, prescription, physical security, import, and export requirements associated with Schedule III substances. Accordingly, the Director certifies that this action will have no impact on the ability of small businesses to compete and he therefore determines that no regulatory flexibility analysis is required.

This action has been analyzed in accordance with the principles and criteria contained in E.O. 12612, and it has been determined that this matter does not have sufficient federalism implications to require the preparation of a Federalism Assessment.

It has been determined that drug control matters are not subject to review by the Office of Management and Budget (OMB) pursuant to the provisions of E.O. 12291. Accordingly, this action is not subject to those provisions of E.O. 12778 which are contingent upon review by OMB. Nevertheless, the Director has determined that this is not a "major rule," as that term is used in E.O. 12291, and that it would otherwise meet the applicable standards of sections 2(a) and 2(b)(2) of E.O. 12778.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

Under the authority vested in the Attorney General by title XIX of Public Law 101-647, as delegated to the Administrator of the DEA pursuant to 21 U.S.C. 871(a) and 28 CFR 0.100, the Director of the Office of Diversion Control hereby amends 21 CFR part 1308 as set forth below:

PART 1308—[AMENDED]

1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b) unless otherwise noted.

§ 1308.34 [Amended]

2. Section 1308.34 is amended by adding five new entries to the Table of Exempt Anabolic Steroid Products, to be placed in alphabetical order first by Trade Name and then by Company, to read as follows:

§ 1308.34 Exempt anabolic steroid products.

* * * * *

TABLE OF EXEMPT ANABOLIC STEROID PRODUCTS

Trade name	Company	NDC No.	Form	Ingredients	Quality
* *	*	*	*	*	*
Synovex H Pellets in process	Syntex Animal Health, Palo Alto, CA.		Drum	Testosterone propionate	25 mg.
				Estradiol benzoate	2.5 mg.
Synovex H Pellets in process granulation.	Syntex Animal Health, Palo Alto, CA.		Drum	Testosterone propionate	10 parts.
				Estradiol benzoate	1 part.
Testagen	Clint Pharmaceuticals, Nashville, TN.	55553–257	Vial	Testosterone cypionate	50 mg/ml.
				Estradiol cypionate	2 mg/ml.
* *	*	*	*	*	*
Testosterone Cypionate—Estradiol Cypionate Injection.					
Testosterone Cypionate—Estradiol Cypionate Injection.	Goldline Labs, Ft. Lauderdale, FL.	0182–3069	Vial	Testosterone cypionate	50 mg/ml.
				Estradiol cypionate	2 mg/ml.
* *	*	*	*	*	*
Testosterone Enanthate—Estradiol Valerate Injection.					
Testosterone Enanthate—Estradiol Valerate Injection.	Goldline Labs, Ft. Lauderdale, FL.	0182–3073	Vial	Testosterone enanthate	90 mg/ml.
				Estradiol valerate	4 mg/ml.
* *	*	*	*	*	*

Dated: March 26, 1993.

Gene R. Haislip,

Director, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 93–7463 Filed 3–30–93; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing-Federal Housing Commissioner

24 CFR Parts 207, 213, 220, 221, 231 and 234

[Docket No. R–93–1645; FR–3405–F–01]

Increase in FHA Multifamily Mortgage Limits

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This rule implements section 509 of the Housing and Community Development Act of 1992, by increasing the per-unit dollar limits applicable to FHA multifamily housing.

EFFECTIVE DATE: April 30, 1993.

FOR FURTHER INFORMATION CONTACT: Linda Cheatham, Director, Office of Insured Multifamily Development, room 6134, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone, voice: (202) 708–3000; (TDD) 708–4594. (These are not toll-free numbers).

SUPPLEMENTARY INFORMATION: Section 509 of the Housing and Community Development Act of 1992 (Pub. L. 102–550, approved October 28, 1992) increases the per-family-unit dollar limits applicable to the FHA multifamily housing programs. Under these limits, the insured mortgage on a multifamily property or project must involve a principal amount which does not exceed (for that part of the property or project attributable to dwelling use), a set dollar amount for the various types of family units (one bedroom, two bedroom etc.) it contains.

This rule revises existing HUD regulations to implement the statutory increases for the following FHA programs:

24 CFR part 207—Multifamily housing mortgage insurance;

Part 213—Cooperative housing mortgage insurance;

Part 220—Mortgage insurance and insured improvement loans for urban renewal and concentrated development areas;

Part 221—Low cost and moderate income mortgage insurance;

Part 231—Housing mortgage insurance for the elderly; and

Part 234—Condominium ownership mortgage insurance.

The rule is ministerial in nature, in that it merely updates current regulations to reflect the new statutory maximum limits. It should be noted that the new dollar amounts are maximum limits, and that a per-family-unit dollar requirement is only one of several underwriting criteria which must be met by applicants for FHA mortgage insurance.

It should also be noted that section 509 of the Housing and Community Development Act of 1992 provides, in subsection (h), that the "Secretary of Housing and Urban Development shall issue regulations necessary to carry on the amendments made [by this section] which shall take effect not later than the expiration of the one-year period beginning on the date of the enactment of this Act."

Other Matters

Executive Order 12291

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 by the President on February 17, 1981. An 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 significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Secretary, in approving this rule, has certified that the rule does not have a significant economic impact on a substantial number of small entities. The rule is limited to updating HUD regulations to reflect certain mortgage loan limits recently enacted by the Congress.

NEPA

Under HUD regulations (24 CFR 50.20(k)) this rule is exempt from the requirements of the National Environmental Policy Act as set forth in 24 CFR part 50. The rule relates to internal administrative procedures whose content does not involve a development decision nor affect the physical condition of project areas or building sites but only relates to the establishment of statutorily required loan limits.

This rule was not listed in the Department's Semiannual Agenda of Regulations published on November 3, 1992, (57 FR 51392) in accordance with Executive Order 12291 and the Regulatory Flexibility Act.

Executive Order 12612, Federalism

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. As a result, the rule is not subject to review under the Order.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule only involves establishment of statutorily required mortgage loan limits.

The catalog of Federal Domestic Assistance program numbers are 14.112, 14.122, 14.126, 14.134, 14.135, 14.138, 14.139.

List of Subjects

24 CFR Part 207

Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR Part 213

Cooperatives, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 220

Home improvement, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Urban renewal.

24 CFR Part 221

Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 231

Aged, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 234

Condominiums, Mortgage insurance, Reporting and recordkeeping requirements.

Accordingly, 24 CFR parts 207, 213, 220, 221, 231 and 234 are amended to read as follows:

PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE

1. The authority citation for 24 CFR part 207 is revised to read as follows:

Authority: 12 U.S.C. 1713, 1715b; 42 U.S.C. 3535(d). Sections 207.258 and 207.258b are also issued under 12 U.S.C. 1701z–11(e).

2. Paragraphs (a)(2) and (b)(1) of § 207.4 are revised to read as follows:

§ 207.4 Maximum mortgage amounts.

(a) * * *

(2) For such part of the property or project attributable to dwelling use (excluding exterior land improvements, as defined by the Commissioner) an amount per family unit, depending on the number of bedrooms, which may be:

(i) $30,420 without a bedroom.

(ii) $33,696 with one bedroom.

(iii) $40,248 with two bedrooms.

(iv) $49,608 with three bedrooms.

(v) $59,160 with four or more bedrooms.

* * * * *

(b) * * *

(1) Increase the dollar amount limitations per family unit, as provided in paragraph (a)(2) of this section, to not exceed:

(i) $35,100 without a bedroom.

(ii) $39,312 with one bedroom.

(iii) $48,204 with two bedrooms.

(iv) $60,372 with three bedrooms.

(v) $68,262 with four or more bedrooms.

* * * * *

3. Paragraphs (b)(2)(i) and (b)(2)(ii) of § 207.32a are revised to read as follows:

§ 207.32a Eligibility of mortgages on existing projects.

* * * * *

(b) * * *

(2)(i) The total of the amounts per family dwelling unit (excluding exterior land improvements, as defined by the Commissioner) depending on the number of bedrooms, which may be:

(A) 5$30,420 without a bedroom.

(B) $33,696 with one bedroom.

(C) $40,248 with two bedrooms.

(D) $49,608 with three bedrooms.

(E) $59,160 with four or more bedrooms.

(ii) *Increased mortgage amount—elevator type structure.* In order to compensate for the higher costs incident to construction of elevator type structures of sound standards of construction and design, the Commissioner may increase the dollar amount limitation per family unit as provided in paragraph (b)(2)(i) of this section, to not to exceed:

(A) $35,100 without a bedroom.

(B) $39,312 with one bedroom.

(C) $48,204 with two bedrooms.

(D) $60,372 with three bedrooms.

(E) $68,262 with four or more bedrooms.

* * * * *

PART 213—COOPERATIVE HOUSING MORTGAGE INSURANCE

4. The authority citation for 24 CFR part 213 continues to read as follows:

Authority: 12 U.S.C. 1715b, 1715e; 42 U.S.C. 3535(d).

5. Paragraphs (a)(2) and (g) of § 213.7 are revised to read as follows:

§ 213.7 Maximum insurable amounts.

(a) * * *

(2) For such part of the property or project attributable to dwelling use (excluding exterior land improvements, as defined by the Commissioner) an amount per family unit, depending on the number of bedrooms, which may be:

(i) $30,420 without a bedroom.

(ii) $33,696 with one bedroom.

(iii) $40,248 with two bedrooms.

(iv) $49,608 with three bedrooms.
(v) $59,160 with four or more bedrooms.

* * * * *

(g) *Increased mortgage amount—elevator type structure.* In order to compensate for the higher costs incident to construction of elevator type structures of sound standards of construction and design, the Commissioner may increase the dollar amount limitation per family unit as provided in paragraph (a)(2) of this section, to not to exceed:
(1) $35,100 without a bedroom.
(2) $39,312 with one bedroom.
(3) $48,204 with two bedrooms.
(4) $60,372 with three bedrooms.
(5) $68,262 with four or more bedrooms.

* * * * *

PART 220—MORTGAGE INSURANCE AND INSURED IMPROVEMENT LOANS FOR URBAN RENEWAL AND CONCENTRATED DEVELOPMENT AREAS

6. The authority citation for 24 CFR part 220 continues to read as follows:

Authority: 12 U.S.C. 1713, 1715b, 1715k; 42 U.S.C. 3535(d).

7. Paragraphs (a) and (b) § 220.507 are revised to read as follows:

§ 220.507 Maximum mortgage amounts.

(a) *Dollar limitation—in general.* A mortgage may involve a principal obligation not in excess of the following:
(1) For such part of the property or project attributable to dwelling use (excluding exterior land improvements, as defined by the Commissioner), an amount per family unit depending on the number of bedrooms, which may be:
(i) $30,420 without a bedroom.
(ii) $33,696 with one bedroom.
(iii) $40,248 with two bedrooms.
(iv) $49,608 with three bedrooms.
(v) $59,160 with four or more bedrooms.
(2) Where the project involves the rehabilitation of not more than five family units, the mortgage amount per family unit designated in paragraph (a)(1) of this section may be increased by 25 percent, as follows:
(i) $50,310 for a unit with two bedrooms.
(ii) $62,010 for a unit with three bedrooms.
(iii) $73,950 for a unit with four or more bedrooms.
(b) *Increased mortgage amount—elevator type structure.*
(1) In order to compensate for the higher costs incident to construction of elevator type structures of sound standards of construction and design, the Commissioner may increase the dollar amount limitation per family unit as provided in paragraph (a)(2) of this section, to not to exceed:
(i) $35,100 without a bedroom.
(ii) $39,312 with one bedroom.
(iii) $48,204 with two bedrooms.
(iv) $60,372 with three bedrooms.
(v) $68,262 with four or more bedrooms.
(2) With respect to any elevator type project involving the rehabilitation of not more than five family units, the dollar amount per family unit, as provided in paragraph (b)(1) of this section may be increased by 25 percent, as follows:
(i) $60,255 for a unit with two bedrooms.
(ii) $75,465 for a unit with three bedrooms.
(iii) $85,328 for a unit with four or more bedrooms.

* * * * *

PART 221—LOW COST AND MODERATE INCOME MORTGAGE INSURANCE

8. The authority citation for 24 CFR part 221 is revised to read as follows:

Authority: 12 U.S.C. 1715b, 1715*l*), 42 U.S.C. 3535(d); sec. 221.544(a)(3) is also issued under 12 U.S.C. 1707(a).

9. Paragraphs (a)(1) and (b) of § 221.514 are revised to read as follows:

§ 221.514 Maximum mortgage amounts.

(a) * * *
(1) *Dollar limitation on units.* For such part of the property or project attributable to dwelling use (excluding exterior land improvements, as defined by the Commissioner) an amount per family unit, depending on the number of bedrooms, which may be:
(i) For projects involving eligible nonprofit mortgagors, to be insured under section 221(d)(3) of the Act:
(A) $33,638 without a bedroom.
(B) $38,785 with one bedroom.
(C) $46,775 with two bedrooms.
(D) $59,872 with three bedrooms.
(E) $66,700 with four or more bedrooms.
(ii) For projects involving eligible mortgagors other than nonprofit mortgagors, to be insured under section 221(d)(3) of the Act:
(A) $30,275 without a bedroom.
(B) $34,907 with one bedroom.
(C) $42,097 with two bedrooms.
(D) $53,885 with three bedrooms.
(E) $66,030 with four or more bedrooms.
(iii) For projects to be insured under section 221(d)(4) of the Act:
(A) $30,274 without a bedroom.
(B) $34,363 with one bedroom.
(C) $41,536 with two bedrooms.
(D) $52,135 with three bedrooms.
(E) $59,077 with four or more bedrooms.

* * * * *

(b) *Increased mortgage amount—elevator type structure.* In order to compensate for the higher costs incident to construction of elevator type structures of sound standards of construction and design, the Commissioner may increase the dollar amount limitation per family unit as provided in paragraph (a)(1) of this section, to not to exceed:
(1) For projects involving eligible nonprofit mortgagors, to be insured under section 221(d)(3) of the Act:
(i) $35,400 without a bedroom.
(ii) $40,579 with one bedroom.
(iii) $49,344 with two bedrooms.
(iv) $63,834 with three bedrooms.
(v) $70,070 with four or more bedrooms.
(2) For projects involving eligible mortgagors other than nonprofit mortgagors, to be insured under section 221(d)(3) of the Act:
(i) $31,860 without a bedroom.
(ii) $36,521 with one bedroom.
(iii) $44,410 with two bedrooms.
(iv) $57,451 with three bedrooms.
(v) $63,064 with four or more bedrooms.
(3) For projects to be insured under section 221(d)(4) of the Act:
(i) $32,701 without a bedroom.
(ii) $37,487 with one bedroom.
(iii) $45,583 with two bedrooms.
(iv) $58,968 with three bedrooms.
(v) $64,730 with four or more bedrooms.

* * * * *

PART 231—HOUSING MORTGAGE INSURANCE FOR THE ELDERLY

10. The authority citation for 24 CFR part 231 continues to read as follows:

Authority: 12 U.S.C. 1715b, 1715v; 42 U.S.C. 3535(d).

11. Paragraph (a) of § 231.3 is revised to read as follows:

§ 231.3 Maximum mortgage amounts—new construction.

* * * * *

(a) *Family unit limitations.* For such part of the property or project attributable to dwelling use (excluding exterior land improvements as defined by the Commissioner) an amount per family unit, depending on the number of bedrooms, which may be:
(1) $28,782 without a bedroom.
(2) $32,176 with one bedroom.
(3) $38,423 with two bedrooms.
(4) $46,238 with three bedrooms.

(5) $54,360 with four or more bedrooms.

* * * * *

12. Section 231.5 is revised to read as follows:

§ 231.5 Maximum mortgage amounts—elevator type structures.

In order to compensate for the higher costs incident to construction of elevator type structures of sound standards of construction and design, the Commissioner may increase the dollar amount limitations per family unit, as provided in § 231.3(a), to not exceed:

(a) $32,701 without a bedroom.

(b) $37,487 with one bedroom.

(c) $45,583 with two bedrooms.

(d) $58,968 with three bedrooms.

(e) $64,730 with four or more bedrooms.

PART 234—CONDOMINIUM OWNERSHIP MORTGAGE INSURANCE

13. The authority citation for 24 CFR part 234 is revised to read as follows:

Authority: 12 U.S.C. 1715b, 1715y; 42 U.S.C. 3535(d). Section 234.520(a)(2)(ii) is also issued under 12 U.S.C. 1707(a).

14. Paragraph (b) of § 234.525 is revised to read as follows:

§ 234.525 Maximum mortgage amounts—new construction.

* * * * *

(b) *Family unit limitation.* For such part of the property or project attributable to dwelling use (excluding exterior land improvements as defined by the Commissioner) an amount per family unit, depending on the number of bedrooms, which may be:

(i) $30,420 without a bedroom.

(ii) $33,696 with one bedroom.

(iii) $40,248 with two bedrooms.

(iv) $49,608 with three bedrooms.

(v) $59,160 with four or more bedrooms.

* * * * *

15. Paragraph (a) of § 234.530 is revised to read as follows:

§ 234.530 Increased mortgage amounts.

(a) *Elevator type structures.* In order to compensate for the higher costs incident to construction of elevator type structures of sound standards of construction and design, the Commissioner may increase the dollar amount limitation per family unit, as provided in § 234.525(b), to not to exceed:

(1) $35,100 without a bedroom.

(2) $39,312 with one bedroom.

(3) $48,204 with two bedrooms.

(4) $60,372 with three bedrooms.

(5) $68,262 with four or more bedrooms.

* * * * *

Dated: March 19, 1993.

James E. Schoenberger,

Associate General Deputy, Assistant Secretary for Housing.

[FR Doc. 93–7381 Filed 3–30–93; 8:45 am]

BILLING CODE 4210–27–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[PP 1E4024/R1181; FRL–4189–2]
RIN 2070–AB78

Pesticide Tolerance for Metalaxyl

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document establishes a tolerance for combined residues of the fungicide metalaxyl and its metabolites in or on the raw agricultural commodity cranberry. The regulation to establish a maximum permissible level for residues of the fungicide in or on the commodity was requested in a petition submitted by the Interregional Research Project No. 4 (IR-4).

EFFECTIVE DATE: Effective on March 31, 1993.

ADDRESSES: Written objections, identified by the document control number [PP 1E4024/R1181], may be submitted to the Hearing Clerk (A-110), Environmental Protection Agency, rm. 3708M, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Hoyt L. Jamerson, Product Manager (PM) 43, Registration Division (H7505W), Office of Pesticide Programs, Environmental Protection Agency, No. 13, 6th Floor, Crystal Station #1, 2800 Jefferson Davis Hwy., Arlington, VA 22202, (703)-308-8783.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 31, 1992 (57 FR 62542), EPA issued a proposed rule announcing that the Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, had submitted pesticide petition (PP) 1E4024 to EPA on behalf of the Agricultural Experiment Stations of Massachusetts, New Jersey, and Washington. The petition requested that the Administrator, under section 408(e) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 346a(e), propose the establishment of a tolerance for residues of the fungicide metalaxyl [*N*-(2,6-dimethylphenyl)-*N*-(methoxyacetyl) alanine methyl ester], and its metabolites containing the 2,6-dimethylaniline moiety, and *N*-(2-hydroxy methyl-6-methyl)-*N*-(methoxyacetyl) alanine methyl ester, each expressed as metalaxyl, in or on the raw agricultural commodity cranberry at 4.0 parts per million (ppm).

There were no comments or requests for referral to an advisory committee received in response to the proposed rule. The data submitted with the petition and other relevant material have been evaluated and were discussed in the proposed rule (57 FR 62542, Dec. 31, 1992). Therefore, the tolerance is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after the date of publication of this document in the **Federal Register**, file written objections and/or a request for a hearing with the Hearing Clerk at the address given above. 40 CFR 178.20. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections. 40 CFR 178.25. Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested, the requestor's contentions on each such issue, and a summary of any evidence relied upon by the objector. 40 CFR 178.27. A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: there is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested. 40 CFR 178.32.

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

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or food additive regulations or raising tolerance levels or food additive regulations or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was

published in the **Federal Register** of May 4, 1981 (46 FR 24950).

Dated: March 19, 1993.

Douglas D. Campt,

Director, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In § 180.408(a) table, by adding and alphabetically inserting the raw agricultural commodity cranberry, to read as follows:

§ 180.408 Metalaxyl; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * * *	
Cranberry	4.0
* * * * *	

* * * * *

[FR Doc. 93-7299 Filed 3-30-93; 8:45 am]

BILLING CODE 6560-50-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 400

Refugee Resettlement Program: Refugee Cash Assistance and Refugee Medical Assistance

AGENCY: Administration for Children and Families (ACF), HHS, Office of Refugee Resettlement.

ACTION: Withdrawal of a final rule.

SUMMARY: This rule withdraws the regulation that was published in the **Federal Register** on March 1, 1993, (58 FR 11793) to reduce the duration of the special programs of refugee cash assistance (RCA) and refugee medical assistance (RMA) from a refugee's first 8 months in the United States to a refugee's first 5 months, effective April 1, 1993. The Department intends to seek supplemental funding during FY 1993 to maintain the RCA/RMA eligibility period at the current 8-month eligibility level for the remainder of FY 1993. In the event that the Department is unsuccessful in obtaining such additional funds, a separate emergency final rule is being published to decrease the eligibility period from 8 months to 3 months, effective June 1, 1993.

Under the Secretary's authority, the final rule which was published in the **Federal Register** on March 1, 1993, on page 11793 is withdrawn. The RCA and RMA eligibility period remains at the current level of a refugee's first 8 months in the U.S.

DATE: March 31, 1993.

FOR FURTHER INFORMATION CONTACT: Toyo Biddle (202) 401-9250.

Dated: March 26, 1993.

Laurence J. Love,

Acting Assistant Secretary for Children and Families.

Approved: March 26, 1993.

Donna E. Shalala,

Secretary, Department of Health and Human Services.

[FR Doc. 93-7590 Filed 3-30-93; 8:45 am]

BILLING CODE 4150-04-M

45 CFR Part 400

Refugee Resettlement Program: Refugee Cash Assistance and Refugee Medical Assistance

AGENCY: Administration for Children and Families (ACF), HHS, Office of Refugee Resettlement.

ACTION: Final rule.

SUMMARY: This final rule would reduce the duration of the special programs of refugee cash assistance (RCA) and refugee medical assistance (RMA) from a refugee's first 8 months in the United States to a refugee's first 3 months in the United States for the remainder of FY 1993, effective June 1, 1993.

The reduction is necessitated by the limited funds appropriated for transitional and medical services (TAMS) for Federal FY 1993. Refugee assistance under section 412 of the Immigration and Nationality Act is expressly limited by the extent of available appropriations.

The Department intends to seek supplemental funding during FY 1993 to maintain the RCA/RMA eligibility period at the current 8-month eligibility level for the remainder of FY 1993. In the event that the Department is unsuccessful in obtaining such additional funds, we are publishing this separate emergency final rule to decrease the eligibility period from 8 months to 3 months, effective June 1, 1993.

EFFECTIVE DATE: June 1, 1993.

ADDRESSES: Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services, 370 L'Enfant Promenade, SW., Washington, DC 20447.

FOR FURTHER INFORMATION CONTACT: Toyo A. Biddle, (202) 401-9253.

SUPPLEMENTARY INFORMATION:

Background

Current regulations at 45 CFR 400.203(b) and 400.204(b) provide for Federal refugee funding, subject to the availability of funds (45 CFR 400.202), to be provided to States for the special programs of refugee cash assistance (RCA) and refugee medical assistance (RMA) "during the 12-month period beginning with the first month the refugee entered the United States (except during Federal FY 1993, 8-month period)." The 8-month eligibility period was first established by regulation on January 10, 1992.

Description of the Final Regulation

This final rule would reduce the duration of the special programs of refugee cash assistance (RCA) and refugee medical assistance (RMA) from a refugee's first 8 months in the United States to a refugee's first 3 months in the United States for the remainder of FY 1993, effective June 1, 1993.

The reduction is necessitated by the limited funds appropriated for transitional and medical services (TAMS) for Federal FY 1993. Refugee assistance under section 412 of the Immigration and Nationality Act is expressly limited by the extent of available appropriations. 8 U.S.C. 1522(a)(1)(A); 45 CFR 400.202.

The decision to reduce the period of time-eligibility is based on the Department's analysis of FY 1992 costs and cost trends in the RCA and RMA programs and on the number of refugees who entered the United States during the latter part of FY 1992 and those who will be admitted during FY 1993 under the refugee admissions ceiling of 122,000 publicly funded refugees established by the President after consultation with Congress. (Memorandum from the President to the United States Coordinator for Refugee Affairs, Determination of FY 1993 Refugee Admissions Numbers and Authorization of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), respectively, of the Immigration and Nationality Act, Presidential Determination No. 93-1, October 2, 1992.)

While the refugee admissions ceiling of 122,000 for FY 1993 is approximately 7% lower than the 131,624 publicly funded admissions in FY 1992, the fixed

appropriation of $245,810,656 available for TAMS to cover the costs of refugee cash and medical assistance, unaccompanied minors, State administration, and the voluntary agency matching grant program represents a reduction of 10% from the amount available for these programs in FY 1992.

In part as a result of a reduction in appropriated funds for FY 1993, ORR had issued a Notice of Proposed Rulemaking (NPRM) on November 2, 1992, to terminate the RCA and RMA programs effective January 31, 1993. ORR planned to replace them, through the grant and contract process, with a new private resettlement program and a private medical program. However, this action was challenged in a suit filed on December 7, 1992, in the United States District Court, Western District of Washington at Seattle in the case of *Nguyen* v. *Sullivan* (No. C92–1867WD), and the Department has been permanently enjoined from terminating the State-administered refugee cash and medical assistance program. In order to enable the State-administered RCA/RMA program to operate for the remainder of FY 1993 within the fixed appropriation available, it is necessary to reduce the period of time-eligibility for RCA and RMA to a refugee's first 3 months in the U.S.

Analysis shows that the fixed appropriation of $245,810,656 for TAMS for FY 1993 will be insufficient to provide funding for a period longer than a refugee's first 3 months in the U.S. during the remainder of FY 1993, effective June 1, 1993. If the current State-administered RCA and RMA programs were to be continued with an 8-month eligibility period, it is estimated that all available funds would be exhausted by July 31, 1993, and no RCA or RMA would be available to needy refugees during the last 2 months of the fiscal year.

In determining the number of months of benefits to provide under the RCA and RMA programs, it was assumed that the funds appropriated for TAMS, less the amounts necessary for the matching grant program and the unaccompanied minors program, were available for the RCA and RMA programs, including State administrative costs. This totals approximately $176 million of the $245,810,656 appropriated for TAMS for FY 1993.

The estimate is derived from refugee arrival, eligibility, and participation data. Arrival data are derived by forecasting refugee arrival patterns based on previous years and the annual refugee admissions ceiling set by the President. Eligibility data are computed by determining the number of refugees who have been in the country only for the number of months that will be paid through RCA/RMA funds. The participation data are derived by estimating what fraction of the time-eligibility refugees will actually be RCA/RMA eligible (because they are not eligible for AFDC or SSI), as well as relying on dependency rates based on historical rates.

Using quarterly estimates of RCA and RMA participation, costs are determined by multiplying the number of participants by the per capita amount of cash and medical assistance expected to be paid to the refugees in FY 1993. These per capita costs are based on full-year State-reported expenditures for FY 1992, plus inflation estimates. In determining administrative costs, FY 1992 administrative costs are adjusted for inflation for FY 1993. Varying the number of months of RCA/RMA benefits changes the size of the time-eligible population. It was determined that funds were sufficient to cover 8 months of benefits from October 1, 1992, through May 31, 1993, and 3 months of RCA/RMA benefits from June 1, 1993, through September 30, 1993. The reasons for such a substantial reduction in the RCA/RMA eligibility period are threefold: Higher medical costs, an increase in participation rates, and the fact that the RCA/RMA eligibility period was continued at an 8-month level during the first eight months of the fiscal year, resulting in the expenditures of a sizeable portion of TAMS funds during that period and thus leaving a smaller balance of available TAMS funds for the remainder of the fiscal year.

The Department considers it of the utmost importance to provide refugee support in a manner that ensures the availability of refugee support throughout the year. Failure to decrease the months of eligibility would mean that funds available would be insufficient to carry the program through the end of the year, with the result that, during the latter months of FY 1993, an estimated 25,000 needy refugees would be without Federally-funded refugee assistance.

This rule is applicable to both current and newly-arriving refugees effective June 1, 1993.

Consistent with the preceding actions, 45 C.F.R. 400.2, 400.60(b), 400.100(b), 400.203(b), 400.204(b), and 400.209(b) are being amended to reduce the duration of RCA and RMA in FY 1993 from a refugee's first 8 months in the U.S. to a refugee's first 3 months in the U.S.

Justification for Dispensing with Notice of Proposed Rulemaking

A period for public comment is not being provided because it would be impracticable, unnecessary, and not in the public interest for the following reasons:

Under the current statute and regulations, the duration of benefits is a function of the level of appropriations. The resulting computation is a matter which public comment would not significantly aid because Congressional funding limitations effectively establish the eligibility period, rendering notice of proposed rulemaking and comment procedures unnecessary. In addition, although consideration of alternatives may be assisted by public input, there is insufficient time to consider other options without adversely impacting the public interest. The public interest is clearly served by avoiding the premature exhaustion of funds and in having a finite account equitably distributed throughout the fiscal year.

Because there is a continuing flow of refugees into the United States and because continuing costs for RCA and RMA are being incurred by the States, any delays in applying a reduced period of time-eligibility would result in the need for ever-greater reductions in the RCA and RMA programs in order to avoid their abrupt and complete termination and the absence of such assistance to both current and newly arriving refugees.

Accordingly, the agency finds good cause for issuance of a final rule effective June 1, 1993.

Regulatory Procedures

Regulatory Impact Analysis

Executive Order 12291 requires that a regulatory impact analysis be prepared for major rules, which are defined in the Order as any rule that has an annual effect on the national economy of $100 million or more, or certain other specified effects. The Department has determined that these rules are not major rules within the Executive Order because they will not have an annual effect on the economy of $100 million or more; nor will they result in a major increase in costs or prices for consumers, any industries, any governmental agencies, or any geographic region; and, they will not have an adverse effect 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 import markets.

This final rule reduces the eligibility period for refugee cash assistance (RCA)

and refugee medical assistance (RMA) from a refugee's first 8 months in the U.S. to a refugee's first 3 months, in order to contain refugee cash and medical assistance costs within the FY 1993 appropriation level.

Regulatory Flexibility Act

The Regulatory Flexibility Act (Pub. L. No. 96–354) requires the Federal government to anticipate and reduce the impact of regulations and paperwork requirements on small businesses. The primary impact of these rules is on State governments and individuals. Therefore, we certify that these rules will not have a significant impact on a substantial number of small entities because they affect benefits to individuals and payments to States. Thus, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

This rule does not contain collection-of-information requirements.

Statutory Authority

Section 412(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1522(a)(9), authorizes the Secretary of HHS to issue regulations needed to carry out the program.

(Catalogue of Federal Domestic Programs: 93.566, Refugee and Entrant Assistance—State-Administered Programs)

List of Subjects in 45 CFR Part 400

Grant programs—Social programs, Health care, Public assistance programs, Refugees, Reporting and Recordkeeping requirements.

Dated: March 26, 1993.

Laurence J. Love,

Acting Assistant Secretary for Children and Families.

Approved: March 26, 1993.

Donna E. Shalala,

Secretary, Department of Health and Human Services.

For the reasons set forth in the preamble, 45 CFR part 400 is amended as follows:

PART 400—REFUGEE RESETTLEMENT PROGRAM

1. The authority citation for Part 400 continues to read as follows:

Authority: Section 412(a)(9), Immigration and Nationality Act (8 U.S.C. 1522(a)(9)).

§ 400.2 [Amended]

2. Section 400.2 is amended by amending the definitions of "Refugee cash assistance" and "Refugee medical assistance" by removing the words "(except during Federal FY 1993, less than an 8-month period)" and by adding in their place "(except during Federal FY 1993, less than a 3-month period)".

§§ 400.60(b) and 400.100(b) [Amended]

3. Sections 400.60(b) and 400.100(b) are amended by removing the words "(except during Federal FY 1993, 8-month period)" and adding in their place "(except during Federal FY 1993, 3-month period)".

§§ 400.203(b) and 400.204(b) [Amended]

4. Sections 400.203(b) and 400.204(b) are amended by removing the words "(except during Federal FY 1993, 8-month period)" and adding: "(except during Federal FY 1993, 3-month period)".

§ 400.209(b) [Amended]

5. Section 400.209(b) is amended by removing the words "(except during Federal FY 1993, 8 months)" and adding in their place "(except during Federal FY 1993, 3 months)".

[FR Doc. 93–7589 Filed 3–30–93; 8:45 am]

BILLING CODE 4150–04–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 92–205; RM–8059]

Radio Broadcasting Services; Belle Plaine, IA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Cynthia A. Siragusa, substitutes Channel 238C3 for Channel 238A at Belle Plaine, Iowa, and modifies her construction permit (File No. BPH–910905MB) to specify operation on the higher class channel. See 57 FR 41719, September 11, 1992. Channel 238C3 can be allotted to Belle Plaine in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.8 kilometers (10.4 miles) south to avoid a short-spacing to Station KQMG–FM, Channel 237A, Independence, Iowa, and to accommodate petitioner's desired transmitter site, at coordinates North Latitude 41–45–00 and West Longitude 92–19–00. With this action, this proceeding is terminated.

EFFECTIVE DATE: May 10, 1993.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 92–205, adopted March 8, 1993, and released March 25, 1993. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Iowa, is amended by removing Channel 238A and adding Channel 238C3 at Belle Plaine.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93–7345 Filed 3–30–93; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 92–284; RM–8119]

Radio Broadcasting Services; Repton, AL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots FM Channel 266A to Repton, Alabama, as that community's first local aural transmission service, in response to a petition for rule making filed by Curry Communications, Inc. *See* 57 FR 59331, December 15, 1992. Coordinates used for Channel 266A at Repton are 31–24–30 and 87–14–24. With this action, the proceeding is terminated.

EFFECTIVE DATES: May 10, 1993. The window period for filing applications on Channel 266A at Repton, Alabama, will open on May 11, 1993, and close on June 10, 1993.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 92–284, adopted March 8, 1993, and released

March 25, 1993. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by adding Repton, Channel 266A.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93–7343 Filed 3–30–93; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 92–225; RM–8073]

Radio Broadcasting Services; Northport, AL, and Macon, MS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 264C3 for Channel 264A at Northport, Alabama, and modifies the license of Station WLXY(FM) to specify operation on the higher powered channel, as requested by Warrior Broadcasting, Inc. See 57 FR 59040, December 14, 1992. Additionally, since no expression of interest in retaining vacant Channel 263A at Macon, Mississippi, was received in response to the Notice of Proposed Rule Making, the allotment is deleted to accommodate the modification at Northport. Coordinates for Channel 264C3 at Northport, Alabama, are 33–16–00 and 87–44–01. With this action, the proceeding is terminated.

EFFECTIVE DATE: May 10, 1993.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 92–225, adopted March 8, 1993, and released March 25, 1993. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by removing Channel 264A and adding Channel 264C3 at Northport.

3. Section 73.202(b), the Table of FM Allotments under Mississippi, is amended by removing Macon, Channel 263A.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93–7344 Filed 3–30–93; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 90–522; RM–7493, RM–7499]

Radio Broadcasting Services; LaCrosse, FL and Douglas, GA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document stays the opening of the filing window for Channel 258A at LaCrosse, Florida, and suspends the substitution of Channel 258C for Channel 258C1 at Douglas, Georgia. This action was necessary because the coordinates specified in the Report and Order create a short-spacing between Channel 258A at LaCrosse and Channel 258C at Douglas. See 58 FR 7193, February 5, 1993.

EFFECTIVE DATE: This action is effective March 15, 1993.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: The final rule for this allotment was published at 58 FR 7194, February 5, 1993. This is a summary of the Commission's Order Staying Filing Window and Effective Date, MM Docket No. 90–522, adopted March 15, 1993, and released March 16, 1993. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 1919 M Street, NW., room 246, or 2100 M Street, NW., suite 140, Washington, DC 20037.

The window period for filing applications was scheduled to open on March 19, 1993, and close on April 19, 1993. The effective date for the substitution of Channel 258C for Channel 258C1 at Douglas, Georgia, was March 18, 1993.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Accordingly, 47 CFR Part 73 is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by suspending the allotment of Channel 258C at Douglas, and adding Channel 258C1 at Douglas, effective March 15, 1993, until further notice.

Federal Communications Commission.

Douglas W. Webbink,

Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93–7418 Filed 3–30–93; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 92–178; RM–8045]

Radio Broadcasting Services; Lawton, OK

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Communicorp, Inc., substitutes Channel 231C2 for Channel 232A at Lawton, Oklahoma, and modifies the license of Station KQLI to specify operation on the higher class

channel. See 57 FR 42537, September 15, 1992. Channel 231C2 can be allotted to Lawton in compliance with the Commission's minimum distance separation requirements at the station's licensed transmitter site, at coordinates North Latitude 34–34–24 and West Longitude 98–28–40. With this action, this proceeding is terminated.

EFFECTIVE DATE: May 10, 1993.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 92–178, adopted March 8, 1993, and released March 25, 1993. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street NW., suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

47 CFR Part 73—[Amended]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by removing Channel 232A and adding Channel 231C at Lawton.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93–7338 Filed 3–30–93; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 92–48; RM–7922]

Radio Broadcasting Services; Bagdad, AZ

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 280A to Bagdad, Arizona, as that community's first local aural transmission service, in response to a petition for rule making filed by Chris Sarros. *See* 57 FR 9996, March 23, 1992. Coordinates for Channel 280A at Bagdad are 34–34–52 and 113–12–14. Bagdad is located within 320 kilometers (199 miles) of the United States-Mexico border and therefore, concurrence of the Mexican government to this proposal was obtained. With this action, the proceeding is terminated.

DATES: Effective May 10, 1993. The window period for filing applications for Channel 280A at Bagdad, Arizona, will open on May 11, 1993, and close on June 10, 1993.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634–6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632–0394.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 92–48, adopted March 5, 1993, and released March 25, 1993. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by adding Bagdad, Channel 280A.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93–7340 Filed 3–30–93; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 92–272; RM–8107]

Radio Broadcasting Services; Alturas, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 267C for Channel 233C1 at Alturas, California, and modifies the license for Station KYAX (FM) to specify operation on the nonadjacent higher powered channel, as requested by KCNO, Inc. *See* 57 FR 56894, December 1, 1992. Additionally, Channel 293C is allotted to Alturas, as an additional equivalent channel, since an interest in applying for a second Class C allotment at that community was expressed by Crystal Broadcasting Company. Coordinates for Channel 267C at Alturas are 41–25–00 and 121–06–32; coordinates for Channel 293C at Alturas are 41–29–18 and 120–32–18. With this action, the proceeding is terminated.

EFFECTIVE DATES: May 10, 1993. The window period for filing applications on Channel 293C at Alturas, California, will open on May 11, 1993, and close on June 10, 1993.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634–6530. Questions related to the window application filing process regarding Channel 293C at Alturas, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632–0394.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 92–272, adopted March 8, 1993, and released March 25, 1993. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 2100 M Street NW., suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by removing Channel 233C1 and adding Channel 267C at Alturas, and by adding Channel 293C at Alturas.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93–7342 Filed 3–30–93; 8:45 am]

BILLING CODE 6712–01–M

Lucille Hughes 703-697-7266 being

DEPARTMENT OF DEFENSE

48 CFR Parts 215 and 252

Defense Federal Acquisition Regulation Supplement; Recoupment of Nonrecurring Costs on Sales of U.S. Items

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove language on recoupment of nonrecurring costs as a result of the implementation of major policy changes that have been incorporated in DoD Directive 2140.2, Recoupment of Nonrecurring Costs (NC) on Sales of U.S. Items. The revised DoD Directive 2140.2, eliminates the requirement for recoupment on sales entered into on or after January 13, 1993, except for recoupment required by Act of Congress.

EFFECTIVE DATE: March 24, 1993.

FOR FURTHER INFORMATION CONTACT: Charles W. Lloyd, (703) 697-7266.

SUPPLEMENTARY INFORMATION:

A. Background

This DFARS rule finalizes the interim rule that was published in the **Federal Register** on September 10, 1992 (57 FR 41422), under DFARS Case 92-D021.

The interim DFARS rule published in the **Federal Register** on September 10, 1992 (57 FR 41422) eliminated recoupment on derivative items and items other than Major Defense Equipment for new contracts. Subsequently, on October 7, 1992, the Deputy Secretary of Defense (DEPSECDEF) determined that the national defense would be facilitated by the elimination of the recoupment requirement from existing DoD contracts, except as expressly required by statute. Accordingly, pursuant to the authority of Public Law 85-804, the DEPSECDEF directed that existing DoD contracts be amended or modified as necessary to delete any requirement for the recoupment of nonrecurring costs on sales or binding agreement to sell, that were executed on or after October 7, 1992, except for those sales for which an Act of Congress (section 21(e) of the Arms Export Control Act) requires the recoupment of nonrecurring costs.

agreements

On January 13, 1993, the DEPSECDEF approved a revision of DoDD 2140.2, that eliminates the requirement for recoupment on all sales entered into on or after January 13, 1993, except for recoupment required by Act of Congress. Consequently, ~~effective January 13, 1993~~, DFARS subpart 215.70 and the clause at 252.215-7004 are eliminated. The clause shall not be used in contracts awarded on or after March 24, 1993. Recoupment required by the Arms Export Control Act on future sales will be handled directly between the DoD and its foreign military sale customer.

(delete)

By determination made January 13, 1993, the DEPSECDEF extended the application of his October 7, 1992, memorandum to cover all contracts entered into from October 7, 1992 through January 13, 1993.

B. Regulatory Flexibility Act

The Department of Defense certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* because the recoupment policies apply only to items which have at least a $50 million dollar investment.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies; however, since OMB currently is not carrying in its inventory any burden hours for the information collection requirements associated with recoupment of nonrecurring costs, we are not processing a request for reduction of the information collection requirements to OMB for approval.

List of Subjects in 48 CFR Parts 215 and 252

Government procurement.

Claudia L. Naugle,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR parts 215 and 252 are amended as follows:

1. The authority citation for 48 CFR part 215 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, Defense FAR Supplement 201.301.

PART 215—CONTRACTING BY NEGOTIATION

215.70 [Removed]

2. Subpart 215.70 is removed in its entirety.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.215-7004 [Removed]

3. Section 252.215-7004 is removed in its entirety.

[FR Doc. 93-7356 Filed 3-30-93; 8:45 am]

BILLING CODE 3810-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 87-10; Notice 6]

RIN 2127-AE73

Federal Motor Vehicle Safety Standards; Power-Operated Window, Partition, and Roof Panel Systems

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule; response to petitions for reconsideration.

SUMMARY: In response to petitions for reconsideration of a June 1992 final rule, this rule amends Federal Motor Vehicle Safety Standard (FMVSS) 118, *Power-Operated Window, Partition, and Roof Panel Systems.* This rule clarifies the standard's requirements and provides manufacturers additional flexibility in meeting them.

DATES: The changes made in this rule are effective April 30, 1993.

Any petition for reconsideration of this rule must be received by NHTSA no later than April 30, 1993.

ADDRESSES: Petitions for reconsideration should refer to the docket number and notice number of this rule and be submitted to: Administrator, room 5220, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Mr. Patrick Boyd, NHTSA Office of Vehicle Safety Standards, NRM-11, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366-6346.

SUPPLEMENTARY INFORMATION:

Background

On April 16, 1991 (56 FR 15290), NHTSA published a final rule that amended Standard 118. Among other things, the amendment permitted power-operated windows, partitions and roof panel systems (WPR's) operable by remote means or by means located on the vehicle exterior.

Unsupervised closings increase the risk that someone, particularly a child, could be caught between a closing WPR and its frame. To minimize the risk that a child could be entrapped and injured, the April 1991 rule allowed closings by external or remote means for certain WPR's under a narrow set of specified circumstances. The WPR's were those that reverse direction before exerting specified levels of force on cylinders of

specified sizes, and reopen to at least a specified minimum distance. The cylinders were selected to be representative of the diameters of appendages that could be injured by the closing of a WPR, such as a finger, arm or head.

Following publication of that rule, NHTSA was petitioned by several parties to reconsider aspects of the rule. On June 5, 1992 (57 FR 23958), NHTSA published a final rule responding to those petitions for reconsideration. The June 1992 rule amended the standard in several respects. It removed the restriction on the circumstances under which closing is permitted for systems that have an automatic reversal feature. This change permitted automatically reversing WPR's that could close under circumstances other than the narrowly specified ones in the 1991 rule. NHTSA stated that even if a child's finger, arm or head were in the path of a closing WPR, the automatic reversing feature would prevent serious injuries. (57 FR at 23959.)

The June 1992 rule also changed the test procedure for automatically reversing WPR's. Briefly, the procedure specifies that a rigid sensor rod from 4 mm to 200 mm in diameter is placed between an open power WPR and the WPR's frame. The WPR is then moved toward the closed position, but must reverse direction before exerting a 100 newton force on the rod.

The June 1992 rule also changed the requirement about the size of the opening to which the WPR must reopen. NHTSA required that the WPR reopen either to a position that permits a 200 mm diameter rod to be placed through the opening, or to a position that is at least as open as the position at the time closing was initiated.

NHTSA received five petitions for reconsideration of the June 1992 rule. Petitioners were Mercedes-Benz, Volkswagen, American Sunroof Company (ASC), Webasto Sunroofs, and Brose North America. Today's rule responds to those petitions.

Petitions for Reconsideration

The petitioners raised three issues concerning the June 1992 rule.

1. Test Procedure

All of the petitioners suggested that the standard should specify the stiffness (force-deflection ratio), or compressibility, of the sensor rod. The stiffness of a force sensor determines the maximum force it will register at a given deflection. If a force sensor rod has a lower stiffness than a human finger, for example, it will register a force lower than that which would actually be exerted against a finger at a given penetration. All the petitioners suggested a value of 10 newtons per millimeter (10 N/mm) for the sensor rod. The petitioners said that the suggested value is specified in the German Road Traffic Act. That Act was identified by NHTSA as the source for the 100 newton limit in the standard (i.e., that the WPR must reverse direction before exerting a 100 newton force on the rod).

Some petitioners stated that the stiffness of the sensor rod must be specified because sensor rods of different values will provide different results. For example, a sensor rod with a stiffness of 10 N/mm, which is more compressible than a rigid rod, would "crush" 10 mm before the 100 newton limit can be measured. In contrast, if a sensor rod with a stiffness of 100 N/mm were used, the 100 newton force limit could be measured after only 1 mm of crush.

The commenters recommended against specifying a sensor rod with an extremely high stiffness. Volkswagen said such a rod would not be as representative of a finger, arm, head or neck as a rod with a lower stiffness. ASC and Volkswagen argued that an extremely stiff rod could make it virtually impossible to meet the standard, because the 100 newton limit could be reached "instantaneously" (Volkswagen's term) using a rod made from a non-yielding material. ASC stated:

> Even if an electronic force detection system could be built which needed no time at all to detect the resistive force generated by the obstruction and could start to reverse the mechanical drive system immediately, the drive system itself (motor, drive links, etc.) still requires some time to overcome the forward inertia of a typical physical system.

NHTSA agrees with the petitioners' arguments regarding the need to specify the stiffness of the test rod. However, NHTSA concludes that the 10 N/mm value suggested by the petitioners would not meet the need for safety. A sensor rod having a stiffness of 10 N/mm cannot measure a force of 100 N unless it has been compressed 10 mm. Such a rod would permit the WPR to travel 10 mm after meeting an obstruction before reversing. A child's finger placed in a 10 mm opening could be severely injured in such a situation.

NHTSA is specifying that sensor rods 25 mm or smaller in diameter will have a stiffness of at least 65 N/mm, and that rods larger than 25 mm in diameter will have a stiffness of at least 20 N/mm. Two values are specified for rod stiffness to provide manufacturers some flexibility in designing WPR's. Smaller rods, representing small appendages like fingers, are used to test smaller openings. The smaller rod with the 65 N/mm stiffness ensures that the rod can compress only 1.5 mm before the WPR must reverse. The available crush space for small openings must be limited; fingers placed in a small opening can be injured even if the WPR opening is reduced by only a few millimeters.

The sensors larger than 25 mm in diameter represent larger appendages, and could compress 5 mm before the WPR must reverse. These sensors may have a larger amount of compressibility before registering the maximum force, since larger body parts can tolerate larger levels of crush or squeezing before an injury is sustained. These larger sensors are permitted to be "softer" to provide design flexibility without compromising safety. The head, neck and larger limb that might be trapped in the larger opening can generally withstand more compression without injury than a finger trapped in a small opening. At the same time, the softer sensor also allows manufacturers to design WPR's such that they would be able to close at a higher rate from a fully open position to within 25 mm of the WPR frame than what would have been possible with a stiffer sensor. (The faster a WPR is traveling, the more difficult it is for the WPR to stop and reverse direction. The softer sensor allows more reaction time and stopping distance for the WPR to stop and reverse than does a stiffer sensor.) The WPR would be able to close rapidly for most of the way, then slow for the last 25 mm of travel. Since it appears desirable to offer consumers WPR's that close rapidly, NHTSA believes rapidly closing WPR's can be available if the potential safety hazards are controlled. The sensor stiffness values chosen respond to the manufacturers' concerns for compliance measurement and WPR closure speed, while maintaining safe WPR operation.

Mercedes raised another issue regarding the test procedure. In arguing for the use of sensor rods with a stiffness of 10 N/mm, Mercedes said that a rigid sensor rod can produce "instantaneous force spikes" that may exceed 100 newtons when the window, consisting of a rigid material, meets a rigid sensor. A massive sensor rod can produce a larger spike than a sensor of less mass.

NHTSA agrees that, under the circumstances described by Mercedes, a force spike can occur due to an abrupt change of speed when the WPR hits the sensor rod. NHTSA did not intend for these force spikes to be included in the determination of the maximum force on

the sensor. These force spikes are related to the impact force on the sensor (caused by the resistance to motion of the mass of the sensor rod struck by the closing WPR), and not to the squeezing force on the rod. Such impact forces lack the significant opposing forces that characterize squeezing. It is only the squeezing forces exerted by a closing WPR system that are a concern to the agency since it is those forces that cause the injuries under consideration. (See, 57 FR 23958. "The purpose of the standard is to minimize the risk of personal injury that may result if a person is *caught between* a closing power-operated window and the window frame." (Emphasis added.))

NHTSA has amended the standard to clarify that impact force spikes would be excluded in the determination of the maximum force on the sensor. The standard specifies that the WPR must reverse direction before exerting a squeezing force of 100 newtons on the rod.

2. Size of Openings

The June 1992 rule requires a WPR to reverse and open to either: (a) A position that permits a 200 mm diameter rod to be placed through the opening, or (b) a position that is at least as open as the position at the time closing was initiated. Mercedes suggests that the rule should replace option (a) with an option that the WRP open "to a position that is at least as open as the position at the time the window reversed direction plus 20 millimeters." Mercedes believes "it would be more appropriate to provide a standard 'reopening' clearance of 20 mm for all sizes of obstructions."

NHTSA has decided not to adopt Mercedes' suggestion, because if the WPR were to close upon a child's neck, a 20 millimeter space would be insufficient to allow the child to withdraw easily his or her head through the opening. However, the agency is amending the standard to specify a third option for the reopening of WPR's on reversal, in response to Mercedes' suggestion that the clearance for removing trapped obstructions of any size should be "standardized." The option would permit the WPR to open to "a position that is at least as open as the position at the time the window reversed direction plus 125 millimeters" (about five inches). The agency is providing this option because manufacturers may want to design systems that reopen a fixed amount after reversal. The 125 millimeter distance would ensure easy passage of a head through the WPR opening.

3. Sunroofs

Volkswagen requested that hinged sunroofs be excluded from the definition of "power operated roof panel systems" adopted by the April 1991 rule. Volkswagen stated that "hinged sunroofs present no safety hazard because of their location and minimal total opening and relatively low closing force at the open side." Also, Volkswagen said, "compliance with the force limitation requirements would be very difficult for the hinged mechanisms."

NHTSA does not agree that hinged roof panels should be excluded. The agency decided earlier in this rulemaking to reject these arguments that Standard 118 need not apply to sunroofs because of their location, and that there is no safety need for the standard to apply to pop-up type roof panels. Volkswagen provided no new information that would change this decision. Thus, that part of its petition is denied.

Effective Date

These amendments are effective in 30 days. An effective date earlier than 180 days after the date of issuance of this rule is in the public interest because this rule clarifies the requirements and provides manufacturers flexibility in meeting them.

This final rule does not have any retroactive effect. Under section 103(d) of the National Traffic and Motor Vehicle Safety Act (Safety Act; 15 U.S.C. 1392(d)), whenever a Federal motor vehicle safety standard is in effect, a state may not adopt or maintain a safety standard applicable to the same aspect of performance which is not identical to the Federal standard, except to the extent that the state requirement imposes a higher level of performance and applies only to vehicles procured for the State's use. Section 105 of the Safety Act (15 U.S.C. 1394) sets forth a procedure for judicial review of final rules establishing, amending or revoking Federal motor vehicle safety standards. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

NHTSA has examined the impact of this rulemaking action and determined that it is not major within the meaning of Executive Order 12291 or significant within the meaning of the Department of Transportation's regulatory policies and procedures. This rule allows new ways to close window, partition and roof panel systems. The rule does not impose additional costs on manufacturers unless they choose to install systems that use the new methods of closure. This rule provides additional design flexibility to manufacturers choosing to install these optional systems, and clarifies the requirements. For these reasons, the agency has determined that the economic and other effects of this action are so minimal that a full regulatory evaluation is not required.

Regulatory Flexibility Act

NHTSA has considered the effects of this rulemaking action under the Regulatory Flexibility Act. I hereby certify that it will not have a significant economic impact on a substantial number of small entities. Vehicle manufacturers typically do not qualify as small entities. Even if these manufacturers were considered small businesses, this rule does not impose new requirements, but affects manufacturers only if they choose to install window, partition and roof panel systems that are newly permitted by this rulemaking. Small organizations and governmental jurisdictions that purchase vehicles are affected by this amendment only to the extent that these entities purchase motor vehicles. NHTSA believes this amendment will have no significant cost impact to the industry, and therefore it will not result in a significant increase in consumer prices. Since the effects, if any, of this rule would be minimal on small entities, a final regulatory flexibility analysis has not been prepared.

Executive Order 12612

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and the agency has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

National Environmental Policy Act

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

List of Subjects in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles.

PART 571—[AMENDED]

In consideration of the foregoing, 49 CFR part 571 is amended to read as follows:

1. The authority citation for Part 571 continues to read as follows:

Authority: 15 U.S.C. 1392, 1401, 1403, 1407; delegation of authority at 49 CFR 1.50.

§571.118 [Amended]

Section 571.118 is amended as follows:

2. S4(e) is amended by removing the period appearing at the end of the paragraph and adding a semi-colon in its place.

3. S4(f) is revised to read as follows:

* * * * *

(f) If the window, partition, or roof panel is in a static position before starting to close and in that position creates an opening so small that a 4 mm diameter semi-rigid cylindrical rod cannot be placed through the opening at any location around its edge in the manner described in S5(b); or

* * * * *

4. S5 is revised to read as follows:

S5. (a) Notwithstanding S4, a power operated window, partition or roof panel system may close if it meets the following requirements—

(1) While closing, the window, partition or roof panel system must reverse direction before contacting, or before exerting a squeezing force of 100 newtons or more on, a semi-rigid cylindrical rod from 4 mm to 200 mm in diameter that has the force-deflection ratio described in S5(c), and that is placed through the window, partition or roof panel system opening at any location, in the manner described in S5(b); and

(2) Upon such reversal, the window, partition or roof panel system must open to one of the following positions, at the manufacturer's option:

(i) A position that is at least as open as the position at the time closing was initiated;

(ii) A position that is not less than 125 millimeters more open than the position at the time the window reversed direction; or

(iii) A position that permits a semi-rigid cylindrical rod that is 200 mm in diameter to be placed through the opening at the same contact point(s) as the rod described in S5(a)(1).

(b) The test rod is placed through the window, partition or roof panel opening from the inside of the vehicle such that the cylindrical surface of the rod contacts any part of the structure with which the window, partition or roof panel mates. Typical placements of test rods are illustrated in Figure 1.

(c) The force-deflection ratio of the test rod is at least 65 N/mm for a rod 25 mm or smaller in diameter, and at least 20 N/mm for a rod larger than 25 mm in diameter.

Issued on March 24, 1993.

Howard M. Smolkin,

Executive Director.

[FR Doc. 93–7181 Filed 3–30–93; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 642

[Docket No. 920246–2229]

Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic

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

ACTION: Closure of commercial fishery for king mackerel.

SUMMARY: NMFS closes the commercial fishery in the exclusive economic zone (EEZ) off the east coast of Florida between the Volusia/Flagler and Monroe/Dade County boundaries. NMFS has determined that 259,000 pounds (117,482 kg) of king mackerel have been landed from that area since emergency regulations reopened the commercial fishery in the area under daily vessel trip limits on February 18, 1993. With this closure, all commercial fisheries are closed for Gulf migratory group king mackerel in the EEZ through June 30, 1993. The closure is necessary to protect the overfished Gulf king mackerel resource.

EFFECTIVE DATES: Closure is effective 12:01 a.m., local time, March 27, 1993, through June 30, 1993.

FOR FURTHER INFORMATION CONTACT: Mark F. Godcharles, 813–893–3161.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic resources (king mackerel, Spanish mackerel, cero, cobia, little tunny, dolphin, and, in the Gulf of Mexico only, bluefish) is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic, prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils), and its implementing regulations at 50 CFR part 642, under the authority of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, (Magnuson Act).

The commercial fishery for Gulf group king mackerel in the eastern zone was closed on January 13, 1993, when the applicable commercial quota was reached (58 FR 4599, January 15, 1993) By an emergency interim rule (58 FR 10990, February 23, 1993), the commercial fishery for Gulf group king mackerel was reopened on February 18, 1993, off the east coast of Florida between the Volusia/Flagler and Monroe/Dade County boundaries with a 25-fish daily vessel trip limit. Under the terms of that emergency interim rule, the commercial fishery is to remain open under the trip limit through March 31, 1993, or until 259,000 pounds (117,482 kg) of king mackerel are landed from the area, whichever occurs earlier.

NMFS has determined that the open area quota was reached on March 26, 1993. Accordingly, the commercial fishery for Gulf group king mackerel from the entire eastern zone is closed effective 12:01 a.m., local time, March 27, 1993. This closure of the eastern zone remains in effect through June 30, 1993, the end of the fishing year. However, effective April 1, and through October 31, each year, the boundary separating the Gulf and Atlantic migratory groups of king mackerel shifts from the Volusia/Flagler County, Florida boundary (29°25′N. latitude) to the Monroe/Collier County, Florida boundary (25°48′N. latitude).

NMFS previously determined that the commercial quota of 0.77 million pounds (0.35 million kg) of king mackerel from the western zone of the Gulf migratory group was reached on October 17, 1992, and closed that segment of the fishery on October 18, 1992 (57 FR 47998, October 21, 1992). Thus, with this closure of the commercial fishery in the entire eastern zone, all commercial fisheries are closed for Gulf migratory group king mackerel in the EEZ through June 30, 1993.

Except for a person aboard a charter vessel, during the closure, no person aboard a vessel permitted to fish under a commercial allocation may fish for, retain, or have in possession in the EEZ, Gulf migratory group king mackerel. A person aboard a charter vessel may continue to fish for Gulf migratory group king mackerel under the bag and possession limits set forth in § 642.24 (a)(1)(i) and (a)(2), provided the vessel is operating as a charter vessel and the vessel has an annual charter vessel permit, as specified in § 642.4(a)(2). A charter vessel with a permit to fish on a commercial allocation is operating as a charter vessel when it carries a passenger who pays a fee or when there are more than three persons aboard, including operator and crew.

During the closure, Gulf migratory group king mackerel taken in the EEZ, including those harvested under the bag limit, may not be purchased, bartered, traded, or sold or attempted to be purchased, bartered, traded, or sold. This prohibition does not apply to trade in king mackerel of the Gulf migratory group that were harvested, landed, and bartered, traded, or sold prior to the closure and held in cold storage by a dealer or processor.

Classification

This action is required by 50 CFR 642.31(c) and complies with E.O. 12291.

List of Subjects in 50 CFR Part 642

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 25, 1993.

David S. Crestin,

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

[FR Doc. 93–7375 Filed 3–26–93; 1:28 pm]

BILLING CODE 3510–22–M

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50 CFR Part 672

[Docket No. 921226–3053]

Groundfish of the Gulf of Alaska

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

ACTION: Final rule.

SUMMARY: NMFS is implementing a regulatory amendment to delay the opening of the second season pollock fishery in the combined Western and Central Regulatory Areas of the Gulf of Alaska (W/C GOA) from the beginning of the second quarterly reporting period (around April 1) until June 1. This action is necessary to increase revenues from the GOA pollock harvest by avoiding a second quarter directed fishery at a time when pollock have recently spawned and flesh yield is low. Additionally, NMFS anticipates this action will reduce discards of undersized pollock, and of incidental catch amounts of chinook salmon in the pollock fishery. This action is intended to promote the goals and objectives of the North Pacific Fishery Management Council (Council) with respect to groundfish management off Alaska.

EFFECTIVE DATE: March 26, 1993.

ADDRESSES: Individual copies of the environmental assessment/regulatory impact review/final regulatory flexibility analysis (EA/RIR/FRFA) prepared for this action may be obtained from the Fisheries Management Division, Alaska Region, NMFS, Box 21668, Juneau, AK 99802, Attention: Lori Gravel.

FOR FURTHER INFORMATION CONTACT: Jessica A. Gharrett, Fisheries Management Division, (907) 586–7229.

SUPPLEMENTARY INFORMATION:

Background

The domestic and foreign groundfish fisheries in the exclusive economic zone of the GOA are managed by the Secretary of Commerce (Secretary) under the Fishery Management Plan for Groundfish of the GOA (FMP). The FMP was prepared by the Council under the Magnuson Fishery Conservation and Management Act (Magnuson Act) and is implemented by regulations for the foreign fishery at 50 CFR 611.92 and for the U.S. fishery at 50 CFR part 672. General regulations that also pertain to U.S. fisheries appear at 50 CFR part 620.

Regulations at § 672.20(a)(2)(iv) provide that the pollock total allowable catch (TAC) in the combined W/C GOA be apportioned among statistical areas Shumagin (61), Chirikof (62), and Kodiak (63) in proportion to known distribution of the pollock biomass. Each apportionment is divided equally into the four quarterly reporting periods of the fishing year.

At its September 1992 meeting, the Council recommended that NMFS prepare a proposed rule for Secretarial review and approval that would delay the start of the second pollock fishing season in the W/C GOA from the first day of the second quarterly reporting period until the first day of the weekly reporting period that begins nearest June 1. The FMP at section 4.3.3 requires that the Council consider the following criteria when recommending regulatory amendments to fishing seasons: biological, bycatch, exvessel and wholesale prices, product quality safety, cost, other fisheries, coordinated season timing, enforcement and management costs, and allocation. A detailed discussion of these criteria, which were considered by the Council in making its recommendation of a delayed second pollock fishing season, is found in the ER/RIR/FRFA prepared for this action.

A proposed rule for this action was published in the **Federal Register** on January 6, 1993 (58 FR 532). A complete description of the GOA pollock second season delay was published in the preamble to the proposed rule, and additional information also is available in the EA/RIR/FRFA.

Comments on the Proposed Rule

Public comment on the proposed rule was invited through February 5, 1993. No written comments were received during the comment period.

Changes in the Final Rule From the Proposed Rule

Two changes are made in the final rule from the proposed rule. First, paragraph 672.23(f) is changed to specify that directed fishing for the four quarterly pollock allowances will start on January 1, June 1, July 1, and October 1. This change will simplify regulations, which as proposed, were cumbersome and difficult to understand. This change causes the starting dates to vary no more than 3 days from what otherwise would have been implemented and does not change the substantive intent of the proposed regulations. Therefore, no changes in impacts from those already analyzed in the EA/RIR/IRFA are anticipated. Second, in § 672.20, paragraphs (c)(1)(i)(A) and (c)(1)(ii) are revised by deleting the sentence "The notice also will include the dates that directed fishing may commence for each quarterly allowance of pollock." in each paragraph. This change is necessary because the starting dates will now be specified in regulations. The starting dates for the pollock seasons as announced in the 1993 GOA proposed specification (57 FR 57982, December 8, 1992) are superceded by this final rule.

Classification

The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), has determined that this rule is necessary for the conservation and management of the pollock fishery off Alaska and is consistent with the Magnuson Act and other applicable law.

NMFS prepared an EA for this final rule and the Assistant Administrator concluded that there will be no significant impact on the human environment as a result of implementation of this rule. A copy of the EA is available (see ADDRESSES).

The Assistant Administrator determined that this rule is not a "major rule" requiring a regulatory impact analysis under E.O. 12291. This determination is based on the RIR prepared by NMFS. A copy of the RIR may be obtained (see ADDRESSES).

NMFS prepared an FRFA that concludes that this rule will have a significant economic impact on a substantial number of small entities. A copy of this analysis is available from NMFS (see ADDRESSES).

This rule does not contain a collection-of-information for purposes of the Paperwork Reduction Act.

NMFS has determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal management program of the State of Alaska. This determination was submitted for review by the responsible State agency under section 307 of the Coastal Zone Management Act. Consistency is inferred because the appropriate State agency did not reply within the statutory time period.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

Informal consultations under the Endangered Species Act were concluded for this action: for Steller sea lions, February 16, 1993; and for the short-tailed albatross, December 22, 1992. An informal consultation on impacts of groundfish fisheries under the FMP was concluded February 20, 1992, for Snake River sockeye salmon, fall chinook salmon, and spring/summer chinook salmon. As a result of the informal consultations, the Regional Director determined that fishing activities under this rule are not likely to adversely affect endangered or threatened species.

NMFS has determined that delaying the effectiveness of this final rule for 30 days under section 553 (d) of the Administrative Procedure Act is contrary to the public interest. This determination was reached because a delay in effectiveness beyond March 29, 1993, would result in the fishery commencing on that date, causing economic losses from low pollock flesh recovery, increased catches and discards of undersized pollock, and increased incidental catch amounts of chinook salmon. Therefore, the 30-day delayed effectiveness period for the final rule is waived to allow the effective date to be the date of filing for public inspection with the Office of the Federal Register.

List of Subjects in 50 CFR Part 672

Fisheries, Reporting, and Recordkeeping requirements.

Dated: March 26, 1993.

Samuel W. McKeen,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 672 is amended as follows:

PART 672—GROUNDFISH OF THE GULF OF ALASKA

1. The authority citation for 50 CFR part 672 continues to read as follows:

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

§ 672.20 [Amended].

2. In § 672.20, the second sentence in paragraph (c)(1)(i)(A), which reads, "This notice also will include the dates that directed fishing may commence for each quarterly allowance of pollock." is removed.

3. In § 672.20, the second sentence in paragraph (c)(1)(ii)(A), which reads, "This notice will also include the dates that directed fishing may commence for each quarterly allowance of pollock." is removed.

4. In § 672.23, paragraph (a) is revised and a new paragraph (f) is added to read as follows:

§ 672.23 Seasons.

(a) Fishing for groundfish in the regulatory areas and districts of the Gulf of Alaska is authorized from 00:01 a.m., Alaska local time (A.l.t.), January 1, through 12 midnight, A.l.t., December 31, subject to the other provisions of this part, except as provided in paragraphs (c) through (f) of this section.

* * * * *

(f) Subject to other provisions of this part, directed fishing for pollock in the Western and Central Regulatory Areas of the Gulf of Alaska is authorized: from 00:01 a.m., A.l.t., January 1 through 12 noon, A.l.t., April 1; from 12 noon, A.l.t., June 1 through 12 noon, A.l.t., July 1; from 12 noon, A.l.t., July 1 through 12 noon, A.l.t., October 1; and from 12 noon, A.l.t., October 1 through 12 midnight, A.l.t., December 31.

[FR Doc. 93–7434 Filed 3–26–93; 4:15 pm]

BILLING CODE 3510–22–M

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50 CFR Parts 611 and 672

[Docket No. 921107–3068]

Foreign Fishing; Groundfish of the Gulf of Alaska

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

ACTION: Final 1993 initial specifications of groundfish and associated management measures; closures; request for comments.

SUMMARY: NMFS announces initial 1993 harvest specifications of Gulf of Alaska (GOA) groundfish, other than Pacific ocean perch (POP), and associated determinations pertaining to management of GOA groundfish fisheries during 1993. This action is necessary to establish harvest limits for groundfish during the 1993 fishing year and associated management measures. NMFS also is closing specified fisheries consistent with the final 1993 groundfish specifications and fishery bycatch allowances of prohibited species. These measures are intended to carry out management objectives contained in the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP).

DATES: Effective March 26, 1993, 4:15 p.m., including closures to directed fishing described herein. All closures to directed fishing are effective through 24:00 a.l.t., December 31, 1993, except that closures to directed fishing for pollock in Statistical Areas 62 and 63 are effective through 12 noon, a.l.t., on March 29, 1993. Comments are invited on the apportionments of reserves on or before April 15, 1993.

ADDRESSES: Comments should be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802–1668 (Attn. Lori Gravel). Copies of a Final Environmental Assessment for 1993 Total Allowable Catch Specifications for the GOA, dated January 1993 (EA), may be obtained from this address. The Final Stock Assessment and Fishery Evaluation Report, dated November 1992, is available from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, Alaska 99510.

FOR FURTHER INFORMATION CONTACT: Jessica A. Gharrett, Fishery Management Biologist, Alaska Region, NMFS, (907) 586–7230.

SUPPLEMENTARY INFORMATION:

Background

NMFS announces for the 1993 fishing year: (1) Total allowable catches (TAC) for each groundfish target species category, other than POP, in the GOA and apportionments thereof among domestic annual processing (DAP), joint venture processing (JVP), total allowable level of foreign fishing (TALFF), and reserves; (2) apportionments of reserves to DAP; (3) assignments of the sablefish TAC to authorized fishing gear users; (4) apportionments of pollock TAC among regulatory areas, seasons, and between inshore and offshore components; (5) apportionment of Pacific cod TAC between inshore and offshore components; (6) apportionment of the "other species" TAC among regulatory areas; (7) prohibited species catch (PSC) limits relevant to fully utilized groundfish species; (8) closures to directed fishing; (9) Pacific halibut PSC mortality limits; and (10) seasonal apportionments of the halibut PSC limits. The interim specification for POP established by 57 FR 57982 (December 8, 1992) of 1,062 metric tons (mt) remains in effect. A discussion of each of these measures follows.

The process of determining TACs for groundfish species in the GOA is established in regulations implementing the FMP, which was prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act). The FMP is implemented by regulations for the foreign fishery at 50 CFR part 611 and for the U.S. fishery at 50 CFR part 672. General regulations that also pertain to U.S. fisheries appear at 50 CFR part 620.

Pursuant to § 672.20(a)(2)(ii), the sum of the TACs for all species must fall within the combined optimum yield (OY) range established for these species of 116,000–800,000 mt in § 672.20(a)(1). Under §§ 611.92(c)(1) and 672.20(a)(2)(i), TACs are apportioned initially among DAP, JVP, TALFF, and reserves. The DAP amounts are intended for harvest by U.S. fishermen for delivery and sale to U.S. processors. JVP amounts are intended for joint ventures in which U.S. fisherman typically deliver their catches to foreign processors at sea. TALFF amounts are intended for harvest by foreign fishermen. Regulations at § 672.20(a)(2)(ii) establish initial reserves equal to 20 percent of the TAC for pollock, Pacific cod, flounder target species categories, and "other species." Reserve amounts are set aside for possible reapportionment to DAP and/or JVP if the initial apportionments prove inadequate. Reserves that are not reapportioned to DAP or JVP may be reapportioned to TALFF according to § 672.20(d)(2).

The Council met during September 22–27, 1992, and developed recommendations for proposed 1993 TAC specifications for each target species category of groundfish on the basis of the best available scientific information. The Council also recommended other management measures pertaining to the 1993 fishing year. Under § 672.20(c)(1)(ii), 1993 specifications were proposed in the **Federal Register** (57 FR 57982, December 8, 1992). No JVP or TALFF amounts were specified because GOA groundfish are fully utilized by DAP fisheries. Under § 672.20(c)(1)(ii), one-fourth of the preliminary specifications and gear apportionments and one-fourth of the Pacific halibut PSC amounts were effective January 1 on an interim basis and are now superseded by this **Federal Register** notice of final 1993 specifications, except for POP.

The Council met December 8–13, 1992, to review the best available scientific information concerning groundfish stocks, and to consider public testimony regarding 1993 groundfish fisheries. Scientific information is contained in the Stock Assessment and Fishery Evaluation Report for the 1993 Gulf of Alaska Groundfish Fishery (SAFE report) dated November 1992, which was prepared and presented by the GOA Plan Team to the Council and the Council's Scientific and Statistical Committee (SSC) and Advisory Panel (AP). New information contained in the November 1992 SAFE report includes the following:

a. For Pollock

Hydroacoustic data from a spring 1992 survey in the Shelikof Strait conducted by the Alaska Fisheries Science Center; estimates of catch-at-age from the 1991 fishery; updated estimates of catch; and length frequency data from the 1992 hydroacoustic survey and the first quarter 1992 fishery.

b. For POP

Revised biomass estimates from the 1984 and 1987 GOA trawl surveys; and length frequency data from 1990 and 1991 fisheries.

c. For Groundfish, Generally

Data from the NMFS Observer Program Office for 1992; revised estimates of biomass from the 1990 bottom trawl survey in the GOA; data from the 1992 cooperative and domestic longline surveys; and updated estimates of catch.

The SSC adopted Acceptable Biological Catch (ABC) recommendations from the Plan Team as provided in the SAFE report for all target species categories, except those for pollock and black rockfish. The recommended ABCs, listed in Table 1, reflect harvest amounts that would not cause overfishing as defined in the FMP. The Council adopted SSC recommendations for the ABC for each target species category, except for pollock. The following is a discussion of the Plan Team, SSC, and Council actions on ABCs for pollock, Northern rockfish, and black rockfish.

The exploitable biomass for pollock in the combined Western and Central Regulatory Areas (W/C GOA) during 1993 is estimated at 1,062,000 mt, which is based on the Stock Synthesis (SS) model. The SAFE report, dated November 1992, presents a detailed discussion of new information and stock assessment methodology for pollock. The Plan Team estimated ABC for pollock in the W/C GOA to be 203,000 mt, an increase from 1992 of 84,000 mt but well below the overfishing level of 286,000 mt. The Plan Team commented, tha although the recommended ABC was biologically defensible, it might not represent an adequate conservative TAC in view of unquantifiable concerns about: (1) Low probability of recruitment of a strong year class; (2) continued declines in spawning biomass; (3) disproportionate targeting on older year classes; (4) indications of large-scale ecosystem changes that may affect carrying capacity for pollock in the GOA; and (5) change in age-at-maturity.

The SSC concurred with the model used to generate pollock biomass, but felt the ABC should be more conservative than the ABC recommended by the Plan Team (203,00 mt) for the W/C GOA. The SSC calculated an ABC of 111,000 mt using the 1992 fishing exploitation rate (10 percent). The SSC then averaged its figure with the ABC recommended by the Plan Team to arrive at a "stock-specific" pollock ABC of 157,000 mt for the W/C GOA. The SSC further noted that an ABC of 157,000 mt may not adequately consider the status of Steller sea lions and certain seabirds that prey on pollock, although it remains unclear whether fishing practices contribute to declines in those species. The SSC finally recommended a pollock ABC of 111,000 mt, to incorporate ecosystem concerns.

The Council, on reviewing the Plan Team, SSC, and AP recommendations, recommended that the ABC for pollock in the W/C GOA be 157,000 mt and that ecosystem concerns, particularly Steller sea lions, be addressed in the recommended TAC of 111,000 mt. The Council also adopted the SSC and AP recommendations that the ABC for pollock in the Eastern Regulatory Area be 3,400 mt.

For Northern rockfish, the Plan Team recommended that the species be managed separately from the remaining "other (slope) rockfish" to prevent over harvesting. Northern rockfish are currently harvested disproportionately to their relative abundance in the "other rockfish" complex. The Plan Team, SSC, and AP recommended ABCs for Northern rockfish and for the remaining "other rockfish" complex of 5,760 mt and 8,300 mt, respectively. The Council adopted the SSC and AP recommendations.

The Plan Team also recommended separate management for black rockfish to prevent harvests out of proportion to the species' abundance in the pelagic shelf rockfish complex. The recommended ABC was based on historical catches. The SSC felt that insufficient information existed on which to base an ABC or manage the fishery, and declined to establish an

ABC for that species. The AP recommended that the species remain in the pelagic shelf rockfish complex pending availability of additional biological and fishery information. The Council adopted the AP recommendation.

1. Specifications of TAC and Apportionments Thereof Among DAP, JVP, TALFF, and Reserves

The Council recommended TACs equal to ABCs for Pacific cod, sablefish, Northern rockfish, pelagic shelf rockfish, and demersal shelf rockfish (DSR). The Council recommended TACs less than ABCs for all other species and species groups: pollock; deep-and shallow water flatfish; flathead sole; arrowtooth flounder; POP; shortraker/rougheye rockfish (SR/RE); "other rockfish;" and thornyhead rockfish (Table 1).

The reduced TAC recommended for pollock in the W/C GOA includes ecosystem concerns, in particular the importance of pollock as prey for Steller sea lions and seabirds as discussed above. Regulations that implement Amendment 25 to the FMP authorize the apportionment of pollock TAC specified for the combined W/C GOA Regulatory Area among the Shumagin, Chirikof, and Kodiak Districts. These are co-extensive with Statistical Areas 61, 62, and 63, respectively. Apportionments are proportional to distribution of exploitable biomass as determined by the most recent NMFS biomass surveys. These respective proportions are 21.7, 23.4, and 54.9 percent. Accordingly, respective apportionments are 24,087 mt, 25,974 mt, and 60,939 mt (Table 1). For rockfishes, the Council recommended reduced TACs because of the depleted status of many of the target species. For POP, the Council recommended a TAC (2,560 mt) that is 46 percent of the recommended ABC (5,560 mt), and 49 percent of the 1992 TAC (5,200 mt). The Council expressed concern over (1) a history of high commercial exploitation for POP, (2) the current low biomass of POP relative to estimated pre-exploitation levels, (3) uncertainties about the accuracy of surveys, biomass estimates, and exploitation rates, (4) apparent low recruitment and relatively old age of the POP population, and (5) the increase in exploitation rate being proposed for 1993 over that used in 1992.

The Council heard public testimony (1) supporting the 5,560 mt ABC adopted by the Council and its committees, (2) indicating that the recommended TAC would likely preclude directed fisheries for POP, (3) estimating the gross wholesale value of the 1992 GOA POP TAC was $6.2 million annually, of which $3.4 million might be foregone under the recommended 1993 TAC, and (4) that the POP fishery is conducted by a relatively small number of factory trawlers, each of which might bear a significant loss from the reduced TAC. The Council responded that biological concerns about POP stocks warranted immediate reduction of catches. The Council directed staff to begin analyses that would examine rebuilding potential for POP, establish options, and enumerate associated biological and socioeconomic costs and benefits, as required by the FMP for any such program. The Council is scheduled to review this analysis at its April 1993 meeting.

The sum of the TACs approved by the Council for GOA groundfish, including POP and "other species", is 306,651 mt, which is within the OY range specified by the FMP.

The Council, after adopting the TACs, then recommended 1993 apportionments of the TACs for each species category among DAP, JVP, TALFF, and reserve. Existing harvesting and processing capacity of the U.S. industry is capable of utilizing the entire 1993 TAC specification for GOA groundfish. Therefore, the Council recommended that DAP equal TAC for each species category, resulting in no TALFF or JVP apportionments for the 1993 fishing year.

NMFS has reviewed the Council's recommendations for TAC specifications and apportionments and hereby approves these specifications under § 672.20(c)(1)(ii)(B), except for POP and "other species" which is calculated as a percent of TACs in each regulatory area.

For POP, the Council made its recommendation without the benefit of biological and economic data that have recently become available and that NMFS believes should be considered in establishing the 1993 POP TAC, particularly in consideration of the potential economic value of that fishery. Therefore, NMFS is requesting that the Council reexamine available information and reconsider at its April 1993 meeting the recommendation for the 1993 POP TAC. NMFS anticipates specifying a 1993 TAC for POP prior to the beginning of the trawl season for rockfish on June 28. Until that time, interim amounts of POP previously specified in the **Federal Register** (57 FR 57982, December 8, 1992) are anticipated to be sufficient to support ongoing fisheries without unintentional waste and discard.

For "other species," the FMP establishes a TAC equal to 5 percent of the sum of TACs of target species. The Council recommended that "other species" be allocated separately for each regulatory area. Table 1 shows the resultant TAC for "other species" in each regulatory area based on target TACs, excluding POP.

The sum of: (1) Final TACs for groundfish target species; (2) the interim TAC specified for POP, which remains in effect; and (3) "other species," is 305,078 mt.

TABLE 1.—FINAL 1993 SPECIFICATIONS, OVERFISHING LEVELS, ACCEPTABLE BIOLOGICAL CATCHES (ABC), AND TOTAL ALLOWABLE CATCHES (TAC) FOR THE WESTERN/CENTRAL (W/C), WESTERN (W), CENTRAL (C), AND EASTERN (E) REGULATORY AREAS AND IN THE SHUMAGIN (SH), CHIRIKOF (CH), KODIAK (KD), WEST YAKUTAT (WYK), AND SOUTHEAST OUTSIDE (SEO) DISTRICTS OF THE GULF OF ALASKA (GW) [1].

[Specifications of domestic annual processing (DAP) equal TAC. Values are in metric tons.]

Species	Area [2]	Overfishing level	ABC	TAC=DAP
Pollock [3]	SH	286,000	34,068	24,087
	CH	.....	36,737	25,974
	KD	.....	86,195	60,939
	W/C	.....	157,000	111,000
	E	9,020	3,400	3,400

TABLE 1.—FINAL 1993 SPECIFICATIONS, OVERFISHING LEVELS, ACCEPTABLE BIOLOGICAL CATCHES (ABC), AND TOTAL ALLOWABLE CATCHES (TAC) FOR THE WESTERN/CENTRAL (W/C), WESTERN (W), CENTRAL (C), AND EASTERN (E) REGULATORY AREAS AND IN THE SHUMAGIN (SH), CHIRIKOF (CH), KODIAK (KD), WEST YAKUTAT (WYK), AND SOUTHEAST OUTSIDE (SEO) DISTRICTS OF THE GULF OF ALASKA (GW)[1].—Continued

[Specifications of domestic annual processing (DAP) equal TAC. Values are in metric tons.]

Species	Area[2]	Overfishing level	ABC	TAC=DAP
Total			160,400	114,400
Pacific cod[4]	W		18,700	18,700
	C		35,200	35,200
	E		2,800	2,800
Total		78,100	56,700	56,700
Deep water flatfish[5]	W		2,020	1,740
	C		35,580	15,000
	E		7,930	3,000
Total		59,650	45,530	19,740
Shallow water flatfish[6]	W		27,480	4,500
	C		21,260	10,000
	E		1,740	1,740
Total		70,860	50,480	16,240
Flathead sole	W		12,580	2,000
	C		31,830	5,000
	E		5,040	3,000
Total		64,780	49,450	10,000
Arrowtooth flounder	W		38,880	5,000
	C		253,330	20,000
	E		29,080	5,000
Total		451,690	321,290	30,000
Sablefish[7]	W		2,030	2,030
	C		9,610	9,610
	WYK		3,830	3,830
	SEO		5,430	5,430
Total		27,750	20,900	20,900
Northern rockfish[8]	W		1,000	1,000
	C		4,720	4,720
	E		40	40
Total		10,360	5,760	5,760
Other rockfish[9]	W		330	214
	C		1,640	1,064
	E		6,330	4,105
Total		9,850	8,300	5,383
Shortraker/rougheye rockfish[10]	W		100	90
	C		1,290	1,161
	E		570	513
Total		2,900	1,960	1,764
Pelagic shelf rockfish[11]	W		1,010	1,010
	C		4,450	4,450
	E		1,280	1,280
Total		11,300	6,740	6,740
Demersal shelf rockfish[12]	SEO	1,600	800	800
Thornyhead rockfish	GW	1,441	1,180	1,062
Other species[13]	W		na	3,045
	C		na	9,687

TABLE 1.—FINAL 1993 SPECIFICATIONS, OVERFISHING LEVELS, ACCEPTABLE BIOLOGICAL CATCHES (ABC), AND TOTAL ALLOWABLE CATCHES (TAC) FOR THE WESTERN/CENTRAL (W/C), WESTERN (W), CENTRAL (C), AND EASTERN (E) REGULATORY AREAS AND IN THE SHUMAGIN (SH), CHIRIKOF (CH), KODIAK (KD), WEST YAKUTAT (WYK), AND SOUTHEAST OUTSIDE (SEO) DISTRICTS OF THE GULF OF ALASKA (GW)[1].—Continued

[Specifications of domestic annual processing (DAP) equal TAC. Values are in metric tons.]

Species	Area[2]	Overfishing level	ABC	TAC=DAP
	E	.....	na	1,795
Total		na	na	14,527
Grand total[14]		.....	735,220	305,078

[1] Table 1 shows final TACs for all groundfish, except for POP, for which the interim TAC specified at 57 FR 57982 (December 8, 1992) remains in effect. See footnote 14 for an explanation of the "Total".

[2] See figure 1 of § 672.20 for description of regulatory areas/districts.

[3] TAC for W/C Regulatory Area is 111,000 mt, representing the sum of the Shumagin (SH), Chirikof (CH), and Kodiak (KD) districts. The category pollock is allocated entirely to vessels catching pollock for processing by the inshore component after subtraction of an amount that is projected by the Regional Director to be caught by, or delivered to, the offshore component incidental to fishing for other groundfish species.

[4] The category Pacific cod is allocated 90 percent to vessels catching Pacific cod for processing by the inshore component and 10 percent to vessels catching Pacific cod for processing by the offshore component (Table 4).

[5] The category "deep water flatfish" means rex sole, Dover sole, and Greenland turbot.

[6] The category "shallow water flatfish" means flounders not including "deep water flatfish," flathead sole, or arrowtooth flounder.

[7] The category sablefish is allocated to trawl and hook-and-line gears (Table 2).

[8] The category Northern rockfish (*Sebastes polyspinis*) was previously part of the "Other rockfish" complex.

[9] The category "other rockfish" in the Western and Central Regulatory Areas and in the West Yakutat District includes slope rockfish, and demersal shelf rockfish as defined in #12 below. The category "other rockfish" in the Southeast Outside District includes only the slope rockfish.

Slope rockfish means all members of the genus *Sebastes* not defined as pelagic shelf rockfish, demersal shelf rockfish, or Pacific Ocean perch, including the following:

Sebastes aurora (aurora rockfish), *S. melanostomus* (blackgill rockfish), *S. paucispinis* (bocaccio), (*S. goodei* (chilipepper rockfish), *S. crameri* (darkblotch rockfish), *S. elongatus* (greenstriped rockfish), *S. variegatus* (harlequin rockfish), *S. wilsoni*, (pygmy rockfish), *S. proriger* (redstripe rockfish), *S. zacentrus* (sharpchin rockfish), *S. jordani* (shortbelly rockfish), *S. brevispinis* (silvergrey rockfish), *S. diploproa* (splitnose rockfish), *S. saxicola* (stripetail rockfish), *S. miniatus* (vermilion rockfish), and *S. reedi* (Yellowmouth rockfish).

"Pacific Ocean perch" means *Sebastes alutus*.

[10] The category "shortraker/rougheye rockfish" includes *Sebastes borealis* and *S. aleutianus*, respectively.

[11] The category "pelagic shelf rockfish" includes: *Sebastes melanops* (black rockfish), *S. mystinus* (blue rockfish), *S. ciliatus* (dusky rockfish), *S. entomelas* (widow rockfish), and *S. flavidus* (yellowtail rockfish).

[12] The category "demersal shelf rockfish" includes: *Sebastes pinniger* (canary rockfish), *S. nebulosus* (China rockfish), *S. caurinus* (copper rockfish), *S. maliger* (quillback rockfish), *S. babcocki* (redbanded rockfish), *S. helvomaculatus* (rosethorn rockfish), *S. nigrocinctus* (tiger rockfish), and *S. ruberrimus* (yelloweye rockfish).

[13] The category "other species" includes Atka mackerel, sculpins, sharks, skates, eulachon, smelts, capelin, squid, and octopus. The "other species" TAC is equal to the sum of: (1) 5 percent of the final TACs of the target species except POP, and (2) 5 percent of the interim TAC of POP, in each Regulatory Area.

[14] "Total" includes the ABC and the interim TAC for POP (1062 mt) established at 57 FR 57982 (December 8, 1992).

2. Apportionment of Reserves to DAP

Regulations implementing the FMP require 20 percent of each TAC for pollock, Pacific cod, flounder species and the "other species" category be set aside in reserves for possible apportionment at a later date (§ 672.20(a)(2)(ii)). NMFS apportioned all the reserves to DAP effective on January 1 for the preceding 5 years, including 1992. For 1993, NMFS apportions reserves for each species category to DAP, anticipating that domestic harvesters and processors will need all the DAP amounts. Specifications of DAP shown in Table 1 reflect apportioned reserves. Under § 672.20(d)(5)(iv), the public may submit comments on the apportionments of reserves. Comments should focus on whether, and the extent to which, operators of vessels of the United States will harvest reserve or DAP amounts during the remainder of the year and whether, and the extent to which, U.S. harvested groundfish can or will be processed by U.S. fish processors or received at sea by foreign fishing vessels.

3. Assignments of the Sablefish TACs to Authorized Fishing Gear Users

Under § 672.24(c), sablefish TACs for each of the regulatory areas and districts are assigned to hook-and-line and trawl gear. In the W/C GOA Regulatory Areas, 80 percent of each TAC is assigned to hook-and-line gear and 20 percent is assigned to trawl gear. In the Eastern Regulatory Area, 95 percent of the TAC is assigned to hook-and-line gear and 5 percent is assigned to trawl gear. This latter amount may only be used as bycatch to support directed fisheries for other target species. Sablefish caught with pot gear may not be retained. Table 2 shows the 1993 apportionments of sablefish TACs between the gear types.

TABLE 2.—1993 SABLEFISH TAC SPECIFICATIONS IN THE GULF OF ALASKA AND ASSIGNMENTS THEREOF TO HOOK-AND-LINE TRAWL GEAR.

[Values are in metric tons.]

Area/district	TAC	Hook-and-line share	Trawl
Western	2,030	1,624	406
Central	9,610	7,688	1,922
Eastern:			
West Yakutat	3,830	3,638	192
Southeast Outside .	5,430	5,158	272
Total	20,900	18,108	2,792

4. Apportionments of Pollock TAC Among Regulatory Areas, Seasons, and Between Inshore and Offshore Components

In the GOA, pollock is apportioned by area, season, and to inshore and offshore components. Regulations at § 672.20(a)(2)(iv) require that the TAC for pollock in the combined W/C GOA

Regulatory Areas be apportioned among statistical areas Shumagin (61), Chirikof (62), and Kodiak (63) in proportion to known distribution of the pollock biomass. This measure was implemented under Amendment 25 and is intended to distribute spatially the pollock harvest to protect sea lions. Each statistical area apportionment is further divided equally among the four quarterly reporting periods of the fishing year. Within any fishing year, any unharvested amount of any quarterly allowance of pollock TAC is added in equal proportions to the quarterly allowances of following quarters, resulting in a sum for each quarter that does not exceed 150 percent of the initial quarterly allowance. Similarly, harvests in excess of a quarterly allowance of TAC are deducted in equal proportions from the remaining quarterly allowances of that fishing year. The Eastern Regulatory Area pollock TAC of 3,400 mt is not allocated among smaller areas of quarters.

Regulations at § 672.20(a)(2)(v)(A) require that the DAP apportionment for pollock in all regulatory areas and all quarterly allowances thereof be allocated to vessels catching pollock for processing by the inshore and offshore components. After subtracting an amount of pollock that is projected by the Regional Director to be caught by, or delivered to, the offshore component incidental to fishing for other groundfish species, the pollock TAC is allocated entirely to vessels catching pollock for processing by the inshore component. At this time, incidental amounts of pollock to be caught by the offshore component are unknown, and will be determined during the fishing year. The distribution of pollock within the combined W/C GOA Regulatory Areas is shown in Table 3.

TABLE 3.—DISTRIBUTION OF POLLOCK IN THE WESTERN AND CENTRAL GULF OF ALASKA FOR 1993; BIOMASS DISTRIBUTION, AREA APPORTIONMENTS, AND QUARTERLY ALLOWANCES. BIOMASS DISTRIBUTION IS BASED ON 1990 SURVEY DATA

[Values are in metric tons]

Statistical area	Biomass percent	1993 TAC	Quarterly allowance
Shumagin (SH, 61)	21.7	24,087	6,022
Chirikof (CH, 62)	23.4	25,974	6,494
Kodiak (KD, 63)	54.9	60,939	15,234
Total ..	100	111,000	27,750

NMFS issued a final rule to delay the opening of the second season pollock fishery in the combined Western and Central Regulatory Areas of the GOA to June 1. The final rule is contained elsewhere in this **Federal Register** publication. The final rule also specified that directed fishing for the four quarterly pollock allowances would start on January 1, June 1, July 1, and October 1. Therefore, under § 672.23(f), pollock fishing seasons are as follows:

Pollock quarter	Pollock quarter dates and times*
1	01/01 (00:01 a.m.)–04/01 (12 noon)
2	06/01 (12 noon)–07/01 (12 noon)
3	07/01 (12 noon)–10/01 (12 noon)
4	10/01 (12 noon)–12/31 (12 midnight)

*The time of openings and closures is Alaska local time.

5. Apportionment of Pacific Cod TAC Between Inshore and Offshore Components

Regulations at § 672.20(a)(2)(v)(B) require that the DAP apportionment of Pacific cod in all regulatory areas be allocated to vessels catching Pacific cod for processing by the inshore and offshore components. Pacific cod is allocated 90 percent to vessels catching Pacific cod for processing by the inshore component and 10 percent to vessels catching Pacific cod for processing by the offshore component. Inshore and offshore allocations of the 56,700 mt Pacific cod TAC for 1993 are shown in Table 4.

TABLE 4.—ALLOCATION OF PACIFIC COD TAC FOR 1993 IN THE GULF OF ALASKA; ALLOCATIONS TO INSHORE AND OFFSHORE COMPONENTS

[Values are in metric tons]

Regulatory area	TAC	Component	
		Inshore (90%)	(Offshore (10%)
Western	18,700	16,830	1,870
Central	35,200	31,680	3,520
Eastern	2,800	2,520	280
Total	56,700	51,030	5,670

6. Apportionment of "Other Species" TAC Among Regulatory Areas

The FMP specifies that the TAC for the "other species" category is equal to 5 percent of the combined TACs for target species. The Council recommended that for 1993, separate amounts of "other species" be made available in each of the three regulatory areas. This more accurately reflects the intended use of "other species" as incidental catch to support groundfish target fisheries, and will reduce competition among users of other species. Therefore, the TAC for "other species" in each regulatory area is equal to 5 percent of the sum of the final TACs of target species and the interim POP TAC for each regulatory area, as follows (in mt):

Regulatory area	Sum of target TACs*	"Other species"
Western	60,905	3,045
Central	193,749	9,687
Eastern	35,897	1,795
Total	290,551	14,527

*The total for each regulatory area includes one-third of the TAC for thornyhead rockfish.

7. PSC Limits Relevant to Fully Utilized Species

Under § 672.20(b)(1), if NMFS determines after consultation with the Council that the TAC for any species or species group will be fully utilized in the DAP fishery, a groundfish PSC limit applicable to the JVP fisheries may be specified for that species or species group.

The Council recommended that DAP equal TAC for each species category. Zero amounts of JVP are available. NMFS concurs with the Council's recommendation, and has not established any JVP amounts. Therefore, no groundfish PSC limits under § 672.20(b)(1) are necessary.

8. Closures to Directed Fishing

The "Proposed 1993 Initial Specifications of Groundfish and Associated Management Measures" for the GOA (57 FR 57982, December 8, 1992) contained several closures to directed fishing for groundfish during 1993. These final specifications affirm previous closures, and include some additional closures.

Under § 672.20(c)(2)(ii), the Regional Director determined that the entire TACs or allocations of TAC of some groundfish species and species groups will be needed as incidental catch to support other anticipated groundfish fisheries during 1993. The Regional Director is establishing directed fishing allowances of zero mt and prohibiting directed fishing for the remainder of the fishing year for the following: (1) Pacific cod for processing by the offshore component in the Western, Central, and Eastern Regulatory Areas; (2) pollock for processing by the offshore component in the Western, Central, and Eastern Regulatory Areas; (3) sablefish caught by trawl gear in the Western and Central

Regulatory Areas; (4) SR/RE in the Western and Eastern Regulatory Areas; (5) "other rockfish" in the Western Regulatory Area; and, (6) Northern rockfish in the Eastern Regulatory Area. Additionally, regulations at § 672.24(c)(1) prohibit directed fishing for sablefish with gear other than hook-and-line gear in the Eastern Regulatory Area.

Under authority of the interim specifications (57 FR 57982, December 8, 1992) and at §§ 672.20(c)(1)(ii)(A) and 672.20(c)(2)(ii), the Regional Director established a directed fishing allowance and closed directed fishing for Pacific cod by vessels harvesting Pacific cod in the Western Regulatory Area for processing by the inshore component (58 FR 13214, March 10, 1993). Under this current action, and § 672.20(c)(2)(ii) the Regional Director has determined that amounts of Pacific cod remaining in the final specification for the Western Regulatory Area in 1993 for the inshore component are needed as incidental bycatch to support anticipated groundfish fishing activity later in 1993. Therefore, the Regional Director is establishing a directed fishing allowance of 16,000 mt (which has already been harvested), and NMFS is closing directed fishing for Pacific cod by vessels harvesting Pacific cod in the Western Regulatory Area for processing by the inshore component, for the remainder of the fishing year.

The Regional Director determined that the interim first quarterly allowances of pollock apportioned to Statistical Areas 62 and 63 had been reached. NMFS closed directed fishing for pollock in those areas (58 FR 11985, March 2, 1993, and 58 FR 11986, March 2, 1993, respectively). The Regional Director has now determined that the final first quarterly allowances of pollock for areas 62 and 63 (6,494 mt and 15,234 mt, respectively) have been taken. Therefore, NMFS is closing directed fishing for pollock by all vessels catching pollock in those areas under § 672.20(c)(2)(ii), until the second quarterly pollock allowances become available. On March 29, fishing for pollock in Statistical Areas 62 and 63 will resume for vessels catching pollock for delivery for processing by the inshore component. A proposed regulatory change would delay the second quarter pollock season until June 1, 1993.

Directed fishing standards for the aforementioned closures may be found at § 672.20(g).

9. Halibut Prohibited Species Catch (PSC) Mortality Limits

Under § 672.20(f)(2), annual Pacific halibut PSC limits are established and apportioned to trawl and hook-and-line gear and may be apportioned to pot gear. At its December 1992 meeting, the Council recommended that NMFS establish halibut PSC limits of 2,000 mt and 750 mt for trawl and hook-and-line gear, respectively, for 1993. Further, 10 mt of the hook-and-line PSC limit is apportioned to DSR, and the remaining 740 mt is apportioned to all other hook-and-line fisheries.

The Council recommended that pot gear be exempt from Pacific halibut PSC limits for the 1993 fishing year. Operators of vessels using pot gear caught approximately 10,000 mt of groundfish, mostly Pacific cod, during 1992. Observer information suggests that the mortality of Pacific halibut caught in pots is low, approximately 5 percent. Using this rate, NMFS estimates that approximately 4 mt of Pacific halibut mortality occurred in the GOA pot fisheries during 1992.

The Regional Director will project when the 1993 Pacific halibut PSC limits will be reached during the fishing year on the basis of observed halibut bycatch rates, assumed mortality rates, and reported groundfish catch. Assumed mortality rates for halibut bycatch vary, depending on the gear being used and the groundfish target. After reviewing information contained in the November 1992 SAFE report, NMFS observer data, and information provided by the International Pacific Halibut Commission (IPHC), the Council recommended the following assumed mortality rates for Pacific halibut that are caught as bycatch in the following fisheries: 75 percent for pelagic trawl pollock; 60 percent for trawl rockfish, shallow water flatfish, and "other species"; 55 percent for non-pelagic trawl pollock and deep water flatfish; 20.5 percent for hook-and-line sablefish; 16 percent for all other hook-and-line fisheries; and 5 percent for all pot fisheries. These rates may be adjusted during the fishing year if warranted by new information.

If halibut bycatch is caught at the same rate in 1993 as in 1992, the assumed halibut mortality rates for trawl gear will result in faster accrual of Pacific halibut mortality in the pelagic trawl pollock fishery, and slower accrual in all other trawl fisheries than in 1992 when a 65 percent assumed rate was used for all targets. For hook-and-line gear, the sablefish fishery will accrue more halibut mortality than in 1992 when a 16 percent rate was assumed.

NMFS cannot predict whether the 1993 assumed mortality rates will constrain the trawl and hook-and-line groundfish fisheries. Harvesters are expected to change fishing methods in response to: (1) A vessel incentive program in which trawl fishermen are subject to enforcement actions if observed Pacific halibut bycatch rates exceed a bycatch rate standard specified in regulations; (2) a proposed change in the definition of pelagic trawl gear and new performance-based standards for this gear type; and, (3) a proposed requirement for careful release or gangion-cutting for halibut bycatch taken with hook-and-line gear. Groundfish may be fully harvested, subject to market constraints, even under lower Pacific halibut mortality caps.

NMFS concurs with the Council's recommendations listed above. The following types of information as presented in, and summarized from, the 1992 SAFE report, or as otherwise available from NMFS, Alaska Department of Fish and Game (ADF&G), the IPHC, or public testimony were considered.

(A) Estimated Halibut Bycatch in Prior Years

The best available information on estimated halibut bycatch is from 1992 observer data. Assumed halibut mortality rates are based on 1990 and 1991 observer data. The calculated halibut bycatch mortality amounts by trawl, hook-and-line, and pot gear for 1992 are 1,718 mt, 1,131 mt, and 4 mt, respectively, for a total of 2,853 mt. These mortality amounts seasonally constrained trawl fisheries during the first and third quarters of the fishing year. Trawling, with the exception of trawling for pollock with pelagic trawl gear, was closed from March 22 to March 31, 1992 (57 FR 10297, March 25, 1992), from August 5 to September 30 (57 FR 35765, August 11, 1992), and from October 30 through December 31 (57 FR 52737, November 5, 1992), as a result of halibut PSC seasonal allowances. Hook-and-line fishing was closed from October 30 through December 31 (57 FR 52594, November 4, 1992), due to attainment of halibut PSC seasonal allowances.

The amount of groundfish that could have been harvested in 1992 without halibut PSC constraints is unknown. The EA estimates 25,500 mt of groundfish, worth an estimated $11.3 million, were foregone by the trawl fishery. Lacking market incentives, some groundfish would not have been

harvested, regardless of halibut PSC bycatch availability.

(B) Expected Changes in Groundfish Stocks

At its December 1992 meeting, the Council adopted lower ABCs for Pacific cod, POP, and thornyhead rockfish and a higher ABC for pollock, deep water flatfish, and arrowtooth flounder than ABCs adopted for these species for 1992. Other ABCs are essentially unchanged from 1992 levels, including those for DSR after adjustment for the increase in the size of the Southeast Outside District, and for the combined Northern rockfish and "other rockfish" species groups. More information on these changes is included in the Final SAFE Report dated November 1992 and in the Council and SSC minutes.

(C) Expected Changes in Groundfish Catch

The total of the 1993 TACs for the GOA, including the interim TAC for POP, is 305,078 mt, an increase of 6 percent over the 1992 TAC total of 289,066 mt (including POP). This notice significantly changes TACs from 1992 for certain target species categories, including reductions in Pacific cod, SR/RE, Northern rockfish and "other rockfish," pelagic shelf rockfish, and thornyhead rockfish, and increases in pollock, shallow water flatfish, and arrowtooth flounder.

TACs for Pacific cod and for the combined rockfishes (SR/RE, Northern rockfish and "other rockfish," pelagic shelf rockfish, and thornyhead rockfish) are decreased from 63,500 mt in 1992 to 56,700 mt in 1993, and from 24,704 mt in 1992 to 20,709 mt in 1993, respectively. The lower Pacific cod and rockfish TACs could reduce halibut mortality associated with those fisheries, and make more halibut bycatch available to support other trawl fisheries, especially those for flounders. TACs for shallow water flatfishes and arrowtooth flounder and for pollock increased from 36,740 mt to 46,240 mt, and from 87,400 mt to 114,400 mt, respectively. Greater participation in flounder fisheries is anticipated due to stronger markets and displacement of the offshore fleet from the pollock and Pacific cod fisheries. Additionally, recent technical developments suggest that arrowtooth flounder might be suitable for surimi production. Any increase in directed fishing for flounders will result in additional halibut PSC bycatch mortality, which might constrain trawlers in 1993. The increase in pollock TAC is not expected to affect halibut bycatch, because most of the pollock in the GOA is harvested with pelagic trawls that have low bycatches of halibut.

(D) Current Estimates of Halibut Biomass and Stock Condition

The IPHC 1992 stock assessment for the 1993 fishing year indicates that the total exploitable biomass of Pacific halibut available for 1992 was 265.8 million pounds (120,566 mt). Halibut biomass declined 11 percent from the previous stock assessment, a rate similar to declines observed in previous years. Recruitment (abundance of 8-year-old fish) appears to have dropped off coastwide, attributable to declines in Areas 3A, 3B, and 4, and stable recruitment in Area 2C, in spite of increases in Areas 2A and 2B. The 15-year-old age class, which recruited strongly as 8-year-old fish in 1985, is contributing less and less to the fishery yield. The low recruitment in recent years, in conjunction with recent exploitation rates in the commercial fishery, is expected to contribute to a continued decline in the overall stock at a rate of 5–10 percent per year over the next several years. A return to historically low recruitment levels as indicated by the numbers of 8-year-old fish in Area 3A supports the hypothesis of cyclically driven recruitment. The IPHC is recommending a decrease in the exploitation rate from 0.35 to 0.30 by 1994.

(E) Potential Impacts of Expected Fishing for Groundfish on Halibut Stocks and U.S. Halibut Fisheries

Impacts of the groundfish fishery on Pacific halibut stocks and the halibut fisheries will be minimized by the overall PSC mortality limit. The 1993 groundfish fisheries are expected to catch the entire halibut PSC limit of 2,750 mt. According to the IPHC, allowable directed commercial catch of halibut is determined by subtracting recreational catch, waste, and bycatch amounts from a portion of the exploitable biomass. Therefore, although the amount of halibut available for directed halibut fisheries will be reduced, halibut bycatch in groundfish fisheries is not expected to have any effect on halibut stocks.

(F) Methods Available for, and Costs of, Reducing Halibut Bycatches in Groundfish Fisheries

Halibut bycatch may be reduced by: (1) Reducing amounts of groundfish TACs; (2) reducing halibut bycatch rates through Vessel Incentive Programs; (3) gear modifications; (4) changes in groundfish fishing seasons; and (5) reducing the PSC mortality limits.

Reductions in groundfish TACs do not encourage fishermen to reduce bycatch rates. Costs that would be imposed on fishermen as a result of reducing TACs depend on species and amounts of groundfish foregone.

Trawl vessels carrying observers for purposes of complying with § 672.27 are subject to the Vessel Incentive Program outlined in § 672.26. The program encourages trawl fishermen fishing for groundfish to avoid high halibut bycatch rates by specifying bycatch rate standards for various target fisheries.

Current regulations at § 672.24(b)(2) require groundfish pots to have halibut exclusion devices to reduce halibut bycatches. Resulting low bycatch and mortality rates of halibut in pot fisheries have justified exempting pot gear from PSC limits. Because none of the halibut PSC limit was needed during 1992 pot gear fisheries, it was apportioned entirely to support bycatch needs in trawl and hook-and-line gear. Pending approval by NMFS, a proposed change in the definition of pelagic trawl gear, together with a new performance-based standard, is expected to reduce halibut bycatch by displacing fishing activity away from the bottom when specified halibut bycatch levels are reached during the fishing year. This would allow operators of vessels using midwater trawls to continue to fish for groundfish without halibut PSC constraints.

Groundfish fishing seasons have reduced halibut bycatch. The sablefish hook-and-line season starts May 15, and the rockfish trawl fishery is delayed until the beginning of the third fishing quarter, June 28, 1993. These delays postpone sablefish and rockfish fisheries until halibut have migrated into shallow water.

For 1993, it will be difficult to predict when halibut mortality limits will be reached. Although the PSC limits are the same as in 1992, new assumptions about mortality rates and changes in TACs make predictions speculative for trawl gear. The increased mortality associated with the sablefish fishery will likely result in earlier attainment of the hook-and-line halibut mortality limit.

NMFS and the Council will review methods listed under (F), above, to determine their effectiveness. Changes will be initiated as necessary in response to this review or to public testimony and comment, either through regulatory or FMP amendments.

Consistent with the goals and objectives of the FMP to reduce halibut bycatches while providing an opportunity to harvest the groundfish OY, NMFS assigns 2,000 mt and 750 mt

of halibut PSC mortality limits to trawl and hook-and-line gear, respectively. While these limits reduce the harvest quota for commercial halibut fishermen, NMFS has determined that they will not result in unfair allocation to any particular user group. NMFS recognizes that some halibut bycatch will occur in the groundfish fishery, but expansion of the Vessel Incentive Program, required gear modifications, a delay in the hook-and-line sablefish and trawl rockfish seasons, and the proposed requirement of "careful release" techniques for halibut in the hook-and-line gear fisheries are intended to reduce adverse impacts on halibut fishermen while promoting the opportunity to achieve the OY from the groundfish fishery. The success of those measures depends, in part, on action taken by vessel operators to reduce Pacific halibut bycatches and bycatch mortalities as they respond to regulatory requirements.

10. Seasonal Apportionments of the Halibut PSC Limits

Under § 672.20(f)(2), the Pacific halibut PSC limits are apportioned based on recommendations from the Council. For 1993, the Council recommended that Pacific halibut PSC limits for trawl gear for the second and third quarters be reversed from amounts in 1992 (Table 5). Slight adjustments were made to allow PSC limits to coincide with 1993 fishing weeks and quarterly reporting periods. Regulations specify that overages or shortfalls in PSC catches will be accounted for within the 1993 fishing year.

TABLE 5.—PACIFIC HALIBUT PSC LIMITS, ALLOWANCES, AND APPORTIONMENTS FOR 1993. THE PACIFIC HALIBUT PSC LIMIT FOR HOOK-AND-LINE GEAR IS ALLOCATED TO THE DEMERSAL SHELF ROCKFISH (DSR) FISHERY, AND TO FISHERIES OTHER THAN DSR.

[Values are in metric tons]

Trawl gear		Hook-and-line gear			
		Other than DSR			
Dates	Amount	Dates	Amount	Dates	Amount
Jan 1–Mar 28	600 (30%)	Jan 1–May 14	200 (27%)	Jan 1–Dec 31	10 (100%)
Mar 29–Jun 27	400 (20%)	May 15–Aug 31	500 (68%)		
Jun 28–Oct 3	600 (30%)	Sep 1–Dec 31	40 (5%)		
Oct 4–Dec 31	400 (20%)				
Total	2,000 (100%)		740 (100%)		10 (100%)

As required by § 672.20(f)(2)(iii), season apportionments of the halibut PSC limits are based on information summarized in the SAFE report, or as otherwise available, which is summarized below:

(A) Seasonal Distribution of Pacific Halibut

Adult Pacific halibut generally spawn in water 230–450 meters (m) deep from November through March; the peak of spawning is in December and January. During April and May, Pacific halibut migrate onto the offshore banks in water 135–270 m deep. During June through August, Pacific halibut are found in much shallower water, 45 m or less. During September and October, Pacific halibut migrate back to deeper water for spawning.

(B) Seasonal Distribution of Target Groundfish Species Relative to Pacific Halibut Distribution

Most of the groundfish species are found in deep water during winter when water temperatures are relatively warmer (4 °C) than temperatures in shallower water (1 °C). As detailed in the SAFE report, pollock, Pacific cod, shallow water flatfish species, and certain rockfish species are in deep water during winter but generally at depths shallower than where Pacific halibut are found. In summer, these species are in the same shallow water as Pacific halibut.

The recommended seasonal trawl apportionments will accommodate intensive fishing for flounder species during the first half of the fishing year when halibut are in deep water, and for deep water rockfish in the third quarter when halibut are in shallow water. These amounts will also accommodate early-year fishing for Pacific cod, generally a shallow water species. The recommended seasonal hook-and-line apportionments will accommodate intensive fishing for sablefish starting on May 15. Even though Pacific halibut bycatches should be markedly reduced after that date as Pacific halibut migrate into shallow water, the industry prefers to have substantial bycatch to support the valuable sablefish fishery.

(C) Expected Pacific Halibut Bycatch Needs on a Seasonal Basis Relevant to Changes in Pacific Halibut Biomass and Expected Catches of Target Groundfish Species.

TACs for Pacific cod and for all rockfishes except DSR are lower in 1993 than in 1992. TACs for pollock, shallow water flatfish, and arrowtooth flounder are substantially increased. Because of the TAC changes and changes in the assumed halibut bycatch mortality rates, all 2,000 mt of Pacific halibut bycatch mortality allocated to trawl gear and 750 mt allocated to hook-and-line gear are expected to be taken.

The Council recommended four seasonal apportionments of Pacific halibut PSC limit for trawl gear, equal to 30, 20, 30, and 20 percent. Most of the trawl share of the Pacific halibut PSC limit is expected to be taken during the first three quarters. Other than flounders and a limited amount of rockfishes, little groundfish is expected to be available or of high market demand for trawlers late in the year. Therefore, bycatch needs of Pacific halibut during the fourth quarter are expected to be smaller.

For the first quarter, most halibut bycatch will be needed in trawl fisheries for Pacific cod and flounders. Because halibut are in deep water in the winter, bycatch mortality in deep water flounder fisheries will likely be higher than at times later in the year. Pollock will be harvested primarily with pelagic trawl gear which has a low bycatch of halibut.

The second and third quarter proportions are reversed from those in 1992. This recommendation was made because a regulatory delay of trawling for rockfish and a proposed delay of the second quarter pollock season will reverse halibut bycatch needs during the

second and third quarters. Additionally, an anticipated increase in catch of shallow water flatfish during 1993 will increase halibut needs in the third quarter.

(D) Expected Variations in Bycatch Rates Throughout the Fishing Year

Pacific halibut bycatch rates will vary with the seasonal distribution of Pacific halibut. During winter months when Pacific halibut are in deep water, groundfish fisheries for deep-water species will experience higher Pacific halibut bycatch rates. Fisheries for shallow-water species will encounter lower Pacific halibut bycatch rates. This situation will be reversed during summer months when Pacific halibut are in shallower water. The Council's recommended large first and third quarterly apportionments to trawl gear reflect expected harvest patterns for Pacific cod and flounders in the first quarter, and pollock, rockfish and flounders in the third quarter. The allocation of 67 percent of the halibut PSC for hook-and-line gear to the second trimester reflects the needs of the lucrative sablefish fishery commencing on May 15.

(E) Expected Changes in Directed Groundfish Fishing Seasons

Two changes in the groundfish fishing seasons are anticipated from 1992 to 1993. The trawl rockfish fisheries will begin at the beginning of the third quarter, and the second pollock season, if approved, will be delayed from April 1 to a date near June 1. The rockfish season was changed, in part, to decrease halibut bycatch. Because Pacific halibut bycatch is relatively minor in the pollock fishery, the Council's recommended season change for pollock is not a major consideration in Pacific halibut PSC management.

(F) Expected Start of Fishing Effort

Except for GOA rockfish, fishing with trawl gear started on January 20. Trawling for rockfish species will start on June 28. Fishing with hook-and-line and pot gear for Pacific cod started in early January because Pacific cod were aggregated into spawning schools promoting good catch rates. Fishing with hook-and-line gear for sablefish will start on May 15.

(G) Economic Effects of Establishing Seasonal Pacific Halibut Allocations on Segments of the Target Groundfish Industry

The manner in which PSC limits are seasonally apportioned will affect the amount of groundfish OY that will be harvested during a season. Ideally, the seasonal apportionment of Pacific halibut PSC limits will permit each fishery to harvest fully the available resource without exceeding the PSC limits for each gear group. In reality, seasonal apportionments may not allow full harvests.

After the trawl fisheries were closed October 30, 1992, upon reaching the PSC limit for Pacific halibut, substantial amounts of flounder target categories (excluding arrowtooth flounder, which is largely a bycatch species) and some pelagic shelf rockfish and "other rockfish" remained unharvested. The amount of groundfish foregone in 1992 by harvesters using trawl gear is estimated at 25,500 mt, worth approximately $11.3 million exvessel. Lacking market incentives, some amounts of groundfish would not have been harvested, regardless of halibut PSC bycatch availability. A more thorough discussion of economic effects is contained in the SAFE report and EA.

NMFS has determined that the Council's recommendation for the seasonal apportionments of the Pacific halibut PSC to gear types is appropriate and is implementing the Council's recommendation.

Response to Comments

Written comments on the proposed 1993 specifications and other management measures were requested until January 4, 1993. No written comments were received during the comment period on the specifications as proposed. However, four letters were received by the Director, Alaska Region, NMFS (Regional Director), during the comment period on Council recommendations for final specifications. Two of these letters expressed support for the Council's recommendation of TAC for POP and "other rockfish"; one additionally supported the recommendation for SR/RE. Two other letters opposed to the Council recommendation for POP, and supported a higher TAC for POP. NMFS will respond to comments regarding POP when NMFS specifies a TAC for that species; the comments regarding other rockfishes and SR/RE are summarized and addressed below.

Comment 1: The TACs recommended for "other rockfish" and SR/RE by the Council were appropriate. The fisheries for "other rockfish" and SR/RE have a high bycatch of POP; allowing a TAC equal to the ABC of "other rockfish" would compromise the conservation and rebuilding measures adopted by the Council in recommending a reduced POP TAC. Additionally, the ABC for "other rockfish" was based on the average natural mortality rate for the complex. A TAC set at ABC would not provide sufficient protection to any species that has a low natural mortality rate and may be harvested disproportionately to its relative abundance in the complex.

Response: NMFS has adopted the Council's TAC recommendation for "other rockfish." NMFS agrees that a conservative harvest approach is warranted for rockfishes, and unnecessary bycatches, particularly of POP, should be minimized until a detailed population and rebuilding analysis can be evaluated. NMFS also concurs that for species managed as a complex, harvest levels should be set in such a manner as to afford protection for vulnerable species within the complex.

Classification

This action is authorized under 50 CFR 611.92 and 672.20 and complies with E.O. 12291.

This action apportions reserves to DAP fisheries on a date other than those specified in § 672.20(d)(i). The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), finds that it is necessary to waive the opportunity for prior public comment to prevent premature closure of the fishery. In accordance with § 672.20(d)(5)(iv), comments are invited on the reserve apportionments as noted in "DATES" above.

NMFS prepared an environmental assessment on the 1993 TAC specifications. The Assistant Administrator concluded that no significant impact on the environment will result from their implementation.

An informal consultation under the Endangered Species Act for the final 1993 initial groundfish specifications was concluded for Steller sea lions, on January 27, 1993, and for listed, proposed, and candidate seabirds on February 3, 1993. An informal consultation for listed species of Pacific salmon was concluded for groundfish fisheries under the FMPs on February 20, 1992. As a result of the informal consultations, the Regional Director determined that fishing activities under the final 1993 TACs are not likely to adversely affect endangered or threatened species in a manner or to an extent not previously considered.

List of Subjects

50 CFR Part 611

Fisheris, Foreign relations.

50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

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

Dated: March 26, 1993.

Samuel W. McKeen,

Program Management Officer, National Marine Fisheries Service.

[FR Doc. 93-7435 Filed 3-26-93; 4:15 pm]

BILLING CODE 3510-22-M

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50 CFR Part 672

[Docket No. 921107-3068]

Groundfish of the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is closing the directed fishery for Pacific cod by the inshore component in the Central Regulatory area (CG) (statistical areas 62 and 63) in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the Pacific cod total allowable catch (TAC) for the inshore component in this area.

EFFECTIVE DATES: 12 noon, Alaska local time (A.l.t.), March 26, 1993, through 12 midnight, A.l.t., December 31, 1993.

FOR FURTHER INFORMATION CONTACT: Andrew N. Smoker, Resource Management Specialist, Fisheries Management Division, NMFS, (907) 586-7228.

SUPPLEMENTARY INFORMATION: The groundfish fishery in the GOA exclusive economic zone is managed by the Secretary of Commerce according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR parts 620 and 672.

In accordance with § 672.20(c)(1)(ii)(B), the allowance of Pacific cod TAC for the inshore component in the CG was established by the final specifications (contained elsewhere in this **Federal Register** document) as 31,680 mt.

The Director of the Alaska Region, NMFS (Regional Director), has determined, in accordance with § 672.20(c)(2)(ii), that the allowance of the 1993 Pacific cod TAC for the inshore component in the CG soon will be reached. Therefore, in accordance with § 672.20(a)(2)(v)(B), the Regional Director has established a directed fishing allowance for vessels catching Pacific cod for processing by the inshore component of 27,680 mt, with consideration that 4,000 mt will be taken as incidental catch in directed fishing for other species in the CG. The Regional Director had determined that the directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by vessels catching Pacific cod for processing by the inshore component in the CG, effective from 12 noon, A.l.t., March 26, 1993, through 12 midnight, A.l.t., December 31, 1993.

Directed fishing standards for applicable gear types may be found in the regulations at § 672.20(g).

Classification

This action is taken under 50 CFR 672.20, and is in compliance with Executive Order 12291.

List of Subjects in 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

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

Dated: March 26, 1993.

David S. Crestin,

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

[FR Doc. 93-7436 Filed 3-26-93; 8:45 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 58, No. 60
Wednesday, March 31, 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.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

Cost, Feasibility, and Privacy Implications of Tracking Individual Deposits

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Request for comments; extension of comment period.

SUMMARY: On February 3, 1993, the Federal Deposit Insurance Corporation (FDIC) published a document requesting public comment on a study of the desirability, cost, feasibility, and privacy implications of tracking any individual's insured and uninsured deposits and the exposure of the Federal Government with respect to all insured depository institutions (58 FR 6903). The FDIC is extending the period for public comment on this notice for 30 days from April 5, 1993 to May 5, 1993.

DATES: Written comments must be received on or before May 5, 1993.

ADDRESSES: Written comments shall be addressed to Hoyle L. Robinson, Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments may be hand-delivered to Room F–402, 1776 F Street, NW., Washington, DC on business days between 8:30 a.m. and 5 p.m. Comments may also be inspected in FDIC's Reading Room, room 7118, 550 17th Street, NW., between 8:30 a.m. and 5 p.m. on business days. [FAX number (202) 898–3838]

FOR FURTHER INFORMATION CONTACT: Jay W. Golter, Financial Analyst, Division of Research and Statistics, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429, (202) 898–3924.

SUPPLEMENTARY INFORMATION: Section 311(d) of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub. L. 102–242, requires the FDIC to conduct a study of the cost and feasibility of tracking the insured and uninsured deposits of any individual and the exposure of the Federal Government with respect to all insured depository institutions. The study must include detailed, technical analysis of the costs and benefits associated with the least expensive manner of implementing the tracking system. As part of the study, the FDIC must investigate, review, and evaluate—

(A) The data systems that would be required to track deposits in all insured depository institutions;

(B) The reporting burdens of such tracking on individual depository institutions;

(C) The systems which exist or which would be required to be developed to aggregate such data on an accurate basis;

(D) The implications such tracking would have for individual privacy; and

(E) The manner in which systems would be administered and enforced.

In order to obtain public comment on all issues related to this study, on February 3, 1993, the FDIC published a request for comment in the **Federal Register** (58 FR 6903) for a 60 day comment period to end on April 5, 1993. In response to a request for an extension of the comment period and in view of the variety of issues to be studied, the FDIC is extending the period for public comment for 30 days from April 5, 1993 to May 5, 1993.

By order of the Board of Directors. Dated at Washington, D.C. this 23rd day of March, 1993.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 93–7367 Filed 3–30–93; 8:45 am]

BILLING CODE 6714–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Chapter I

[Summary Notice No. PR–93–6]

Petition for Rulemaking; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for rulemaking received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for rulemaking (14 CFR part 11), this notice contains a summary of certain petitions requesting the initiation of rulemaking procedures for the amendment of specified provisions of the Federal Aviation Regulations and of denials or withdrawals of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received by May 31, 1993.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–10), room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267–3132.

FOR FURTHER INFORMATION CONTACT: D. Michael Smith, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence, SW., Washington, DC 20591; telephone (202) 267–7470.

This notice is published pursuant to paragraphs (b) and (f) of § 11.27 of part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC on March 22, 1993.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Rulemaking

Docket No.: 27163
Petitioner: Mr. Charles Webber
Regulations Affected: 14 CFR 11.25
Description of Rulechange Sought:

To require that a petitioner be given 45-day advance notification of related publication in the **Federal Register**; to

require that a petitioner need submit to the FAA only one copy of a petition; to require the FAA to assign a docket number and notify the petitioner within 1 week of receipt of a petition; to require that the FAA publish a summary of a petition in the **Federal Register** within 90 days of receipt of the petition; to require that errors in the **Federal Register** summary publication be cause for republication if requested by the petitioner; to require that a petitioner be provided promptly with copies of all comments received; to require that if a petition is not resolved in 60 days, the FAA prepare and provide the petitioner a schedule of events that would lead to such action; to require that within 60 days of the closing of the comment period, if the Administrator determines that the petition does not justify instituting rulemaking, the FAA issue a denial order to the petitioner which will subsequently be published in the **Federal Register**; to require that within 60 days of the close of the comment period and every 90 days thereafter, the Office or Service concerned would advise the petitioner in writing of the status and progress of the petition; and to require that each general notice of proposed rulemaking be published in the **Federal Register** and that persons subject to it be named and personally served with a copy.

Petitioner's Reason for the Request:

The petitioner feels that current regulations do not adequately address petitioners' rights regarding their petitions for changes to Federal Aviation Regulations.

[FR Doc. 93-7392 Filed 3-30-93; 8:45 am]

BILLING CODE 4910-13-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200 and 270

[Release No. IC-19362, File No. S7-13-93]

RIN 3235-AF56

Expedited Procedure for Exemptive Orders and Expanded Delegated Authority

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule amendments and requests for comment.

SUMMARY: The Commission is proposing for public comment an amendment to rule 0-5 under the Investment Company Act of 1940 that would establish an expedited review procedure for certain routine applications. The proposed rule amendment would permit applicants to obtain an exemptive order within 90 days if certain requirements are satisfied. The proposed rule amendment also would allow the Commission to declare certain inactive applications to be abandoned. The Commission also is proposing for public comment an amendment to rule 30-5 that would expand the delegated authority of the Director of the Division of Investment Management. The proposed rule amendments are intended to streamline the review procedure for exemptive applications and reduce delays in obtaining exemptive orders.

DATES: Comments must be received on or before June 29, 1993.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. All comment letters should refer to File No. S7-13-93. 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: Matthew M. O'Toole, Attorney, or Diane C. Blizzard, Assistant Director, both at (202) 272-2048, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission today is requesting public comment on proposed amendments to rule 0-5 (17 CFR 270.0-5) under the Investment Company Act of 1940 (15 U.S.C. § 80a-1, *et seq.*) (the "Act"). In addition, the Commission is requesting public comment on proposed amendments to rule 30-5, Delegation of Authority to Director of Division of Investment Management ("Delegation of Authority Rule") (17 CFR 200.30-5). These amendments would implement the recommendations made in the recently issued report by the Division of Investment Management, Protecting Investors: A Half Century of Investment Company Regulation, in Chapter 13, Procedures for Exemptive Orders.[1]

I. Background

The Act delegates to the Commission considerable flexibility in its regulation of investment companies. In over thirty separate provisions, the Act authorizes the Commission to issue orders[2] providing relief from specific statutory requirements.[3] Most significantly, section 6(c) gives the Commission the broad power to exempt conditionally or unconditionally any person, security, or transaction from any provisions of the Act or any rule thereunder, provided that the exemption is "necessary or 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]."[4] Congress enacted section 6(c) to give the Commission the flexibility to address unforeseen or changed circumstances in the investment company industry.[5]

Past applications for exemptive orders under the Act have addressed a wide variety of issues in a number of contexts.[6] For example, some

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[1] Division of Investment Management, SEC, *Procedures for Exemptive Orders*, Protecting Investors: A Half Century of Investment Company Regulation 503-525 (1992) [hereinafter the Protecting Investors report]. This report concluded a two-year examination of the regulation of investment companies and certain other pooled investment vehicles. The Exemptive Procedures chapter discusses the Division's findings and recommendations in greater detail. The Division's recommendations were based, in part, on suggestions made by commenters responding to a Commission release requesting comment on the regulation of investment companies. Request for Comment on Reform of the Regulation of Investment Companies, Investment Company Act Release No. 17534 (June 15, 1990), 55 FR 25322 (hereinafter Study Release).

[2] Although this release generally refers to exemptive orders, the proposed rule amendments would cover all types of applications for orders under rule 0-5. 17 CFR 230.0-5. In contrast, an application for an order under section 8(f) would not receive expedited review under this proposed rule amendment because the application is not covered by rule 0-5. Applications for orders under sections 2(a)(9), 3(b)(2), and 9(c) also would not receive expedited review because these applications are inherently fact-specific. *See* paragraph (b) of the proposed rule.

[3] *See, e.g.*, section 3(b)(2) (Commission may find that issuer is "primarily engaged" in a non-investment company business even though issuer may technically meet definition of investment company); section 9(c) (Commission may permit otherwise disqualified person to serve in various capacities with respect to investment companies); section 17(b) (Commission may exempt proposed transactions from the Act's affiliated transaction prohibitions); codified at 15 U.S.C. 80a-3(b)(2), -(9c), -17(b).

[4] 15 U.S.C. section 80a-6(a).

[5] See, e.g., Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 872 (1940) [hereinafter 1940 Senate Hearings] (Commissioner Healy, a principal author of the Act, stated that "it seemed possible and even quite probable that there might be companies—which none of us have been able to think of—that ought to be exempted."); id. at 197 (David Schenker, Chief Counsel of the Investment Trust Study, and also a principal author of the Act, stated that "the difficulty of making provision for regulating an industry which has so many variants and so many different types of activities * * * is precisely [the reason that section 6(c)] is inserted.").

[6] The extent to which the financial services industry depends on the exemptive process is demonstrated by the number of applications filed with the Commission. For example, in fiscal year

Continued

applications have requested relief from provisions of the Act to permit registered investment companies to operate in a more efficient and less costly manner.[7] Other applications have been filed either to implement innovations or create new investment vehicles that do not fit within the regulatory confines of the Act.[8]

Filing requirements and specifications for applications are set forth in rules 0–2,[9] 0–4,[10] and 0–5(d).[11] Applicants also are expected to follow published Division guidelines for filing applications.[12] Specifically, applicants must state an adequate basis for the relief requested, including detailed justification for removal of any statutory protections, and identify any benefits expected for investors and any conditions imposed to protect investors.[13] Applicants also must cite and discuss prior applications for similar relief and, to the extent possible, bring their proposal within applicable precedent.[14]

Applications filed with the Commission are forwarded to the Division and generally are reviewed in the order received. During the review process, the Division may ask for clarification of, or modification to, an application so that the relief meets the Act's standards. An applicant that does not respond to such a request in a timely manner may have its application placed on inactive status at the Division's discretion.[15]

The Commission may issue an order on an application "only after appropriate notice and opportunity for hearing."[16] Accordingly, once review of an application is completed, and a determination is made that relief should be granted, a notice of the filing of the application generally must be published in the **Federal Register**.[17] The notice provides interested persons an opportunity to request a hearing on the matter within a specified period of time (typically twenty-five days from the date of the issuance of the notice), and indicates the earliest date upon which an order disposing of the matter may be entered.[18]

The vast majority of notices of applications and exemptive orders are issued by the Division under delegated authority. The Delegation of Authority Rule authorizes the Division Director to issue notices of applications under numerous sections of the Act[19] and underlying rules, where the matter either presents issues previously settled by the Commission or fails to raise questions of fact or policy requiring a hearing.[20] The rule similarly authorizes the Division Director to issue orders where a notice has been issued and no request for a hearing has been filed.[21] In essence, rule 30–5 relieves the Commission from performing functions "which experience has demonstrated to be of a routine or non-controversial nature."[22] Rule 30–5 nonetheless requires a number of applications to be presented to the Commission for consideration, including *all* applications under provisions of the Act for which rule 30–5 does not grant the Division Director delegated authority,[23] and other applications involving matters not previously settled by the Commission.[24]

1991, 331 applications (almost one a day) were filed under the Act.

[7] For instance, the Commission has issued numerous orders permitting several open-end investment companies ("mutual funds") to deposit overnight cash balances into a joint trading account, the daily balance of which would be used to enter into repurchase agreements. By depositing such balances into a joint trading account, the funds are able to reduce costs and thereby increase the return they otherwise would have achieved had each fund separately made these investments. See, e.g., Short-Term Investments Co., Investment Company Act Release Nos. 18550 (Feb. 13, 1992), 57 FR 6156 (Feb. 20, 1992) (Notice of Application) and 18614 (Mar. 12, 1992), 50 SEC Docket 2196 (Mar. 24, 1992) (Order).

[8] The Commission issued numerous orders beginning in the 1980s permitting mutual funds to impose contingent deferred sales loads ("CDSLs") and offer multiple classes of shares with different sales charges and expenses. See, e.g., Freedom Investment Trust, Investment Company Act Release Nos. 16487 (July 20, 1988), 56 FR 56260 (Notice of Application) and 16526 (Aug. 16, 1988), 41 SEC Docket 904 (Order) (CDSLs); Comstock Partners Strategy Fund, Investment Company Act Release Nos. 26672 (June 5, 1992), 57 FR 26672 (Notice of Application) and 18828 (July 1, 1992), 51 SEC Docket 1853 (Order) (multi-class fund). Money market funds could not have been offered without exemptive relief from section 2(a)(41), which requires registered investment companies to value their securities based on market values, if available, or if not, as determined in good faith by the board of directors. In a series of orders beginning in the 1970s, the Commission permitted money market funds to use alternative valuation methods, such as amortized cost or penny rounding. These orders were later codified in rule 2a–7. 17 CFR 270.2a–7. In addition, the Commission has issued over 125 orders under section 6(c) exempting structured financings backed by mortgage-related assets. See, e.g., Shearson Lehman CMO, Inc., Investment Company Act Release Nos. 15796 (June 11, 1987), 52 FR 23246 (Notice of Application) and 15852 (July 2, 1987), 38 SEC Docket 1403 (Order) (collateralized mortgage obligations). The Commission later adopted a rule excluding certain structured financings from the definition of "investment company." 17 CFR 270.3a–7.

[9] 17 CFR 270.0–2. Rule 0–2 contains various requirements for filing papers and applications with the Commission, including how filings are received and dated, what signatures and authorizations must appear, and what applications should contain.

[10] 17 CFR 270.0–4 (regarding incorporation by reference of documents filed with the Commission).

[11] 17 CFR 270.0–5(d) (filing fee requirement). Rule 0–5–(a)-(c) sets forth Commission procedures for considering and disposing of applications. 17 CFR 270.0–5–(a)-(c).

[12] Commission Policy and Guidelines for Filing of Applications for Exemption, Investment Company Act Release No. 14492 (Apr. 30, 1985), 50 FR 19339 [hereinafter Release No. 14492]. The release was issued in response to increases in the early 1980s in both the number and complexity of exemptive applications.

[13] *Id.* Section 3. *See also* 17 CFR 270.0–2(e) (requiring that each application contain a brief statement of the reasons why the applicant should be entitled to the action requested). Section 34(b) makes it unlawful for any person to make any untrue or misleading statement in connection with an application or other document filed with the Commission. 15 U.S.C. 80a–33(b).

[14] Release No. 14492, *supra* note 12, section 1. An order issued for the same relief sometimes is referred to as a "precedent." Applicants are further expected to review all relevant provisions of the Act and rules thereunder, and all pertinent Commission releases, before filing an application. *Id.*

[15] Initial comments on an exemptive application generally are given at one time and within 45 days of receipt, although novel or complex applications may take longer. Id. at n.1. Generally, applicants are required to file an amendment within 60 days of receipt of comments. Id. section 8. An applicant may reactivate an inactive application at any time, however, by filing a request with the Division or by filing the required amendment. Action on a reactivated application commences from the date of receipt of the request or the amendment by the Division and does not date back to the filing of the original application. This allows a reviewer to become reacquainted with the facts and issues involved in the application. Id.

[16] Section 40(a), codified at 15 U.S.C. 80a–39(a). In certain circumstances, however, emergency or temporary orders may be appropriate without prior notice.

[17] 17 CFR 270.0–5(a). The notice briefly describes the proposal, states why the applicant believes the proposal qualifies for an exemption, summarizes the critical representations and states the conditions contained in the application. Rule 0–2(g) requires that a proposed notice be submitted as an exhibit to the application and be modified to reflect any subsequent amendments. 17 CFR 270.0–2(g). Division guidelines anticipate that notices of routine applications that require no amendment be published within 60 days of receipt of the application. Release No. 14492, supra note 12, at n.1. Due to the increasing number and complexity of applications, however, these guidelines may not be followed at times.

[18] See 17 CFR 270.0–5(a). Under the Federal Register Act, the notice period generally must last for at least 15 days after publication. 44 U.S.C. 1508. Due to this 15 day requirement, and because notices generally are not published in the **Federal Register** for at least six days after the notice is issued, the notice period typically runs approximately 25 days from the date of issuance. Orders granting the requested relief generally are issued within two days of the expiration of the notice period, unless a hearing is requested by an interested party or is ordered by the Commission on its own motion. See Release No. 14492, supra note 12, at n.1; see also rule 0–5(b)–(c).

[19] The Delegation of Authority Rule also authorizes the Division Director to issue notices of applications (and orders) under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1, et seq.] [hereinafter Investment Advisers Act]. 17 CFR 200.30–5(e).

[20] 17 CFR 200.30–5(a)(1), (e)(3).

[21] 17 CFR 200.30–5(a)(2), (e)(4).

[22] Investment Company Act Release No. 3645 (Mar. 8, 1963) (adopting rules delegating functions to division directors).

[23] See, e.g., section 2(a)(9) (Commission may determine whether a person controls a company); codified at 15 U.S.C. § 80a–2(a)(9).

[24] Rule 30–5 does not delegate to the Division Director the authority to order hearings or deny

Obtaining an exemptive order from the Commission typically takes from six to eight months from the date an application is received, depending on various factors including the novelty and complexity of the requested relief, the Division's workload, the time it takes for applicants to respond to comments, and whether the Division Director has delegated authority. The time period also depends upon whether the application contains the facts and legal analysis needed to justify granting the relief, and whether the application complies with the procedural rules and guidelines.

Applicants and counsel have long complained that obtaining an exemptive order on both routine and complex applications takes too long.[25] They argue that lengthy review procedures delay the commencement of transactions, prevent applicants from responding quickly to changing market conditions, and slow the entry of new products to the market, all to the detriment of investors.

The Commission recognizes that these are legitimate concerns. On the other hand, applications can involve transactions on the forefront of investment company law. In those instances, substantial time and resources are expended to analyze thoroughly the legal and policy issues raised, and the recommendations the Division must make to the Commission often include significant policy choices. Even applications that generally are based on precedent often contain significant variations from previous applications that the Division must scrutinize carefully.

The Commission must balance the industry's legitimate concerns over delays in obtaining orders with the Commission's responsibility to analyze significant questions of fact or law underlying the requested relief. Accordingly, in order to streamline review procedures while continuing to scrutinize applications properly, the Commission is proposing to amend rule 0–5 to establish an expedited review procedure for applications that follow precedent, and to amend rule 30–5 to expand the Division Director's delegated authority to approve certain applications.

II. Proposed Revisions to Rule 0–5 for Expedited Review

The proposed amendment to rule 0–5 would allow certain applicants to receive an exemptive order within 90 days of filing an application if the application is based on clear precedent. This approach balances the applicants' desire for a prompt response with the Commission's responsibility under the Act to protect investors. The Division each year receives numerous applications that are essentially identical, except for identifying information, to previously granted applications. The rule amendments would enable those applicants to obtain exemptive orders on a predictable and expedited basis. At the same time, the Commission must preserve its role in the review process. Thus, the rule amendments also provide a procedure for identifying applications submitted for expedited review on the basis of precedent that is inapposite,[26] and for discontinuing expedited review in cases where complete review is deemed appropriate.[27]

Under the amendments, present rule 0–5 would become paragraph (a), and a new paragraph (b) would be added that would provide for expedited review. Applications reviewed under paragraph (b) thus would be subject to the general procedures in paragraph (a), as well as any other applicable filing requirements of the Act and rules.[28] Subparagraph (b)(3) would establish certain time periods for the issuance of notices and orders on applications that conform to precedent, permitting eligible applications to receive an exemptive order within 90 days of filing. Subparagraphs (b)(1) and (b)(2) would impose eligibility and other requirements for expedited review. Subparagraph (b)(4) would establish procedures for discontinuing the expedited procedures, and subparagraph (a)(5) would be added to the rule to permit the Commission[29] to deem certain inactive applications to be abandoned.

A. Expedited Review of Applications Based on Precedent

1. Expedited Review Procedure

Under proposed subparagraph (b)(3), a notice of application would be issued by the Commission within 60 days from the filing of an application, as long as certain requirements were satisfied. In addition, unless either a request for a hearing were filed by an interested person in response to the notice of application published in the **Federal Register**, or the Commission ordered a hearing on its own motion, an order would be issued within 30 days from publication of the notice in the **Federal Register**.[30] Taking into consideration the Commission's limited resources, comment is requested on whether the 60-day and 30-day time periods proposed by the rule amendments are reasonable.

Under the proposed introductory language in paragraph (b), applications filed under sections 2(a)(9), 3(b)(2) or 9(c) would be ineligible for expedited review. The Commission believes these particular types of applications are too fact-specific to be appropriately reviewed under a procedure that relies on clear precedent. The Commission requests comment, however, whether applications filed under these sections or any other section of the Act should be excluded from the expedited review procedure.

The running of the 60-day review period would be subject to certain exceptions. In particular, the filing of an unsolicited amended and restated application automatically would toll the 60-day period. The issuance of a comment letter requesting clarification to, or modification of, the application also would automatically toll the 60-day period.[31] Although applications would be required to conform to precedent, and the Commission anticipates that few comment letters would be issued, there occasionally may be times when a comment letter is necessary either to resolve technical matters or because modifications to precedent are

applications. If the Division, for whatever reason, decides that it is not willing to recommend that the Commission issue an order, the Division may ask that the application be withdrawn. If the applicant does not do so, the Division may recommend that the application be set down for a hearing. Release No. 14492, supra note 12, at n.3; see Counsellors Tandem Securities Fund, Inc. and Sequoia Partners L.P., Investment Company Act Release No. 18940 (Sept. 10, 1992).

[25] See, e.g., Letter from the Subcomm. on Investment Companies and Investment Advisers of the Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association, to Jonathan G. Katz, Secretary, SEC, 7–9 (Oct. 18, 1990), File No. S7–11–90.

[26] Precedent would be inapposite if, for example, an applicant were to use as precedent an application that has been superseded or does not correspond to the requested relief.

[27] The Commission believes that while some Commission resources will be devoted to meeting the time periods imposed by the proposed amendments, such resources would be minimal because, among other reasons, its staff will be reviewing applications and draft notices that have been marked to show changes from previous applications and notices.

[28] See, e.g., 17 CFR 270.0–2 (general filing requirements).

[29] The Commission would delegate this authority to the Division. See subparagraph (a)(9) of the proposed amendment to rule 30–5.

[30] Once a notice is issued by the Commission, the notice will be published in the **Federal Register** in approximately six days. The proposal merely establishes a *maximum* number of days in which the Commission shall act if an applicant correctly follows the established procedures. Thus, if the notice were issued in *less* than 60 days, the order could be issued in less than 90 days.

[31] See paragraph (b)(3)(i)(A) of the proposed rule.

advisable.[32] The proposed rule further provides that the 60-day period would resume fifteen days after the applicant files an amended and restated application that responds to the comment letter, marked to show all changes from the original application or most recent amendment,[33] unless the Division determines that the amended and restated application does not respond adequately to the comment letter. In such case, the Division would notify the applicant that the 60-day period remains tolled.[34]

The Commission believes that the Division needs adequate time to review the amended and restated application both to ensure that it is responsive to the comment letter and to determine whether it still satisfies the requirements established in subparagraphs (b)(1) and (b)(2). The Commission requests comment, however, whether the proposed tolling mechanism is the most appropriate procedure for handling the review of amended and restated applications.[35]

Finally, if a comment letter goes unanswered for more than 30 days, a new 60-day review period would commence on the date an amended and restated application is filed.[36] The Commission requests comment, however, whether a new 60-day review period is appropriate, or whether, in the alternative, such applications should be removed from expedited review and considered thereafter under the general procedures provided in paragraph (a).

Several commenters on the Study Release suggested that the Commission adopt a rule that would allow exemptive applications to become effective automatically within a fixed period of time unless the Commission takes preventive action.[37] These commenters note that such a change would make the Division's procedures resemble provisions of the Securities Act governing the effectiveness of registration statements,[38] and provisions of the Exchange Act regarding the use of proxy materials.[39]

There are critical distinctions, however, between allowing a particular filing to become effective by the passage of time on the one hand, and granting exemptive applications on the other. Specifically, for a registration statement, a statutory obligation is imposed on the issuer to provide full and accurate disclosure of material information, even after the registration statement has become effective and review is completed.[40] In other words, the issuer remains fully liable under the registration statement. For exemptive applications, however, an applicant that has received a Commission order gains a measure of protection from liability, even if the applicant made misrepresentations in its application.[41] Moreover, while section 6(c) is broad, it is not without limitations and it specifically requires the Commission to grant exemptions *only* if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and other purposes intended by the Act.[42] The passive granting of exemptive relief could call into question whether the Commission was meeting its obligations under the Act.

2. Requirements for Expedited Review

In order for an applicant to use the expedited review procedure in subparagraph (b)(3), the application must meet certain requirements under subparagraphs (b)(1) and (b)(2). Subparagraph (b)(1) would require that the applicant seek relief that is consistent in all material respects with the most recent order issued on applications for the same relief. Thus, an applicant seeking relief from particular sections of the Act must use as precedent only those applications for which relief was granted under the same sections. In other words, there could be no "mixing and matching" of relief. The time period for determining the most recent order would be as of thirty days preceding the filing of the application seeking expedited review.[43] Furthermore, subparagraph (b)(1) would require the order to have been issued within two years preceding the filing of the application seeking expedited review.

The expedited procedure is intended to be used only in routine cases where the Commission already has had sufficient time to analyze and consider the requested relief. The Commission believes that applications seeking expedited review must be adequately supported. By requiring that applications seeking expedited review rely on precedent which must be less than two years old, the proposed rule amendments would ensure that the Division is familiar with applicable precedent.

The Commission requests comment, however, whether only applications that obtained relief identical to the application seeking expedited review should be recognized as precedential applications, or whether previous applications could serve as precedent even though the application for expedited review sought only a portion of the relief granted in the previous application.

Subparagraph (b)(1) also requires that an application submitted for expedited review contain certain information, including a statement on its facing sheet that the applicant requests expedited review under rule 0–5(b),[44] and, under a separate heading, a brief summary of the relief requested together with citations to the release numbers of the notices and orders issued on the applications submitted as precedent.

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[32] As the Division reviews the application and makes the necessary findings as required by law, the Division must consider how new facts and circumstances might dictate a modification to precedent.

[33] In addition, counsel, or if applicant is not represented by counsel, the person executing the amended and restated application, must provide a written representation that such markings are accurate and complete. See subparagraph (b)(3)(i)(A)(*l*) of the proposed amendment to rule 0–5.

[34] Such notification would be made in a comment letter addressing the amended and restated application.

[35] In certain instances, the Division may determine that a responsive filing is unnecessary after the comment letter is sent. To address this circumstance, under paragraph (b)(3)(i)(A)(2), the Division simply could send a letter to the applicant announcing that the 60-day period has resumed.

[36] See paragraph (b)(3)(i)(B) of the proposed rule amendments. Of course, if more than 120 days has elapsed since the mailing of the comment letter, the application already may have been declared abandoned under proposed paragraph (a)(5) of the rule. See infra section II.B.

[37] See Letter from Federated Investors to Jonathan G. Katz, Secretary, SEC, 1–2 (Oct. 10, 1990), File No. S7–11–90; Letter from Investment Company Institute to Jonathan G. Katz, Secretary, SEC, 45–46 (Oct. 5, 1990), File No. S7–11–90; Letter from Prudential Mutual Fund Management, Inc. to Jonathan G. Katz, Secretary, SEC, 9 (Oct. 9, 1990), File No. S7–11–90.

[38] Section 8(a) of the Securities Act provides that registration statements become effective in 20 days unless the Commission issues a stop order under either section 8(b) or 8(d). Securities Act of 1933, 15 U.S.C. § 77h(a), (b), (d). In practice, however, most registration statements contain "delaying amendment" language prescribed in rule 473, 17 CFR 230.473, and become effective only when the staff completes its review.

[39] 17 CFR 240.14a–6 (Commission must make comments within 10 days of filing proxy materials).

[40] Securities Act of 1933 sections 11(a), 12, 17(a); 15 U.S.C. 77k(a), 77l, 77q(a).

[41] Under section 38(c) of the Act, no liability attaches "to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason." 15 U.S.C. 80a–37(c).

[42] 15 U.S.C. 80a–6(c).

[43] This 30-day period prior to filing is intended to recognize that applicants may not be able to include as precedent applications that recently have received orders. Of course, at the end of this 30-day period, relevant notices already would be approximately 60 days old.

[44] A statement could be in the form of a checkmarked box next to a request for expedited review under rule 0–5(b) on the facing sheet of the application, similar to rule 487, 17 CFR 230.487.

These requirements are intended to clearly identify requests for expedited review and the precedents on which they rely. They also are intended to help the Commission verify the accuracy of applicants' representations.

Proposed subparagraph (b)(1)(iii) would require that an application seeking expedited review contain each condition, and each material representation, included in the final version of the most recent precedential application.[45] The Commission recognizes that certain representations made in precedential applications are not material to the relief granted, and thus should not be required in applications seeking expedited review. Since conditions embody the essential parts of a precedential application, each of them would be required.

Subparagraph (b)(2) of the proposed rule requires that certain items accompany an application for expedited review. These include a copy of the application marked to show all changes from the application that was granted by the most recent order submitted as precedent, and a draft notice marked to show all changes from the notice issued on such precedential application.[46] These exhibits would allow the Commission readily to discern any variations between the application seeking expedited review and the most recent precedential application.

Subparagraph (b)(2) also requires a statement signed by counsel[47] representing that the application meets each of the requirements of subparagraph (b)(1). Such statement also must represent that both the application marked to show changes and the draft notice marked to show changes were complete and accurate. This written representation would be similar to the representation required from counsel under rule 485 for post-effective amendments filed by certain registered investment companies,[48] and under rule 487 for certain unit investment trusts,[49] and should take the form of a letter signed by counsel.[50]

In essence, the Commission would be requesting counsel to represent that there are no provisions of the application that render it ineligible for filing under paragraph (b). Such a representation, in addition to any other document filed with the application for expedited review, would be subject to section 34(b) of the Act.[51] The Commission requests comment, however, whether there are other appropriate and effective means of ensuring the accuracy of applications and exhibits submitted for expedited review.

3. Discontinuance of Expedited Review

Proposed subparagraph (b)(4) would establish a procedure and bases by which the Commission could discontinue the expedited review of any application. Specifically, the Commission may discontinue expedited review to reconsider whether to grant the relief requested or to consider the need for modifications to an application. In addition, the Commission may determine not to expedite review of any or all applications due to constraints on Commission resources. The Commission would notify affected applicants in writing in cases where the Commission is reconsidering its policy or deciding whether an application needs modification, or by publication in the **Federal Register** in cases where Commission resources will not sustain expedited review.

Subparagraph (b)(4) does not address the situation where an application submitted for expedited review is incomplete or inaccurate. In that case, the Commission could discontinue expedited review because the application did not meet the requirements of paragraph (b). Depending on the degree of incompleteness or inaccuracy, the Commission alternatively could choose, in its discretion, to seek revisions to the application through comments.[52] Of course, the Commission would consider an application for which expedited review has been discontinued under the general procedures in paragraph (a).

B. Applications Deemed To Be Abandoned

Under subparagraph (a)(5) of the proposed rule amendments, the Commission may declare an application abandoned if an applicant fails to file an amended application or otherwise respond in writing to a request for clarification of, or modification to, an application within 120 days of the mailing of such request. Furthermore, if the Division issues a letter stating that it will recommend that the Commission order a hearing on an application, the Commission may declare the application abandoned if the applicant, within 120 days, does not request that the Division recommend a hearing.[53] If the applicant subsequently decides to pursue an abandoned application, the applicant must file a request with the Division to have the application reactivated. The Commission requests comment whether the 120-day period, or a shorter or longer period, is appropriate.

III. Proposed Revisions to Rule 30–5 To Provide for Expanded Delegated Authority

The Commission believes that some of the delays on applications may be caused by an unnecessarily narrow delegation of authority from the Commission to the Division Director. Accordingly, the Commission also is proposing to amend paragraphs (a)(1), (a)(2), (e)(3) and (e)(4) of the Delegation of Authority Rule. These amendments would broaden the Division Director's delegated authority by granting delegated authority with respect to all sections of the Act, and Investment Advisers Act, except as specifically limited.[54] Most importantly, the amendments also would incorporate a new concept of discretion into the

[45] The Commission recognizes that certain applications have many versions due to the filing of amendments. The Commission would require that applications seeking expedited review contain each condition and material representation of the final version of the application submitted as the most recent precedent.

[46] This would serve as the draft notice required under rule 0–2(g). 17 CFR 270.0–2(g).

[47] If the applicant is not represented by counsel, such statement must be signed by the person executing the application. The term "counsel" includes either outside or in-house counsel.

[48] 17 CFR 230.485(e). See Revised Procedures for Processing Post-Effective Amendments Filed by Separate Accounts of Insurance Companies, Investment Company Act Release No. 12434 (May 14, 1982), 47 FR 22356. Such post-effective amendments filed by open-end management investment companies or unit investment trusts become effective immediately under rule 485(b).

[49] 17 CFR 230.487(b)(6). See Automatic Effectiveness of Registration Statements Filed by Certain Unit Investment Trusts, Investment Company Act Release No. 12423 (May 7, 1982), 47 FR 20290. Under rule 487, which provides for expedited effectiveness of registration statements for certain series of unit investment trusts, the Commission indefinitely may suspend a registrant's eligibility for expedited treatment. The Commission has delegated that authority to the Division Director. 17 CFR 200.30–5(b–3).

[50] Except for the requirements of rule 2(e), 17 CFR 201.2(e), counsel would not be held responsible for the accuracy or completeness of the facts in the application, nor would a legal opinion from counsel be required. This is the standard established under rule 487. See Investment Company Act Release No. 12423 (May 7, 1982), 47 FR 20290, 20293. As noted, any amendments to the application also must be accompanied by a written representation from counsel under subparagraph (b)(3)(i)(A)(*l*) of the proposed rule amendments.

[51] § 34(b) of the Act states that it shall be unlawful to make any untrue statement of a material fact in "any registration statement, application, report, account, record, or other document filed * * * pursuant to this title * * *" 15 U.S.C. § 80a–33(b).

[52] See supra notes 30–33 and accompanying text; paragraph (b)(3)(i)(A) of the proposed rule.

[53] Subparagraph (a)(5) is based upon a procedure for abandoned offering statements established under rule 264 of Regulation A. 17 CFR 230.264.

[54] See, e.g., 17 CFR 200.30–5(a)(8) (delegating authority to the Division to issue notices with respect to applications for orders under § 9(c)).

Division Director's decision to present applications to the Commission. Thus, the Division Director generally could issue notices and orders under all provisions of the Act and Investment Advisers Act if the matter did not appear to her to present significant issues not previously settled by the Commission, or to raise questions of fact or policy indicating that the public interest or the interest of investors warranted consideration of the matter by the Commission.

The proposed amendment to rule 30–5 also would add a new provision to the rule to delegate authority to the Division Director to declare certain applications to be abandoned under proposed subparagraph (a)(5) of rule 0–5. Finally, the proposed amendment would delegate authority to the Division Director to suspend use of the expedited review procedure under subparagraph (b)(4) of rule 0–5.

IV. Cost/Benefit of Proposed Actions

Proposed amendments to rules 0–5 and 30–5 would not impose any significant burdens on investment companies. These proposed amendments would benefit investment companies by streamlining the review procedure for exemptive applications and reducing delays in obtaining exemptive orders. 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.

V. 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 0–5 and 30–5. The Analysis explains that the proposed amendments would establish an expedited review procedure for certain exemptive applications and expand the delegated authority of the Director of the Division of Investment Management. The Analysis states that the proposed amendments are intended to reduce delays in obtaining exemptive orders. It also states that while amendments to rule 30–5 would have no new reporting or recordkeeping requirements, the proposed amendment to rule 0–5 would require applicants to file with the Commission an application marked to show changes from the application relied on as precedent; a draft notice marked to show changes from the notice relied on as precedent; and a representation of counsel that the application at issue conforms to the requirements of rule 0–5(b). The Analysis states, however, that any added burden from these requirements would be minimal because many applications already include exhibits that are marked to show changes. The Commission considered a number of significant alternatives to the proposed amendments, but prefers the proposed approach because it provides investment companies with a procedure to receive exemptive orders in an expedited manner, while still permitting the Commission to discharge its responsibility to protect investors. A copy of the Initial Regulatory Flexibility Analysis may be obtained by contacting Matthew M. O'Toole, Esq. or Diane C. Blizzard, Esq., both at Mail Stop 10–4, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

VI. Statutory Authority

The Commission is proposing amendments to rule 0–5 pursuant to sections 6(c) and 38(a) [15 U.S.C. 80a–6(c), 37(a)] of the Act. The Commission is proposing amendments to rule 30–5, the Delegation of Authority Rule, pursuant to section 4A [15 U.S.C. 78d–1] of the Securities Exchange Act of 1934.

List of Subjects in 17 CFR Parts 200 and 270

Authority delegations (government agencies), Investment companies, Reporting and recordkeeping requirements.

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 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The authority citation for part 200, subpart A continues to read in part as follows:

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. Section 200.30–5 is amended by revising paragraphs (a)(1) and (a)(2), adding paragraphs (a)(9) and (a)(10), and revising paragraphs (e)(3) and (e)(4) to read as follows:

§ 200.30–5 Delegation of authority to Director of Division of Investment Management.

* * * * *

(a) With respect to the Investment Company Act of 1940 (15 U.S.C. 80a–1, et seq.):

(1) Except as otherwise provided in this section, to issue notices, pursuant to § 270.05 of this chapter, with respect to applications for orders under the Act and the rules and regulations promulgated thereunder, and, with respect to section 8(f) of the Act, in cases where no application has been filed, where, upon examination, the matter does not appear to him to present significant issues not previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants consideration of the matter by the Commission.

(2) Except as otherwise provided in this section, to authorize the issuance of orders where a notice, pursuant to § 270.0–5 of this chapter, has been issued and no request for a hearing has been received from any interested person within the period specified in the notice and it appears to him that the matter involved presents no significant issue that he believes has not previously been settled by the Commission and it does not appear to him to be necessary in the public interest or the interest of investors that the Commission consider the matter.

* * * * *

(9) To declare applications to be abandoned under the Act.

(10) To suspend the operation of § 270.0–5(b) of this chapter, and to issue written notices to applicants of such suspensions.

* * * * *

(e) With respect to the Investment Advisers Act of 1940 (15 U.S.C. 80b–1, *et seq.*):

* * * * *

(3) To issue notices, pursuant to § 275.0–5(a) of this chapter, with respect to applications for orders under the Act and the rules and regulations promulgated thereunder, where, upon examination, the matter does not appear to him to present significant issues not previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants consideration of the matter by the Commission.

(4) To authorize the issuance of orders where a notice, pursuant to § 275.0–5(a) of this chapter, has been issued and no request for a hearing has been received from any interested person within the period specified by the notice and it appears to him that the matter involved presents no significant issue that he believes has not previously been settled

by the Commission and it does not appear to him to be necessary in the public interest or the interest of investors that the Commission consider the matter.

* * * * *

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;

* * * * *

2. Section 270.0–5 is revised to read as follows:

§270.0–5 Procedure with respect to applications and other matters.

(a) *General Procedures.* The procedure set forth in this paragraph (a) will be followed with respect to any proceeding initiated by the filing of an application, or upon the Commission's own motion, pursuant to any section of the Act or any rule or regulation thereunder, unless in the particular case a different procedure is provided:

(1) Notice of the initiation of the proceeding will be published in the **Federal Register** and will indicate the earliest date upon which an order disposing of the matter may be entered. The notice will also provide that any interested party may, within the period of time specified therein, submit to the Commission in writing any facts bearing upon the desirability of a hearing on the matter and may request that a hearing be held, stating his or her reasons therefor and the nature of his or her interest in the matter.

(2) An order disposing of the matter will be issued as of course, following the expiration of the period of time referred to in paragraph (a)(1) of this section, unless the Commission thereafter orders a hearing on the matter.

(3) The Commission will order a hearing on the matter, if it appears that a hearing is necessary or appropriate in the public interest or for the protection of investors:

(i) Upon the request of any interested person; or

(ii) Upon its own motion.

(4) At the time of filing an application under the Act, the applicant or applicants shall pay to the Commission a total fee of $500, no part of which shall be refunded; however, this fee shall not be applicable to:

(i) Any application for deregistration of an investment company pursuant to Section 8(f) of the Investment Company Act if such company has assets of less than $100,000; or

(ii) Any application pursuant to Section 9(c) of such Act.

(5) The Commission may declare an application to be abandoned if the applicant does not file an amended application or otherwise respond in writing to any letter requesting clarification to or modification of the application, or request that the Division of Investment Management recommend a hearing in response to any letter stating that the Division will oppose the relief requested by the applicant, within 120 days of the mailing of such letter.

(b) *Procedures for Expedited Review of Applications.* Subject to the general procedures described in paragraph (a) of this section, an applicant may request expedited review of an application, other than an application filed under section 2(a)(9), section 3(b)(2) or section 9(c) of the Act, provided that the application meets the requirements of paragraphs (b)(1) and (b)(2) of this section.

(1) Any application for which expedited review is requested shall seek relief that is consistent in all material respects with relief granted by the most recent order (as of thirty days preceding the filing of the application) issued on applications for such relief, and must have been issued within two years preceding the filing of the application, and must contain:

(i) A statement on the facing sheet of such application that applicant requests expedited review under the procedures set forth in this paragraph (b);

(ii) Under a separate heading, a brief summary of the relief requested, together with citations to the captions and Act release number of the notice and order issued on the application submitted as precedent under this paragraph (b)(1); and

(iii) Each of the conditions and material representations contained in the most recent order issued on the final version of the application submitted as precedent under this paragraph (b)(1).

(2) Any application for which expedited review is requested shall be accompanied by the following, attached as exhibits:

(i) A copy of such application marked to show all changes from the final version of the application that was granted by the most recent order submitted as precedent under paragraph (b)(1) of this section;

(ii) A draft notice marked to show all changes from the notice issued on the application that was granted by the most recent order submitted as precedent under paragraph (b)(1) of this section; and

(iii) A statement signed by counsel or, if applicant is not represented by counsel, the person executing the application, representing that such application meets each of the requirements of paragraph (b)(1) of this section and that the markings required by this paragraph (b)(2) are accurate and complete.

(3)(i) A notice as described in paragraph (a)(1) of this section will be issued by the Commission within 60 days from the filing of the application, except that:

(A) The mailing of a letter requesting clarification to or modification of the application to the applicant, or any person authorized to receive communications on behalf of the applicant, or the filing of an amended and restated application by the applicant, shall toll such 60-day period, and such 60-day period shall resume either:

(*1*) 15 days after the filing of an amended and restated application, marked to show all changes from the original application or most recent amendment thereto and accompanied by a statement signed by counsel or, if applicant is not represented by counsel, the person executing the amended application, representing that such markings are accurate and complete; or

(*2*) Upon the mailing of a letter to the applicant announcing that such period has resumed; and

(B) If an amended and restated application is not filed within 30 days of the mailing of any letter requesting clarification to or modification of the application, and no letter has been mailed to the applicant announcing that the 60-day period has resumed, a new 60-day period shall commence on the date such amended and restated application is filed, subject to paragraph (a)(5) of this section.

(ii) Unless the Commission receives a written request for a hearing, or otherwise determines to order a hearing on the matter, an order will be issued as provided by paragraph (a)(2) of this section within 30 days of the publication of the notice in the **Federal Register**.

(4) Notwithstanding any other provision of this section, the Commission may discontinue expedited review:

(i) Of any application in order to reconsider whether to grant the relief requested or to consider the need for modifications to such application; or

(ii) Of any or all applications due to constraints on the Commission's resources. The Commission shall notify affected applicants in writing or by publication in the **Federal Register**.

By the Commission.

Dated: March 26, 1993.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-7440 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-P

POSTAL SERVICE

39 CFR Part 266

Privacy of Information

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: This proposed rule modifies current regulations for the disclosure of information to prospective employers about current or former employees. The amended regulation will specify the exact data elements that may be given to prospective employers without the employee's authorization to release.

DATE: Comments on the proposed rule must be received on or before April 30, 1993.

ADDRESS: Comments may be mailed to: United States Postal Service, Records Office, 475 L'Enfant Plaza Rm 8831, Washington DC 20260-5240.

Comments also may be delivered to Room 8831 at the above address between 8:15 a.m. and 4:45 p.m., Monday through Friday. Comments received also may be inspected during the above hours in Room 8831.

FOR FURTHER INFORMATION CONTACT: Betty E. Sheriff, Records Office (202-268-2924).

SUPPLEMENTARY INFORMATION: Current postal regulations and supporting policy in handbooks allow the disclosure of limited information to prospective employers of current or former postal employees. Public information that may be released is specifically defined as: Grade, duty status, length of service, job title, and salary. The regulation amended by this notice also permits disclosure of the date of separation of a former employee and the reason for separation. Supporting policy in postal handbooks further reference "reason of separation of a former employee as shown on Form 50, Notification of Personnel Action." Because some of the reasons for separation, as denoted by codes on the Form 50, are personal in nature, this notice amends the current regulation to limit disclosure of the reason for separation to specific terms not having substantial privacy implications. Postal handbooks and the routine use authorizing disclosure of employee data to prospective employers will be amended to parallel this proposed rule. (See routine use No. 1 of USPS 120.070, Personnel Records—General Personnel Folder (Official Personnel Folders and records related thereto), last published on June 19, 1991 at 56 FR 28181, amended on December 4, 1992 at 57 FR 57516.)

List of Subjects in 39 CFR Part 266

Privacy, Release of Information.

For the reasons set out in this notice, the Postal Service proposes to amend part 266 of Title 39, CFR as follows:

PART 266—PRIVACY OF INFORMATION

1. The authority citation for part 266 continues to read as follows:

Authority: 39 U.S.C. 401; 5 U.S.C. 552a.

2. Paragraph (b)(5) of § 266.4 is revised to read as follows:

* * * * *

(b) * * *

(5) *Employee Job References.* Prospective employers of a postal employee or a former postal employee may be furnished with the information in paragraph (b)(4) of this section, in addition to the date and the reason for separation, if applicable. The reason for separation must be limited to one of the following terms: Retired, resigned, death, or separated. Other terms or variations of these terms (e.g., retired—disability) may not be used. If additional information is desired, the requester must submit the written consent of the employee, and an accounting of the disclosure must be kept.

* * * * *

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 93-7409 Filed 3-30-93; 8:45 am]

BILLING CODE 7710-12

ENVIRONMENTAL PROTECTION AGENCY

[TN-95-5651; FRL-4608-8]

40 CFR Parts 52 and 81

Designation of Areas for Air Quality Planning Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On August 26, 1992, the State of Tennessee, through the Tennessee Department of Conservation and Environment, submitted a request to redesignate Knox County (classified as a marginal nonattainment area) from nonattainment to attainment for ozone (O_3) and a maintenance plan. The State has met the requirements for redesignation contained in section 107(d)(3)(E) of the Clean Air Act as amended in 1990 (CAA). EPA proposes to approve the maintenance plan and the redesignation of Knox County, Tennessee, to attainment for O_3. The redesignation is based on three years of ambient monitoring data that shows no violations of the O_3 standard during the three-year period, 1989-1991, as well as the implementation of EPA-approved O_3 control strategies.

DATES: To be considered, comments must be received on or before April 30, 1993.

ADDRESSES: Comments may be mailed to Leslie Cox at the EPA Region IV address listed below. Copies of the material submitted by Tennessee may be examined during normal business hours at the following locations:

Region IV Air Programs Branch, Environmental Protection Agency, 345 Courtland Street, Atlanta, Georgia 30365.

Division of Air Pollution Control, Tennessee Department of Conservation and Environment, L & C Annex, 9th Floor, 401 Church Street, Nashville, Tennessee 37243-1531.

Knox County Department of Air Pollution Control, City/County Building, suite 459, 400 Main Avenue, Knoxville, Tennessee 37902.

FOR FURTHER INFORMATION CONTACT: Leslie Cox of the Region IV Air Programs Branch at 404-347-2864 and at the above address.

SUPPLEMENTARY INFORMATION: In a **Federal Register** notice published November 6, 1991, Knox County was designated as nonattainment for ozone due to monitored exceedances of the ozone standard during the summer of 1988. This designation became effective 60 days later on January 6, 1992. On August 26, 1992, the State of Tennessee, through the Tennessee Department of Conservation and Environment, submitted a request for Knox County to be redesignated to attainment for ozone. This request was based on three years (1989, 1990, and 1991) of quality assured monitoring data with an expected exceedance rate for the ozone standard of less than 1.0 per year. EPA has determined that the State of Tennessee has met all of the CAA requirements for designation pursuant to section 107(d)(3)(E). The requirements of section 107(d)(3)(E) are as follows.

Section 107(d)(3)(E)(i) The Administrator has Determined That the Area has Attained the National Ambient Air Quality Standard

Tennessee submitted quality-assured air quality data showing that Knox County has attained the ozone NAAQS for ozone for the three year period, 1989–1991. Following the procedures described in 40 CFR 50.9, Knox County had an average annual number of expected exceedances of less than or equal to one. During that period, there was only one exceedance in 1990, and hence, no violations of the ozone standard. Knox County has continued to attain the standard in 1992, as well.

Section 107(d)(3)(E)(ii) The Administrator has Fully Approved the Applicable Implementation Plan for the Area Under Section 110(k)

The proposed approval of the maintenance plan in this notice, along with the current approved Tennessee SIP and the pending approval of the recently submitted revisions (January 29, 1992, and June 15, 1992) to the Knox County portion of the Tennessee SIP, regarding PSD, meets all requirements under part D section 110 which are applicable to the Knox County, Tennessee, area. Corrections to the PSD rules were made by Knox County so that EPA could fully approve the PSD regulation for Knox County. The approval of this change will be published in a direct final **Federal Register** notice.

EPA will not take final action redesignating Knox County from nonattainment to attainment until EPA has taken final action on Knox County's PSD rules. Therefore, we believe that Knox County will have a fully approved SIP under section 110(k) at the time final approval action is taken on the PSD submittal.

Section 107(d)(3)(iii) The Administrator Determines that the Improvement in Air Quality is Due to Permanent and Enforceable Reductions in Emissions Resulting from Implementation of the Applicable Implementation Plan and Applicable Federal Air Pollutant Control Regulations and Other Permanent and Enforceable Reductions

The Federal Motor Vehicle Control Program (FMVCP) requirements for lower tail pipe standards have reduced emissions in Knox County. The FMVCP, which began in 1968, produces significant reductions in average emissions per vehicle each year as new, highly controlled vehicles replace old, dirty vehicles in the vehicle fleet. In Knoxville, these reductions in VOC were 6%–8% per vehicle per year for the 1989–1991 time period. In addition, the Federal requirements to reduce the Reid Vapor Pressure (RVP) of gasoline to 9.5 psi went into effect in Knox County during the Summer of 1989. (Previously, the RVP was set at 10.5 psi for May, June, and September and 9.5 psi for July and August.) The air quality data showing attainment of the standard is for the time period, 1989–1991, when this requirement was in effect. As required for nonattainment areas in the Southeast, a RVP of 7.8 psi went into effect on June 1, 1992, in Knox County. This is discussed further under the section on maintenance plans. Tennessee has also voluntarily adopted VOC RACT regulations for sources that are applicable in Knox County. These VOC regulations were recently corrected to be consistent with EPA's pre-Amendment RACT guidance.[1] Therefore, since the area violated the standard, permanent and enforceable VOC emissions reductions have been obtained through State and Federal control programs.

Section 107(d)(3)(E)(iv) The Administrator has Fully Approved a Maintenance Plan for the Area as Meeting the Requirements of Section 175A.

Tennessee has submitted a maintenance plan based on the 1990 Base Year Inventory submitted as required in section 175A of the CAA. The maintenance plan includes a requirement to assess growth factors on a triennial basis with the contingency to assess on a yearly basis if the projection inventory is exceeded by 10% or more. The monitoring network in Knox County will be maintained in accordance with the regulatory requirements of 40 CFR part 58. The projection inventory is required by the CAA to demonstrate maintenance of the standard for 10 years from the date of final approval of the redesignation request. Therefore, Knox County has submitted an inventory which projects out to the year 2004. This covers the 10 years required in the projection inventory and builds in extra years to account for the time it will take to process this redesignation. The projection inventory reflects the allowable emission rate and the expected actual production or activity level.

The plan contains a contingency to implement additional control measures such as Control Technique Guideline (CTG) categories within six (6) months should actual monitored violations of the ozone standard occur in the area. Also, if actual monitored violations of the ozone standard occur within twelve (12) months after regulations for all VOC CTG categories are effective, NO_x control measures will be considered as an alternate/additional strategy.

Accompanying the redesignation request is a request to revise the Federal RVP for the Knox County area from 7.8 psi, which went into effect on June 1, 1992, to 9.0 psi. EPA will consider this request in a separate action. For purposes of redesignation, however, Tennessee's reliance on a 9.0 psi RVP to demonstrate maintenance of the ozone standard does not affect EPA's ability to act on the request. Although Knox County will be required to retain the 7.8 psi RVP until EPA takes final action revising the RVP, the less stringent RVP for purposes of demonstrating maintenance does not affect EPA's proposed approval of the maintenance plan and the redesignation request.

The projected inventory shows that even with the 9.0 psi RVP (as opposed to the present RVP of 7.8 psi), the total emissions for VOC, NO_x, and CO for the year 2004 will be less than the 1990 base year total emissions for those pollutants. Additionally, at no time do the total VOC projected emissions exceed the 1990 baseline year.

Section 107(d)(3)(E)(v) The State Containing Such Area has Met all Requirements Applicable to the Area Under Section 110 and Part D.

The State has complied with all requirements of section 110 and part D of the CAA. In addition, Tennessee has taken additional measures beyond section 110 and part D by implementing RACT fix-ups statewide, even though RACT is not required statewide for Tennessee. For reasons discussed above, EPA believes that all of the requirements of section 107(d)(3)(E) have been satisfied.

The 1990 Amendments require that states make several changes to their PSD program, as well. However, these changes do not affect this redesignation. EPA anticipates receipt of these changes from Tennessee upon final promulgation of revised federal regulations.

Upon redesignation of this area to attainment, the PSD provisions contained in part C of title I are applicable. Until that time, the

[1] Among other things, the pre-Amendment guidance consists of the VOC RACT portions of the Post-87 policy, 52 FR 45044 (November 24, 1987); the Bluebook, "Issues Relating to VOC Regulation Cutpoints, Deficiencies and Deviations, Clarification to Appendix D of November 24, 1987 **Federal Register** Notice" (of which notice of availability was published in the **Federal Register** on May 25, 1988); and the existing CTGs.

nonattainment new source review (NSR) provisions of part D still apply. Although Tennessee has not submitted part D permitting provisions, permitting under the interim transitional guidance[2] satisfies the CAA requirements.

EPA has not promulgated final conformity regulations, however, the State has committed to develop conformity procedures consistent with the final Federal regulations and, if necessary, will submit an appropriate SIP revision. Therefore, EPA believes that the section 176 conformity requirement is sufficiently met because the promulgation date for conformity procedures has not passed and the State has committed to adopt appropriate procedures.

PROPOSED ACTION: Today, EPA is proposing to approving the redesignation of Knox County to attainment for ozone. This action is contingent on minor corrections which must be made to the 1990 Base Year Emission Inventory and the PSD revisions which must be approved before final approval can be granted.

For further information, the reader may review the Technical Support Document which contains a detailed review of the material submitted. This is available at the EPA address given previously. Interested persons are invited to submit comments on this proposed approval. EPA will consider all comments received within thirty days of the publication of this notice.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et. seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

Redesignation of an area to attainment under section 107(d)(3)(E) of the CAA does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any regulatory requirements on sources. The Administrator certifies that the approval of the redesignation request will not affect a substantial number of small entities.

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

List of Subjects

40 CFR Part 52

Air pollution control, Carbon Monoxide, Hydrocarbons, Incorporation by Reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Authority: 42 U.S.C. 7401–7671q.

Dated: February 11, 1993.

Don Guinyard,

Acting Regional Administrator.

[FR Doc. 93–7355 Filed 3–30–93; 8:45 am]

BILLING CODE 6560–50–P

[2] The part D permitting transitional guidance is contained in the following EPA memoranda from John Seitz: "New Source Review Program Transitional Guidance" (March 11, 1991) and "New Source Review Program Supplemental Transitional Guidance on Applicability of New part D NSR Permit Requirements" (September 3, 1992).

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40 CFR Part 63

[FRL–4608–7]

National Emission Standards for Hazardous Air Pollutants; Halogenated Solvent Emissions From Organic Solvent Cleaners

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is interested in obtaining comments from industry potentially affected by this standard, to help it in its efforts to determine the economic impact of this NESHAP. As this rulemaking is being developed, it is the EPA's desire to ensure that these standards are based on the most complete and accurate information available.

DATES: Comments must be postmarked on or before April 30, 1993.

ADDRESSES: Comments on this notice should be submitted in duplicate if possible, to Central Docket Section (LE–131), Attention: Docket Number A–92–39, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Almodovar, Chemicals and Petroleum Branch, or Mr. John L. Sorrels, Standards Development Branch, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711, telephone numbers (919) 541–0283 and (919) 541–5041, respectively.

SUPPLEMENTARY INFORMATION:

I. Background

Under Section 112 of the Clean Air Act Amendments of 1990, the Environmental Protection Agency (EPA) is required to promulgate a national emission standard for hazardous air pollutants (NESHAP) for the halogenated solvent cleaning-vapor degreasing source category. The initial source category list can be found in the **Federal Register** (57 FR 31576; July 16,1992) notice entitled "Initial List of Source Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990." This NESHAP is being developed for the control of the following halogenated solvent emissions from organic solvent batch vapor cleaners, and from organic solvent continuous (also called in-line cleaners) cold and vapor cleaners: 1,1,1 trichloroethane, perchloroethylene, methylene chloride, and trichloroethylene. This rulemaking is subject to a consent decree in which the EPA must propose the regulation not later than November 15, 1993, and promulgate it not later than 12 months after proposal. The solvent cleaning-vapor degreasing industry includes both major and area sources.

The information collection effort to develop this regulation has focused on manufacturers of halogenated solvent cleaners, users of this type of equipment, and manufacturers of halogenated solvents. Through this effort, the EPA has collected data to estimate: Number of halogenated solvent cleaners which would be subject to this rule, solvent consumption for the above mentioned solvents, and effectiveness of control techniques used to control emissions from this type of equipment. The collected information is being used to develop background information to support the rulemaking and to develop an economic impact analysis for industries subject to it.

It is well recognized that there is no unique "degreasing" industry. A 1976 study identified 38 3-digit standard industrial classification (SIC) industries that use degreasers (Docket No. OAQPS–78–12, Item III-B–001). These industries range from production of guided missiles, space vehicles, and associated parts (SIC 376) with 141 establishments (places of business) to industrial machinery, not elsewhere classified (SIC 359) with 22,346 establishments. More than 254,000 establishments could be affected directly or indirectly by a degreasing NESHAP. Most of these establishments are small businesses; in only one SIC code did 50 percent or more of the

establishments have 100 or more employees. According to the Small Business Association (SBA), 500 is the maximum number of employees for an establishment in these SIC codes to be designated a small business.

According to 1991 data, the most commonly used halogenated solvent was 1,1,1 trichloroethane (TCA), of which 123.8 million kilograms were consumed. The next most commonly used was trichloroethane (TCE), and then methylene chloride (MC) and perchloroethylene (PCE).

The EPA also attempted to account for the number of degreasers using halogenated solvents. As of 1987, there were approximately 25,000 to 35,000 batch vapor cleaners, and 2,000 to 3,000 continuous cleaners according to the EPA estimates.

The EPA has also developed capital and annual costs for several control techniques used to evaluate control combinations found in degreasers. Capital costs are assumed to include taxes, freight, and installation charges. In addition, floor space required by add-on equipment is included as a capital cost. The utility and labor requirements for each add-on control device were translated into annual operating costs. As with the capital costs and floor space requirements, the annual operating costs were developed by averaging data for each cleaner model size. Costs were developed based upon a 15-year lifetime for the equipment, a 10 percent interest, median control costs for each level of control, and a solvent recovery credit which equals the emission reduction achieved by the control combination. The solvent recovery credit assumes that all solvent no longer emitted represents a direct solvent savings. In addition to the previously mentioned cost considerations, solvent prices and the equipment operating schedules used to develop these costs influence the outcome of this analysis. Solvent prices used in the cost analysis were obtained by averaging the prices quoted by several solvent distributors for each solvent. Average solvent prices used are: methylene chloride ($1.03/kg), perchloroethylene ($1.11/kg), trichloroethylene ($1.43/kg), and 1,1,1 trichloroethane ($2.202/kg). This cost analysis reflects cost savings, particularly in the larger batch cleaners and in-line cleaners. Cost savings imply that solvent recovery credits are greater than annualized control costs.

II. Request for Comments

It would be very helpful for the EPA to receive comments from the affected industry to help in its efforts to determine the economic impact of this NESHAP. Specific comments are requested in the following areas (the term "degreaser" refers only to degreasers using halogenated solvents, unless otherwise noted):

- Provide the 3-digit SIC code or a description of the type of businesses which use degreasers.
- Provide information on what percentage of production cost is accounted for by degreasing for products that are put in degreasers.
- Discuss reasons, if any, for not being able to obtain capital to finance an emission control retrofit of an existing degreaser or to purchase a new one.
- For a particular size and type (i.e., batch or continuous cleaner), provide information on what is the average service life for a degreaser.
- Discuss the reasons for switching to alternative solvents (aqueous, semi-aqueous, or other nonhalogenated) and alternative techniques (dip cleaning, wipe-on rags).
- Provide information as to why some products might require halogenated solvent degreasing (i.e., why substitution of halogenated solvents might not be possible for degreasing certain products).
- Discuss instances in which cold cleaners that use halogenated solvents are presently in operation.
- Provide comments, if any, on the assumptions and cost methodology described in this notice (i.e., solvent prices).
- Provide comments on the existence of cost savings in this source category.

Dated: March 24, 1993.

Michael Shapiro,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 93-7353 Filed 3-30-93; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 93-64, RM-8195]

Radio Broadcasting Services; Corning, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed on behalf of Phoenix Broadcasting, Inc., licensee of Station KCEZ(FM), Corning, California, seeking the substitution of Channel 264C1 for Channel 264B and modification of its license accordingly to specify operation on the higher powered channel. Coordinates for this proposal are 40-15-31 and 122-05-20.

Petitioner's modification proposal is consistent with the provisions of Section 1.420(g) of the Commission's Rules. Therefore, we will not accept competing expressions of interest in the use of Channel 264C1 at Corning, or require the petitioner to demonstrate the availability of an additional equivalent class channel.

DATES: Comments must be filed on or before May 17, 1993, and reply comments on or before June 1, 1993.

ADDRESSES: Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Dennis J. Kelly, Esq., Cordon and Kelly, P.O. Box 6648, Annapolis, MD 21401.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 93-64, adopted March 8, 1993, and released March 25, 1993. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, D.C. 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 93-7339 Filed 3-30-93; 8:45 am]

BILLING CODE 6712-01-M

Notices

Federal Register
Vol. 58, No. 60
Wednesday, March 31, 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 AGRICULTURE

Federal Grain Inspection Service

Request for Comments on the Applicants for Designation in the Geographic Areas Currently Assigned to the Schneider (IN) Agency and the State of Georgia (GA)

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: FGIS requests interested persons to submit comments on the applicants for designation to provide official services in the geographic areas currently assigned to Schneider Inspection Service, Inc. (Schneider), and the Georgia Department of Agriculture (Georgia).

DATES: Comments must be postmarked, or sent by telecopier (FAX) or electronic mail by April 30, 1993.

ADDRESSES: Comments must be submitted in writing to Homer E. Dunn, Chief, Review Branch, Compliance Division, FGIS, USDA, room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454. SprintMail users may respond to [A:ATTMAIL,O:USDA,ID:A36HDUNN]. ATTMAIL and FTS2000MAIL users may respond to !A36HDUNN. Telecopier (FAX) users may send responses to the automatic telecopier machine at 202–720–1015, attention: Homer E. Dunn. All comments received will be made available for public inspection at the above address located at 1400 Independence Avenue, SW., during regular business hours.

FOR FURTHER INFORMATION CONTACT: Homer E. Dunn, telephone 202–720–8525.

SUPPLEMENTARY INFORMATION:

This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

In the January 28, 1993, **Federal Register** (58 FR 6382), FGIS asked persons interested in providing official services in the geographic areas assigned to Schneider and Georgia to submit an application for designation. Applications were due by March 1, 1993. Schneider and Georgia, the only applicants, each applied for designation in the entire area currently assigned to them.

FGIS is publishing this notice to provide interested persons the opportunity to present comments concerning the applicants for designation in the Schneider and Georgia areas. Commenters are encouraged to submit reasons and pertinent data for support or objection to the designation of these applicants. All comments must be submitted to the Compliance Division at the above address.

Comments and other available information will be considered in making a final decision. FGIS will publish notice of the final decision in the **Federal Register**, and FGIS will send the applicants written notification of the decision.

AUTHORITY: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: March 23, 1993

Neil E. Porter

Acting Director, Compliance Division

[FR Doc. 93–7008 Filed 3–30–93; 8:45 am]

BILLING CODE 3410–EN–F

Request for Applications from Persons Interested in Designation to Provide Official Services in the Geographic Areas Presently Assigned to the Mid-Iowa (IA) and Southern Illinois (IL) Agencies, and the State of Oregon (OR)

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: The United States Grain Standards Act, as amended (Act), provides that official agency designations shall end not later than triennially and may be renewed. The designations of Mid-Iowa Grain Inspection, Inc. (Mid-Iowa), Southern Illinois Grain Inspection Service, Inc. (Southern Illinois), and the Oregon Department of Agriculture (Oregon) will end September 30, 1993, according to the Act, and FGIS is asking persons interested in providing official services in the specified geographic areas to submit an application for designation.

DATES: Applications must be postmarked or sent by telecopier (FAX) on or before April 30, 1993.

ADDRESSES: Applications must be submitted to Homer E. Dunn, Chief, Review Branch, Compliance Division, FGIS, USDA, Room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454. Telecopier (FAX) users may send their application to the automatic telecopier machine at 202–720–1015, attention: Homer E. Dunn. If an application is submitted by telecopier, FGIS reserves the right to request an original application. All applications will be made available for public inspection at this address located at 1400 Independence Avenue, S.W., during regular business hours.

FOR FURTHER INFORMATION CONTACT: Homer E. Dunn, telephone 202–720–8525.

SUPPLEMENTARY INFORMATION:

This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

Section 7(f)(1) of the Act authorizes FGIS' Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services.

FGIS designated Mid-Iowa, main office located in Cedar Rapids, Iowa; Southern Illinois, main office located in O'Fallon, Illinois; and Oregon, main office located in Salem, Oregon, to provide official grain inspection services under the Act on October 1, 1990.

Section 7(g)(1) of the Act provides that designations of official agencies shall end not later than triennially and may be renewed according to the criteria and procedures prescribed in Section 7(f) of the Act. The designations of Mid-Iowa, Southern Illinois, and Oregon end on September 30, 1993.

The geographic area presently assigned to Mid-Iowa, in the State of Iowa, pursuant to Section 7(f)(2) of the

Act, which will be assigned to the applicant selected for designation is as follows:

Bounded on the North by the northern Winneshiek and Allamakee County lines;

Bounded on the East by the eastern Allamakee County line; the eastern and southern Clayton County lines; the eastern Buchanan County line; the northern and eastern Jones County lines; the eastern Cedar County line south to State Route 130;

Bounded on the South by State Route 130 west to State Route 38; State Route 38 south to Interstate 80; Interstate 80 west to U.S. Route 63; and

Bounded on the West by U.S. Route 63 north to State Route 8; State Route 8 east to State Route 21; State Route 21 north to D38; D38 east to State Route 297; State Route 297 north to V49; V49 north to Bremer County; the southern Bremer County line; the western Fayette and Winneshiek County lines.

The geographic area presently assigned to Southern Illinois, in the States of Illinois and Indiana, pursuant to Section 7(f)(2) of the Act, which will be assigned to the applicant selected for designation is as follows:

Bounded on the East in Indiana by the eastern Putnam, Owen, and Greene County lines; the southern Greene County line; the southern Sullivan County line west to U.S. Route 41(150); U.S. Route 41(150) south to U.S. Route 50; U.S. Route 50 west to the eastern Lawrence County line; in Illinois, the eastern Lawrence, Wabash, Edwards, White, and Gallatin County lines;

Bounded on the South by the southern Gallatin, Saline, and Williamson County lines; the southern Jackson County line west to U.S. Route 51; U.S. Route 51 north to State Route 13; State Route 13 northwest to State Route 149; State Route 149 west to State Route 3; State Route 3 northwest to State Route 51; State Route 51 south to the Mississippi River;

Bounded on the West by the Mississippi River north to Interstate 270; Interstate 270 east to Interstate 70; Interstate 70 east to State Route 4; State Route 4 north to Macoupin County; the southern Macoupin County line; the eastern Macoupin County line north to a point on this line which intersects with a straight line, from the junction of State Route 111 and the northern Macoupin County line to the junction of Interstate 55 and State Route 16 (in Montgomery County); and

Bounded on the North from this point southeast along the straight line to the junction of Interstate 55 and State Route 16; State Route 16 east-northeast to a point approximately 1 mile northeast of Irving; a straight line from this point to the northern Fayette County line; the northern Fayette, Effingham, and Cumberland County lines; the western Clark County line; the western Edgar County line north to U.S. Route 36; U.S. Route 36 east across the Illinois-Indiana State line to the western Parke County line; the northern Parke and Putnam County lines.

The following locations, outside of the above contiguous geographic area, are part of this geographic area assignment: Tabor Grain Co., Newman, Douglas County, Illinois; Tabor Grain Co., Oakland, Coles County, Illinois; and Cargill, Inc., Dana, Vermillion County, Indiana (located inside Champaign-Danville Grain Inspection Departments, Inc.'s, area).

The geographic area presently assigned to Oregon, pursuant to Section 7(f)(2) of the Act, which will be assigned to the applicant selected for designation, is the entire State of Oregon, except those export port locations within the State which are serviced by FGIS.

Interested persons, including Mid-Iowa, Southern Illinois, and Oregon are hereby given the opportunity to apply for designation to provide official services in the geographic areas specified above under the provisions of Section 7(f) of the Act and section 800.196(d) of the regulations issued thereunder. Designation in the specified geographic areas is for the period beginning October 1, 1993, and ending September 30, 1996. Persons wishing to apply for designation should contact the Compliance Division at the address listed above for forms and information.

Applications and other available information will be considered in determining which applicant will be designated.

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: March 23, 1993

Neil E. Porter,

Acting Director, Compliance Division.

[FR Doc. 93–7007 Filed 3–30–93; 8:45 am]

BILLING CODE 3410-EN-F

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Advance Monthly Retail Sales Survey.

Form Number(s): B–104(93).

Agency Approval Number: 0607–0104.

Type of Request: Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.

Burden: 3,363 hours.

Number of Respondents: 3,363.

Avg Hours Per Response: 5 minutes.

Needs and Uses: The Bureau of the Census conducts the Advance Monthly Retail Sales Survey to collect monthly sales data from a national sample of retail establishments. The survey provides an early indication of changes in current retail trade activity at the United States level. Census releases the advance sales estimates 9 days after the end of the data month in a press release called "Advance Monthly Retail Sales Report." The Council of Economic Advisors, Bureau of Economic Analysis, Federal Reserve Board, other government agencies, and businesses use the advance monthly sales estimates in formulating economic decisions.

Affected Public: Businesses or other for–profit organizations, Small businesses or organizations.

Frequency: Monthly.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Maria Gonzalez, (202) 395–7313.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, room 5312, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Maria Gonzalez, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: March 26, 1993.

Edward Michals,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 93–7458 Filed 3–30–93; 8:45 am]

BILLING CODE 3510-07-F

Agency Form Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: School Enrollment Report.

Form Number(s): P–4.

Agency Approval Number: 0607–0459.

Type of Request: Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.

Burden: 20 hours.

Number of Respondents: 40.

Avg. Hours Per Response: 30 minutes.

Needs and Uses: The Census Bureau prepares estimates of state population and migration patterns which are used by Federal agencies to allocate Federal program funds, as bases for rates of occurrences, and as input for Federal surveys. The Census Bureau uses state population estimates to control their county estimates and as a basis for state projections. Census uses school enrollment data in preparing their state population estimates. Some state education agencies publish this enrollment information in time for Census to use it in their estimates. Census uses the School Enrollment Report to gather school enrollment data from the 40 state agencies that do not publish in time for them to use their reports.

Affected Public: State or local governments.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Maria Gonzalez, (202) 395–7313.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, room 5312, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Maria Gonzalez, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: March 26, 1993.

Edward Michals,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 93–7459 Filed 3–30–93; 8:45 am]

BILLING CODE 3510–07–M

Bureau of the Census

Census Advisory Committee (CAC) of the American Economic Association (AEA), the CAC of the American Marketing Association (AMA), the CAC of the American Statistical Association (ASA), and the CAC on Population Statistics; Meeting

Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463 as amended by Pub. L. 94–409), we are giving notice of a joint meeting followed by separate and jointly held (described below) meetings of the CAC of the AEA, CAC of the AMA, CAC of the ASA, and CAC on Population Statistics. The joint meeting will convene on April 15–16, 1993 at the Bureau of the Census, room 1630, Federal Building 3, Suitland, Maryland.

The CAC of the AEA is composed of nine members appointed by the president of the AEA. It advises the Director, Bureau of the Census, on technical matters, accuracy levels, and conceptual problems concerning economic surveys and censuses; reviews major aspects of the Census Bureau's programs; and advises on the role of analysis within the Census Bureau.

The CAC of the AMA is composed of nine members appointed by the chairman of the board of the AMA. It advises the Director, Bureau of the Census, regarding the statistics that will help in marketing the Nation's products and services and on ways to make the statistics the most useful to users.

The CAC of the ASA is composed of 12 members appointed by the president of the ASA. It advises the Director, Bureau of the Census, on the Census Bureau's programs as a whole and on their various parts; considers priority issues in the planning of censuses and surveys; examines guiding principles; advises on questions of policy and procedures; and responds to Census Bureau requests for opinions concerning its operations.

The CAC on Population Statistics is composed of four members appointed by the Secretary of Commerce and five members appointed by the president of the Population Association of America from the membership of that Association. The CAC on Population Statistics advises the Director, Bureau of the Census, on current programs and on plans for the decennial census of population.

The agenda for the April 15 combined meeting that will begin at 9 a.m. and end at 10:15 a.m. is: (1) Introductory remarks by the Acting Director, Bureau of the Census; (2) economic and agriculture censuses update; and (3) research data centers.

The agendas for the four committees in their separate and jointly held meetings that will begin at 10:30 a.m. and adjourn at 4:45 p.m. on April 15 are as follows:

The CAC of the AEA: (1) Census Bureau responses to recommendations and activities of special interest to the CAC of the AEA, (2) current issues in poverty measurement, (3) transportation statistics, (4) improvement of the M3 survey with computer-assisted survey information collection (joint with the CAC of the AMA), and (5) economic classification policy committee issue papers (joint with the CACs of the AMA and the ASA).

The CAC of the AMA: (1) Census Bureau responses to recommendations and activities of special interest to the CAC of the AMA, (2) issues and initiatives for census quality management, (3) public information office action plan for 1993, (4) improvement of the M3 survey with computer-assisted survey information collection (joint with the CAC of the AEA), and (5) economic classification policy committee issue papers (joint with the CACs of the AEA and the ASA).

The CAC of the ASA: (1) Census Bureau responses to recommendations and activities of special interest to the CAC of the ASA, (2) research to improve mail-back response rates for decennial census forms (joint with the CAC on Population Statistics), (3) research on adjustment of the 1990 census base for postcensal estimates (joint with the CAC on Population Statistics), (4) overview of R&D sampling and estimation (joint with the CAC on Population Statistics), and (5) economic classification policy committee issue papers (joint with the CACs of the AEA and the AMA).

The CAC on Population Statistics: (1) Census Bureau responses to recommendations and activities of special interest to the CAC on Population Statistics, (2) research to improve mail-back response rates for decennial census forms (joint with the CAC of the ASA), (3) research on adjustment of the 1990 census base for postcensal estimates (joint with the CAC of the ASA), (4) overview of R&D sampling and estimation (joint with the CAC of the ASA), and (5) metropolitan area redefinitions and research.

The agendas for the April 16 meeting that will begin at 9 a.m. and adjourn at 1 p.m. are:

The CAC of the AEA: (1) Preliminary evaluation of the annual capital expenditures survey, (2) manufacturing energy consumption survey, (3) development and discussion of recommendations, and (4) closing session including (a) continued committee and staff discussions, (b) plans and suggested agenda for next meeting, and (c) comments by outside observers.

The CAC of the AMA: (1) Census Bureau education program: introducing the leaders of tomorrow, (2) market research on the usage of Census Bureau products (joint with the CAC on Population Statistics, (3) development and discussion of recommendations, and (4) closing session including (a)

continued committee and staff discussions, (b) plans and suggested agenda for next meeting, and (c) comments by outside observers.

The CAC of the ASA: (1) Census 2000: Report on content and wording (joint with the CAC on Population Statistics), (2) overview of the Economic Statistical Methods Division, (3) development and discussion of recommendations, and (4) closing session including (a) continued committee and staff discussions, (b) plans and suggested agenda for next meeting, and (c) comments by outside observers.

The CAC on Population Statistics: (1) Census 2000: Report on content and wording (joint with the CAC of the ASA), (2) market research on the usage of Census Bureau products (joint with the CAC of the AMA), (3) development and discussion of recommendations, and (4) closing session including (a) continued committee and staff discussions, (b) plans and suggested agenda for next meeting, and (c) comments by outside observers.

All meetings are open to the public, and a brief period is set aside on April 16 for public comment and questions. Those persons with extensive questions or statements must submit them in writing to the Census Bureau Committee Liaison Officer at least 3 days before the meeting.

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should also be directed to the Census Bureau official named below.

Persons wishing additional information regarding these meetings or who wish to submit written statements may contact the Committee Liaison Officer, Mrs. Phyllis Van Tassel, room 2419, Federal Building 3, Suitland, Maryland. (Mailing address: Washington, DC 20233). Telephone: (301) 763-5410—TDD (301) 763-4056.

Dated: March 24, 1993.

Harry A. Scarr,

Acting Director, Bureau of the Census.

[FR Doc. 93-7426 Filed 3-30-93; 8:45 am]

BILLING CODE 3510-07-M

Bureau of Export Administration

Action Affecting Export Privileges, Baxter International Inc.

Order

The Office of Antiboycott Compliance, Bureau of Export Administration, United States Department of Commerce (Department), having determined to initiate an administrative proceeding against Baxter International Inc. (Baxter) pursuant to section 11(c) of the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C.A. app. §§ 2401-2420 (1991 and Supp. 1992)) (the Act),[1] and part 788 of the Export Administration Regulations (currently codified at 15 CFR parts 768-799 (1992)) (the Regulations), based on allegations set forth in the Proposed Charging Letter that is attached hereto and incorporated herein by reference, that Baxter, a United States person as defined in § 769.1(b) of the Regulations, in connection with activities in the interstate or foreign commerce of the United State as defined in § 769.1(d) of the Regulations, violated part 769 of the Regulations in that, from February 1988 through November 1988, Baxter furnished 337 items of prohibited information with intent to comply with, further, or support an unsanctioned foreign boycott, and failed to report to the Department its receipt of four separate boycott-related requests;

The Department and Baxter having entered into a Consent Agreement (Agreement) whereby the Department and Baxter have agreed to settle this matter in accordance with the terms and conditions set forth therein; and

The terms and conditions of the Agreement having been approved by me;

It is Therefore Ordered:

First, that Baxter will pay to the Department, in complete settlement of all alleged violations of the Regulations arising out of the activities set forth in the Proposed Charging Letter, the sum of $3,382,000. Baxter shall pay such sum in its entirety to the Department in the manner specified in the attached instructions, within 30 days of service upon it of this Order.

Second, that through March 24, 1995 with respect to its activities in the Syrian Arab Republic (Syria) and the Kingdom of Saudi Arabia (Saudi Arabia), Baxter and its successors, whether acting directly or through any subsidiaries, affiliates, assigns, officers, partners, representatives, agents, or employees (hereinafter collectively referred to as Baxter and its affiliates), wherever located, shall be prohibited:

(i) From entering into new contracts or other arrangements,

(ii) From renewing or extending existing contracts or other arrangements, and

(iii) From negotiating future contracts or other arrangements

for the sale or delivery of any commodities, software, or technology exported or to be exported from the United States, and subject to the Regulations (hereinafter referred to as U.S.-origin commodities, software, or technology).

Third, that Baxter and its affiliates may not apply for or use any export license or reexport authorization in connection with the export of U.S.-origin commodities, software, or technology from the United States to Syria or Saudi Arabia, or the reexport thereof, from the date of entry of this Order through March 24, 1995, unless in performance of contractual obligations in effect prior to March 25, 1993.

Fourth, that Baxter shall provide to the Department, within 30 days from the date of entry of this Order, a complete listing and copies of all existing contracts or other arrangements that Baxter and its affiliates have in effect on or before March 25, 1993, for the sale or delivery, directly or indirectly, of any U.S.-origin commodities, software, or technology to Syria or Saudi Arabia. Further, with respect to the export or reexport of any U.S.-origin commodities, software, or technology to Syria or Saudi Arabia through March 24, 1996, Baxter and its affiliates shall, in connection with any application to the Office of Export Licensing for an individual or other validated license or for any reexport authorization that may be required by the Regulations, and on each Shipper's Export Declaration filed in connection with any export made from the United States, identify the specific contract pursuant to which each such export or reexport is to be made.

Fifth, that Baxter shall voluntarily comply with any reasonable request made by the Department to inspect records with respect to the export or reexport of any U.S.-origin commodities, software, or technology by Baxter or its affiliates and will produce copies of such records upon such request.

Sixth, that Baxter and its affiliates shall be prohibited from taking any action that departs from past practices in such a way as to enable entities not affiliated with Baxter to supply to Syria or Saudia Arabia items that Baxter and its affiliates would be barred from furnishing by this Order, in an effort to avoid, evade, circumvent or otherwise limit the effect of the terms and conditions of the denial of export privileges set forth herein.

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[1] The Act expired on September 30, 1990. Executive Order 12730 (55 FR 40373, October 2, 1990) invoked the International Emergency Economic Powers Act (50 U.S.C.A. 1701-1706 (1991)), to continue in effect the Regulations, and, to the extent permitted by law, the provisions of the Act.

Seventh, the provisions of § 787.12 of the Regulations shall not apply.

Eighth, that the proposed Charging Letter, the Agreement, and this Order shall be made available to the public and this Order shall be published in the **Federal Register** and served on Baxter.

This Order is effective immediately.

Entered this 25th day of March, 1993.

Douglas E. Lavin,

Acting Assistant Secretary for Export Enforcement.

[FR Doc. 93–7354 Filed 3–30–93; 8:45 am]

BILLING CODE 3510–DT–M

Minority Business Development Agency

Business Development Center Applications: U.S. Virgin Islands

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) is canceling the announcement to solicit competitive applications under its Minority Business Development Center program to operate a U.S. Virgin Islands MBDC for a three (3) year period, starting July 1, 1993 to June 30, 1994 in the U.S. Virgin Islands SMSA (Closing date March 17, 1993). Refer to the **Federal Register** dated February 16, 1993, 58 FR 8584.

Dated: March 25, 1993.

John F. Iglehart,

Regional Director, New York Regional Office.

[FR Doc. 93–7386 Filed 3–30–93; 8:45 am]

BILLING CODE 3510–21–M

Business Development Center Applications: U.S. Virgin Islands

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: In accordance with Executive Order 11625, the Minority Business Development Agency (MBDA) is soliciting competitive applications under its Minority Business Development Center (MBDC) program to operate an MBDC for approximately a 3-year period, subject to Agency priorities, recipient performance and the availability of funds. The cost of performance for the first Budget period (12 months) is estimated as $169,125 in Federal funds, and a minimum of $29,846 in non-Federal (cost sharing) contribution, from September 1, 1993 to August 31, 1994. Cost-sharing contributions, may be in the form of cash contributions, client fees, in-kind contributions or combinations thereof. The MBDC will operate in the U.S. Virgin Islands SMA geographic service area.

The funding instrument for the MBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, State, local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services to the minority business community for the establishment and operation of viable minority businesses. To this end, MBDA funds organizations that can identify and coordinate public and private sector resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated initially by regional staff on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points).

An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive. The selection of an application for further processing by MBDA will be made by the Director based on a determination of the application most likely to further the purpose of the MBDC Program. The application will then be forwarded to the Department for final processing and approval, if appropriate. The Director will consider past performance of the applicant on previous Federal awards. Unsatisfactory performance under prior Federal awards may result in an application not being considered for funding.

MBDCs shall be required to contribute at least 15% of the total project cost through non-Federal contributions. To assist them in this effort, MBDCs may charge client fees for management and technical assistance (M&TA) rendered. Based on a standard rate of $50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less, and 35% of the total cost for firms with gross sales of over $500,000.

MBDCs performing satisfactorily may continue to operate after the initial competitive year for up to 2 additional budget periods.

MBDCs with year-to-date "commendable" and "excellent" performance ratings may continue to be funded for up to 3 or 4 additional budget periods, respectively. Under no circumstances shall an MBDC be funded for more than 5 consecutive budget periods without competition. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's performance, the availability of funds and the Agency priorities.

Awards under this program shall be subject to all Federal and Departmental regulations, policies, and procedures applicable to Federal assistance awards.

Applicants are notified that if they incur any costs prior to an award being made they do so solely at their own risk of not being reimbursed by the Government. Applicants are notified that notwithstanding any verbal assurance that they may have received, there is no obligation on the part of DoC to cover pre-award costs.

If an application is selected for funding, DoC has no obligation to provide any additional future funding in connection with that award. Renewal of an award to increase funding or extend the period of performance is at the total discretion of DoC.

No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either:

1. The delinquent account is paid in full;
2. A negotiated re-payment schedule is established and at least one payment is received; or
3. Other arrangements satisfactory to DoC are made.

Applicants are subject to Governmentwide Debarment and Suspension (Nonprocurement) requirements as stated in 15 CFR part 26. The departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the MBDC has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the

conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of MBDC work requirements; and reporting inaccurate or inflated claims of client assistance or client certification. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

Notification must be provided that all non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or is presently facing, criminal charges such as fraud, theft, perjury, or other matters which significantly reflect on the applicant's management honesty or financial integrity.

On November 18, 1988, Congress enacted the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, title V, subtitle D). The statute requires contractors and grantees of Federal agencies to certify that they will provide a drug-free workplace. Pursuant to these requirements, the applicable certification form must be completed by each applicant as a precondition for receiving Federal grant or cooperative agreement awards. False information on the application can be grounds for denying or terminating funding.

"Certification for Contracts, Grants, Loans, and Cooperative Agreements" and SF–LLL, the "Disclosure of Lobbying Activities" (if applicable) is required in accordance with section 319 of Public Law 101–121, which generally prohibits recipients of Federal contracts, grants, and loans from using legislative Branches of the Federal Government in connection with a specific contract, grant or loan.

15 CFR part 28 is applicable and prohibits recipients of Federal contracts, grants, and cooperative agreements from using appropriated funds for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a specific contract, grant, or cooperative agreement. Form CD–511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying" and, when applicable, the SF–LLL, "Disclosure of Lobbying Activities," are required.

Notification must be provided that recipients shall require applicants/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD–512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF–LLL, "Disclosure of Lobbying Activities." Form CD–512 is intended for the use of recipients and should not be transmitted to DoC. SF–LLL submitted by any tier recipient or subrecipient should be submitted to DoC in accordance with the instructions contained in the award document.

CLOSING DATE: The closing date for application is May 12, 1993. Applications must be postmarked on or before May 12, 1993. The mailing address for submission is:

ADDRESSES: New York Regional Office, Minority Business Development Agency, Jacob K. Javits Federal Building, rm. 3720, New York, New York 10278, Area Code/Telephone Number: (212) 264–3262.

FOR FURTHER INFORMATION CONTACT: John F. Iglehart, Regional Director, New York Regional Office at (212) 264–3263.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above New York address. A Pre-application Conference to assist all interested applicants will be held on April 15, 1993, from 10 a.m. to 3 p.m. in St. Thomas, U.S. Virgin Islands at the Federal Building Conference Room No. 110. For information, please contact the MBDA Regional Office at (212) 264–3262.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Dated: March 25, 1993.

John F. Iglehart,

Regional Director, New York Regional Office.

[FR Doc. 93–7387 Filed 3–30–93; 8:45 am]

BILLING CODE 3510–21–M

National Oceanic and Atmospheric Administration

Issuance of Modification to Scientific Research Permit No. 782 (P771 #61)

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

On February 8, 1993, notice was published in the **Federal Register** (58 FR 7548) that a request had been submitted by the National Marine Fisheries Service's National Marine Mammal Laboratory, 7600 Sand Point Way, NE., BIN C15700, Seattle, WA 98115–0070, to modify Permit No. 782 to authorize the recapture of up to 50 previously immunized California sea lions (*Zalophus californianus*) for further evaluation of their immune system competence.

Notice is hereby given that on March 24, 1993, as authorized by the provisions of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361–1407), the National Marine Fisheries Service issued the requested modification for the above taking subject to certain conditions set forth in the modified permit.

Office of Protected Resources, National Marine Fisheries Service, NOAA, 1335 East West Highway, Silver Spring, MD 20910 (301/713–2289);

Director, Southwest Region, National Marine Fisheries Service, NOAA, 501 W. Ocean Blvd., suite 4200, Long Beach, CA 90801–4213, (310/980–4016); and

Director, Northwest Region, National Marine Fisheries Service, NOAA, 7600 Sand Point Way, NE., BIN C15700, Building 1, Seattle, WA 98115–0070, (206/526–6150).

Dated: March 24, 1993.

William W. Fox, Jr.,

Director, Office of Protected Resources.

[FR Doc. 93–7385 Filed 3–30–93; 8:45 am]

BILLING CODE 3510–02–M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Application for U.S. Army ROTC 2 and 3-Year Scholarship.

Type of Request: Reinstatement.

Average Burden Hours/Minutes Per Response: 30 minutes.

Responses Per Respondent: 1.

Number of Respondents: 5,300.

Annual Burden Hours: 2,650.

Annual Responses: 5,300.

Needs and Uses: The application is one of the tools used in the selection process for the 2 and 3-year scholarship program. The ROTC scholarship provides highly qualified men and women who desire to pursue a commission in the U.S. Army. The application and information provide the basis for the scholarship award.

Affected Public: Individuals or households.

Frequency: Annually.

Respondent's Obligation: Required to obtain or retain a benefit.

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, WHS/DIOR, 1215 Jefferson Davis Highway, suite 1204, Arlington, Virginia 22202–4302.

Dated: March 25, 1993.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 93–7399 Filed 3–30–93; 8:45 am]

BILLING CODE 3810–01–M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Uniform Tender of Rates and/or Charges for Transportation Services; MTHQ Form 43, OMB No. 0702–0018.

Type of Request: Reinstatement.

Average Burden Hours/Minutes Per Response: 36 minutes.

Responses Per Respondent: 4.261.

Number of Respondents: 2,076.

Annual Burden Hours: 5,252.

Annual Responses: 8,846.

Needs and Uses: The Military Traffic Management Command evaluates bids for transportation service and determines which carriers to utilize so that the government pays the lowest rate for moving personal property.

Affected Public: Businesses or other for-profit; small businesses or organizations.

Frequency: Semiannually.

Respondent's Obligation: Required to obtain or retain a benefit.

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, WHS/DIOR, 1215 Jefferson Davis Highway, suite 1204, Arlington, Virginia 22202–4302.

Dated: March 25, 1993.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 93–7400 Filed 3–30–93; 8:45 am]

BILLING CODE 3810–01–M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Department of Defense Facility Security Clearance Survey Data Sheet; DD Form 374; OMB No. 0704–0009.

Type of Request: Revision.

Average Burden Hours/Minutes Per Response: 4 hours.

Responses Per Respondent: 1.

Number of Respondents: 1,750.

Annual Burden Hours: 7,000.

Annual Responses: 1,750.

Needs and Uses: This collection provides a uniform method for recording information obtained during a survey of a contractor facility. The purpose of the survey is to (1) determine the eligibility of a contractor for entry and participation, or continued participation, in the Defense Industrial Security Program, and (2) determine ability of a facility to safeguard classified information.

Affected Public: Individuals or households; businesses or other for-profit; non-profit institutions; small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain a benefit.

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 Office 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, WHS/DIOR, 1215 Jefferson Davis Highway, suite 1204, Arlington, Virginia 22202–4302.

Dated: March 25, 1993.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 93–7401 Filed 3–30–93; 8:45 am]

BILLING CODE 3810–01–M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title: Survey of Current Unit Prices for Equipment and Material on Naval Vessels.

Type of Request: New collection.

Average Burden Hours/Minutes Per Response: 30 minutes.

Responses Per Respondent: 1.

Number of Respondents: 1,600.

Annual Burden Hours: 800.

Annual Responses: 1,600.

Needs and Uses: This survey is required to obtain data from the shipbuilding industry and DoD supporting businesses in order to analyze changes in prices for designated equipment and other material. The resulting information will be furnished to the Naval Sea Systems Command for inclusion in its annual publication of POM-Year cost guidance as well as to DoD's Production Base Information System.

Affected Public: Businesses or other for-profit; Federal agencies or employees; small businesses or organizations.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Peter N. Weiss.

Written comments and recommendations on the proposed information collection should be sent to Mr. Weiss 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, WHS/DIOR, 1215 Jefferson Davis Highway, suite 1204, Arlington, Virginia 22202–4302.

Dated: March 25, 1993.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 93–7402 Filed 3–30–93; 8:45 am]

BILLING CODE 3810–01–M

Department of the Army

Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: 20–21 April 1993.

Time of Meeting: 0800–1700 on 20 April 1993, 0800–1300 on 21 April 1993.

Place: Pentagon.

Agenda: The Army Science Board's 1993 Summer Study Panel on "Innovative Acquisition Strategies for the 90s" will meet to receive briefings on Army force structure, current budget issues, future budget estimates, and contingency warfighting. This meeting will be closed to the public in accordance with Section 552b.(c) of title 5, U.S.C., specifically subparagraph (1) thereof and title 5, U.S.C. appendix 2, subsection 10(d). The classified and non-classified information to be discussed will be so inextricable intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information, (703) 695–0781.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 93–7411 Filed 3–30–93; 8:45 am]

BILLING CODE 3710–08–M

Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: 22 April 1993.

Time of Meeting: 0800–1500 hours.

Place: Pentagon.

Agenda: The Army Science Board's 1993 Summer Study Panel (Aviation Subpanel) on "Innovative Acquisition Strategies for the 90s" will meet to discuss future Army aviation acquisition strategies and technology opportunities given probable funding constraints. This meeting will be closed to the public in accordance with section 552b.(c) of title 5, U.S.C., specifically subparagraph (1) thereof and title 5, U.S.C. appendix 2, subsection 10(d). The classified and unclassified information to be discussed will be so inextricably intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information (703) 695–0781.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 93–7412 Filed 3–30–93; 8:45 am]

BILLING CODE 3710–08–M

Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: 21–23 April 1993.

Time of Meeting: 0800–1700 hours daily.

Place: McLean, VA.

Agenda: The Army Science Board's 1993 Summer Study on "Missile Defense Programs" will meet to continue work on the study. The ASB will receive briefings on Sensor Systems, Signal Processing, Guidance Systems, Weapon Systems Lethality, BM/C3I Architectures, and Simulations. This meeting will be closed to the public in accordance with section 552b.(c) of title 5, U.S.C., specifically subparagraph (1) thereof and title 5, U.S.C. appendix 2, subsection 10(d). The classified and unclassified information to be discussed will be so inextricably intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information (703) 695–0781.

Sally A. Warner

Administrative Officer, Army Science Board.

[FR Doc. 93–7414 Filed 3–30–93; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF ENERGY

Advisory Committee on Environmental Restoration and Waste Management; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770), notice is hereby given of the following Advisory Committee meeting. This meeting is rescheduled from March 17–18, 1993, which was postponed due to inclement weather at the meeting site.

Name: Environmental Restoration & Waste Management Advisory Committee (EMAC).

Date and Time: Thursday, April 22, 1993, 8:30 a.m. to 5:15 p.m.; Thursday, April 22, 1993, 7:30 p.m. to 10:30 p.m.; Friday, April 23, 1993, 8:30 a.m. to 6 p.m.

Place: Tennessee Army National Guard Armory, 1780 Oak Ridge Turnpike, Oak Ridge, Tennessee 37830.

Contact: James T. Melillo, Executive Secretary, EMAC, EM–1, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 479–1191.

Purpose of the Committee: The purpose of the Committee is to provide the Assistant Secretary, Environmental Restoration and Waste Management (EM) with advice and recommendations on both the substance and the process of the EM Programmatic Environmental Impact Statement (PEIS) and other EM projects from the perspectives of affected groups and State and local Governments. The EMAC will help to improve the Environmental Restoration and Waste Management Program by assisting in the process of securing consensus recommendations, and providing the Department's numerous publics with opportunities to make their views known on the Environmental Restoration & Waste Management Program.

Tentative Agenda

Thursday, April 22, 1993

8:30 a.m.
Chairman Glenn Paulson Opens Meeting. EMAC Mission Discussions. Committee Business

12:15 p.m.
Lunch

1:45 p.m.
Panel Discussion: Unique Drivers of Technology Development at Oak Ridge

5:30 p.m.
Meeting Adjourns

7:30 p.m.
Public Comment Session

10:30 p.m.
Meeting Adjourned

Friday, April 23, 1993

8:30 a.m.
Chairman Paulson Reconvenes Public Meeting. Media Panel. Office of Technology Assessment Presentation, "Managing Cleanup, and Worker Health and Safety at the Nuclear Weapons Complex."

12:15 p.m.
Lunch

1:45 p.m.
Panel Discussion—EPA Advisory Committee on Federal Facility Environmental Restoration (Keystone); Committee Business

6 p.m.
Meeting Ends

Public Participation

The meeting is open to the public. Written statements may be filed with

the Committee either before, during or after the meeting. Members of the public having questions pertaining to agenda items should contact James T. Melillo at the address or telephone number listed above. Individuals wishing to orally address the Committee should contact Ms. Sandy Perkins by phone in Oak Ridge at (615) 576–1590 or call (800) 862–8860 and leave a message. Individuals may also register on April 22, 1993, at the meeting. Every effort will be made to hear all those wishing to speak to the Committee, on a first come, first serve basis. Those who call in and reserve time will be given the opportunity to speak first. The Committee Chairperson is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Transcripts

The transcript of the meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC. 20585 between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on March 25, 1993.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 93–7449 Filed 3–30–93; 8:45 am]

BILLING CODE 8450–01–M

Energy Information Administration

Petroleum Marketing Division (PMD) Survey Forms

AGENCY: Energy Information Administration, Department of Energy.

ACTION: Notice of the proposed revision and/or extension of the petroleum marketing survey forms and solicitation of comments.

SUMMARY: The Energy Information Administration (EIA), as part of its continuing effort to reduce paperwork and respondent burden (required by the Paperwork Reduction Act of 1980, Public Law No. 96–511, 44 U.S.C. 3501 *et seq.*), conducts a presurvey consultation program to provide the general public and other Federal agencies with an opportunity to comment on proposed and/or continuing reporting forms. This program helps to ensure that requested data can be provided in the desired format, reporting burden is minimized, reporting forms are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, EIA is soliciting comments concerning the proposed revision and/or extension to the forms:

EIA–14, "Refiners' Monthly Cost Report"
EIA–182, "Domestic Crude Oil First Purchase Report"
EIA–782A, "Refiners'/Gas Plant Operators' Monthly Petroleum Product Sales Report"
EIA–782B, "Resellers'/Retailers' Monthly Petroleum Product Sales Report"
EIA–782C, "Monthly Report of Petroleum Products Sold Into States for Consumption"
EIA–821, "Annual Fuel Oil and Kerosene Sales Report"
EIA–856, "Monthly Foreign Crude Oil Acquisition Report"
EIA–863, "Petroleum Product Sales Identification Survey"
EIA–877, "Winter Heating Fuels Telephone Survey"
EIA–878, "Motor Gasoline Telephone Price Survey"

Also, a question has been added to the standard list of questions for potential data users to solicit comments on preferences as to whether EIA should publish data measured in metric units.

DATES: Written comments must be submitted within 30 days of the publication of this notice. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below of your intention to do so as soon as possible.

ADDRESSES: Send comments to Dr. John S. Cook, Director, Petroleum Marketing Division, Mail Stop 2H–058 EI–43, Forrestal Building, U.S. Department of Energy, Washington, DC 20585.

FOR FURTHER INFORMATION OR TO OBTAIN COPIES OF THE PROPOSED FORM AND INSTRUCTIONS: Requests for additional information or copies of the form and instructions should be directed to Ms. Claudia Hernandez at the address listed above or telephone (202) 586–6559.

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Request for Comments

I. Background

In order to fulfill its responsibilities under the Federal Energy Administration Act of 1974 (Pub. L. No. 93–275) and the Department of Energy Organization Act (Pub. L. No. 95–91), the Energy Information Administration is obliged to carry out a central, comprehensive, and unified energy data and information program which will collect, evaluate, assemble, analyze, and disseminate data and information related to energy resource reserves, production, demand, and technology, and related economic and statistical information relevant to the adequacy of energy resources to meet demands in the near and longer term future for the Nation's economic and social needs.

The Petroleum Marketing Program Surveys collect information on costs, sales, prices, and distribution of crude oil and petroleum products. The data are published in the Petroleum Marketing Monthly, the Winter Fuels Report, and the Petroleum Marketing Annual as well as other EIA reports and publications.

II. Current Actions

In keeping with its mandated responsibilities, EIA proposes to extend for three years the petroleum marketing data collection forms. EIA also proposes modifications to the following forms to measure change in petroleum markets due to the Clean Air Act Amendments of 1990, to provide more relevant crude oil and propane price data, to increase reporting accuracy, and to reduce ambiguity in the instructions. The proposed changes are summarized below:

1. Form EIA–782A, "Refiners'/Gas Plant Operators' Monthly Petroleum Product Sales Report."

- Add oxygenated and reformulated gasoline to the product slate.
- Expand the wholesale gasoline sales column to include "DTW," "Rack," and "Bulk" sales.
- Expand the No. 2 diesel category to "No. 2 diesel less than or equal to .05 percent sulfur" and "No. 2 diesel greater than .05 percent sulfur."
- Expand propane sales type categories to include residential, commercial/institutional, industrial, company operated outlets, petrochemical, farm, other retail, and wholesale propane sales.
- Discontinue the sales category "leaded regular motor gasoline."

2. Form EIA–782B, "Resellers'/Retailers' Monthly Petroleum Product Sales Report."

- Add oxygenated and reformulated gasoline to the product slate.
- Expand the wholesale gasoline sales column to include "DTW," "Rack," and "Bulk" sales.
- Expand the No. 2 diesel category to "No. 2 diesel less than or equal to .05 percent sulfur" and "No. 2 diesel greater than .05 percent sulfur."
- Add residential, commercial/institutional, industrial, company operated outlets, petrochemical, farm,

other retail, and wholesale propane sales to the sales type category.

• Discontinue the sales category "leaded regular motor gasoline."

3. Form EIA–782C, "Monthly Report of Petroleum Products Sold into States for Consumption."

• Add oxygenated and reformulated gasoline to the product slate.

• Expand the No. 2 diesel category to "No. 2 diesel less than or equal to .05 percent sulfur" and "No. 2 diesel greater than .05 percent sulfur."

• Discontinue the sales category "leaded regular motor gasoline."

4. Form EIA–14, "Refiners' Monthly Cost Report."

• No changes.

5. Form EIA–182, "Domestic Crude Oil First Purchase Report."

• Collect crude stream price data.

6. Form EIA–856, "Monthly Foreign Crude Oil Acquisition Report."

• No changes.

7. Form EIA–821, "Annual Fuel Oil and Kerosene Sales Report."

• Expand the No. 2 diesel category to "No. 2 diesel less than or equal to .05 percent sulfur" and "No. 2 diesel greater than .05 percent sulfur."

• For 1994, add oxygenated gasoline to the product slate.

• For 1994, add residential, other retail, and wholesale propane sales.

8. Form EIA–863, "Petroleum Product Sales Identification Survey."

• Add oxygenated gasoline to the product slate.

• Add residential, other retail, and wholesale propane sales to the sales type category.

9. Form EIA–877, "Winter Heating Fuels Telephone Survey."

• No changes.

10. Form EIA 878, "Daily Motor Gasoline Price Survey."

• No changes.

III. Request for Comments

Prospective respondents and other interested parties should comment on the proposed extension and/or revisions. The following general guidelines are provided to assist in the preparation of responses. Please indicate to which form(s) your comments apply.

As a potential respondent:

A. Are the instructions and definitions clear and sufficient? If not, which instructions require clarification?

B. Can the data be submitted using the definitions included in the instructions?

C. Can data be submitted in accordance with the response time specified in the instructions?

D. Public reporting burden for this collection is estimated to average:

Form	Burden hours per response
EIA–14	2.4
EIA–182	4.3
EIA–782A	15.0
EIA–782B	2.5
EIA–782C	4.1
EIA–821	3.2
EIA–856	6.3
EIA–863	1.1
EIA–877	.2
EIA–878	.1

How much time, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, do you estimate it will require you to complete and submit the required form?

E. What is the estimated cost of completing this form, including the direct and indirect costs associated with the data collection? Direct costs should include all costs, such as administrative costs, directly attributable to providing this information.

F. How can the form be improved?

G. Do you know of any other Federal, State, or local agency that collects similar data? If you do, specify the agency, the data element(s), and the means of collection.

As a potential user:

A. Can you use data at the levels of detail indicated on the form?

B. For what purpose would you use the data? Be specific.

C. How could the form be improved to better meet your specific needs?

D. Are there alternate sources of data and do you use them? What are their deficiencies and/or strengths?

E. For the most part, information is published by EIA in U.S. customary units, e.g., cubic feet of natural gas, short tons of coal, and barrels of oil. Would you prefer to see EIA publish more information in metric units, e.g., cubic meters, metric tons, and kilograms? If yes, please specify what information (e.g., coal production, natural gas consumption, and crude oil imports), the metric unit(s) of measurement preferred, and in which EIA publication(s) you would like to see such information.

EIA is also interested in receiving comments from persons regarding their views on the need for the information contained in the petroleum marketing survey forms.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form; they also will become a matter of public record.

Statutory Authorities: Sections 3506(a) and (c)(1), Paperwork Reduction Act of 1980, as amended, Pub. L. No. 96–511, 44 U.S.C. § 3506 (a) and (c)(1).

Issued in Washington, DC March 25, 1993.

Yvonne M. Bishop,

Director, Statistical Standards.

[FR Doc. 93–7450 Filed 3–30–93; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket No. EG93–34–000]

Diamond Energy, Inc.; Application for Commission Determination of Exempt Wholesale Generator Status

March 25, 1993.

On March 18, 1993, Diamond Energy, Inc. (Diamond), on behalf of its to-be-formed subsidiary, Clearfield Partners, L.P. (Applicant), 633 West Fifth Street, Los Angeles, California, 90071, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's Regulations.

Diamond is developing a coal-fired electric generating facility with a capacity of up to 166 MW (Facility) to be located in the Cooper Township, Clearfield, Pennsylvania that will be owned and operated by Applicant. All of the Facility's electricity will be sold at wholesale.

Any person desiring to be heard concerning the application for exempt wholesale generator status should file a motion to intervene or comments with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application. All such motions and comments should be filed on or before April 12, 1993, and must be served on the applicant. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93–7428 Filed 3–30–93; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. QF93-65-000]

South Glens Falls Limited Partnership; Application for Commission Certification of Qualifying Status of a Small Power Production Facility

March 25, 1993.

On March 19, 1993, South Glens Falls Limited Partnership of Civic Center Plaza, suite 100, 5 Warren Street, Glens Falls, New York 12801, submitted for filing an application for certification of a facility as a qualifying small power production facility pursuant to § 292.207(b) of the Commission's Regulations. No determination has been made that the submittal constitutes a complete filing.

According to the applicant, the 13.78 MW hydroelectric small power production facility will be located on the Hudson River in Saratoga and Warren Counties, New York, and will consist of two vertical shaft Kaplan turbine generators and a 100-ft long transmission line. Commercial operation of the facility is expected to commence in December of 1994.

Any person desiring to be heard or objecting to the granting of qualifying status should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests must be filed within 30 days after the date of publication of this notice in the FEDERAL REGISTER and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-7372 Filed 3-30-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-143-020]

Great Lakes Gas Transmission Limited Partnership; Compliance Filing

March 25, 1993.

Take notice that Great Lakes Gas Transmission Limited Partnership (Great Lakes) on March 23, 1993, tendered for filing as part of its FERC Gas Tariff, Original Volume No. 2, the following revised tariff sheets, with a proposed effective date of November 1, 1991:

Sixth Substitute Eighteenth Revised Sheet No. 77

Sixth Substitute Fourteenth Revised Sheet No. 151

Great Lakes states that the purpose of Great Lakes' filing is to supplement its March 8, 1993 compliance tariff filing implementing the partial settlement in Docket Nos. RP91-143-000, *et al.*

Great Lakes states that the proposed tariff sheets correct: (1) Tariff language, at article 7 appearing on Sheet No. 77 which, through an administrative error, contained language different than that contained in the *proforma* tariff sheet included with the partial settlement; and (2) a typographical error contained in article VIII, paragraph 1(a) appearing on Sheet No. 151.

Great Lakes states that copies of the letter, together with the tariff sheets, are being served upon each party designated on the official service list complied in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before April 1, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-7373 Filed 3-30-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ES93-28-000]

Midwest Power Systems Inc.; Application

March 25, 1993.

Take notice that on March 23, 1993, Midwest Power Systems Inc. (Midwest) filed an application with the Federal Energy Regulatory Commission under section 204 of the Federal Power Act requesting authorization to issue not more than 750,000 shares of Preferred Stock, no par value, over a two-year period. Also, Midwest requests exemption from the Commission's competitive bidding regulations.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before April 22, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-7370 Filed 3-30-93; 8:45 am]

BILLING CODE 6717-01-M

[RP 93-32-001]

Northern Border Pipeline Co.; Proposed Changes in FERC Gas Tariff

March 25, 1993.

Take notice that on March 5, 1993, Northern Border Pipeline Company (Northern Border) tendered for filing to become part of Northern Border Pipeline Company's FERC Gas Tariff, Original Volume No. 1, the following revised tariff sheet:

Fifteenth Revised Sheet Number 157

The purpose of this filing is to revise the Maximum Rate under Rate Schedule IT-1 as required by Northern Border's Tariff to reflect the reduced return on common equity approved by the Commission's Letter Order issued March 4, 1993 in Docket No. RP92-177-001 and RP92-177-002. Northern Border proposes to decrease the Maximum Rate from 4.052 cents per 100 Dekatherm-Miles to 3.863 cents per 100 Dekatherm-Miles.

Northern Border requests that the revised tariff sheet be made effective January 1, 1993. Northern Border will refund to the Shippers which shipped natural gas volumes through the Northern Border system pursuant to Rate Schedules IT-1 or OT-1 at the currently effective Maximum Rate the difference between the currently effective Maximum Rate and the herein proposed Maximum Rate plus interest computed in accordance with paragraph 154.67(c)(2).

Northern Border states that copies of its filing have been sent to all of Northern Border's contracted shippers.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE.,

Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedures, 18 CFR 385.211. All such protests should be filed on or before April 1, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-7371 Filed 3-30-93; 8:45 am]

BILLING CODE 6717-01-M

Tennessee Gas Pipeline Co.; Request Under Blanket Authorization

March 25, 1993.

Take notice that on March 22, 1993, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP93-263-000 a request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.213) for authorization to add an additional delivery point under an existing firm sales service presently provided by Tennessee to Granite State Gas Transmission, Inc. (Granite), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Tennessee states that it currently provides natural gas service to Granite pursuant to authorization granted in Docket Nos. CP69-222 and CP70-185, and under the terms and conditions of Tennessee's CD-6 and CD-5 Rate Schedules and the terms and conditions of a gas sales contract between Tennessee and Granite dated July 1, 1992, as filed with the Commission in Docket No. RP86-119-020, *et al.*, on August 24, 1992. Pursuant to a request of Granite, Tennessee proposes to add the Monson delivery point located in Hampden County, Massachusetts, as a delivery point under the contract. No facilities are proposed.

Tennessee does not propose to increase or decrease the total daily and/or annual quantities it is authorized to deliver to Granite. Tennessee asserts that the establishment of the proposed new delivery point is not prohibited by Tennessee's currently effective tariff and that it has sufficient capacity to accomplish the deliveries at the proposed new delivery point without detriment or disadvantage to any of Tennessee's other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 93-7369 Filed 3-30-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-47-003]

U-T Offshore System; Compliance Filing

March 25, 1993.

Take notice that U-T Offshore System (U-TOS) tendered for filing on March 19, 1993, Sixth Revised Sheet No. 5 and First Revised Sheet No. 72 of its FERC Gas Tariff, Second Revised Volume No. 1.

U-TOS states that the tariff sheets are proposed to be effective January 1, 1993, and are being filed in compliance with the Federal Energy Regulatory Commission's (Commission) letter order issued March 4, 1993 (March 4 Order) in U-T Offshore System, Docket Nos. RP92-47-002, RP92-95-001 and CP90-1874-000.

U-TOS states that the Commission's March 4 Order approved an uncontested Stipulation and Agreement (Agreement) submitted by U-TOS in the referenced dockets. Pursuant to Ordering Paragraph (1) of the March 4 Order, U-TOS filed Sixth Revised Sheet No. 5. The tariff sheet reflects the settlement rates set forth in appendix A to the Agreement. U-TOS states that refunds as a result of approval of this compliance filing will be made at the times and in the manner prescribed by Article I of the Agreement.

U-TOS further states it is filing Sixth Revised Sheet No. 5 prior to the date on which the March 4 Order technically becomes a "Final Commission Order" under the Agreement. However, because the Agreement was uncontested, U-TOS believes that it is appropriate to treat the March 4 Order as a "Final Commission Order."

U-TOS also states that pursuant to the March 4 Order, U-TOS is required to file a tariff sheet reflecting the termination of its capacity brokering program effective January 1, 1993. First Revised Sheet No. 72 is being filed in compliance therewith.

UTOS states that copies of this filing were mailed to its shippers and all parties listed on the service list heretofore established by the Commission in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedures, 18 CFR 385.211. All such protests should be filed on or before April 1, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-7374 Filed 3-30-93; 8:45 am]

BILLING CODE 6717-01-M

Office of Energy Research

Fusion Energy Advisory Committee; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770), notice is hereby given of the following meeting:

Name: Fusion Energy Advisory Committee (FEAC).

Date and Time: Thursday, April 15, 1993—8:30 a.m.-5:30 p.m.; Friday, April 16, 1993—8:30 a.m.-4:00 p.m.

Place: Sheraton Reston Hotel, 11810 Sunrise Valley Drive, Reston, Virginia 22091.

Contact: Deborah Lonsdale, U.S. Department of Energy, GTN, Office of Fusion Energy (ER-50), Office of Energy Research, Washington, D.C. 20585, Telephone: 301-903-4941.

Purpose of the Committee: To provide advice on a continuing basis to the Department of Energy on the complex scientific and technical issues that arise in the planning, management, and implementation of its Fusion Energy Program.

Tentative Agenda:

Thursday, April 15, 1993

Status of International Thermonuclear Experimental Reactor

Tokamak Physics Experiment Conceptual Design Review

Report on Panel VII on Inertial Confinement Fusion
Public Comment (10-minute Rule)
Friday, April 16, 1993
Continuation of Panel VII on Inertial Confinement Fusion
FEAC Deliberations
Public Comment (10-minute Rule)

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact: Deborah Lonsdale at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. The Chairperson of the Committee is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Transcripts: The transcript of the meeting will be available for public review and copying at the Freedom of Information Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays

Issued at Washington, DC on March 25, 1993.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 93–7451 Filed 3–30–93; 8:45 am]

BILLING CODE 6450–01–M

Office of Hearings and Appeals

Proposed Refund Procedures

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of Proposed Implementation of Special Refund Procedures.

SUMMARY: Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) announces the proposed procedures for the disbursement of $7,000,000, plus accrued interest, obtained by the DOE pursuant to a Consent Order between the Department of Energy and Eason Drilling Company (formerly Eason Oil Company) and ITT Corporation. The OHA has tentatively determined that the funds will be distributed in accordance with the DOE's special refund procedures, 10 CFR part 205, subpart V.

DATE AND ADDRESS: Comments. must be filed in duplicate within 30 days of publication of this notice in the **Federal Register**, and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington DC 20585. All comments should display a reference to Case Number LEF–0040.

FOR FURTHER INFORMATION CONTACT: Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–2390.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(b) of the procedural regulations of the Department of Energy (DOE), 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the procedures that the DOE has tentatively formulated to distribute $7,000,000 that has been remitted by Eason Drilling Company (formerly Eason Oil Company) ("Eason") and the ITT Corporation to the DOE to settle possible pricing violations. These possible pricing violations concern Eason's sales of natural gas liquids, motor gasoline refined from crude oil condensate, kerosene, and gas oil during the period November 1, 1973 through December 31, 1979. The DOE is currently holding the funds in an interest bearing account pending distribution.

Applications for refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized. Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of the publication in the **Federal Register**, and should be sent to the address set forth at the beginning of this notice. All comments received will be available for public inspection between the hours of 1 p.m. through 5 p.m., Monday through Friday, except federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in room 1E–234, 1000 Independence Avenue, SW., Washington, DC 20585. If commentors express sufficient interest in presenting their views orally, the DOE will convene a public hearing. In the event we determine to hold a hearing, notice will be given in the **Federal Register**.

Dated: March 24, 1993.

George B. Breznay,

Director, Office of Hearings and Appeals.

Proposed Decision and Order of the Department of Energy; Implementation of Special Refund Procedures

March 24, 1993.
Names of Firms: Eason Oil Company, ITT Corporation
Date of Filing: February 5, 1992
Case Number: LEF–0040

On February 5, 1992, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) filed a petition with the Office of Hearings and Appeals (OHA), requesting that the OHA formulate and implement procedures for distributing funds obtained through the settlement of enforcement proceedings involving Eason Drilling Company (Eason Drilling), formerly Eason Oil Company (Eason), and Eason's former parent corporation, ITT Corporation (ITT), pursuant to 10 C.F.R. Part 205, Subpart V.[1] This Proposed Decision sets forth the OHA's tentative plan for distributing these funds to qualified refund applicants. Since the procedures set forth in this Decision are in proposed form, no refund applications should be filed at this time. A final determination will be issued at a later date announcing that the filing of Eason refund applications is authorized.

I. Background

During the period covered by the Consent Order (November 1, 1973 through December 31, 1979), Eason owned all or part of several natural gas processing plants. In addition, Eason owned a substantial minority interest in a plant which, in addition to producing natural gas liquids, refined crude oil condensate into motor gasoline, kerosene and gas oil. Accordingly, Eason was subject to the DOE Mandatory Petroleum Price Regulations. An ERA audit of Eason records revealed possible violations of these regulations, in sales of Eason's covered products during the period November 1973 through December 1979. On the basis of this audit, the ERA issued a Proposed Remedial Order (PRO) to Eason on September 14, 1984. This Office affirmed in part these alleged violations and issued a Remedial Order to Eason

[1] Eason was acquired by International Telephone and Telegraph Company (now ITT) on August 20, 1977. In December 1984, ITT sold Eason to Sohio Petroleum Company and Sonat, Inc. On July 22, 1985, ITT stipulated that it assumed liability for all violations arising from Eason's activities. Consequently, references to Eason in this Decision also refer to ITT.

on December 6, 1990. *Eason Oil Company*, 20 DOE ¶ 83,011 (1990). On January 4, 1991, Eason appealed the Remedial Order to the Federal Energy Regulatory Commission (Docket No. RO91-1-000).

In order to settle all claims between Eason and the DOE, the two parties entered into a Consent Order (the Consent Order) that resolves all matters relating to Eason's compliance with the federal petroleum price and allocation regulations during the period November 1, 1973 through December 31, 1979 (the Consent Order period). The Consent Order became final upon publication in the **Federal Register** on June 28, 1991. 56 Fed. Reg. 29640 (June 28, 1991). Execution of the Consent Order is neither an admission by Eason nor a finding by the DOE of any violation by Eason of any statute or regulation. Consent Order at ¶ 504.

The Consent Order covers Eason's sales of covered products from all of the natural gas processing plants in which it had an ownership interest. Information furnished to the DOE by ITT indicates that Eason sold 205,417,603 gallons of propane, butane, natural gasoline and ethane from following gas plants in which Eason had an ownership interest (the operator of the plant is indicated in parentheses): (1) Crescent, Oklahoma (Eason); (2) Laverne, Oklahoma (Sun); (3) Beaver, Oklahoma (Cabot, Carbon); (4) Okeene, Oklahoma (Amoco); (5) Thomas, Oklahoma (Mobil); (6) Star Lacey, Oklahoma (Amoco); (7) Elmwood, Oklahoma (Amoco); (8) Gillette, Wyoming (Arco); (9) Lacasane, Louisiana (T&P Oil Company); (10) Ames, Oklahoma (Tenneco); and (11) Dubach, Louisiana (Kerr-McGee). Eason's precise ownership interest in each of these plants and the corresponding volumes of covered products that it sold from each of these plants are listed in the Appendix to this Decision and Order. In addition, the Proposed Remedial Order issued to Eason found that the Dubach, Louisiana plant also refined crude oil condensate into motor gasoline, kerosene and gas oil. Based on information contained in the ERA audit workpapers, we estimate that Eason sold approximately 92,087,016 gallons of covered products produced from crude oil condensate during the audit period.[2] *See* Appendix.

Under the terms of the Consent Order, Eason deposited $7,000,000 into an interest-bearing escrow account maintained by the Department of the Treasury for ultimate distribution by the DOE. These monies were paid in full on July 29, 1991. This Proposed Decision and Order sets forth the OHA's tentative plan for distributing these funds to qualified purchasers of Eason's covered products.

II. Proposed Refund Procedures

As indicated above, the Consent Order settles:

all civil and administrative disputes, claims and causes of action, whether or not heretofore asserted, between the DOE, * * *, and Eason, * * *, relating to Eason's compliance with the federal petroleum price and allocation regulations, * * *, during the period November 1, 1973 through December 31, 1979 * * *

Consent Order at ¶ 101. The phrase federal petroleum price and allocation regulations is defined by the Consent Order as:

all pricing, allocation, reporting and recordkeeping requirements imposed by or under the Economic Stabilization Act (ESA) of 1970, the Emergency Petroleum Allocation Act of 1974, the DOE Act, any and all amendments to said Acts, Presidential Proclamation 3279, all applicable DOE regulations codified in 6 CFR Parts 130 and 150, and 10 CFR Parts 205, 210, 211, 212 and 213 including all rules, rulings, guidelines, interpretations, clarifications, manuals, decisions, orders, forms, and reporting and certification requirements regarding such regulations.

Consent Order at ¶ 202.

A. Eligibility for Refunds

To the extent that is possible, the settlement amount of $7,000,000, plus accrued interest, will be distributed to purchasers of covered Eason NGLs, NGLPs and other covered refined products who can show that they were injured by Eason's pricing practices during the period November 1, 1973 through December 31, 1979.

B. Calculation of Refund Amount

We propose adopting a volumetric method to apportion the Eason escrow account. Under this volumetric refund approach, a claimant's allocable share of the refined products pool is equal to the number of gallons of covered products purchased during the Consent Order period times a per gallon refund amount. We will derive the volumetric figure (per gallon refund amount) by dividing the $7,000,000 received from Eason by the total volume of covered products sold by the firm during the regulatory period. This yields a volumetric refund amount of $.02353 per gallon, exclusive of interest.[3] This method is based upon the presumption that the alleged overcharges were spread equally over all gallons of covered products sold by Eason during the regulatory period. *E.g., American Pacific International, Inc.*, 14 DOE ¶ 85,158 at 88,293 (1986) (*API*).[4]

Under the volumetric approach, an eligible claimant will receive a refund equal to the number of gallons of covered products that it purchased from Eason during the period November 1973 through December 1979 (or the appropriate date of decontrol of each product), multiplied by the per gallon volumetric amount for this proceeding. Accordingly, each claimant will be required to establish, by documentation or reasonable estimation, the volume of products that it purchased during this period. In addition, each successful claimant will receive a pro rata portion of the interest that has accrued on the Eason funds since the date of remittance.

As in previous cases, we will establish a minimum amount of $15 for refund claims. *E.g., Uban Oil Co.*, 9 DOE ¶ 82,541 at 85,225 (1982).

C. Showing of Injury

We propose that each claimant will be required to document its purchases of covered products from Eason during the Consent Order period. In addition, we propose that in order to receive a refund, an applicant generally must demonstrate through the submission of detailed evidence that it did not pass on the alleged overcharges to its customers. *See, e.g., Office of Enforcement*, 8 DOE ¶ 82,597 at 85,396–97 (1981).

However, as we have done in many prior refund cases, we propose to adopt specific injury presumptions that will simplify and streamline the refund process for some categories of

[2] The ERA audit workpapers indicate that crude oil purchases by the Dubach, Louisiana plant during the Consent Order period totalled 2,738,848.18 barrels, resulting in the production of approximately 115,031,624 gallons of motor gasoline, kerosene and gas/oil from this crude oil. Since the prices of kerosene and gas/oil were decontrolled in 1976, we have excluded the volumes of those products that were produced after the dates of decontrol. Accordingly, we find that Eason sold approximately 92,087,016 gallons of covered products from the Dubach, Louisiana plant during the Consent Order period.

[3] To compute this figure, we estimated that Eason sold a total of 297,504,619 gallons of covered products during the period from November 1973 through December 1979.

[4] Nevertheless, we realize that the impact on an individual claimant may have been greater than the volumetric amount. We therefore propose that the volumetric presumption will be rebuttable, and we will allow a claimant to submit evidence detailing the specific overcharges that it incurred in order to be eligible for a larger refund. *E.g., Standard Oil Co./Army and Air Force Exchange Service*, 12 DOE ¶ 85,015 (1984).

customers: small claims, end-users, and regulated firms and cooperatives. These presumptions will excuse members of certain applicant categories from proving that they were injured by Eason's alleged overcharges, and are discussed below.

D. Reseller Applicants Seeking Refunds of $10,000 or Less

We propose to adopt a presumption, as we have in many previous cases, that resellers seeking small refunds were injured by Eason's pricing practices. *See, e.g., E.D.G., Inc.*, 17 DOE ¶ 85,679 (1988). We recognize that the cost to the applicant of gathering evidence of injury to support a small refund claim could exceed the expected refund. Consequently, without simplified procedures, some injured parties would be denied an opportunity to obtain a refund.

In many prior proceedings, we have established a small claims threshold of $5,000. *E.g., Gulf Oil Corporation*, 16 DOE ¶ 85,381 (1987). In this proceeding, the volumetric factor is significantly higher than in most proceedings. As a result, the allocable share of many small retailers, resellers and refiners who would typically qualify for a refund at or below the usual small claims amount of $5,000 will be well above that amount in this proceeding. If we keep the small claims threshold at $5,000 in this proceeding, it would increase the number of firms, especially very small firms, that would be faced with the burden of making a detailed showing of injury in order to receive their allocable share. It would also increase the burden on this Office because of the need to analyze more detailed injury showings and would thus slow down the evaluation of claims. Therefore, to minimize these burdens, we are proposing a small claims threshold of $10,000. *See Enron Corp.*, 21 DOE ¶ 85,323 at 88,957 (1991).

Accordingly, under the proposed small-claims presumption in this proceeding, a claimant who claims a refund of $10,000 or less will not be required to submit any evidence of injury beyond establishing that it is one of the eligible customers that purchased the covered products from Eason. We propose that a reseller applicant must follow the procedures that are outlined below if the applicant is seeking a refund in excess of $10,000, plus interest accrued on that amount while in escrow.

E. Medium-Range Presumption

We propose, that in lieu of making a detailed showing of injury, a reseller, retailer or refiner claimant whose allocable share of the Consent Order funds for purchases of Eason's refined products exceeds $10,000 may elect to receive as its refund the larger of $10,000 or 60 percent of its allocable share up to $50,000. The use of this presumption reflects our conviction that these claimants were likely to have experienced some injury as a result of the alleged overcharges. In other proceedings involving NGLs and NGLPs, we have determined that a 60 percent presumption for the medium-range purchasers of NGLs and NGLPs accurately reflected the amount of their injury as a result of their purchases of those products. *Sauvage Gas Co.*, 17 DOE ¶ 85,304 (1988); *see also Suburban Propane Gas Corp.*, 16 DOE ¶ 85,382 (1987). Accordingly, a claimant in this group will only be required to provide documentation of its purchase volumes of Eason's covered products in order to be eligible to receive a refund of 60 percent of its total allocable share.

F. Reseller Applicants Seeking Larger Refunds

We propose that if a retailer, reseller or refiner claims an amount in excess of $10,000, and declines to accept the medium-range presumption, it will be required to provide a detailed demonstration of its injury. We propose that it will be required to demonstrate that it maintained a "bank" of unrecovered product costs in order to show that it did not pass along the alleged overcharges to its own customers. In addition, we propose that a claimant must show that market conditions would not permit it to pass through those increased costs. *See, e.g., Quintana Energy Corp.*, 21 DOE ¶ 85,032 at 88,117 (1991). If a reseller that is eligible for a refund in excess of $10,000 elects not to submit the cost bank and purchase price information described above, it may still apply for a small claims refund of $10,000 plus accrued interest from the escrow fund.

G. End-users

We propose to adopt a presumption that end-users or ultimate consumers whose businesses are unrelated to the petroleum industry, were injured by Eason's alleged overcharges and are entitled to their full share of the settlement monies obtained from Eason. Unlike regulated firms in the petroleum industry, end-users were not subject to price controls during the Consent Judgement period. Moreover, these unregulated firms were not required to keep records that justified selling price increases by reference to cost increases. Therefore, an analysis of the impact of the alleged overcharges on the final prices of non-petroleum goods and services would be beyond the scope of a special refund proceeding. *See, e.g., American Pacific International, Inc.*, 14 DOE ¶ 85,158 at 88,294 (1986). We propose, therefore, that any applicant claiming to be an end-user, must establish that it was an Eason customer or a successor thereto and that the nature of its business made it an ultimate consumer of the Eason covered products that it purchased. If an applicant establishes those two facts, it will receive its full pro-rata share as its refund without making a detailed demonstration of injury.

H. Regulated Firms and Cooperatives

We propose that regulated firms (such as public utilities) and agricultural cooperatives, which are required to pass on to their customers the benefit of any refund received, will be exempted from the requirement that they make a detailed showing of injury. *Marathon Petroleum Co.*, 14 DOE ¶ 85,269 at 88,515 (1986); *see also Office of Special Counsel*, 9 DOE ¶ 82,538 at 85,203 (1982). We will require a regulated firm or cooperative to establish that it was an Eason customer or a successor thereto. In addition, we will require each such claimant to certify that it will pass any refund received through to its customers, to provide us with a full explanation of the manner in which it plans to accomplish this restitution to its customers and to notify the appropriate regulatory or membership body of the receipt of the refund money. If a regulated firm or cooperative meets these requirements, it will receive a refund equal to its full pro-rate share. However, any public utility claiming a refund of $10,000 or less, or accepting the medium-range presumption of injury, will not be required to submit the above referenced certifications and explanation. A cooperative's sales of covered product to non-members will be treated in the same manner as sales by other resellers or retailers.

I. Indirect Purchasers

We propose that firms which made indirect purchases of covered Eason products during the Consent Order period may also apply for refunds. If an applicant did not purchase directly from Eason, but believes that covered products it purchased from another firm were originally purchased from Eason, the applicant must establish its basis for that belief and identify the reseller from whom the products were purchased. Indirect purchasers who either fall within a class of applicant whose injury is presumed, or who can prove injury, may be eligible for a refund if the

reseller of Eason products passed through Eason's alleged overcharges to its own customers. *E.g., Dorchester Gas Corp.*, 14 DOE ¶ 85,240 at 88,451–52 (1986).

J. Spot Purchasers

We propose to adopt the rebuttable presumption that a claimant who made only spot purchases from Eason was not injured as a result of those purchases. A claimant is a spot purchaser if it made only sporadic purchases of significant volumes of covered Eason products. Accordingly, a spot purchaser claimant must submit specific and detailed evidence to rebut the spot purchaser presumption and to establish the extent to which it was injured as a result of its spot purchases from Eason. *E.g., Office of Enforcement*, 8 DOE ¶ 82,597 at 85,396–97 (1981).

K. Applicants Seeking Refunds Based on Allocation Claims

We also recognize that, while the Consent Order makes no mention of known allocation violations, we may receive claims alleging Eason's failure to furnish petroleum products that it was obliged to supply under the DOE allocation regulations that became effective in January 1974. *See* 10 C.F.R. Part 211. Such claims could be based on the Consent Order's broad language regarding the matters settled. *See* Section II above. Any such application will be evaluated with reference to the standards set forth in Subpart V implementation decisions such as *Office of Special Counsel*, 10 DOE ¶ 85,048 at 88,220 (1982), and refund application cases such as *Mobil Oil Corp./Reynolds Fuels, Inc.*, 17 DOE ¶ 85,575 (1989), action for reviewing pending, CA–3–89–2983–G (N.D. Tex. filed Nov. 22, 1989). These standards generally require an allocation claimant to demonstrate the existence of a supplier/purchaser relationship with the Consent Order firm and the likelihood that the Consent Order firm failed to furnish petroleum products that it was obliged to supply to the claimant under 10 C.F.R. Part 211. In addition, the claimant should provide evidence that it sought redress from the alleged allocation violation. Finally, the claimant must establish that it was injured and document the extent of the injury.

In our evaluation of whether allocation claims meet these standards, we will consider various factors. For example, we will seek to obtain as much information as possible about the Agency's treatment of complaints made to it by the claimant. We will also look at any affirmative defenses that Eason may have had to the alleged allocation violation. *E.g., id.* In assessing an allocation claimant's injury, we will evaluate the effect of the alleged allocation violation on its entire business operations with particular reference to the amount of product that it received from suppliers other than Eason. In determining the amount of an allocation refund, we will utilize any information that may be available regarding the amount of Eason allocation violations in general and regarding the specific allocation violation alleged by the claimants. Finally, since the Eason Consent Order reflects a negotiated compromise of the issues involved in an enforcement proceeding against Eason, as well as potential unknown violations, and the Consent Order amount is therefore less than Eason's potential liability, we will pro rate any allocation refunds that would otherwise be disproportionately large in relation to the Consent Order fund. *Cf. Amtel, Inc./Whitco, Inc.*, 19 DOE ¶ 85,319 (1989).

III. Distribution of the Remainder of the Eason Consent Order Funds

In the event that money remains after all refund claims from the Eason fund have been analyzed, the remaining funds in that account will be disbursed as indirect restitution in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), 15 U.S.C. §§ 4501–4507 (1988). Pursuant to the PODRA, the funds will be distributed to state governments for use in energy conservation programs.

IV. Conclusion

Applications for Refund should not be filed at this time. Detailed procedures for filing Applications for Refund will be provided in a final Decision and Order. Before distributing any portion of the Consent Order fund, we will publicize the distribution process, and provide an opportunity for any potential claimants to file a claim. Comments regarding the tentative distribution process set forth in this Proposed Order should be filed with the Office of Hearings and Appeals within 30 days of the publication of this Proposed Order in the **Federal Register.**

It Is Therefore Ordered That: The refund amount remitted to the Department of Energy by Eason Drilling Company and ITT Corporation, pursuant to the Consent Order finalized on June 28, 1991, will be distributed in accordance with the foregoing decision.

Appendix

EASON OIL COMPANY—PRODUCT INFORMATION

Name of facility	Operator	Eason's ownership interest	Eason's sales volume
Natural Gas Liquid Products:			
Crescent, OK	Eason	1.00000000	115,470,821
Laverne, OK	Sun	0.00585000	4,637,070
Beaver, OK	Cabot Carbon	0.01640400	695,227
Okeene, OK	Amoco	0.00994700	1,407,937
Thomas, OK (Putnam Oswego)	Mobil	0.01988400	2,322,486
Star Lacey, OK	Amoco	0.01159000	313,742
Elmwood, OK	Amoco	0.06321020	5,792,864
Gillette, WY	Arco	0.04180700	6,666,936
Lacasane, LA	T&P Oil Co.	0.29475000	9,102,870
Ames, OK	Tenneco	0.10886194	16,182,786
Dubach, LA	Kerr-McGee	0.25000000	42,824,864
Refined Products:			
Dubach, LA	Kerr-McGee	0.25000000	92,087,016
Total			297,504,619

[FR Doc. 93–7452 Filed 3–30–93; 8:45 am]
BILLING CODE 6450–01–M

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS–00131A; FRL–4575–9]

Environmental Leadership Program; Open Meeting; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).
ACTION: Notice.

SUMMARY: This notice announces a public meeting and an extension of comment period relating to EPA's proposed Environmental Leadership Program. EPA will hold a public meeting at the time and place listed below in this notice to receive comments on the Environmental Leadership Program which was proposed in the **Federal Register** of January 15, 1993. EPA is also extending the comment period on that notice. The original comment period was to close April 15, 1993; the comment period is extended to May 17, 1993.

DATES: The meeting will take place on Thusday, May 6, 1993, from 8 a.m. to 5 p.m. Additional time on May 7 may be scheduled if needed. The comment period is extended to May 17, 1993.

ADDRESSES: The meeting will be held at the: Disabled American Veterans Office, 807 Maine Avenue SW., Washington, DC.

Comments on the Environmental Leadership Program should be mailed to: TSCA Nonconfidential Information Center (NCIC) (TS–793), also known as, TSCA Public Docket Office, Office of Pollution Prevention and Toxics, Environmental Protection Agency, rm. E–G99, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Linda Glass-Rimer, Environmental Protection Agency (1102), Pollution Prevention Policy Staff, 401 M St., SW., Washington, DC 20460, Telephone: (202) 260–8616.

SUPPLEMENTARY INFORMATION: EPA has proposed the creation of a voluntary Environmental Leadership Program intended to encourage a long-term commitment by corporations and facilities to high quality environmental management practices, pollution prevention, and sustainable development. The Agency is aggressively seeking comment from all interested parties. In the **Federal Register** of January 15, 1993 (58 FR 4802), EPA announced a 90–day comment period on the proposed Environmental Leadership Program. In response to many requests, the comment period is extended to May 17, 1993.

The purpose of this public meeting is to encourage additional comments. A schedule is being developed for presentations, each lasting 10 minutes. Please call (202) 260–4889 to reserve a time for presenting your comments.

Dated: March 24, 1993.

Mark Greenwood,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 93–7422 Filed 3–30–93; 8:45 am]
BILLING CODE 6560–50–F

[FRL–4609–4]

Science Advisory Board, Drinking Water Committee; Open Meeting

Under the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Science Advisory Board's (SAB) Drinking Water Committee (DWC) will meet on April 19–20, 1993. The Committee will meet on Monday, April 19, from 8:30 a.m. to 5:30 p.m. and on Tuesday, April 20, from 9 a.m. to no later than 4:30 p.m. at U.S. EPA Headquarters, Waterside Mall Conference Center, room 3 North, 401 M Street, SW., Washington, DC 20460. The meeting is open to the public and seating is on a first-come basis.

At this meeting, the Committee will: (1) Review the scientific basis of the draft Drinking Water Criteria Document on Inorganic Arsenic, (2) provide a consultation regarding the "Draft Requirements for Nationwide Approval of New and Optionally Revised Methods for Inorganic and Organic Parameters in National Primary Drinking Water Regulations Monitoring" ("Chemistry Testing Protocol," for short), (3) receive a briefing concerning the proposed National Human Exposure Assessment Survey (NHEXAS), (4) receive a progress report on the NAS/NRC review of the Risk Assessment for Fluoride in Drinking Water, and (5) receive a briefing regarding the chemical selection criteria for drinking water regulations (Phase VIB). Documents provided to the Committee as background and for review of item (1) above are available from Dr. Charles Abernathy, U.S. Environmental Protection Agency, 401 M Street SW. (Mail Code WH–586), Washington, DC 20460. Telephone: (202) 260–5374. No background documents are available for items (3), (4) and (5) above.

For additional information concerning this meeting, including copies of a draft agenda and copies of the "Chemistry Testing Protocol," item (2) above, please contact Mrs. Frances Dolby, Staff Secretary, or Mr. Manuel R. Gomez, Designated Federal Official, Science Advisory Board (A–101F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Telephone: (202) 260–6552; FAX: (202) 260–7118.

Members of the public who wish to make a brief oral presentation to the Committee must contact Mr. Gomez no later than Monday, April 12, 1993 in order to be included on the Agenda. Written statements of any length (at least 35 copies) may be provided to the Committee up until the meeting. The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. In general, each individual or group making an oral presentation will be limited to a total time of ten minutes or less, at the Chair's discretion.

Dated: March 22, 1993.

A. Robert Flaak,

Acting Staff Director, Science Advisory Board.

[FR Doc. 93–7425 Filed 3–30–93; 8:45 am]
BILLING CODE 6560–50–M

[FRL–4609–3]

Science Advisory Board, Environmental Economics Advisory Committee; Open Meeting

Under Public Law 92–463, notice is hereby given that the Environmental Economics Advisory Committee (EEAC) of the Science Advisory Board will meet on April 30, 1993 at the Old Colony Inn, 625 First Street, Alexandria VA 22314. The hotel telephone number is (703) 548–6300.

The meeting, which is open to the public, will start at 8 a.m., and adjourn no later than 5 p.m. Its main purpose is to continue discussions and the review (initiated at a December 22, 1992 meeting of the Committee) of a draft contingent valuation study *(Methods for Measuring Non-Use Values: A Contingent Valuation Study of Groundwater Cleanup)* prepared for EPA's Office of Policy, Planning, and Evaluation, and the Office of Solid Waste. The Committee will address, among other issues, the design, conduct, and findings of the study, its applicability to EPA regulatory issues, and other analyses and literature relevant to groundwater valuation.

Requests for copies of the contingent valuation study, and questions concerning its content should be

addressed to Mr. Gary Ballard (OS 311), Regulatory Analysis Branch, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW., Washington DC 20460, (202) 260–2429. The study is not available from the Science Advisory Board. Members of the public desiring additional information about the conduct of the meeting or the agenda should contact Mr. Samuel Rondberg, Designated Federal Official, Environmental Economics Advisory Committee, Science Advisory Board (A101F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260–6552). Anyone wishing to make a presentation at the meeting should forward a written statement (35 copies) to Mr. Rondberg by April 20, 1993. The Science Advisory Board expects that the public statements presented at its meetings will not be repetitive of previously submitted written statements. In general, each individual or group making an oral presentation will be limited to a total time of ten minutes.

Dated: March 19, 1993.

A. Robert Flaak,

Acting Staff Director, Science Advisory Board.

[FR Doc. 93–7424 Filed 3–30–93; 8:45 am]

BILLING CODE 6560–50–M

[OPP–50759; FRL–4576–8]

Receipt of an Application for an Experimental Use Permit for a Transgenic Plant Pesticide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On January 19, 1993, EPA received an application from Ciba-Geigy Corporation, Seed Division for an EPA Experimental Use Permit (EUP) for a transgenic plant pesticide. This is the third EUP application under the Federal Insecticide, Fungicide, and Rodenticide Act for testing with a pesticidal substance that is produced in a plant. The Agency has determined that this application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting public comments on this application.

DATES: Written comments must be received by April 30, 1993.

ADDRESSES: Comments, in triplicate, should bear the docket control number OPP–50759 and be submitted to: Public Response and Program Resources Branch, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Room 1128, Crystal Mall #2, 1921 Jefferson Davis Highway, Crystal City, VA 22202.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. Written comments will be available for public inspection in room 1128 at the Virginia address given above, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Phillip O. Hutton, Product Manager (PM) 18, Registration Division (H7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Room 213, Crystal Mall #2, 1921 Jefferson Davis Highway, Crystal City, VA 22202, (703)305–7690.

SUPPLEMENTARY INFORMATION: On January 19, 1993, EPA received an application for an EUP from Ciba-Geigy Corporation, Seed Division (Ciba Seeds), P.O. Box 12257, Research Triangle Park, North Carolina 27709–2257. The application was assigned EPA File Symbol 66736–EUP–R. Ciba Seeds proposes to test a truncated version of the cryIA(b) δ-endotoxin (derived from the soil microbe *Bacillus thuringiensis*) as expressed in maize plants originating from crosses of descendants of two separate transformation events (Event 171 & Event 176) of the proprietary inbred line CG00526. The February 1993 issue of the international journal *Bio/Technology* (11:194–200) describes how the maize was transformed.

Both transformation events of CG00526 involved insertion of a synthetic gene, encoding the truncated cryIA(b) δ-endotoxin, via microprojectile bombardment into immature maize embryos. Plants originating from Event 171 have the δ-endotoxin gene controlled by the Cauliflower Mosiac Virus 35S promoter, as well as chimeric 35S/ β-glucuronidase (GUS) and 35S/ phophinothricin resistance genes used as selectable markers. Plants originating from Event 176 have 2 copies of the δ-endotoxin gene controlled by the maize PEPC promoter, causing the δ-endotoxin to be expressed in green tissues, or a maize pollen-specific promoter causing the δ-endotoxin to be expressed in pollen/anther tissue. Like Event 171 plants, Event 176 plants have a phosphinothricin resistance gene, controlled by the Cauliflower Mosiac Virus 35S promoter, as a selectable marker.

Larger-scale testing is being sought to evaluate the crosses of descendants of Event 171 & Event 176 transformants in different geographic areas under a variety of conditions and to cross the insecticidal gene into more corn lines. Some limited studies are currently in progress in Florida, Hawaii, and Illinois under USDA permits. Plantings under this EUP proposed through March 1994 will take place in six states (Florida, Hawaii, Illinois, Iowa, Nebraska, and North Carolina), with cumulative acreage of transgenic plants at a maximum of 33 acres. With the exception of locations intended for breeding and seed increase activities, most test plots will not exceed 0.3 acre in size.

Activities proposed for the proposed plantings through March 1994 are as follows: Gene efficacy evaluations, resistance management experiments, insect susceptibility studies, breeding and seed increases. The maximum amount of cryIA(b) protein in seeds to be planted for this period is 35.7 grams.

Plantings proposed for the period between April 1994 through March 1995 will cumulatively total up to 104 acres of transgenic corn in nine states with most test plots not exceeding 0.3 acres (Florida, Hawaii, Illinois, Indiana, Iowa, Nebraska, North Carolina, and Wisconsin). In addition to continuing the five types of activities proposed for earlier plantings, yield evaluations and insect population dynamics studies are also planned. Details of the proposed planting between April 1994 through March 1995 have not yet been submitted to the Agency.

No temporary tolerances are being requested relative to the proposed EUP since any reserved transgenic plant material will be used only for research or future plantings. All other material will be destroyed. Following each field test, all plant material not required for future research or plantings will beincorporated into the soil to decompose. The proposed EUP program will be supervised by professionally qualified employees of Ciba Seeds. Most activities will be conducted at Ciba research facilities; the remainder will be conducted by qualified university or private cooperators.

Upon review of the Ciba Seeds application, any comments received in

response to this notice and any other relevant information, the U.S. EPA will decide whether to issue or deny the EUP. If issued, the U.S. EPA will set conditions under which the experiments are to be conducted. Any issuance of an EUP by the Agency will be announced in the **Federal Register**.

Dated: March 19, 1993.

Lawrence Culleen,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 93-7306 Filed 3-30-93; 8:45 am]

BILLING CODE 6560-50-F

[OPP-66173; FRL 4573-9]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations.

DATES: Unless a request is withdrawn by June 29, 1993, orders will be issued cancelling all of these registrations.

FOR FURTHER INFORMATION CONTACT: By mail: James A. Hollins, Office of Pesticide Programs (H7502C), Environmental Protection Agency, 401 M Street SW, Washington, DC 20460. Office location for commercial courier delivery and telephone number: Room 220, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA, 703-305-5761.

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 6(f)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, provides that a pesticide registrant may, at any time, request that any of its pesticide registrations be cancelled. The Act further provides that EPA must publish a notice of receipt of any such request in the **Federal Register** before acting on the request.

II. Intent to Cancel

This Notice announces receipt by the Agency of requests to cancel some 63 pesticide products registered under section 3 or 24(c) of FIFRA. These registrations are listed in sequence by registration number (or company number and 24(c) number) in the following Table 1:

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product Name	Chemical Name
000059-00193	Flair	Butoxypolypropylene glycol 1-Napthyl-*N*-methylcarbamate *O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate (Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20% Pyrethrins
000070-00183	Kill Ko Mal-Thox HDC Dust	Methoxychlor (2,2-bis(p-methoxyphenyl)-1,1,1-trichloroethane) *O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000134-00039	Hess & Clark Six Roost Paint	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000241-00076	Malathion Technical	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000241-00110	Malathion ULV Concentrate Insecticide	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000279 IL-92-0001	Command 4EC	2-(2-Chlorophenyl)methyl-4,4-dimethyl-3-isoxazolidinone
000299-00105	Martin's 5% Malathion Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000299-00180	Martins Cow and Calf Dust	Methoxychlor (2,2-bis(*p*-methoxyphenyl)-1,1,1-trichloroethane) *O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000407-00282	Imperial Home Orchard Spray	Methoxychlor (2,2-bis(*p*-methoxyphenyl)-1,1,1-trichloroethane) *O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate cis-*N*-Trichloromethylthio-4-cyclohexene-1,2-dicarboximide
000602-00087	Purina Malathion Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000602-00183	Purina Fruit Tree Spray	Methoxychlor (2,2-bis(*p*-methoxyphenyl)-1,1,1-trichloroethane) *O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate cis-*N*-Trichloromethylthio-4-cyclohexene-1,2-dicarboximide
000602-00227	Purina Hog and Cattle Dusting Powder	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000606-00099	Corn King Sulphurized Oil	Mineral oil - includes paraffin oil from 063503 Sulfur
000655-00080	Prentox Malathion 25% WP	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000655-00123	Prentox Malathion 8 Lb. Emulsifiable Concentrate	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000655-00149	Prentox 80% Malathion Emulsifiable Concentrate	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000655-00323	Prentox Malathion 5 Lb. Emulsifiable Concentrate Premium	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000655-00550	10% Malathion Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000802-00170	Miller's Pet, Poultry and Livestock Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
001258-00690	CCH (Commercial Calcium Hypochlorite)	Calcium hypochlorite

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product Name	Chemical Name
001258–00892	Olin HTH Dry Chlorine Giant Tablets	Calcium hypochlorite
001258–00896	Dry Chlorinator Granular for Swimming Pools	Calcium hypochlorite
001258–00932	Olin Kiddle Pool Sanitizer	Calcium hypochlorite
001258–00935	Olin HTH Granular Dry Chlorine-65 for Swimming Pools	Calcium hypochlorite
001258–00936	Olin HTH Granular Dry Chlorine-35 for Swimming Pools	Calcium hypochlorite
001258–00938	CCH - 65 (Commercial Calcium Hypochlorite)	Calcium hypochlorite
001258–01052	Olin HTH Shock Treatment & Superchlorinator for Swimming	Calcium hypochlorite
001258–01127	Bio - Free One Tablets	Calcium hypochlorite
001258–01128	Bio - Blitz One Tablets	Calcium hypochlorite
001258–01130	Bio Blitz La Tablets	Calcium hypochlorite
001258–01134	HTH 2 Gram Spa & Hot Tub Tablets	Calcium hypochlorite
001258–01135	HTH 5 Gram Spa & Hot Tub Tablets	Calcium hypochlorite
001258–01146	Calcium Hypochlorite Tablets - 2 Gram	Calcium hypochlorite
001258–01147	Calcium Hypochlorite Tablets - 5 Gram	Calcium hypochlorite
001258–01148	Calcium Hypochlorite Tablets - 10 Gram	Calcium hypochlorite
001258–20006	Olin Calcium Hypochlorite Sanitizer	Calcium hypochlorite
002217–00464	Grain Gard Flour Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
002548–00077	Max Kill Malathion 80 WE	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
002935–00139	Red-Top Premium Grade Malathion Grain Protectant	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
003468–00014	4% Malathion	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
003772–00007	Earl May 57% Malathion Spray	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate Xylene range aromatic solvent
005549–00043	4% Malathion Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
008006–00008	Easy Cattle Oil	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
008590–00012	Agway Malathion 25W	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
008590–00185	Agway Malathion-Pyrethrins-Piperonyl Butoxide 4-0.1-1D	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate (Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20% Pyrethrins
010349–00004	Nalco Visco 1152	3-Alkoxy*-2-hydroxypropyl trimethyl ammonium chloride *(100% C12-C15 as in linear, primary alcohol)
010349–00010	Visco 1153	Nonylphenoxypolyethoxyethanol - Iodine complex 1-(Alkyl* amino)-3-aminopropane monoacetate *(as in fatty acids of coconut oil) *N*-Polyoxyethylated stearylamine
010349–00022	Nalco Visco 4997	3-Alkoxy*-2-hydroxypropyl trimethyl ammonium chloride *(100% C12-C15 as in linear, primary alcohol)
034704–00019	Clean Crop Malathion 25% Dust Base	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
034704–00291	Hapkins Malathion 25% W.P.	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
034704–00292	Hopkins 5% Malathion Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
034704–00456	Clean Crop Malaspray 8EC	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
034704–00528	Professional Grade Malathion Insect Spray	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
036301–00011	J-Mal-92 Premium Grade Malathion Agricultural Insecticide	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
045385–00074	J-H Tanner's Insecticide	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate (Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20% Pyrethrins
045385–00075	Cenol Premium Grade 50% Malathion Emulsifiable Concentrate	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
047000–00009	Malathion 5-E Grain Protectant Contains Cythion	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product Name	Chemical Name
047000–00010	2% Malathion Backrubber Solution	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
047000–00024	Economy's 57% Malathion Emulsifiable Concentrate	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
047000–00037	Economy Malathion 5% Dust Insecticide	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
047099–00002	Racor 11-1266	2,2'-(1-Methyltrimethylenedioxy)bis(4-methyl-1,3,2-dioxaborinane) 2,2'-Oxybis(4,4,6-trimethyl-1,3,2-dioxaborinane)
056644–00005	5% Malathion Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
056644–00007	Security Brand 25% Malathion Wettable	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate

Unless a request is withdrawn by the registrant within 90 days of publication of this notice, orders will be issued cancelling all of these registrations. Users of these pesticides or anyone else desiring the retention of a registration should contact the applicable registrant directly during this 90-day period. The following Table 2 includes the names and addresses of record for all registrants of the products in Table 1, in sequence by EPA Company Number.

TABLE 2.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA Company No.	Company Name and Address
000059	Coopers Animal Health Inc., 1201 Douglas Ave, Kansas City, KS 66103.
000070	Wilbur-Ellis Co., Box 16458, Fresno, CA 93755.
000134	Hess & Clark, Inc., 7th & Orange, Ashland, OH 44805.
000241	American Cyanamid Co., Agri Research Div - U.S. Regulatory Affairs, Box 400, Princeton, NJ 08543.
000279	FMC Corp., ACG Speciality Products, 1735 Market Street, Philadelphia, PA 19103.
000299	C. J. Martin Co, 606 W. Main St., Box 9, Nacogdoches, TX 75961.
000407	Imperial Inc., Box 98, Shenandoah, IA 51601.
000602	Purina Mills, Inc., Box 66812, St Louis, MO 63166.
000606	Prince Agri Products, Inc., One Prince Plaza, Quincy, IL 62301.
000655	Prentiss Inc., C. B. 2000, Floral Park, NY 11002.
000802	Chas H. Lilly Co., 7737 N.E. Killingsworth, Portland, OR 97218.
001258	Olin Corp., Box 586, Cheshire, CT 06410.
002217	PBI/Gordon Corp., 1217 W. 12th Street, Box 4090, Kansas City, MO 64101.
002548	Research Products Co., Division of McShares, Inc., Box 1460, Salina, KS 67402.
002935	Wilbur Ellis Co., 191 W. Shaw Ave, Fresno, CA 93704.
003468	Schall Chemical Inc., 120 N. Broadway, Montevista, CO 81144.
003772	Earl May Seed & Nursery L.P., c/o Bonide Products Inc., 2 Wurz Ave, Yorkville, NY 13495.
005549	Coastal Chemical Corp., PO Box 856, Greenville, NC 27834.
008006	Easy Chemical & Mfg Co. Inc., R R 1, Seward, NE 68434.
008590	Agway Inc., c/o Universal Cooperatives Inc., Box 460, Minneapolis, MN 55440.
010349	Nalco Chemical Co, One Nalco Center, Box 87, Naperville, IL 60563.
034704	Platte Chemical Co., Inc., c/o Willaim M. Mahlburg, Box 667, Greeley, CO 80632.
036301	Degesch America, Inc., Houston Division, 14802 Park Almeda Drive Box 451036, Houston, TX 77245.
045385	CTX Inc., 481 Scotland Rd, Mchenry, IL 60050.
047000	Chem-Tech, Ltd, 4515 Fleur Dr. #303, Des Moines, IA 50321.
047099	Parker-Hannifin Corp., Racor Division, Box 3208, Modesto, CA 95353.
056644	Security Products Co. of Delaware, Inc., 7801 Metro Parkway, Box 59084, Minneapolis, MN 55420.

III. Loss of Active Ingredients

Unless these requests for cancellation are withdrawn, two pesticide active ingredients will no longer appear in any registered products. Those who are concerned about the potential loss of these active ingredients for pesticidal use are encouraged to work directly with the registrants to explore the possibility of their withdrawing the request for cancellation. These active ingredients are listed in the following Table 3 with the EPA Company Number of their registrants:

TABLE 3.—ACTIVE INGREDIENTS WHICH WOULD DISAPPEAR AS A RESULT OF REGISTRANTS' REQUESTS TO CANCEL

CAS No.	Chemical Name	EPA Company No.
26635–92–7	Polyoxyethylated stearylamine	010349
68187–63–3	Alkoxy*-2-hydroxypropyl trimethyl ammonium chloride *(100% C12-C15 as in linear, primary alcohol)	010349

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to James A. Hollins, at the address given above, postmarked before June 29, 1993. This written withdrawal of the request for cancellation will apply only to the applicable 6(f)(1) request listed in this notice. If the product(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. The withdrawal request must also include a commitment to pay any reregistration fees due, and to fulfill any applicable unsatisfied data requirements.

V. Provisions for Disposition of Existing Stocks

The effective date of cancellation will be the date of the cancellation order. The orders effecting these requested cancellations will generally permit a registrant to sell or distribute existing stocks for 1 year after the date the cancellation request was received. This policy is in accordance with the Agency's statement of policy as prescribed in **Federal Register** No. 123, Vol. 56, dated June 26, 1991. Exceptions to this general rule will be made if a product poses a risk concern, or is in noncompliance with reregistration requirements, or is subject to a data call-in. In all cases, product-specific disposition dates will be given in the cancellation orders.

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Unless the provisions of an earlier order apply, existing stocks already in the hands of dealers or users can be distributed, sold or used legally until they are exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product(s). Exceptions to these general rules will be made in specific cases when more stringent restrictions on sale, distribution, or use of the products or their ingredients have already been imposed, as in Special Review actions, or where the Agency has identified significant potential risk concerns associated with a particular chemical.

Dated: March 18, 1993.

Douglas D. Campt,
Director, Office of Pesticide Programs.

[FR Doc. 93–7301 Filed 3–30–93; 8:45 am]
BILLING CODE 6560–50–F

[OPP–00350; FRL–4189–7]

Iron Salts; Pesticide Reregistration Eligibility Document; Availability for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of reregistration eligibility document; opening of public comment period.

SUMMARY: This Notice announces the availability of the Reregistration Eligibility Document (RED) for the chemical case iron salts, and the start of a 60–day public comment period. The RED for iron salts is the Agency's formal regulatory assessment of the health and environmental data base of the subject chemical case, and presents the Agency's determination regarding which pesticidal uses of iron salts are eligible for reregistration.

DATES: Written comments on the RED must be submitted by June 1, 1993.

ADDRESSES: Three copies of comments identified with the docket number "OPP–00350" should be submitted to: By mail: Public Response and Program Resources Branch, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to: Room 1132, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted as a comment in response to this Notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set for in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public docket. Information not marked confidential will be included in the public docket without prior notice. The public docket and docket index will be available for public inspection in Rm. 1132 at the address given above, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

To request a copy of the above RED, or a RED Fact Sheet, contact the Public Response and Program Resources Branch, in Rm. 1132, at the address given above or call (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Technical questions on the RED should be directed to the Chemical Review Manager, Yvonne Brown, at (703) 308–8073.

SUPPLEMENTARY INFORMATION: The Agency has issued Reregistration Eligibility Documents for the chemical case iron salts, including the pesticidal active ingredients iron sulfate, iron sulfate monohydrate, and iron sulfate heptahydrate. Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended in 1988, EPA is conducting an accelerated reregistration program to reevaluate existing pesticides to make sure they meet current scientific and regulatory standards. The data base to support the reregistration of these active ingredients is substantially complete. EPA has determined that all currently registered products containing iron salts as an active ingredient are eligible for reregistration.

All registrants of products containing iron salts have been sent the appropriate RED and must respond to the labeling requirements and the product specific data requirements (if applicable) within 8 months of receipt. These products will not be reregistered until adequate product specific data have been submitted and all necessary product label changes are implemented.

The reregistration program is being conducted under congressionally mandated time frames, and EPA recognizes both the need to make timely reregistration decisions and to involve

the public. Therefore, EPA is issuing the RED as a final document with a 60–day comment period. Although the 60–day public comment period does not affect the registrant's response due date, it is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the RED. All comments will be carefully considered by the Agency and if any of those comments impact on the RED, EPA will issue an amendment to the RED and publish a Federal Register Notice announcing its availability.

Dated: March 11, 1993.

Peter Caulkins,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 93–7423 Filed 3–30–93; 8:45 am]

BILLING CODE 6560–50–F

[OPP–34041; FRL 4574–1]

Notice of Receipt of Requests for Amendments to Delete Uses in Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of request for amendment by registrants to delete uses in certain pesticide registrations.

DATES: Unless a request is withdrawn, the Agency will approve these use deletions and the deletions will become effective on June 29, 1993.

FOR FURTHER INFORMATION CONTACT: By mail: James A. Hollins, Office of Pesticide Programs (H7502C), Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. Office location for commercial courier delivery and telephone number: Room 220, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA, 703–305–5761.

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. The Act further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, the Administrator may approve such a request.

II. Intent to Delete Uses

This notice announces receipt by the Agency of applications from registrants to delete uses in the nine pesticide registrations listed in the following Table 1. These registrations are listed by registration number, product names and the specific uses deleted. Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant before June 29, 1993 to discuss withdrawal of the applications for amendment. This 90-day period will also permit interested members of the public to intercede with registrants prior to the Agency approval of the deletion.

TABLE 1.—REGISTRATIONS WITH REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS.

Registration No.	Product Name	Delete From Label
000400–00423	Terrazole 4 Flowable Fungicide	Turf, rye grass seed
000869–00125	Green Light Systemic Fungicide	Roses, flowers, shade trees, ornamentals
003125–00099	Metasystox-R 50% Concentrate	Avocados
008660–00075	Vertagreen Systemic Disease Control	Ornamentals
010182–00152	Eptam 6-E Selective Herbicide	Flax, sweet potatoes, green peas, table beets
010182–00155	Eptam 5-G Selective Herbicide	Flax, sweet potatoes, green peas, table beets
010182–00160	Eptam 10-G Selective Herbicide	Flax, sweet potatoes, green peas, table beets
010182–00199	Eptam 20-G Selective Herbicide	Flax, sweet potatoes, green peas, table beets
010182–00220	Eptam 7-E Selective Herbicide	Flax, sweet potatoes, green peas, table beets

The following Table 2 includes the names and addresses of record for all registrants of the products in Table 1, in sequence by EPA company number.

TABLE 2.—REGISTRANTS REQUESTING AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

Company No.	Company Name and Address
000400	Uniroyal Chemical Co., Inc., 74 Amity Rd., Bethany, CT 06524.
000869	Green Light Co., P.O. Box 17985, San Antonio, TX 78217.
003125	Miles, Inc., Agriculture Division, 8400 Hawthorne Road, P.O. Box 4913, Kansas City, MO 64120.
008660	The Andersons, Parker Fertilizer Co., 201 W. Fourth St., P.O. Box 540, Sylacauga, AL 35150.
010182	ICI Americas, Inc., Agricultural Products, New Murphy Road & Concord Pike, Wilmington, DE 19879.

III. Existing Stocks Provisions

The Agency has authorized registrants to sell or distribute product under the previously approved labeling for a period of 18 months after approval of the revision, unless other restrictions have been imposed, as in special review actions.

Dated: March 18, 1993.

Douglas D. Campt,

Director, Office of Pesticide Programs.

[FR Doc. 93-7300 Filed 3-30-93; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

March 24, 1993.

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of this submission may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW, Suite 140, Washington, DC 20037, (202) 857-3800. For further information on this submission contact Judy Boley, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503, (202) 395-4814.

OMB Number: None.

Title: Frequency Coordinator Evaluation.

Action: New collection.

Respondents: Individuals or households, state or local governments, non-profit institutions, and businesses or other for-profit (including small businesses).

Frequency of Response: On occasion reporting.

Estimated Annual Burden: 11,000 responses; .166 hours average burden per response; 1,826 hours total annual burden.

Needs and Uses: Report and Order, PR Docket No. 83-737 requires the Commission to monitor the overall performance and quality of service of the frequency coordination committees designated for the Private Land Mobile Radio Service. The evaluation form has been developed to provide the Commission with ratings and comments from the user public to evaluate the performance of the frequency coordination committees. The data will be used by Commission staff to evaluate the present frequency coordination process, service to the public, and to make recommendations on any necessary corrective action. Licensees will be randomly selected in various radio services and being sent an evaluation. The response to the survey is entirely voluntary. Although the Commission does not intend to use a formal statistical method of data collection, tracking of the response rate for each radio service and frequency coordinator is planned. The replies will provide the capability to gauge each frequency coordination committee's quality of service to the public.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 93-7341 Filed 3-30-93; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Regarding Treatment of Security Interests After Appointment of the FDIC as Conservator or Receiver

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Policy statement.

SUMMARY: The FDIC has adopted a Statement of Policy which sets forth procedures and guidelines as to how the FDIC, as conservator or receiver of an insured depository institution, will treat security interests in the assets of an insured depository institution.

EFFECTIVE DATE: March 23, 1993. This Statement of Policy applies to all security agreements to which an insured depository institution is a party regardless of date of such agreement.

FOR FURTHER INFORMATION CONTACT: Michael H. Krimminger, Senior Counsel (202-736-0336) or Linda L. Stamp, Counsel (202-736-0161), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION: The Board of Directors of the FDIC has adopted a Statement of Policy Regarding Treatment of Security Interests After Appointment of the Federal Deposit Insurance Corporation as Conservator or Receiver. The text of the Policy Statement follows:

Statement of Policy Regarding Treatment of Security Interests After Appointment of the Federal Deposit Insurance Corporation as Conservator or Receiver

Introduction

The power of the Federal Deposit Insurance Corporation (FDIC) to repudiate contracts of a federally-insured depository institution (an Institution) for which the FDIC is appointed conservator or receiver,[1] is among the most important and powerful statutory rights the FDIC exercises.

Congress recognized this when it amended the Federal Deposit Insurance Act (the Act) in 1989 to codify the FDIC's rights as conservator or receiver to repudiate contracts and to make special provision for security interests.[2] In effect, Congress intended to strike a reasonable balance between the rights of the FDIC, on the one hand, and the reasonable expectations of the marketplace, on the other.

The FDIC Board of Directors also recognizes the importance of these provisions. Recent inquiries to the FDIC demonstrate concern regarding the enforceability of security interests for public deposits in insured depository institutions.[3] In an effort to avoid misunderstanding or uncertainty by market participants involved in secured transactions with Institutions generally, the FDIC is adopting this "Statement of Policy Concerning Treatment of Secured Obligations After Appointment of the FDIC as Conservator or Receiver."[4]

Background

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) was signed into law on August 9, 1989.[5] FIRREA codified in section 11(e) of the Act the FDIC's repudiation right as conservator or receiver.[6]

Section 11(e) also provides that the right is not to be construed as permitting

[1] 12 U.S.C. 1821(e).

[2] 12 U.S.C. 1821(e)(11).

[3] The granting of security interests to protect deposits in excess of the $100,000 insured by the FDIC may be authorized or required for public deposits by state and/or federal law. See 12 CFR 7.7410.

[4] Nothing contained herein should be interpreted as contradicting or impairing the policies expressed in the "FDIC Statement of Policy on Qualified Financial Contracts" (FDIC Statements of Policy 5113 (Dec. 12, 1989)) or in the "Statement of Policy Regarding Treatment of Collateralized Put Obligations After Appointment of the Federal Deposit Insurance Corporation as Conservator or Receiver" (FDIC Statement of Policy 5335 (July 9, 1991)).

[5] Public Law No. 101-73, 103 Stat. 183 (1989).

[6] FIRREA § 212(e), 103 Stat. 241; see H.R. Rep. No. 101-54(I), 101st Cong., 1st Sess. 332 (1989).

the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.[7] Therefore, if the FDIC repudiates a legally enforceable and perfected security agreement, it cannot avoid any legally enforceable and perfected security interest in the collateral to the extent of the statutory damages allowed by section 11(e) of the Act.

In April 1992, the U.S. Court of Appeals for the Eighth Circuit addressed the meaning of "legally enforceable" as used in the statute.[8] It held that the term required strict compliance with each of the affirmative requirements of section 13(e) of the Act, including the "contemporaneous" requirement,[9] and the *D'Oench* doctrine.[10] The court also held that all state law requirements applicable to the legal enforceability and perfection of security interests must be met.[11]

That decision prompted some concern by those who have entered into or propose to enter into secured deposit or credit transactions with an Institution.

Construing sections 11(e) and 13(e) of the Act together, it remains clear that security interests that are not perfected and legally enforceable may be avoided by the FDIC as conservator or receiver. For this purpose, the term "legally enforceable" requires compliance with sections 11(d)(9), 11(n)(4)(I), and 13(e) of the Act.

Regardless of the date of the contract, the foregoing summary of existing law applies to all contracts to which an Institution is a party, if the FDIC is or was appointed conservator or receiver of such Institution on or after August 9, 1989.

Historical Position of the FDIC

The FDIC has maintained that it will not seek to avoid otherwise legally enforceable and perfected security interests solely because the security agreement does not meet the "contemporaneous" requirement of sections 11 and 13 of the Act.[12]

Similarly, the FDIC has not sought to avoid an otherwise legally enforceable and perfected security interest solely because the secured obligation or the collateral subject to such security interest (a) was not acquired by the Institution contemporaneously with the approval and execution of the security agreement granting the security interest and/or (b) may change, increase, or be subject to substitution from time to time during the period that the security interest is enforceable and perfected.[13]

Assumptions

The foregoing analysis assumes that (a) the agreement was undertaken in the ordinary course of business, not in contemplation of insolvency, and with no intent to hinder, delay or defraud the Institution or its creditors; (b) the secured obligation represents a *bona fide* and arm's length transaction; (c) the secured party or parties are not insiders or affiliates of the Institution; (d) the grant or creation of the security interest was for adequate consideration; and (e) the security agreement evidencing the security interest is in writing, was approved by the Institution's board of directors or loan committee (which approval is reflected in the minutes of a meeting of the board of directors or committee), and has been, continuously from the time of its execution, an official record of the Institution.[14]

Factors Considered

The FDIC considered several factors in the development of this statement of policy. Those factors include the legal rights and powers of the FDIC, assurances that may have been provided in the past by staff of the FDIC and the reliance placed upon those assurances by market participants, and the desirability for market certainty and stability. The FDIC also considered the potential long-term cost to the FDIC of adopting alternative positions or policies, and the potential for redemption or prepayment in the event of acceleration of the maturities of existing secured obligations of Institutions in the event of repudiation.

Statement of Policy

Contemporaneous Requirement. Provided all of the foregoing "Assumptions" are met, the FDIC, acting as conservator or receiver for an Institution, will not seek to avoid an otherwise legally enforceable and perfected security interest solely because the security agreement granting or creating such security interest does not meet the "contemporaneous" requirement of sections 11(d)(9), 11(n)(4)(I), and 13(e) of the Act.

Specifically, the FDIC will not seek to avoid such a security interest solely because the secured obligation or collateral subject to the security interest (a) was not acquired by the Institution contemporaneously with the approval and execution of the security agreement granting the security interest and/or (b) may change, increase, or be subject to substitution from time to time during the period that the security interest is enforceable and perfected.

Right to Redeem or Prepay. Notwithstanding the foregoing, the FDIC retains the right, as conservator or receiver, to redeem or prepay any secured obligation of an Institution by repudiation or otherwise.

Upon repudiation, the secured party is entitled to any damages allowable pursuant to section 11(e) of the Act. The liability of the FDIC as conservator or receiver for exercising its repudiation rights is limited to "actual direct compensatory damages" as provided in section 11(e) of the Act. Such damages are to be determined as of the date of appointment of the conservator or receiver, as contrasted with certain "qualified financial contracts" where resulting damages are determined as of the date of repudiation.[15]

The FDIC shall have a reasonable period of time, generally, no more than 180 days from the date of appointment of the FDIC as conservator or receiver for an Institution, to elect whether to redeem or prepay, by repudiation or otherwise, secured obligations of the Institution.

By order of the Board of Directors. Dated at Washington, DC this 23rd day of March, 1993.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 93–7368 Filed 3–30–93; 8:45 am]

BILLING CODE 6714–01–M

[7] 12 U.S.C. 1821(e)(11).

[8] *North Arkansas Medical Center* versus *Barrett*, 962 F.2d 780 (8th Cir. 1992).

[9] *Id.* at 787.

[10] *Id.* (citing *D'Oench, Duhme & Co.* versus *FDIC*, 315 U.S. 447 (1942)); see *Id.* at 788–89 (purposes of section 1823(e) and *D'Oench* doctrine "are to facilitate regulation and protect the FDIC from financial loss by assuring that the bank's financial condition can be assessed instantaneously; to assure senior bank officials are aware of unusual transactions before the bank agrees to them; and to prevent collusion between bank employees and customers on the eve of the bank's failure").

[11] *Id.* at 785.

[12] FDIC Advisory Opinions 4423 (Dec. 15, 1989).

[13] FDIC Advisory Opinions 4537 (Apr. 2, 1991).

[14] FDIC Advisory Opinions 4537 (Apr. 2, 1991); FDIC Advisory Opinions 4423 (Dec. 15, 1989).

[15] 12 U.S.C. 1821(e).

FEDERAL RESERVE SYSTEM

Chemical Banking Corporation; Application to Engage in Nonbanking Activities

Chemical Banking Corporation, New York, New York (Applicant), has applied pursuant to section 4(c)(8) of the Bank Holding Company Act (12

U.S.C. 1843(c)(8)) (BHC Act) and § 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)) to engage *de novo* through its wholly owned subsidiary, Chemical Securities Inc., New York, New York (Company), a broker-dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), in underwriting and dealing in, to a limited extent, all types of debt securities, including without limitation sovereign debt securities, corporate debt securities, debt securities convertible into equity securities, and securities issued by a trust or other vehicle secured by or representing interests in debt obligations. Applicant also proposes to provide services that are incidental to the foregoing activities. Applicant proposes to conduct these activities throughout the United States and the world.

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with Board approval, engage in any activity which the Board, after due notice and opportunity for hearing, has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. This statutory test requires that two separate tests be met for an activity to be permissible for a bank holding company. First, the Board must determine that the activity is, as a general matter, closely related to banking. Second, the Board must find in a particular case that the performance of the activity by the applicant bank holding company may reasonably be expected to produce public benefits that outweigh possible adverse effects.

A particular activity may be found to meet the "closely related to banking" test if it is demonstrated that banks have generally provided the proposed activity; that banks generally provide services that are operationally or functionally similar to the proposed activity so as to equip them particularly well to provide the proposed activity; or that banks generally provide services that are so integrally related to the proposed activity as to require their provision in a specialized form. *National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1237 (DC Cir. 1975). In addition, the Board may consider any other basis that may demonstrate that the activity has a reasonable or close relationship to banking or managing or controlling banks. Board Statement Regarding Regulation Y, 49 FR 806 (1984).

The Board previously has approved, by order, underwriting and dealing in, to a limited extent, all types of debt and equity securities. J.P. Morgan & Co. Incorporated, et al., 75 Federal Reserve Bulletin 192 (1989) (1989 Section 20 Order), as modified by Order dated September 21, 1989, 75 Federal Reserve Bulletin 751 (1989) (Modification Order). Applicant has stated that it will conduct the proposed underwriting and dealing activities using the same methods and procedures, and subject to the same prudential limitations established by the Board in the 1989 Section 20 Order, as modified by the Modification Order, including the Board's 10 percent revenue limitation on such activities. For this reason, Applicant contends that approval of the application would not be barred by section 20 of the Glass-Steagall Act (12 U.S.C. 377), which prohibits the affiliation of a state member bank with any company principally engaged in the underwriting, public sale, or distribution of securities.

In order to satisfy the proper incident to banking test, section 4(c)(8) of the BHC Act requires the Board to find that the performance of the activities by Company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices. Applicant believes that the proposed activities will benefit the public by promoting competition, lower financing costs, and more innovative financing. Applicant also believes that approval of this application will allow Company to provide a wider range of services and added convenience to its customers. Applicant believes that the proposed activities will not result in any unsound banking practices or other adverse effects.

In publishing the proposal for comment, the Board does not take a position on issues raised by the proposal. Notice of the proposal is published solely in order to seek the views of interested persons on the issues presented by the application and does not represent a determination by the Board that the proposal meets, or is likely to meet, the standards of the BHC Act.

Any comments or requests for hearing should be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, not later than April 29, 1993. Any request for a hearing on this application must, as required by § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)), be accompanied by a statement of the reasons why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

This application may be inspected at the offices of the Board of Governors or the Federal Reserve Bank of New York.

Board of Governors of the Federal Reserve System, March 24, 1993.

William W. Wiles,

Secretary of the Board.

[FR Doc. 93–7403 Filed 3–30–93; 8:45 am]

BILLING CODE 6210–01–F

Comerica Incorporated; Application to Engage De Novo in the Provision of Expanded Employee Benefits Consulting Services and Career Counseling Services Through its Subsidiary, ComeriCOMP, Inc.

Comerica Incorporated, Detroit, Michigan ("Applicant"), has applied pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) ("BHC Act"), and § 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)), to offer career counseling services to un-affiliated business organizations and individuals through its wholly owned subsidiary ComeriCOMP, Inc., Detroit, Michigan ("ComeriCOMP"). ComeriCOMP currently provides employee benefits consulting services to affiliates and non-affiliates, and career counseling services to Applicant and its affiliates. With this proposal, Applicant seeks to expand its career counseling activities by offering these services to non-affiliated companies and individuals. These services include: (1) Assessing an individual's education, prior business experience, salary history, interests, and skills; (2) providing assistance in preparing resumes and cover letters; (3) contacting potential employers regarding employment opportunities, and making this information available to its clients; (4) conducting general workshops addressing the financial aspects of unemployment, economic trends, the job search process, and alternative career options; and (5) providing individual counseling to set goals in obtaining employment. Applicant proposes to conduct these activities on a nationwide basis.

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with Board approval, engage in any activity "which the Board, after due notice and opportunity for hearing, has

determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." Thus, the Board must determine initially that the activity is, as a general matter, "closely related to banking." Second, the Board must find in a particular case that the performance of the activity by the applicant bank holding company may reasonably be expected to produce public benefits that outweigh possible adverse effects.

A particular activity may be found to meet the "closely related to banking" test if it is demonstrated that banks have generally provided the proposed activity; that banks generally provide services that are operationally or functionally so similar to the proposed activity so as to equip them particularly well to provide the proposed activity; or that banks generally provide services that are so integrally related to the proposed activity as to require their provision in a specialized form. *National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1337 (DC Cir. 1975)("*National Courier*"). In addition, the Board may consider any other basis that may demonstrate that the activity has a reasonable or close relationship to banking or managing or controlling banks. Board Statement Regarding Regulation Y, 49 FR 806 (1984).

Applicant believes that the proposed activities meet the *National Courier* standard because: (1) ComeriCOMP and other bank holding companies and banks currently provide career counseling services to bank and bank holding company employees, former employees, and individuals whose jobs are terminated following acquisitions; (2) the proposed services are operationally and functionally similar to the employee benefits consulting activities that the Board has already approved for bank holding companies and that ComeriCOMP already provides; and (3) both the proposed activities and ComeriCOMP's present employee benefits consulting services involve conveying financial information similar to information provided by bank holding companies in conducting financial advisory services, such as investment advice, consumer financial counseling, and tax preparation and planning pursuant to sections (b)(4), (20), and (21) of the Board's Regulation Y (12 CFR 225.25(b)(4),(20), and (21)). Accordingly, Applicant contends that the proposed activities are operationally and functionally similar to those currently being conducted by banks and bank holding companies and are therefore closely related to banking.

In determining whether an activity meets the second, or proper incident to banking, test of section 4(c)(8), the Board must consider whether the performance of the activity by an affiliate of a holding company "can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." 12 U.S.C. 1843(c)(8). Applicant argues that the provision of the proposed activities would be beneficial to the public because: (1) A limited number of companies in the United States provide such services to its present and/or displaced employees; (2) such services are usually provided only to top executive personnel; and (3) the outplacement and career counseling services currently provided are inadequate. Additionally, Applicant asserts that ComeriCOMP could provide the proposed services more cost efficiently than other market providers, and because these services would be provided on a fee for service basis with no guarantees of employment, Applicant claims that the proposed activities are relatively risk free. For these reasons, Applicant believes that providing the proposed career counseling services would result in public benefits, such as greater convenience, increased, competition, and gains in efficiency that would outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

Any comments or requests for hearing must be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, not later than April 30, 1993. Any request for hearing on this application must, as required by § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)), be accompanied by a statement of the reasons why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

This application may be inspected at the offices of the Board of Governors or the Federal Reserve Bank of Chicago.

Board of Governors of the Federal Reserve System, March 25, 1993.

William W. Wiles,

Secretary of the Board.

[FR Doc. 93-7407 Filed 3-30-93; 8:45 am]

BILLING CODE 6210-01-F

Compagnie de Suez and Banque Indosuez; Acquisition of Company Engaged in Nonbanking Activities

The organization listed in this notice has applied under § 225.23(a) or (f) of the Board's Regulation Y (12 CFR 225.23(a) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than April 20,1993.

A. Federal Reserve Bank of New York (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. Compagnie de Suez and Banque Indosuez, both in Paris, France; to engage *de novo* through their subsidiary, Indosuez Carr Futures, Inc., Paris, France, in acting as a futures commission merchant in the provision of execution, clearing and advisory services to nonaffiliated persons with

respect to futures contracts for the Cotation Assistee en Continue 40 Index on the Marche a terme international de France.

Board of Governors of the Federal Reserve System, March 25, 1993.

William W. Wiles,

Secretary of the Board.

[FR Doc. 93-7405 Filed 3-30-93; 8:45 am]

BILLING CODE 6210-01-F

Dennis F. Murphy, Jr., et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 20, 1993.

A. Federal Reserve Bank of Boston (Robert M. Brady, Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02106:

1. *Dennis F. Murphy, Jr.*, Bolton, Massachusetts; to acquire an additional 2.5 percent of the voting shares of Community Bancorp, Inc., Hudson, Massachusetts, for a total of 15.67 percent, and thereby indirectly acquire The Hudson National Bank, Hudson, Massachusetts.

B. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Paul M. Hefti Non-Qualifying Trust*, Paul M. Hefti and Kay Hefti Coletti, co-trustees, Scottsbluff, Nebraska, to acquire an additional 3.0 percent for a total of 32.77 percent; Paul M. Hefti II, Scottsbluff, Nebraska, to acquire an additional 3.07 percent for a total of 18.17 percent; Kay Hefti Coletti, Laramie, Wyoming, to acquire an additional 1.53 percent for a total of 16.63 percent; and E. Lorraine Hefti, Alliance, Nebraska, to retain 0.03 percent of the voting shares of First State BancShares, Inc., Scottsbluff, Nebraska, and thereby indirectly acquire First State Bank, Scottsbluff, Nebraska.

Board of Governors of the Federal Reserve System, March 25, 1993.

William W. Wiles,

Secretary of the Board.

[FR Doc. 93-7406 Filed 3-30-93; 8:45 am]

BILLING CODE 6210-01-F

Trustmark Corporation; Formation of, Acquisition by, or Merger of Bank Holding Companies

The company listed in this notice has applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that application or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Comments regarding this application must be received not later than April 23, 1993.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *Trustmark Corporation*, Jackson, Mississippi; to acquire an additional 20.25 of the voting shares of UniSouth Banking Corporation, Columbus, Mississippi, for a total of 25.26 percent.

Board of Governors of the Federal Reserve System, March 25, 1993.

William W. Wiles,

Secretary of the Board.

[FR Doc. 93-7404 Filed 3-30-93; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[OIS-020-N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances and Coverage Decisions

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: 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 October, November, and December 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 October 1 and December 31, 1992. On August 21, 1989 (54 FR 34555), we published the content of the Manual and indicated that we will publish quarterly any updates. Adding to this listing the complete text of the changes to the Medicare Coverage Issues Manual 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 October 1 through December 31, 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 October 1 and December 31, 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).
- January 7, 1993 (58 FR 3028).

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 December 31, 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), and those desiring information on the Medicare Coverage Issues Manual may wish to review the August 21, 1989 publication. We have divided this current listing into four tables.

Table I identifies previous **Federal Register** documents 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 HCFA 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 Carriers Manual, Part 2—Program Administration (HCFA-Pub. 14–2) transmittal entitled "Contractor Performance Evaluation Program—FY 1993," use the Superintendent of Documents No. HE 22.8/7–3, and the HCFA transmittal number 122.

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. Copies can be purchased or reviewed 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 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.

During the quarter covered by this notice, the former Rural Health Clinic Manual has been revised to include instructions applicable to Federally Qualified Health Centers (FQHCs). The new manual is intended to provide guidance to Rural Health Clinics (RHCs) and FQHCs. This manual contains coverage requirements, billing procedures, and related instructions governing performance of RHCs and FQHCs under the Medicare program.

Table II—Medicare and Medicaid Manual Instructions October through December 1992

Trans. No.	Manual/subject/publication number
	Intermediary Manual Part 2—Audits, Reimbursement Program Administration (HCFA-Pub. 13–2) (Superintendent of Documents No. HE 22.8/6–2)
390	• Contractor Performance Evaluation Program—FY 1993
	Intermediary Manual Part 3—Claims Process (HCFA-Pub. 13–3) (Superintendent of Documents No. HE 22.8/6)
1580 ...	• Review of Form HCFA–1450 for Inpatient and Outpatient Bills
	Home Health Agency Denials, Limitation of Liability and Appeals Paragraphs
1581 ...	• Review of Form HCFA–1450 for Inpatient and Outpatient Bills
	Determining Covered/Noncovered Days and Charges
	Processing No-Payment Bills
	Processing Provider Liable Inpatient Bills—Lack of Medical Necessity or Care is Custodial
	OCE Editor
	PRO Preadmission/Preprocedure Review
	Transfers Between Hospitals
	Outliers
	Adjustment Bills
	Additional Payment Amounts for Hospitals With Disproportionate Share of Low Income Patients
	Rural Referral Centers
	Criteria and Payment for Sole Community Hospitals and for Medicare Dependent Hospitals
	Hospital Capital Payments Under PPS
	Provider-Specific File
	Provider Specific Data Record Layout and Description
	Provider-Specific Payment Data
1582 ...	• Reimbursement for Services of Nonparticipating Domestic Hospitals
	Designated Intermediaries
	Exhibits (Model Denial Letters)
1583 ...	• Billing For Durable Medical Equipment and Prosthetic Orthotic/Prosthetic Devices
	Mammography Screening
	National Standard Electronic Remittance Advice
1584 ...	• Provider Access to Limited Eligibility Data
	Eligibility Data Available
	Part A Inquiry Reply Screen Display—HIQAR
	Part A Inquiry Reply Data—HUQAR
1585 ...	• Processing the HCFA–382, ESRD Beneficiary Selection
1586 ...	• Review of Form HCFA–1450 for Inpatient and Outpatient Bills
	Provider-Specific Data Record Layout and Description
1587 ...	• Election Procedures
	Election, Revocation and Change of Hospice

Table II—Medicare and Medicaid Manual Instructions October through December 1992—Continued

Trans. No.	Manual/subject/publication number
	Billing for Covered Services After Hospice Benefits are Exhausted
	Requirements—General
	Covered Services
	Special Coverage Requirements
Intermediary Manual Part 4—Audit Procedures (HCFA-Pub. 13–4) (Superintendent of Documents No. HE 22.8/6–4)	
30	• Summary of Professional Review
Carriers Manual Part 2—Program Administration (HCFA-Pub. 14–2) (Superintendent of Documents No. HE 22.8/7–3)	
122	• Contractor Performance Evaluation Program—FY 1993
Carriers Manual Part 3—Claims Process (HCFA-Pub. 14–3) (Superintendent of Documents No. HE 22.8/7)	
1440 ...	• Rebundling of CPT Codes
1441 ...	• Payment to Ambulatory Surgical Centers
	Carrier Adjustment of Payment Rates
	Rebundling of CPT–4 Codes
	Wage Index for Determining Ambulatory Surgical Center Facility Payments
1442 ...	• Specimen Collection Fee
	Travel Allowance
Program Memorandum Intermediaries (HCFA-Pub. 60A) (Superintendent of Documents No. HE 22.8/6–5)	
A–92–7	• Correction to Program Memorandum A–92–3
A–92–8	• Prospective Payment System and Other Bill Processing Changes
A–92–9	• Change in Hospice Payment Rates
A–92–10.	• Extension of Due Date for Filing Provider Cost Reports on Form HCFA–2552–92
State Operations Manual Provider Certification (HCFA-Pub. 7) (Superintendent of Documents No. HE 22.8/12)	
255	• Certification Functions of the State Agency
	Relationship of Survey Date to Date of Initial Medicare Approval
	Meaning of "Providers" and "Suppliers"
	Identification of Potential Providers and Suppliers
	Identifying Eligible Providers and Suppliers
	Suppliers Using Improperly Labeled or Post 1974 Equipment
	Conducting Initial Surveys and Scheduled Resurveys
	Conducting Unscheduled Surveys
	Facility Refuses to Allow Survey
	Reviewing Forms At Beginning of Survey
	Completing the Survey Report
	Certification of Additional Services

Table II—Medicare and Medicaid Manual Instructions October through December 1992—Continued

Trans. No.	Manual/subject/publication number
	Specific Requirements for Expansion of Services
	Exhibits (CLIA Forms)
	Program Background and Responsibilities
	Identification of Laboratories and Actions Related to Initial Applications and Certification
	Actions Related to Certification
	The Survey Process and Related Activities
	Adverse Actions
	Appeals and Adverse Actions
	Special Procedures for Accredited and CLIA-Exempt Laboratories
	Budget and Administration
	CLIA Related Expenses
	The Budgetary Process
	Financial Accounts and Reporting
Regional Office Manual Standard and Certification (HCFA-Pub. 23–2) (Superintendent of Documents No. HE 22.8/8)	
325	• Services Rendered in Nonparticipating Providers
Peer Review Organization Manual (HCFA-Pub. 19) (Superintendent of Documents No. HE 8/8–15)	
2	• Background
	Policy
	Exceptions
	Private Review
	Training Activities
	Contracting Requirements
3	• Background
	Statutory Requirements for Agreements
	Specifications
4	• Introduction
	Electronic Media Formatting
	File Specifications
	Edit Timeframes
	Output Procedures
	Record Format
	Delivery Date
5	• On-site Review Requirements
6	• Hospital Issuance of Message to Beneficiaries
	Monitoring Procedures
	An Important Message From Medicare
Hospital Manual (HCFA-Pub. 10) (Superintendent of Documents No. HE 22.8/2)	
644	• Payment Under Prospective Payment System Diagnosis-Related Groups
	Outliers
	Rural Referral Centers
	Criteria and Payment for Sole Community Hospitals and for Medicare Dependent Hospitals
645	• Billing For Durable Medical Equipment and Orthotic/Prosthetic Devices
	Billing For Mammography Screening
646	• Payment for Services Received in Nonparticipating Hospitals

Table II—Medicare and Medicaid Manual Instructions October through December 1992—Continued

Trans. No.	Manual/subject/publication number
	Designated Carriers
Christian Science Sanatorium (HCFA-Pub. 32) (Hospital Manual Supplement (HCFA-Pub. 10)) (Superintendent of Documents No. HE 22.8/2–2)	
29	• General Admission Procedures
	Identifying Other Primary Payers During the Admission Process
30	• Claims Processing Timeliness
Home Health Agency Manual (HCFA-Pub. 11) (Superintendent of Documents No. HE 22.8/5)	
257	• Billing For Durable Medical Equipment and Orthotic/Prosthetic Devices
258	• Establishing Entitlement to Medicare for Home Health Services
	Identifying Other Primary Payers When Establishing the Home Health Plan of Treatment
259	• Claims Processing Timeliness
Skilled Nursing Facility Manual (HCFA-Pub. 12) (Superintendent of Documents No. HE 22.8/3)	
316	• Billing For Durable Medical Equipment and Orthotic/Prosthetic Devices
	Billing For Mammography Screening
317	• General Admission Procedures
	Identifying Other Primary Payers During the Admission Process
318	• Claims Processing Timeliness
Rural Health Clinic and Federally Qualified Health Center Manual (HCFA-Pub. 27) (Superintendent of Documents No. HE 22.8/19:985)	
1	• New Manual
2	• Health Insurance Card and Other Evidence of Medicare Entitlement
3	• Claims Processing Timeliness
Renal Dialysis Facility Manual (Non-Hospital Operated) (HCFA-Pub. 29) (Superintendent of Documents No. HE 22.8/13)	
57	• Health Insurance Card and Other Evidence of Medicare Entitlement
58	• Claims Processing Timeliness
Outpatient Physical Therapy and Comprehensive Outpatient Rehabilitation Facility Manual (HCFA-Pub. 9) (Superintendent of Documents No. HE 22.8/9)	
108	• Billing for Durable Medical Equipment and Orthotic/Prosthetic Devices
109	• Determining How Much to Charge Patient Before Billing Is Submitted
	Identifying Other Primary Payers Prior to Billing
110	• Claims Processing Timeliness
Coverage Issues Manual (HCFA-Pub. 6) (Superintendent of Documents No. HE 22.8/14)	
62	• Vitrectomy
63	• Platelet-Derived Wound-Healing Formula

Table II—Medicare and Medicaid Manual Instructions October through December 1992—Continued

Trans. No.	Manual/subject/publication number
64	• Cochlear Implantation
Hospice Manual (HCFA-Pub. 21) (Superintendent of Documents No. HE 22.8/18)	
32	• Admission Procedures
33	• Claims Processing Timeliness
34	• Eligibility and Coverage
	Use of Election Periods
	Election, Revocation and Change of Hospice
	Covered Services
	Special Coverage Requirements
Provider Reimbursement Manual Part 1 (HCFA-Pub. 15-1) (Superintendent of Documents No. HE 22.8/4)	
369	• Swing-Bed Reimbursement for Qualifying Small, Rural Hospitals
	Availability of Swing-Bed Reimbursement Method
	Patient Days for Purposes of Swing-Bed Reimbursement
	Definitions
	Payment To Swing-Bed Hospitals Prior to October 1, 1990
	Payment To Spring-Bed Hospitals On or After October 1, 1990
	Application of Lower of Cost or Charges Principle to Services Furnished in Swing-Bed Hospital
	Application of Ceiling on Rate of Hospital Cost Increases
	Swing-Bed Reimbursement Under Prospective Payment System
	Swing-Bed Reimbursement for Small Rural Hospitals With Distinct Part SNF
	Additional Conditions Relating to Swing-Bed Reimbursement for Rural Hospitals With More Than 49 Beds
	Medicare Regional Swing-Bed Rates
370	• Methodology for Determining Per Diem Prospective Payment Rates Effective for Cost Reporting Periods Beginning on or After October 1, 1992, and Before October 1, 1993
Provider Reimbursement Manual Part II—Provider Cost Reporting Forms and Instructions (Chapter 15) (HCFA-Pub. 15-IIO) (Superintendent of Documents No. HE 22.8/4)	
4	• Supplemental Worksheet F-2—Computation of Difference Between Total Interim Payments and Net Cost of Covered Services

Table II—Medicare and Medicaid Manual Instructions October through December 1992—Continued

Trans. No.	Manual/subject/publication number
Provider Reimbursement Manual Part II—Provider Cost Reporting Forms and Instructions (Chapter 16) (HCFA-Pub. 15-IIP) (Superintendent of Documents No. HE 22.8/4)	
1	• Skilled Nursing Facility and Skilled Nursing Facility Health Care Complex Cost Report, Form HCFA-2540-92
Provider Reimbursement Manual Part II—Provider Cost Reporting Forms and Instructions (Chapter 19) (HCFA-Pub. 15-IIS) (Superintendent of Documents No. HE 22.8/4)	
14	• Supplemental Worksheet F-2-Computation of Difference Between Total Interim Payments and Net Cost of Covered Services
	Supplemental Worksheet F-3-Computation of Return on Equity Capital of Proprietary Providers
15	• Supplemental Worksheet F-2-Computation of Difference Between Total Interim Payments and Net Cost of Covered Services
	Supplemental Worksheet F-3-Computation of Return on Equity Capital of Proprietary Providers
Provider Reimbursement Manual Part II—Provider Cost Reporting Forms and Instructions (Chapter 28) (HCFA-Pub. 15-IIAB) (Superintendent of Documents No. HE 22.8/4)	
1	• Hospital and Hospital Health Care Complex Cost Report, Form HCFA-2552-92
Provider Reimbursement Manual Part II—Provider Cost Reporting Forms and Instructions (Chapter 31) (HCFA-Pub. 15-IIAE) (Superintendent of Documents No. HE 22.8/4)	
1	• Chain Home Office Cost Statement Form HCFA-287-92
State Medicaid Manual Part 2—State Organization and General Administration (HCFA-Pub. 45-2) (Superintendent of Documents No. HE 22.8/10)	
81	• Federal Financial Participation for Nurse Aide Training and Competency Evaluation Programs
82	• Data the State May Release to Its Agents or Providers
State Medicaid Manual Part 3—Eligibility (HCFA-Pub. 45-3) (Superintendent of Documents No. HE 22.8/10)	
60	• Maintenance of Effort Requirements
	Pay-In Spenddown Option

Table II—Medicare and Medicaid Manual Instructions October through December 1992—Continued

Trans. No.	Manual/subject/publication number
State Medicaid Manual Part 4—Services (HCFA-Pub. 45-4) (Superintendent of Documents No. HE 22.8/10)	
61	• Less than Effective and Identical, Related or Similar Drugs
State Medicaid Manual Part 6—Payment for Services (HCFA-Pub. 45-6) (Superintendent of Documents No. HE 22.8/10)	
21	• Specific Upper Limits for Multiple Source and "Other" Drugs and Upper Limits Requirements
	Addendum (Listing of Multiple Source Drugs)
State Medicaid Manual Part 7—Quality Control (HCFA-Pub. 45-7) (Superintendent of Documents No. HE 22.8/10)	
47	• State Plan Requirements
	Contents of Required State Submissions
	Data Analysis Content
	Introduction
	Analysis of Reported Data
	Table Instructions
State Medicaid Manual Part 11—Medicaid Management Information System (HCFA-Pub. 45-11) (Superintendent of Documents No. HE 22.8/10)	
16	• Safeguards
Regional Office Manual Medicaid (HCFA-Pub. 23-6) (Superintendent of Documents No. HE 22.8/8-4)	
35	• Regional Office Procedures and Guidelines Governing the Approval of State Acquisitions of Medicaid ADP Equipment and Services
Program Memorandum Medicaid State Agencies (HCFA-Pub. 17) (Superintendent of Documents No. HE 22.28)	
92-7 ...	• Title XIX, Social Security Act, Medicaid Eligibility, Coverage and Payment
Medicare/Medicaid Sanction—Reinstatement Report (HCFA-Pub. 69)	
92-10 .	• Report of Physicians/Practitioners, Providers and/or Other Health Care Suppliers Excluded/Reinstated
92-11 .	• Report of Physicians/Practitioners, Providers and/or Other Health Care Suppliers Excluded/Reinstated
92-12 .	• Cumulative Report of Physicians/Practitioners, Providers and/or Other Health Care Suppliers Sanctioned/Reinstated

TABLE III.—REGULATIONS AND NOTICES PUBLISHED OCTOBER THROUGH DECEMBER 1992

Publication date/citation	42 CFR Part	Title
FINAL RULES		
10/07/92 (57 FR 46093)	435	Medicaid Program; Targeting Information for Income and Eligibility Verification Systems.
10/08/92 (57 FR 46431)	447	Medicare and Medicaid Programs; Requirements for Long-Term Care Facilities.
10/20/92 (57 FR 47779)	412, 466	Medicare Program; Payment to Hospitals for Furnishing Photocopies to Peer Review Organizations.
11/02/92 (57 FR 49397)	456	Medicaid Program; Drug Use Review Program and Electronic Claims Management System for Outpatient Drug Claims.
11/12/92 (57 FR 53572)	483	Medicare and Medicaid Programs; Charges to Residents' Funds in Nursing Homes.
11/17/02 (57 FR 54179)	414	Medicare Program; Payment Change for Home Dialysis.
11/20/92 (57 FR 54705)	441	Medicaid Program; Prohibitions on FFP for Educational and Vocational Training for Institutionalized Individuals.
11/20/92 (57 FR 54710)	442	Medicaid Program; Elimination of Certain Written Documentation Pertaining to Medicaid Long-Term Care Facilities.
11/24/92 (57 FR 55118)	433	Medicaid Program; Limitations on Provider-Related Donations and Health Care-Related Taxes; Limitations on Payments to Disproportionate Share Hospitals.
11/25/92 (57 FR 55896)	400, 405	Medicare Program; Revision of the Medicare Economic Index.
12/02/92 (57 FR 56996)	400, 401, 405	Medicare and Medicaid Programs; Approved Information Collection Requirements and HCFA's Claims Collection Authority.
12/03/92 (57 FR 57109)	414	Medicare Program; Continuous Use of Durable Medical Equipment.
12/07/92 (57 FR 57675)	405, 410, 414	Medicare Program; Payment for Durable Medical Equipment and Orthotic, and Prosthetic Devices.
12/11/92 (57 FR 58716)	406	Medicare Program; Technical Corrections to Hospital Insurance Eligibility and Entitlement Regulations.
PROPOSED RULES		
10/07/92 (57 FR 46119)	417	Medicare Program; Appeal Rights and Procedures for Beneficiaries Enrolled in Prepaid Health Care Plans.
10/08/92 (57 FR 46362)	431, 440, 442, 488, 489, 498	Medicare and Medicaid Programs; Revised Effective Date of Medicare/Medicaid Provider Agreement and Supplier Participation.
11/27/92 (57 FR 56294)	435	Medicaid Program; Extension of Medicaid When Support Collection Results in Termination of Eligibility.
12/03/92 (57 FR 57125)	421	Medicare Program; Revisions to Criteria and Standards for Evaluating Intermediaries and Carriers.
12/04/92 (57 FR 57403)	435	Medicaid Program; Computer Matching and Privacy Protection for Medicaid Eligibility.
12/14/92 (57 FR 59024)	417, 434	Medicare and Medicaid Programs; Requirements for Physician Incentive Plans in Prepaid Health Care Organizations.
12/28/92 (57 FR 61614)	456, 483	Medicare and Medicaid Programs; Resident Assessment in Long-Term Care Facilities.

NOTICES

Publication date/citation	Title
10/01/92 (57 FR 45544)	Medicare Program; Update of Ambulatory Surgical Center Payment Rates.
10/07/92 (57 FR 46177)	Medicare Program; Schedule of Limits for Skilled Nursing Facility Inpatient Routine Service Costs.
10/09/92 (57 FR 46509)	Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1993 Rates (Correction to the Final Rule Published 09/01/92 (57 FR 39746)).
10/16/92 (57 FR 47468)	Medicare and Medicaid Programs; Quarterly Listing of Program Issuances and Coverage Decisions.
10/19/92 (57 FR 47587)	Medicare and Medicaid Programs; Use of Standardized Federal Claims Processing Forms and Procedures.
10/21/92 (57 FR 48033)	Medicare Program; Revised Procedures for Paying Claims from Providers of Services.
11/20/92 (57 FR 54798)	Medicare Program; Withdrawal of Coverage of Thermography.
11/20/92 (57 FR 54894)	Medicare and Medicaid Programs; Quarterly Listing of Program Issuances and Coverage Decisions.
11/24/92 (57 FR 55261)	Medicaid Program; Limitations on Aggregate Payments to Disproportionate Share Hospitals: Fiscal Year 1993.
11/25/92 (57 FR 55914)	Medicare Program; Fee Schedule for Physicians' Services for Calendar Year 1993.
11/25/92 (57 FR 56168)	Medicare Program; Physician Performance Standard Rates of Increase for Federal Fiscal Year 1993 and Physician Fee Schedule Update for Calendar Year 1993.
11/27/92 (57 FR 56345)	Medicare Program; Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for 1993.
12/01/92 (57 FR 56918)	Medicare Program; Part A Premium for 1993 for the Uninsured Aged and for Certain Disabled Individuals Who Have Exhausted Other Entitlement.
12/01/92 (57 FR 56919)	Medicare Program; Monthly Actuarial Rates and Monthly Supplementary Medical Insurance Premium Rates Beginning January 1, 1993 (Correction Published 12/21/92 (57 FR 60568)).
12/15/92 (57 FR 59379)	Medicare Program; Fee Schedule for Physicians' Services for Calendar Year 1992 (Correction to the Final Rule Published 11/25/91 (56 FR 59502)).

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. 62; section 35–16, Vitrectomy.

CLARIFICATION—EFFECTIVE DATE: Not Applicable.

Section 35–16, Vitrectomy, is revised to remove payment discussion from the Coverage Issues Manual. Payment instructions are located in chapter 15 of the Medicare Carriers Manual (MCM) for physician vitrectomy services, in § 5243 of the MCM for ambulatory surgical center facility vitrectomy services, and § 4630 of the MCM for payment bundling provisions regarding vitrectomy Physicians' Current Procedural Terminology codes.

35–16 VITRECTOMY

Vitrectomy may be considered reasonable and necessary for the following conditions: vitreous loss incident to cataract surgery, vitreous opacities due to vitreous hemorrhage or other causes, retinal detachments secondary to vitreous strands, proliferative retinopathy and vitreous retraction. See chapter 15 of the Medicare Carriers Manual for how to determine payment for physician vitrectomy services and § 5243 of the Medicare Carriers Manual for how to determine payment for ASC facility vitrectomy services. Also, see § 4630 of the Medicare Carriers Manual to identify when, for Medicare payment purposes, certain vitrectomy codes are included in other codes or when codes for other services include vitrectomy codes. The CPT codes for vitrectomy services are 67005, 67010, 67036, 67038, 67039, and 67040.

Transmittal No. 63; section 45–26, Platelet-Derived Wound-Healing Formula.

NEW IMPLEMENTING INSTRUCTIONS—EFFECTIVE DATE: Services performed on or after 12/28/92.

Section 45–26, Platelet-Derived Wound-Healing Formula.—This section has been added to reflect noncoverage of a platelet-derived formula containing growth factors intended to treat nonhealing wounds (e.g., Procuren). The Table of Contents of the Medicare Coverage Issues Manual, Supplies—Drugs, has been revised to reflect this noncoverage.

Section 45–26, Platelet-Derived Wound-Healing Formula.—Not Covered

A platelet-derived formula containing growth factors intended to treat nonhealing wounds (e.g., Procuren) is provided through hospital-based outpatient facilities as part of comprehensive wound-care programs designed to treat patients with chronic nonhealing wounds. It is usually applied at first in the presence of a physician, with the patient continuing applications at home. There is a lack of sufficient published data to determine the safety and efficacy of the platelet-derived wound healing formula (based on a technology review by the Public Health Service). Therefore, it is not covered under Medicare because it is not considered reasonable and necessary within the meaning of § 1862(a)(1) of the law.

Transmittal No. 64; section 66–14, Cochlear Implantation.

CHANGED IMPLEMENTING INSTRUCTIONS—EFFECTIVE DATE: Services performed on or after 12/31/92.

Section 66–14, Cochlear Implantation.—This section has been revised to allow coverage of cochlear implants for children ages 2 through 17 who have a bilateral profound sensorineural hearing impairment and demonstrate little or no benefit from a hearing aid. The restriction to services performed on and after 10/2/86 has been removed. Use HCPCS code L8614.

65–14 COCHLEAR IMPLANTATION

A cochlear implant device is an electronic instrument, part of which is implanted surgically to stimulate auditory nerve fibers, and part of which is worn or carried by the individual to capture and amplify sound. Cochlear implant devices are available in single channel and multi-channel models. The purpose of implanting the device is to provide an awareness and identification of sounds and to facilitate communication for persons who are profoundly hearing impaired.

Medicare coverage is provided only for those patients who meet all of the following selection guidelines.

A. Adults.—

- Diagnosis of total sensorineural deafness that cannot be mitigated by use of a hearing aid in patients whose auditory cranial nerves are stimulable;
- Cognitive ability to use auditory clues and a willingness to undergo an extended program of rehabilitation;
- Post-lingual deafness;
- Adulthood (at least 18 years of age);
- Freedom from middle ear infection, an accessible cochlear lumen that is structurally suited to implantation, and freedom from lesions in the auditory nerve and acoustic areas of the central nervous system; and
- No contraindications to surgery.

B. Children (Effective for services performed on and after 12/31/92).—

The FDA has approved marketing of a multi-channel cochlear implant device for use in prelingually and postlingually deafened children 2 through 17 years of age. (FDA approved labeling limits use of the device in adults to those who are postlingually deafened.) Medicare coverage is provided for such a device for children who meet the following patient selection guidelines:

- No contraindications to the implant, including those described in the product's FDA-approved package insert;
- Diagnosis of bilateral profound sensorineural deafness with little or no benefit from a hearing (or vibrotactile) aid, as demonstrated by the inability to improve on age appropriate close-set word identification tasks;
- Freedom from middle ear infection, an accessible cochlear lumen that is structurally suited to implantation, and freedom from lesions in the auditory nerve and acoustic areas of the central nervous system; and
- The device must be used in accordance with the FDA approved labeling.

(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: March 19, 1993

William Toby,

Acting Deputy Administrator, Health Care Financing Administration.

[FR Doc. 93–7410 Filed 3–30–93; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–060–43–7122 08 1016; CACA 30372]

Realty Action; Kern and San Bernardino Counties, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Exchange of Public and Private Lands in Kern and San Bernardino Counties, California.

SUMMARY: The following described public lands in Kern County were determined to be suitable for disposal by exchange under Section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716, by the June 6, 1991 **Federal Register** publication of the exchange base segregation notice for

the Western Mojave Land Tenure Adjustment (LTA) Project (56 FR 109; pp. 26137–26139). This determination applies to all public lands within the section listed below.

San Bernardino Meridian, California

T. 9 N., R.12 W.
Sec. 8: N½NW¼NE¼, SW¼NE¼, E½NE¼ and S½.
containing 460.00 acres, more or less, in Kern County.

In exchange for these lands, Pacific Gateway Homes L.P., a California limited partnership, has offered the following non-Federal lands:

Mount Diablo Meridian, California

T. 31 S., R 45 E.
Sec. 2: lot 1;
Sec. 17: S½;
T. 32 S., R 45 E.
Sec. 3: All;
Sec. 5: All.
containing 1776.39 acres, more or less, in San Bernardino County.

The purpose of this exchange is to acquire and consolidate public land ownership and achieve the multi-agency objectives of the Western Mojave LTA Project. Disposal of the isolated selected public land tract is consistent with the Western Mojave Land Tenure Adjustment Project and the California Desert Conservation Area Plan (December 1980), as amended.

The public lands to be conveyed from the United States will be subject to the following terms and conditions:

A. Reservations to the United States.

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States. Act of August 30, 1890 (43 U.S.C. 945).

2. Those rights for public highway purposes granted to the State of California Division of Highways, its successors or assigns, by right-of-way, Serial No. CARI 05925, pursuant to the Act of August 27, 1958 (23 U.S.C. 317) as to the SE¼SE¼SE¼ of section 8, (U.S. Interstate Highway 14).

All minerals will be reserved by the United States pending final review.

B. Third Party Rights. The public lands will be conveyed subject to valid existing rights, including the following:

1. Those rights for a public frontage road (Kern County System road No. 2708) granted to Kern County, its successors or assigns, by RS 2477 legislation, Act of July 26, 1866 (formerly 43 U.S.C. 932), as to E½E½E½ of section 8.

2. Those rights for construction, operation and maintenance of a road and sewer pipeline, granted to Griffin/Benezra Rosa, its successors or assigns, by right-of-way No. CACA 27149 pursuant to the Act of October 21, 1976 (43 U.S.C. 1761), in the N½N½N½N½N½NE¼ of section 8.

3. Such rights as Ray Eyherabide has to graze the land until March 15, 1995 in accordance with Section 15, Taylor Grazing Act, Grazing Authorization No. 046552.

4. Those rights for construction, operation and maintenance of a material site, granted to the State of California, Department of Public Works, its successors or assigns, by right-of-way No. CALA 053096 pursuant to the Act of November 9, 1921, in the E½NE¼ of section 8.

As provided in 43 CFR 2201.1(b), the publication of this exchange in the **Federal Register** shall continue to segregate all of the public lands described herein from all other forms of appropriation under the public land laws, including the mineral laws but not the mineral leasing laws. The segregative effect will terminate upon issuance of a conveyance document, upon publication in the **Federal Register** of a termination of the segregation, or two years from the date of this publication, whichever occurs first.

The value of the lands to be exchanged are in approximate balance. Equalization of value will be achieved by acreage adjustment, a payment to the United States by the proponent in an amount not to exceed 25 percent of the value of the public lands to be conveyed, a waiver by the proponent of any excess value owed by the United States, or by a wavier under the amendment to subsection 206(b) Federal Land Policy and Management Act of 1976 provided by Section 9 Federal Land Exchange Facilitation Act of 1988.

Additional information, is available at the Barstow Resource Area Office, 150 Coolwater Lane, Barstow, CA 92311 (619–256–3591), and the California Desert District Office, 6221 Box Springs Blvd., Riverside, CA 92507–0714.

For a period of forty-five (45) days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager at the above address.

Dated: March 23, 1993.

Henri R. Bisson,

District Manager.

[FR Doc. 93–7350 Filed 3–30–93; 8:45 am]

BILLING CODE 4310–40–M

[ID–942–03–4730–02]

Idaho: Filing of Plats of Survey; Idaho

The plat of survey of the following described land was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 9 a.m., March 22, 1993.

The plat representing the dependent resurvey of portions of the south boundary, subdivisional lines, and mineral survey nos. 2197 and 2677, and the subdivision of section 33, and the survey of Lots 12 and 14 in section 33, Township 29 North, Range 8 East, Boise Meridian, Idaho, Group No. 842, Idaho, was accepted March 3, 1993.

This survey was executed to meet certain administrative needs of the Bureau of Land Management.

All inquiries concerning the survey of the above-described land must be sent to the Chief, Branch of Cadastral Survey, Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

Dated: March 22, 1993.

Gary T. Oviatt,

Acting Chief Cadastral Surveyor for Idaho.

[FR Doc. 93–7348 Filed 3–30–93; 8:45 am]

BILLING CODE 4310–66–M

[ID–942–03–4730–02]

Idaho: Filing of Plats of Survey; Idaho

The plat of survey of the following described land was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 9 a.m., on March 22, 1993.

The plat representing the dependent resurvey of a portion of the subdivisional lines and the subdivision of certain sections in Township 8 South, Range 21 East, Boise Meridian, Idaho, Group No. 844, Idaho, was accepted March 3, 1993.

This survey was executed to meet certain administrative needs to the Bureau of Land Management.

All inquiries concerning the survey of the above-described land must be sent to the Chief, Branch of Cadastral Survey, Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho 83706.

Dated: March 22, 1993.

Gary T. Oviatt,

Acting Chief, Cadastral Surveyor for Idaho.

[FR Doc. 93–7349 Filed 3–30–93; 8:45 am]

BILLING CODE 4310–66–M

Fish and Wildlife Service

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been

submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Service's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made directly to the Service Clearance Officer and the Office of Management and Budget, Paperwork Reduction Project (1018–0008) Washington, DC 20503, telephone 202–395–7340.

Title: Bird Banding File Reference Card

OMB Approval Number: 1018–0008

Abstract: The Bird Banding File Reference Card is used to trace banded birds for the study of migration factors and other population characteristics. A report is filed upon discovery of a banded bird, and provides the only method of obtaining complete and accurate records of such birds. Banding data is used by Federal and State conservation agencies, university researchers, bird observatories, environmental consulting firms, and others for a variety of purposes. Banding data is used to promulgate annual hunting regulations, aid the recovery of endangered species, assess the effect of environmental contaminants on birds, and to answer basic biological questions. In short, banding provides information otherwise unobtainable on bird biology, behavior, migration and survival.

Service Form Number: 3–1831

Frequency: On occasion

Description of Respondents: Individuals and households

Estimated Completion Time: Less than 3 minutes per response

Annual Responses: 19,000

Annual Burden Hours: 950

Service Clearance Officer: James E. Pinkerton, 703–358–1943 Mail Stop—224 Arlington Square, U.S. Fish and Wildlife Service, Washington, DC 20240

Dated: March 22, 1993.

William F. Hartwig,

Acting Assistant Director, Refuges and Wildlife.

[FR Doc. 93–7337 Filed 3–30–93; 8:45 am]

BILLING CODE 4310–55–M

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Service's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made directly to the Service Clearance Officer and the Office of Management and Budget, Paperwork Reduction Project (1018–0023), Washington, DC 20503, Telephone 202–395–7340.

Title: Sandhill Crane Harvest Questionnaires

OMB Approval Number: 1018–0023

Abstract: The hunting of lesser sandhill cranes is authorized in eight mid-western states. The survey is an annual effort by the U.S. Fish and Wildlife Service to obtain an annual estimate of the magnitude, geographical and temporal distribution of the sandhill crane harvest. The resulting assessment of the population status serves to guide both the Service and State wildlife agencies in the annual promulgation of regulations for hunting sandhill cranes. Such data is also needed to preclude over-harvest and for effective management of the species.

Service Form Number(s): 3–530 and 3–530A (Follow-up questionnaire)

Frequency: Annually

Description of Respondents: Individuals and households

Estimated Completion Time: The reporting burden is estimated to average .083 hours (5 minutes) per response, including time for reviewing instructions.

Annual Responses: 8,000

Annual Burden Hours: 664

Service Clearance Officer: James E. Pinkerton, 703–358–1943

Mail Stop—224 Arlington Square, U.S. Fish and Wildlife Service, Washington, DC 20240

Dated: January 15, 1993.

Thomas Dwyer,

Acting Assistant Director; Refuges and Wildlife.

[FR Doc. 93–7346 Filed 3–30–93; 8:45 am]

BILLING CODE 4310–55–M

National Park Service

Availability of Plan of Operations and Environmental Assessment for Drilling and Operation of the State CR 5–3 "B" Gas Well; Anadarko Petroleum Corp.; Lake Meredith National Recreation Area, Moore County, TX

Notice is hereby given in accordance with § 9.52(b) of Title 36 of the Code of Federal Regulations that the National Park Service has received from Anadarko Petroleum Corporation a Plan of Operations for the Drilling and Operation of the State CR 5–3 "B" Gas Well within Lake Meredith National Recreation Area, Moore County, Texas.

The Plan of Operations and Environmental Assessment are available for public review and comment for a period of 30 days from the publication date of this notice in the Office of the Superintendent, Lake Meredith National Recreation Area, 419 East Broadway, Fritch, Texas; and the Southwest Regional Office, National Park Service, 1220 South St. Francis Drive, room 211, Santa Fe, New Mexico.

Dated: March 24, 1993.

John Cook,

Regional Director, Southwest Region.

[FR Doc. 93–7383 Filed 3–30–93; 8:45 am]

BILLING CODE 4310–70–M

National Register of Historic Places; Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before March 20, 1993. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013–7127. Written comments should be submitted by April 15, 1993.

Beth L. Savage,

Acting Chief of Registration, National Register.

ARIZONA

Coconino County

Museum of Northern Arizona Exhibition Building, 3001 N. Fort Valley Rd., Flagstaff, 93000305

Pima County

San Pedro Chapel, 5230 E. Ft. Lowell Rd., Tucson, 93000306

CALIFORNIA

Orange County

Christ College Site, Address Restricted, Irvine vicinity, 93000300

CONNECTICUT

New London County

Wheeler Block, 40 Norwich Ave., Colchester, 93000312

GEORGIA

Bibb County

Fort Hill Historic District, Roughly bounded by Emery Hwy., Second St. Ext., Mitchell and Morrow Sts. and Schaeffer Pl., Macon, 93000313

North Highlands Historic District, Roughly bounded by Nottingham Dr., Boulevard and Clinton Rd., Macon, 93000297

LOUISIANA

Jefferson Davis Parish

Angelus, 1114 N. Cutting, Jennings, 93000296

Jaenke, F. R., House, 114 Davies Ave., Jennings, 93000301

Livingston Parish

Denham Springs City Hall, 115 Mattie St., Denham Springs, 93000304

MASSACHUSETTS

Plymouth County

Thumb, Tom, House, 351 Plymouth St., Middleborough, 93000298

MISSISSIPPI

Forrest County

North Main Street Historic District, Roughly bounded by Jackson St., Gordon's Cr., South, North, Providence and Red Sts. and the Illinois Central RR tracks, Hattiesburg, 93000307

Yazoo County

Deasonville Archeological Site, Address Restricted, Deasonville vicinity, 93000299

MONTANA

Gallatin County

Buttelman Ranch (Willow Creek Area MPS), Address Restricted, Willow Creek vicinity, 93000309

Green Ranch (Willow Creek Area MPS), Address Restricted, Willow Creek vicinity, 93000310

Lower Willow Creek Rural Historic Landscape District (Willow Creek Area MPS), Address Restricted, Willow Creek vicinity, 93000311

Peterson Place (Willow Creek Area MPS), Address Restricted, Willow Creek vicinity, 93000308

NORTH CAROLINA

Guilford County

Sternberger, Sigmund, House (Greensboro MPS), 712 Summit Ave., Greensboro, 93000302

OHIO

Delaware County

Detwiller, John, Tavern and Farmstead, 2877 N. OH 257, Radnor, 93000294

Lewis, Samuel, Farmhouse, 5979 Radnor Rd., Radnor vicinity, 93000295

TENNESSEE

Blount County

Hitch, John, House (Blount County MPS), Lee Lambert Rd., 0.5 mi. S of Old Walland Hwy., Maryville vicinity, 89000924

WEST VIRGINIA

Mingo County

Matewan Historic District, Roughly bounded by McCoy Alley, Railroad Alley, Mate St. underpass and Warm Hollow to the head of the hollow, Matewan. 93000303.

[FR Doc. 93-7382 Filed 3-30-93; 8:45 am]

BILLING CODE 4310-70-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-339]

Certain Commercial Food Portioners, Components Thereof, Including Software, and Process Thereof; Commission Determination to Review an Initial Determination Terminating the Investigation on the Basis of a Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review the initial determination (ID) (Order No. 38) issued in the above-captioned investigation by the presiding administrative law judge (ALJ) on February 19, 1993. Commission review was prompted by concerns about paragraph two of the confidential settlement agreement. The Commission will send a letter to the parties requesting further information.

ADDRESSES: Copies of the ID and all other non-confidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000.

FOR FURTHER INFORMATION CONTACT: Jean Jackson, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3104. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 22, 1992, based on a complaint filed by Design Systems, Inc. (DSI) of Redmond, Washington. 57 FR 32561 (July 22, 1992). DSI alleged violations of section 337 in connection with the importation and sale of certain commercial food portioners covered by U.S. Letters Patent 4,557,019.

On February 1, 1993, complainant Design Systems, Inc., and the remaining respondents to the investigation—Lumetech, Ltd., Koch Supplies Inc., and Carl Jorgensen Co.—filed a joint motion to terminate the investigation on the basis of a settlement agreement. On February 11, 1993, the Commission investigative attorney filed a response in support of the joint motion.

On February 19, 1993, the ALJ issued an ID granting the joint motion to terminate the investigation based on the settlement agreement. No petitions for review of the ID or agency or public comments were filed.

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and § 210.55-.56 of the Commission's Interim Rules of Practice and Procedure (19 CFR 210.55-.56).

Issued: March 24, 1993.

By order of the Commission.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 93-7417 Filed 3-30-93; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-349]

Certain Diltiazem Hydrochloride and Diltiazem Preparations; Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on February 25, 1993, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Tanabe Seiyaku Co., Ltd., 2-10 Dosho-machi 3-Chome, Chuo-ku, Osaka, Japan, and Marion Merrell Dow, Inc., 9300 Ward Parkway, Kansas City, Missouri 64114. An amended complaint was filed on March 23, 1993. The complaint, as amended, alleges violations of subsection (a)(1)(B)(ii) of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain diltiazem hydrochloride and diltiazem preparations alleged to be manufactured abroad by a method covered by claim 1 of U.S. Letters Patent 4,438,035, and that there exists an industry in the

United States as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after a full investigation, issue a permanent exclusion order and permanent cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., room 112, Washington DC 20436, telephone 202–205–1802. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

FOR FURTHER INFORMATION CONTACT: Juan Cockburn, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2572.

AUTHORITY: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in § 210.12 of the Commission's Interim Rules of Practice and Procedure, 19 CFR 210.12.

SCOPE OF INVESTIGATION: Having considered the complaint, the U.S. International Trade Commission, on March 25, 1993, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B)(ii) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain diltiazem hydrochloride and diltiazem preparations made abroad by a process allegedly covered by claim 1 of U.S. Letters Patent 4,438,035; and whether there exists an industry in the United States as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are—

Tanabe Seiyaku Co., Ltd., 2–10 Dosho-machi 3-Chome, Chuo-ku, Osaka, 541 Japan

Marion Merrell Dow, Inc., 9300 Ward Parkway, Kansas City, Missouri 64114

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Profarmaco Nobel SRL, Via Cucchiari 17, 20155 Milan, Italy

Abic Ltd., Industrial Zone 5, Hayozma Street, P.O. Box 2077, Kiryat Nordau, Netanya, Israel 52120

Orion Corporation Fermion, Orionintie 1, SF–02200 Espoo, Finland

Mylan Pharmaceuticals, Inc., 781 West Chestnut Ridge Road, Morgantown, West Virginia 26505

Mylan Laboratories, Inc., 1030 Century Building, Pittsburgh, Pennsylvania 15222

Copley Pharmaceuticals, Inc., 25 John Road, Canton, Massachusetts 02021

Interchem Corporation, Route 120 North, Paramus, New Jersey 07652

Gyma Laboratories of America, Inc., 65 Commercial Avenue, Garden City, New York 11530

Rhone-Poulenc Rorer, Inc., 500 Arcola Road, Collegeville, Pennsylvania 19426

(c) Juan Cockburn, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., room 401Q, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with sections 210.21 of the Commission's Interim Rules of Practice and Procedure, 19 CFR 210.21. Pursuant to §§ 201.16(d) and 210.21(a) of the Commission's Rules, 19 CFR 201.16(d) and 210.21(a), such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondents, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

Issued: March 26, 1993.

By order of the Commission.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 93–7419 Filed 3–30–93; 8:45 am]

BILLING CODE 7020–02–M

Investigations Nos. 731–TA–566 and 569 (Final); Ferrosilicon From Kazakhstan and Ukraine

Determinations

On the basis of the record[1] developed in the subject investigations, the Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from Kazakhstan and Ukraine of ferrosilicon, provided for in subheadings 7202.21.10, 7202.21.50, 7202.21.75, 7202.21.90, and 7202.29.00 of the Harmonized Tariff Schedule of the United States, that have found by the Department of Commerce to be sold in the United States at less than fair value (LTFV). The Commission also unanimously determines, pursuant to section 735(b)(4)(A) of the Act, that critical circumstances do not exist with respect to ferrosilicon imports from Kazakhstan and Ukraine; thus, the retroactive imposition of antidumping duties is not necessary.

Background

The Commission instituted these investigations effective December 22, 1992, following preliminary determinations by the Department of Commerce that imports of ferrosilicon from Kazakhstan and Ukraine were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of December 29, 1992 (57 FR 61919). The hearing was held in Washington, DC, on January 22, 1993, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on March 23, 1993. The views of the Commission are contained in USITC Publication 2616 (March 1993) entitled "Ferrosilicon

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

from Kazakhstan and Ukraine: Determinations of the Commission in Investigations Nos. 731–TA–566 and 569 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

Issued: March 24, 1993.

By order of the Commission.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 93–7416 Filed 3–30–93; 8:45 am]

BILLING CODE 7020–02–M

INTERSTATE COMMERCE COMMISSION

[Finance Docket Nos. 28905 (Sub-No. 22); 29430 (Sub-No. 20)]

CSX Corp., Control, Chessie System, Inc. & Seaboard Coast Line Industries, Inc.; Norfolk Southern Corp. Control, Norfolk & Western Railway Co., and Southern Railway Co. (Arbitration Review)

AGENCY: Interstate Commerce Commission.

ACTION: Request for comments; extension of comment due date.

SUMMARY: By decision served December 16, 1992 (57 FR 60004, December 17, 1992), the Commission granted the Brotherhood of Railway Carmen (Carmen) a 60-day extension of the comment due date. Replies are currently due on April 2, 1993. By motion filed March 23, 1993, Carmen requests an extension to May 3, 1993 to file reply comments. Carmen states additional time is needed to address the important issues raised in the Commission's request for comments. Carmen also states that such an extension will not unreasonably delay the resolution of this matter. The request is reasonable and will be granted.

DATES: Replies are due on May 3, 1993.

ADDRESSES: Send pleadings referring to Finance Docket Nos. 28905 (Sub-No. 22) and 29430 (Sub-No. 20) to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

Finance Docket Nos. 28905 (Sub-No. 22); 29430 (Sub-No. 20).

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 927–5660 [TDD for the hearing impaired: (202) 927–5721].

Decided: March 25, 1993.

By the Commission, Sidney L. Strickland, Jr., Secretary.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 93–7413 Filed 3–30–93; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Charter Reestablishment

In accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. app.), and 41 CFR 101–6.1015, the Attorney General has determined that the reestablishment of the Uniform Crime Reporting (UCR) Data Providers Advisory Policy Board is in the public interest in connection with the performance of duties imposed upon the Federal Bureau of Investigation (FBI) by law, and hereby gives notice of reestablishment.

The Board recommends to the Director, FBI, general policy with respect to the philosophy, concept, and operational procedures of the UCR Program as they relate to local and state UCR systems that provide UCR crime statistics and data.

The Board consists of twenty representatives from agencies within the United States that provide crime data. Candidates for Board membership are nominated by the International Association of Chiefs of Police (IACP), by the National Sheriffs' Association (NSA), and by the National Academy Associates (NAA). Specifically, two candidates are elected by the NAA to represent that organization. One candidate is an elected sheriff and the other is a chief of police. Five candidates will be chosen by the NSA. At least one of the five NSA candidates must be a member of the NSA UCR Committee; the remaining four candidates must represent the four geographical regions of the country. There are nine candidates from the IACP. One candidate is to represent the IACP UCR Records Committee. The remaining eight candidates are to represent the four geographical regions, with two being selected from each region. The IACP and the NSA are directed, within these limitations, to nominate candidates for Board membership representing jurisdictions of varying population sizes (over 200,000; 100–200,000; 50–100,000; less than 50,000). Additionally, the Director of the FBI will nominate four members to the Board. All candidates will be active law enforcement executives and their agencies must be contributors to the nation's UCR Program. All candidates for membership are subject to the approval of the Attorney General.

Dated: March 24, 1993.

Janet Reno,

Attorney General.

[FR Doc. 93–7358 Filed 3–30–93; 8:45 am]

BILLING CODE 4410–02–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–28,092]

Cyprus Thompson Creek Mining Co.; Clayton, ID; Affirmative Determination Regarding Application for Reconsideration

On March 8, 1993, counsel for the company requested administrative reconsideration of the Department of Labor's Notice of Negative Determination Regarding Eligibility to Apply for Workers Adjustment Assistance for workers at the subject firm. The Department's Negative Determination was issued on January 27, 1993 and published in the **Federal Register** on March 11, 1993, (58 FR 8063).

Counsel claims, among other things, that the Cyprus workers were certified during 1987 under similar conditions and to deny them now would be arbitrary and capricious decision making.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 23d day of March 1993.

Stephen A. Wandner,

Deputy Director, Office of Legislation & Actuarial Services Unemployment Insurance Service.

[FR Doc. 93–7429 Filed 3–30–93; 8:45 am]

BILLING CODE 4510–30–M

Employment and Training Administration

[TA-W-28,261; TA-W-28,263]

Phillips Chemical Company, Houston, TX; Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance; Correction

This corrects the notice on petitions TA-W-28,261 and TA-W-28,263 which was published in the **Federal Register** on February 11, 1993 (58 FR 8064) in FR Document 93-3273. Location errors appear on page 8064 in the 2nd column, 2nd line and 4th line of the Appendix Table under TA-W-28,261 and TA-W-28,263.

Both locations lines should read "Houston, Texas" instead of "Bartlesville, OK" (TA-W-28,261) and "Pasadena, CA" (TA-W-28,263).

Signed at Washington, DC, this 24th day of March 1993.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 93-7430 Filed 3-30-93; 8:45 am]

BILLING CODE 4510-30-M

Job Training Partnership Act (JTPA) Modifications to the Governor's Coordination and Special Services Plans and Statewide Job Training Plans

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration has issued Training and Employment Guidance Letter (TEGL) No. 4-92, dated February 5, 1993. TEGL No. 4-92 provides guidance to States regarding modifications to the Program Year 1993 Governor's Coordination and Special Services Plans and the Statewide Job Training Plans resulting from the enactment of the Job Training Reform Amendments of 1992. TEGL No. 4-92 is reprinted below for public information.

Dated: March 24, 1993.

Dolores Battle,

Administrator, Office of Job Training Programs.

Training and Employment Guidance Letter No. 4-92

From: Carolyn M. Golding, Acting Assistant Secretary of Labor.

Subject: Job Training Partnership Act (JTPA) Amendments Modifications to the Governor's Coordination and Special Services Plans.

1. Purpose. To transmit planning guidance to States regarding modifications to the Governor's Coordination and Special Services Plans (GCSSP) and the Statewide Service Delivery Area Job Training Plans resulting from the enactment of the Job Training Amendments of 1992.

2. Reference. Job Training Amendments of 1992.

3. Background. Section 121(a)(2) of the JTPA provides that "Any State seeking financial assistance under this Act shall submit a GCSSP for two program years to the Secretary describing the use of all resources provided to the State and its service delivery areas under this Act * * *."

Section 121(b)(7) requires that a modification to the GCSSP be submitted by the Governor to the Secretary if major changes occur in labor market conditions, funding, or other factors during the period covered by the plan. Since the States' submission in May 1992 of the GCSSP's for Program Years 1992 and 1993, the JTPA Amendments of 1992 have been enacted, requiring major changes to Title II programs for Program Year 1993.

Section 104(c) states that "If changes in labor market conditions, funding, or other factors require substantial deviation from an approved job training plan, the private industry council and the appropriate chief elected official * * * shall submit a modification of such plan * * *."

RESCISSIONS

EXPIRATION DATE: Continuing

Accordingly, all Governors are expected to review the following sections of the Amendments and interim final regulations and, where appropriate, modify the State's GCSSP for PY 1993. Development of modifications shall proceed on the basis of the statutory language and interim final regulations. In addition, all Governors of single State service delivery areas (SDA's) must modify the State's job training plan.

4. JTPA Amendments of 1992. Modifications to the State's current GCSSP, and, as appropriate, the Statewide Service Delivery Area Job Training Plan, are necessary as a result of the following sections of the 1992 Amendments:

a. Private Industry Council

Section 627.475 of the JTPA regulations provide that the Governor shall establish general standards for Private Industry Council (PIC) oversight responsibilities. The required PIC standards shall be included in the GCSSP. (20 CFR 627.475)

b. Governor's Coordination and Special Services Plans

Section 121(b)(2). The GCSSP shall describe the measures taken by the State to ensure coordination and avoid duplication between agencies administering the Job Opportunities and Basic Skills (JOBS) program and programs under Title II in the planning and delivery of services. The plan shall describe the procedures developed by the State to ensure that the State JOBS plan is consistent with the coordination criteria specified in this plan; and shall identify the procedures developed to provide for the review of the JOBS plan by the State Job Training Coordinating Council (SJTCC).

Section 121(b)(3). The Plan shall describe the projected use of resources, including oversight of program performance, program administration, and program financial management, capacity building, priorities and criteria for State incentive grants, and performance goals for State-supported programs. The description of capacity building shall include the Governor's plans for technical assistance to SDA's and service providers, interstate technical assistance and training arrangements, other coordinated technical assistance arrangements undertaken pursuant to the direction of the Secretary, and as applicable, research and demonstration projects.

c. State Education Coordination and Grants

Section 123 requires the Governor to allocate 8 percent of the State's funds to any State education agency in accordance with a jointly agreed upon plan. Pursuant to section 123(c), the Governor shall include in the GCSSP a description of the use of State's 8 percent funds in conformance with section 123 of the Act and 20 CFR 628.205 and 628.315 of the regulations.

d. State Human Resource Investment Council

Section 701 of the JTPA, as amended, authorizes the establishment of a State Human Resource Investment Council (HRIC) to advise the Governor on coordination of Federal human resource programs within the State. The HRIC may replace existing State councils dealing with Federal human resource programs.

The option for the Governor to designate the HRIC to carry out the responsibilities of the SJTCC, in lieu of establishing a SJTCC, is authorized at section 122(d)(1) of JTPA, as amended. (20 CFR 628.215)

e. Services for Older Workers

Section 202(c)(1)(D) of JTPA, as amended, specifies a 5 percent set-aside to support Services to Older Individuals. Plans for the use of such funds for PY 93 shall be developed in accordance with section 204(d) of JTPA, as amended, and 20 CFR 628.320.

f. Linkages

Section 205 of JTPA, as amended, requires SDA's to establish appropriate linkages with federally authorized programs including: The Adult Education Act; the Carl D. Perkins Vocational and Applied Technology Education Act; the Rehabilitation Act of 1973; the Wagner-Peyser Act; JOBS; the Food Stamp Act; the National Apprenticeship Act; the U.S. Housing Act; the National Literacy Act of 1991; Head Start; title V of the Older Americans Act, and other provisions of JTPA.

Additionally, SDA's are required to establish other appropriate linkages with other organizations and agencies, such as State and local educational agencies, local service agencies, public housing agencies, community organizations, business and labor groups, volunteer groups working with disadvantaged adults, and other training, education, employment, economic development and social service programs. (Section 205 and 20 CFR 627.200).

5. Nontraditional Employment for Women.

The Nontraditional Employment for Women (NEW) Act requires SDAs to include goals in their PY 92 and 93 plans. Such goals have been included in most of the GCSSPs submitted by Governors for PY 92–93. While the Amendments do not specifically require changes to the NEW goals, the general changes in program design and targeting of services may result in changes to the NEW goals included in the GCSSP for PY 93. Furthermore, Governor's staffs may find that the goals initially set warrant refinement, given the relatively short period provided for the initial goal setting. Accordingly, Governors should consider refinement of their NEW goals in the development and submission of this modification.

6. Format

Given the wide variety of approaches taken by the States in constructing the GCSSP and the Job Training Plan, the Department believes that it would be more expeditious if a common outline was followed. Therefore, we are requesting that these modifications adhere to the attached outlines.

7. Submittal

Modifications to the PY 1992/1993 GCSSP's and the Statewide Service Delivery Area Job Training Plans must be submitted for receipt by the Administrator, Office of Job Training Programs, by May 15, 1993. Also, a copy should be sent to the appropriate ETA Regional Office.

8. Burden Hours Estimates

The National Office estimates that the burden estimate of 40 hours includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

9. Inquiries

Inquiries should be directed to James Wiggins or Barbara DeVeaux at 202–219–7533.

10. Attachments

Attachment I

Modification to GCSSP

I. Identifying Information

A. The name and address of the grantee.

B. Date of submission of the modification and the number of the modification (I, II, III, etc).

C. Time period covered.

D. The specific changes to be made in the GCSSP and the reason(s) for the modification. (Describe the section of the plan where this information is included.)

II. Program Information

A. Goals and Objectives

B. Coordination

1. Describe the measures taken by the State to ensure coordination and lack of duplication with the Job Opportunities and Basic Skills (JOBS) training program. (Section 121 (b)(2) and 20 CFR 628.205)

III. Program Activities

B. Projected Use of Resources

1. Describe the State system for the State and sub-State allocation of JTPA funds including the following: Title II–A, II–B, and II–C; education coordination and grants (8 percent); administrative, management, and auditing (5 percent); incentive grants, capacity building and technical assistance (5 percent) and services for older individuals (5 percent). (Section 121(b)(3)).

2. Describe the State's administrative system to assure oversight of the programs operated in the SDA's as well as those State-supported programs operated throughout the State. The discussion should include a description of the role of the SJTCC or HRIC in program operations and oversight. Specify the role of the SJTCC in oversight of Title II–A, II–B, II–C, 8 percent State Education Coordination and Grants, programs for older individuals, and incentive, capacity building and technical assistance programs. (Section 121(b)(3)).

3. Describe the State's administrative activities, and procurement and financial management policies, including auditing and oversight to be conducted using the funds allocated to the State for administrative, financial management and auditing activities. (Section 121(b)(3)).

4. Describe the training activities to be funded with Title II–A, II–B, and II–C funds. (Section 121(b)(3)).

5. Describe the types of training and participant support activities to be funded with services for older individuals funds. (Section 204(d) and 20 CFR 20 628.320)

(a) Describe the State's procedures for accomplishing consultation with the PIC when providing services to older individuals. (Section 204(d) and 20 CFR 628.320)

(b) Describe the State's policy for providing services to individuals with additional barriers to employment. List the SDA's and additional barriers approved by the Governor. (Section 204(d)(5)(B) and 20 CFR 628.320)

6. Describe the projected use of State Education Coordination and Grants (8 percent) funds. (Section 123(c)).

(a) Identify the State education agency (ies) responsible for education and training that will be the recipient(s) of these funds. (Section 123 and 20 CFR 628.315).

(b) Describe the projects to be funded. (Section 123(a)(2) and 20 CFR 628.315(c)(2)).

(c) Describe the anticipated agreements and the agency (ies), administrative entities and SDA's with whom the agreements will be made. (Section 123 (b) and 20 CFR 628.315(b)).

(d) Describe all of the information specified at section 123 (c). (Section 123 and 20 CFR 628.315).

(e) Describe all the State match for the use of these funds. (Section 123(a) and 20 CFR 628.315(e)).

7. (a) Describe how the State has involved SDAs in planning the use of capacity building and technical assistance funds. (20 CFR 628.305).

(b) Describe any requirements the State may have developed for the inclusion of a capacity building and technical assistance strategy as part of the planning guidance for the preparation of SDA local job training plans. (20 CFR 628.420).

(c) Describe how capacity building investments will enhance staff capabilities at the State and local levels, including service providers.

(d) Describe the use of resources that will provide technical assistance to SDAs failing to meet performance standards. (Section 121(b)(3)).

(i) Specify the percentage of the "five percent" funds available under Section 202(c)(1)(B) that will be used for capacity building and technical assistance.

(ii) Describe the formula, weighing schemes, and standards for measuring degree of performance to be used in distributing the balance of the funds for incentive grants to SDAs. (20 CFR 629.325).

8. If the State plans to participate in the incentive bonus program under title V (Jobs for Employable Dependent Individuals (JEDI)), describe how the State will encourage successful implementation of: (a) Training

activities of eligible individuals whose placement is the basis for the payment to the State of the incentive bonus; and (b) the training services, outreach activities, and pre-employment supportive services provided furnished to these individuals. (Title V of JTPA).

IV. Signature

The modification shall contain the Governor's signature or the signature and title of his/her designee. The name of the signer shall be typed below the signature.

V. Plan Submission

States shall submit three copies of any necessary modifications, each with an original signature of the Governor or of a designee to: Dolores Battle, Administrator, Office of Job Training Programs, Department of Labor/Employment & Training Administration, 200 Constitution Avenue, NW., room N4459, Washington, DC 20210.

Also, a copy of the modification must be sent to the appropriate ETA Regional Office.

Attachment II

Modification to Statewide Service Delivery Area Job Training Plan

The Job Training Plan Modification shall contain:

I. Identifying Information

(A) Identification and address of grant recipient.

(B) Identification and address of entity or entities which will administer the program (see section 104(b)(1) of JTPA, if different from the grant recipient).

(C) Date of submission.

(D) Area covered by SDA (i.e., Entire State of _____).

(E) Time period covered by the Plan.

II. Program Information

(A) Specific descriptions of each of the required elements found in sections 104(b)(3) through 104(b)(13) of the Act. (20 CFR 628.420(B)(9))

(B) A statement assuring that the State will publish its plan and make it available for review and comment, as specified in section 105(a) of the Act.

(C) A statement assuring that the State will comply with the cost limitations contained in section 108 of the Act. (20 CFR 627.445).

III. Signature

An original signature of the Governor or authorized designee shall be affixed to each of the three copies of the Statewide Plan submitted. The name of the signer (and the signer's title, if a designee) shall be typed below the signature.

[FR Doc. 93-7431 Filed 3-30-93; 8:45 am]

BILLING CODE 4510-30-M

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Design & Manufacturing Systems; Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting.

Dates and Times: April 12, 1993—8:30 a.m. to 5:30 p.m.

Place: National Science Foundation, 1800 "G" Street, rm 1128, Washington, DC 20550

Type of Meeting: Closed

Contact Person: Dr. F. Stan Settles, Program Director, Design & Manufacturing Systems, rm 1128, National Science Foundation, 1800 "G" St. NW., Washington, DC 20550. Telephone: (202) 357-5167

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate Engineering Faculty Internships Initiative 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.

Reason for Late Notice: Difficulty arranging a convenient meeting time.

Dated: March 26, 1993.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 93-7384 Filed 3-30-93; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice

Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law 97-415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97-415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from March 8, 1993, through March 19, 1993. The last biweekly notice was published on March 25, 1993.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room P-223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland from 7:30 a.m. to 4:15 p.m. Federal

workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

By April 30, 1993, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room for the particular facility involved. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington DC 20555, by the above date. Where petitions are filed during the last 10 days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 248-5100 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to **(Project Director)**: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document room for the particular facility involved.

Carolina Power & Light Company, et al., Docket Nos. 50-325 and 50-324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendments request: December 28, 1992

Description of amendments request: The proposed amendments would correct a discrepancy between Technical Specification (TS) 3.1.5, Standby Liquid Control System (SLCS), and TS Tables 3.3.2-1 and 4.3.2-1. Operational Condition 5 would be deleted from the applicability requirements of TS 3.1.5, and the associated Action statement for Operability Condition 5 would also be deleted. The proposed changes also delete both operability and surveillance requirements in Tables 3.3.2-1, Isolation Actuation Instrumentation, and 4.3.2-1, Isolation Actuation Instrumentation Surveillance Requirements, associated

with the SLCS initiation while the unit is in Operational Condition 3. The proposed change would also add the word "Operational" before the word Conditions in the Applicability and Action Statements of TS 3.1.5 to bring the TS terminology to current usage.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The Standby Liquid Control System (SLCS) is a special safety system not required for unit operation, and never expected to be needed for unit safety due to the large number of independent control rods available to shutdown the reactor. The SLCS has very limited capability of initiating any events. Rupture of the SLCS piping, inadvertent injection, and plant chemistry problems are all bounded by previously analyzed events (small line break, reactor water cleanup). Should the boron solution ever be injected into the reactor, either intentionally or inadvertently, after making certain that the normal reactivity controls will keep the reactor subcritical, the boron is removed from the reactor coolant system by flushing for gross dilution followed by operation of the reactor cleanup system. There is practically no effect on reactor operations when the boron concentration has been reduced below approximately 50 ppm [parts per million].

The proposed amendments delete two current operational condition requirements for the SLCS because of the highly improbable chances of reactivity excursions in Operational Conditions 3 and 5. The design basis ensures that in the highly unlikely event regular reactivity controls fail, the SLCS will bring the reactor subcritical. The assumptions in the design basis are preserved by the proposed amendments. As such, the accidents evaluated in Chapter 15 of the UFSAR [Updated Final Safety Analysis Report] are not affected by the proposed changes; therefore, this amendment request odes not involve a significant increase in the probability of an accident previously evaluated.

The proposed amendments make no modifications to the SLCS instrumentation. In addition, the function of the SLCS instrumentation is not altered. Special provisions for single control rod removal/multiple rod removal with surrounding fuel removal are in effect for Operational Condition 5. Operational Condition 3 is currently applicable for the SLCS in Tables 3.3.2-1 and 4.3.2-1; however, this condition has never been applicable in SLCS Specification 3.1.5. There are also special provisions for single rod removal in Operational Condition 3 to prohibit reactivity excursions. As a result, the SLCS is never expected to provide any mitigating functions in Operational Condition 3 or 5.

The Brunswick UFSAR Chapter 15 accidents associated with reactivity excursions are not affected by the proposed amendments. In addition, the proposed changes will not compromise the mitigating features of the SLCS required during a reactivity excursion if this system were initiated. As such, the Technical Specification amendments do not involve a significant increase in the consequences of an accident previously evaluated.

2. The proposed amendments do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The Technical Specification amendments delete Operational Conditions 3 and 5 from SLCS applicability. In Operational Conditions 1 and 2, the special shutdown capability (SLCS) could be required since several rods could be withdrawn from the core at once and potentially not be reinserted. The SLCS will remain applicable in these operational conditions.

In Operational Condition 3, control rods are only allowed to be withdrawn under special operations for single control rod withdrawal utilizing the one-rod-out interlock. This provides adequate controls to assure that the reactor remains subcritical. In Operational Condition 5, only a single control rod can be withdrawn from a core cell containing fuel assemblies. Multiple control rod removal is allowed only if the fuel is removed from all four surrounding fuel cells. This provides adequate shutdown margin and assures that the reactor does not become critical. As such, the SLCS is not needed for this operational condition.

Correcting the noted discrepancy in the Brunswick Technical Specifications does not involve modifications to any safety-related equipment and will not alter or introduce new plant operations. As such, the proposed amendments do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendments do not involve a significant reduction in the margin of safety.

The proposed amendments do not change safety limits, setpoints, or plant design at the Brunswick Plant. There are no functions of the system which have been compromised by these changes. The design basis for this system has been preserved. The SLCS surveillance requirements for Operational Conditions 1 and 2 will continue to assure a high degree of reliability for this system. Therefore, the proposed amendments do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: University of North Carolina at Wilmington, William Madison Randall Library, 601 S. College Road, Wilmington, North Carolina 28403-3297.

Attorney for licensee: R. E. Jones, General Counsel, Carolina Power & Light Company, P. O. Box 1551, Raleigh, North Carolina 27602

NRC Acting Project Director: Jocelyn A. Mitchell

Carolina Power & Light Company, et al., Docket Nos. 50-325 and 50-324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendments request: December 31, 1992

Description of amendments request: The proposed change would revise Technical Specification (TS) Section 3/4.7.1.2, Service Water System, and its associated Bases Section. The first change requested would revise the Limiting Condition for Operation (LCO) and the Action Statements by changing the number of nuclear service water pumps required to be operable whenever either unit is in Operational Condition 1, 2, or 3 from two nuclear service water pumps per unit to three nuclear service water pumps per site. The second proposed change would incorporate the surveillance requirements of TS 4.7.1.2.c into the proposed Action statement b.4 of the TS 3.7.1.2, and would delete the existing TS 4.7.1.2.c. TS Section 3.4.10.5, Plant Service Water, would also be changed to reflect the new sequence of the proposed action statements. The word "Operational" would be incorporated before the word "Conditions" in the Applicability Statement.

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Proposed Change 1:

The proposed change requires both the nuclear and the conventional headers to be operable with three site nuclear and two unit conventional service water pumps capable of supplying the headers when the unit is OPERATIONAL CONDITIONS 1, 2, or 3. The proposed change does not affect the number of service water pumps required operable when the unit is in OPERATIONAL CONDITIONS 4 or 5. These requirements will ensure single failure criteria are met, ensure the availability of service water for emergency diesel generator cooling during the initial ten minute period of a design basis accident, and ensure sufficient service water capability for the post-ten minute period of a design basis accident.

The service water system only aids in mitigation of an accident and does not act as an initiator of an accident sequence. Therefore, the proposed amendments do not involve an increase in the probability of an accident previously evaluated.

The proposed site nuclear service water pump requirements will assure emergency

diesel generator cooling will be available following any design basis accident, regardless of which unit is involved in the accident or plant transient. As such, the proposed amendments do not involve a significant increase in the consequences of an accident previously evaluated.

Proposed Change 2:

The proposed change is administrative in nature since the change simply relocates existing remedial actions from an event-based surveillance requirement (Technical Specification 4.7.1.2.c) to the Limiting Condition for Operation ACTION statement. This change will more clearly link the need for the additional verifications associated with the service water system nuclear header being inoperable when the unit is in OPERATIONAL CONDITION 4 or 5. Therefore, the proposed change does not increase the probability an accident previously evaluated.

In addition, this proposed change does not alter the actions involved in the surveillance requirements by relocating these under the ACTIONS Statements. No plant operations are altered by this relocation. As such, this change does not increase the consequences of an accident previously evaluated.

2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Proposed Change 1:

The service water system is designed to provide flow for lubrication and cooling of equipment during normal operations and under accident conditions. The system can also provide flow to the chlorination system and be cross-connected to the RHR system during emergencies to provide core flooding capabilities. As noted above, the service water system supports mitigation of an accident, but does not act as an initiator of an accident sequence. The proposed change does not affect the ability of the service water system to perform its intended function. No new service water operations are introduced. The requested amendments will assure that the service water system will be available to provide an adequate supply of cooling water for both normal operating and emergency operating conditions, and will not alter plant operations. Therefore, the proposed amendments do not create the possibility of a new or different kind of accident from any accident previously evaluated.

Proposed Change 2:

As noted in item 1 above, the proposed change is administrative in nature since the change simply relocates existing remedial actions from an event-based surveillance requirement (Technical Specification 4.7.1.2.c) to the Limiting Condition for Operation ACTION statement. This relocation does not involve any changes to safety-related equipment or safety-related functions which could initiate any kind of accident. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment does not involve a significant reduction in the margin of safety.

Proposed Change 1:

The proposed change revises the service water pump operability requirements to account for the improved low flow capability of the nuclear service water pumps and the elimination of the minimum flow path. The proposed change to the Technical Specifications will ensure the availability of service water for diesel generator cooling during the initial ten minute period of a design basis accident, even assuming the worst case single failure, as well as assure sufficient service water capability for the post-ten minute period of a design basis accident. Therefore, the proposed change does not involve a significant reduction in the margin of safety.

Proposed Change 2:

As noted in items 1 and 2 above, the proposed change is administrative in nature since the change simply relocates existing remedial actions from an event-based surveillance requirement (Technical Specifications 4.7.1.2.c) to the Limiting Condition for Operation ACTION statement. No safety limits, setpoints, or design margins are impacted by this change. Therefore, the proposed change does not involve a reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: University of North Carolina at Wilmington, William Madison Randall Library, 601 S. College Road, Wilmington, North Carolina 28403-3297.

Attorney for licensee: R. E. Jones, General Counsel, Carolina Power & Light Company, P. O. Box 1551, Raleigh, North Carolina 27602

NRC Acting Project Director: Jocelyn A. Mitchell

Carolina Power & Light Company, et al., Docket No. 50-400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina

Date of amendment request: February 26, 1993

Description of amendment request: This Technical Specification (TS or Specification) change revises TS 3.4.9 by replacing the current five-year heatup and cooldown limitation with revised limitations based on the predicted reactor vessel neutron exposure at 11 effective full power years (EFPY) of operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Technical Specifications 3.4.9.1 and 3.4.9.2 "REACTOR COOLANT SYSTEM PRESSURE/TEMPERATURE LIMITS" provide RCS pressure-temperature limits to protect the reactor pressure vessel from brittle fracture by clearly separating the region of normal operations from the region where the vessel is subject to brittle fracture. The heatup and cooldown rates of Specifications 3.4.9.1 and 3.4.9.2, and LTOP [low-temperature overpressure protection] setpoints in Specification 3.4.9.4 are designed to ensure that the 10 CFR 50 Appendix G pressure-temperature limits for the RCS [reactor cooant system] are not exceeded during any condition of normal operation including anticipated operational occurrences and system hydrostatic tests.

General Design Criterion 31 of Appendix A to 10 CFR 50 requires that the reactor coolant boundary shall be designed with sufficient margin to assure that when stressed under operating, maintenance, testing, and postulated accident conditions (1) the boundary behaves in a nonbrittle manner and (2) the probability of rapidly propagating fracture is minimized.

Title 10 of the Code of Federal Regulations Part 50 Appendix G, "Fracture Toughness Requirements," requires the effects of changes in the fracture toughness of reactor vessel materials caused by neutron radiation throughout the service life of nuclear reactors to be considered in the pressure-temperature limits. The change is used in conjunction with the material initial reference temperature (RT [nil-ductility]) to establish the limiting pressure-temperature curves. Regulatory Guide [RG] 1.99 contains procedures for calculating the effects of neutron radiation embrittlement of the low-alloy steels currently used for light-water-cooled reactor vessels.

Using the RG 1.99 Revision 2 and Appendix G to 10 CFR 50, new Adjusted Nil Ductility Reference Temperatures (ART [nil-ductility]) and limiting pressure-temperature curves were prepared for the projected reactor vessel exposure at 11 Effective Full Power Years (EFPY) of operation. These new curves in conjunction with the associated changes in the heatup and cooldown ranges and the existing Low Temperature Overpressure Protection System setpoints provide the required assurance that the reactor pressure vessel is protected from brittle fracture up to 11 EFPY of operation.

No changes to the design of the facility has [sic] been made. No new equipment has been added or removed and no operational setpoints have been altered. The revised analysis and resultant adjustment of the operating limitations provide assurance that the Reactor Coolant System is protected from brittle fracture.

Therefore, the proposed amendments to the pressure-temperature limitations, the heatup and cooldown ranges, and the recalculated limiting material ART [nil-ductility] do not involve a significant increase in the probability or consequences of an accident previously evaluated;

collectively they maintain the required buffer necessary to protect the reactor vessel from brittle fracture given a limiting mass or temperature input to the RCS for up to 11 EFPY of operation.

2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

No new equipment has been added or removed and no operational setpoints have been altered. The revised analysis and resultant adjustment of the operating limitations provides assurance that the Reactor Coolant System is protected from brittle fracture. No new accident or malfunction mechanism is introduced by this amendment.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment does not involve a significant reduction in the margin of safety.

The heatup and cooldown rates of Specifications 3.4.9.1 and 3.4.9.2, and LTOP setpoints in Specification 3.4.9.4 are designed to ensure that the 10 CFR 50 Appendix G pressure-temperature limits for the RCS are not exceeded during any condition of normal operation including anticipated operational occurrences and system hydrostatic tests.

New Nil Ductility Reference Temperatures and limiting pressure-temperature curves were prepared for the projected reactor vessel exposure at 11 Effective Full Power Years of operation in accordance with 10 CFR 50 Appendix G and the methodology provided in Regulatory Guide 1.99, Revision 2.

The revised heatup and cooldown ranges, in conjunction with the current rates and LTOP setpoints ensure that the Appendix G pressure-temperature curves are not challenged given a limiting mass or heat input to the RCS during normal operations, anticipated occurrences and system hydrostatic testing.

Since restrictions remain in place to ensure the Appendix G operating limits of the reactor vessel are not challenged, the margin of safety defined in the Technical Specification BASES is not significantly reduced by this change.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Cameron Village Regional Library, 1930 Clark Avenue, Raleigh, North Carolina 27605.

Attorney for licensee: R. E. Jones, General Counsel, Carolina Power & Light Company, P. O. Box 1551, Raleigh, North Carolina 27602

NRC Acting Project Director: Jocelyn A. Mitchell

Carolina Power & Light Company, et al., Docket No. 50-400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina

Date of amendment request: March 4, 1993

Description of amendment request: The proposed Technical Specification change would allow the initial and requalification training programs for licensed personnel to be based on a systematic approach to training in accordance with 10 CFR 55.31, 10 CFR 55.59, and under the guidance in NRC Generic Letter 87-07.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

This administrative change to Technical Specification 6.4 has no affect on equipment, procedures, or accident initiators. Therefore, there would be no increase in the probability or consequences of an accident previously evaluated.

2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Since this is an administrative change, there are no modifications or additions to plant equipment. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment does not involve a significant reduction in the margin of safety.

The proposed change does not affect any parameters which relate to the margin of safety as defined in the Technical Specifications. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Cameron Village Regional Library, 1930 Clark Avenue, Raleigh, North Carolina 27605.

Attorney for licensee: R. E. Jones, General Counsel, Carolina Power & Light Company, P. O. Box 1551, Raleigh, North Carolina 27602

NRC Acting Project Director: Jocelyn A. Mitchell

Commonwealth Edison Company, Docket Nos. 50-254 and 50-265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

Date of amendment request: February 26, 1993

Description of amendment request: The proposed amendment would revise the surveillance interval for the channel functional test of the Reactor Protection System Electrical Protective Assemblies (RPS-EPA units) per the guidance provided by Generic Letter 91-09, "Modification of Surveillance Interval for the Electrical Protective Assemblies in Power Supplies for the Reactor Protection System." The proposed change would eliminate the potential for inadvertent reactor trip caused by testing the RPS-EPA units during power operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously analyzed.

The proposed change modifies the surveillance requirement for an electrical protective device on the Reactor Protection System. The proposed change does not affect any accident precursor or initiator. Therefore, the probability of an accident is not affected by the proposed change.

The RPS-EPA units are designed to protect RPS equipment from abnormal operating voltage or frequency produced by RPS motor generator sets. The proposed change will preclude the need to test the RPS-EPA units during power operation. This will eliminate the potential for reactor scrams and Group isolations during performance of the surveillance, thus preventing unwarranted challenges to safety systems. The proposed Technical Specification amendment does not affect the operability of the RPS-EPA units. The demonstrated high reliability of the RPS-EPA units (reference J. A. Silady to T. E. Murley letter dated July 6, 1990) ensures that they will be capable of performing as designed in the event of an abnormal condition on an RPS bus. Based upon this historical reliability, the proposed change does not affect the ability of the Reactor Protection System to maintain the integrity of the fuel cladding, protect the reactor coolant pressure boundary, or limit the amount of energy released to primary containment. Therefore, the consequences of an accident is not affected by the proposed change.

2. Create the possibility of a new or different kind of accident from any accident previously analyzed.

The proposed change does not decrease the ability of the RPS-EPA units to perform their intended function, nor do the proposed changes create any opportunities for a new or different accident outside of those previously evaluated. No new or different modes of

plant operation are introduced by the proposed changes. Therefore, there is no possibility of creating any new failure mechanisms which could initiate a new or different kind of accident from those previously analyzed.

3. Involve a significant reduction in the margin of safety.

This proposed Technical Specification amendment ensures that a spurious RPS trip does not result in a reactor scram and group isolations during RPS-EPA functional testing. The proposed change does not affect the operability of the RPS-EPA units. The demonstrated high reliability of the RPS-EPA units ensures that they will be capable of performing as designed in the event of an abnormal condition on an RPS bus. Therefore, the margin of safety is not affected.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Dixon Public Library, 221 Hennepin Avenue, Dixon, Illinois 61021

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60690

NRC Project Director: James E. Dyer

Commonwealth Edison Company, Docket Nos. 50-295 and 50-304, Zion Nuclear Power Station, Units 1 and 2, Lake County, Illinois

Date of amendment request: September 1, 1992, as supplemented on February 22, 1993

Description of amendment request: The proposed amendment would change the Technical Specifications (TS). It would remove the heatup and cooldown limitation curves from the TS and relocate them to a newly created Pressure and Temperature Limits Report, revise the LTOP enabling temperature in Mode 4, delete the allowance to maintain a safety injection pump aligned for injection when in the LTOP range, and remove the reactor vessel toughness data tables, fast neutron fluence figures, and materials irradiation surveillance specimen inspection schedule from the TS and relocate them to the UFSAR.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The proposed Amendment revises requirements associated with Reactor Coolant System (RCS) Heatup and Cooldown Limitations and Low Temperature Overpressure Protection. The specific changes addressed by this significant hazards consideration are as follows:

• Updating RCS Heatup and Cooldown Limit Curves.

• Relocating RCS Pressure and Temperature Limitations to the PRESSURE AND TEMPERATURE LIMITS REPORT.

1. The proposed Technical Specification changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The removal and updating of the pressure and temperature limits has no influence or impact on the probability or consequences of any accident previously evaluated. The reactor vessel pressure and temperature are not assumed to be initiators of analyzed events. However, pressure and temperature limits do preclude operation in an unanalyzed condition. The revised limitations provide an equivalent level of protection to the previous limitations. In addition, the acceptance criteria for the calculations performed have not been significantly altered. Thus, there will be no change in the probability of vessel failure through crack propagation. Reactor vessel integrity is assumed in mitigating the consequences of design basis accidents. The revised limitations will not affect the performance of any safety systems or structures beyond ensuring the continued integrity of Zion reactor vessels. Therefore, the change to the pressure and temperature limits does not involve significant increases in the probability or consequences of an accident previously evaluated. The pressure and temperature limits, although not in Technical Specifications, will continue to be followed in the operation of Zion Station. The proposed amendment still requires exactly the same actions to be taken when or if limits are exceeded as is required by current Technical Specifications. The limits within the Pressure and Temperature Limits Report (PTLR) will be implemented and controlled per Zion procedures. Any changes to the PTLR will be in accordance with NRC approved methodology discussed in WCAP-13406, "Heatup and Cooldown Limit Curves for Normal Operation for Zion Units 1 & 2." Changes to the PTLR will be performed per the requirements of 10CFR50.59. This ensures that future changes to the pressure and temperature limits in the PTLR will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not necessitate a physical alteration of the plant (no new or different types of equipment will be installed). The removal and updating of the pressure and temperature limitations has no affect on any of the systems or structures at Zion Station. No safety related equipment or safety function will be altered as a result of this proposed change. The imposition of more conservative heatup and cooldown limitations will not interact with any other phase of operation at Zion Station. The updated limitations provide an equivalent level of protection to the previous limitations. In addition, acceptance criteria for the calculations have not been significantly altered. The pressure and temperature limits are calculated using NRC approved methods and submitted to the NRC to allow the staff to continue to trend the values of these limits. The Technical Specifications will continue to require operation within the required pressure and temperature limits and appropriate actions will be taken, when or if limits are exceeded. Therefore, the proposed amendment does not in any way create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The margin of safety is not affected by the removal and updating of the pressure and temperature limits. WCAP-13406 "Heatup and Cooldown Limit Curves for Normal Operation for Zion Units 1 & 2" addresses the criteria for the acceptability of these calculations. The methodology of WCAP-13406 was used for revising the heatup and cooldown limitations. The revised heatup and cooldown limitations for Zion Station provide an equivalent level of safety to that which previously existed and ensures that the requirements of 10CFR50 Appendix G are satisfied. In addition, the allowable stresses that the reactor vessel could be subjected to have not been altered from the currently existing levels. Appropriate measures exist to control the values of the pressure and temperature limits. The proposed amendment continues to require operation within the pressure and temperature limits as obtained from the NRC approved methodologies and appropriate actions to be taken, when or if limits are exceeded. The development of the changes to the pressure and temperature limits will continue to conform to those methods described in the NRC approved documentation. In addition, each change to the pressure and temperature limits will involve a 10CFR50.59 safety review to assure that operation of the unit within the limits will not involve a significant reduction in a margin of safety. Therefore, the proposed changes are administrative in nature and do not impact the operation of the Zion Station in a manner that involves a reduction in the margin of safety.

The proposed Amendment revises requirements associated with Reactor Coolant System (RCS) Heatup and Cooldown Limitations and Low Temperature Overpressure Protection. The specific changes addressed by this significant hazards consideration are as follows:

• Relocating the capsule withdrawal schedule from the Technical Specifications to the UFSAR.

• Relocating from the Technical Specifications the Reactor Vessel Toughness Data Tables and Fast Neutron Fluence Figures to a UFSAR reference.

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The removal of the capsule withdrawal schedule, the Reactor Vessel Toughness Data

Tables, and the Fast Neutron Fluence Figures, from the Zion Station Technical Specifications has no influence or impact on the probability or consequences of any accident previously evaluated. The capsule withdrawal schedule, although not in Technical Specifications, will be followed in the operation of the Zion Station. The proposed amendment still requires exactly the same actions to be taken as is required by current Technical Specifications. The capsule withdrawal schedule will be implemented and controlled per Zion procedures. The capsule withdrawal schedule will be in accordance with UFSAR Section 5.3.1.1. In addition, the Reactor Vessel Toughness Data Tables and the Fast Neutron Fluence Figures only provide information that is used in deriving the heatup and cooldown limitation curves. This same information, the Reactor Vessel Toughness Data Tables and Fast Neutron Fluency Figures, is located in the Westinghouse Topical Reports that describe the methodology used to derive the heatup and cooldown limitation curves. The Westinghouse Topical Reports will also be referenced in the UFSAR. Changes to the capsule withdrawal schedule or the reference to the Westinghouse Topical Report will be performed per the requirements of 10CFR50.59. This ensures that future changes to the capsule withdrawal schedule or the reference to the Westinghouse Topical Report will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The removal of the capsule withdrawal schedule and the Reactor Vessel Toughness Data Tables, and the Fast Neutron Fluence Figures has no influence or impact, nor does it contribute in any way to the probability or consequences of an accident. No safety related equipment, safety function, or plant operations will be altered as a result of this proposed change. The capsule withdrawal schedule is in accordance with NRC approved documentation. The Technical Specifications will continue to require capsules be withdrawn on the required schedules. The Tables and Figures provide information only and will be referenced in the UFSAR. Therefore, the proposed amendment does not in any way create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The margin of safety is not affected by the removal of the capsule withdrawal schedule, the Reactor Vessel Toughness Data Tables and the Fast Neutron Fluence Figures from the Technical Specifications. The margin of safety presently provided by current Technical Specifications remains unchanged. Appropriate measures exist to control the capsule withdrawal schedule, the Reactor Vessel Toughness Data Tables and the Fast Neutron Fluence Figures. The proposed amendment also continues to require capsules to be withdrawn on a required schedule obtained from the NRC approved methodology. The development of the changes to the capsule withdrawal schedule will continue to conform to those methods described in the NRC approved documentation. In addition, each change to the capsule withdrawal schedule and any change to the reference to the Westinghouse Topical Report (containing the reactor vessel toughness data tables and fast neutron fluence figures) will involve a 10CFR50.59 safety review to assure that operation of the unit within the limits will not involve a significant reduction in a margin of safety. Therefore, the proposed change is administrative in nature and does not impact the operation of the Zion Station in a manner that involves a reduction in the margin of safety.

The proposed Amendment revises requirements associates with the Reactor Coolant System (RCS) Heatup and Cooldown Limitations and Low Temperature Overpressure Protection (LTOP). The specific changes addressed by this significant hazards consideration are as follows:

- Revising the LTOP enable temperature.
- Deleting the allowance to have a maximum of one safety injection pump aligned for injection into the RCS and OPERABLE.

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The LTOP enable temperature has been shifted in the conservative direction by enabling LTOP at a high temperature (320°F) than the current 250°F. This revision will provide the LTOP protection in a wider span of temperatures than presently exists. The pressurizer power operated relief valves (PORVs) automatic setpoint of 435 psig will provide ample margin for reactor vessel protection within the revised heatup and cooldown curves. As is the case currently, a potential exists for a spurious PORV opening with the resultant loss of inventory from the RCS. With the revised LTOP enable temperature, the exposure to spurious PORV opening is increased. However, the additional exposure (between 250°F and 320°F) is minimal and existing mitigating features for this event are maintained. The PORVs are instrumented to annunciate if one were open. Also, the PORVs are provided with block valves that will allow operator action to isolate a PORV if it fails to close. If a PORV were to spuriously open, station operating procedures direct operators to isolate it. Operators would have ample time to isolate because of the significantly lower pressures that are typical of LTOP operation. These compensatory measures assure that this revision to the LTOP enable temperature does not significantly increase the probability or consequences of any accident previously evaluated.

An inadvertent safety injection pump actuation with injection into the RCS was not assumed to be an initiator of an analyzed event since operation of the safety injection pumps is prohibited. Deletion of the allowance to have a safety injection pump aligned for injection into the RCS and OPERABLE during LTOP conditions helps ensure an inadvertent safety injection to the RCS does not occur. This change ensures the assumptions of the LTOP analysis for mass addition to the RCS are maintained. This change also ensures that an RCS mass addition transient can be relieved by the operation of a single power operated relief valve or the limiting conditions placed on the pressurizer. Therefore, the deletion of the allowance for a safety injection pump to be aligned to the RCS and OPERABLE does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The change does not physically alter the plant nor does it affect any of Zion's systems or structures. The revised LTOP enable temperature actually expands the region covered by the conservative lower PORV setpoint and therefore provides an equivalent or higher level of protection. The deletion of the allowance to have a safety injection pump aligned for injection into the RCS and OPERABLE achieves consistency with the assumptions of the current LTOP analysis for mass addition to RCS. In addition, the design criteria for LTOP remains unaffected by this revision. Therefore, the change does not create the possibility of a new or different kind of accident.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The margin of safety is not reduced by the changes. The Technical Specification requirements for LTOP remain unchanged except for the conservative raising of the enable temperature and the deletion of the allowance to have a safety injection pump aligned for injection into the RCS and OPERABLE. The expanded region of LTOP coverage provides assurance that protection is available during the conditions when an LTOP event could occur. Deletion of the allowance to have a maximum of one safety injection pump aligned for injection into the RCS and OPERABLE achieves consistency with the LTOP analysis. This ensures the assumptions of the LTOP analysis are maintained since inadvertent actuation of a safety injection pump was not analyzed. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60690

NRC Project Director: James E. Dyer

Commonwealth Edison Company, Docket No. 50-295, Zion Nuclear Power Station, Unit 1, Lake County, Illinois

Date of amendment request: March 3, 1993

Description of amendment request: The proposed amendment would defer the next calibration of the Unit 1 containment recirculation sump level instrumentation until the end of the next refueling outage.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change does not result in any hardware or operating procedure changes. The frequencies for surveillances are not assumed in the initiation of any analyzed events. This change allows a one time delay in the performance of the CHANNEL CALIBRATION required by Surveillance Requirement 4.8.9 for the CRSL instruments. It would be overly conservative to assume the two Unit 1 CRSL instruments are inoperable when the CHANNEL CALIBRATION has not been performed within the 18 month frequency. Since the CHANNEL CALIBRATIONS for these instrument channels have been successfully performed within the previous interval, it is primarily a question of OPERABILITY that has not been verified by performance of the surveillance within the new required frequency. In addition, alternate indication of containment water level is available from the RWST level instrument channels and the containment water level (wide range) instrument channels. Therefore, the consequences of an accident previously evaluated are not significantly increased since the most likely outcome of performing the CHANNEL CALIBRATION would demonstrate the CRSL instruments are OPERABLE.

2. Does the change create the possibility of a new or different kind of accident from any previously analyzed?

The proposed change does not result in plant operations or configurations that could create a new or different type of accident. No new equipment is being introduced, and installed equipment is not being used in a new or different manner. No plant configuration changes are being made as a result of this amendment request. Additionally, this request deals with instrumentation that performs a monitoring function. There is no active interface between the subject instrumentation and the installed equipment whose failure would initiate a transient event. Therefore, the change will not create a new or different type of accident.

3. Does the change involve a significant reduction in a margin of safety?

The increased time allowed for the performance of the CHANNEL CALIBRATION of the CRSL instruments is acceptable based on the small probability of an event requiring these instruments to function. Granting a one time extension to the 18 month CHANNEL CALIBRATION for the Unit 1 CRSL instruments is acceptable considering the historical reliability of these instrument channels. Without this extension, a unit shutdown would be required to perform the surveillance or to comply with the actions for inoperable instrument channels which cannot be restored. As such, any reduction in a margin of safety will be insignificant and offset by the benefit gained in plant safety due to the avoidance of a plant shutdown transient.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60690

NRC Project Director: James E. Dyer

Entergy Operations, Inc., Docket No. 50-368, Arkansas Nuclear One, Unit No. 2, (ANO-2) Pope County, Arkansas

Date of amendment request: February 24, 1993

Description of amendment request: The proposed change would revise the containment internal pressure lower limit of Technical Specification Figure 3.6-1 from 12.8 to 13.2 psia.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1 - Does Not Involve A Significant Increase in the Probability or Consequences of An Accident Previously Evaluated.

Containment internal pressure is not an event initiator of any accident analyzed in the ANO-2 Safety Analysis Report (SAR) and does not affect the probability of occurrence of any event previously analyzed. Therefore, this change does not increase the probability of any accident previously evaluated.

Increasing the initial containment pressure from 12.8 psia to 13.2 psia is in the conservative direction and will not result in an increase in the consequences of the LBLOCA [large-break loss-of-coolant accident] analysis. This change is requested based on a LBLOCA analysis that has included cumulative cycle fuel design and core physics changes, anticipated plant changes (10% tube plugging), and utilization of the latest approved evaluation model. The sum of these changes have resulted in an increase in the LBLOCA PCT [peak clad temperature]. A new PCT of 2142°F has been calculated, which remains bounded by the 2200°F limit as defined by 10 CFR 50.46. Due to dose calculations for the LBLOCA being totally independent from the ECCS [emergency core cooling system] analysis (based on Technical Information Document 14844), the increase in PCT does not affect the dose calculations. Therefore, this change does not constitute a significant increase in the consequences of an accident previously evaluated.

Criterion 2 - Does Not Create the Possibility of a New or Different Kind of Accident from any Previously Evaluated.

The proposed change does not involve any design changes, or plant modifications. The new lower limit for containment pressure represents more restrictive limitations than that imposed by the present Technical Specifications and constitutes a conservative change in plant operation. Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

The new LBLOCA analysis performed and referenced in this submittal will not modify the plant. The analysis was performed using the latest ABB-CE approved evaluation model and conservative input parameters to bound the ANO-2 design. Use of the new ANO-2 LBLOCA input parameters and evaluation model does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3 - Does Not Involve a Significant Reduction in a Margin of Safety.

The Region of Acceptable Operation of ANO-2 TS Figure 3.6-1 has been evaluated and shown to result in peak containment pressures within the design pressure as was the case with the original analyses. As indicated above, the LBLOCA analysis is not negatively impacted by this change, but due to the combined evaluation with other conservative input parameter changes, a higher PCT is calculated.

The new LBLOCA analysis performed for ANO-2 was done with an approved evaluation model that complies with the requirements of Appendix K, and has resulted in a higher PCT (2142°F versus 2086°F for cycle 10) and greater core wide clad oxidation (0.843% versus 0.617%). These results are attributed to the input parameter changes. Although the PCT and core wide clad oxidation has increased, the results still are in compliance with the acceptance criteria set forth in 10 CFR 50.46 which establish limits and required design margins, and therefore, does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Tomlinson Library, Arkansas Tech University, Russellville, Arkansas 72801

Attorney for licensee: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, N.W., Washington, D.C. 20005-3502

NRC Project Director: George T. Hubbard, Acting Director

Entergy Operations, Inc., Docket No. 50-368, Arkansas Nuclear One, Unit No. 2, (ANO-2) Pope County, Arkansas

Date of amendment request: February 24, 1993

Description of amendment request: The proposed amendment would change the flow test acceptance criteria for a single pump in the high pressure safety injection (HPSI) system from a minimum of 196 gallons-per-minute (gpm) for each injection leg to a total flow of 570 gpm, excluding the highest injection leg's flow rate.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1 - Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated.

The proposed change to the surveillance requirements for a post modification HPSI system flow test maintains the requirement to verify the current accident analyses values (as approved in Amendment 86) for HPSI flow and does not change the current level of protection provided to the reactor core by the HPSI system. Hardware changes have not been made to the system which could increase the probability or consequence of any accident within the current design basis. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2 - Does Not Create the Possibility of a New or Different Kind of Accident from any Previously Evaluated.

The HPSI system will continue to provide adequate flow into the RCS for the design basis events. No system hardware changes have been made which could have an adverse impact on this capability. Therefore the acceptance criteria changes will not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3 - Does Not Involve a Significant Reduction in the Margin of Safety.

The proposed change does not involve any hardware change and thus does not change the capability of the HPSI system to deliver sufficient flow to accomplish its design basis function. The basis for the Surveillance Requirement is to ensure that the system provides an acceptable level of total ECCS [emergency core cooling system] flow equal to or greater than that assumed in the accident analyses. The revised specification will still require demonstration of adequate total HPSI flow following system modification consistent with the current accident analyses. Since the system will continue to provide the same flow, the change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Tomlinson Library, Arkansas Tech University, Russellville, Arkansas 72801

Attorney for licensee: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, N.W., Washington, D.C. 20005-3502

NRC Project Director: George T. Hubbard, Acting Director

Florida Power and Light Company, et al., Docket No. 50-335 St. Lucie Plant, Unit No. 1, St. Lucie County, Florida

Date of amendment request: March 4, 1993

Description of amendment request: The proposed amendment excludes penetrations inside containment from the 31-day surveillance requirement of Technical Specification (TS) 4.6.1.1.a.1. and is consistent with similar provisions contained in NUREG-1432, Standard Technical Specifications for Combustion Engineering plants.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Pursuant to 10 CFR 50.92, a determination may be made that a proposed license amendment involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. Each standard is discussed as follows:

(1) Operation of the facility in accordance with the proposed amendment would not involve a significant increase in the probability or consequences of an accident previously evaluated.

Strict control of containment entries, measures being taken to ensure that penetration components are locked, sealed or otherwise secured in their closed positions, and the administrative controls that assure a low probability of valve misalignments described in the supporting safety analysis for the proposed amendment provide assurance that containment integrity is preserved without performing the 31 day verification surveillance inside containment. Therefore, operation of the facility in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) Operation of the facility in accordance with the proposed amendment would not create the possibility of a new or different kind of accident from any accident previously evaluated.

This amendment does not result in any change to the physical plant or in the mode of operation of the plant. Therefore, operation of the facility in accordance with the proposed amendment would not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) Operation of the facility in accordance with the proposed amendment would not involve a significant reduction in a margin of safety.

Penetration components inside containment are operated under dministrative controls and entries into containment are restricted. Certain penetration components, as appropriate, are locked, sealed, or otherwise secured in their proper positions to assure containment integrity during Operating Modes 1, 2, 3, and 4. Therefore, operation of the facility in accordance with the proposed amendment would not involve a significant reduction in a margin of safety.

Based on the discussion presented above and on the supporting safety analysis, FPL has concluded that this proposed license amendment involves no significant hazards consideration.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Indian River Junior College Library, 3209 Virginia Avenue, Fort Pierce, Florida 34954-9003

Attorney for licensee: Harold F. Reis, Esquire, Newman and Holtzinger, 1615 L Street, NW., Washington, DC 20036

NRC Project Director: Herbert N. Berkow

Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50-424 and 50-425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: July 31, 1992, as revised January 22, 1993

Description of amendment request: The proposed amendments would add a new Technical Specification (TS) 3/4.7.1.6, entitled "Main Feedwater Isolation Systems," and associated bases. The proposed TS addition would

incorporate a Limiting Condition for Operation to require that the main feedwater isolation and regulating valves (MFIVs and MFRVs) and their respective bypass valves (BFIVs) be operable when the reactor is in Modes 1 or 2 (unless the MFIV, MFRV, or associated BFIV is closed and deactivated). Appropriate action statements, surveillance requirements, and bases would also be added.

Basis for proposed no significant hazards consideration determination: The MFIVs, MFRVs, and BFIVs perform a safety-related function of isolating main feedwater flow to the secondary side of the steam generators to avoid excessive cooling and additional mass and energy release after a main steam line break accident. Closure of these valves is also credited in the FSAR safety analyses for feedwater malfunction, feedwater line break, steam generator tube rupture, and small-break loss of coolant accidents. The Vogtle TSs do not contain limiting conditions for operation, surveillance requirements, or bases addressing this safety-related function. The proposed changes would correct this oversight.

As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed addition to the Technical Specifications does not involve a significant increase in the probability or consequences of an accident previously evaluated because it adds requirements to maintain the feedwater isolation systems in a state that is consistent with the accidents previously analyzed.

2. The proposed addition to the Technical Specifications does not create the possibility of a new or different kind of accident from any accident previously evaluated because it requires the feedwater isolation system to be maintained operable in a manner that is consistent with the current accident analyses and does not introduce any new or different operating requirements for the feedwater isolation systems.

3. The proposed addition to the Technical Specifications does not involve a significant reduction in a margin of safety because it will require the feedwater isolation system to perform in accordance with the assumptions used in the safety analyses. Therefore, operation in accordance with the proposed specification will not affect any of the acceptance limits or analyses used to demonstrate operation within the acceptance limits.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards

Local Public Document Room location: Burke County Public Library, 412 Fourth Street, Waynesboro, Georgia 30830

Attorney for licensee: Mr. Arthur H. Domby, Esquire, Troutman, Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308-2210

NRC Project Director: David B. Matthews

Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50-424 and 50-425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: January 22, 1993

Description of amendment request: The proposed amendments would revise Technical Specification (TS) 3/4.8.1.1, "A.C. Sources - Operating," and TS 3/4.3.2, "Engineered Safety Features Actuation System Instrumentation," to clarify and add requirements regarding the automatic load sequencers. Specifically:

(1) TS 3.8.1.1, which lists the A.C. electrical power sources required to be operable in Modes 1, 2, 3, and 4, would be supplemented with:

c. Automatic load sequencers for train A and B and its corresponding action statement would be supplemented with:

g. with one automatic load sequencer inoperable, restore the inoperable load sequencer to OPERABLE status within 12 hours or be in at least HOT STANDBY within the next 6 hours and in COLD SHUTDOWN within the following 30 hours.

(2) Action Statements 14, 20, and 23 of Table 3.3-2, "Engineered Safety Features Actuation System Instrumentation," would be supplemented with:

(With channels inoperable due to an inoperable load sequencer, apply the ACTION statement of specification 3.8.1.1 for an inoperable load sequencer.)

(3) TS Bases 3.8.1.1 would be supplemented with:

The ACTION times specified for an inoperable automatic load sequencer are based on the times allowed when a combination of one diesel generator and one offsite circuit is inoperable. This conservatively addresses any consequential effects of an inoperable load sequencer on other engineered safety features and avoids having to evaluate the ACTION based on table 3.3-2.

Basis for proposed no significant hazards consideration determination: The load sequencer automatically starts the diesel and connects Class 1E loads to the 4.16-kV bus following an accident or a loss of offsite power. The Vogtle TSs already include surveillance requirements for the load sequencers (TSs 4.8.1.1.2.h.4, 4.8.1.1.2.h.6, and 4.8.1.1.2.h.12) but contain no corresponding Limiting Condition for Operation concerning the effects of an inoperable load sequencer on instrumentation listed in TS Table 3.3-2. The proposed TS changes would clarify the appropriate actions and ensure that appropriate actions are taken when a load sequencer is inoperable or removed from service. The proposed action time of 12 hours for an inoperable sequencer is proposed by the licensee to correspond to the action time currently allowed when an offsite power source and diesel generator are inoperable.

As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed revision to the Technical Specifications does not involve a significant increase in the probability or consequences of an accident previously evaluated because the action to be taken when a load sequencer is inoperable is consistent with an already specified condition that is more significant than an inoperable sequencer, namely, the loss of an entire train of emergency power.

2. The proposed revision to the Technical Specifications does not create the possibility of a new or different kind of accident from any accident previously evaluated because it does not involve any change to the design, operation, or performance of the load sequencer. It only serves to clearly identify the appropriate conservative response to an inoperable load sequencer.

3. The proposed addition to the Technical Specifications does not involve a significant reduction in a margin of safety because the proposed action to take when a sequencer is not operable is the same as the action already required by the Technical Specifications when no power is available to the entire train.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Burke County Public Library, 412 Fourth Street, Waynesboro, Georgia 30830

Attorney for licensee: Mr. Arthur H. Domby, Esquire, Troutman, Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308-2210

NRC Project Director: David B. Matthews

Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50-424 and 50-425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: January 22, 1993

Description of amendment request: The proposed amendments would revise Technical Specification (TS) Table 2.2-1, "Reactor Trip System Instrumentation Trip Setpoints," and TS Table 3.3-3, "Engineered Safety Features Actuation System Instrumentation Trip Setpoints," to delete information that became obsolete once all steam generator instrumentation taps were relocated to elevation 333 inches, and to revise the value of "Z" for the steam generator level instrumentation. The Z-value represents the statistical summation of errors assumed for the instrument setpoints in various analyses, and is used in the TSs to determine reporting requirements.

Specifically, the change would delete the footnotes in TS Table 2.2-1 and TS Table 3.3-3 that read: "... the value stated inside the parenthesis is for instrumentation that has the lower tap at elevation 333 [inches]; the value stated outside the parenthesis is for instrumentation that has the lower tap at elevation 438 [inches]." The associated values within these tables that are outside the parenthesis, and their reference to these footnotes, would be deleted. The changes to TS Table 2.2-1 apply to reactor trip due to Steam Generator Water Level Low-Low; this Z-value would be changed to 17.6. The changes to TS Table 3.3-3 apply to turbine trip and feedwater isolation due to Steam Generator Water Level High-High; this Z-value would be changed to 10.47. The changes to TS Table 3.3-3 also apply to auxiliary feedwater actuation (start motor-driven pumps and start turbine driven pump) due to Steam Generator Water Level Low-Low; these Z-values would be changed to 17.6.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The revised Technical Specifications do not involve a significant increase in the probability or consequences of an accident previously evaluated. Operation with these revised values will not cause any design or analysis acceptance criteria to be exceeded. The structural and functional integrity of any plant system is unaffected. The steam generator water level reactor trip system and engineered safety feature actuation system functions are part of the accident mitigation response and are not themselves initiators for any transient. Therefore, the probability of occurrence is not affected.

The changes to the Technical Specifications do not affect the integrity of the fission product barriers utilized for mitigation of radiological dose consequences as a result of an accident. Since the Technical Specifications revision does not affect the results or conclusions of FSAR [Final Safety Analysis Report] accident analyses, the offsite mass releases used as input to the dose calculations are unchanged from those previously assumed. Therefore, the offsite dose predictions remain within the acceptance criteria. Since it has been determined that the FSAR accident analyses are not affected by these parameter modifications, it is concluded that the consequences of an accident previously evaluated are not increased.

2. The revised Z values do not create the possibility of a new or different kind of accident from any accident previously evaluated. The safety analysis limit values are not changed. Thus, the changes do not affect the assumed accident initiation sequences. No new operating configuration is being imposed by the Z value adjustments that would create a new failure scenario. In addition, no new failure modes are being created for any plant equipment. Therefore, the types of accidents defined in the FSAR continue to represent the credible spectrum of events which bound safe plant operation.

3. The proposed changes do not involve a significant reduction in a margin of safety because there is no reduction in the margin of safety associated with the revised Z values for the steam generator water level - low-low and high-high trip functions. The results and conclusions of the accident analyses as presented in the FSAR remain applicable. Thus, all safety analysis acceptance criteria continue to be met. The margin of safety for each safety analysis is unchanged, and therefore the margin of safety associated with the steam generator level setpoints is unchanged.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Burke County Public Library, 412 Fourth Street, Waynesboro, Georgia 30830

Attorney for licensee: Mr. Arthur H. Domby, Esquire, Troutman, Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308-2210

NRC Project Director: David B. Matthews

GPU Nuclear Corporation, et al., Docket No. 50-219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey

Date of amendment request: March 3, 1993

Description of amendment request: The amendment proposes the reduction of the setpoint of the ninth (highest) safety valve from 1230 to 1221 psig.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The proposed Technical Specification Change Request does not involve a significant hazards consideration for the reasons as stated below:

1. Involve a significant increase in the probability or consequence of an accident previously evaluated.

The change in setpoint of the ninth safety valve will not increase the probability of occurrence or the consequences of an accident previously evaluated in the [Safety Analysis Report] SAR because there is no change to the number or function of the nine safety valves. The only event initiator that involves a safety valve is a spurious valve opening which is not affected by the change in setpoint.

The activity will not increase the probability of occurrence or consequence of a malfunction of equipment important to safety previously evaluated in the SAR based on a reliability analysis of [recirculation pump trip] RPT, [electromatic relief valves] EMRVs and safety valves which shows that the likelihood of reactor vessel overpressure due to an [anticipated transient without scram] ATWS remains very small.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed activity does not create a possibility for an accident of malfunction of a different type than any previously identified in the SAR since existing safety valves remain unchanged, and no systems are affected by this modification. Analyses demonstrate that all of the appropriate event acceptance limits have been satisfied for the proposed new setpoint.

3. Involve a significant reduction in the margin of safety.

The margin of safety as presently defined in the basis for the Technical Specifications will not decrease as a result of this proposed change.

For the purposes of this evaluation, the margin of safety is defined as the margin between the safety limit and fission product barrier failure. Because the event does not exceed the event limit (1375 psig), the margin of safety is not reduced.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff

proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Ocean County Library, Reference Department, 101 Washington Street, Toms River, New Jersey 08753

Attorney for licensee: Ernest L. Blake, Jr., Esquire. Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Project Director: John F. Stolz

Illinois Power Company and Soyland Power Cooperative, Inc., Docket No. 50-461, Clinton Power Station, Unit No. 1, DeWitt County, Illinois

Date of amendment request: October 16, 1992

Description of amendment request: The proposed amendment would make editorial changes to the Clinton Power Station Operating License and Technical Specifications to correct typographical errors, provide clarification and remove provisions which are no longer applicable.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

(1) The proposed changes only consist of clarifications, corrections of typographical errors and the deletion of provisions which are no longer applicable. Therefore, these changes do not affect any previous analysis. These changes do not affect the intent or implementation of the applicable Technical Specifications, and in fact, reduce or eliminate confusion, provide consistency between Technical Specifications, and ensure that the Operating License and Technical Specifications reflect current plant status. Since these are editorial changes which do not impact the plant design or operations, this proposed change cannot increase the probability or the consequences of any accident previously evaluated.

(2) The proposed changes are editorial only and do not affect the plant design or operation. No new failure modes are introduced since these proposed changes only correct typographical errors and provide additional clarification. Therefore, the request will not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) The proposed changes only provide correction of typographical errors and clarification of inconsistent direction to the operators. These changes do not alter or delete technical requirements and as such, maintain an equivalent level of safety. Therefore, these changes do not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Vespasian Warner Public Library, 120 West Johnson Street, Clinton, Illinois 61727

Attorney for licensee: Sheldon Zabel, Esq., Schiff, Hardin and Waite, 7200 Sears Tower, 233 Wacker Drive, Chicago, Illinois 60606

NRC Project Director: James E. Dyer

Illinois Power Company and Soyland Power Cooperative, Inc., Docket No. 50-461, Clinton Power Station, Unit No. 1, DeWitt County, Illinois

Date of amendment request: February 11, 1993

Description of amendment request: The proposed amendment would change Clinton Power Station Technical Specification 3/4.3.4.2, "End-Of-Cycle Recirculation Pump Trip System Instrumentation," to revise the frequency for measuring the breaker arc suppression time from once every 18 months to once every 60 months.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

(1) The proposed change merely brings the current [Clinton Power Station] CPS Technical Specification into conformance with the Standard Technical Specifications and does not result in any changes to the existing plant design. The change to increase the test interval for measuring the breaker arc suppression time is supported by the reliability of the [End-Of-Cycle Recirculation Pump Trip] EOC-RPT system circuit breakers. Since the change does not impact the ability of the EOC-RPT system to perform its function, and since the proposed change can reduce the potential for inadvertent scrams or system actuations and unnecessary wear and tear on associated components, this change does not result in a significant increase in the consequences of any accident previously evaluated. As the EOC-RPT system is designed to initiate a recirculation pump trip to reduce the peak reactor pressure and power resulting from a turbine trip or generator load rejection, the proposed change has no impact on the probability of occurrence of a turbine trip or generator load rejection transient.

(2) This request does not result in any change to the plant design nor does it involve a significant change in current plant operation. The EOC-RPT System Response Time will continue to be determined and the system, including breaker action, will continue to be tested every 18 months. As a result, no new failure modes are introduced, and the request will not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) The proposed request does not adversely impact the reliability of the EOC-RPT system and in fact takes credit for the reliability of system components to reduce the potential for plant transients. In addition, the system will continue to perform its design function of providing additional margin to the core thermal minimum critical power ratio (MCPR) safety limits under end-of-cycle conditions. Since this request does not involve an adverse impact to system operation or reliability, and since the EOC-RPT system function is not affected by the proposed change, this request does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Vespasian Warner Public Library, 120 West Johnson Street, Clinton, Illinois 61727

Attorney for licensee: Sheldon Zabel, Esq., Schiff, Hardin and Waite, 7200 Sears Tower, 233 Wacker Drive, Chicago, Illinois 60606

NRC Project Director: James E. Dyer

Illinois Power Company and Soyland Power Cooperative, Inc., Docket No. 50-461, Clinton Power Station, Unit No. 1, DeWitt County, Illinois

Date of amendment request: February 11, 1993

Description of amendment request: The proposed amendment would revise Clinton Power Station (CPS) Design Features Technical Specification 5.3.1, "Fuel Assemblies," to make the fuel design features more generic to allow use of other NRC-approved fuel designs. Also, the proposed amendment would revise Specification 5.3.2, "Control Rod Assemblies," to allow the use of NRC-approved control rod designs which contain hafnium metal in addition to boron carbide powder. In addition, the proposed amendment would revise Specification 3.3.1, "Reactor Protection System Instrumentation," and the Bases to transfer the specific value of the simulated thermal power time constant for the Average Power Range Neutron Monitors (APRMs) from the Technical Specifications to the Core Operating Limits Report (COLR).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

(1) The proposed changes do not involve a significant increase in the probability or consequences of any accident previously evaluated. There will be no change in the

operation of the facility as a result of the amendment.

The fuel design requirements are being proposed to be more generic but still require that these designs be developed and analyzed using NRC-approved codes and methods. This approach is consistent with NRC Generic Letter 90-02 Supplement 1. Further, design evaluations, as required by 10 CFR 50.59, will ensure that the licensing basis for the plant continues to be maintained while utilizing advanced fuel designs. In addition to allowing the use of NRC-approved advanced fuel designs, the proposed wording for Fuel Assembly Design Features, as provided in NRC Generic Letter 90-02 Supplement 1, allows limited substitutions of zirconium alloy or stainless steel filler rods for fuel rods in accordance with NRC-approved applications of fuel rod configurations. However, the proposed wording will still require the fuel assemblies to be analyzed with applicable NRC staff-approved codes and methods and shown by tests or analyses to comply with all fuel safety design bases. As a result, appropriate evaluations will, as discussed in the Generic Letter supplement, be performed. These evaluations will ensure that there is no significant increase in the probability or consequences of any accident previously evaluated.

The use of hafnium as a neutron-absorbing material has been specifically approved by the NRC for use in BWR control rod assemblies. Use of NRC-approved control rod designs and materials will not significantly alter the neutron absorption (reactivity worth), mechanical properties (e.g., corrosion resistance) or other functional characteristics (e.g., weight and dimensions) of the control rods in an adverse way. Control rods containing hafnium are designed to be neutronically and physically compatible with the existing boron carbide rod design. The proposed change does not alter the required number of control rods nor does it affect any of the Technical Specifications relating to operability or testing of the control rods (e.g., the shutdown margin and scram timing requirements are unaffected). Therefore, the proposed change will not involve a significant increase in the probability or consequences of any accident previously evaluated.

With respect to the proposed amendment to replace the specific value of the cycle-specific simulated thermal power time constant in the Technical Specifications with a reference to the Core Operating Limits Report (COLR), the simulated thermal power time constant specified in the COLR will continue to be determined utilizing NRC-approved analytical methods and will continue to be used for calibration of the APRM Flow Biased Simulated Thermal Power-High trip function in accordance with the Technical Specifications. The transfer of the specific value of the fuel and cycle-specific simulated thermal power time constant from the CPS Technical Specifications has no impact on the implementation of the associated Technical Specifications. Based on the above, the proposed change has no impact on the probability or consequences of any transient or accident occurrence.

(2) The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated. As stated above, no safety functions or plant operation will be altered as a result of this amendment.

As described in item (1) above, the proposed changes to the fuel design requirements will still require that the designs be developed and analyzed using NRC-approved codes and methods. In addition, fuel reconstitution will be performed within the guidelines of Generic Letter 90-02 Supplement 1 and as a result, no new failure modes will be introduced. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The use of NRC-approved control rod designs using hafnium as an absorber material does not produce any new mode of plant operation or alter the control rods in such a way as to adversely affect their function or operability since the new control rods are designed to be compatible with the existing control rods. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed change to replace the specific value of the simulated thermal power time constant with a reference to the COLR is in accordance with the guidance provided in Generic Letter 88-16 for requesting removal of the values of cycle-specific parameters from Technical Specifications. The establishment of the simulated thermal power time constant will continue to be in accordance with an NRC-approved methodology. As a result, no new failure modes are introduced. Therefore, this change cannot create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) The proposed change does not involve a significant reduction in a margin of safety.

As described in item (1) above, the proposed changes to the fuel design requirements will still require that the designs be developed and analyzed using NRC-approved codes and methods. In addition, fuel reconstitution will be performed within the guidelines of Generic Letter 90-02 Supplement 1. As a result, the proposed change will not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Vespasian Warner Public Library, 120 West Johnson Street, Clinton, Illinois 61727

Attorney for licensee: Sheldon Zabel, Esq., Schiff, Hardin and Waite, 7200 Sears Tower, 233 Wacker Drive, Chicago, Illinois 60606

NRC Project Director: James E. Dyer

Illinois Power Company and Soyland Power Cooperative, Inc., Docket No. 50-461, Clinton Power Station, Unit No. 1, DeWitt County, Illinois

Date of amendment request: February 11, 1993

Description of amendment request: The proposed amendment would bring the Clinton Power Station Technical Specifications in compliance with the amended 10 CFR 50.36a requirements which change the submittal frequency of the "Semiannual Radioactive Effluent Release Report" from semiannually to annually.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

(1) The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change is designed to conform the [Clinton Power Station] CPS Technical Specifications to changes in the NRC regulations (in this case, 10CFR50.36a). As described within the discussion of the final rule in the Federal Register, the proposed action (i.e., the proposed change to 10CFR50.36a) "will not reduce the protection of the public health and safety or the common defense and security." The proposed changes to the CPS Technical Specifications are consistent with this intent as they are designed to remove inconsistencies between CPS Technical Specifications and 10CFR50.36a and do not affect plant operation in any way. The proposed changes do not result in a change to plant systems and have no effect on accident conditions or assumptions. The proposed changes are to reporting requirements only and do not affect possible initiating events for accidents previously evaluated, or any system functional requirements. Therefore, the proposed changes to the subject Technical Specifications cannot increase the probability or consequences of an accident previously evaluated.

(2) The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

As stated above, the proposed changes are administrative in nature. The proposed changes do not affect the reactor coolant pressure boundary or any other plant systems or structures, nor do they affect any system functional requirements or operability requirements. Consequently, no new failure modes are introduced as a result of the proposed changes, and therefore the proposed changes cannot initiate any new or different kind of accident.

(3) The proposed changes do not result in a significant reduction in the margin of safety.

The proposed changes are administrative in nature and do not affect any Updated

Safety Analysis Report (USAR) design bases, accident assumptions, or Technical Specification Bases. Therefore, the proposed changes do not result in the reduction in any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Vespasian Warner Public Library, 120 West Johnson Street, Clinton, Illinois 61727

Attorney for licensee: Sheldon Zabel, Esq., Schiff, Hardin and Waite, 7200 Sears Tower, 233 Wacker Drive, Chicago, Illinois 60606

NRC Project Director: James E. Dyer

Illinois Power Company and Soyland Power Cooperative, Inc., Docket No. 50-461, Clinton Power Station, Unit No. 1, DeWitt County, Illinois

Date of amendment request: February 17, 1993

Description of amendment request: The proposed amendment would provide three partial exemptions from the requirements of 10 CFR 50, Appendix J, regarding containment integrated leakage rate testing and changes to the Clinton Power Station (CPS) Technical Specification Bases and Operating License NPF-62 to reflect NRC approval of the proposed partial exemptions. The partial exemptions from 10 CFR 50, Appendix J, include: (1) a partial exemption from Section III.A.1.(a) requirement to stop a Type A test (containment integrated leakage rate test (CILRT)) if excessive leakage is detected; (2) a partial exemption from Section III.D.1.(a) requirement to perform the third Type A test of each 10-year service period when the plant is shut down for the 10-year plant inservice inspections; and (3) a partial exemption from Section III.A.5.(b) acceptance criteria for Type A tests with respect to determining the frequency of subsequent Type A tests.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

(1) These proposed operating license and [Technical Specification] TS changes consist of editorial and technical changes. The editorial changes merely reflect approval of partial exemptions from 10CFR50 Appendix J and make an editorial format change. The technical changes involve deletion of the requirement to perform the third Type A test for each 10-year service period during the shutdown for the 10-year plant inservice inspections and a change to base the frequency of subsequent Type A tests on an "as-found" leakage limit of [maximum allowable containment leakage rate] La and require the "as-left" overall containment integrated leakage rate to be less than 0.75 La prior to plant restart. These two technical changes only involve containment leak rate testing requirements and are based on partial exemptions from Appendix J to 10CFR50. Because these changes only involve leak rate testing, they cannot increase the probability of any accident previously evaluated.

With respect to elimination of the requirement to perform the third Type A test for each 10-year service period during the shutdown for the 10-year plant inservice inspections, there is no significant benefit in coupling these two surveillances. Each of these two surveillances (i.e., the Type A tests and the 10-year ISI program) is independent of the other and provides assurances of different plant characteristics. The Type A tests assure the required leak-tightness for the reactor primary containment to demonstrate compliance with the guidelines of 10CFR Part 100. The 10-year ISI program provides assurance of the integrity of the plant's structures, systems, and components as well as verifying operational readiness of pumps and valves in compliance with 10CFR50.55a. There is no safety-related concern necessitating their coupling to the same refueling outage. As a result, this change cannot increase the consequences (i.e., offsite dose) of any accident previously evaluated.

With respect to the change to the basis for determining the frequency for performing subsequent Type A tests, this change does not increase the consequences of any accident previously evaluated. The acceptance criterion for [measured containment leakage rate] Lam was established in Appendix J as 0.75 La in order to provide a margin of 25 percent (i.e., 0.25 La) to account for possible deterioration of the reactor primary containment leak-tightness between the periodic Type A tests. The value of La is the leakage rate assumed in the accident analyses in Chapter 15 of the [Updated Safety Analysis Report] USAR. (Refer to Table 15.6.5-5 of the CPS USAR.) Per these analyses, offsite doses resulting from a design-basis loss-of-coolant accident were calculated to be 4.4 Rem whole body and 163 Rem inhalation at the Exclusion Area boundary and 1.7 Rem whole body and 156 Rem inhalation at the Low Population Zone boundary. (Refer to Table 15.6.5-6 of the CPS USAR.) These calculated doses are well below the 10CFR100.11 guidelines of 25 Rem whole body and 300 Rem total. In addition, there is no need for the 25-percent margin to account for deterioration at the end of a Type A test interval since the "as-found" leakage corresponds to the actual condition of the containment at the end of the test interval. Moreover, with respect to "as-left" leakage, the 0.75 La acceptance criterion of 10CFR50 Appendix J will continue to be required to be met prior to plant restart.

There is also added assurance that there will not be any significant undetected degradation in the reactor primary containment leakage during each Type A test interval in that the primary contributors to potentially excessive leakage paths will be measured during the required periodic Type B and Type C tests. These latter tests will be conducted at intervals no greater than 2 years. (Refer to Section III.D.2 and III.D.3 of Appendix J and Surveillance Requirement 4.6.1.2.b.) The principal contributors to any deterioration in the containment leakage rate would thereby be detected and corrected at least once between Type A tests. The air locks will also continue to be tested at intervals of 6 months.

Therefore, based on the above, these proposed changes will not increase the probability or the consequences of any accident previously evaluated.

(2) These proposed changes do not involve any change to the plant design or operation. As discussed above, these changes cannot increase the consequences of any accident previously evaluated. As a result, no new failure modes are created. Therefore, these proposed changes cannot create the possibility of any new or different kind of accident from any accident previously evaluated.

(3) As previously noted, the proposed changes consist of editorial and technical changes. The editorial changes do not directly involve or impact any margin of safety as they merely acknowledge approval of proposed partial exemptions from 10CFR50 Appendix J and make an editorial format change. The proposed technical changes (to delete the requirement to perform the third Type A test for each 10-year service period during the shutdown for the 10-year plant inservice inspections, to base the frequency of subsequent Type A tests on an "as-found" leakage limit of La and require the "as-left" overall containment integrated leakage rate to be less than 0.75 La prior to plant restart) do not change the acceptance criteria that must be met for inservice inspections, do not relax the "as-left" condition of the containment that must be met prior to plant restart and do not change the requirements that must be met between plant refueling outages. Therefore, these proposed changes do not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Vespasian Warner Public Library, 120 West Johnson Street, Clinton, Illinois 61727

Attorney for licensee: Sheldon Zabel, Esq., Schiff, Hardin and Waite, 7200 Sears Tower, 233 Wacker Drive, Chicago, Illinois 60606

NRC Project Director: James E. Dyer

Iowa Electric Light and Power Company, Docket No. 50-331, Duane Arnold Energy Center, Linn County, Iowa

Date of amendment request: December 31, 1992

Description of amendment request: The proposed amendment would revise the technical specifications (TS) by changing Section 3.6, "Primary Systems Boundary" and adding definitions into Section 1.0, "Definitions". The proposed changes provide additional definitions and improve clarity and consistency of LCOs and SRs. Most of the changes are consistent with the Standard TS (NUREG-1202) while other changes are editorial or administrative in nature. Guidance provided by Generic Letters (GL) 90-09, "Alternative Requirements for Snubber Visual Inspection Intervals and Corrective Actions," and GL 91-01, "Removal of the Schedule for the Withdrawal of Reactor Vessel Material Specimens from Technical Specifications," was used.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1) The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes discussed in this section are provided to enhance the overall quality and safety significance of the existing DAEC TS. The proposed TS do not change any accident analysis, plant safety analysis, calculations, degrade existing plant programs, modify any functions of safety related systems, or accident mitigation functions DAEC has previously been credited with. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously analyzed.

The proposed changes to the Bases Section 3.6 and 4.6 reflect the above changes and include various editorial corrections. These changes have no effect on the consequences of a previously evaluated accident.

2) The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not alter any plant parameters, revise any safety limit setpoint, or provide any new release pathways. In addition, the proposed changes do not modify the operation or function of any safety related equipment, nor do they introduce any new modes of operation, failure modes, or physical changes to the plant. The proposed changes do not change any plant parameters or transient responses assumed in the Design Bases of the plant and therefore, do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes to the Bases Section 3.6 and 4.6 reflect the above changes and include various editorial corrections. Therefore, the proposed changes and corrections do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3) The proposed changes do not involve a significant reduction in the margin of safety.

The proposed changes do not require any modifications to existing plant systems or equipment, Emergency Operating Procedures, safety limit settings, or parameters utilized in the licensing bases for the safety analysis. These proposed changes are being made to enhance TS Section 3.6 by clarifying and making LCOs and SRs consistent throughout the section. In addition, several LCOs and SRs have been added, providing additional information that did not exist in the current TS. As discussed above, the proposed changes do not change any safety analysis or any accident mitigation actions for which DAEC has previously taken credit. Therefore, the proposed changes do not involve a significant reduction in the margin of safety.

The proposed changes to the Bases Section 3.6 and 4.6 reflect the above changes and include various editorial corrections. These changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Cedar Rapids Public Library, 500 First Street, S.E., Cedar Rapids, Iowa 52401

Attorney for licensee: Jack Newman, Esquire, Kathleen H. Shea, Esquire, Newman and Holtzinger, 1615 L Street, NW., Washington, DC 20036

NRC Project Director: John N. Hannon

Iowa Electric Light and Power Company, Docket No. 50-331, Duane Arnold Energy Center, Linn County, Iowa

Date of amendment request: December 31, 1992

Description of amendment request: The proposed amendment would change the Technical Specifications 3.0 and 4.0 and corresponding Bases and modify existing specifications consistent with new requirements denoting the applicability of Limiting Conditions for Operation and Surveillance Requirements, consistent with the requirements denoted in the Standard Technical Specifications and Generic Letters 87-09 and 89-14.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1) The proposed change will not increase the probability or consequences of an accident previously evaluated. The change provides specific applicability requirements to both the Limiting Conditions for Operation and the Surveillance Requirements. The proposed change incorporates only those applicability requirements and exceptions denoted in the Standard Technical Specifications as modified by Generic Letters 87-09 and 89-14, the Improved Technical Specifications (NUREG-1433), or DAEC plant specific terminology which is considered administrative in nature. Invoking the proposed applicability requirements, and thus the administrative requirements imposed on the systems, subsystems, trains, components, or devices, better ensures that these systems, subsystems, trains, components, or devices, will be available to mitigate the consequences of an accident or transient event. Further, the proposed change does not affect any accident or safety analysis event initiator as analyzed in the Final Safety Analysis Report, nor involve any modification to equipment.

2) The proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed change does not affect any equipment design or configuration and, therefore, no new or different types of failures are created. The proposed change will not create any new modes of operation, but ensures that appropriate administrative requirements are invoked (i.e. operability status of a system) prior to mode changes.

3) The proposed change will not involve a significant reduction in the margin of safety. The proposed change does not reduce the margin of safety because it has no impact on any safety analysis assumption. The proposed change is in fact more restrictive due to the additional administrative requirements imposed on the Limiting Conditions for Operation and Surveillance Requirements in each individual specification. The proposed change ensures that each system, subsystem, train, component, or device denoted in the Technical Specifications is maintained with applicability requirements that are consistent with the Standard Technical Specifications and other regulatory guidance documents.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Cedar Rapids Public Library, 500 First Street, S.E., Cedar Rapids, Iowa 52401

Attorney for licensee: Jack Newman, Esquire, Kathleen H. Shea, Esquire, Newman and Holtzinger, 1615 L Street, NW., Washington, DC 20036

NRC Project Director: John N. Hannon

Niagara Mohawk Power Corporation, Docket No. 50-410, Nine Mile Point Nuclear Station, Unit 2, Oswego County, New York

Date of amendment request: February 12, 1993

Description of amendment request: The proposed Technical Specification (TS) changes would revise TS Table 1.2, "Operational Conditions," and TS 3/4.9.1, "Reactor Mode Switch," to permit movement of a single control rod with the reactor in the hot shutdown or cold shutdown conditions for purposes such as venting of a control rod drive or scram time testing of a control rod. The current TS permit movement of a control rod in these operational conditions to recouple a rod to its drive.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not involve a significant increase in the probability or consequences of an accident previously evaluated.

This revision would allow a single control rod to be withdrawn under control of the reactor mode switch refuel position one-rod-out interlock in OPERATIONAL CONDITIONS 3 and 4. This interlock is explicitly assumed in the safety analysis for control rod removal error during refueling. A prompt reactivity excursion could potentially result in fuel failure. The one-rod-out interlock, together with the requirements for adequate SHUTDOWN MARGIN during refueling, provides protection against prompt reactivity excursions by preventing withdrawal of more than one control rod and ensuring the core remains subcritical with any one control rod withdrawn. The addition of surveillance requirements for the one-rod-out interlock will assure the interlock is operable prior to withdrawal of a control rod in OPERATIONAL CONDITIONS 3 and 4. Although this change would allow an increase in the frequency of single control rod withdrawals in OPERATIONAL CONDITIONS 3 and 4, the probability of previously analyzed accidents, including control rod withdrawal error, is not affected.

The consequences of previously analyzed accidents in OPERATIONAL CONDITIONS 3 and 4 are not affected by this proposed change. The SHUTDOWN MARGIN requirements of Specification 3.1.1 require the reactor to be subcritical when all control rods are fully inserted except for the single control rod having the highest reactivity worth being fully withdrawn. The one-rod-out interlock of the reactor mode switch refuel position permits only a single control rod to be withdrawn. The proposed change will not result in the reactor having the potential for attaining criticality in OPERATIONAL CONDITIONS 3 and 4 or affect the initial conditions assumed in any design basis accident analysis.

Based on the above, the probability and consequences of previously analyzed accidents are not increased.

2. The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not create the possibility of a new or different kind of accident from any accident previously evaluated.

Single control rods can be withdrawn in OPERATIONAL CONDITIONS 3 and 4 under the existing Technical Specifications to permit control rod recoupling. The proposed change would merely expand this provision to other control rod maintenance and testing activities performed in OPERATIONAL CONDITIONS 3 and 4. The withdrawal of individual control rods in OPERATIONAL CONDITIONS 3 and 4 is a mode of operation permitted under limited circumstances by the existing Technical Specifications. The revision to Specification 3/4.9.1 provides additional assurance that the one-rod-out interlock is OPERABLE in OPERATIONAL CONDITIONS 3 and 4.

The additional control rod maintenance and testing activities which could be performed in OPERATIONAL CONDITIONS 3 and 4 are permitted by the existing Technical Specifications in OPERATIONAL CONDITIONS 1, 2 and 5. Examples of activities which could be performed include venting of control rods following a reactor scram or control rod drive system outage, normal control rod insertion/withdrawal timing and adjustment, control rod scram time testing and control rod friction testing.

Since single control rod withdrawal for the purpose of recoupling is currently allowed in OPERATIONAL CONDITIONS 3 and 4, and Specification 3/4.9.1 is revised to ensure the one-rod-out interlock is OPERABLE, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not involve a significant reduction in a margin of safety.

The Technical Specifications currently permit single control rod withdrawal for the purpose of control rod recoupling when in OPERATIONAL CONDITIONS 3 or 4 if the one-rod-out interlock is OPERABLE. This change merely allows additional activities for which a single control rod may be withdrawn when in OPERATIONAL CONDITION 3 or 4, with the same restriction that the one-rod-out interlock be OPERABLE.

While the Technical Specifications currently allow limited control rod withdrawal in OPERATIONAL CONDITIONS 3 and 4 provided the one-rod-out interlock is OPERABLE, they have no surveillance requirements for the one-rod-out interlock while in OPERATIONAL CONDITION 3 or 4. The revision to the APPLICABILITY statement in Specification 3/4.9.1 invokes the Surveillance Requirements for the one-rod-out interlock whenever control rod withdrawal is performed in OPERATIONAL CONDITIONS 3 and 4. Together, the operability requirements for the one-rod-out interlock and the SHUTDOWN MARGIN requirements of Specification 3.1.1 ensure the reactor will be maintained subcritical during single control rod withdrawals.

Therefore, this change will not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Attorney for licensee: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005-3502.

NRC Project Director: Robert A. Capra

Niagara Mohawk Power Corporation, Docket No. 50-410, Nine Mile Point Nuclear Station, Unit 2, Oswego County, New York

Date of amendment request: February 27, 1993

Description of amendment request: The proposed Technical Specification (TS) changes would revise TS Section 1.0, "Definitions;" Section 3/4.3.6, "Control Rod Block Instrumentation;" Bases Section B2.1, "Bases for Safety Limits;" and Bases Section B3/4.2, "Power Distribution Limits." The proposed change to TS Section 1.0 would replace the reference to General Electric Company's critical power correlation, "GEXL," with a more generic term to allow the utilization of other NRC-approved critical power correlations. The proposed change to TS Section 3/4.3.6 would increase the setpoint for the Recirculation Flow Upscale Rod Block by three percent to facilitate reactor operations at up to 105 percent of rated core flow. The proposed changes to Bases Sections B2.1 and B3/4.2 would reflect the proposed change to TS Section 1.0, incorporate revisions to General Electric's approved analytical techniques, update references, and reflect changes made to the Reload Section of the Nine Mile Point Nuclear Station, Unit 2 Updated Safety Analysis Report.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not involve a significant increase in the probability or consequences of an accident previously evaluated.

Recirculation Flow Rod Block

The proposed change would alleviate spurious rod block actuations and nuisance alarms currently associated with operation above 100% of rated core flow by revising the high recirculation flow block instrument setpoints from 108% to 111% of rated flow and 111% to 114% of rated flow for the trip setpoint and allowable value, respectively. The operational design basis for high flow rod block is to provide an operator warning signal in response to unexpected high core flow operation. This flow unit upscale trip performs no safety function and the design basis transient and accident analyses do not take any credit for it. The probability of any accident is not significantly increased by operating at 105% core flow because the APRM [Average Power Range Monitor] flow biased scram and the Rod Block Monitor are "clamped" at their 100% core flow values and the 100% core flow values are not changing. The effect of ICF [increased core flow] operation on MCPR [Minimum Critical Power Ratio] operating limits has been previously evaluated and found not significant and MCPR operating limits for the current cycle are bounding for operation in the ICF region. PCT [peak clad temperature] has been evaluated and substantial margin still exists below the limit of 2200°F. Loads on reactor internals, containment, and piping systems have been evaluated and stresses remain within design limits. Therefore, there is no increase in the consequences of any accident.

Critical Power Correlation

Revising the definition of critical power ratio is a modification to analytical techniques and has no effect on the probability of any transient or accident. The transient analyses will continue to be performed using NRC approved critical power correlations and the methodologies approved for the Core Operating Limits Report. The resultant operating limit MCPRs will still assure that the Safety Limit MCPR is not violated during abnormal operating transients. The Safety Limit MCPR provides assurance that one of the principal barriers to the release of radioactive materials, the fuel cladding, is not degraded. Therefore, revising the definition of critical power ratio will not increase the consequences of any transient or accident.

The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not create the possibility of a new or different kind of accident from any accident previously evaluated.

Recirculation Flow Rod Block

Operating with ICF has been evaluated in the USAR [Updated Safety Analysis Report] and does not provide any new accident modes. The control rod block instrument setpoints for the reactor coolant system recirculation flow upscale condition change from 108% to 111% of rated flow and 111% to 114% of rated flow for the trip setpoint and allowable value, respectively. The operational design basis for high flow rod block is to provide an operator warning signal in response to unexpected high core flow operation. The flow unit upscale trip performs no safety function and the design basis transient and accident analyses take no credit for it.

Critical Power Correlation

The change to the definition of Critical Power Ratio does not alter the intent or interpretation of the Technical Specifications. The existing operability requirements for MCPR will remain intact. Thus, the proposed change will not alter the plant configuration or any mode of operation.

The response to previously evaluated accidents remains within previously assessed limits of temperature and pressure, assuring the environmental qualification of plant equipment is not adversely affected by this proposed amendment. Further, all safety-related systems and components remain within their applicable design limits. Thus, system and component performance is not adversely affected by this change, thereby assuring that the design capabilities of those systems and components are not challenged in a manner not previously assessed so as to create the possibility of a new or different kind of accident. Therefore, operation of Nine Mile Point Unit 2, in accordance with the proposed change, will not create the possibility of a new or different kind of accident from any previously assessed.

The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not involve a significant reduction in a margin of safety.

Recirculation Flow Rod Block

The results of the reload analysis, as documented in Appendix A of the USAR, assure that the current Technical Specifications, including the limits specified in the Core Operating Limits Report, are adequate to preclude the violation of any Safety Limits during ICF operation. To maintain adequate operating margin, the control rod block instrument setpoints for the reactor coolant system recirculation flow upscale condition are being changed from 108% to 111% of rated flow and 111% to 114% of rated flow for the trip setpoint and allowable value, respectively. These setpoints are being increased to maintain an adequate trip setpoint margin allowing for uncertainties and noise, so as not to impact plant high flow operations.

Whereas the analyzed core flow range was previously increased by 5% (from 100% to 105%), the high flow trip setpoint is being increased only 3% (from 108% to 111%); therefore, the function of the trip as an indication/alarm of unintended high flow operation is actually enhanced. Further, the RBM [Rod Block Monitor] upscale setpoint is "clamped" at its 100% core flow value of 110%.

Critical Power Correlation

The proposed change revises the definition of Critical Power Ratio to provide a more generic designation for the critical power correlation. The proposed change provides clarification and will not alter the

Limiting Condition for Operation or Surveillance Requirements associated with MCPR. The safety and operating limits for MCPR will still be determined in accordance with an approved NRC methodology in accordance with the Core Operating Limits Report.

The proposed changes will not cause existing Technical Specification operational limits or system performance criteria to be exceeded. The proposed changes assure that the system response to postulated accidents remains within accepted limits. Thus, the margins of safety established by the Technical Specifications are not altered by this amendment. Therefore, operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not result in a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Attorney for licensee: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005-3502.

NRC Project Director: Robert A. Capra

Philadelphia Electric Company, Docket Nos. 50-352 and 50-353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of amendment request: March 8, 1993

Description of amendment request: The licensee proposes to modify the Operating License Nos. NPF-39 and NPF-85 for the Limerick Generating Station (LGS), Units 1 and 2. The amendment would revise paragraph 2.B.(5) to the operating licenses to allow the licensee to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station (SNPS) at the LGS site. SNPS never commenced commercial operation and is currently being decommissioned.

The fuel was fabricated by General Electric Company (GE) and consists of 560 GE6-(P8x8R) pressurized, C-lattice, non-barrier fuel bundles. These fuel bundles are similar to those utilized in the LGS Unit 1 initial core loading. The 560 fuel bundles include 340 enriched to 2.19 w/o U-235, 144 enriched to 1.76 w/o U-235, and the remaining 76 are natural uranium (i.e., 0.711 w/o U-235).

The fuel was used at SNPS only in a limited testing program at 5% power. The estimate of the entire core fission product inventory is less than 0.02% of the source term, and its decay heat rate is 265 watts (i.e., 900 Btu/hr). The fuel transport is planned by rail utilizing the GE IF-300 Series spent fuel cask. The GE IF-300 Series spent fuel cask design has received an NRC Certificate of

Compliance (No. 9001), but it will be amended to address the specific pay load to be utilized for the transport of the SNPS fuel to the LGS site.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

As explained below, the receipt and storage of the SNPS fuel and fuel channels at LGS, Unit 1 and Unit 2, will not increase the probability of occurrence of any accident previously evaluated in the LGS UFSAR.

The SNPS fuel is similar to fuel previously received, stored, and used at LGS, and the SNPS fuel is the same mechanical design as originally evaluated for Unit 1 in the FSAR. Handling of the SNPS fuel will not differ significantly from the fuel handling procedures described in LGS UFSAR Section 9.1.4, "Fuel Handling System." The impact on the LGS spent fuel pool criticality is bounded by the fuel pool criticality analysis in LGS UFSAR Section 9.1.2.3.1. Furthermore, the impact of the SNPS fuel decay heat on the LGS spent fuel pool cooling capacity is negligible. The radiological consequences of a dropped fuel assembly involving the slightly irradiated Shoreham fuel are bounded by the fuel handling accident involving highly irradiated spent fuel described in LGS UFSAR Section 15.7.4 "Fuel Handling Accident." The physical consequences of a dropped fuel assembly (i.e., on fuel assemblies and structures) are within the scope of LGS UFSAR Section 9.1.2.3.2.3, "Dropped Fuel Bundle Analyses." Restricting the RE main hoist critical load to 110 tons and the use of single failure proof equipment precludes a cask drop due to single failure. Therefore, as stated in LGS UFSAR Section 15.7.5, an analysis of the spent fuel cask drop is not required.

At the time the SNPS fuel is considered for use in either of the LGS reactor cores, a cycle-specific core nuclear analysis will be performed, and will include the effect on the thermal-hydraulic stability in accordance with NRC Generic Letter 88-07, Supplement 1. The SNPS fuel will be used only if the results of the cycle specific analysis are acceptable.

Therefore, the proposed change does not involve an increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

No physical alterations of plant configuration, changes to set points, or changes to operating parameters are involved in implementing the proposed change. The receipt, handling, and storage of the irradiated SNPS fuel is essentially the same as the movement of irradiated fuel using a spent fuel cask that is discussed in UFSAR Section 9.1.4.2.1, "Spent Fuel Cask." The impact of the SNPS fuel and its packaging material on the LGS spent fuel pool criticality is bounded by the fuel pool criticality analysis in LGS UFSAR Section 9.1.2.3.1. Furthermore, the impact of the SNPS fuel decay heat on the LGS spent fuel pool cooling capacity is negligible.

The proposed change does not affect the function or operation of any system or equipment; therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The margin of safety established in the UFSAR and maintained by compliance with the Technical Specifications [TS] will be maintained. The effect of the SNPS fuel on LGS spent fuel pool cooling capability, storage capacity, and criticality is bounded by existing analyses in the UFSAR as discussed above. Because the fuel is only slightly irradiated and of a similar design to that used at LGS, the movement of the SNPS fuel does not involve any changes in fuel handling practices, types of fuel handling accidents that need to be considered, or occupational radiation exposure from spent fuel pool operations or fuel transfer. The proposed change does not increase the risk or degree of radiological dose to the general public from that previously evaluated.

The operating limits established in the Core Operating Limits Report (COLR) will be submitted to the NRC as required by TS Section 6.9.1.9 prior to using the SNPS fuel in the LGS reactor cores.

Therefore, the proposed change will not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Pottstown Public Library, 500 High Street, Pottstown, Pennsylvania 19464.

Attorney for licensee: J. W. Durham, Sr., Esquire, Sr. V.P. and General Counsel, Philadelphia Electric Company, 2301 Market Street, Philadelphia, Pennsylvania 19101

NRC Project Director: Charles L. Miller

Philadelphia Electric Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Dockets Nos. 50-277 and 50-278, Peach Bottom Atomic Power Station, Units Nos. 2 and 3, York County, Pennsylvania

Date of application for amendments: February 26, 1993

Description of amendment request: The licensee has requested a change in the surveillance testing interval for the Logic System Functional Tests (LSFTs) for the 1) Primary Containment Isolation System (PCIS), 2) Core Standby Cooling System (CSCS), 3) Control Rod Block Actuation System and 4) Radiation Monitoring System actuations. The licensee proposes to perform the LSFTs every 24 months (30 months with allowable grace) rather than every 6 months as is currently required. LSFTs are performed to verify operability of all switches, relays, contacts and wiring which make up a particular system's logic. The revised surveillance test interval is proposed to conform to the licensee's operating cycle length.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The change proposed in this application does not constitute a significant hazards consideration in that:

i) The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed TS changes involve a change in the surveillance testing intervals. The proposed changes [d]o not physically impact the plant nor do they impact any design or functional requirements of the associated systems. That is, the proposed TS changes do not degrade the performance or increase the challenges of any safety systems assumed to function in the accident analysis. The proposed TS changes do not impact the TS surveillance requirements themselves nor the way in which the surveillance requirements are performed. In addition, the proposed TS changes do not introduce any new accident initiators since no accidents previously evaluated have as their initiators anything related to the change in the frequency of surveillance testing. Also, the proposed TS changes do not affect the availability of equipment or systems required to mitigate the consequences of an accident because of other, more frequent testing or the availability of redundant systems or equipment. Furthermore, an historical review of surveillance test results indicated that there was no evidence of any failures that would invalidate the above conclusions. Therefore, the proposed TS changes do not increase the probability or consequences of an accident previously evaluated.

ii) The proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed TS changes involve a change in the surveillance testing intervals. The proposed TS changes do not introduce new accident initiators or any failure mechanisms of a different type than those previously evaluated since there are no physical changes being made to the facility. In addition, the surveillance test requirements themselves and the way surveillance tests are performed will remain unchanged. Furthermore, an

historical review of surveillance test results indicated there was no evidence of any failures that would invalidate these conclusions. Therefore, the proposed TS changes do not create the possibility of a new or different kind of accident from any previously evaluated.

iii) The proposed changes do not involve a significant reduction in a margin of safety.

Although the proposed TS changes will result in an increase in the interval between surveillance tests, the impact on system availability is insignificant based on other, more frequent testing, redundant systems and equipment, and independent studies which support PECo's evaluation. Furthermore, there is no evidence of any failures that would impact the availability of the systems. Therefore, the margin of safety assumptions in the licensing bases are not impacted and the proposed TS changes do not reduce a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Government Publications Section, State Library of Pennsylvania, (REGIONAL DEPOSITORY) Education Building, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, Pennsylvania 17105.

Attorney for licensee: J. W. Durham, Sr., Esquire, Sr. V.P. and General Counsel, Philadelphia Electric Company, 2301 Market Street, Philadelphia, Pennsylvania 19101

NRC Project Director: Charles L. Miller

Philadelphia Electric Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Dockets Nos. 50-277 and 50-278, Peach Bottom Atomic Power Station, Units Nos. 2 and 3, York County, Pennsylvania

Date of application for amendments: March 5, 1993

Description of amendment request: The licensee proposes to modify Appendix A of the Peach Bottom Atomic Power Station (PBAPS), Unit Nos. 2 and 3 licenses. The proposed changes would revise Technical Specification Table 3.15 and its associated basis for seismic monitoring instrumentation. The modifications are requested to support an upgrade of the seismic monitoring instrumentation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Licensee proposes that this application does not involve significant hazards consideration for the following reasons:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change revises the Measurement Range of the Triaxial Time-History Accelerographs and the Triaxial Response-Spectrum Recorders. The current Technical Specification values for the Measurement Range represent the total range that the instrument is capable of providing, not the specified design measurement range for PBAPS.

The proposed changes do not affect the initial conditions or precursors assumed in any Updated Final Safety Analysis Report Section 14 accident analysis. Further, these proposed changes do not decrease the effectiveness of equipment relied upon to mitigate the previously evaluated accidents.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2) The proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed changes enhance[s] the seismic systems ability to accurately monitor and alarm seismic activity. It does not change any operating procedures. Therefore implementation of the proposed changes will not affect the design function or configuration of any component or introduce any new operating scenarios or failure modes or accident initiation.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3) The proposed changes do not involve a significant reduction in a margin of safety.

Revising the Technical Specifications to accurately reflect the measurement range of the new seismic monitoring instrumentation does not affect any safety related equipment or activity.

Therefore, the proposed changes do not reduce any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Government Publications Section, State Library of Pennsylvania, (REGIONAL DEPOSITORY) Education Building, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, Pennsylvania 17105.

Attorney for licensee: J. W. Durham, Sr., Esquire, Sr. V.P. and General Counsel, Philadelphia Electric Company, 2301 Market Street, Philadelphia, Pennsylvania 19101

NRC Project Director: Charles L. Miller

Portland General Electric Company, et al., Docket No. 50-344, Trojan Nuclear Plant, Columbia County, Oregon

Date of amendment request: January 27, 1993

Description of amendment request: The proposed amendment, by Portland General Electric Company, PGE or the licensee, would modify the facility staffing and training requirements to reflect the permanently defueled non-operating status of the Trojan Nuclear Plant. Since the licensee no longer plans to operate the facility and has requested a possession only license for Trojan Nuclear Plant operators would only be required to monitor and maintain the spent fuel storage facility. As such, the operators do not require training and qualification in areas that would be of value only during reactor power operations. The licensee proposes to amend section 6.0, Administrative Controls, of the Trojan Technical Specifications, to redefine the facility staffing and training requirements consistent with the facility in a non-operating permanently defueled condition.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.92(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

In accordance with the requirements of 10 CFR 50.92, Issuance of Amendment, this license amendment request is judged to involve no significant hazards consideration based upon the following:

1. The requested license amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change is to eliminate the requirements for licensed operators and a licensed operator training program and to replace those with certified fuel handlers and a certified fuel handler training program. Since the Plant is defueled, the range of accidents for which an operator needs to be trained is significantly diminished such that a training program of the depth and breath of that required by 10 CFR 55 is no longer needed. In lieu of a 10 CFR 55 licensed operator training program, a NRC-approved certified fuel handler training program will be utilized. Since this training program will adequately equip the operations personnel for fuel handling operations, including responses to abnormal events/accidents, there will be no increase in the probability of these events occurring or in the consequences of these events. The proposed changes do not affect Plant equipment or the procedures for equipment operation or response to abnormal events/accidents.

2. The requested license amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change is to eliminate the requirements for licensed operators and a licensed operator training program and to replace those with certified fuel handlers and a certified fuel handler training program. This change ensures the qualifications of the operations personnel are commensurate with the tasks to be performed and the conditions to be responded to. This change does not affect Plant equipment or the procedures for operating Plant equipment and, therefore, does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The requested license amendment does not involve a significant reduction in a margin of safety.

The proposed change is to eliminate the requirements for licensed operators and a licensed operator training program and to replace those with certified fuel handlers and a certified fuel handler training program. This change ensures the qualifications of the operations personnel are commensurate with the tasks to be performed and the conditions to be responded to. The assumptions for a fuel handling accident in the Fuel Building are not affected by the proposed changes. Therefore, the proposed amendment does not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis, and based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Branford Price Millar Library, Portland State University, 934 S.W. Harrison Street, P.O. Box 1151, Portland, Oregon 97207.

Attorney for licensee: Leonard A. Girard, Esq., Portland General Electric Company, 121 S.W. Salmon Street, Portland, Oregon 97204.

NRC Project Director: Seymour H. Weiss

Power Authority of the State of New York, Docket No. 50-333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of amendment request: February 22, 1993

Description of amendment request: The proposed amendment to the James A. FitzPatrick Technical Specifications (TS) would revise TS 1.0. T, 4.0.B, and associated Bases to reflect the recommendations provided in Generic Letter (GL) 89-14, "Line-Item Improvements In Technical Specifications - Removal Of The 3.25 Limit On Extending Surveillance Intervals," dated August 21, 1989. TS 4.0.B currently permits surveillance intervals to be extended up to 25 percent of the surveillance interval. This extension facilitates the scheduling of surveillance activities and allows surveillances to be postponed when plant conditions are not suitable for conducting a surveillance, for example, during transient conditions or other ongoing surveillance or maintenance activities. TS 4.0.B also limits extending surveillances so that the combined time interval for any three consecutive surveillance intervals shall not exceed 3.5 times the specified surveillance interval. The proposed changes would remove the 3.5 surveillance interval limit in TS 4.0.B in accordance with GL 89-14. The associated definition of "Surveillance Frequency" in TS 1.0. T is also removed. The associated Bases are revised to reflect the stated changes.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Operation of the FitzPatrick plant in accordance with the proposed Amendment would not involve a significant hazards consideration as defined in 10 CFR 50.92, since it would not:

1. involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes will not require modification to any plant structures, systems or components. Surveillance test effectiveness and operability as determined by testing will remain the same. The proposed changes will not alter testing. The small change in reliability will not be of a nature to initiate an accident and will not effect the consequences of an accident since mitigating systems are still available.

2. create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes will not require modification to any plant structures, systems or components. The changes remove the limitation for extending surveillance intervals, remove the associated definition and revise Bases accordingly. The nature of the changes preclude the possibility of a new or different kind of accident.

3. involve a significant reduction in a margin of safety.

The proposed changes to remove the limit on surveillance interval extensions and associated definition will not cause a significant reduction in the margin of safety. Removal of the limit results in a small increase to allowable surveillance intervals. This would not result in a significant degradation in the reliability of systems and components under surveillance. Adherence to the limit could require forced shutdown to perform surveillance or the performance of surveillance when conditions are not suitable. It could also require routine surveillances when conditions are not suitable. The safety benefits of removing the limit are more significant than the small increase in the surveillance interval for consecutive extensions.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Attorney for licensee: Mr. Charles M. Pratt, 1633 Broadway, New York, New York 10019.

NRC Project Director: Robert A. Capra

Power Authority of the State of New York, Docket No. 50-333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of amendment request: February 22, 1993

Description of amendment request: The proposed amendment to the James A. FitzPatrick Technical Specifications (TS) would revise the surveillance interval for the electrical protective assemblies (EPAs) in the Reactor Protection System (RPS). Electrical protective assemblies are used in the power supplies for the RPS. The EPAs ensure that RPS components are protected from abnormal voltages or frequencies from the RPS motor generator (MG) set or the alternate power supplies. The EPAs protect the RPS components by tripping a breaker between the MGs and the RPS when abnormal voltages or frequencies are encountered.

The testing of each EPA channel involves a dead-bus transfer and the momentary interruption of power results in a half scram and half isolation. NRC Generic Letter (GL) 91-09, "Modification of Surveillance Interval for the Electrical Protective Assemblies in Power Supplies for the Reactor Protection System," dated June 27, 1991, recommended elimination of testing of EPAs during power operation. This change would reduce the possibility of inadvertent reactor trips caused by testing of the EPAs during power operation. In accordance with GL 91-09, the licensee has proposed to change TS 4.9.G.1 from requiring a channel functional test at least once every 6 months to requiring a channel functional test each time the plant is in cold shutdown for a period of more than 24 hours, unless performed in the previous 6 months. The associated

Bases are also being revised to reflect the surveillance schedule change.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Operation of the FitzPatrick plant in accordance with the proposed Amendment would not involve a significant hazards consideration as defined in 10 CFR 50.92, since it would not:

1. involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes revise the testing frequency for the electrical protective assemblies (EPAs) for the Reactor Protection System (RPS). These changes are in accordance with Generic Letter 91-09. There are no changes to plant design or operation. Increasing the test interval up to 18 months produces a small increase in probability that an inoperable EPA would not be detected. Increased testing during cold shutdown produces a small increase in probability that shutdown cooling can be isolated. These risks are offset by eliminating the possibility of trips due to testing during power that would challenge safety systems.

2. create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change will not change design, operation or the testing process. The change to testing intervals will not effect any condition that could result in a new or different type of accident.

3. involve a significant reduction in a margin of safety.

The testing of each EPA channel involves a dead-bus transfer and the momentary interruption of power results in a half scram and half isolation. Generic Letter 91-09 notes that many plants have encountered problems with the reset of the half trip resulting in inadvertent scrams and group isolation that challenge safety systems during power operation. Eliminating EPA testing at power operation increases the margin of safety by eliminating the potential for trips due to testing that challenge safety systems. An insignificant reduction in the margin of safety is introduced by increasing the test interval up to 18 months producing a small increase in risk that an inoperable EPA would not be detected. The elimination of potential challenges to safety systems provides a safety benefit that offsets the increased risks of component failure and shutdown cooling isolation.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Attorney for licensee: Mr. Charles M. Pratt, 1633 Broadway, New York, New York 10019.

NRC Project Director: Robert A. Capra

Power Authority of The State of New York, Docket No. 50-286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of amendment request: January 25, 1993

Description of amendment request: The licensee commenced operating on a 24-month fuel cycle, instead of the previous 18-month fuel cycle, with fuel cycle 9. Fuel cycle 9 started in August 1992. In order to accommodate operation on a 24-month cycle, the licensee requested a Technical Specifications (Appendix A) and an Environmental Technical Specifications (Appendix B) amendment to incorporate the changes listed below:

(1) The licensee proposed changing the frequency of process and area radiation monitor calibration (specified in Appendix A Table 4.1-1 and Appendix B Tables 3.1-1 and 3.2-1) to accommodate operation on a 24-month cycle.

(2) The licensee proposed changing the frequency of radioactivity recorder calibration (specified in Appendix B Table 3.1-1) to accommodate operation on a 24-month cycle.

In addition, the licensee requested the following administrative changes:

(1) The licensee proposed changing Appendix A Table 4.1-1 to specify and identify each radiation monitor by its appropriate tag number and to reformat the table for consistency.

(2) The licensee proposed changing Appendix B Tables 3.1-1 and 3.2-1 to specify and identify each radiation monitor by its appropriate tag number.

(3) The licensee proposed changing Appendix B Tables 2.1-1 and 3.1-1 to clarify monitoring requirements for the condensate polisher waste release path.

(4) The licensee proposed changing Appendix B Table 3.1-1 to clearly indicate that the surveillance requirement for monitor R-23 will remain as once per 18 months.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Consistent with the criteria of 10 CFR 50.92, the enclosed application is judged to involve no significant hazards based on the following information:

(1) Does the proposed license amendment involve a significant increase in the probability or consequences of any accident previously evaluated?

Response:

The administrative changes to Table 4.1-1 of Appendix A [Technical Specifications] and to Tables 2.1-1, 3.1-1 and 3.2-1 of Appendix B [Radiological Environmental Technical Specifications (RETs)] to the Operating License allow for improved readability and clarification of the Technical Specifications and RETS. These changes do not affect any probabilities or consequences of any accident previously evaluated because they do not change any current Technical Specification or RETS requirements.

The other changes propose extending the calibration intervals for certain radiation monitors and radioactive recorders to be consistent with the length of the operating cycle (24 months). These changes can not affect the probabilities of any previously analyzed accidents because this instrumentation is not a cause of any previously analyzed accidents. This instrumentation provides indication of a plant malfunction which might lead to a health hazard or plant damage, and provides indication associated with radioactive releases to the environment.

There is adequate assurance that an appropriate assessment of the operability of the radiation monitors and radioactive recorders will be provided through various functional tests and programs. Since extending the calibration test intervals for this instrumentation does not involve changes in equipment/system functions and does not adversely affect operability, the changes do not involve a significant increase in the consequences of any accident previously evaluated.

(2) Does the proposed license amendment create the possibility of a new or different kind of accident from any previously evaluated?

Response:

The administrative changes to Table 4.1-1 of Appendix A and to Tables 2.1-1, 3.1-1 and 3.2-1 of Appendix B to the Operating License allow for improved readability and clarification of the Technical Specifications and RETS. These changes do not create the possibility of a new or different kind of accident from any previously evaluated because they do not change any current Technical Specification or RETS requirements.

The other changes propose extending the calibration intervals for certain radiation monitors and radioactive recorders to be consistent with the length of the operating cycle (24 months). Since these proposed changes do not involve changes in equipment/system functions and do not adversely affect operability, the proposed changes do not create the possibility of a new or different kind of accident from any previously analyzed.

(3) Does the proposed amendment involve a significant reduction in a margin of safety?

Response:

The administrative changes to Table 4.1-1 of Appendix A and to Tables 2.1-1, 3.1-1 and 3.2-1 of Appendix B to the Operating License allow for improved readability and clarification of the Technical Specifications

and RETS. These changes do not involve a significant reduction in a margin of safety because they do not change any current Technical Specification or RETS requirements.

The other changes propose extending the calibration intervals for certain radiation monitors and radioactive recorders to be consistent with the length of the operating cycle (24 months). These changes will not involve a significant reduction in a margin of safety.

There is adequate assurance that an appropriate assessment of the operability of the radiation monitors and radioactive recorders will be provided through various functional tests and programs. Additionally, the proposed changes to extend the calibration intervals for this instrumentation do not involve changes to established setpoints. Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. In addition, the proposed changes follow the guidance provided in Generic Letter 91-04, "Changes in Technical Specification Surveillance Intervals to Accommodate a 24-Month Fuel Cycle," as applicable. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: White Plains Public Library, 100 Martine Avenue, White Plains, New York 10601.

Attorney for licensee: Mr. Charles M. Pratt, 10 Columbus Circle, New York, New York 10019.

NRC Project Director: Robert A. Capra

Public Service Electric & Gas Company, Docket No. 50-354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: February 2, 1993

Description of amendment request: This license change request would provide a longer period of time to reduce the setpoints of the Average Power Range Monitors and the Rod Block Monitor when the plant enters single loop operations. Additionally, the changes would incorporate updated core values relative to single loop operations.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

PSE&G has, pursuant to 10 CFR 50.92, reviewed the proposed amendment to determine whether our request involves a significant hazards consideration. We have determined that operation of the Hope Creek Generating Station in accordance with the proposed changes:

1. Will not involve a significant increase in the probability or consequences of an accident previously evaluated.

A. Single Loop Operations

Appendix 15C of the Hope Creek UFSAR contains the single loop analysis that was completed for PSE&G by General Electric. Section 15.C.3.2 evaluates a rod withdrawal error event while in single loop operations and states:

"The rod withdrawal error at rated power is given in the FSAR. These analyses are performed to demonstrate, even if the operator ignores all instrument indications and the alarm which could occur during the course of the transient, the rod block system will stop rod withdrawal at a minimum critical power ratio (MCPR) which is higher than the fuel cladding integrity safety limit. Modification of the rod block equation [...] and lower power assures the MCPR safety limit is not violated."

Relative to the APRMs, Section 15.C.3.2 concludes:

"The APRM trip settings are flow biased in the same manner as the rod block monitor trip settings. Therefore, the APRM rod block and scram settings are subject to the same procedural changes as the rod block monitor trip settings discussed above."

The changes proposed in this submittal would require an APRM and/or RBM channel to be placed in the tripped condition if its setpoints have not been reduced within four hours of entering single loop operations. This would ensure that if thermal power reached the setpoint of the channel that has been reduced, the trip function would occur at the setpoint applicable to single loop operation. Based on these conservative actions, it is concluded that the proposed changes will not involve a significant increase in the probability or consequences of an accident previously evaluated.

B. Power Ascension Program Data

The proposed changes incorporate plant values which have been conservatively determined from power ascension tests as discussed in Section III.B of this submital. In two cases, the proposed values are more limiting than those presently contained in the affected specifications and in the third case, the value has not been specified until now. Therefore, the proposed changes will not involve a significant increase in the probability or consequences of an accident previously evaluated.

C. Specification 3.0.2

The proposed changes merely clarify the intent of Specification 3.0.2 and are therefore viewed as administrative in nature.

2. Will not create the possibility of a new or different kind of accident from any accident previously evaluated.

A. Single Loop Operations

The constraints imposed by the proposed changes will ensure that, while in single loop operations, the subject trip functions will still occur at the setpoints applicable to single loop operations under the same time limits as the present specification (i.e., within four hours of entering single loop operations). Additionally, the proposed changes will not involve any physical changes to the plant.

B. Power Ascension Program Data

The proposed changes will not involve any physical changes to the plant and have been conservatively determined as discussed in Section III.B of this submittal.

C. Specification 3.0.2

The proposed changes merely clarify the intent of Specification 3.0.2 and are therefore viewed as administrative in nature.

3. Will not involve a significant reduction in a margin of safety.

A. Single Loop Operations

The proposed changes will provide a more reasonable period of time to reduce the setpoints of the APRMs and RBM by requiring conservative actions to be taken. These actions will ensure that the applicable trip functions will still occur at the setpoints applicable to single loop operations within the same time period as currently specified (i.e., four hours). These changes, therefore, will not involve a reduction in a margin of safety.

B. Power Ascension Program Data

Insofar as each of the proposed core values that would be incorporated by this submittal were conservatively determined as described in Section III.B of this submittal, it can be concluded that there will be no reduction in margin of safety.

C. Specification 3.0.2

The proposed changes merely clarify the intent of Specification 3.0.2 and are therefore viewed as administrative in nature.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Pennsville Public Library, 190 S. Broadway, Pennsville, New Jersey 08070

Attorney for licensee: M. J. Wetterhahn, Esquire, Winston and Strawn, 1400 L Street, NW., Washington, DC 20005-3502

NRC Project Director: Charles L. Miller

Public Service Electric & Gas Company, Docket Nos. 50-272 and 50-311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of amendment request: February 23, 1993

Description of amendment request: This amendment request would change Technical Specification (TS) Table 3.3-11, "Accident Monitoring Instrumentation," ACTION 3, for both units. The current action statement requires at least one (of two per unit) boric acid storage tank (BAST) to have operable level indication. If the level indication on the second tank is lost, the

unit would be placed into TS Action Statement 3.0.3 requiring, within 1 hour, that action be initiated to shut down the unit. The requested change would allow 72 hours to attempt restoration of one of the level detectors before initiation of a shutdown.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The request is only administrative in nature and does to involve a system that was assumed to function in any of the design/licensing basis analysis, and therefore the probability or consequences of an accident previously evaluated are not increased.

2. Does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not introduce any design or physical configuration changes to the facility which could create new accident scenarios.

3. Does not involve a significant reduction in a margin of safety.

As stated in response to question number 1 above, the proposed change does not affect a system that was taken credit for or assumed to function under any of the design/licensing basis analysis. Consequently, there is no reduction in any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Salem Free Public library, 112 West Broadway, Salem, New Jersey 08079

Attorney for licensee: Mark J. Wetterhahn, Esquire, Winston and Strawn, 1400 L Street, N.W., Washington, D.C., 20005-3502

NRC Project Director: Charles L. Miller

Tennessee Valley Authority, Docket Nos. 50-259, 50-260 and 50-296, Browns Ferry Nuclear Nuclear Plant, Units 1, 2, and 3, Limestone County, Alabama

Date of amendment request: December 23, 1992 (TS 328)

Description of amendment request: The proposed amendment modifies the operability requirements for the Low Pressure Coolant Injection (LPCI) system. The proposed change permits LPCI to be considered operable by manual action to restore reactor coolant inventory while this system is aligned for shutdown cooling.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. The proposed amendment does not involve a significant increase in the probability or consequences of any accident previously evaluated.

Part of the proposed change will add a footnote to present TS [Technical Specification] 3.5.B.1. This footnote will allow LPCI to be considered operable during alignment and operation for shutdown cooling [SDC] with reactor steam dome pressure less than 105 psig [pounds per square inch, gauge] in hot shutdown, if capable of being manually realigned and not otherwise inoperable. The proposed change will explicitly state in the TS, LPCI operability provisions which are appropriate for the hot shutdown condition when less than the RHR [Residual Heat Removal] cut-in permissive of 105 psig. The proposed change ensures that credit can be taken for LPCI operability if manual realignment from SDC is possible and only if LPCI is not inoperable due to causes other than the manual valve realignment. The proposed change does not decrease the requirement for operability of two loops of LPCI in the hot shutdown condition, but rather allows operability to be expanded to include manual realignment from SDC. The availability of the LPCI loop may be different than present provisions since automatic initiation is replaced with manual realignment from the SDC mode of RHR; however, since the reactor is in hot shutdown at less than 105 psig, there is sufficient time for operators to realign to the LPCI subsystem if required. In addition to LPCI, present TS requirements for availability of the automatic initiation capability of core spray remain in effect and are not changed by this proposed TS amendment request.

The proposed change to TS 3.5.B.9 will retain the present requirements for one loop of LPCI to be available when the reactor vessel pressure is atmospheric and the reactor contains irradiated fuel. The availability of the LPCI loop may be different than present provisions since automatic initiation is replaced with manual realignment from the SDC mode of RHR; however, since the reactor is in cold shutdown, there is sufficient time for operators to realign to the LPCI subsystem if required. In addition to LPCI, present TS requirements for availability of the automatic initiation capability of core spray remain in effect and are not changed by this proposed TS amendment request. The proposed changes to the TS do not modify equipment which could affect accident precursors or initiators.

LPCI injection is designed to reflood the vessel following a pipe break from 0.2 square feet to a Design Basis Accident (DBA) Loss of Coolant Accident (LOCA) at rated pressure and power. LPCI functions independently, but in conjunction with the Core Spray system to limit fuel cladding temperature and prevent fuel failure. The function of LPCI is maintained by the proposed TS change since operator action to realign from SDC will provide LPCI injection, if required. The delay in providing LPCI injection due to realignment from the SDC mode is not significant since reactor pressure is low, the plant is in a shutdown condition, and the system realignment will be performed expeditiously by operators trained to perform this evolution.

When the reactor is at atmospheric pressure, the need for LPCI is less than when pressurized. The credible means for loss of vessel inventory at atmospheric pressure is inappropriate maintenance action or valve lineup errors and not pipe breaks. There are administrative controls and equipment interlocks to prevent such occurrences. If the Core Spray system starts and injects during a loss of vessel inventory event, with reactor pressure at atmospheric, then LPCI injection will not be required. If there is a total failure of the Core Spray system during this postulated event, realignment of the RHR system will limit the consequences to less than those of the analyzed accidents and transients. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change will maintain the availability of LPCI when the reactor vessel pressure is less than 105 psig and in the hot shutdown or cold shutdown condition. Manual realignment of the RHR system from the SDC mode to LPCI is procedurally controlled and is an evolution that reactor operators are thoroughly trained to perform. This manual realignment will not significantly alter the ability of LPCI to perform its design function for these reactor conditions. [The licensee states that sufficient time is available to manually realign the system to restore reactor coolant inventory in the event of an accident. The proposed change does not modify other LPCI operability requirements.] The proposed change does not "... modify existing equipment design. The requirements for operability of redundant reactor water injection sources such as the Core Spray system are not modified by this proposed TS change. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment does not involve a significant reduction in the margin of safety.

The proposed changes do not affect the automatic initiation capability of LPCI at reactor conditions other than hot shutdown at less than 105 psig in the vessel and in cold shutdown with irradiated fuel in the reactor. The proposed change clarifies present provisions by allowing LPCI to be considered operable when capable of being manually realigned from the SDC mode. The impact of this change will be to increase the time to start providing makeup water to the reactor from LPCI in a loss of inventory event. However, as stated above, the Core Spray system availability has not been changed and

will provide necessary makeup requirements. The response time for providing makeup water will only be increased if the Core Spray system fails and one loop of RHR is in SDC mode and the other loop is not available for service. For the reactor conditions where the proposed TS change can be utilized, there is ample time to manually realign the RHR loop in SDC mode to the LPCI mode. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c), are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Athens Public Library, South Street, Athens, Alabama 35611

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11H, Knoxville, Tennessee 37902

NRC Project Director: Frederick J. Hebdon

Washington Public Power Supply System, Docket No. 50-397, Nuclear Project No. 2, Benton County, Washington

Date of amendment request: March 15, 1993

Description of amendment request: The licensee proposes to change the Design Feature section of the technical specifications (TS) to incorporate a planned replacement of current control rods with General Electric Duralife 215 model control rods. The proposed change would incorporate the design materials of the new control rods, boron carbide and hafnium, into the TS.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

The replacement control rod design performs similarly to, or better than, the original control rods. The Duralife 215 is designed to have increased corrosion resistance and structural integrity compared to the original control rods. This reduces the probability of a stuck rod and of the control rod drop accident. The power shaping capability is comparable between the two designs so the Duralife 215 will have no impact on the consequences of licensing basis transients and accidents affected by power shape. Scram reactivity and insertion times are unchanged with respect to the sensitivity of the licensing basis analysis and, therefore, will not impact the consequences of any accidents impacted by reactor scram. Rod drop velocities and the enthalpy deposited in the fuel as a result of a rod drop accident are also within the bounds of the licensing basis analysis, so the consequences of this accident are not impacted. For these reasons, the replacement of the original control rods with Duralife 215 control rods does not represent a significant increase in the probability or consequences of a previously evaluated accident or transient.

2. Does the amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change does not introduce a new mode of plant operation, and the replacement control rods are, by design, fully interchangeable with the original control rods. The power shaping and reactivity control functions of the Duralife 215 are comparable to the original control rods, and the mechanical strength and corrosion resistance of the Duralife 215 are superior to the original control blades. Taken together, these factors indicate that control rod replacement does not create the possibility of any accident that has not been previously evaluated.

3. Does the amendment involve a significant reduction in a margin of safety?

The Duralife 215 has been shown to be equivalent, and in some respects better, than the original control rods. The Duralife 215 has comparable reactivity worth when compared to the original control rods. The hafnium in the high flux region of the Duralife 215 provides maximum benefit to increasing the nuclear lifetime. GE has conducted scram speed tests and uses an analytical model which can simulate any core and control rod drive arrangement. Comparing scram speeds between the Duralife 215 and the original control rod design show slight changes. The GE analysis has shown that the scram speeds are not sufficiently different to impact the transient and accident analyses for WNP-2 because differences are within the error bounds assumed in the analyses. The structural strength and corrosion resistance of the Duralife 215 are greater than the original control rods, as such the Duralife 215 has increased resistance to distortion and fatigue. Reduced distortion or fatigue experienced by a control rod corresponds to a reduced likelihood that control rod will be involved in a control rod drop accident or become stuck. Hence the replacement of original control rods with the Duralife 215 does not represent a significant reduction in any margin of safety in the licensing basis.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Richland Public Library, 955 Northgate Street, Richland, Washington 99352

Attorney for licensee: Nicholas S. Reynolds, Esq., Winston & Strawn, 1400 L Street, N.W., Washington, D.C. 20005-3502

NRC Project Director: Theodore R. Quay

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration. For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

The Cleveland Electric Illuminating Company, Centerior Service Company, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, Toledo Edison Company, Docket No. 50-440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio

Date of application for amendment: February 26, 1993

Brief description of amendment request: The amendment would allow a one-time exception to the requirements of TS 6.3.1. to permit a specific individual to assume the active duties of Manager, Perry Operations Section, without currently holding a Senior Reactor Operator License.

Date of individual notice in **Federal Register:** March 11, 1993 (58 FR 13511)

Expiration date of individual notice: April 12, 1993

Local Public Document Room location: Perry Public Library, 3753 Main Street, Perry, Ohio 44081.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the

Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the Federal Register as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document rooms for the particular facilities involved.

Carolina Power & Light Company, Docket No. 50-261, H. B. Robinson Steam Electric Plant, Unit No. 2, Darlington County, South Carolina

Date of application for amendment: November 20, 1992.

Brief description of amendment: The amendment changes the Technical Specifications to add a requirement to calibrate auxiliary feedwater flow instrumentation at refueling outages and deletes the requirement for a separate functional test on a refueling outage interval.

Date of issuance: March 12, 1993

Effective date: March 12, 1993

Amendment No. 145

Facility Operating License No. DPR-23. Amendment revises the Technical Specifications.

Date of initial notice in Federal Register: January 6, 1993 (58 FR 592)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 12, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: Hartsville Memorial Library, Home and Fifth Avenues, Hartsville, South Carolina 29535

Commonwealth Edison Company, Docket Nos. STN 50-454 and STN 50-455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois Docket Nos. STN 50-456 and STN 50-457, Braidwood Station, Unit Nos. 1 and 2, Will County, Illinois

Date of application for amendments: September 16, 1992

Brief description of amendments: The amendments delete certain references related to operator licensing, which are no longer applicable, from Section 6 of the Technical Specifications.

Date of issuance: March 3, 1993

Effective date: March 3, 1993

Amendment Nos.: 52, 52, 41 and 41

Facility Operating License Nos. NPF-37, NPF-66, NPF-72 and NPF-77: The amendments revised the Technical Specifications.

Date of initial notice in Federal Register: November 12, 1992 (57 FR 53784). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 3, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: For Byron, the Byron Public Library, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010; for Braidwood, the Wilmington Township Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481.

Commonwealth Edison Company, Docket No. 50-237, Dresden Nuclear Power Station, Unit 2, Grundy County, Illinois

Date of application for amendment: September 14, 1992

Brief description of amendment: The amendment revises the pressure/temperature (P/T) limits in Section 3.6 of the Technical Specifications (TS) to correct a deficiency in the P/T limits currently in the TS identified by the licensee.

Date of issuance: March 3, 1993

Effective date: Immediately, to be implemented within 30 days.

Amendment No.: 123

Facility Operating License No. DPR-19. The amendment revised the Technical Specifications.

Date of initial notice in Federal Register: November 25, 1992 (57 FR 55578)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 3, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: Morris Public Library, 604 Liberty Street, Morris, Illinois 60450.

Commonwealth Edison Company, Docket Nos. 50-295 and 50-304, Zion Nuclear Power Station, Units 1 and 2, Lake County, Illinois

Date of application for amendments: April 1, 1991, as supplemented October 26, 1992

Brief description of amendments: The amendment revises the Technical Specifications by incorporating alternative methods of controlling high radiation areas.

Date of issuance: March 11, 1993

Effective date: Immediately, to be implemented within 60 days.

Amendment Nos.: 143 and 132

Facility Operating License Nos. DPR-39 and DPR-48. The amendments revised the Technical Specifications.

Date of initial notice in Federal Register: May 1, 1991 (56 FR 20030) The October 26, 1992, submittal provided additional clarifying information that did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 11, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

Entergy Operations, Inc., Docket Nos. 50-313 and 50-368, Arkansas Nuclear One, Unit Nos. 1 and 2, Pope County, Arkansas

Date of amendment request: September 28, 1992, as supplemented by letter dated December 2, 1992

Brief description of amendments: The amendments consisted of changes to the Arkansas Nuclear One Industrial Security Plan (ISP) to allow added flexibility in determining the security shift staffing requirements and compensatory measures based on plant activities and the status of the overall security program.

Date of issuance: March 8, 1993

Effective date: March 8, 1993

Amendment Nos.: 162 and 144

Facility Operating License Nos. DPR-51 and NPF-6. Amendments revised the Facility Operating Licenses.

Date of initial notice in Federal Register: February 3, 1993 (58 FR 6996)

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 8, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Tomlinson Library, Arkansas Tech University, Russellville, Arkansas 72801

Entergy Operations, Inc., Docket Nos. 50-313 and 50-368, Arkansas Nuclear One, Unit Nos. 1 and 2, Pope County, Arkansas

Date of amendment request: September 28, 1992, as supplemented by letter dated January 26, 1993

Brief description of amendments: The amendments added limiting conditions for operation and surveillance requirements for each unit's main steam line radiation monitors in accordance with Generic Letter 83-37.

Date of issuance: March 6, 1993

Effective date: 30 days from the date of issuance

Amendment Nos.: 163 and 145

Facility Operating License Nos. DPR-51 and NPF-6. Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 3, 1993 (58 FR 6996) The additional information contained in the supplemental letter dated January 26, 1993, was clarifying in nature and, thus, within the scope of the initial notice and did not affect the staff's proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 6, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Tomlinson Library, Arkansas Tech University, Russellville, Arkansas 72801

Florida Power and Light Company, Docket No. 50-335, St. Lucie Plant, Unit No. 1, St. Lucie County, Florida

Date of application for amendment: October 21, 1992

Brief description of amendment: This amendment revises Technical Specification 4.5.2.d.1 to delete the requirements to verify operability of autoclosure interlock for the shutdown cooling system.

Date of issuance: March 18, 1993

Effective date: March 18, 1993

Amendment No.: 120

Facility Operating License No. DPR-67: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:**

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 18, 1993. No significant hazards consideration comments received: No.

Local Public Document Room location: Indian River Junior College Library, 3209 Virginia Avenue, Fort Pierce, Florida 34954-9003

Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket No. 50-366, Edwin I. Hatch Nuclear Plant, Unit 2, Appling County, Georgia

Date of application for amendment: November 10, 1992

Brief description of amendment: The amendment temporarily revises Hatch Unit 2 Technical Specification 3.6.6.1 regarding the operability of Hatch Unit 1 standby gas treatment system.

Date of issuance: March 10, 1993

Effective date: March 10, 1993

Amendment Nos.: 124

Facility Operating License Nos. DPR-57 and NPF-5. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 3, 1993 (58 FR 6997)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 10, 1993

No significant hazards consideration comments received: No.

Local Public Document Room location: Appling County Public Library, 301 City Hall Drive, Baxley, Georgia 31513

Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50-424 and 50-425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of application for amendments: September 17, 1992, as supplemented February 12 and 25, 1993

Brief description of amendments: The amendments modify the Technical Specifications by revising a time constant used for lag compensation in the equations for overtemperature and overpower delta temperature trip functions, and a constant (K_4) in the setpoint equation for overpower delta temperature.

Date of issuance: March 10, 1993

Effective date: To be implemented within 60 days of issuance

Amendment Nos.: 57 and 36

Facility Operating License Nos. NPF-68 and NPF-81: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 14, 1992 (57 FR 47135) The February 12 and 25, 1993, letters provided additional information in support of the original request and did not change the NRC's proposed finding of no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 10, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Burke County Library, 412 Fourth Street, Waynesboro, Georgia 30830

Gulf States Utilities Company, Docket No. 50-458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: December 22, 1992

Brief description of amendment: The amendment corrects minor non-conservative errors in acceptance criteria for technical application surveillance requirements for emergency core cooling system pumps. The amendment increases the acceptance criteria for pump differential pressure for high pressure core spray, low pressure core spray, and low pressure coolant injection pumps to be consistent with the Bases for Technical Specification 4.5.1.

Date of issuance: March 18, 1993

Effective date: March 18, 1993

Amendment No.: 66

Facility Operating License No. NPF-47. The amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 3, 1993 (58 FR 6998).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 18, 1993. No significant hazards consideration comments received. No.

Local Public Document Room location: Government Documents Department, Louisiana State University, Baton Rouge, Louisiana 70803.

Houston Lighting & Power Company, City Public Service Board of San Antonio, Central Power and Light Company, City of Austin, Texas, Docket Nos. 50-498 and 50-499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: September 28, 1992, as supplemented by letter dated November 12, 1992.

Brief description of amendments: The amendments change the technical specifications by: (1) replacing the variable shutdown requirements (TS Figure 3.1-1) with a constant value; and (2) changing Surveillance Requirement 4.1.1.1.2, clarifying reactivity balance calculations to confirm core design predictions, leading to the validation of shutdown margin.

Date of issuance: March 9, 1993

Effective date: March 9, 1993, to be implemented within 15 days of issuance.

Amendment Nos.: 48 and 37

Facility Operating License Nos. NPF-76 and NPF-80. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** January 6, 1993 (58 FR 595).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 9, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Wharton County Junior College, J. M. Hodges Learning Center, 911 Boling Highway, Wharton, Texas 77488

Houston Lighting & Power Company, City Public Service Board of San Antonio, Central Power and Light Company, City of Austin, Texas, Docket Nos. 50-498 and 50-499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of application for amendment: August 30, 1991, as superseded by letter dated June 2, 1992.

Brief description of amendments: The amendments change the Technical Specifications (TS) by changing the action and surveillance requirements of TS 3/4.3.3.7 to reflect changes in the toxic gas monitors and number of logic channels for Unit 2. TS changes which reflected comparable changes for Unit 1 were approved in Amendments 45 (Unit 1) and 34 (Unit 2), issued on November 5, 1992.

Date of issuance: March 19, 1993

Effective date: March 19, 1993, to be implemented not later than the completion of the third refueling outage for Unit 2.

Amendment Nos.: 49 and 38

Facility Operating License Nos. NPF-76 and NPF-80. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 2, 1992 (57 FR 45643).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 19, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Wharton County Junior College, J. M. Hodges Learning Center, 911 Boling Highway, Wharton, Texas 77488.

Indiana Michigan Power Company, Docket Nos. 50-315 and 50-316, Donald C. Cook Nuclear Plant, Unit Nos. 1 and 2, Berrien County, Michigan

Date of application for amendments: February 27, 1991

Brief description of amendments: The amendments would change Technical Specification (TS) 3.6.3.1, "Containment Isolation Valves," to provide an exception to the requirements of TS 3.0.4 to allow mode change with inoperable containment isolation valves, provided the action requirements of the TS are met.

Date of issuance: March 16, 1993

Effective date: March 16, 1993

Amendment Nos.: 170 and 153

Facility Operating License Nos. DPR-58 and DPR-74. Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** May 15, 1991 (56 FR 22470)

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 16, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Maude Preston Palenske Memorial Library, 500 Market Street, St. Joseph, Michigan 49085.

Iowa Electric Light and Power Company, Docket No. 50-331, Duane Arnold Energy, Center, Linn County, Iowa

Date of application for amendment: December 11, 1992

Brief description of amendment: The amendment revised the Technical Specifications by modifying the requirements for performing a channel functional test of the Electrical Protective Assemblies. It also modifies the calibration frequency to an operating cycle basis.

Date of issuance: March 8, 1993

Effective date: March 8, 1993

Amendment No.: 191

Facility Operating License No. DPR-49. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 3, 1993 (58 FR 7000).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 8, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Cedar Rapids Public Library, 500 First Street, S. E., Cedar Rapids, Iowa 52401.

Nebraska Public Power District, Docket No. 50-298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: January 5, 1993

Brief description of amendment: The proposed changes modify the Cooper Nuclear Station Technical Specifications to delete the Limiting Conditions for Operation and Surveillance Requirements for Residual Heat Removal and Core Spray low-voltage auxiliary relays 27X3 1A/1B.

Date of issuance: March 11, 1993

Effective date: March 11, 1993

Amendment No.: 159

Facility Operating License No. DPR-46. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 3, 1993 (58 FR 7001)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 11, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Auburn Public Library, 118 15th Street, Auburn, Nebraska 68305.

Nebraska Public Power District, Docket No. 50-298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: October 8, 1992

Brief description of amendment: The amendment changed the Cooper Nuclear Station Technical Specification to revise the onsite organizational structure by creating new site management positions.

Date of issuance: March 11, 1993

Effective date: March 11, 1993

Amendment No.: 160

Facility Operating License No. DPR-46. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** December 23, 1992 (57 FR 61115)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 11, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Auburn Public Library, 118 15th Street, Auburn, Nebraska 68305.

Northeast Nuclear Energy Company, et al., Docket No. 50-423, Millstone Nuclear Power Station, Unit No. 3, New London County, Connecticut

Date of application for amendment: September 22, 1992

Brief description of amendment: The proposed amendment revises the Technical Specification for Millstone Unit 3 to change the measurement range from plus or minus 1g to plus or minus 2g for a seismic monitoring instrument, the triaxial peak accelerograph P/A2.

Date of issuance: March 8, 1993

Effective date: March 8, 1993

Amendment No.: 77

Facility Operating License No. NPF-49. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 28, 1992 (57 FR 48822).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 8, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Learning Resources Center, Thames Valley State Technical College, 574 New London Turnpike, Norwich, Connecticut 06360.

Northeast Nuclear Energy Company, et al., Docket No. 50-423, Millstone Nuclear Power Station, Unit No. 3, New London County, Connecticut

Date of application for amendment: January 15, 1993, as supplemented January 21, 1993.

Brief description of amendment: The amendment revises the Millstone Unit No. 3 Technical Specifications, Section 4.7.10.e by extending the surveillance requirement frequency for the snubber functional tests by allowing a one-time extension to the current 18-month surveillance, plus the additional 25 percent allowed by Technical Specification 4.0.2.

Date of issuance: March 9, 1993

Effective date: March 9, 1993

Amendment No.: 78

Facility Operating License No. NPF-49. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 5, 1993 (58 FR 7265)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 9, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Learning Resources Center, Thames Valley State Technical College, 574 New London Turnpike, Norwich, Connecticut 06360.

Omaha Public Power District, Docket No. 50-285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

Date of amendment request: October 9, 1992

Brief description of amendment: The amendment revised the Technical Specification (TS) to reduce the number of unnecessary starts for the emergency diesel generators (EDGs) due to scheduled preventative maintenance or testing. The changes provide an alternative to starting the remaining EDG every time an EDG is declared inoperable.

Date of issuance: March 12, 1993

Effective date: March 12, 1993

Amendment No.: 150

Facility Operating License No. DPR-40. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** November 25, 1992 (57 FR 55585)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 12, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: W. Dale Clark Library, 215 South 15th Street, Omaha, Nebraska 68102

Omaha Public Power District, Docket No. 50-285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

Date of amendment request: February 13, 1992, as supplemented January 8 and January 13, 1993.

Brief description of amendment: The amendment revised Technical Specification 2.6, "Containment System" and the definition of Containment Integrity to reflect the Combustion Engineering Standard Technical Specification for containment integrity and the Personnel Air Lock.

Date of issuance: March 16, 1993

Effective date: March 16, 1993

Amendment No.: 151

Facility Operating License No. DPR-40. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** March 18, 1992 (57 FR 9449)

The additional information contained in the supplemented letters dated January 8 and January 13, 1993, was clarifying in nature, and thus, within the scope of the initial notice and did not affect the staff's proposed on significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 16, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: W. Dale Clark Library, 215 South 15th Street, Omaha, Nebraska 68102

Pacific Gas and Electric Company, Docket Nos. 50-275 and 50-323, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California

Date of application for amendments: December 21, 1990, as supplemented November 22, 1991 and October 26, 1992 (LAR 90-14)

Brief description of amendments: These amendments add a new technical specification (TS) 3/4.7.1.7, "Main Feedwater Regulating, Bypass and Isolation Valves," to the Diablo Canyon Power Plant TS. These amendments also increase the main feedwater regulating valve and bypass valve closure time limit from 5 to 7 seconds.

Date of issuance: March 18, 1993

Effective date: March 18, 1993

Amendment Nos.: 77 and 76

Facility Operating License Nos. DPR-80 and DPR-82: The amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** March 6, 1991 (56 FR 9382) The November 22, 1991 and October 26, 1992, provided clarifications on the safety analysis, and more restrictive surveillance requirements and allowed outage times for the proposed TS that did not change the action noticed in the Federal Register on March 6, 1991, and did not affect the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 18, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: California Polytechnic State University, Robert E. Kennedy Library, Government Documents and Maps Department, San Luis Obispo, California 93407

Power Authority of The State of New York, Docket No. 50-286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of application for amendment: September 29, 1992, as supplemented December 23, 1992.

Brief description of amendment: The amendment revised the Technical Specifications (TS) to incorporate the following changes:

(1) The auxiliary feedwater (AFW) pump full-flow testing frequency (specified in TS Section 4.8.1.a) was changed to accommodate operation on a 24-month cycle.

(2) The AFW pump automatic start verification frequency (specified in TS Section 4.8.3.b) was changed to accommodate operation on a 24-month cycle. In addition, the wording of the AFW pump automatic start verification requirement was changed from "each" actuation signal to "an" actuation signal.

(3) The AFW recirculation valve actuation verification frequency (specified in TS Section 4.8.3.a) was changed to accommodate operation on a 24-month cycle.

(4) The AFW backup supply valve testing frequency (specified in TS Section 4.8.1.c) was changed to accommodate operation on a 24-month cycle.

These changes followed the guidance provided in Generic Letter 91-04, "Changes in Technical Specification Surveillance Intervals to Accommodate a 24-Month Fuel Cycle," as applicable

Date of issuance: March 10, 1993

Effective date: March 10, 1993

Amendment No.: 128

Facility Operating License No. DPR-64: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 3, 1993 (58 FR 7004).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 10, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: White Plains Public Library, 100 Martine Avenue, White Plains, New York 10610.

South Carolina Electric & Gas Company, South Carolina Public Service Authority, Docket No. 50-395, Virgil C. Summer Nuclear Station, Unit No. 1, Fairfield County, South Carolina

Date of application for amendment: September 23, 1992

Brief description of amendment: The amendment removes Technical Specification (TS) Table 3.6-1 which includes lists of components referenced in individual specifications. In addition, the TS requirements have been modified so all references to Table 3.6-1 are removed under guidance provided in Generic Letter 91-08.

Date of issuance: March 5, 1993

Effective date: March 5, 1993

Amendment No.: 110

Facility Operating License No. NPF-12. Amendment revises the Technical Specifications.

Date of initial notice in **Federal Register:** November 25, 1992 (57 FR 55590)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 5, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: Fairfield County Library, Garden and Washington Streets, Winnsboro, South Carolina 29180.

South Carolina Electric & Gas Company, South Carolina Public Service Authority, Docket No. 50-395, Virgil C. Summer Nuclear Station, Unit No. 1, Fairfield County, South Carolina

Date of application for amendment: October 6, 1992

Brief description of amendment: The amendment changes the Technical Specifications to permit an increase in the maximum permissible average level of steam generator tube plugging (SGTP) from 15 percent to 18 percent. Although no value for STP is specified in the TS, the increase in SGTP would result in a 1.7 percent decrease in the minimum measured flow (MMF) value which is referenced in TS 3/4.2.3. The proposed reduction in MMF will, in turn, require changes to Table 2.2.-1. Specifically, the overtemperature delta T values for total allowance and the statistical summation of errors (Z) would be changed.

Date of issuance: March 18, 1993

Effective date: March 18, 1993

Amendment No.: 111

Facility Operating License No. NPF-12. Amendment revises the Technical Specifications.

Date of initial notice in **Federal Register:** December 9, 1992 (57 FR 58251)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 18, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: Fairfield County Library, Garden and Washington Streets, Winnsboro, South Carolina 29180.

Southern Nuclear Operating Company, Inc., Docket Nos. 50-348 and 50-364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama.

Date of amendments request: October 13, 1992

Brief description of amendments: The amendments change Technical Specification 3/4.4.5 and Bases Section 3/4.4.5 to include new requirements with respect to operability and surveillance of power-operated relief valves (PORVs) and block valves. The changes are based on the guidance contained in Generic Letter 90-06 and are intended to enhance the reliability of the PORVs and block valves.

Date of issuance: March 8, 1993

Effective date: March 8, 1993

Amendment Nos.: 97 and 89

Facility Operating License Nos. NPF-2 and NPF-8. Amendments revise the Technical Specifications.

Date of initial notice in **Federal Register:** February 3, 1993 (58 FR 7005)

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 8, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: Houston-Love Memorial Library, 212 W. Burdeshaw Street, P. O. Box 1369, Dothan, Alabama 36302

Tennessee Valley Authority, Docket Nos. 50-259, 50-260 and 50-296, Browns Ferry Nuclear Plant, Units 1, 2 and 3, Limestone County, Alabama

Date of application for amendments: September 28, 1992 (TS 330)

Brief description of amendments: These license amendments revise Browns Ferry Nuclear Plant Technical Specifications by removing detailed listings of circumferential pipe welds requiring additional inspections and placing them in controlled plant procedures, in accordance with guidance provide4d by Generic Letter 91-08.

Date of issuance: March 18, 1993

Effective date: March 18, 1993

Amendment Nos. 191-Unit 1; 206-Unit 2; 163-Unit 3

Facility Operating License Nos. DPR-33, DPR-52 and DPR-68: Amendments revise the Technical Specifications.

Date of initial notice in **Federal Register:** November 25, 1992 (57 FR 55592)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 18, 1993.

No significant hazards consideration comments received: None

Local Public Document Room location: Athens Public Library, South Street, Athens, Alabama 35611

Virginia Electric and Power Company, Docket Nos. 50-280 and 50-281, Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia.

Date of application for amendments: August 4, 1992, as supplemented January 14, 1993.

Brief description of amendments: The amendments allow the entry into an action statement due to a missed surveillance to be delayed for 24 hours, and requires the completion of the surveillance requirements of a limiting condition for operation prior to changing operational conditions. In addition, exceptions to certain requirements of Section 4.0 to Generic Letter 87-09 are also approved.

Date of issuance: March 12, 1993

Effective date: March 12, 1993

Amendment Nos. 175, 174

Facility Operating License Nos. DPR-32 and DPR-37: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:**

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 12, 1993.

No significant hazards consideration comments received: No

Local Public Document Room location: Swem Library, College of William and Mary, Williamsburg, Virginia 23185

Washington Public Power Supply System, Docket No. 50-397, Nuclear Project No. 2, Benton County, Washington

Date of application for amendment: November 25, 1992

Brief description of amendment: The amendment changes Section 6 (Administrative Controls) of the

Technical Specifications (TS) to: (1) modify the title of the Nuclear Safety Assurance Group (NSAG) to the Nuclear Safety Assurance Division (NSAD), and Director of Licensing and Assurance to Director of Quality Assurance, (2) modify the titles of the members on the Plant Operations Committee (POC), (3) delete the position of Assistant Plant Manager as Vice Chairman of the POC, and allow the Plant Manager to designate a Vice Chairman from the POC membership in the POC meeting minutes, and (4) add the Engineering Services Division Manager as a POC member. One title change involves splitting the current combined responsibilities for Chemistry/Radiation Protection into two different management positions responsible for their respective activities. This change provides for a reorganization of the plant management to make the various divisions of station operation more responsive to plant issues and events.

Date of issuance: March 8, 1993

Effective date: March 8, 1993

Amendment No.: 113

Facility Operating License No. NPF-21: The amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** January 6, 1993 (58 FR 601)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 8, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: Richland Public Library, 955 Northgate Street, Richland, Washington 99352

Wisconsin Public Service Corporation, Docket No. 50-305, Kewaunee Nuclear Power Plant, Kewaunee County, Wisconsin

Date of application for amendment: September 10, 1992, as supplemented November 30, 1992.

Brief description of amendment: The amendment revised the Technical Specification Table TS 4.1-1, page 4, item 19, Radiation Monitoring System, to remove the surveillance requirements for the Component Cooling Water Radiation Monitor (R-17). Upon elimination of the automatic actuation feature, R-17 provides indication only. In addition, the related bases for TS 3.1.d were revised.

Date of issuance: March 8, 1993

Effective date: March 8, 1993

Amendment No.: 98

Facility Operating License No. DPR-43. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 28, 1992 (57 FR 48832) The licensee's supplemental submission of November 30, 1992, proposed revisions to the bases only. The Commission's previous proposed determination of no significant hazards was not affected.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 8, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room location: University of Wisconsin Library Learning Center, 2420 Nicolet Drive, Green Bay, Wisconsin 54301.

Wolf Creek Nuclear Operating Corporation, Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: June 11, 1992

Brief description of amendment: The amendment revises Technical Specification 4.8.1.1.2 by removing the numerical value of 1352 kW associated with the verification of the emergency diesel generators capability to reject the largest single load, the essential service water pump motor, while maintaining required voltage and frequency. In lieu of the numerical value, the revised technical specification denotes the actual load, the essential service water pump motor, which is to be rejected during the emergency diesel generator load rejection surveillance.

Date of issuance: March 8, 1993

Effective date: March 8, 1993

Amendment No.: 59

Facility Operating License No. NPF-42. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 5, 1992 (57 FR 34592).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 8, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room Locations: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

Wolf Creek Nuclear Operating Corporation, Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: December 22, 1992

Brief description of amendment: The amendment deletes the surveillance requirement of Technical Specification 4.8.1.1.2(i)(2), which involves performing a pressure test of portions of the emergency diesel fuel oil system. Alternative testing for the tanks and piping would include leak testing at hydrostatic head pressure with the tanks filled to design capacity and would be governed by Technical Specification 4.0.5.

Date of issuance: March 19, 1993

Effective date: March 19, 1993, to be implemented within 30 days of issuance.

Amendment No.: 60

Facility Operating License No. NPF-42. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** February 3, 1993 (58 FR 7009)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 19, 1993.

No significant hazards consideration comments received: No.

Local Public Document Room Locations: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

Dated at Rockville, Maryland, this 24th day of March, 1993.

For the Nuclear Regulatory Commission

Jack W. Roe,

Director, Division of Reactor Projects - III/IV/V, Office of Nuclear Reactor Regulation

[Doc. 93-7284 Filed 3-30-93; 8:45 am]

BILLING CODE 7590-01-F

Commonwealth Edison Co., Zion Nuclear Power Station, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact

[Docket Nos. 50-295 and 50-304]

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of exemptions from the requirements of sections III.G.2, III.G.2.b and III.G.3 of appendix R to 10 CFR part 50 to Commonwealth Edison Company (the licensee), for the Zion Nuclear Power Station, Units 1 and 2, located in Lake County, Illinois.

Environmental Assessment

Identification of Proposed Action

In a letter dated August 5, 1992, the licensee requested seven exemptions and documented a revision to a previous exemption from 10 CFR part 50, appendix R, as a result of a recent reassessment of the combustible load values in fire zones and areas. The exemption requests are all revisions of previous requests that were either granted or found to be unnecessary by the NRC staff. The following is a summary of the stated exemption requests.

1. Due to increased combustible loading in the main control room and auxiliary electric equipment room, the licensee requests a revised exemption from the requirements of 10 CFR part 50, appendix R, section III.G.3, for an area wide fixed suppression system.

This exemption would increase the allowable combustible loading in these areas.

2. Due to increased combustible loading in the component cooling water pump area, auxiliary feedwater pump area, auxiliary building elevations 592', 617', and 642' and main steam pipe tunnels, the licensee requests a revised exemption from the requirements of 10 CFR part 50, appendix R, section III.G.2.b, for area wide detection and suppression and for 20 feet of separation between redundant safe shutdown components.

This exemption would increase the allowable combustible loading in these areas.

3. Due to increased combustible loading in the outer and inner crib house, the licensee requests a revised exemption from the requirements of 10 CFR part 50, appendix R, section III.G.2, for redundant circuits to be separated by a 3-hour barrier, or an alternate shutdown capability independent of the areas.

This exemption would increase the allowable combustible loading in these areas.

4. The licensee previously requested an exemption from the requirements of 10 CFR part 50, appendix R, section III.G.2.b, for area wide detection and suppression and for 20 feet of separation between redundant safe shutdown components as they apply to the auxiliary building, elevation 542', residual heat removal pump room area. In a safety evaluation report dated June 7, 1988, the NRC staff concluded an exemption was not required for the 542' elevation because the existing fire protection features in conjunction with cold shutdown repair procedures meet the technical requirements of section III.G.1.b of appendix R to 10 CFR part 50 and related staff guidance. Since this conclusion was independent of the combustible loading, the exemption is not affected by the increased combustible loading of which the licensee is notifying the NRC staff.

The Need for the Proposed Action

The licensee's reassessment of the combustible load values in fire zones and areas has identified the need for several exemptions from 10 CFR part 50, appendix R. The proposed exemptions are needed to permit the licensee to operate the plant without being in violation of the Commission's requirements.

Environmental Impacts of the Proposed Action

The proposed exemptions will provide a degree of fire protection that is adequate for the affected areas of the plant such that there is no increase in the risk of fires at this facility. Furthermore, the proposed exemptions would not adversely impact the capability to safely shut down the plant in the event of a fire; would not pose a threat to fuel cladding integrity; would not pose a threat to containment integrity; and would provide an acceptable level of safety, equivalent to that attained by compliance with Sections III.G.2, III.G.2.b and III.G.3 of appendix R to 10 CFR part 50. Based on considerations discussed above, the Commission concludes that granting the proposed exemptions will not increase the probability of an accident and will not result in any post-accident radiological releases in excess of those previously determined for the Zion Nuclear Power Station. The proposed exemptions would not otherwise affect radiological plant effluents, nor result in any significant occupational exposure.

With regard to potential non-radiological impacts, the proposed exemptions involve features located within the restricted area as defined in 10 CFR part 20. They do not affect non-radiological plant effluents and have no other environmental impact.

Therefore, the Commission concludes that there are no significant radiological or non-radiological environmental impacts associated with the proposed exemptions.

Alternative to the Proposed Action

Since the Commission has concluded that there are no measurable environmental impacts associated with the proposed exemptions, any alternatives with equal or greater environmental impact need not be evaluated. The principal alternative would be to deny the exemptions and require rigid compliance with the requirements of 10 CFR part 50, appendix R, Sections III.G.2, III.G.2.b and III.G.3. Such action would not enhance the protection of the environment. Furthermore, requiring installation of modifications to bring the plant into compliance with 10 CFR part 50, appendix R, in lieu of the revised exemptions would result in additional costs to the licensee, including loss of income from generating power, without adding any benefits already available by existing plant systems or proposed compensatory measures.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in connection with the Nuclear Regulatory Commission's Final Environmental Statement, dated December 1972, related to the operation of the Zion Nuclear Power Station, Units 1 and 2.

Agencies and Persons Consulted

The NRC staff reviewed the licensee's submittal that supports the proposed exemptions discussed above. The NRC staff did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption.

Based upon the foregoing environmental assessment, the staff concludes that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the licensee's request for exemption dated August 5, 1992, which is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC and at the Waukegan Public Library, 128 North County Street, Waukegan, Illinois 60085.

Dated at Rockville, Maryland, this 24th day of March 1993.

For the Nuclear Regulatory Commission.

James E. Dyer,

Director, Project Directorate III-2, Division of Reactor Projects III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 93-7394 Filed 3-30-93; 8:45 a.m.]

BILLING CODE 7590-01-M

Proposed Generic Communication; "Line-Item Technical Specification Improvements to Reduce Testing During Power Operation"

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of opportunity for public comment.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to issue a generic letter. A generic letter is an NRC document that (1) requests licensees to submit analyses or descriptions of proposed corrective actions, or both, regarding matters of safety, safeguards, or environmental significance, or (2) requests licensees to submit information to the NRC on other technical or administrative matters, or, (3) transmits information to licensees regarding approved changes to rules or

regulations, the issuance of reports or evaluations of interest to the industry, or changes to NRC administrative procedures. This draft generic letter presents the results of the NRC staff examination of technical specification surveillance requirements that require testing during power operation. This draft generic letter also provides guidance to assist licensees in preparing a license amendment request to implement the recommendations that resulted from the examination. The NRC is seeking comment from interested parties regarding both the technical and regulatory aspects of the proposed generic letter presented under the Supplementary Information heading. This proposed generic letter and supporting documentation were discussed in meeting number 234 of the Committee to Review Generic Requirements (CRGR). The proposed generic letter, as approved by the CRGR, and the supporting documentation are available in the Public Document Rooms under accession number 9303190122. The NRC will consider comments received from interested parties in the final evaluation of the proposed generic letter. The NRC final evaluation will include a review of the technical position and, when appropriate, an analysis of the value/impact on licensees. Should this generic letter be issued by the NRC, it will become available for public inspection in the Public Document Rooms.

Comment period expires April 30, 1993. Comments submitted after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except for comments received on or before this date.

ADDRESSES: Submit written comments to Chief, Rules Review and Directives Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Written comments may also be delivered to room P–223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 7:30 am to 4:15 pm, Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, 2120 L Street, NW. (Lower level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Thomas Dunning, (301) 504–1189.

SUPPLEMENTARY INFORMATION: Draft Generic Letter, "Line-Item Technical Specification Improvements to Reduce Surveillance Requirements for Testing During Power Operation."

Dated at Rockville, Maryland, this 25th day of March 1992.

For the Nuclear Regulatory Commission.

Gail H. Marcus,

Chief, Generic Communications Branch, Division of Operating Reactor Support, Office of Nuclear Reactor Regulation.

To: All Holders of Operating Licenses or Construction Permits for Nuclear Power Reactors

Subject: Line-Item Technical Specification Improvements to Reduce Surveillance Requirements for Testing During Power Operation (Generic Letter 93–)

The staff of the U.S. Nuclear Regulatory Commission (NRC) has completed a comprehensive examination of technical specification (TS) surveillance requirements that require testing during power operation. This effort is a part of the NRC Technical Specification Improvement Program (TSIP). The results of this work are reported in NUREG-1366, "Improvements to Technical Specifications Surveillance Requirements," December 1992. NUREG–1366 is available for examination in the NRC Public Document Room, 2120 L street, NW, Lower Level, Washington, DC 20555 and for purchase from the GPO Sales Program by writing to the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013–7082. In performing this study, the staff found that while the majority of the testing at power is important, safety can be improved, equipment degradation decreased, and an unnecessary burden on personnel resources eliminated by reducing the amount of testing that the TS require at power operating conditions. However, only a small fraction of the TS surveillance intervals was considered to warrant relaxation. The staff has prepared the enclosed guidance to assist licensees in preparing a license amendment request to implement these recommendations as line-item TS improvements. The NRC issued improved standard technical specifications in September 1992 that incorporated the recommendations of NUREG-1366.

Licensees and applicants are encouraged to propose TS changes that are consistent with the enclosed guidance. The NRC project managers will review requests for license amendments to verify that they conform to this guidance. Please contact the project manager or the contact indicated below if you have questions on this matter.

Any response to the suggestion that licensees or applicants propose these TS changes is voluntary. Therefore, any action taken in response to the guidance provided in this generic letter is not a backfit under § 50.109 of title 10 of the Code of Federal Regulations (10 CFR 50.109). The following information, although not requested under the provisions of 10 CFR 50.54(f), would be helpful to the NRC in evaluating the cost of complying with the suggestion to propose TS changes addressed by this generic letter:

1. The licensee staff time and costs to prepare the amendment request.

2. An estimate of the long-term costs that would be incurred or saved in the future as a result of implementing this TS change.

Contact: T. G. Dunning, NRR, (301) 504–1189.

This request is covered by Office of Management and Budget Clearance Number 3150–0011, which expires June 30, 1994. The estimated average number of burden hours is 40 person hours per licensee response, including those needed to assess the new recommendations, search data sources, gather and analyze the data, and prepare the required letters. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Information and Records Management Branch (MNBB 7714), Division of Information Support Services, Office of Information and Resource Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555 and to Ronald Minsk, Office of Information and Regulatory Affairs (3150–0011), NEOB–3019, Office of Management and Budget, Washington, DC 20503.

Sincerely,

James G. Partlow,

Associate Director for Projects, Office of Nuclear Reactor Regulation.

Enclosure: As stated.

Guidance for Implementing Line-Item Technical Specification Improvements to Reduce Testing During Power Operation

Introduction

This enclosure provides guidance for preparing a license amendment request to change the technical specifications (TS) to reduce testing during power operation. These line-item TS improvements are based on the recommendations of an NRC study that included a comprehensive examination of surveillance requirements and is reported in NUREG–1366, "Improvements to Technical Specifications Surveillance Requirements."

Each of the applicable NUREG recommendations is addressed herein with examples of TS changes based upon standard technical specification (STS) requirements that were used as model TS when many plants obtained their operating license. The title and number of each of these line-item improvements corresponds to the section title and number in NUREG–1366 in which the staff recommended the change. The staff is providing the NUREG recommendation for each item, but the NUREG finding is provided only where it is necessary to clarify the intent of the NUREG recommendation. The staff is providing the wording for the changes to specific TS sections using the noted model STS requirements, with the reactor vendor identified in brackets and noted as "(Typ)" where it is typical of the change that applies to the TS for reactors of more than one type or vendor. The staff is providing the wording for a few of the recommendations from TS changes that have been approved for a specific plant. In this case, the plant is identified in brackets as the source of the guidance.

The proposed TS changes for plants that have TS in a format that is different than the STS should be consistent with the intent of the NUREG recommendation, the enclosed guidance, and the format of individual plant TS.

Compatibility With Operating Experience

Licensees should not propose changes to extend any surveillance interval if the recommendations of NUREG–1366 are not compatible with plant operating experience. Therefore, each licensee should include a statement in the license amendment request that all proposed TS changes are compatible with plant operating experience and are consistent with this guidance.

Line-Item TS Improvements

4.1 Moderator Temperature Coefficient Measurements (PWR)

Findings: (1) Technical Specifications require a determination of moderator temperature coefficient at 300 ppm boron concentration. (2) If measured moderator temperature coefficient is more negative (less conservative than the TS value), the licensee must measure the moderator temperature coefficient every 14 EFPDs until the end of the cycle. (3) Measuring the moderator temperature coefficient at low boron concentrations is difficult. (4) VEPCO [Virginia Electric Power Company] proposed a method for eliminating this requirement below 60 ppm. (5) Method is plant-specific.

Recommendation: Other licensees may wish to use the VEPCO approach.

The following condition must be met and addressed to justify the use of the VEPCO approach:

Results of plant-specific analysis are required that show that the maximum possible change in moderator temperature coefficient (MTC) from 60 ppm to the end of the operating cycle (EOC) is less than the difference in the values of MTC from 60 ppm to EOC MTC that are specified in this Technical Specification.

3/4.1 Reactivity Control Systems—Moderator Temperature Coefficient, [W STS (Typ)] TS 4.1.1.3:

The MTC shall be determined to be within its limits during each fuel cycle as follows:

a. The MTC shall be measured and compared to the BOL limit specification 3.1.1.3a., above, prior to initial operation above 5% of rated thermal power, after each fuel loading; and

b. The MTC shall be measured at any THERMAL POWER and compared to −[3.0] × 10–4 delta-k/k/degree-F (all rods withdrawn, rated thermal power condition) within 7 EFPD after reaching an equilibrium boron concentration of 300 ppm.* In the event this comparison indicates the MTC is more negative than −[3.0] × 10–4 delta-k/k/degree-F, the MTC shall be measured, and compared to the EOC MTC limit of Specification 3.1.1.3b., at least once per 14 EFPD during the remainder of the fuel cycle.

**Once the equilibrium boron concentration (all rods withdrawn, rated thermal power condition) is 60 ppm or less, further measurement of the MTC may be suspended if the measured MTC at an equilibrium boron concentration of 60 ppm or less is less negative than [the predicted value of MTC at 60 ppm].*

(Footnote added to be consistent with recommendation.)

4.2 Control Rod Movement Test

4.2.1 Pressurized Water Reactors

Recommendation: Change frequency of the PWR control rod movement test to quarterly.

3/4.1.3 Movable Control Assemblies, [W STS (Typ)] TS 4.1.3.1.2:

Each full-length rod not fully inserted in the core shall be determined to be OPERABLE by movement of at least 10 steps in any one direction at least once per *92* days.

(Replaced "31" with "92" days.)

4.2.2 Boiling Water Reactors

Recommendation: The TS should be changed to require that if a control rod is immovable because of friction or mechanical interference, the other control rods should be tested within 24 hours and every 7 days thereafter.

(**Note:** Existing TS requirements include testing control rods every 7 days. Therefore, the recommendation to change the frequency for tests that apply when a control rod is immovable to include "once every 7 days thereafter" is already covered by the existing requirements that apply before the occurrence of an immovable rod as noted in item a below.)

3/4.1.3 Control Rods, [BWR/6 STS (Typ)] TS 4.1.3.1.2:

When above the low power setpoint of the RPCS, all withdrawn control rods not required to have their directional control valves disarmed electrically or hydraulically shall be demonstrated OPERABLE by moving each control rod at least one notch:

a. At least once per 7 days, and

b. *Within* 24 hours when any control rod is immovable as a result of excessive friction or mechanical interference.

(Replaced "At least once per" with "Within.")

4.3 Standby Liquid Control System BWR

Recommendation: (1) Explosive valves should be tested once each refueling interval for fuel cycles up to 24 months duration. (2) The SBLC system pump test should be required by technical specifications quarterly, in agreement with the ASME Code.

3/4.1.5 Standby Liquid Control System, [BWR/5 STS] TS 4.1.5:

The standby liquid control system shall be demonstrated OPERABLE:

a. At least once per 24 hours by verifying that: (No change to items a.1, a.2, and a.3.)

b. At least once per 31 days by:

1. *(Unused)*

(Item b.1 is noted as "Unused" since it is relocated to item c.1, below. No change to items b.2, b.3, and b.4.)

c. *At least once per 92 days by:*

(New item c. The current item c is renumbered as item d, below.)

1. Starting both pumps and recirculating demineralized water to the test tank.

(Item c.1 is relocated from b.1, above.)

d. At least once *each refueling interval* by:

(Replaced "per 18 months during shutdown" with "each refueling interval.")

1. Initiating one of the standby liquid control system loops, including an explosive valve, and verifying that a flow path from the pumps to the reactor pressure vessel is available by pumping demineralized water into the reactor

vessel. The replacement charge for the explosive valve shall be from the same manufactured batch as the one fired or from another batch which has been certified by having one of the batch successfully fired. Both injection loops shall be tested in *any two consecutive refueling intervals.*

(Item c.1 was relocated from item b.1, above, and replaced "36 months" with "any two consecutive refueling intervals." No change to items d.2 through d.5 that were renumbered as items c.2 through c.5.)

3/4.1.5 Standby Liquid Control System, [BWR/4 STS] TS 4.1.5:

The standby liquid control system shall be demonstrated OPERABLE by:

c. Demonstrating that when tested (pursuant to Specification 4.0.5) (at least once per 92 days), the minimum flow requirement of (41.2) gpm at a pressure of greater than or equal to (1220) psig is met.

(Item c is consistent with the recommended change. No change to item c or to items a and b is required.)

d. At least once *each refueling interval* by:

(Replaced "per 18 months during shutdown" with "each refueling interval.")

1. Initiating one of the standby liquid control system loops, including an explosive valve, and verifying that a flow path from the pumps to the reactor pressure vessel is available by pumping demineralized water into the reactor vessel. The replacement charge for the explosive valve shall be from the same manufactured batch as the one fired or from another batch which has been certified by having one of the batch successfully fired. Both injection loops shall be tested in *any two consecutive refueling intervals.*

(Replaced "36 months" with "any two consecutive refueling intervals." No change to items d.2 through d.4.)

4.4 Closure Time Testing of Scram Discharge Volume Vent and Drain Valves (BWR)

Recommendation: Other BWR licensees may wish to use the Georgia Power Co./GE method on a plant-specific basis to extend the SDV vent and drain valve closure time requirement.

The following condition must be met and addressed to justify the use of the Georgia Power Co./GE method:

Results of plant-specific analysis are required using approved methods, for example, MDE 103 1184, to derive a new vent and drain valve closure time. The analysis must take into account assumptions about the value of each of the following factors: (1) Scram time, (2) displacement volume of water per individual control rod drive, (3) average expected post-scram leakage flow per individual control rod drive, (4) SDV drain flow before isolation, and (5) minimum scram discharge volume.

3/4.1.3 Control Rods, [BWR/6 STS] TS 4.1.3.1.4:

Plant-specific valve closure times should be provided in item a.1 of TS 4.1.3.1.4 that is addressed under the recommendations for Section 4.5, below.

4.5 Reactor Scram Testing to Demonstrate Operability of Scram Discharge Volume (SDV) Vent and Drain Valves (BWR)

Recommendations: (1) Remove the requirement for a scram check of SDV vent and drain valve operability at 50% rod density or less. (2) Require an evaluation of SDV system response after each scram to verify that no abnormalities exist prior to plant restart. (3) Require vent and drain valve operability testing during a scram from shutdown conditions.

3/4.1.3 Control Rods, [BWR/6 STS] TS 4.1.3.1.1:

The scram discharge volume drain and vent valves shall be demonstrated operable by:

a. At least once per 31 days verifying each valve to be open, and

b. *Evaluating SDV system response prior to plant startup after each scram to verify that no abnormalities exist.*

(This change to Item b replaces the 92-day cycling test for each valve.)

The scram discharge volume shall be determined operable by demonstrating:

a. The scram discharge volume drain and vent valves operable, when control rods are scram tested from a shutdown condition at least once per 18 months, by verifying that the drain and vent valves:

(Replaced "a 50% rod density or less" with "a shutdown condition.")

3. Close within (30) seconds after receipt of a signal for control rods to scram, and

2. Open when the scram signal is reset.

b. (No change.)

5.1 Nuclear Instrumentation Surveillance (PWR)

Recommendation: Change surveillance intervals of analog channel functional tests of nuclear instrumentation to quarterly.

Plant-specific requirements have been established based upon the staff's review and approval of topical reports for extending the surveillance intervals for reactor protection system channels from monthly to quarterly as follows:

Letter from C.O. Thomas (NRC) to J.J. Sheppard (WOG–CP&L), of February 21, 1985, Subject: Acceptance for Referencing of Licensing Topical Report WCAP–10271, "Evaluation of Surveillance Frequencies and Out Of Service Time for the Reactor Protection Instrumentation Systems." Also see Westinghouse Owners Group Guidelines for Preparing Submittals Requesting Revision of Reactor Protection System Technical Specification, Revision 1, per letter OG–158, L.D. Butterfield (WOG–CECO) to Harold R. Denton (NRC), September 3, 1985.

Letter from A.C. Thadani (NRC) to T.A. Pickens (BWROG–NSPC), of July 15, 1987, Subject: General Electric Company (GE) Topical Reports NEDC–30844, "BWR Owners Group Response to NRC Generic Letter 83–28," and NEDC–30851P, "Technical Specification Improvement Analysis for BWR RPS."

Letter from A.C. Thadani (NRC) to C.W. Smythe (BWOG–GPU), of December 5, 1988, Subject: NRC Evaluation of BWOG Topical Report BAW 10167 and Supplement 1, "Justification for Increasing the Reactor Trip System On-Line Test Interval."

For CE plants, there is no generic evaluation for increasing RPS surveillance intervals. Therefore, guidance on the recommended TS change is as follows:

3/4.3.1 Reactor Protective Instrumentation, [CE STS] TS Table 4.3–1:

TABLE 4.3–1.—REACTOR PROTECTIVE INSTRUMENTATION SURVEILLANCE REQUIREMENTS

Functional unit	Channel check	Channel calibration	Channel functional test	Modes for which surveillance is required
2. Linear Power Level—High	S	D(2,4)M(3,4), R(4)(10)	Q	1, 2
3. Logarithmic Power Level— High	S		Q and S/U(1)	1, 2, 3, 4, 5

(Changed Channel Functional Test frequency from "M" to "Q.")

5.2 Slave Relay Testing (PWR, BWR)

Recommendation: Perform relay testing on a staggered test basis over a cycle and leave the tests carrying highest risk to a refueling outage or other cold shutdown.

The following condition must be met and addressed to justify this approach:

Plant-specific analysis is required to identify those slave relays that should be tested only during a refueling outage or other cold shutdown because of a high risk associated with such testing.

3/4.3.2 Engineered Safety Feature Actuation System (ESFAS) Instrumentation, [W STS (Typ)] TS Table 4.3–2:

TABLE 4.3–2.—ENGINEERED SAFETY FEATURE ACTUATION SYSTEM INSTRUMENTATION SURVEILLANCE REQUIREMENTS

Functional Unit	Slave relay test
[High risk items]	*R*
[Non-high risk items]	*(1)*

(1) Every ( ) days on a STAGGERED TEST BASIS.

(Add "SLAVE RELAY TEST" column to TS tables that do not have it and add footnote (1). The test frequency for high risk items is "R," and the test frequency for the remaining items is to be specified in the footnote at the current TS frequency for slave relays tests, but on a staggered test basis.)

5.3 Test Intervals for RPS and ESFAS (PWR, BWR)

Recommendation: Test three-channel systems on the four-channel schedule. Do not test one of the three channels during a four-channel test interval. Thus, the sequence of testing would be:

Three channels	Four channels
A	A
B	B
C	C
	D
A	A

3/4.3.1 Reactor Trip System Instrumentation, [W STS (Typ)] TS Table 4.3–1:

Table 4.3–1.—Table Notation

(11) Each channel shall be tested at least every 92 days on a staggered test basis. *Individual channels in three-channel systems may be tested on the same schedule for the corresponding channel of four-channel systems.*

(The addition to Note (11), which specifies staggered testing of RPS channels, allows testing of three-channel systems on the same schedule for the corresponding channel of four-channel systems. The same addition should be made to the corresponding note in TS Table 4.3–1 that requires staggered testing of ESFAS channels.)

5.4 Hydrogen Monitor Surveillance (PWR, BWR)

Recommendation: Change frequency of calibration to once each refueling interval and analog channel operational test to quarterly.

3/4.6.5 Combustible Gas Control—Hydrogen Monitors, [W STS (Typ)] TS 4.6.5.1:

Each hydrogen monitor shall be demonstrated OPERABLE by the performance of a channel check at least once per 12 hours, an analog channel operational TEST at least once per *92* days, and at least once *each refueling interval* by performing a CHANNEL CALIBRATION using sample gas containing:

(Replaced "31" with "92" days and "92 days on a Staggered test basis" with "each refueling interval.")

a. One volume percent hydrogen, balance nitrogen, and

b. Four volume percent hydrogen, balance nitrogen.

5.5 Reactor Trip Breaker Testing (PWR)

A TS change was not recommended for this item.

5.6 Power Range Instrument Calibration (PWR)

A TS change was not recommended for this item.

5.7 Control Element Assembly Calculator Surveillance (CE CPC PWR)

Recommendation: Extend the surveillance interval from monthly to quarterly.

3/4.3.1 Reactor Protective Instrumentation, [CE STS] TS Table 4.3–1:

TABLE 4.3–1.—REACTOR PROTECTIVE INSTRUMENTATION SURVEILLANCE REQUIREMENTS

Functional unit	Channel check	Channel calibration	Channel functional test	Surveillance is required
15. CEAC Calculators	S	R	Q, R(6)	1, 2

(Channel Functional Test frequency changed from "M" to "Q.")

5.8 Incore Detector Surveillance (CE and B&W PWRs)

Recommendation: The B&W surveillance requirement for incore detectors should be used for CE plants.

3/4.3 Instrumentation—Incore Detectors, [B&W STS] TS 4.3.3.2:

The incore detector system shall be demonstrated operable:

a. By performance of a channel check within 7 days prior to its use for measurement of the axial power imbalance or the quadrant power tilt.

b. At least once per 18 months by performance of a channel calibration which does not include the neutron detectors.

5.9 Response Time Testing of Isolation Instrumentation (PWR, BWR)

Recommendation: Delete requirement from both BWR and PWR technical

specifications to perform response time testing where the required response time corresponds to the diesel start time.

3/4.3.2 ESFAS Instrumentation, [W STS (Typ)] TS Table 3.3–5:

TABLE 3.3–5.—ENGINEERED SAFETY FEATURES RESPONSE TIMES

Initiating signal and function	Response time in seconds
(Identify item)	*NA*

(Replaced specified response time with "NA" for those Initiating Signal and Function entries where the response time [excluding the response time of valves that is confirmed under the inservice testing program] corresponds to the diesel start time.)

5.10 Source Range Monitor and Intermediate Range Monitor Surveillances (BWR)

Recommendation: The calibration interval for the BWR SRMs and IRMs should be changed to once each refueling interval.

3/4.3.6 Control Rod Block Instrumentation, [BWR/6 STS (Typ)] Table 4.3.6–1:

TABLE 4.3.6–1.—CONTROL ROD BLOCK INSTRUMENTATION SURVEILLANCE REQUIREMENTS

Trip function	Channel check	Channel functional test	Channel calibration	Operational conditions in which surveillance required
3. Source range monitors:				
a. Detector not full in	NA	S/U(b),W	NA	2, 5
b. Upscale	NA	S/U(b),W	*R*	2, 5
c. Inoperative	NA	S/U(b),W	NA	2, 5
d. Downscale	NA	S/U(b),W	*R*	2, 5
4. Intermediate range monitors:				
a. Detector not full in	NA	S/U(b),W	NA	2, 5
b. Upscale	NA	S/U(b),W	*R*	2, 5
c. Inoperative	NA	S/U(b),W	NA	2, 5
d. Downscale	NA	S/U(b),W	*R*	2, 5

(Changed Channel Calibration frequency from "Q" to "R.")

5.11 Calibration of Recirculation Flow Transmitters (BWR)

A TS change was not recommended for this item.

5.12 Autoclosure Interlocks (PWR, BWR)

A TS change was not recommended for this item.

5.13 Turbine Overspeed Protection System Testing (PWR, BWR)

Recommendation: Where the turbine manufacturer agrees, the turbine valve testing frequency should be changed to quarterly.

The following condition must be met and addressed to justify the use of this approach:

A statement is required confirming the turbine manufacturer's concurrence with the proposed change.

3/4.3.4 Turbine Overspeed Protection, [W STS (Typ)] TS 4.3.4.2:

The above required Turbine Overspeed Protection System shall be demonstrated OPERABLE:

a. At least once per *92* days by *direct observation of the movement* of each of the following valves through at least one complete cycle from the running position:

(No change to the listing of turbine valves. Replaced "7" with "92" days and "cycling" with "direct observation of the movement" of each valve.)

b. *(Unused)*

(Item b is noted as "Unused" since surveillance for direct observation of valve movement is included in item a above.)

5.14 Radiation Monitors (PWR, BWR)

Recommendation: In order to decrease licensee burden and increase the availability of radiation monitors, change the monthly channel functional test to quarterly.

3/4.3.2 Engineered Safety Feature Actuation System Instrumentation, [CE STS (Typ)] TS Table 4.3–2:

TABLE 4.3–2.—ENGINEERED SAFETY FEATURE ACTUATION SYSTEMS INSTRUMENTATION SURVEILLANCE REQUIREMENTS

Functional unit	Channel check	Channel calibration	Channel functional test	Modes for which surveillance is required
5. Shield Building Filtration (SBFAS):				
e. Containment Radiation—High Gaseous Monitor	S	R	*Q*	1, 2, 3, 4
Particulate Monitor	S	R	*Q*	1, 2, 3, 4
Area Monitor	S	R	*Q*	1, 2, 3, 4

TABLE 4.3–2.—ENGINEERED SAFETY FEATURE ACTUATION SYSTEMS INSTRUMENTATION SURVEILLANCE REQUIREMENTS—Continued

Functional unit	Channel check	Channel calibration	Channel functional test	Modes for which surveillance is required
7. Containment Purge Valves Isolation:				
e. Containment Radiation—High Gaseous Monitor	S	R	Q	1, 2, 3, 4
Particulate Monitor	S	R	Q	1, 2, 3, 4
Area Monitor	S	R	Q	1, 2, 3, 4

(Channel Functional Test frequency changed from "M" to "Q.")

3/4.3.3 Monitoring Instrumentation—Radiation Monitoring Instrumentation, [CE STS] TS Table 4.3–3:

TABLE 4.3–3.—RADIATION MONITORING INSTRUMENTATION SURVEILLANCE REQUIREMENTS

Functional unit	Channel check	Channel calibration	Channel functional test	Modes for which surveillance is required
(All items)	(No change)	(No change)	Q	(No change)

(Channel Functional Test frequency changed from "M" to "Q.")

3/4.3.3 Monitoring Instrumentation—Radioactive Liquid Effluent Monitoring Instrumentation—Radioactive Gaseous Effluent Monitoring Instrumentation, [W STS(Typ)] TS Table 4.3–8 and Table 4.3–9:

No change in existing STS guidance is required. The surveillance interval for an Analog Channel Operational Test (equivalent of a Channel Functional Test for other reactor vendors) is specified as "Q" (quarterly). Plants having a monthly test interval for this surveillance may request a change in the test interval to quarterly.

5.15 Radioactive Gas Effluent Monitor Calibration Standard (PWR, BWR)

A TS change was not recommended for this item.

6.1 Reactor Coolant System Isolation Valves (PWR)

Recommendation: Increase the 72-hour time for remaining in cold shutdown without leak testing the RCS isolation valves to 7 days.

3/4.4.6 Reactor Coolant System Leakage—Leakage Detection Systems, [W STS (Typ)] TS 4.4.6.2.2:

Each Reactor Coolant System Pressure Isolation Valve specified in Table 3.4–1 shall be demonstrated operable by verifying leakage to be within its limit:

a. At least once per 18 months,

b. Prior to entering MODE 2 whenever the plant has been in COLD SHUTDOWN for *7 days* or more and if leakage testing has not been performed in the previous 9 months.

(Replaced "72 hours" with "7 days." No change to items c, d and e.)

6.2 Power-(or Pilot-) Operated Relief Valves (PORVs) and Block Valves (PWR)

Recommendation: Direction concerning PORV and block valves surveillances will be provided in the resolution of GI–70 and GI–94.

This guidance was provided by Generic Letter 90–06 of June 25, 1990.

6.3 High Point Vent Surveillance Testing (PWR)

Recommendation: Licensees to evaluate applicability of Catawba Technical Specification Bases with respect to high point vent surveillance testing and revise the frequency of testing of RCS vent valves to cold shutdown or refueling if appropriate.

Catawba TS Bases 3/4.4.11, Reactor Coolant System Vents, states the following:

Reactor Coolant System vents are provided to exhaust noncondensible gases and/or steam from the primary system that could inhibit natural circulation core cooling. The operability of at least one Reactor Coolant System vent path from the reactor vessel head, and the pressurizer steam space ensures that the capability exists to perform this function.

The valve redundancy of the Reactor Coolant System vent paths serves to minimize the probability of inadvertent or irreversible actuation while ensuring that a single failure of a vent valve, power supply or control system does not prevent isolation of the vent path.

The function, capabilities, and testing requirements of the Reactor Coolant System vent systems are consistent with the requirements of Item II.B.1 of NUREG–0737, "Clarification of TMI Action Plan Requirements," November 1980.

Licensees should confirm and incorporate the applicable portions of the above Catawba TS Bases into the Bases Section for Reactor Coolant System Vent TS to implement the following TS change.

3/4.4.11 Reactor Coolant System Vents, [W STS (Typ)] TS 4.4.11.1:

Each Reactor Coolant System vent path block valve not required to be closed by action a. or b., above, shall be demonstrated operable at least once per *cold shutdown, if not performed within the previous* 92 days, by operating the valve through one complete cycle of full travel from the control room.

(Added "cold shutdown, if not performed within the previous" 92 days)

6.4 Low-Temperature Overpressure Protection (PWR)

A TS change was not recommended for this item.

6.5 Specific Activity of the Reactor Coolant 100/E (PWR, BWR)

A TS change was not recommended for this item.

6.6 Pressurizer Heaters (PWR)

Recommendation: The capacity of pressurizer heaters should be tested once each refueling interval for those plants without dedicated safety-related heaters. The capacity of pressurizer heaters should be tested every 92 days for plants with dedicated safety-related heaters. For those PWRs which have pressurizer heaters tied to a vital bus, no testing of switching between power supplies should be required.

3/4.4.3 Pressurizer, [W STS (Typ)] TS 4.4.3.2:

The capacity of each of the above required groups of pressurizer heaters shall be verified by energizing the heaters and measuring circuit current at least once per 92 days.

(No change. This TS guidance is applicable for plants with dedicated safety-related heaters)

The capacity of each of the above required groups of pressurizer heaters shall be verified by energizing the heaters and measuring circuit current at least once *each refueling interval.*

(Replaced "per 92 days" with "each refueling interval." Applicable for plants without dedicated safety-related heaters)

3/4.4.3 Pressurizer, [W STS (Typ)] TS 4.4.4.3:

The emergency power supply for the pressurizer heaters shall be demonstrated operable at least once per 18 months by manually transferring power from the normal to the emergency power supply and energizing the heaters.

(No change, but this TS is not applicable for plants with some pressurized heaters permanently tied to a vital bus and it may be removed)

7.1 Surveillance of Boron Concentration in the Accumulator/ Safety Injection/Core Flood Tank (PWR)

Recommendation: It should not be necessary to verify boron concentration of accumulator inventory after a volume increase of 1% or more if the makeup water is from the RWST and the minimum concentration of boron in the RWST is greater than or equal to the minimum boron concentration in the accumulator, the recent RWST sample was within specifications, and the RWST has not been diluted.

3/4.5.1 Accumulators—Cold Leg Injection, [W STS (Typ)] TS 4.5.1.1.1:

Each cold leg injection accumulator shall be demonstrated operable:

a. (No change.)

b. At least once per 31 days and within 6 hours of each solution volume increase of greater than or equal to [1% of tank volume] by verifying the boron concentration in the water-filled accumulator. *This surveillance is not required when the volume increase makeup source is the RWST and the RWST has not been diluted since verifying that the RWST boron concentration is equal to or greater than the accumulator boron concentration limit.*

(Added clarification to note when surveillance is not required. For B&W and CE plants, the term "cold leg injection accumulator" is replaced with "core flooding tank" or "safety injection tank," respectively, and "RWST" is replaced with "borated water storage tank" or "refueling water tank," respectively)

7.2 Verification That ECCS Lines Are Full of Water (Contain No Air) (PWR)

A TS change was not recommended for this item.

7.3 Verification of Proper Valve Lineups of ECCS and Containment Isolation Valves (PWR, BWR)

A TS change was not recommended for this item.

7.4 Accumulator Water Level and Pressure Channel Surveillance Requirements (PWR)

Recommendation: (1) Licensees to examine channel checks surveillance and operational history to determine if there is a basis for justifying the extension of frequency for analog channel operational tests for pressure and level channels. (2) Add a condition to the ECCS accumulator LCO for the case where "One accumulator is inoperable due to the inoperability of water level and pressure channels," in which the completion time to restore the accumulator to operable status will be 72 hours.

The NRC staff and industry effort to develop new STS recognized that accumulator instrumentation operability is not directly related to the capability of the accumulators to perform their safety function. Therefore, surveillance requirements for this instrumentation are being relocated from the new STS and the only surveillance that is being retained is that required to confirm that the parameters defining accumulator operability are within their specified limits.

3/4.5.1 Accumulators—Cold Leg Injection, [W STS (Typ)] TS 4.5.1.1.1:

Each cold leg injection accumulator shall be demonstrated operable:

a. At least once per 12 hours by:

1. Verifying *that* the contained borated water volume and nitrogen cover-pressure in the tanks *are within their limits*, and

(Removed the reference to verifying operability "by the absence of alarms" consistent with the removal of the surveillance requirements for this instrumentation. Added clarification to verifying that the noted parameters are within their limits)

2. Verifying that each cold leg injection accumulator isolation valve is open.

(No change for item a.2)

3/4.5.1 Accumulators—Cold Leg Injection, [W STS (Typ)] TS 4.5.1.1.2:

Each accumulator water level and pressure channel shall be demonstrated operable:

a. At least once per 31 days by the performance of an analog channel operational test, and

b. At least once per 18 months by the performance of a channel calibration.

Specification 4.5.1.1.2 above may be removed from TS but should be retained as an existing plant procedure requirement that may be subsequently modified under plant change control procedures and the related requirements of the Administrative Controls Section of the TS.

7.5 Visual Inspection of the Containment Sump (PWR)

Recommendation: Inspection of the containment at least once daily if the containment has been entered that day, and during the final entry to ensure that there is no loose debris that would clog the sump.

3/4.5.1.2 ECCS Subsystems—Tavg Greater Than or Equal to (350) degrees-F, [CE STS (Typ)] TS 4.5.2:

Each ECCS subsystem shall be demonstrated operable by:

(No change to items a and b)

c. By visual inspection which verifies that no loose debris (rags, trash, clothing, etc.) is present in the containment which could be transported to the containment sump and cause restriction of the pump suctions during LOCA conditions. This visual inspection shall be performed:

1. For all accessible areas of the containment prior to establishing containment integrity, and

2. *At least once daily* of the areas affected within containment *by containment entry and during the final entry* when containment integrity is established.

(The underlined additions were made, and "at the completion of containment entry" was removed as it implied an

inspection separate from that activity for which the containment entry was made)

7.6 Verification of Boron Concentration in the Boron Injection Tank (Westinghouse PWR)

Recommendation: Measure concentration of boron in the boric acid storage tank rather than in the BIT if it can be justified that the concentrations are the same.

The following condition must be met and addressed to justify the use of this approach:

A justification is required that the measurement of the boron concentration in the boric acid storage tank verifies the boron concentration in the BIT.

3/4.5.4 Boron Injection System—Boron Injection Tank, [W STS] TS 4.5.4.1:

The boron injection tank shall be demonstrated operable by:

a. Verifying the contained borated water volume at least once per 7 days,

b. Verifying the boron concentration of the water in the tank *by measuring the boron concentration in the boric acid storage tank* once per 7 days, and

(Added clarification of where measurement is made)

c. Verifying the water temperature at least once per 24 hours.

(No change for item c)

8.1 Containment Spray System (PWR)

Recommendation: The surveillance interval [air or smoke flow test] should be extended to 10 years.

Recent Experience: On June 11, 1991, the Southern California Edison Company (SCE) reported that a containment spray system (CSS) air flow test for San Onofre Unit 1 indicated that several nozzles were blocked. SCE investigated and found that seven nozzles were clogged with sodium silicate, a coating material that was applied to the carbon steel CSS piping in 1977. The licensee conducted air flow tests in 1980, 1983, and 1988 and obtained acceptable results.

This event does not alter the recommendation for an extension of the air flow test surveillance interval for plants with the more commonly used stainless steel piping system. However, licensees for plants using carbon steel piping must justify any change in the surveillance interval because of the San Onofre experience.

3/4.6.2 Depressurizing and Cooling Systems—Containment Spray System, [CE STS (Typ)] TS 4.6.2.1:

Each Containment Spray System shall be demonstrated operable:

d. At least once per *10* years by performing an air or smoke flow test through each spray header and verifying each spray nozzle is unobstructed.

(Changed the surveillance interval from "5" to "10" years)

8.2 Containment Purge Supply and Exhaust Isolation Valves (PWR)

A TS change was not recommended for this item.

8.3 Ice Condenser Inlet Doors (PWR)

Finding: Duke Power Co. justified a surveillance interval for containment inlet door testing that eliminated the need for a shutdown. [Duke Power Co. had 6 years of testing experience for McGuire Units 1 and 2 without a failure and the design does not allow water condensation to freeze, a common cause of stuck doors.]

Recommendation: The Duke proposal may be used by other utilities if it can be justified on a plant-specific basis.

3/4.6.7 Ice Condenser—Ice Condenser Doors, [McGuire TS (Typ)] TS 4.6.5.3.1:

Inlet Doors—Ice condenser inlet doors shall be:

a. (No change)

b. Demonstrated operable during shutdown at least once *each refueling interval* by:

(Replaced "per 9 months" with "each refueling interval")

(1) (No change.)

(2) (No change.)

(3) Testing *all* doors and verifying that the torque required to open each door is less than [195] inch-pounds when the door is 40 degrees open. This torque is defined as the "door opening torque" and is equal to the nominal door torque plus a frictional torque component.

(Replaced "a sample of at least 25% of the" with "all" and removed the last sentence of this section relating to selecting door samples such that all doors are tested at least once during four test intervals.)

8.4 Testing Suppression Chamber to Drywell Vacuum Breakers (BWR)

Recommendation: (1) The monthly surveillance test should be retained. (2) The time each vacuum breaker shall be tested following any discharge of steam to the suppression chamber should be changed to 12 hours.

3/4.6.4 Vacuum Relief, Suppression Chamber-Drywell Vacuum Breakers, [BWR/5 STS] TS 4.6.4.1:

Each suppression chamber-drywell vacuum breaker shall be:

a. Verified closed at least once per 7 days.

b. Demonstrated operable:

1. At least once per 31 days and within *12* hours after any discharge of steam to the suppression chamber from the safety-relief valves, by cycling each vacuum breaker through at least one complete cycle of full travel.

(Replaced "2" with "12" hours. No change to items 2 and 3.)

8.5 Hydrogen Recombiner (PWR)

Recommendation: Change the surveillance test interval for the hydrogen recombiner functional test to once each refueling interval. [The test interval is 6 months for some plants.]

3/4.6.5 Combustible Gas Control-Electric Hydrogen Recombiners, [B&W STS (Typ)] TS 4.6.5.2:

Each hydrogen recombiner system shall be demonstrated operable:

a. (No change)

b. At least once *each refueling interval* by:

(Replaced "18 months," which is the current STS requirement for PWRs, with "each refueling interval." No change to items b.1, b.2, and b.3.)

3/4.6.7 Atmospheric Control-Containment and Drywell Hydrogen Recombiner Systems, [BWR/6] TS 4.6.7.1:

Each containment and drywell hydrogen recombiner system shall be demonstrated operable:

a. (No change.)

b. At least once *each refueling interval* by:

(Replaced " per 18 months," which is the current BWR/6 STS requirement, with "each refueling interval." No change to items b.1 through b.4.)

8.6 Sodium Tetraborate Concentration in Ice Condenser Containment Ice

Recommendation: Change the analysis interval to once each refueling interval.

3/4.6.7 Ice Condenser-Ice Bed, [W STS] TS 4.6.7.1:

The ice condenser shall be determined operable:

a. (No change.)

b. *Once each refueling interval* by chemical analyses which verify that at least nine representative samples of stored ice have a boron concentration of at least 1800 ppm as sodium tetraborate and a pH of 9.0 to 9.5 at 20 degrees-C.

(Combined item b and b.1, with the surveillance interval being "Once each refueling interval" rather than "At least once per 9 months.")

c. At least once per 9 months by:

(Renumbered item b as item c.)

(No change to items c.1 and c.2. Renumbered items b.2 and b.3 as items c.1 and c.2.)

d. (No change to this item. Renumbered item c as item d)

9.1 Auxiliary Feedwater Pump and System Testing (PWR)

Recommendation: Change frequency of testing AFW pumps to quarterly on a staggered test basis.

3/4.7 Plant Systems—Auxiliary Feedwater, [CE STS (Typ)] TS 4.7.1.2:

Each auxiliary feedwater pump shall be demonstrated operable:

a. At least once per 31 days by:

1. Verifying that each valve (manual, power-operated or automatic) in the flow path that is not locked, sealed, or otherwise secured in position, is in its correct position.

(Renumbered items a.1 and a.2 as items b.1 and b.2 below, and renumbered item a.3 as a.1.)

b. *At least once per 92 days on a staggered test basis by:*

1. Verifying that each motor-driven pump develops a discharge pressure of greater than or equal to _____psig at a flow of greater than or equal to _____gpm.

2. Verifying that the turbine-driven pump develops a discharge pressure of greater than or equal to _____psig at a flow of greater than or equal to _____gpm when the secondary steam supply pressure is greater than _____psig. The provisions of Specification 4.0.4 are not applicable for entry into MODE 3.

(Added item b. Renumbered items a.1 and a.2 as items b.1 and b.2.)

9.2 Main Steam Line Isolation Valve (MSIV) Surveillance Testing

A TS change was not recommended for this item.

9.3 Control Room Emergency Ventilation System (PWR, BWR)

Findings: (1) The Surveillance requirements for the control room emergency ventilation system contain a requirement that the control room temperature be verified every 12 hours to assure that it is less than a temperature typically in excess of 100 degrees-F. (2) This temperature limit is to ensure equipment operability and human habitability. It does not appear to be effective for either purpose.

Recommendation: Replace this requirement with a more useful surveillance or delete it if a more effective limit cannot be established.

Because the burden for verifying that the control room temperature is within its limit is not believed to be significant, no change to existing TS are proposed in response to this recommendation. However, changes to temperature limits may be proposed on a plant-specific basis to reflect the initial temperature used to calculate the control room peak temperature during a station black out event.

10.1 Emergency Diesel Generator Surveillance Requirements (PWR, BWR)

Recommendation: (1) When a EDG itself is inoperable (not including a support system or independently testable component), the other EDG(s) should be tested only once (not every 8 hours) and within 8 hours unless the absence of any potential common mode failure can be demonstrated. (2) EDGs should be loaded in accordance with the vendor recommendations for all test purposes other than the refueling outage LOOP tests. (3) The hot-start test following the 24-hour EDG test should be a simple EDG start test. If the hot-start test is not performed within the required 5 minutes following the 24-hour EDG test, it should not be necessary to repeat the 24-hour EDG test. The only requirement should be that the hot-start test is performed within 5 minutes of operating the diesel generator at its continuous rating for 2 hours or until operating temperatures have stabilized. (4) Delete the requirement for alternate testing that requires testing of EDG and other unrelated systems not associated with an inoperable train or subsystem (other than an inoperable EDG).

3/4.8.1 A.C. Sources—Operating, [Typical STS Requirements, non-vendor specific] TS 3.8.1.1, ACTIONS:

a. With an offsite circuit of the above required A.C. electrical power sources inoperable, * * *

(Delete the following requirement to test EDGs: "If either diesel generator has not been successfully tested within the past 24 hours, demonstrate its OPERABILITY by performing Surveillance Requirements 4.8.1.1.2.a.5 and 4.8.1.1.2.a.6 for each such diesel generator, separately, within 24 hours.")

b. * * * If the diesel generator became inoperable due to any cause other than *an inoperable support system or* preplanned preventive maintenance or testing, demonstrate the operability of the remaining operable diesel generator by performing Surveillance Requirements 4.8.1.1.2.a.5 and 4.8.1.1.2.a.6 within *8 hours, unless testing of an independently testable component has demonstrated the absence of any potential common mode failure for the remaining diesel generator.*

(Added the noted conditions under which testing of an EDG is not required and replaced "24 hours" with "8 hours." Remove any other requirement to perform the specified surveillances every 8 hours thereafter or to perform testing of alternate trains of other systems.)

d. With two of the above required offsite A.C. circuits inoperable, restore * * *

(Deleted the following requirement to test EDGs: "demonstrate the OPERABILITY of two diesel generators separately by performing the requirements of Specifications 4.8.1.1.2.a.5 and 4.B.1.1.2.a.6 within 1 hour and at least once per 8 hours thereafter, unless the diesel generators are already operating;")

TS 4.8.1.1.2:

a. In accordance with the frequency specified in Table 4.8–1 on a staggered test basis by:

(6) Verifying the generator is synchronized, loaded to greater than or equal to [continuous rating] kW in *accordance with the manufacturer's recommendations*, and operates with a load greater than or equal to [continuous rating] for at least 60 minutes, and

(Replaced "less than or equal to [60] seconds" with "accordance with the manufacturer's recommendations.")

e. At least once per 18 months, during shutdown, by:

(7) Verifying the diesel generator operates for at least 24 hours. * * * Within 5 minutes after completing this 24-hour test, perform Specification *4.8.1.1.2.a.5);* * * *.

(Replaced TS "4.8.1.1.2.e.6).b)" [simulated loss-of-offsite power start and load test] with "4.8.1.1.2.a.5)" [EDG start test].)

*If Specification *4.8.1.1.2.a.5)* is not satisfactorily completed, it is not necessary to repeat the preceding 24-hour test. Instead, the diesel generator may be operated at [continuous rating] kW for *2 hours* or until operating temperature has stabilized.

(Replaced the reference to TS "4.8.1.1.1.e.6).b)" with "4.8.1.1.2.a.5)" and replaced "1 hour" with "2 hours." This footnote may be added if it does not exist in plant TS.)

TS (Plant-specific):

Where plant TS require the testing of the one train (EDG, system, or subsystem) when an alternate train, system, or subsystem (other than an EDG) is inoperable, such requirements may be removed from plant TS.

10.2 Battery Surveillance Requirements (PWR, BWR)

A TS change was not recommended for this item.

11 Refueling

A TS change was not recommended in this area.

12 Special Test Exceptions

Suspending Shutdown Margin Requirements (PWR)

Recommendation: All PWR licensees may select the Florida Power and Light Co. (FP&L) proposal to eliminate one rod drop test if they satisfy the condition of performing a rod drop test no more than 7 days before reducing shutdown margin. If a rod drop test has been performed within this time, another test is not necessary.

3/4.10 Special Test Exceptions—Shutdown Margin, [FP&L TS (Typ)] TS 4.10.1.2:

Each CEA not fully inserted shall be demonstrated capable of full insertion when tripped from at least the 50% withdrawn position within *7 days* prior to reducing the shutdown margin to less than the limits of Specification 3.1.1.1.

(Replaced "24 hours" with "7 days.")

13 Radioactive Effluents

Waste Gas Storage Tanks (PWR)

Recommendation: The surveillance requirement for the limit on the number of curies in the waste gas tank should be changed to: "The quantity of radioactive material contained in each waste gas decay tank shall be determined to be within the limit at least once every 7 days whenever radioactive materials are added to the tank, and at least once every 24 hours during primary coolant system degassing operations."

3.11 Radioactive Effluents—Gas Storage Tanks, [W STS (Typ)] TS 4.11.2.6:

The quantity of radioactive material contained in each gas storage tank shall be determined to be within the above limit at least once per *7 days* when radioactive materials are added to the tank *and at least once per 24 hours during primary coolant system degassing operations.*

(Replaced "24 hours" with "7 days" and added the new requirement for performing surveillance "at least once per 24 hours during primary coolant system degassing operations.")

14 Conclusions

General Recommendations

Items (1) through (3) of the General Recommendations did not include any recommendations for changes to technical specifications.

(4) Section 4.0.2 of the Technical Specifications, which allows the extension of a surveillance test interval, should be made applicable to Section 4.0.5 concerning the ASME Code testing in those Technical Specifications which presently do not allow Section 4.0.2 to be applied.

3/4.0 Applicability [All STS (Typ)] TS 4.0.5 (c):

(c) The provisions of Specification 4.0.2 are applicable to the above required frequencies for performing inservice inspection and testing activities.

For plants with custom TS, the reference to TS 4.0.2 should be replaced with the applicable TS section that allows surveillance intervals to be extended by 25 percent of the specified interval. In addition, the term "above" may be deleted from the reference to the "required frequencies for performing inservice inspection and testing activities." Finally, if plant TS do not include a general specification (TS 4.0.5) on inservice inspection and testing, a new numbered general specification requirement should be proposed based on the STS model specification (TS 4.0.5), or the following statement should be proposed for addition to the specification that allows surveillance intervals to be extended by 25 percent of the specified interval:

This provision is applicable to the required frequencies for performing inservice inspection and testing of ASME Code Class 1, 2, and 3 components, pumps, and valves in accordance with Section XI of the ASME Boiler and Pressure Vessel Code and applicable addenda as required by 10 CFR part 50, § 50.55a(g).

[FR Doc. 93-7398 Filed 3-30-93; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-344]

Portland General Electric Company, Trojan Nuclear Plant; Confirmatory Order Modifying License (Effective Immediately), License No. NPF-1

I

Portland General Electric Company (PGE, the licensee) is the holder of Facility Operating License No. NPF-1 issued by the U.S. Nuclear Regulatory Commission (the NRC) pursuant to 10 CFR part 50 on November 21, 1975. The license authorizes the operation of the Trojan Nuclear Plant (the facility) at steady-state power levels not to exceed 3411 megawatts thermal. The facility consists of a pressurized water reactor (PWR) and supporting systems located at the licensee site in Columbia County, Oregon.

II

On January 4, 1993, the Directors of PGE voted to accept the recommendation by PGE management to permanently cease power operations at the Trojan Nuclear Plant. The facility had been shut down since November 9, 1992, when a leak in the "B" steam generator was detected. PGE began defueling the reactor on January 23, 1993, and completed the movement of all fuel elements to the spent fuel pool on January 27, 1993. Since the vote on January 4, 1993, PGE has decided to decommission the facility. On January 27, 1993, the licensee submitted, to the NRC, an amendment request for a Possession-Only License.

At the end of January 1993, PGE gave 60-day notice of termination of employment to approximately 45 percent of its operating and support staff. The licensee assured the NRC that it would ensure adequate staffing to conform to the requirements of its current license for the shutdown condition. PGE is also proceeding with plans to discontinue customary maintenance on equipment necessary to support operations other than that needed to safely store fuel in the spent fuel pool.

III

The NRC has determined that the public health and safety require that the licensee not return fuel to the reactor vessel because the licensee is currently revising its procedures to no longer require the maintenance of structures, systems, or components in a condition that would allow power operation. As revised, the procedures would only encompass structures, systems, or components required to be maintained during the current defueled mode 6 condition of the facility, and would not cover, for example, the reactor coolant system, the reactor protection system and the safety injection system.

Additionally, the licensee notified the NRC on January 14, 1993 and February 11, 1993, that they are withdrawing certain commitments made to the staff. These commitments included system upgrades, analyses, and revisions to procedures necessary for power operations. As a result of the permanent cessation of operations at the facility, the licensee no longer plans to complete the system upgrades, perform the analyses, or revise the procedures.

If PGE were to place nuclear fuel into the reactor vessel, this could result in a core criticality and the production of power. Should this occur after the end of March 1993, there may not be a sufficient number of adequately trained personnel to control operation. In addition, if the licensee begins to curtail maintenance of systems needed for operation of the facility, as currently planned, it is questionable whether

necessary safety equipment would be available to ensure the protection of the public health and safety.

On January 27, 1993, the licensee submitted a letter notifying the NRC that PGE decided to permanently cease power operations at the Trojan Nuclear Plant. On February 2, 1993, the licensee also submitted a letter to the NRC informing the staff that as of January 27, 1993, all reactor fuel had been moved to the spent fuel storage facility. In a letter of February 17, 1993, the licensee requested that a condition be placed in the Trojan Nuclear Plant Operating License that prohibits the movement of new or spent fuel into the reactor building without prior NRC approval. In that letter, the licensee committed to not move new or spent fuel into the reactor building without prior NRC approval. I find the licensee commitment as stated in its letter of February 17, 1993, acceptable and necessary and conclude that with this commitment plant safety is reasonably assured.

In view of the foregoing, I have determined that the public health and safety require the licensee commitment not to move new or spent fuel into the reactor building without prior NRC approval be confirmed by this Order. The licensee has agreed to this action pursuant to 10 CFR 2.202. I have also determined based on the licensee consent and on the significance of this prohibition, that the public health and safety require that this Order be effective immediately.

IV

Accordingly, pursuant to Sections 103, 161b, 161i, of the Atomic Energy Act of 1954, as amended, and the Commission regulations in 10 CFR 2.202 and 10 CFR part 50, it is hereby *Ordered*, effective immediately, that Facility Operating License No. NPF-1 is modified as follows:

The licensee is prohibited from placing any nuclear fuel into the Trojan Nuclear Plant reactor building without prior approval in writing from the NRC. This Confirmatory Order in no way relieves the licensee of the terms and conditions of its operating license.

V

Any person adversely affected by this Confirmatory Order, other than the licensee, may request a hearing within 20 days of its issuance. Any request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Chief, Docketing and Service Section. Copies of the hearing request also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Hearings and Enforcement at the same address, and the Regional Administrator, NRC Region V, at 1450 Maria Lane, suite 210, Walnut Creek, California 94596, and to the licensee. If such a person requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria in 10 CFR 2.714(a).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), (57 FR 20194) May 12, 1992, any person other than the licensee adversely affected by this Order, may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, the provisions specified in Section IV above shall be final 20 days from the date of this Order without further order or proceedings. An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated at Rockville, Maryland this 24th day of March 1993.

For the Nuclear Regulatory Commission.

Thomas E. Murley,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 93-7397 Filed 3-30-93; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-271]

Vermont Yankee Nuclear Power Corp.; Withdrawal of Application for Amendment to Facility Operating License

The United States Nuclear Regulatory Commission (the Commission) has granted the request of Vermont Yankee Nuclear Power Corporation to withdraw its December 15, 1992, application for proposed amendment to Facility Operating License No. DPR-28 for the Vermont Yankee Nuclear Power Station, located in Vernon, Vermont.

The proposed amendment would have revised the plant technical specifications to allow a one time extension of the 7-day allowed outage time to 14 days for the 'B' diesel generator during the current operating cycle.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on January 21, 1993 (58 FR 5435).

For further details with respect to this action, see the application for amendment dated December 15, 1992, and the licensee's letter dated March 9, 1993, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, 20555 and the local public document room, located at the Brooks Memorial Library, 224 Main Street, Brattleboro, Vermont 05301.

Dated at Rockville, Maryland this 25th day of March, 1993.

For the Nuclear Regulatory Commission

Daniel H. Dorman,

Project Manager, Project Directorate I-3, Division of Reactor Projects-I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 93-7396 Filed 3-30-93; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-32047; File No. SR-AMEX-93-03]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change; American Stock Exchange, Inc.

March 25, 1993.

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 January 19, 1993, the American Stock Exchange, Inc. ("AMEX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The AMEX proposes to continue to waive the imposition of transaction charges until March 31, 1993, for any

transactions executed on the Exchange in either the Index Trust SuperUnit or Money Market SuperUnit, and, to similarly waive the imposition of transaction charges for 90 days to commence on the first day of trading of Standard & Poor's Corporation ("S&P") Depository Receipts ("SPDRs") on the Exchange.

The text of the proposed rule change is available at the Office of the Secretary, AMEX, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and statutory basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The 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

(1) Purpose

On November 6, 1992, trading commenced in Index Trust SuperUnits and Money Market Trust SuperUnits (collectively "SuperUnits").[1] With trading volume by floor professionals and off-floor accounts extremely light, in late November, 1992, the Exchange waived its imposition and collection of transaction charges ("TCs") for orders executed on the Exchange for all accounts (*i.e.*, accounts of floor traders, specialists, and customer and firm propriety off-floor orders) through the close of business on December 31, 1992.[2] Since trading volume remains light, the Exchange now proposes to continue to waive its imposition and collection of TCs as noted above until March 31, 1993.

The AMEX is presently trading SPDRs in minimum increments of 1/32's resulting in the tightest possible trading differential.[3] Accordingly, transaction costs could be a meaningful factor in encouraging or deterring trading in this product. Therefore, the Exchange has determined to waive its imposition and collection of transaction charges for SPDRs orders executed on the Exchange for all accounts, *i.e.*, accounts of floor traders, specialists, and customer and firm proprietary off-floor orders. This waiver will extend for 90 days after the commencement of trading SPDRs.

(2) Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act, in general, and furthers the objectives of section 6(b)(4), in particular, in that the waiver of transaction charges will benefit all market participants who choose to trade SuperUnits and/or SPDRs.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The AMEX believes that the proposed rule change will not impose a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Since the proposed rule change concerns changing a fee or other charge imposed by the AMEX, it has become effective immediately upon filing pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4 thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any 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. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by April 21, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-7441 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-M

[1] See Securities Exchange Act Release No. 30394 (February 21, 1992), 57 FR 7409 (approving File No. SR-AMEX-90-06).

[2] See Securities Exchange Act Release No. 31869 (February 17, 1993), 58 FR 11078.

[3] See Securities Exchange Act Release Nos. 31794 (February 5, 1993), 56 FR 7272 (approving File No. SR-AMEX-92-45) and 31591 (December 18, 1992), 57 FR 60253 (approving File No. SR-AMEX-92-18).

[4] 17 CFR 200.30-3(a)(12) (1992).

[Release No. 34-32039; File Nos. SR-Amex-93-07; SR-BSE-93-08; SR-MSE-93-03; SR-NASD-93-11; SR-NYSE-93-13; SR-PSE-93-04; and SR-Phlx-93-09]

Self-Regulatory Organizations; The American Stock Exchange, et al.

March 23, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that the above mentioned self-regulatory organizations filed with the Securities and Exchange Commission ("Commission") the proposed rule changes as described in Items I, II, and III below, which Items have been prepared primarily by the self-regulatory organizations.[2] The

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] The proposed rule changes were filed with the Commission as follows: The American Stock Exchange ("Amex") on February 22, 1993; the Boston Stock Exchange ("BSE") on February 9, 1993; the Midwest Stock Exchange ("MSE") on February 17, 1993; the National Association of Securities Dealers ("NASD") on March 1, 1993; the New York Stock Exchange ("NYSE") on March 4, 1993; the Pacific Stock Exchange ("PSE") on March 5, 1993; and the Philadelphia Stock Exchange ("Phlx") on March 5, 1993. The PSE's and BSE's proposed rule changes as originally filed were designated as filings of the Boston Stock Exchange Clearing Corporation and the Pacific Clearing Corporation, respectively. On March 17, 1993, and March 18, 1993, the PSE and the BSE, respectively, amended their proposed rule changes to designate the rule changes as filings of the exchanges. Letter to Jack Drogin, Special Counsel, Division of Market Regulation, Commission, from Michael D. Pierson, Market Regulation, PSE, dated March 17, 1993; and

Continued

Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organizations' Statement of the Terms of Substance of the Proposed Rule Changes

The Amex, BSE, MSE, NASD, NYSE, PSE, and Phlx ("self-regulatory organizations" or "SROs") herewith are filing proposed rule changes regarding book-entry settlement that would require, subject to certain exceptions set forth in the texts of the rules, book-entry settlement of transactions between member firms and between member firms and their clients where settlement is effected on a delivery-versus-payment ("DVP") or receipt-versus-payment ("RVP") basis. The text of the proposed rule is attached as Exhibit A.

II. Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis For, the Proposed Rule Changes

In their filings with the Commission, the SROs included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule changes. The texts of these statements may be examined at the places specified in Item IV below. The SROs have prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organizations' Statement of the Purpose and Statutory Basis for, the Proposed Rule Changes

The proposed rule changes are intended to serve as a key element in the implementation in the United States ("U.S.") of the recommendation of the Group of Thirty, U.S. Working Committee ("Committee"), Clearance and Settlement Project ("Project"), regarding book-entry settlement of securities transactions.[3] The proposed rule changes were submitted to the Commission by each SRO in conjunction with substantially similar rule filings by the other SROs.[4]

In connection with the Project, the Committee has recommended that settlements and other movements of corporate and municipal securities, for transactions among financial intermediaries (brokers, dealers, and banks) and between financial intermediaries and their institutional clients, be effected only by book-entry movements within a depository.[5] The proposed rules would implement such a book-entry settlement requirement, subject to certain exceptions discussed below, resulting in book-entry settlement for transactions in depository-eligible securities between SRO members and their clients where settlement is effected on a DVP or RVP basis. Approval of the book-entry settlement rule proposals therefore would ensure that the vast majority of securities transactions effected in the U.S. markets will be settled by book-entry.

The proposed rules will not apply to or affect the manner in which member firms settle transactions with traditional retail customers, settlement of transactions in securities that are not depository-eligible, or transactions in which settlement occurs outside the U.S. The proposed rules also make exceptions for transactions for same-day settlement where the deliverer cannot by reasonable efforts deposit the securities prior to a depository's cut-off time for same-day crediting of deposited securities and other special transactions where the deliverer cannot by reasonable efforts deposit the securities prior to a cut-off date that is established by a depository.[6] The latter exception is intended to address corporate reorganizations and other extraordinary activities where a deliverer is unable by reasonable efforts to meet a depository's established delivery cut-off time.

The Committee's recommendation regarding book-entry settlement is one of several Committee recommendations which are directed toward reducing risk in the U.S. national market system. The book-entry settlement recommendation also was supported strongly by the Bachmann Task Force in its recent report submitted to the Chairman of the Commission.[7] In order to provide broker-dealers with sufficient time to implement internal systems and procedures for compliance with these requirements, the proposed rule would become effective sixty days after Commission approval.

The SROs believe that the proposed rule changes are consistent with section 6(b)(5) of the Act,[8] which provides that the rules of a national securities exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest. The proposed rule is designed to reduce the number of transactions in depository-eligible securities for which settlement is effected by the delivery of physical securities. By requiring that transactions between member firms and transactions between member firms and clients that settle on a DVP or RVP basis occur (with rare exceptions) in a book-entry environment, the efficiency of the U.S. clearance and settlement system will be enhanced and the potential for systemic risk will be reduced.

B. Self-Regulatory Organizations' Statement on Burden on Competition

The SROs believe that the proposed rule changes will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organizations' Statement on Comments on the Proposed Rule Change Received From Members.

The SROs have neither solicited nor received comments on the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the SROs consent, the Commission will:

---

letter to Jack Drogin from Karen A. Aluise, Attorney, BSE, dated March 18, 1993.

[3] The Group of Thirty is an independent, non-partisan, non-profit organization established in 1978. In 1988, the Group of Thirty initiated a project to improve the state of risk, efficiency and cost in the world's clearance and settlement systems. See Implementing the Group of Thirty Recommendations in the United States, I–1 (November 1990).

[4] The proposed rule changes were developed through the efforts of the Committee's Legal and Regulatory Subgroup, which included representatives of the Amex, MSE, NASD, NYSE, Phlx, the National Securities Clearing Corporation, The Depository Trust Company, the Municipal Securities Rulemaking Board, and the Commission's Division of Market Regulation.

[5] Implementing the Group of Thirty Recommendations in the United States, Supra note 3, at 1, 2.

[6] With respect to the exception for transactions for same-day settlement, the NASD's proposed rule change omits the phrase "reasonable efforts" and only allows the exception where the deliverer cannot deposit the securities prior to a depository's cut-off time for same-day crediting of deposited securities and for other special transactions where the deliverer cannot deposit the securities prior to a cut-off date that is established by a depository. The NASD's proposed rule still will require transactions between member firms and transactions between member firms and clients that settle on a DVP or RVP basis to occur (with rare exceptions) in a book-entry environment.

[7] Bachmann Task Force on Clearance and Settlement Reform in U.S. Securities Markets, Report Submitted to the Chairman of the Securities and Exchange Commission (May 1992).

[8] 15 U.S.C 78f(b)(5) (1988).

(A) By order approve such proposed changes or

(B) Institute proceedings to determine whether the proposed rule changes should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the 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, N.W., Washington, D.C. 20549. Copies of such filings also will be available for inspection and copying at the principal offices of the above-mentioned SROs. All submissions should refer to the file numbers in the caption above and should be submitted by April 21, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

Exhibit A—Book-Entry Settlement

(a) A member, member organization, or affiliated member shall use the facilities of a securities depository for the book-entry settlement of all transactions in depository eligible securities with another financial intermediary or a member of a national securities exchange or a registered securities association.

(b) A member, member organization, or affiliated member shall not effect a delivery-versus-payment or receipt-versus-payment transaction in a depository-eligible security with a customer unless the transaction is settled by book-entry using the facilities of a securities depository.

(c) For purposes of this rule, the term "securities depository" shall mean a securities depository registered as a clearing agency under Section 17A of the Securities Exchange Act of 1934.

(d) The term "depository-eligibile securities" shall mean securities that (i) are part of an issue (as identified by a single CUSIP number) of securities that is eligible for deposit at a securities depository and (ii) with respect to a particular transaction, are eligible for book-entry transfer at the depository at the time of settlement of the transaction.

(e) This rule shall not apply to transactions that are settled outside of the United States.

(f) The requirements of this rule shall supersede any inconsistent requirements of the [name of SRO].

(g) This rule shall not apply to any transaction where the securities to be delivered in settlement of the transaction are not on deposit at a securities depository and

(i) If the transaction is for same-day settlement, the deliverer cannot be reasonable efforts deposit the securities in a securities depository prior to the cut-off time established by the depository for same-day crediting of deposited securities, or

(ii) The deliverer cannot be reasonable efforts deposit the securities in a depository prior to a cut-off date established by the depository for that issue of securities.

[FR Doc. 93-7443 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-M

[9] 17 CFR 200.30-3(a)(12) (1991).

[Release No. 34-32048; File No. SR-NYSE-93-04]

Self-Regulatory Organizations; Filing of Proposed Rule Changes, New York Stock Exchange, Inc.

March 25, 1993.

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 January 15, 1993, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule changes as described in Items I, II, and III below, which Items have been prepared by the NYSE. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Changes

The Exchange proposes to amend NYSE Rules 700 (Applicability, Definitions and References) and 703 (Series of Options Open for Trading) to introduce for trading index options that will expire on the second business day following the end of each calendar quarter ("End-of-quarter Options" or "QIXs"). The Exchange seeks approval to list QIX options on the NYSE Composite Stock Index ("NYA").

The text of the proposed rule changes is available at the Office of the Secretary, NYSE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The NYSE 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 the Statutory Basis for, the Proposed Rule Changes

(1) Purpose

In response to the proliferation of over-the-counter ("OTC"), non-exchange traded options, and in order to accommodate institutional investors whose performance is judged on a quarterly basis, the Exchange is proposing to list index stock group options that expire on the second business day following the end of each calendar quarter, rather than the customary expiration date of "the Saturday immediately following the third Friday of the expiration month." For example, if the proposed QIX options were listed on the Exchange at present, the next three expiration dates would be April 2, 1993, July 2, 1993, and October 4, 1993. The exercise settlement value for QIXs will be based on the opening value of the corresponding index on the business day prior to expiration, or, in other words, at the opening of business on the first business day following the end of a calendar quarter. If a component stock does not open, the prior closing price will be used to calculate the exercise settlement value.

The Exchange proposes to settle QIX options based on the opening prices of an index stock groups component stocks rather than the closing prices. The Exchange feels that the use of opening prices is the best strategy for addressing widely-held concerns about the actual and potential impact of derivative products on the pricing mechanism and integrity of the stock market. The Exchange believes that the use of opening prices diverts order flow away from the close of trading and therefore avoids the order imbalance and concomitant price volatility that historically accompanies the close of trading on index option expiration dates.

In addition, by moving the order imbalance to the morning, the Exchange imposes its time-tested opening procedures, which provide a mechanism for handling the stock volume that accompanies the expiration of an index option. Experience has shown that those procedures, and in particular, the early collection and dissemination of order imbalances, provide market participants with sufficient opportunity to evaluate the unique impact of index-related orders and to react accordingly. The NYSE believes that the use of opening prices generally reduces the potential impact of order imbalances on specialists and other market participants.

Having determined the propriety of opening values rather than closing values, the NYSE next determined to propose the use of opening values on the first business day subsequent to the end of a calendar quarter, rather than opening values for the last business day of a calendar quarter. The additional day provides the investor with an opportunity to roll out of, or to close out, a position at the end of a calendar quarter. This ability to roll out of, or to close out, a position at the end of a calender quarter, rather than a day earlier, has meaning because QIX options are designed to allow institutions to hedge over the full calendar quarter. At this time, the Exchange proposes to list QIX options on the NYA with the symbol of "NYE," and intends to list up to eight series for trading. In addition, the Exchange proposes to retain the flexibility to assign an index multiplier for QIX options of as much as 500 rather than the customary 100 so as to allow the Exchange to accommodate the needs of portfolios of the size that the Exchange expects to make use of QIX options. Aside from the expiration dates and multiplier, contract terms for traditional options on an index stock group will apply for QIX options on that index stock group. For example, traditional and QIX options on the same index stock group will have the same exercise style (*i.e.*, American or European).

Similarly, position and exercise limits that apply to traditional options on an index stock group will also apply to QIX options on that index stock group. However, in order to equalize positions to account for differences in index multipliers, the Exchange proposes to require adjustment to the number of QIX option contracts used for the purposes of calculating exercise and position limits for options on an index stock group. That is, one must multiply the number of QIX option contracts by the index multiplier and divide that product by 100 in order to arrive at the number of QIX options to be used in the position limit calculation. For example, if the Exchange sets the index multiplier for a QIX option on the NYA at 500, it would multiply the number of contracts on that index by five (*i.e.*, the 500 index multiplier divided by 100 = 5) for the purposes of position and exercise limit calculations. In addition, QIX options will be aggregated with positions in other NYSE-traded option contracts on the same index stock group for position and exercise limit purposes.

(2) Basis

The Exchange believes that the proposed rule changes are consistent with section 6(b) of Act, in general, and furthers the objectives of section 6(b)(5), in particular, in that they are designed to promote just and equitable principles of trade and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NYSE believes that the proposed rule changes do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Changes Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule changes, or

(b) Institute proceedings to determine whether the proposed rule changes should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 the NYSE. All submissions should refer to the file number in the caption above and should be submitted by April 21, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[1]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–7442 Filed 3–30–93; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–32045; File No. SR–NYSE–92–36]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change Relating to an Amendment to Enhance Specialist Performance Standards

March 24, 1993.

On December 23, 1992, the New York Stock Exchange, Inc., ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Rule 103A to enhance performance standards relating to the turnaround time for specialists' handling of Designated Order Turnaround ("DOT") system orders.[3]

The proposed rule change was published for comment in Securities Exchange Act Release No. 31760 (January 25, 1993), 58 FR 6650 (February 1, 1993). No comments were received on the proposal.

NYSE Rule 103A specifies performance standards for specialists, and provides for the initiation of a

[1] 17 CFR 200.30–3(a)(12)(1992).

[1] 15 U.S.C. 78s(b)(1) (1938).

[2] 17 CFR 240.19b–4 (1991).

[3] The NYSE's DOT system (also known as Super Dot) was developed by the NYSE to facilitate the routing of orders from NYSE members' offices to specialists on the NYSE floor.

formal "Performance Improvement Action" in any case where a specialist unit does not meet a performance standard specified in the rule.[4] Rule 103A has historically contained performance standards applicable to the handling of orders received by specialists by means of the DOT system.[5]

Effective with the second quarter of 1993, the Exchange proposes to implement a new DOT turnaround standard for specialists. The current standard requires a specialist unit to turn around 90% of its DOT orders in two minutes during any two quarters in a "rolling" four quarter period. The Exchange proposes to raise this standard by requiring specialist units to turn around 90% of their DOT orders in one minute during any two quarters in a "rolling" four quarter period.

Rule 103A requires that any modification of existing standards be communicated to the membership at least one quarter before it is actually implemented.[6] The Exchange states that it notified the membership prior to the first quarter of 1993 of its intention to implement the revised turnaround standard as of the beginning of the second quarter of 1993.[7]

The Exchange also is seeking the Commission's approval at this time to adopt a 30-second turnaround performance standard for implementation at some appropriate future date. The Exchange states that it will provide both the Commission and its membership with at least one quarter's notice before implementation of the 30 second standard.

The Exchange states that the basis under the Act for this proposed rule change is the requirement under section 6(b)(5) that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed amendments to Rule 103A are consistent with these objectives in that they are intended to promote timely, efficient and high quality specialist performance in the handling and servicing of market orders received by means of the Exchange's automated order routing system.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of sections 6(b)(5) and 11(b) of the Act.[8] The Commission believes that the NYSE's proposal is consistent with the section 6(b)(5) requirement that the rules of an exchange be designed to promote just and equitable principles of trade, to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also believes that the proposal is consistent with section 11(b) of the Act, and Rule 11b–1 thereunder,[9] which allow securities exchanges to promulgate rules relating to specialists in order to maintain fair and orderly markets and to remove impediments to and protect the mechanism of a national market system. The proposal upholds the Exchange's objective to promote the maintenance of fair and orderly markets because it enhances the Exchange's ability to evaluate specialist performance and when warranted take appropriate action to improve such performance.[10]

The Commission fully supports and encourages the NYSE's continuing efforts to develop meaningful and effective evaluation criteria that encourage improved specialist performance and market quality. The Commission believes it is important to market quality that the Exchange have accurate and comprehensive measures of specialist performance. These specialist performance measures are especially important in light of the significant role played by the NYSE specialist in providing stability and liquidity to exchange markets.

The Commission believes that the NYSE proposal should enhance specialist performance and market quality by increasing specialist performance standards for the turnaround of DOT orders from a requirement of 90% turnaround in two minutes to a 90% turnaround in one minute and, in the future, to a 90% turnaround in 30 seconds during any two quarters in a rolling four quarter period. The Commission believes that the revised standards more accurately reflect current industry practice and would encourage the Exchange to consider adopting the 30 second turnaround time as soon as practicable. In this regard, the NYSE has stated that, on average, DOT orders are turned around in 28 seconds.[11] Moreover, the enhanced specialist performance standards should increase the level of customer service provided by NYSE member organizations by promoting quicker turnaround of customer orders. This, in turn, should promote certainty in the status of customer orders and promote efficiency in the marketplace.

The Commission recognizes that although the NYSE intends to implement the one minute turnaround standard upon approval of this proposed rule change, the NYSE's proposal to adopt a 30 second turnaround performance standard will be implemented at a future date.[12] The NYSE has stated, however, that it would provide both the Commission and the Exchange membership with at least one quarter's notice prior to implementation of the 30 second standard.[13] In addition to the one quarter notice, the Commission requests that the NYSE submit notice of its intent to implement the 30 second standard in the form of a proposed rule change for immediate effectiveness upon filing, pursuant to section 19(b)(3)(A) of the Act[14] and subparagraph (e) of Securities Exchange Act Rule 19b–4,[15] as a proposal constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or

[4] NYSE Rule 103A grants authority to the Exchange's Market Performance Committee ("MCP") to develop and administer systems and procedures, including the determination of appropriate standards and measurements of performance, designed to measure specialist performance and market quality. Specialist performance is reviewed on a periodic basis to determine whether or not particular specialist units need to take action to improve their performance. Based on such determinations, the MPC is authorized to conduct a formal Performance Improvement Action in an appropriate case and where warranted take appropriate action, such as: notifying the unit in writing that its performance needs to be improved, informing the unit in writing of measurable goals that the unit will be expected to achieve to improve its performance, imposing an allocation freeze, and initiating a reallocation proceeding.

[5] The Exchange's current evaluation criteria under Rule 103A.10 include objective standards that measure specialist performance at the opening (both regular and delayed), the timeliness of a unit's response to status requests, as well as DOT order turnaround. Specialist performance also is measured by the Exchange's Specialist Performance Evaluation Questionnaire.

[6] *See* NYSE Rule 103A.30.

[7] *See* Memorandum from Catherine R. Kinney, Executive Vice President, Equities/Audit, NYSE and Edward Kwalwasser, Executive Vice President, Regulation, NYSE, to Members and Member Organizations, dated December 29, 1992.

[8] 15 U.S.C. 78f(b)(5) and 78k(b) (1988).

[9] 17 CFR 240.11b–1 (1992).

[10] *See supra* note 4.

[11] Telephone conversation between Don Siemer, NYSE, and Diana Luka-Hopson, Commission, on March 9, 1993.

[12] As noted above, we would encourage the NYSE to consider adopting the more stringent standard, after it has had some experience with the 60 second turnaround time structure.

[13] NYSE Rule 103A.30 requires that any modifications, deletions, or additions to Rule 103A be communicated to the membership at least one quarter before they are implemented.

[14] 15 U.S.C. 78s(b)(3)(A) (1988).

[15] 17 CFR 240.19b–4(e) (1991).

enforcement of an existing rule of the self-regulatory organization. In this way, the NYSE will provide notice of the implementation of the new standard to public customers and investors.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act,[16] that the proposed rule change (SR–NYSE–92–36) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–7359 Filed 3–30–93; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–19355; 812–8156]

American Capital Government Target Series, et al.; Notice of Application

March 25, 1993.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: American Capital Government Target Series ("Trust") and American Capital Asset Management, Inc. ("Adviser").

RELEVANT ACT SECTIONS: Order requested under section 17(b) for an exemption from section 17(a), and under rule 17d–1(b) to permit a joint transaction otherwise prohibited by section 17(d) and rule 17d–1(a).

SUMMARY OF APPLICATION: Applicants seek an order that would permit one of the Trust's two portfolios to acquire all of the assets and assume all of the liabilities of the Trust's other portfolio.

FILING DATE: The application was filed on November 10, 1992, and amended and restated on January 25, 1993 and March 15, 1993.

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 April 19, 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 notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, DC 20549. Applicants, c/o American Capital Asset Management, Inc., 2800 Post Oak Blvd., Houston, Texas 77046.

FOR FURTHER INFORMATION CONTACT: Barry A. Mendelson, Senior Attorney, at (202) 504–2284, 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 at the SEC's Public Reference Branch.[1]

Applicants' Representations

1. The Trust was organized on June 14, 1990 as a Massachusetts business trust. The Trust is registered under the Act as an open-end, diversified, management investment company. The Trust is comprised of two investment portfolios: Portfolio '97 and Portfolio '98 (the "Portfolios"). The Adviser provides investment advisory, administrative, and management services to the Portfolios.

2. Portfolio '97 and Portfolio '98 have the same investment objectives and policies, the same fee structure, and similar investment portfolios. Both Portfolios invest at least 80% of their assets in obligations issued or guaranteed by the United States government or its agencies or instrumentalities. The only substantive difference between the two Portfolios is the liquidation date. Portfolio '97 is scheduled to liquidate on December 16, 1997; Portfolio '98 is scheduled to liquidate on May 1, 1998.

3. Amalgamated Bank of New York ("Amalgamated"), in its capacity as custodian for certain pension funds and trusts that own shares of the Portfolios, owned of record as of December 31, 1992 approximately 25% of the outstanding shares of Portfolio '97 and 47% of the outstanding shares of Portfolio '98. American Capital Trust Company ("ACTC"), an affiliate of the Adviser, in its capacity as custodian for certain retirement accounts that own shares of the Portfolios, owned of record as of December 31, 1992 approximately 13% of the outstanding shares of Portfolio '97 and 19% of the outstanding shares of Portfolio '98. Amivest Corporation ("Amivest"), in its capacity as investment adviser to certain pension and trust funds that own shares of the Portfolios (and with authority to vote those shares, subject to the ultimate supervision of its clients), arguably controlled as of December 31, 1992 approximately 51% of the outstanding shares of Portfolio '97 and 47% of the outstanding shares of Portfolio '98.

4. The trustees of the Trust, including a majority of those trustees who are not "interested persons" of the Trust ("Disinterested Trustees"), have approved a Plan of Reorganization ("Plan") pursuant to which Portfolio '97 will acquire all of the assets and assume all of the liabilities of Portfolio '98. The net asset value of the shares Portfolio '97 issues in the exchange will equal the net asset value of the shares of Portfolio '98 then outstanding. Each shareholder of Portfolio '98 will receive that number of full and fractional shares of Portfolio '97 equal in value as of the date of the exchange to the value of such shareholder's shares of Portfolio '98.

5. The Trust will submit the proposed Plan to the shareholders of Portfolio '98 for their approval at a meeting called for that purpose. A majority of the outstanding shares of Portfolio '98 will be required to approve the acquisition.

6. The proposed reorganization will result in an increase in the asset size of Portfolio '97. The Trust expects that, to the extent expenses remain relatively fixed and do not vary with asset size, this increase will result in economies of scale to the benefit of all shareholders of the combined Portfolio. The proposed reorganization will facilitate management of the Trust, and should result in a decrease in certain expenses, including brokerage and research costs, audit fees, and general administrative costs.

7. The proposed transaction will not have adverse tax consequences for the shareholders. No gain or loss will be recognized by Portfolio '98 or its shareholders as a result of the reorganization, and applicants will receive an opinion of tax counsel to this effect before consummating the reorganization.

8. The Adviser will pay all of the direct and indirect expenses of the proposed transaction.

Applicants' Legal Analysis

1. Under section 2(a)(3) of the Act, one person is an "affiliated person" of another person if, among other things: the person directly or indirectly owns, controls, or holds with power to vote 5% or more of the other person's

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[16] 15 U.S.C. 78s(b)(2) (1988).

[17] 17 CFR 200.30–3(a)(12) (1991).

[1] This notice supersedes a previous notice, Investment Company Act release No. 19191 (Dec. 29, 1992), that summarized the initial application filed on November 10, 1992. After publication of that notice, applicants advised the SEC staff that certain relevant facts were inadvertently omitted from the initial application. Applicants subsequently amended the application.

outstanding voting securities; 5% or more of the person's outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; or the person directly or indirectly controls, is controlled by, or is under common control with the other person.

2. The Portfolios would be affiliated persons of one another if they are deemed to be under "common control." The Portfolios could be deemed to be under common control because they have common trustees and officers, and a common investment adviser. The Portfolios also could be deemed to be under the common control of Amivest. In addition, Amalgamated and ACTC, by virtue of their record ownership of more than 5% of the Portfolios' stock, arguably are affiliated persons of each Portfolio, and each Portfolio arguably is an affiliated person of Amalgamated and ACTC. If so, Portfolio '97 would be an affiliated person of an affiliated person of Portfolio '98, and vice-versa.

3. Section 17(a) of the Act, in relevant part, prohibits any affiliated person of a registered investment company, or any affiliated person of such a person, from knowingly selling to or purchasing from such investment company any security or other property.

4. Rule 17a-8 under the act exempts from the prohibitions of section 17(a) mergers, consolidations, or purchases or sales of substantially all of the assets involving registered investment companies which may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers. Because the Portfolios may be affiliated with one another other than through their adviser, directors, and officers, applicants may not rely on rule 17a-8. Nevertheless, applicants have agreed to comply with the substantive requirements of the rule. Specifically, the trustees of the Trust, including a majority of the Disinterested Trustees, have determined that the proposed reorganization will be in the best interest of the shareholders of each Portfolio and will not result in the dilution of the current interests of any such shareholder.

5. Section 17(b) of the Act authorizes the SEC to exempt any transaction from the provisions of section 17(a) if: the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned; the transaction is consistent with the policy of each registered investment company concerned; and the transaction is consistent with the general purposes of the Act.

6. Applicants contend that the proposed reorganization meets the standards of section 17(b). Among other things, applicants assert that (a) the shareholders of both Portfolios will benefit from the reorganization (as discussed above), (b) the Adviser will bear all costs of the reorganization, (c) the reorganization is subject to approval of the shareholders of Portfolio '98, who will receive a proxy statement containing information about the transaction, (d) the reorganization will have no adverse tax consequences for shareholders of either Portfolio, and (e) the exchange will be made at net asset value and will not result in dilution of the current interests of any shareholder. Applicants further note that there is little danger of overreaching by Amivest, Amalgamated, or ACTC (or by the pension funds, trusts, and retirement accounts for which Amalgamated and ACTC serve as custodians) because those entities will not receive any benefits from the reorganization different from those benefits received by other shareholders. Moreover, Amalgamated and ACTC are record owners only and will not actually vote on the proposed reorganization.

7. Section 17(d) and rule 17d-1(a), taken together, prohibit an affiliated person of a registered investment company, or an affiliated person of such a person, acting as principal, from participating in, or effecting any transaction in connection with, any joint enterprise or joint arrangement in which such registered company is a participant, unless an application relating thereto has been filed with the SEC and an order approving the joint transaction has been entered.

8. Rule 17d-1(b) provides that in determining whether to grant an order, the SEC must consider whether participation of each Portfolio in the reorganization is consistent with the provisions, policies and purposes of the Act, and the extent to which each Portfolio's participation is on a basis different from or less advantageous than that of other participants.

9. Applicants contend that the proposed reorganization meets the standards of rule 17d-1(b). In particular, they note that each Portfolio will participate in the reorganization on a basis not different from or less advantageous than that of the other Portfolio. Applicants submit that the participation of Amalgamated, ACTC, and Amivest in the proposed reorganization is consistent with rule 17d-1 because Amalgamated, ACTC and Amivest will receive no benefit different from any other Portfolio '98 shareholder.

For the SEC, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-7445 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19360; 811-4976]

Janus Income Series; Notice of Deregistration

March 25, 1993.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Janus Income Series.

RELEVANT ACT SECTIONS: 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 November 12, 1992, and an amendment thereto was filed on March 9, 1993.

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 applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on April 19, 1993, and should be accompanied by proof of service on the 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 Fifth Street, NW., Washington, DC 20549. Applicant, 100 Fillmore Street, suite 300, Denver, Colorado 80206.

FOR FURTHER INFORMATION CONTACT: John V. O'Hanlon, Staff Attorney, at (202) 272-3922, or Elizabeth G. Osterman, Branch Chief, at (202) 272-3016 (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 was an open-end, diversified investment company organized as a business trust under Massachusetts law. Applicant filed a Notification of Registration pursuant to section 8(a) of the Act on January 9, 1987. On that same date, applicant filed a registration statement pursuant to the Securities Act of 1933 and section 8(b) of the Act, which was declared effective on July 1, 1987. The public offering of shares of the Janus Flexible Income Fund series commenced promptly thereafter. A post-effective amendment registering shares of the Janus Intermediate Government Securities Fund series was filed on May 15, 1991. Applicant's two series are hereinafter referred to as the "Funds."

2. At a meeting held on May 8, 1992, applicant's trustees determined that it would be desirable and in the best interests of the Funds that they be reorganized as new series of Janus Investment Fund, a Massachusetts business trust (the "Trust"), and for applicant to be terminated thereafter pursuant to an Agreement and Plan of Reorganization and Liquidation (the "Plan "). The trustees determined that the reorganization would provide an economical and cost efficient form of organization, and would result in significant administrative efficiencies. The trustees also determined that the reorganization would not dilute the interests of the Funds' shareholders

3. A notice of a special meeting of shareholders and a proxy statement regarding the approval of the reorganization and termination of applicant was distributed to applicant's shareholders on or about May 8, 1992. At a special meeting of applicant's shareholders held on July 10, 1992, the shareholders approved applicant's reorganization and termination pursuant to the Plan.

4. On August 7, 1992, the Janus Intermediate Government Securities Fund and the Janus Flexible Income Fund were each reorganized from separate series of applicant into the Janus Intermediate Government Securities Fund series and the Janus Flexible Income Fund series, respectively, of the Trust. On that date, applicant transferred all of the Funds' respective assets, and assigned all of the Funds' respective liabilities, to the Janus Intermediate Government Securities Fund series and the Janus Flexible Income Fund series, as the case may be, of the Trust. In exchange, the Trust transferred to applicant a number of shares of the Janus Intermediate Government Securities Fund series and the Janus Flexible Income Fund series for distribution to the shareholders of the respective Funds. Each shareholder of a Fund received shares of the Janus Intermediate Government Securities Fund series or Janus Flexible Income Fund series of the Trust, as the case may be, identical both in number and net asset value per share to the shares of the Fund held by the shareholder at the time immediately before the reorganization.

5. All expenses incurred by applicant in connection with the reorganization and termination of applicant, consisting of legal expenses, costs of solicitation, printing and mailing expenses, accounting expenses, and miscellaneous expenses, will be paid by the Funds (or their successor funds, the Janus Intermediate Government Securities Fund series and the Janus Flexible Income Fund series of the Trust).

6. As of the date of the publication, applicant had no security holders, assets, or liabilities, and was not a party to any litigation or administrative proceeding.

7. Applicant is not engaged, and does not propose to engage, in any business activities other than those necessary for the winding-up of its affairs .

8. Applicant's existence as a Massachusetts business trust was terminated on August 7, 1992. Applicant filed appropriate documents with the Massachusetts Secretary of State and the Boston, Massachusetts City Clerk.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-7447 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19361; 811-4106]

Janus Venture Fund, Inc.; Notice of Deregistration

March 25, 1993.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Janus Venture Fund, Inc.

RELEVANT ACT SECTIONS: 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 November 12, 1992, and an amendment thereto was filed on March 9, 1993.

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 applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on April 19, 1993, and should be accompanied by proof of service on the 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 Fifth Street, NW., Washington, DC 20549. Applicant, 100 Fillmore Street, suite 300, Denver, Colorado 80206.

FOR FURTHER INFORMATION CONTACT: John V. O'Hanlon, Staff Attorney, at (202) 272-3922, or Elizabeth G. Osterman, Branch Chief, at (202) 272-3016 (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 was an open-end, non-diversified investment company organized as a corporation under Maryland law. Applicant filed a Notification of Registration pursuant to section 8(a) of the Act on September 26, 1984. On that same date, applicant filed a registration statement pursuant to the Securities Act of 1933 and section 8(b) of the Act, which was declared effective on April 26, 1985. The public offering of shares commenced promptly thereafter.

2. At a meeting held on May 8, 1992, applicant's board of directors determined that it would be desirable and in applicant's best interests for applicant to be reorganized as a new series of Janus Investment Fund, a Massachusetts business trust (the "Trust"), and for applicant to be liquidated and dissolved thereafter pursuant to an Agreement and Plan of Reorganization and Liquidation (the "Plan"). The board determined that the reorganization would provide an economical and cost efficient form of organization, and would result in significant administrative efficiencies. The board also determined that the

reorganization would not dilute the interests of applicant's shareholders.

3. A notice of a special meeting of shareholders and a proxy statement regarding the approval of the reorganization and dissolution of applicant was distributed to applicant's shareholders on or about May 28, 1992. At a special meeting of applicant's shareholders held on July 31, 1992, the shareholders approved applicant's reorganization and dissolution pursuant to the Plan.

4. On August 7, 1992, applicant was reorganized from a Maryland corporation into the Janus Venture Fund series of the Trust. On that date, applicant transferred all of its assets, and assigned all of its liabilities, to the Janus Venture Fund series of the Trust. In exchange, the Trust transferred to applicant a number of shares of the Janus Venture Fund series for distribution to applicant's shareholders. Each shareholder received shares of the Janus Venture Fund series of the Trust identical both in number and net asset value per share to the shares of applicant held by the shareholder at the time immediately before the reorganization.

5. All expenses incurred by applicant in connection with the reorganization, liquidation, and dissolution of applicant, consisting of legal expenses, costs of solicitation, printing and mailing expenses, accounting expenses, and miscellaneous expenses, will be paid by applicant (or its successor, the Janus Venture Fund series of the Trust).

6. As of the date of the application, applicant had no security holders, assets, or liabilities, and was not a party to any litigation or administrative proceeding.

7. Applicant is not engaged, and does not propose to engage, in any business activities other than those necessary for the winding-up of its affairs.

8. Applicant filed Articles of Transfer with the Department of Assessments and Taxation of the State of Maryland on August 7, 1992, and will shortly be filing Articles of Dissolution.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-7448 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19359; 811-4105]

Janus Twenty Fund, Inc.; Notice of Deregistration

March 25, 1993.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Janus Twenty Fund, Inc. (previously known as Janus Value Fund, Inc.).

RELEVANT ACT SECTIONS: 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 November 12, 1992, and an amendment thereto was filed on March 9, 1993.

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 applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on April 19, 1993, and should be accompanied by proof of service on the 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 Fifth Street, NW., Washington, DC 20549. Applicant, 100 Fillmore Street, suite 300, Denver, Colorado 80206.

FOR FURTHER INFORMATION CONTACT: John V. O'Hanlon, Staff Attorney, at (202) 272-3922, or Elizabeth G. Osterman, Branch Chief, at (202) 272-3016 (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, non-diversified investment company organized as a corporation under Maryland law. Applicant filed a Notification of Registration pursuant to section 8(a) of the Act on September 26, 1984. On that same date, applicant filed a registration statement pursuant to the Securities Act of 1933 and section 8(b) of the Act, which was declared effective on April 26, 1985. The public offering of shares commenced promptly thereafter.

2. At a meeting held on May 8, 1992, applicant's board of directors determined that it would be desirable and in applicant's best interests for applicant to be reorganized as new series of Janus Investment Fund, a Massachusetts business trust (the "Trust"), and for applicant to be liquidated and dissolved thereafter pursuant to an Agreement and Plan of Reorganization and Liquidation (the "Plan"). The board determined that the reorganization would provide an economical and cost efficient form of organization, and would result in significant administrative efficiencies. The board also determined that the reorganization would not dilute the interests of applicant's shareholders.

3. A notice of a special meeting of shareholders and a proxy statement regarding the approval of the reorganization and dissolution of applicant was distributed to applicant's shareholders on or about May 28, 1992. At a special meeting of applicant's shareholders held on July 31, 1992, the shareholders approved applicant's reorganization and dissolution pursuant to the Plan.

4. On August 7, 1992, applicant was reorganized from a Maryland corporation into the Janus Twenty Fund series of the Trust. On that date, applicant transferred all of its assets, and assigned all of its liabilities, to the Janus Twenty Fund series of the Trust. In exchange, the Trust transferred to applicant a number of shares of the Janus Twenty Fund series for distribution to applicant's shareholders. Each shareholder received shares of the Janus Twenty Fund series of the Trust identical both in number and net asset value per share to the shares of applicant held by the shareholder at the time immediately before the reorganization.

5. All expenses incurred by applicant in connection with the reorganization, liquidation, and dissolution of applicant, consisting of legal expenses, costs of solicitation, printing and mailing expenses, accounting expenses, and miscellaneous expenses, will be paid by applicant (or its successor, the Janus Twenty Fund series of the Trust).

6. As of the date of the application, applicant had no security holders, assets, or liabilities, and was not a party to any litigation or administrative proceeding.

7. Applicant is not engaged, and does not propose to engage, in any business

activities other than those necessary for the winding-up of its affairs.

8. Applicant filed Articles of Transfer with the Department of Assessments and Taxation of the State of Maryland on August 7, 1992, and will shortly be filing Articles of Dissolution.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-7446 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 32040; File No. 600-25]

Securities Exchange Act of 1934

March 23, 1993.

Order Granting Approval of Registration Until March 31, 1994

In the Matter of: The Registration as a Clearing Agency of the Participants Trust Company

On February 1, 1993, Participants Trust Company ("PTC") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(a) of the Securities Exchange Act of 1934 ("Act"),[1] an amendment to its Form CA-1 [2] requesting that the Commission extend PTC's registration as a clearing agency until March 31, 1994. Notice of PTC's amended application and request for extension of temporary registration appeared in the **Federal Register** on February 16, 1993.[3] No comments were received. This order approves PTC's amendment by extending PTC's registration as a clearing agency until March 31, 1994.

On March 28, 1989, the Commission granted PTC temporary registration as a clearing agency pursuant to sections 17A and 19(a) of the Act, and Rule 17Ab2-1 thereunder for a period of twelve months.[4] Subsequently, the Commission issued orders that extended PTC's temporary registration as a clearing agency, the last of which extended PTC's registration until March 31, 1993.[5]

As discussed in detail in the initial order granting PTC's temporary registration,[6] one of the primary reasons for PTC's registration was to develop depository facilities for mortgage-backed securities, particularly securities guaranteed by the Government National Mortgage Association ("GNMA"). PTC services include certificate safekeeping, book entry deliveries, an automated facility for the pledge or segregation of securities and other services related to the immobilization of securities certificates.

PTC continues to make significant progress in the areas of financial performance, regulatory commitments, and operational capabilities. Deposits of GNMA securities grew from $616 billion in December of 1991 to $706 billion in December of 1992.[7] During 1992, PTC designated Real Estate Mortgage Investment Conduit ("REMIC") securities guaranteed by the United States Department of Veterans Affairs ("VA") as eligible for deposit.

PTC continued its efforts over the past year to implement operational and procedural changes in connection with PTC's temporary registration.[8] For example, PTC moved its primary processing site to a more modern facility in Jersey City, New Jersey, which is expected to be less vulnerable to environmental failure. PTC's New York facility remains as its principal office and as a fully redundant operating site.[9] In addition, PTC established a policy relating to the use of excess earnings from invested principal and interest receipts.[10]

Although PTC has made considerable progress toward complying with the undertakings set out above, PTC needs more time to implement fully the changes necessary for compliance. Accordingly, PTC has requested that the Commission extend PTC's registration as a clearing agency until March 31, 1994, to permit PTC to gain experience and stability as a fully operative depository and to comply fully with the undertakings made in connection with PTC's registration.[11]

The Commission believes that PTC continues to meet the determinations enumerated in section 17A(b)(3). PTC has facilitated the prompt and accurate clearance and settlement of mortgage-backed securities. PTC has functioned as a clearing agency for the past four years in compliance with the Act.

It is Therefore Ordered, that PTC's temporary registration as a clearing agency be, and hereby is, extended until March 31, 1994, subject to the terms, undertakings, and conditions specified in Securities Exchange Act Release No. 26671.[12]

For the Commission, by the Division of Market Regulation pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-7357 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-M

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[1] 15 U.S.C. 78s(a).

[2] Letter from John J. Sceppa, President and Chief Executive Officer, PTC, to Ester Saverson, Jr., Branch Chief, Division of Market Regulation, Commission, dated January 29, 1993.

[3] Securities Exchange Act Release No. 31834 (February 8, 1993), 58 FR 8642.

[4] Securities Exchange Act Release No. 26671 (March 28, 1989), 54 FR 13266.

[5] Securities Exchange Act Release Nos. 27858 (March 28, 1990), 55 FR 12614; 29024 (March 28, 1991), 56 FR 13848; and 30537 (April 9, 1992), 57 FR 12351.

[6] *Supra* note 4.

[7] *Supra* note 2.

[8] In connection with PTC's temporary registration, PTC committed to the Commission and the Federal Reserve Bank of New York to make a number of operational and procedural changes, which include:

(1) Eliminating trade reversals from PTC's procedures to cover a participant default;

(2) Phasing out the aggregate excess net debit limitation for extensions under the net debit monitoring level procedures;

(3) Making principal and interest advances, now mandatory, optional;

(4) Allowing participants to retrieve securities in the abeyance account and not allowing participants to reverse a transfer because its customer may not be able to fulfill its financial obligations to the participant;

(5) Eliminating the deliverer's security interest and replacing it with a substitute;

(6) Reexamining PTC's account structure rules to make them consistent with PTC's lien procedures;

(7) Expanding and diversifying PTC's lines of credit;

(8) Assuring operational integrity by developing and constructing a back-up facility; and

(9) Reviewing PTC rules and procedures for consistency with current operations.

Supra note 4.

[9] Securities Exchange Act Release No. 31176 (September 11, 1992), 57 FR 43268 (SR-PTC-92-10).

[10] Securities Exchange Act Release No. 31593 (December 11, 1992), 57 FR 60262.

[11] *Supra* note 2.

[12] *Supra* note 4.

[13] 17 CFR 200.30-3(a)(50) (1972).

Issuer Delisting; Application to Withdraw from Listing and Registration; (Preferred Health Care Ltd., Common Stock, $.01 Par Value) File No. 1-9954

March 25, 1993.

Preferred Health Care Ltd. ("Company") has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2-2(d) promulgated thereunder, to withdraw the above specified security from listing and registration on the American Stock Exchange, Inc. ("Amex").

The reasons alleged in the application for withdrawing this security from listing and registration include the following:

According to the Company, its Board of Directors (the "Board") unanimously approved resolutions on March 5, 1993, to withdraw the Company's Common Stock from listing on the American Stock Exchange ("Amex") and, instead,

list such Common Stock on the National Association of Securities Dealers Automated Quotations/National Market Systems ("NASDAQ/NMS"). According to the Company, the decision of the Board followed a lengthy study of the matter, and was based upon the belief that listing of the Common Stock on NASDAQ/NMS will be more beneficial to its stockholders than the present listing on the Amex because:

(1) The Company believes that the NASDAQ/NMS system of competing market-makers will result in increased visibility and sponsorship for the Common Stock than is presently the case;

(2) The Company believes that the NASDAQ/NMS system will offer the Company's stockholders more liquidity than that presently available on the Amex and less volatility in quoted prices per share when trading volume is slight;

(3) The Company believes that the NASDAQ/NMS system will offer the opportunity for the Company to secure its own group of market-makers and, in doing so, expand the capital base available for trading in its Common Stock; and

(4) The Company believes that firms making a market in the Company's Common Stock on the NASDAQ/NMS system will be inclined to issue research reports concerning the Company, thereby increasing the number of firms providing institutional research and advisory reports.

Any interested person may, on or before April 15, 1993 submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, facts bearing upon whether the application has been made in accordance with the rules of the exchanges and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 93-7365 Filed 3-30-93; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-19357; 812-7978]

Seligman Capital Fund, Inc., et al.; Notice of Application

March 25, 1993.

AGENCY: Securities and Exchange Commission (the "SEC" or "Commission").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Seligman Capital Fund, Inc., Seligman Cash Management Fund, Inc., Seligman Common Stock Fund, Inc., Seligman Communications and Information Fund, Inc., Seligman Frontier Fund, Inc., Seligman Growth Fund, Inc., Seligman High Income Fund Series, Seligman Income Fund, Inc., Seligman International Fund Series, Inc., Seligman Mutual Benefit Portfolios, Inc., Seligman New Jersey Tax-Exempt Fund, Inc., Seligman Pennsylvania Tax-Exempt Fund Series, Seligman Tax-Exempt Fund Series, Inc., Seligman Tax-Exempt Series Trust (the "Funds"), J. & W. Seligman & Co. Incorporated (the "Manager"), and Seligman Financial Services, Inc. (the "Distributor").

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) from sections 18(f), 18(g), and 18(i).

SUMMARY OF APPLICATION: Applicants seek an order that would permit the Funds to issue and sell an unlimited number of classes of shares with different voting rights and expense allocations.

FILING DATES: The application was filed on July 8, 1992 and amended on November 16, 1992, March 1, 1993, and March 4, 1993. Applicants have agreed to file an additional amendment during the notice period. This notice reflects the changes to be made by such additional amendment.

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 April 19, 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 may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicants, 130 Liberty Street, New York, New York 10006.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Staff Attorney, at (202) 272-5287 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 at the SEC's Public Reference Branch.

Applicants' Representations

1. The Funds are open-end management investment companies registered under the Act. The Manager acts as the Funds' investment adviser, the Distributor is the Funds' principal underwriter, and Union Data Service Center, Inc., is the shareholder servicing agency for the Funds.

2. Applicants request that relief also apply to any future registered investment companies, or existing or future series thereof, that may become a member of the Seligman "group of investment companies" as defined in rule 11a-3 and whose shares may be distributed on substantially the same basis as those of the Funds ("Future Funds"). Applicants will comply with all representations and conditions contained in the application with respect to any Future Funds.

3. Except as described below, all shares of the Funds currently are offered daily to the public at their net asset value plus a front-end sales load calculated as a percentage of the offering price at the time of purchase. The sales load is reduced as the aggregate dollar amount invested increases. Under certain circumstances, investors are entitled to combine current, past and proposed purchases of Fund shares and thereby qualify for percentage reductions in any applicable sales load. In addition, the front-end sales load is waived for certain classes of purchasers named in each Fund's prospectus. Shares of Seligman International Fund, a series of Seligman International Fund Series, Inc., and the two portfolios of Seligman Cash Management Fund, Inc., are offered daily at net asset value without the imposition of a sales charge.[1] Currently, none of the Funds imposes an contingent deferred sales charge ("CDSC") or redemption fee on the redemption of its shares.

[1] Shares of Seligman International Fund currently are offered only to advisory clients of the Manager.

4. Each of the Funds (other than Seligman Mutual Benefit Portfolios, Inc., which does not currently intend to participate in the Alternative Distribution System) has adopted distribution plans pursuant to rule 12b–1 under the Act. These rule 12b–1 plans provide that the Funds may pay to the Distributor up to an aggregate of .25% on an annual basis, payable quarterly, of the average daily net assets of the Fund. The plans further provide that such fee will be used in its entirety by the Distributor to make payments for administration, shareholder services and distribution assistance, including, but not limited to: (i) Compensation to securities dealers and other organizations ("Service Organizations") for providing distribution assistance with respect to assets invested in the Fund, (ii) compensation to Service Organizations for providing administration, accounting and other shareholder services with respect to Fund shareholders,[2] and (iii) otherwise promoting the sale of shares of the Fund, including paying for the preparation of advertising and sales literature and the printing and distribution of such promotional materials and prospectuses to prospective investors and defraying the Distributor's costs incurred in connection with its marketing efforts with respect to shares of the Fund. The Distributor may use a portion of the rule 12b–1 fees from each class of shares and, with respect to Class B and Class C, any CDSC proceeds to offset its Fund marketing costs, such as preparation of sales literature, advertising and printing and distributing prospectuses and other shareholder materials to prospective investors.

5. Applicants propose to establish a multi-class distribution system under which the Funds would be permitted to select among an unlimited number of distribution options mixing different loads, service fees, distribution fees, and CDSCs for each Fund (the "Alternative Distribution System"). Under this distribution system, the Funds may offer investors some or all of three distribution options: Shares sold subject to a front-end load and a service fee under a rule 12b–1 plan (the "Front-End Load Option"), shares sold with a lower front-end load, a service fee and a distribution fee under a rule 12b–1 plan (the "Moderate Front-End Load Option"), or shares sold without a front-end load, but with a service fee and a distribution fee under a rule 12b–1 plan, and subject to a CDSC (the "CDSC Option").[3]

6. The Alternative Distribution System would be implemented by having the Funds create more than one class of shares, with Class A shares subject to the Front-End Load Option, Class B shares subject to the Moderate Front-End Load Option, and Class C shares subject to the CDSC Option. Each of the classes offered by any Fund will represent interests in the same portfolio of investments of that Fund. The only differences among the classes of the same Fund will relate solely to: (a) The impact of the disproportionate payments made under the rule 12b–1 plan and any other incremental expenses subsequently identified that should be properly allocated to one or more classes; (b) the fact that the classes will vote separately with respect to the separate class provisions of the rule 12b–1 plan adopted by each Fund on behalf of each portfolio; (c) the difference in exchange privileges of the classes of shares; and (d) the designation of each class of shares of each Fund.

7. Under the Front-End Load Option, an investor will purchase Class A shares at the current, net asset value plus a front-end sales load. The sales loads will be subject to reductions for larger purchases, under a right of accumulation and letters of intent. The loads will be subject to other reductions permitted by section 22(d) of the Act and rule 22d–1 thereunder and set forth in the registration statement of each Fund. Class A shares will be assessed an ongoing service fee under a rule 12b–1 plan based upon a percentage of the average daily net asset value of the Class A shares.

8. Investors choosing the Moderate Front-End Load Option would purchase Class B shares at the current net asset value per share plus a front-end sales load at the time of purchase that is lower than the load applicable to the Class A shares. The loads generally will be subject to certain other reductions permitted by section 22(d) of the Act and rule 22d–1 thereunder and set forth in the registration statement of each Fund. Class B shares will also be subject to a service fee under a rule 12b–1 plan at an annual rate of up to .25%, and a distribution fee expected to be at an annual rate of up to .25%, of average daily net assets pursuant to a rule 12b–1 plan. Any investor who purchases $1,000,000 or more of Class B shares will not be subject to a sales load at the time of purchase, but proceeds from a redemption of Class B shares made within a specified period (currently expected to be 12 months) of the purchase may be subject to a CDSC payable to the Distributor. The amount of any applicable CDSC will be calculated as a specified percentage of the lesser of (i) the net asset value of the shares at the time of purchase, or (ii) the net asset value of the shares at the time of redemption. Currently, the CDSC is expected to be 1% (but may be higher or lower).

9. Investors choosing the DCSC Option will purchase Class C shares at the then current net asset value per share without the imposition of a sales load at the time of purchase. Class C shares will be subject to a service fee at an annual rate of up to .25%, and a distribution fee expected to be at an annual rate of up to .75% of average daily net assets pursuant to a rule 12b–1 plan. In addition, proceeds from a redemption of Class C shares made within a specified period (currently expected to be 12 months) of purchase may be subject to a CDSC payable to the Distributor. The amount of any applicable CDSC will be calculated as a specified percentage of the lesser of (i) the net asset value of the shares at the time of purchase, or (ii) the net asset value of the shares at the time of redemption. Currently, the CDSC is expected to be 1% (but may be higher or lower).

10. Fund investment income and expenses, other than expenses specifically attributable to one class, will be allocated to the classes based on the relative net asset value of shares of each class. Because of the ongoing distribution fee and potentially higher class expenses paid by the holders of Class B and Class C shares, the net income attributable to and the dividends payable on both Class B and Class C shares would be lower than the net income attributable to and the dividends payable on Class A shares.

11. The exchange privileges applicable to each class will be different. It is contemplated that Class A, Class B, and Class C shares of a Fund will be exchangeable only for Class A, Class B, or Class C shares, respectively, of the other Funds, including Class A, Class B, or Class C shares of the money market Funds. Money Market Fund shares will be exchangeable for Class A, Class B, or Class C shares only if the Money Market Fund shares were

[2] Applicants acknowledge that at present the rule 12b–1 plans provide the flexibility for Service Organizations to be compensated for administration, recordkeeping or accounting services. Applicants will submit an application for an amended order at some future date in the event that the Funds want to compensate Service Organizations for the provision of such services with rule 12b–1 payments.

[3] Applicants previously received an exemptive order from the SEC permitting the Funds to impose, and under certain circumstances waive, a CDSC. Investment Company Act Release Nos. 16841 (July 10, 1992) (notice), and 18882 (Aug. 6, 1992) (order).

originally acquired through an exchange, in which case they will be exchangeable only for the class of shares involved in the original exchange into the Money Market Fund shares. Each money market share received in exchange for a non-moneymarket share would continue to be subject to the same rule 12b–1 fees and CDSC that would have been applicable to the exchanged share in the absence of an exchange. The exchange privileges will comply with rule 11a–3 under the Act.

Applicants' Legal Analysis

1. Applicants seek an exemption from sections 18(f), 18(g), and 18(i) of the Act to the extent that the proposed issuance and sale of an unlimited number of classes of shares representing interests in the Funds might be deemed: (a) To result in the issuance of a "senior security" within the meaning of section 18(g) of the Act and thus be prohibited by section 18(f)(1) of the Act; and (b) to violate the equal voting provisions of section 18(i) of the Act.

2. The abuses that section 18 of the Act is intended to redress are set forth in section 1(b) of the Act, which provides that the national public interest and investors' interests are adversely affected when investment companies unduly increase the speculative character of their junior securities by excessive borrowing and the issuance of excessive amounts of senior securities or when they operate without adequate assets or reserves. The Alternative Distribution System does not involve borrowings and does not affect the Funds' existing assets or reserves. The proposed arrangement will not increase the speculative character of the shares of the Funds. The Funds' capital structures under the proposed arrangement will not facilitate control without equity or other investment and will not make it difficult for investors to value the securities of the Funds.

3. Applicants believe that the issuance and sale by the Funds of shares of multiple classes will better enable the Funds to meet the competitive demands of the financial services industry. Under the Alternative Distribution System, an investor will be able to choose the method of purchasing shares that is most beneficial given the amount of the purchase, the length of time the investor expects to hold the shares and other relevant circumstances. Moreover, owners of each class of shares may be relieved of a portion of the fixed costs normally associated with investing in mutual funds since such costs would, potentially, be spread over a greater number of shares than they would be otherwise.

4. The proposed allocation of expenses and voting rights relating to the rule 12b–1 plans is equitable and will not discriminate against any group of shareholders. Investors purchasing Class A shares would pay only a service fee under the portfolio's rule 12b–1 plan, while investors purchasing Class B and Class C shares would pay both a distribution and service fee under the portfolio's rule 12b–1 plan.

Applicants' Conditions

Applicants agree that the order of the Commission granting the requested relief shall be subject to the following conditions:

1. Each class of shares will represent interests in the same portfolio of investments of a Fund and be identical in all respects, except as set forth below. The only differences among various classes of shares of the same Fund will relate solely to: (a) The impact of the rule 12b–1 plan payments made by the shares of each class of a portfolio, any expenses that may be imposed upon a particular class of shares, which are limited to (i) transfer agency fees attributable to a specific class of shares; (ii) printing and postage expenses related to preparing and distributing materials such as shareholder reports, prospectuses and proxies to current shareholders of a specific class; (iii) blue sky registration fees incurred by a class of shares; (iv) Commission registration fees incurred by a class of shares; (v) the expenses of administrative personnel and services as required to support the shareholders of a specific class; (vi) litigation or other legal expenses relating solely to one class of shares; (vii) directors' fees incurred as a result of issues relating to one class of shares (collectively, "Class Expenses"), and any other incremental expenses subsequently identified that should be properly allocated to one class which shall be approved by the Commission pursuant to an amended order; (b) voting rights on matters which pertain to rule 12b–1 plans; (c) the different exchange privileges of the various classes of shares as described in the prospectuses (and as more fully described in the statements of additional information) of the Funds; and (d) the designation of each class of shares of a Fund.

2. The directors of each of the Funds, including a majority of the independent directors, shall have approved the Alternative Distribution System prior to the implementation of the Alternative Distribution System by a particular Fund. The minutes of the meetings of the directors of each of the Funds regarding the deliberations of the directors with respect to the approvals necessary to implement the Alternative Distribution System will reflect in detail the reasons for determining that the proposed Alternative Distribution System is in the best interests of both the Funds and their respective shareholders.

3. The initial determination of the Class Expenses that will be allocated to a particular class and any subsequent changes thereto will be reviewed and approved by a vote of the directors of the Fund including a majority of the independent directors of the Fund. Any person authorized to direct the allocation and disposition of the monies paid or payable by the Fund to meet Class Expenses shall provide to the directors, and the directors shall review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made.

4. On an ongoing basis, the directors of the Funds, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor each Fund for the existence of any material conflicts among the interests of the various classes of shares. The directors, including a majority of the independent directors, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The Manager and the Distributor will be responsible for reporting any potential or existing conflicts to the directors. If a conflict arises, the Manager and the Distributor at their own costs will remedy such conflict up to and including establishing a new registered management investment company.

5. The directors of the Funds will receive quarterly and annual statements complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only distribution expenditures properly attributable to the sale of a class of shares will be used to support the rule 12b–1 fee charged to shareholders of such class of shares. Expenditures not related to the sale of a specific class of shares will not be presented to the directors to support rule 12b–1 fees charged to shareholders of such class of shares. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent directors in the exercise of their fiduciary duties.

6. Dividends paid by a Fund with respect to each class of shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day and will be

in the same amount, except that fee payments made under the rule 12b–1 plan relating to the classes will be borne exclusively by each class and except that any Class Expenses may be borne by the applicable class of shares.

7. The methodology and procedures for calculating the net asset value and dividends/distributions of the various classes and the proper allocation of income and expenses among such classes has been reviewed by an expert (the "Independent Examiner"). The Independent Examiner has rendered a report to the applicants, which has been provided to the staff of the SEC, stating that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner, subject to the conditions and limitations in that report. On an ongoing basis, the Independent Examiner, or an appropriate substitute Independent Examiner, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to the Funds that the calculations and allocations are being made properly. The reports of the Independent Examiner shall be filed as part of the periodic reports filed with the SEC pursuant to section 30(a) and 30(b)(1) of the Act. The work papers of the Independent Examiner with respect to such reports, following request by the Funds (which the Funds agree to make), will be available for inspection by the SEC staff upon the written request for such work papers by a senior member of the Division of Investment Management or of a Regional Office of the Commission, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrators or Associate and Assistant Administrators. The initial report of the Independent Examiner is a "report on policies and procedures placed in operation" as defined and described in SAS No. 44 of the AICPA, and the ongoing reports will be reports on policies and procedures placed in operation and tests of operating effectiveness in accordance with SAS No. 70 of the AICPA, as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

8. Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends/distributions among the various classes of shares and the proper allocations of income and expenses among such classes of shares and this representation has been concurred with the Independent Examiner in the initial report referred to in condition (7) above and will be concurred with by the Independent Examiner, or an appropriate substitute Independent Examiner, on an ongoing basis at least annually in the ongoing reports referred to in condition (7) above. Applicants agree to take immediate corrective action if the Independent Examiner, or appropriate substitute Independent Examiner, does not so concur in the ongoing reports.

9. The prospectuses of the Funds will include a statement to the effect that salespersons and any other persons entitled to receive compensation for selling Fund shares or servicing Fund shareholders may receive different levels of compensation.

10. The Distributor will adopt compliance standards as to when each class of shares may appropriately be sold to particular investors. Applicants will require all persons selling shares of the Funds to agree to conform to such standards.

11. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the directors of the Funds with respect to the Alternative Distribution System will be set forth in guidelines which will be furnished to the directors.

12. Each Fund will disclose in its prospectus the respective expenses, performance data, distribution arrangements, services, fees, sales loads, deferred sales loads, and exchange privileges applicable to each class of shares offered through the prospectus. The shares of all the classes will be offered and sold through a single prospectus. The shareholder reports of each Fund will disclose the respective expenses and performance data applicable to each class of shares. The shareholder reports will contain, in the statement of assets and liabilities and the statement of operations, information related to the Fund as a whole generally and not on a per class basis. Each Fund's per share data, however, will be prepared on a per class basis with respect to all classes of shares of such Fund. To the extent any advertisement or sales literature describes the expenses or performance data applicable to the shares of the respective classes, it will disclose the expenses and/or performance data applicable to all classes of shares of such Fund. The information provided by applicants for publication in any newspaper or similar listing of the Funds' net asset values and public offering prices will separately present the shares of each class.

13. Applicants acknowledge that the grant of the exemptive order requested by this application will not imply SEC approval, authorization, or acquiescence in any particular level of payments that the Funds may make pursuant to rule 12b–1 plans in reliance on the exemptive order.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–7444 Filed 3–30–93; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

Detroit District Advisory Council; Public Meeting

The U.S. Small Business Administration Detroit District Advisory Council will hold a public meeting at 10 a.m. on Thursday, April 29, 1993, at the Muskegon Harbor Holiday Inn in Muskegon, Michigan, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Mr. Raymond L. Harshman, District Director, U.S. Small Business Administration, 477 Michigan Avenue, room 515, Detroit, Michigan 48226, (313) 226-7240.

Dated: March 25, 1993.

Dorothy A. Overal,

Acting Assistant Administrator, Office of Advisory Councils.

[FR Doc. 93–7437 Filed 3–30–93; 8:45 am]

BILLING CODE 8025–01–M

Boise District Advisory Council; Public Meeting

The U.S. Small Business Administration Boise District Advisory Council will hold a public meeting at 9:30 a.m. on Monday, April 19, 1993, at the Kaley Center (the auditorium at West Valley Medical Center—entrance on 10th Avenue), 1717 Arlington Avenue, Caldwell, Idaho, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Thomas E. Bergdoll, Jr., District Director, U.S. Small Business Administration, 1020 Main Street, suite 290, Boise, Idaho 83702, (208) 334–9641.

Dated: March 25, 1993.

Dorothy A. Overal,

Acting Assistant Administrator, Office of Advisory Councils.

[FR Doc. 93-7438 Filed 3-30-93; 8:45 am]

BILLING CODE 8025-01-M

Jackson District Advisory Council; Public Meeting

The U.S. Small Business Administration Jackson District Advisory Council will hold a public meeting from 9 a.m. to 12:30 p.m., on Thursday, April 8, 1993, in the board room of the Deposit Guaranty National Bank, Jackson, Mississippi, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Mr. Jack Spradling, District Director, U.S. Small Business Administration, 101 W. Capitol Street, suite 400, Jackson, Mississippi 39201, (601) 965-5371.

Dated: March 25, 1993.

Dorothy A. Overal,

Acting Assistant Administrator, Office of Advisory Councils.

[FR Doc. 93-7439 Filed 3-30-93; 8:45 am]

BILLING CODE 8025-01-M

[License No. 07/07-0095]

CFB Venture Fund II, L.P.; Issuance of a Small Business Investment Company License

On July 16, 1992 a notice was published in the **Federal Register** (Vol. 57, No. 137 FR p. 31556) stating that an application has been filed by CFB Venture Fund II, L.P. with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations governing Small Business Investment Companies (13 CFR 107.102 (1992)) for a license as a Small Business Investment Company.

Interested parties were given until close of business August 17, 1992 to submit their comments to SBA. No comments were received.

Notice is hereby given that, pursuant to section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 07/07-0095 on March 2, 1993, to CFB Venture Fund II, L.P. to operate as a Small Business Investment Company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: March 22, 1993.

Wayne S. Foren,

Associate Administrator for Investment.

[FR Doc. 93-7352 Filed 3-30-93; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Subcommittee on Aircraft Safety; Research, Engineering, and Development Advisory Committee

Pursuant to section 10(A)(2) of the Federal Advisory Committee Act (Pub. L. 92-362; 5 U.S.C. App. I), notice is given of a meeting of the Federal Aviation Administration (FAA) Subcommittee on Aircraft Safety of the Research, Engineering, and Development (R,E&D) Advisory Committee to be held Thursday, April 15, 1993, at 9 a.m. The meeting will take place at the Federal Aviation Administration Technical Center, Atlantic City International Airport, New Jersey 08495, in the first floor conference room, Building 210.

The agenda for this meeting will include the following:

- Opening Remarks—Chair and Executive Director
- Review of Final Agenda
- Introduction and Program Overview
- Aircraft Safety Research and Development Program Overview
- Cabin Fire Safety Subprogram
- Flight Safety Subprogram
- Airworthiness Subprogram
- Crashworthiness Subprogram
- Aging Aircraft Subprogram
- Propulsion-Fuel Safety Subprogram
- Catastrophic Failure Prevention Subprogram
- Discussion of Program Briefings
- Subcommittee Organization and Formation of Working Groups
- Discussion of Action Items
- Discussion of Future Activities
- Chair's Summary

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements or obtain information should do so by Monday, April 5. Contact Mr. William J. Sullivan, Executive Director of the Subcommittee and Assistant Director, Aircraft Certification Service, AIR-3, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-9554. Any member of the public may present a written statement to the Committee at any time by furnishing the Executive Director with 25 copies.

Issued in Washington, DC, on March 24, 1993.

William J. Sullivan,

Executive Director, Subcommittee on Aircraft Safety, Research, Engineering, and Development Advisory Committee.

[FR Doc. 93-7391 Filed 3-30-93; 8:45 am]

BILLING CODE 4910-13-M

National Highway Traffic Safety Administration

[Docket No. 93-01; Notice 2]

Ford Motor Company; Disposition of Petition for Temporary Exemption From Federal Motor Vehicle Safety Standards

This notice grants the petition by Ford Motor Company of Dearborn, Michigan, for a temporary exemption from certain Federal motor vehicle safety standards for an electric panel delivery van. The notice also denies the petition with respect to Standard No. 106, and S7.3 of Standard No. 208. The basis of the petition was that an exemption will facilitate the development and field evaluation of low-emission motor vehicles.

Notice of receipt of the petition was published on January 7, 1993, and an opportunity afforded for comment (58 FR 3063).

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. For this reason Ford argued that an exemption would facilitate the development and field evaluation of a low emission motor vehicle in the United States.

There are three versions of the Ecostar, which will be classified as a truck for purposes of the safety 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 will be shipped to the U.S. where the electric motor, inverter, transaxle drivetrain, batteries, controls, and other components unique to the Ecostar will be installed. Electrical/electronic controls handling high current/voltage will 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' will be located in the fuel tank space under the load floor. Hybrid vehicles will have a small, gasoline-fueled engine/alternator assembly mounted under the load floor. A hydraulic/regenerative braking system will 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, will 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 requested a 2-year exemption, were:

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 argued 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 argued 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 S7.2 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 argued 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 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 noted 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 stated that the VIN "may not meet certain U.S. requirements." It noted 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 that 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 stated 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 compliance status of its vehicle.

13. Standard No. 219—Windshield Zone Intrusion

The hybrids may also not comply with Standard No. 219, though "[l]imited testing indicates that the electric Ecostar probably meets EEC/ECE 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 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 windshield 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 stated that it had 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 argued that an exemption would be in the public interest because of the 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.

No comments were received on the petition.

The Administrator may exempt Ford from compliance upon such terms and conditions as (s)he deems appropriate upon findings that the exemption would facilitate the development or field evaluation of a low emission motor vehicle, would not unduly degrade the safety of such motor vehicle, and would be in the public interest and consistent with the objectives of the National Traffic and Motor Vehicle Safety Act. Ford has made a prima facie case with respect to several of these factors. Manifestly, a program under which 105 vehicles are produced and leased to Ford's electric vehicle development partners is a program of field evaluations of low-emission vehicles that will be facilitated by a granting of Ford's petition. Given the public policy of the United States to develop alternate energy sources, and to lower emissions from motor vehicle propulsion sources that pollute the atmosphere, an exemption will also serve the public interest. The margin of noncompliance appears slight in most instances, so that exemptions will be consistent with the objectives of the Vehicle Safety Act.

The Administrator must also find that an exemption from each of the requested standards would not "unduly" degrade the safety of the vehicle. In examining Ford's requests, NHTSA has decided to grant Ford's petition, in the main, but to deny its petition from one standard and a portion of another, and to impose a condition of providing operator information with respect to a third. The exemptions are also crafted to reflect Ford's comments on vehicle types and conformance problems. For example, Ford intends to produce 26 hybrid vehicles, and has indicated that, because of their increased weight, they will not conform to Standard No. 219 *Windshield Zone Intrusion*. Thus, the exemption from this standard will cover

only hybrid vehicles, in a number that does not exceed 30.

With respect to Ford's request for exemption from Standards Nos. 101 and 105, NHTSA is granting them provided that Ford will supply each vehicle with information that informs the operator that the brake warning light is represented by the ISO symbol rather than the word "BRAKE", and that provides a drawing of the instrument panel which identifies the location of the heating/defrosting/air conditioning switch, and horn control. NHTSA is also granting Ford's request for exemption of a small number of vehicles from the requirement of continually variable control illumination. The vehicles exempted are intended for use by the U.S. Postal Service, and their nighttime usage will probably be minimal.

As for Standard No. 106, Ford has stated that they "appear" to meet the "performance requirements" of the standard. NHTSA does not understand how the performance of a brake hose can be judged by its appearance, and has concluded that Ford has not met its burden of persuasion that an exemption would not unduly degrade the safety of the vehicle. Therefore, NHTSA is denying Ford's request for exemption from Standard No. 106.

NHTSA accepts Ford's arguments with respect to the lighting deviations from Standard No. 108, that the Ecostars will be operated primarily in urban environments with generally high ambient lighting. Ford's technical failure to comply with Standard No. 120 will be cured when the standard is amended pursuant to a petition currently under review. Because of Ford's retention of title to the Ecostars, a VIN conforming to Standard No. 115 is not required to facilitate the identification and location of vehicles in the event of notification and remedy campaigns.

Ford's request with respect to Standard No. 204 lacks clarity. The statement is made that "some" Ecostars, "particularly the hybrid-electric vehicles equipped with internal combustion engines" may not conform, implying that vehicles other than hybrids should be exempted. However, the petitioner's safety arguments are directed only to the 26 hybrid vehicles that will be produced. The small number of these vehicles and their intended urban operation support granting them an exemption, and NHTSA is doing so, restricting it to hybrid vehicles. Similarly, the low urban speeds at which the Ecostar will be primarily operated supports exemptions from Standards Nos. 207 and 210.

The Ecostars will be fitted with restraint systems that meet all requirements of Standard No. 209 except for the markings required by S4.1(j). These markings are important to identify the belt manufacturer in the event of a notification campaign. With the limited number of vehicles to be covered by an exemption, and with Ford's retention of title, the lack of identification markings does not unduly degrade the safety of the equipment. Given that the restraints conform to ECE/EEC requirements, sufficient reassurance has been provided to justify an exemption from S4.6 of Standard No. 208. Ford has presented no reasons to justify its request for an exemption from the audible seat belt reminder required by S7.3. Because NHTSA routinely requires compliance with this requirement by imported grey market vehicles, the agency does not view it as burdensome to achieve, and is denying Ford's request for an exemption from this aspect of Standard No. 208.

Ford's arguments with respect to Standards Nos. 212 and 219 indicate that only those Ecostars of maximum weight (the 26 hybrids) may fail to comply, and that the margin of failure is small. It is likely that manufacture of the Ecostars will be completed before the effective date of Standard No. 216. Thus, the agency may provide exemptions from these standards as well.

Finally, with respect to Standard No. 301, it appears that not more than 50 to 53 vehicles are subject to the standard. Ford's tests to date and its design practices provide assurance that an exemption would not unduly degrade the safety of the Ecostars.

Accordingly, in consideration of the foregoing, Ford Motor Company is hereby granted Temporary Exemption 93–2, expiring March 1, 1995, for the Ford Ecostar truck, from the following Federal motor vehicle safety standards, or portions thereof, under the terms and conditions indicated: S5.2.3 of 49 CFR 571.101 Motor Vehicle Safety Standard No. 101 *Controls and Displays* and S5.3.5(b) of 49 CFR 571.105 Motor Vehicle Safety Standard No. 105 *Hydraulic Brake Systems* provided that each exempted vehicle is furnished with information that identifies the ISO brake symbol, the heating/defrosting/air conditioning fan switch, and the horn control; S5.3.3 of 49 CFR 571.101 Motor Vehicle Safety Standard No. 101 *Controls and Displays* for no more than ten Ecostar vehicles; the requirements of 49 CFR 571.108 Motor Vehicle Safety Standard No. 108 *Lamps, Reflective Devices, and Associated Equipment* that apply to headlamps, and front and rear side marker lamps; S5.1.1 of 49 CFR 571.102 Motor Vehicle Safety Standard No. 120 *Tire Selection and Rims for Motor Vehicles Other Than Passenger Cars*; 49 CFR 571.115 Motor Vehicle Safety Standard No. 115 *Vehicle Identification Number*; 49 CFR 571.207 Motor Vehicle Safety Standard No. 207 *Seating Systems*; S4.6.1 of 49 CFR 571.208 Motor Vehicle Safety Standard No. 208 *Occupant Crash Protection;* S4.1(j) of 49 CFR 571.209 Motor Vehicle Safety Standard No. 209 *Seat Belt Assemblies* for seat belt assemblies that are original equipment in Ecostar vehicles; 49 CFR 571.210 Motor Vehicle Safety Standard No. 210 *Seat Belt Assembly Anchorages;* and, effective September 1, 1993, 49 CFR 571.216 Motor Vehicle Safety Standard No. 216 *Roof Crush Resistance*. In addition, Temporary Exemption 93–2 is also granted to not more than 30 Ecostar vehicles, equipped with both internal combustion and electric propulsion systems, from the following: 49 CFR 571.204 Motor Vehicle Safety Standard No. 204 *Steering Column Rearward Displacement*, 49 CFR 571.212 Motor Vehicle Safety Standard No. 212 *Windshield Mounting*, 49 CFR 571.219 Motor Vehicle Safety Standard No. 219 *Windshield Zone Intrusion*, and S6.2, S6.3 and S6.4 of 49 CFR 571.301 Motor Vehicle Safety Standard No. 301 *Fuel System Integrity*.

For the reasons stated above, the petitions for exemption from 49 CFR 571.106 Motor Vehicle Safety Standard No. 106 *Brake Hoses*, and from S7.3 of 49 CFR 571.208 Motor Vehicle Safety Standard No. 208 *Occupant Crash Protection* are denied.

Authority: 15 U.S.C. 1410; delegations of authority at 49 CFR 1.50 and 501.4.

Issued on: March 26, 1993.

Howard M. Smolkin,

Executive Director.

[FR Doc. 93–7427 Filed 3–30–93; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Bureau of the Public Debt; Coupons Under Book-Entry Safekeeping (CUBES)

AGENCY: Bureau of the Public Debt, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This notice is being published to announce the reopening by the Department of the Treasury of its Coupons Under Book-Entry Safekeeping

("CUBES") program, to permit the conversion of certain physical coupons detached from U.S. Treasury bonds to book-entry form in the commercial book-entry system. With the reopening of the conversion window under CUBES, depository institutions holding eligible coupons will have the opportunity, during the period from June 1, 1993, to and including November 30, 1993, to convert such coupons to book-entry form. Other entities wishing to convert stripped coupons must arrange to do so through a depository institution.

DATES: June 1, 1993 through November 30, 1993, as described below.

SUPPLEMENTARY INFORMATION: On September 4, 1992, the Department of the Treasury modified the CUBES regulations at 31 CFR part 358 to permit additional reopenings of the CUBES window for conversion to book-entry form of detached, physical coupons (57 FR 40607, Sept. 4, 1992). 31 CFR 358.0(c) provides, in part, that notice of time periods for conversion, as well as coupons eligible for conversion and applicable fees, will be published in the **Federal Register** two months prior to the date coupons may be presented. Accordingly, pursuant to that authority, Treasury will reopen the window for conversion under its CUBES program beginning June 1, 1993, and ending close of business November 30, 1993. Under the program, depository institutions holding coupons stripped from Treasury securities will be permitted to convert them to book-entry form. Entities other than depository institutions which hold stripped Treasury coupons and which wish to convert them to book-entry accounts under the CUBES program must arrange for such conversion through a depository institution.

Only Treasury coupons stripped before the date of this notice, and with payment dates on or after January 1, 1994, will be eligible for conversion, excluding those having payment dates during a callable period.

Presentation of coupons under the reopened CUBES window may be made only at the Federal Reserve Bank of New York (FRBNY) and in compliance with the presentation procedures established by FRBNY. Submissions of coupons are subject to the terms and conditions described in appendix A to part 358, except insofar as the terms and conditions are modified by the regulations, the provisions of this notice, or the procedures issued by the FRBNY related to the conversion.

Physical coupons submitted for the CUBES program will be subject to rejection and book-entry CUBES balances established as a result of the submission of coupons will be subject to adjustment until the submission has been verified and approved by Treasury. This verification and approval will be completed by Treasury within twelve (12) business days following deposit by FRBNY of the coupons into the designated accounts. Such verification and approval by Treasury are final determinations.

The CUBES program will offer on-line trading of CUBES balances between depository institutions. However, the submitting institution is prohibited from trading any CUBES balance resulting from the submission of coupons under this notice prior to the Treasury verification of the submission and approval of the resulting CUBES balances.

If, as a result of verification, Treasury determines that an adjustment is necessary to one or more CUBES balances for the submitting institution, the institution will be notified. If a CUBES balance is insufficient for a reduction adjustment to be processed, the submitting institution is responsible for immediately acquiring such CUBES balance as is necessary to allow the adjustments to be made.

The value of all coupons submitted to FRBNY on the same date with the same delivery instructions and for the same payment date will be rounded down to the next lowest full dollar amount since on-line trading is done only in full dollar amounts. For example, on June 18, institution A submits coupons for a variety of customers or accounts and directs that the CUBES balances be established in its trust account (or similar subaccount). The total of the coupon value with this delivery instruction for payment date 5/15/94 is $44,356.87. The total of the value for payment date 11/15/94 is $56,002.13. The submitting institution will receive in its trus account a 5/15/94 CUBES balance of $44,356.00 and an 11/15/94 CUBES balance of $56,002.00.

Book-entry transfers of CUBES will be subject to the same fee schedule applicable for the transfer of other on-line Treasury book-entry securities.

Once stripped coupons have been converted to CUBES, their reconversion to physical form will not be permitted. The principal (corpus) securities from which the interest coupons have been stripped will not be accepted in CUBES.

A depository institution wishing to participate in CUBES should contact Ms. Jessie Miley of the FRBNY at (212) 720-6972/73 as soon as possible to obtain an information package and the necessary supplies required to present the stripped coupons in acceptable form. The institution should inform the FRBNY of its intention to participate as soon as possible, but no later than two weeks before deposit, and should submit a completed holdings statement on the form provided in the information package.

Participants will be charged a participation fee of $4 per coupon for conversion to book-entry. Participants will also bear the full cost and risk associated with both the delivery of the coupons to the FRBNY and any returns that may be necessary if the stated presentation procedures are not followed.

Submitters of coupons are deemed to agree to the terms and conditions set forth in this notice, 31 CFR part 358, including appendix A except as otherwise modified, and any other requirements that may be prescribed by the Department of the Treasury and the FRBNY.

Richard L. Gregg,

Commissioner, Bureau of the Public Debt.

[FR Doc. 93-7538 Filed 3-30-93; 8:45 am]

BILLING CODE 4810-35-P

Office of Thrift Supervision

The Guardian Bank, a Federal Savings Bank, Boca Raton, FL; Appointment of Conservator

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2) (A) and (C) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for The Guardian Bank, a Federal Savings Bank, Boca Raton, Florida, on March 16, 1993.

Dated: March 25, 1993.

By the Office of Thrift Supervision.

Nadine Y. Washington,

Corporate Secretary.

[FR Doc. 93–7362 Filed 3–30–93; 8:45 am]

BILLING CODE 6720-01-M

[AC–12: OTS No. 4692]

Blue River Federal Savings Bank, Edinburgh, IN; Approval of Conversion Application

Notice is hereby given that on March 22, 1993, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Blue River Federal Savings Bank, Edinburgh, Indiana, to convert to the stock form of organization. Copies of the application

are available for inspection at the Information Services Division, Office of Thrift Supervision, 1776 G Street, NW., Washington, DC 20552, and the Central Regional Office, Office of Thrift Supervision, 111 Wacker Drive, suite 800, Chicago, Illinois 60601–4360.

Dated: March 25, 1993.

By the Office of Thrift Supervision.

Nadine Y. Washington,

Corporate Secretary.

[FR Doc. 93–7360 Filed 3–30–93; 8:45 am]

BILLING CODE 6720–01–M

[AC–13: OTS No. 0650]

Fidelity New York F.S.B., Floral Park, NY; Approval of Conversion Application

Notice is hereby given that on March 24, 1993, the Deputy Assistant Director, Corporate Activities Division, Office of Thrift Supervision, or her designee, acting pursuant to delegated authority, approved the application of Fidelity New York F.S.B., Floral Park, New York, for permission to convert to the stock form of organization. Copies of the application are available for inspection at the Information Services Division, Office of Thrift Supervision, 1776 G Street, NW., Washington, DC 20552, and the Northeast Regional Office, Office of Thrift Supervision, 10 Exchange Place, 18th Floor, Jersey City, New Jersey 07302.

Dated: March 25, 1993.

By the Office of Thrift Supervision.

Nadine Y. Washington,

Corporate Secretary.

[FR Doc. 93–7361 Filed 3–30–93; 8:45 am]

BILLING CODE 6720–01–M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 60
Wednesday, March 31, 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 ENERGY REGULATORY COMMISSION

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: March 24, 1993, 58 FR 15898.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: March 26, 1993, 10 a.m.

CHANGE IN THE MEETING: The following Docket Numbers and Companies have been added as Items CAG–71 and CAG–72 on the Consent Agenda scheduled for March 26, 1993:

Item No., Docket No. and Company

CAG–71, RP92–235–000 and CP91–1671–000, United Gas Pipe Line Company

CAG–72, RP93–5–004, 006 and RP93–96–000, Northwest Pipeline Corporation

Lois D. Cashell,

Secretary.

[FR Doc. 93–7541 Filed 3–29–93; 3:15 pm]

BILLING CODE 6717–02–M

UNITED STATES INTERNATIONAL TRADE COMMISSION

TIME AND DATE: March 31, 1993 at 3 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Inv. No. 731–TA–550 (Final) (Sulfur Dyes from India)—briefing and vote.
2. Outstanding action jacket requests—none.
3. Any items left over from previous agenda.

CONTACT PERSON FOR MORE INFORMATION: Paul R. Bardos, Acting Secretary, (202) 205–2000.

Issued: March 26, 1993.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 93–7503 Filed 3–26–93; 4:28 pm]

BILLING CODE 7020–02–M

Corrections

Federal Register
Vol. 58, No. 60
Wednesday, March 31, 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 TRANSPORTATION

Office of the Secretary

49 CFR Part 1

[OST Docket No. 1; Amdt. No. 1-255]

Organization and Delegation of Powers and Duties; Delegation to the Administrator, Research and Special Programs Administration

Correction

In rule document 93-1508 beginning on page 5631 in the issue of Friday, January 22, 1993 make the following correction:

On page 5632, in the first column, in § 1.53(l), in the fourth line "6207" should read "1607".

BILLING CODE 1505-01-D

DEPARMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 93-AGL-4]

Proposed Transition Area Establishment; Moose Lake, MN

Correction

In proposed rule document 93-5827 beginning on page 13715 in the issue of Monday, Marh 15, 1993, make the following correction:

§ 71.1 [Corrected]

On page 13716, in the first column, in § 71.1, under the heading "*Section 71.181 Designation of Transition Areas*", in the fourth line, "long. 94°" should read "long. 92°".

BILLING CODE 1505-01-D

federal register

Wednesday
March 31, 1993

Part II

Department of Transportation

Federal Highway Administration

Orders in Motor Carriers Safety Enforcement Cases; Notice

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Orders in Motor Carrier Safety Enforcement Cases

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of agency decisions.

SUMMARY: This document gives notice of the Decisions and Orders served from December 5, 1991, through January 8, 1993, concerning motor carrier and hazardous materials proceedings conducted pursuant to 49 CFR part 386. It also includes an order dated September 30, 1991, that was inadvertently omitted when the previous collection of decisions was published on June 26, 1992. (57 FR 28710). The Orders include both those issued by the Associate Administrator for Motor Carriers and those decided by Administrative Law Judges and adopted by the Associate Administrator.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Medalen, Motor Carrier Law Division (202) 366–1354, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: The following Orders are being published:

Name	Docket No.
National Retail Transportation, Inc.	R1–92–03 (R1–92–185)
National Retail Transportation, Inc.	R1–92–03 (R1–92–185)
Sined Leasing, Inc	R1–91–02
Murray Rude Services, Inc	R1–92–01
R.W. Bozel Transfer, Inc	R1–92–051
American Truck & Trailer Repair.	R1–92–001
Specialties, Inc	91–SC–021–SA
Durey-Libby Edible Nuts, Inc.	R1–91–221
Professional Equipment Co., Inc.	R1–92–047
Pappy's Enterprises, Inc	R3–91–112
Robert Hansen Trucking, Inc.	R5–89–174
American Pacific Power Apparatus, Inc.	OR–90–005–075
The Sommers Co., Inc	92–GA–007–SH
Gunther's Leasing Transport, Inc.	R3–92–255
John Steven Johnson/ Steve Johnson & Sons.	R9–89–058
John Steven Johnson/ Steve Johnson & Sons.	R9–89–058
WDP Transportation, Inc	91–KY–027–SA
Pioneer Pallets, Inc	R3–91–171
Bill Carter Trucking, Inc	R3–91–279
LDM Trucking Co., Inc	R9–91–003
Carroll Fulmer & Co., Inc	91–FL–054–SA
National Retail Transportation, Inc.	R1–92–03 (R1–92–185)
Gunther's Leasing Transport, Inc.	Complaint investigation
Costello Industries, Inc	R1–91–225
PVH, Inc. d/b/a Aries Distributors.	91–142
Kessel Lumber Supply, Inc	R3–92–01
John Steven Johnson/ Steve Johnson & Sons.	R9–89–058
James Kelton, Sr. d/b/a Kelton Tours.	90–AL–028–SA
Charles Meadows d/b/a Meadows Auto Sales.	R3–91–72
Fikse & Company	R9–90–042
Humihanz Trucking, Inc	R3–91–129
Beier Enterprises d/b/a Oroweat Beier Enterprises.	R6–90–117
Iron Horse Equipment Corporation.	R9–91–032
Aaron McGruder Trucking, Inc.	R6–91–57
American Diversified Construction, Inc.	90–TN–043–SA
Used Equipment Sales, Inc	R1–91–03
S–W Mills, Inc	R5–91–004
Estelle Robertson	R6–90–69
Wayne P. Bryant & Mark Bryant d/b/a Bryant Trucking.	R7–90–020
James Guest	91–GA–025–SA
Laughlin Transport, Inc	R3–91–104
James M. Montague	R3–89–186
Sunrise Fiberglass Engineering, Inc.	91–21
Shetakis Wholesalers, Inc	R1–91–019
A.M. & Wade Cox	89–TN–021–SA
RKM Equipment & Trucking, Inc.	R9–90–039
Jagpal Transport, Inc	R9–92–020
Transurface Carriers, Inc	R1–90–294
Sined Leasing	91–122
American Pacific Power Apparatus, Inc.	OR–90–006–075
Laughlin Transport, Inc	R3–91–104
R.M. Black, Jr. Produce, Inc.	90–AL–021–SA
John Steven Johnson/ Steve Johnson & Sons.	R9–89–058
Kessel Lumber Supply, Inc	R3–92–01 (R3–91–078)
Gunther's Leasing Transport, Inc.	Complaint investigation
John Steven Johnson/ Steve Johnson & Sons.	R9–89–058
Dan Trease Distributing	85–144H
Forsyth Milk Hauling Co., Inc.	R3–90–037
Gunther's Leasing Transport, Inc.	R3–90–104

Authority: 23 U.S.C. 315, 49 CFR 1.48.

Issued on: March 23, 1993.

E. Dean Carlson,

Executive Director.

National Retail Transportation Inc.; Order Granting Respondent's Motion to Quash

Served January 8, 1993.

This civil forfeiture proceeding was instituted by a Claim Letter issued pursuant to 49 CFR 386.11(b) on January 21, 1992, alleging that National Retail Transportation, Inc. (NRT or Respondent) failed in forty-six instances to preserve for six months supporting documents for drivers' records of duty status. Each failure constitutes a separate violation of 49 CFR 395.8(k). The Regional Director, or Claimant, seeks civil penalties under 49 U.S.C. 521(b)(2) of $23,000, or $500 per violation.

Respondent's October 1, 1992 motion to dismiss this proceeding was denied by my order served October 28, 1992, which, *inter alia*, encouraged the parties to revisit their discovery disputes. Differences evidently remain, however, since Claimant, under date of December 8, 1992, has now applied for several subpoenas *duces tecum* and *ad testificandum* directed to persons and documents affiliated with NRT, which NRT has moved to quash. I grant Respondent's motion.

Administrative subpoenas are enforceable if the information sought is reasonably relevant to the underlying proceeding, so long as the demands are not unreasonably burdensome or broad.[1] I conclude that the information sought is not reasonably relevant to this proceeding.

The Claim Letter, or complaint, seeks to provide that NRT failed to preserve certain documents for applicable periods. The subpoenas seek information concerning Respondent's recordkeeping practices—including an examination of records maintained strictly for tax purposes—and a consultant's view of its safety procedures. The Regional Director is attempting to establish thereby that Respondent has deliberately withheld or destroyed salient documents in order to conceal hours-of-service violations, and that Respondent has lied to FHwA investigators in so doing.

Those may be proper investigatory aims, but in this enforcement proceeding they are not the allegations stated in the Claim Letter. While Claimant argues that information sought to be uncovered by the subpoenas relates to Respondent's compliance posture, a pertinent factor in penalty assessment, and while its contention is true as far as it goes, it goes quite a bit too far. Exploring the issues underpinning Claimant's subpoenas would unduly alter the nature and direction of this case. Questions concerning NRT's intent, and its methods and policies concerning

[1] *U.S.* v. *Newport News Shipbuilding and Dry Dock Co.*, 837 F.2d 162 (4 Cir. 1988); *Federal Trade Commission* v. *Rockefeller*, 441 F. Supp. 234 (S.D.N.Y 1977), *aff'd*, 591 F.2d 182 (2 Cir. 1979).

preservation of its business records, go well beyond the specific matters framed by the Claim Letter. Questions that may bear on the appropriate amount of the penalty are properly examined in the context of whether Respondent violated § 395.8(k) in the forty-six instances cited. Claimant's scenario, by contrast, exalts matters of penalty over the substantive issued limned by the complaint; it would have the tail wag the dog. As such, I conclude that the information sought by these subpoenas is not reasonably relevant to the instant proceeding. Additionally, the Associate Administrator has stated that matters relating to the amount of the penalty alone are not material factual issues in dispute subject to hearing.[2] Against this background, I conclude that these subpoenas should not be enforced and I grant the motion to quash.[3]

The Regional Director has also requested that the hearing be continued in Kentucky in order to hear witnesses who are based in that state. That request may be refiled if still pertinent in light of this order; that aside the hearing will be held in New York City on March 4, 1993, courtroom to be announced.[4]

Burton S. Kolko,
Administrative Law Judge.

National Retail Transportation, Inc.; Order Denying Motion to Dismiss

Served October 28, 1992.

This civil forfeiture proceeding was instituted by a Claim Letter issued pursuant to 49 CFR 386.11(b) on January 21, 1992, alleging that National Retail Transportation, Inc. (NRT or Respondent) failed in forty-six instances to preserve for six months supporting documents for drivers' records of duty status. Each failure constitutes a violation of 49 CFR 395.8(k). The Regional Director, or Claimant, seeks a civil penalty of $23,000, or $500 per violation.[1]

On October 1, 1992, NRT moved for an order dismissing this proceeding. Claimant filed an answer opposing the motion, and Respondent filed a "rebuttal" to the response.

NRT argues that documents it has obtained in discovery establish that no material factual issues are in dispute, and thus no hearing is needed. In support it asserts, citing internal agency documents, that this case violates FHwA policy and that agency officials differ as to the scope and effect of the regulation upon which it is based. NRT also contends that this proceeding discriminatorily singles it out for punishment.

Claimant's response asserts initially that the motion must be dismissed as out of time. On the merits, it asserts that the motion lacks factual basis. Claimant must be given an opportunity to make its case, it argues, stating that it intends to show that NRT violated § 395.8(k) by deliberately refusing to produce documents in an attempt to impede the agency's investigation.

Respondent's rebuttal states that its motion is timely because it is based in critical measure on documents obtained through discovery only days earlier. It also argues that Claimant's proposed manner of proving its case is so different from its allegations as to constitute inadequate notice of the charges against Respondent, tantamount to a denial of due process.

I deny the motion to dismiss. In the first place, it is untimely, having missed the 20-day deadline[2] by 234 days. I am not sympathetic to Respondent's plea for exemption, which leads to my second point.

The discovery-derived documents forming the basis for Respondent's motion, and whatever they show, have no relevance to this case. Whether and how to prosecute this matter is entirely up to the Regional Director. Internal agency debates about the regulation in question are beside the point, and no due process or other concerns are implicated.[3] Respondents' motion fails on the merits as well.

I encourage the parties to revisit, between themselves, their discovery disputes in light of this order. To that end I am dismissing Claimant's motion to compel and all other related motions and requests.[4]

Burton S. Kolko,
Administrative Law Judge.

Order; Sined Leasing, Inc.

Served September 22, 1992.

The parties have agreed to settle this matter prior to hearing and having entered into a settlement agreement, *It is hereby ordered*, That the above matter is dismissed in accordance with the terms of the Stipulation of Compromise and Settlement attached hereto.

Burton S. Kolko,
Administrative Law Judge.

Stipulation of Compromise and Settlement; Sined Leasing, Inc.

It is hereby stipulated by the regional director, Office of Motor Carriers and respondent, Sined Leasing, Inc., through their respective attorneys as follows:

1. The parties agree to settle and compromise this action as to respondent, Sined Leasing, Inc.

2. Respondent, Sined Leasing, Inc. (hereinafter "Respondent"), shall pay to the Federal Highway Administration (hereinafter "Administration") the sum of Seven Thousand Five Hundred Dollars and 00/100's ($7,500) in full satisfaction of any and all claims arising out of the May 23, 1991 Notice of Claim which is the subject of this action.

3. Respondent also agrees to enter into the attached Consent Agreement and Order.

4. This settlement is not an admission by either Respondent or the Administration.

5. Respondent acknowledges that a safety compliance review may be conducted in the near future and, should sufficient violations be discovered, the Administration reserves the right to initiate any and all actions permitted under the Motor Carrier Act, the Interstate Commerce Act and as authorized by 49 App. U.S.C. 521(5)(A).

6. The Respondent acknowledges that it has received adequate notice of the Administration's claim and waives any and all rights it may have to further details of the violations that gave rise to the claim and a decision containing findings of fact and conclusions of law.

7. This settlement is made pursuant to the Federal Claims and Collection Act of 1966, 31 U.S.C. 3701 et. seq. and the regulations of the Administration in 49 CFR part 386.

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[2] *Tonawanda Tank Transport Service, Inc.*, Docket R1-88-130, July 5, 1990; *A.T. Pinto, Inc.*, Docket R3-90-006, February 20, 1990.

[3] Respondent's answer of December 15, 1992, also (1) requested dismissal of this proceeding, which I deny, and (2) applied for a subpoena of a FHwA official, as to which I will reserve judgment pending Claimant's answer.

[4] Respondent's other defenses to Claimant's application for subpoenas are rejected.

[1] The Claim Letter actually asks for a fine of $23,800, but that figure appears to be a typographical error. The Letter clearly states that the basis for the amount sought is $500 per violation alleged, and 46×500=23,000. Further, the Associate Administrator's later-issued Order Appointing Administrative Law Judge states that the Letter "assessed a total penalty of *$23,000*, or $500 per violation" (emphasis supplied). To remove all doubts, Claimant should file an appropriate document indicating the civil penalty sought and the mathematical basis therefor.

[2] 15 days (§§ 386.36(a) and 386.14(a)) plus five days for mailing (§ 386.32(c)).

[3] Alleged selectivity in enforcement is not actionable unless it is deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), *reh. den.* 435 U.S. 918 (1978). Respondent makes no such charge here.

[4] I also request the parties to tone down their rhetoric, which not only hinders accommodation but detracts from the dignity of this proceeding.

Dated: September 4, 1992.

Denis McDaniel,

President, Sined Leasing, Inc.

Dated: September 10, 1992.

Michael C. Damm,

Attorney for Sined Leasing, Inc.

Dated: September 17, 1992.

Milt L. Schmidt,

Acting Regional Director, Office of Motor Carriers.

Dated: September 17, 1992.

Shelia D. O'Sullivan,

Attorney for the Regional Director.

Consent Agreement and Order; Sined Leasing, Inc., Wrightstown, NJ

It is hereby stipulated and agreed by, Sined Leasing, Inc. (Carrier), and the Federal Highway Administration (Administration) as follows:

1. All drivers in Carrier's use and employ shall not operate a vehicle in interstate commerce unless they are medically qualified to do so. A copy of the medical examiner's certificate shall be maintained in the driver qualification file as per 49 CFR 391.51.

2. All drivers subject to controlled substance testing under 49 CFR part 391 subpart H, shall be tested in accordance with that section and 49 CFR part 40, and records of testing shall be maintained as required.

3. Require all drivers to prepare complete, and accurate daily records of duty status for each 24 hour period and submit them to the Carrier within 13 days. All records of duty status shall be maintained at the Carrier's principal place of business along with supporting documents for a period of 6 months. The supporting documents shall include toll receipts, fuel receipts, repair bills, and any other road expense receipts, as well as invoices, bills of lading, dispatch records, and trip reports. Such supporting documents shall be identified with the driver's name and power unit number and maintained on file.

4. The Carrier shall review the accuracy of all drivers records of duty status by checking supporting documents against the duty status record. The Carrier shall establish a policy and program of prohibiting by disciplining or other means, instances of falsification of records. Such policy and program shall include disciplinary action against drivers for instances of falsification of records. The policy shall be in writing and prominently displayed at the Carrier's place of business. Additionally all drivers shall be personally furnished with a copy of the policy. Any disciplinary action taken against a driver pursuant to the policy and program shall be documented in the driver's qualification file.

5. The Carrier shall establish a system to control and insure compliance with the hours of service requirements as set forth in 49 CFR 395.3. Such system shall include a dispatch program that monitors drivers hours on a daily basis, including requiring drivers to call in to the main dispatcher on a 24 hour basis to advise on the number of on-duty and driving hours available for that period and ensuing days. Additionally, where necessary, the Carrier shall utilize team drivers to insure compliance with the hours of service requirements. Drivers shall not be dispatched unless they retain adequate and available on-duty and driving time as per § 395.3, to complete their assigned run.

6. Require all drivers to prepare vehicle inspection reports at the end of each day's operation. Ensure each report is signed by the driver and certification of repairs have been made if defects are reported. The Carrier shall require that vehicles may not be dispatched or used in interstate commerce unless the prior day's inspection report signed by the driver is present in the vehicle and a certification of repairs is completed if necessary. All driver vehicle inspection reports not required to be present on the vehicle, shall be retained on file at the Carriers principal place of business for at least 90 days in accordance with 49 CFR part 396.

7. This agreement has the same force and effect, becomes final, and may be modified, altered, or set aside in the same manner as other orders issued under 49 U.S.C. 501 et seq., 2501 et seq., 3101 et seq., and 10927, note. Additionally after one year from the date of execution of this agreement, any party may petition the Regional Director to modify the terms of this agreement, such modification shall be dependent on the Carriers progress in improving its safety compliance. Any changes in the law or regulations which apply to the provisions of this agreement shall be considered as modifying the agreement to be in conformance with the provisions of the law.

8. The Carrier acknowledges it has received adequate notice of the Administration's actions in this matter and waives any and all rights it may have to further details relating to the violations which gave rise to this Order, including a decision and order containing findings of facts and conclusions of law, and any right to seek judicial review or otherwise contest or challenge the validity of this agreement.

9. The Carrier acknowledges that unannounced on site verification of the Carrier's operation will be conducted and that failure to comply with the Federal Motor Carrier Safety Regulations or with the provisions of this agreement may result in civil penalties as provided by law including those penalties chargeable under 49 CFR part 386, subpart G, appendix A but not a reopening of the specific violations cited in the May 23, 1991 Notice of Claim. In the event that an unannounced on site verification takes place and the appropriate officers of the Carrier are not present, the Carrier will be given an opportunity to notify such officers so they can be present. The Carrier shall have 30 days from the date this Agreement and Order is executed to implement the portions of this Agreement not covered by the Regulations.

Denis McDaniel,

President.

Dated: September 4, 1992.

Milt L. Schmidt,

Acting Regional Director, Office of Motor Carriers.

Dated: September 17, 1992.

Order Terminating Proceeding; Murray Rude Services, Inc.

Served September 9, 1992.

The parties having agreed to settle this matter prior to hearing, *It is therefore ordered* That this matter is dismissed in accordance with the terms and conditions of the settlement agreement and consent order.

Burton S. Kolko,

Administrative Law Judge.

Final Order; R. W. Bozel Transfer, Inc.

This matter comes before me upon a motion by the Regional Director, Region 3, for a final order finding the facts to be as alleged in an amended notice of claim dated December 12, 1991, and imposing a civil penalty of $17,600. This proceeding is governed by the Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

A December 2, 1991, notice of claim charged R. W. Bozel Transfer, Inc. (Bozel), with 20 violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Apparently before it received this notice of claim, Bozel responded to a November 1991 compliance review report on December 4, documenting its efforts to ensure compliance with the regulations. After Bozel was cited by a District of Columbia police officer on December 5 for using a driver (Bob Roth) under the age of 21 in interstate commerce, the

Regional Director amended the notice of claim, adding an additional charge for Bozel's November 19 use of an underage driver.

The amended claim letter, dated December 12, charged Bozel with one substantial health and safety violation and five serious, nonrecordkeeping violations of 49 CFR 391.11 (a) & (b)(1), using an underage driver in interstate commerce; four violations of § 391.27, failing to maintain in driver qualification files the list of each drivers' violations of traffic laws; two violations of § 391.35, failing to maintain in driver qualification files the written examination certificate, questions and driver's answers for each driver; two violations of § 391.51, failing to maintain in driver qualification files a medical examiner's certificate for each driver; one violation of § 391.103, failing to require a driver-applicant to submit to a pre-employment controlled substances test; one violation of § 391.105, failing to require a driver to be tested in accordance with the biennial (periodic) testing requirements; one violation of § 395.3(b), requiring or permitting a driver to drive after having been on duty for 60 hours in 7 consecutive days; and four violations of § 395.8, failing to require drivers to make and submit records of duty status. In all, the December 12 claim letter cited 21 violations and assessed a total penalty of $17,600.

Bozel responded orally to the claim letters. Regional Director's Motion for Final Order at 2. After unsuccessful settlement negotiations, the Regional Director filed a motion for final order and supporting evidence on January 15, 1992, stating that there was no genuine issue of material fact and that he was entitled to judgment as a matter of law.

Bozel responded to the motion for final order on January 27, 1992, admitting to a number of the charges and denying responsibility for others. The carrier did not request a hearing, but defended by stating that the recordkeeping and periodic drug testing charges involved conduct of owner-operators who were independent contractors, not employees of Bozel, and therefore Bozel could not be held liable for their violations. In addition, the carrier claimed it was not given the full 15-day abatement period in which to cease all violations, as provided in the notice of claim. Finally, Bozel stated it believed it could use 20-year-old driver Bob Roth on interstate trips if those trips were wholly within the "commercial zone" of metropolitan Washington, D.C. The Regional Director did not respond to Bozel's January 27 pleading.

Discussion

The Provisions of 49 CFR 386.14

The Rules of Practice provide, "If the respondent does not reply to a Claim Letter within (15 days after it is served), the Claim Letter becomes the final agency order in the proceeding 25 days after it is served." 49 CFR 386.14(e). Bozel did not reply to the December 2 & 12, 1991, notices of claim in accordance with 49 CFR 386.14(b) within the prescribed time period. Therefore, the Regional Director could have sent this case directly to the United States Attorney for enforcement in a Federal district court under 49 CFR 386.65. See Transurface Carriers, Inc., No. R1–90–294, (FHWA March 12, 1992) (Final Order).

Apparently, the Regional Director views Bozel's oral response to the notices of claim as sufficient to avoid a default judgment against the carrier. Although I disagree with this interpretation of § 386.14(e), the notices of claim advised Bozel that "You may elect to discuss, or compromise a settlement of this claim. If you choose this option, you and/or your representative should contact Mr. Walter Johnson at the above address * * *. He may be contacted by telephone * * *." These statements inform the carrier that an oral response within 15 days of receipt of the notice of claim is sufficient under the Rules of Practice. This is incorrect. An oral response neither meets the requirements of § 386.14 regarding the form for a reply, nor does it toll the 15-day time period in which to respond to a notice of claim.

Both claim letters also err in stating that Bozel's "[f]ailure to respond within 30 days of the date of this Notice of Claim will result in this Notice of Claim becoming the final agency order for the full amount claimed pursuant to 386.14(e)." This subsection actually reads, "the Claim Letter becomes the final agency order in the proceeding 25 days after it is served." Contrary to the language in the claim letters, § 386.14 requires a written reply to the notice of claim within 15 days of service. Absent such a written reply, and after 25 days, not 30, the notice of claim becomes a final agency order.

Because the language in the claim letters misinforms the carrier regarding several essential provisions of the Rules of Practice, I have decided to review this matter on the merits, rather than to conclude that Bozel's default is dispositive of the matter.

The Regional Director's Motion for Final Order

A motion for final order is analogous to a motion for summary judgment. See, e.g. *In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). Accordingly, the moving party has the burden of clearly establishing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. All evidence must be viewed in a light most favorable to the nonmoving party, Bozel in this case. In its reply to the motion for final order and in a written statement by Bozel Vice President Chris Bozel, the carrier has admitted to 12 of the 21 charges and unsuccessfully contested the remaining 9 counts.

A. Use of an Underage Driver in Interstate Commerce

Bozel acknowledges that it permitted 20-year-old Bob Roth to drive on the occasions cited in the notices of claim. But the carrier claims "our understanding was that travelling in the commercial zone (of Baltimore, Maryland; Washington, D.C.; and northern Virginia) was exempt from (the definition of) interstate [commerce]." Bozel's January 27, 1992, Reply at 1. Although the FMCSRs once provided a limited "commercial zone" exemption in 49 CFR 390.33, this section was repealed by Act of Congress on November 18, 1988, and since that time, there has been no commercial zone exemption in the FMCSRs. Truck and Bus Safety Reform Act of 1988, Public Law No. 100–690, section 9102, 102 Stat. 4527, 4528 (codified at 49 U.S.C. App. § 2505(h)).[1]

Every motor carrier is charged with knowledge of the regulations. *Cf. In re Robert Hansen Trucking, Inc.*, 57 FR 28731, at 28732, (FHWA 1992) (Order) (holding that "mere ignorance of the law cannot be a defense or an excuse for violating the law"). To accept Bozel's mistake of law as a defense to the charges would appear to reward Bozel's apparent four year failure to educate itself regarding changes made in the safety regulations. Therefore, I find that Bozel's admitted use of an underage driver in interstate commerce is in no way excused or justified by its ignorance of the current safety regulations.

[1] The 1988 Act included a grandfather clause for any person authorized to operate a commercial motor vehicle in a commercial zone throughout the 1-year period ending on November 18, 1988. Based on the evidence before me, it appears that Bob Roth did not begin driving in interstate commerce until 1990, and therefore cannot meet the requirements of the grandfather clause.

B. Excess Hours, Failure to Maintain Records of Duty Status, and No Pre-Employment Drug Test

With regard to the four charges of failing to maintain records of duty status and one count of permitting a driver to drive after having been on duty for 60 hours in seven days, the carrier concedes that "Bozel Transfer's error was not having proper procedures in place to follow-up and inspect record[s] of duty status * * *." Bozel's January 27, 1992, Reply at 3. Section 390.11 provides that, "Whenever in [the FMCSRs] a duty is prescribed for a driver or a prohibition is imposed upon the driver, it shall be the duty of the motor carrier to require observance of such duty or prohibition." In failing to review driver logs and to ensure that drivers maintain records of duty status for their trips, the carrier has permitted the violations to occur. Based on Bozel's admissions that its inadequate inspection and verification of driver records caused these violations, I find Bozel breached its duty to require observance of the regulations. Therefore, Bozel is responsible for its drivers' noncompliance. *Used Equipment Sales, Inc.*, FHWA No. R1–91–03, Motor Carrier Safety, May 6, 1992 (Decision of Administrative Law Judge).

In its reply, Bozel also admitted that it did not require a re-hired former driver to take a pre-employment drug test until "several days after his second hire date." Bozel's January 27, 1992, Reply at 3. Therefore, I find Bozel liable for one violation of § 391.103 for failing to require a driver-applicant to submit to pre-employment drug testing.

C. Bozel's Liability for the Actions of its Owner-Operators

As to the remaining nine charges, *i.e.* eight citations for missing driver qualification file documents and a single charge of using a driver without requiring him to submit to a periodic drug test, Bozel has attempted to disclaim liability. The carrier asserts that its contracts with the independent contractors who committed these violations provide that they, not Bozel, are responsible for complying with all applicable safety regulations. This argument is without merit in this context. The regulations have imposed upon carriers the duty to supervise those drivers used by the carrier, regardless of their employment status. As noted above, 49 CFR 390.11 requires carriers to ensure that their drivers observe all regulatory duties and prohibitions. Significant public interest supports the view that motor carriers cannot simply transfer this responsibility for monitoring driver compliance with federal safety regulations to the drivers requiring the supervision. Therefore, when determining a carrier's responsibility for the actions of its drivers, the FMCSRs do not recognize any distinction between independent contractors under the control of a motor carrier and employees that may be recognized in other contexts.

Penalty Determination

The Regional Director assessed a penalty of $10,000 for the substantial health and safety violation, $500 for each serious, nonrecordkeeping violation, and $300 for each recordkeeping violation, for a total penalty of $17,600.

The Regional Director's sole support for the $10,000 penalty for Bozel's November 19, 1991, use of an underage driver is his assertion that Bozel "continued to use an underaged (sic) driver on December 5, 1991, notwithstanding two prior notices and its written assurance of December 4, 1991, that it would not continue to use underaged (sic) drivers in interstate commerce." Motion for Final Order at 1.

I believe that Bozel's conduct on December 5 is wholly irrelevant to the November 19 charge. Even assuming that the December charge is remotely relevant, the Regional Director's apparent assertion that the mere recurrence of an action is sufficient to prove a substantial health and safety violation is without foundation. Whether an action is a threat to health and safety is inherent in the action itself, and cannot be contrived or created through repetition of actions not likely to cause serious personal injury or death.

Further undermining the Regional Director's contention that Bozel's November 19 use of 20 year old Bob Roth as a driver constitutes a substantial health or safety violation is the Regional Director's treatment of Bozel's earlier use of this driver as a serious pattern of violations. Moreover, if the Regional Director objects so strongly to Bozel's early December conduct, I question why he did not cite Bozel for the December 5 trip in the amended notice of claim. By this decision, I hold only that the Regional Director has not proven that Bozel's actions constitute a substantial health and safety threat, I do not rule out the possibility that use of an underage driver could constitute such a violation.

Bozel's argument that the notice of abatement effectively permits it to violate the FMCSRs with immunity for 15 days after receipt of the notice of claim is illogical. Claiming that Bob Roth's December 5 trip occurred within 15 days after the December 2 claim letter, Bozel argued that this trip could not be the basis of the additional $10,000 penalty. Bozel has simply misinterpreted the notice of abatement provision. Upon receipt of the notice of claim, a carrier must cease all violations immediately. The 15 day period is provided for limited cases where the immediate cessation of a violation may require curative efforts lasting no longer than 15 days. In all cases, violations that could be ceased earlier must be ceased earlier. Nothing in the record before me suggests why Bozel could not have ceased using Bob Roth as a driver immediately upon notification that such use constituted a violation of the regulations. I believe the Regional Director is correct in viewing Bozel's continued use of this driver, after notification that such use violates the safety regulations, as an aggravating factor in assessing a penalty had the Regional Director chosen to cite this post-notification trip by Roth.

Upon review of the penalty determination factors listed in 49 U.S.C. 521(b)(2)(C), I find that the Regional Director has failed to provide evidence sufficient to support a finding that the November 19, 1991, charge constitutes a substantial health and safety violation. I do find, however, that the six underage driver violations constitute a serious pattern of safety violations. Accordingly, I assess a penalty of $500 for the November 19 charge and $500 each for the five remaining underage driver charges.

In addition, I conclude that the drug testing and excess hours charges constitute a serious pattern of safety violations. A pattern may be established by single violations of related regulations. All of the regulatory provisions involved in this pattern seek to ensure that commercial motor vehicle drivers are alert and able to perform at optimum skill levels, free from the detrimental influences of fatigue or controlled substances. Therefore, I assess a penalty of $500 for each of the three violations.

Finally, I find that the $300 penalty assessed by the Regional Director for each of the 12 remaining recordkeeping charges is reasonable to induce compliance with these regulations.

It is hereby ordered That the Regional Director's motion for final order is granted, and R.W. Bozel Transfer, Inc., is directed to pay the sum of $8,100 to the Regional Director, Region 3, within 30 days of the date of entry of this order.

Dated: August 6, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order; American Truck and Trailer Repair

This matter comes before me upon a motion for a final order by the Regional Director, Region 1. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR Part 386.

Background

After a July 1991 compliance review report of American Truck and Trailer Repair (ATTR) cited the carrier for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs), 49 CFR parts 350–399, and the Hazardous Materials Regulations (HMRs), 49 CFR parts 171–180, the Regional Director issued a notice of claim charging ATTR with nine violations. Specifically, ATTR was charged with two violations of 49 CFR 391.51 for failing to maintain a complete driver qualification file for each driver, one violation of 49 CFR 391.103 for failing to require a driver-applicant to submit to a pre-employment controlled substance test, two violations of 49 CFR 396.11 for failing to require drivers to prepare vehicle inspection reports, and four violations of 49 CFR 177.817 for transporting hazardous material not accompanied by a properly prepared shipping paper.

The carrier answered the notice of claim, contending that the charges cited against it were "unjust" and should be "abated." ATTR's October 18, 1991, Reply to the Notice of Claim at 1. The carrier did not request a hearing. The Regional Director's motion for final order followed on February 20, 1992.

Discussion

In its reply to the notice of claim, ATTR claims it was given conflicting and incomplete answers to its questions regarding the applicability of the Federal Motor Carrier Safety Regulations (FMCSRs) and the Hazardous Materials Regulations (HMRs) to its activities by a State trooper and two FHWA safety investigators who visited the carrier on three different occasions. As late as October 1990, ATTR was told by an FHWA safety investigator that neither the FMCSRs nor the HMRs applied to its operations. Safety Investigator Stryshak's Transcript of October 10, 1990, Interview. Once it received what it deemed to be clear instructions on the FMCSRs and HMRs during its July 1991 compliance review, ATTR states it immediately complied with the regulations. Therefore, the carrier concludes that it would have been in compliance from the first instance, had it been clearly instructed when it first asked for guidance on whether the regulations covered its activities.

The Regional Director contests ATTR's claims that it did not receive adequate instruction on the regulations, stating that the regulatory violations noted in a February 1990 safety review report should have been a clear indication that the regulations did apply to the carrier, and that ATTR needed to improve its motor carrier safety program. In addition, the Regional Director asserts that any apparently inconsistent advice given by FHWA safety investigators was due to ATTR providing false or conflicting information to the investigators during the reviews.

Included with the motion for final order were statements made by safety investigators Stryshak and McKeown, detailing the advice they gave the carrier. Mr. Stryshak states, "I also advised (ATTR Vice President of Operations Mr. Iseldyke) that if the carrier's vehicles operated wholly within New Jersey, the carrier would not be subject to the FMCSRs." Stryshak's Transcript of October 10, 1990, Oral Interview. Stryshak "also told him that in the event his drivers/vehicles operated in interstate commerce, *i.e.* across state lines, then the carrier would be subject to the requirements of the FMCSR and HM Regulations." *Id.*

In her July 1991 compliance review, Ms. McKeown "questioned Mr. Iseldyke on his operations, [and] determined that [ATTR] was in fact subject" to the FMCSRs. McKeown's October 28, 1991, Memorandum of July 1991 Compliance Review. Without explanation, McKeown also concluded that ATTR was subject to the HMRs. Finally, McKeown stated, "(n)either my file nor Mr. Iseldyke's files contained any written documentation from Ron Stryshak explaining why they were alledgedly (sic) not subject" to the FMCSRs or HMRs. *Id.*

The Regional Director's Motion for Final Order

Upon review of the case as a whole, I find that there are several deficiencies in the record. Specifically, I do not believe that the Regional Director has met his burden of clearly establishing all of the essential elements of his claim. In this case, where the motor carrier contests the applicability of the regulations, proof that ATTR's operations are subject to the FMCSRs and HMRs is a required element of the Regional Director's *prima facie* case. This evidentiary standard is no less stringent when the non-moving party, in this case ATTR, has denied that it is subject to the regulations but fails to submit evidence in support of its contentions. The Regional Director must succeed on the strength of his own evidence. Therefore, mere allegations that ATTR is in fact subject to the regulations are insufficient to meet the Regional Director's evidentiary burden. *E.g. In re American Pacific Power Apparatus, Inc.*, No. OR–90–006–75, (FHWA March 11, 1992) (Order).

In addition, the statements of investigators Stryshak and McKeown regarding the applicability of the regulations will not support a finding that ATTR's actions fall within the scope of both the FMCSRs and HMRs. First of all, the statements are conclusions and unsupported by evidence, as McKeown's own memorandum reveals. Second, the passages documents how the two investigators provided ATTR with inaccurate and conflicting information regarding the scope of the regulations, due at least in part to Stryshak's incorrect interpretation of the term "interstate commerce."

I recognize that ATTR appears satisfied, after McKeown's July 1991 compliance review, that it has been given clear instruction that it must comply with the regulations. But this fact cannot cure any deficiency in the record. If ATTR's operations lie outside the scope of both the FMCSRs and HMRs, I am without power to adjudicate this controversy, because subject matter jurisdiction cannot be conferred by consent of the litigants.

A. Applicability of the Federal Motor Carrier Safety Regulations

Contrary to the representations made by Mr. Stryshak, the term "interstate commerce," within the meaning of the FMCSRs and underlying statutes, is not synonymous with transport across state lines, and can include operations conducted wholly within a single state. Whether transportation between two points in one state is considered to be part of an interstate movement is determined by the essential character of the commerce, manifested by the shipper's fixed and persisting intent at the time of the shipment, and is ascertained from all the facts and circumstances surrounding the transportation. *Baltimore & O.S.W.R. Co.* v. *Settle*, 260 U.S. 166 (1922); *Texas* v. *U.S.*, 866 F.2d 1546 (5th Cir.), reh'g denied, 874 F.2d 812 (1989).

This definition of "interstate commerce" reveals another issue in this case. The determination of whether a shipment that does not cross state lines is either interstate or intrastate requires a careful review of the circumstances surrounding the transport, but such a review cannot be conducted on the record before me. While recognizing that Stryshak provided no documentary evidence in support of his finding that the FMCSRs and HMRs did not apply to the carrier, McKeown herself failed to support her own conclusions that ATTR was subject to the regulations. Without evidence of the specific actions of ATTR giving rise to the alleged FMCSR violations, I am unable to apply the correct definition of "interstate commerce" to the facts of this case and determine whether the carrier is subject to the FMCSRs.

B. Applicability of the Hazardous Materials Regulations

The scope to the HMRs differs from that of the FMCSRs. Where the FMCSRs were issued under 49 U.S.C. 3102 and section 206 of the Motor Carrier Safety Act of 1984 (codified as amended at 49 U.S.C. App. 2505), the authority for the application of the HMRs to motor carriers is found in the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. App. 1801–1819. The relevant statutory language provides that the HMRs apply to commerce which "affects" interstate or foreign commerce. 49 U.S.C. App. 1802(1). This section has been implemented to extend the application of the HMRs to certain intrastate transport of hazardous materials by interstate carriers. 49 CFR 171.1.

The record before me contains allegations that ATTR violated 49 CFR 177.817 of the HMRs by transporting hazardous material within the state of New Jersey without a properly prepared shipping paper. But even after ATTR objected to the applicability of the HMRs to its operations and investigator Stryshak found that the HMRs did not apply to the carrier, the Regional Director has failed to prove or even allege that these single-state trips constitute interstate commerce or "affect" interstate commerce and therefore fall within my regulatory authority.

Conclusion

ATTR has persuasively contested the applicability of both the FMCSRs and HMRs to its activities, therefore the Regional Director must provide *prima facie* evidence that ATTR falls within the scope of these regulations. Because the record before me lacks such evidence, I cannot grant the Regional Director's motion for final order at this time.

By this decision I do not hold that carriers can simply ignore applicable safety regulations, waiting to be ordered by this agency to comply. Each carrier has a duty to educate itself in the regulations that govern its conduct. *Cf. Luck Trucking, Inc.*, 55 FR 2962, at 2963, (FHWA 1990) (Final Order). Although I am concerned that the safety investigators provided the carrier with inaccurate information, the motion is denied for another reason. The Regional Director failed to prove how the FMCSRs and HMRs allegedly apply to ATTR's activities after the carrier asserted that they did not apply. When ATTR claimed that it did not operate in interstate commerce, and was therefore not subject to the FMCSRs, the Regional Director failed to provide any evidence to support his allegation that ATTR drivers operated across state lines on the dates cited in the notice of claim.

Finally, I note that the Regional Director has cited ATTR for one violation of 49 CFR 391.103 for allegedly failing to require a driver to submit to a pre-employment drug test. In order to assess a penalty for this non-recordkeeping charge, 49 U.S.C. 521(b)(2)(A) requires that I find that such charge constitutes "a serious pattern of safety violations" or a substantial health and safety violation which has led, or could lead, to serious personal injury or death. Therefore, I direct the parties to address this issue in their submissions.

It is hereby ordered, That the Regional Director's motion for a final order is denied with leave to renew. The Regional Director and American Truck and Trailer Repair shall submit pleadings and supporting evidence within 30 days of the date of entry of this order, addressing the issues identified herein. Submissions shall be served in accordance with 49 CFR 386.31.

Dated: August 6, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order; Specialties, Inc.

This matter comes before me upon a motion by the Regional Director, Region 4, seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 CFR part 386.

The Regional Director submitted his motion on January 8, 1992. This motion asked me to "find[] the facts to be as alleged in a Notice of Claim dated October 8, 1991," and to impose a civil penalty in the amount of $4,800. The Regional Director did not attach a copy of the notice of claim to his motion.

According to the Regional Director's motion, the Respondent, Specialties, Inc. (Specialties), was charged with 16 violations of the Federal Motor Carrier Safety Regulations (FMCSRs), 49 CFR parts 350–399. All 16 charges allegedly involved violations of 49 CFR 391.51(a), failure to properly maintain driver qualification files.

Specialties made two timely replies, one on October 14, 1991, and the other on October 23, 1991. Neither reply contained a denial of the alleged violations, but they may fairly be construed as contesting the charges. The first reply acknowledged receipt of the notice of claim and asked for a "compromise and discussion" of the charges. It did not give any details of the contents of the notice. The second reply requested an administrative hearing.

Based on the record before me, I cannot "find the facts to be as alleged" because I do not know what facts have been alleged. For example, without the notice of claim I cannot determine which of the 16 charges leveled against Specialties pertain to which of four different driver's qualification files allegedly found in violation of the regulatory standard. In the absence of such crucial information I must deny the Regional Director's motion for final order.

I have held that a motion for final order is in the nature of one for summary judgment, and therefore the moving party bears the burden of proving that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA Dec. 6, 1991) (Order). If the Regional Director submits a copy of the October 8, 1991, notice of claim, along with supporting evidence, I will reconsider his motion. *In re American Diversified Construction, Inc.*, No. 90–TN–043–SA (FHWA May 12, 1992) (Final Order) at 5–6.

I am not ruling on Specialties' request for a hearing at this time, because I believe the record before me is too incomplete to determine whether there are material factual issues in dispute. See 49 CFR 386.16(b). Specialties should note, however, that its failure to respond to the Regional Director's renewed motion may result in a final order for the Regional Director. See, *e.g., In re American Pacific Power Apparatus, Inc.* (FHWA July 14, 1992) (Final Order).

It is hereby ordered, That the Regional Director's request for a final order is denied, with leave to renew this motion.

Dated: August 6, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Durey-Libby Edible Nuts, Inc.

This matter comes before me upon a motion by the Regional Director, Region 1, seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 CFR part 386.

Background

The Respondent, Durey-Libby Edible Nuts, Inc. (Durey), operates as a private motor carrier in interstate commerce. After a June 17, 1991, compliance review of Durey's operations revealed numerous violations of the Federal Motor Carrier Safety Regulations (FMCSRs), 49 CFR parts 350–399, the Regional Director served Durey with a notice of claim on September 3, 1991. The notice of claim charged the carrier with 10 violations of the FMCSRs, including: Two violations of 49 CFR 391.45, using a driver without a medical examination; two violations of § 391.51, failing to maintain driver qualification files; one violation of § 391.103, using a driver without first obtaining a pre-employment controlled substances test; one violation of § 391.105, failing to require a driver to be tested for controlled substances in accordance with the biennial testing requirements; and four violations of § 396.11, failing to require drivers to prepare vehicle inspection reports.

Durey replied to the notice of claim on October 7, 1991, and requested an administrative hearing. The reply admitted to the four driver vehicle inspection report violations and also contained a statement that could fairly be interpreted as a denial of one of the charges of using a driver without a medical examination ("(Driver) Antonio Martinez has * * * taken the Medical Exam * * *.").[1] The reply did not directly address any of the other charges in the notice of claim.

This reply was sent well after the 15-day deadline imposed by the Rules of Practice, 49 CFR 386.14, and also after the five-day grace period allotted for service by mail under § 386.32(c)(3). In the reply, Durey sought to excuse its tardiness by claiming that it had attempted several times to contact the Federal Program Manager for Region 1 before making a written reply, but had succeeded in reaching him only on September 25, 1992. Durey asked that its hearing request be considered timely because it sent the reply to the Region less than 15 days after contacting the Federal Program Manager.

The Regional Director submitted a Motion for Final Order on October 24, 1991. Durey has made no reply to this motion.

Discussion

1. Durey's Request for an Administrative Hearing

The Rules of Practice require a motor carrier seeking a hearing to include in its reply "an admission or denial of each allegation of the claim * * * and a concise statement of facts constituting each defense * * *." 49 C.F.R. § 386.14(b)(1). The hearing request must also "list all material facts believed to be in dispute." 49 C.F.R. § 386.14(b)(2). Ordinarily, unless a respondent's reply complies with these basic requirements no hearing will be granted.

Based on the record before me in this matter, I find Durey's untimely reply does not present a material factual issue in dispute requiring a hearing. Even though the reply contains a denial of one of the charges in the notice of claim, for purposes of its hearing request Durey has failed to rebut the Regional Director's *prima facie* case. "If the Regional Director opposes the hearing request, as in this case, the motor carrier must do more than just deny the allegations in its pleadings. It must give sufficient evidence to support its allegations." *In re American Pacific Power Apparatus, Inc.*, No. OR–90–006–075, at 2, (FHWA March 11, 1992) (Order). In short, Durey's general, unsupported denial fails to carry the carrier's burden to show the existence of a material factual dispute and does not overcome the Regional Director's opposition to a hearing supported by evidence sufficient to establish a *prima facie* case against the carrier. *American Pacific* at 3.

2. The Regional Director's Motion for Final Order

In an analogy to a motion for summary judgment, I have held that the moving party on a motion for final order bears the burden of proving that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 6, 1991) (Order). All inferences must be drawn in favor of the non-moving party, Durey in this case.

The Regional Director submitted with his motion a signed statement by Durey President Edward Dicker, dated just after the date of the compliance review. *See* Regional Director's Motion for Final Order at Exhibit C. The Regional Director asserts that this statement amounts to an admission of all the charged violations. *Id.* at 3.

I agree that the statement and Durey's reply to the notice of claim, when read together, include admissions to the two driver's qualification file and the four vehicle inspection report charges, and therefore I grant the Regional Director's motion as to counts 3, 4, 7, 8, 9, and 10. I do not, however, agree that Durey has admitted to the remainder of the charges. Instead, I find Dicker's statement's references to the other charges more ambiguous than confessional (*e.g.*, "I am also aware that my drivers are subject to drug testing." "I was also told that I needed to create driver qualification files on my drivers, *have them medically certified*, and require them to complete daily vehicle inspection reports." (emphasis added)).

Nevertheless, based on the record before me, I find that Durey has failed to contest either the two drug-testing charges or the first medical examination charge (relating to driver Waldamer Valez). Neither the carrier's reply to the notice of claim nor Dicker's statement provides any rebuttal to the Regional Director's charges. Nothing in the record before me indicates that Durey has responded to the Regional Director's motion. I find Durey's lack of response to these charges to be in the nature of a default and I grant the Regional Director's motion as to counts 1, 5, and 6.

There remains for my consideration only the second medical examination charge. Here the carrier's late reply is of central importance. I read Durey's reply to contain a denial of this charge. The Regional Director, on the other hand, relies on Dicker's statement to prove the charge. As I have already noted, I find Dicker's statement on this count ambiguous, and not an admission.

This dispute presents a problem that I have encountered before, most recently in *In re America Diversified Construction, Inc.*, No. 90–TN–043–SA (FHWA May 12, 1992) (Final Order) and *American Pacific* (March 11, 1992). Durey has denied this one allegation, but has not provided any evidence to support its position. Furthermore, and more important to my consideration of the instant motion, the Regional Director has also failed to provide evidence on this count. Like his

[1] This statement did not specify whether Mr. Martinez was examined before or after the date of the compliance review.

counterparts in the earlier cases, the Regional Director "did not carry his burden of proving that there is no genuine issue of material fact." *American Diversified* at 5 (quoting *American Pacific* at 4).

In these earlier orders I held that "the Regional Director must succeed on the strength of his own evidence." *Id.* at 5 (quoting *American Pacific* at 5). Durey's unsupported denials would not rebut a *prima facie* case as to the medical examination violation, but the Regional Director has failed to present a *prima facie* case for this count. *Id.* Without more, I cannot hold that the Regional Director has met his burden of clearly establishing the essential elements of his claim, and therefore I must deny the motion for final order as to this count. *Id.*; see Fed. R. Civ. P. 56 (advisory committee notes).

If the Regional Director submits affidavits or other evidence tending to show that Durey committed the second medical examination violation, I will reconsider his motion. Durey should note that if it fails either to respond to the Regional Director's renewed motion or to produce any evidence rebutting the Regional Director's evidence, that failure may result in a final order for the Regional Director on this count.

3. Penalty Determination

Of the nine violations for which I am granting a final order, I find that three of them—the medical examination violation and both drug-testing violations—constitute a serious pattern of safety violations which subject Durey to fines of up to $1,000 per violation, not to exceed $10,000 per pattern. 49 U.S.C. § 521(b)(2)(A). The remaining six counts are for violations of recordkeeping requirements and carry a maximum fine of $500 per violation, not to exceed $2,500 for each type of violation. *Id.*

The Regional Director fined Durey $500 for each violation in a serious pattern and $300 for each recordkeeping violation. Based on the record before me, and after consideration of the nine penalty determination factors of 49 U.S.C. § 521(b)(2)(C), I find the penalties assessed by the Regional Director appropriate and reasonably calculated to induce Durey's compliance with the FMCSRs. Therefore, I grant the Regional Director's motion for final order in the amount of $3,300.

It is hereby ordered, That Respondent Durey-Libby Edible Nuts, Inc.'s, request for a hearing is denied, and the Regional Director's motion for a final order is granted as to counts 2 through 10 and denied as to count one. Durey-Libby Edible Nuts, Inc., is directed to pay $3,300 to the Regional Director within 30 days of the date of this order.

Dated: July 31, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Professional Equipment Co., Inc.

This matter comes before me upon a motion by the Regional Director, Region 1, opposing Professional Equipment Co., Inc.'s (Professional), request for a hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

After a September 25, 1991, compliance review of Professional revealed numerous violations of the Federal Motor Carrier Safety Regulations, a notice of claim was issued by the Regional Director on November 6, 1991, charging Professional with two violations of 49 CFR 391.51, failure to maintain a complete qualification file for each driver used or employed; one violation of 49 CFR 391.105, failure to require a driver to be tested in accordance with the biennial (periodic) testing requirements; and six violations of 49 CFR 396.11, failure to retain a driver vehicle inspection report for at least 3 months. The Regional Director assessed a total penalty of $2,900, $300 for each of the missing driver qualification and vehicle inspection documents, and $500 for the failure to require biennial driver testing.

Professional contacted the Regional Director by phone on 11/13/91 and again on 11/19/91 stating that the assessment was too high and requesting that the penalty be lowered. The Regional Director on both occasions offered a settlement of $2,175, which Professional refused. When no settlement could be reached, the Regional Director reminded the carrier that it could request a hearing within 15 days.

On November 27, 1991, Professional wrote a letter to the Regional Director in which it admitted to the violations listed in the notice of claim, but requested a hearing to compromise the amount of the penalty. There was no further correspondence between the parties and on January 13, 1992, the Regional Director filed a motion for final order asking for a penalty assessment of $2,175 (the amount of the settlement offer). Professional did not respond to the Regional Director's motion for a final order.

Discussion

1. The Rules of Practice require that a hearing request must demonstrate at least one material factual issue in dispute. 49 CFR 386.14(b)(2). In its letter of November 27, 1991, Professional twice acknowledged that the violations charged against it were valid and did not raise any issue of fact, but requested a hearing solely to discuss the amount of the penalty, which it characterized as "excessive." It is well established that the amount of the penalty is not a material factual issue which creates the right to a hearing. *In the Matter of A.T. Pinto, Inc.*, 55 FR 43293 (FHWA 1990) (Reconsideration of Final Order). See also *Drotzman, Inc.*, 55 FR 2929, 2930 (FHWA 1990) (Order Appointing Administrative Law Judge). Because Professional failed to raise a material factual issue in dispute, and also because it admitted to the charges against it, I deny its request for a hearing.

2. The Regional Director's Motion for Final Order. I have held that the moving party on a motion for final order bears the burden of proving that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). I must draw all inferences in favor of the non-moving party, Professional in this case.

The Regional Director, in his motion for final order, argues that Professional admitted to the violations in its letter of November 27, 1991. Professional's letter, when viewed in a light most favorable to the carrier, must be viewed as an admission to these violations. In its letter Professional initially states "We do acknowledge that the infractions are valid," and subsequently reiterates "We are in violation in that our paperwork was not precisely in order."

I note that the Regional Director's motion for final order is not supported by evidence sufficient to show a *prima facie* case, but in this instance such evidence is not required. Professional has admitted to all of the violations and failed to respond to the motion for final order. Therefore I find that Professional violated the regulations as cited in the notice of claim letter, and the Regional Director is entitled to a judgment as a matter of law.

3. Penalty Assessment. The Regional Director, in the notice of claim, assessed a total penalty of $2,900. However, in the motion for final order, the Regional Director has requested a penalty

assessment of $2,175 the settlement figure offered to Professional. Taking into account the factors listed in 49 U.S.C. § 521(b)(2)(C) for determination of the penalty amount, I find that this amount is reasonably calculated to induce Professional's compliance with the regulations and I therefore grant the Regional Director's motion for final order in the amount of $2,175.

It is hereby ordered, That Professional Equipment Co., Inc.'s hearing request is denied, the Regional Director's motion for final order is granted, and Professional Equipment Co. Inc., is directed to pay the sum of $2,175 to the Regional Director, Region 1, within 30 days of this order.

Dated: July 31, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Pappy's Enterprises, Inc.

This matter comes before me upon a motion by the Regional Director, Region 3, for a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Enforcement Proceedings (Rules of Practice), 49 CFR part 386.

Background

The Respondent, Pappy's Enterprises, Inc. (Pappy's), operates as a private motor carrier in interstate commerce. After a January 30, 1991, compliance review identified numerous violations of the Federal Motor Carrier Safety Regulations (FMCSRs), the Regional Director served Pappy's with a notice of claim dated February 25, 1991. This document charged Pappy's with multiple violations of the FMCSRs, but failed to make clear exactly how many infractions Pappy's allegedly had committed. In fact, the notice of claim contained three different figures, each of which it said represented the number of violations found by the compliance review.

First, the notice of claim informed Pappy's that "a safety investigation of your company's operation" had documented "19 violations of the (FMCSRs)." Since I find no support for this number in any other part of the notice of claim, or anywhere else in the record before me, I conclude that this figure represents a typographical error and disregard it. The other two figures are not so easily dismissed, and I will discuss them at length below.

The notice of claim lists *ten* violations. These listed charges include: one count of failing to maintain in a driver's qualification file the responses to inquiries into that driver's driving and/or employment record, in violation of 49 CFR 391.23; one count of failing to maintain in a driver's qualification file the required notation of annual review of driver's driving record, 49 CFR 391.25; one count of failing to maintain in a driver's qualification file the list or certificate of violations of motor vehicle laws or ordinances, 49 CFR 391.27; one count of failing to maintain in a driver's qualification file the original or copy of the driver's road test certificate and/or road test, 49 CFR 391.31; one count of failing to maintain in a driver's qualification file the written examination certificate and/or the examination questions and answers given, 49 CFR 391.35; and five counts of failing to require drivers to prepare and submit records of duty status, 49 CFR 395.8(a).

The exhibits attached to the notice of claim cited Pappy's for *15* infractions; the difference being accounted for by an additional five counts under the driver's records of duty status regulations, complete with background information for each charge. (See Exhibit F to Notice of Claim.) The notice of claim assessed the carrier a penalty of $300 per violation, for "total amount" of $4,500.

Pappy's submitted, through counsel, a timely reply on March 7, 1991. The carrier did not raise any objection to the notice of claim, did not deny the charges, and did not request an administrative hearing. The reply did, however, assert that Pappy's was "moving expeditiously to comply with the requirements set forth in" the notice of claim. The reply also asked the Regional Director to begin settlement negotiations, and to "[p]lease consider this letter as a formal request that the civil forfeiture penalty be suspended * * *."

Settlement negotiations proved unsuccessful and the Regional Director submitted a motion for final order on January 14, 1992. The motion cited "clerical error" as the reason for the inconsistent information in the notice of claim and stated that "[i]n view of this * * *, and in view of the alleged financial condition of the carrier, the Regional Director has determined that a civil forfeiture in the amount of $3,000 (for ten (10) violations) is justified." (Motion for Final Order at 2.) Pappy's did not respond to the Regional Director's motion.

Discussion

A. The Regional Director's Motion for Final Order

The moving party on a motion for final order bears a similar burden to that carried by a party seeking a summary judgment in a court of law: it must prove that no genuine issue of material fact exists, and also that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.,* No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). I must draw all inferences in favor of the non-moving party, Pappy's in this case.

As I have already mentioned, Pappy's reply did not request an administrative hearing and did not deny any of the charges contained in the notice of claim. In fact, included in the exhibits attached to the Regional Director's motion is a signed statement by Pappy's president, Robert B. Geller, in which Mr. Geller admits to all of the violations found during the compliance review and later charged in the notice of claim—including the five "extra" driver's records of duty status charges listed in the exhibits attached to the notice of claim.[1] Accordingly, based on the record before me in this matter I conclude that the Regional Director has met his burden and is entitled to a final order for ten violations of the FMCSRs, as requested in his motion.

The Regional Director did not indicate in his motion which five charges should be dismissed. Because I believe that the five extra records of duty status violations listed in the exhibits attached to the notice of claim account for the discrepancy between the 10 violations cited in the notice of claim and the 15 violations noted in the exhibit list, I hereby dismiss the last five records of duty status charges found in the exhibits to the notice of claim.

B. Penalty Determination

The Regional Director assessed a penalty of $300 for each recordkeeping violation charged in the notice of claim. Pappy's has asked for a suspension of this fine amount due to its allegedly weak financial condition. In support of its request, the carrier provided the Regional Counsel with financial data tending to show its deteriorating fiscal position. (Letter from Robert B. Geller to Regional Counsel of 9/17/91.) Furthermore, the Regional Director based his limited motion for final order, in part, on "the alleged financial condition of the carrier * * *" (Motion for Final Order at 2.)

The statutory penalty provisions for motor carrier enforcement cases list nine factors to be considered in assessing a penalty. See 49 U.S.C. 521(b)(2)(C). Applying these nine factors

[1] I also note for the record that the Regional Director provided other documentary evidence tending to show that Pappy's drivers made all 15 trips listed in the appendix to the notice of claim.

to the record before me, I note first that all of the charges leveled against Pappy's are for violations of recordkeeping requirements. The record before me demonstrates that the Regional Director brought this action only after both a safety and a compliance review revealed violations of the FMCSRs. Pappy's cannot simply ignore applicable regulations or refuse to cure violations identified in separate reviews.

Pappy's, as already noted, complained that it could not pay the assessed fine, and sent the Regional Counsel a letter containing financial statements allegedly showing the carrier's deteriorating financial condition. These documents, however, list Pappy's total assets for the fiscal year ending November 30, 1990, at over $285,000. Also, a 1991 safety review of Pappy's operations listed the carrier's gross annual revenues as $500,000.

The $300 per violation penalty assessed by the Regional Director is well below the maximum allowed by law. *Id.* For the reasons set forth above, I find the $300 per violation amount reasonably calculated to induce Pappy's compliance with the recordkeeping regulations, and I grant the Regional Director's motion for final order in the amount of $3,000.

It is hereby ordered, That the Regional Director's request for a final order is granted. Pappy's Enterprises, Inc., is directed to pay $3,000 to the Regional Director within 30 days of the date of this Order.

Dated: July 15, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order in Response to Motion for Reconsideration; Robert Hansen Trucking, Inc.

This matter comes before me upon a June 10, 1991, motion by the Regional Director, Region 5, for reconsideration of that portion of my May 21, 1991, order which dismissed 36 counts cited against Robert Hansen Trucking, Inc. (Hansen), for requiring or permitting drivers to falsify records of duty status, in violation of 49 CFR 395.8(e). This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

In its March 20, 1990, reply to the notice of claim, Hansen denied that it required or permitted its drivers to falsify their records of duty status, stating that it has a comprehensive safety program to guard against such violations. Rather than requesting a formal hearing, Hansen asked the Associate Administrator to decide the matter based on the evidence submitted with its reply See 49 CFR 386.14(c). On May 25, 1990, Hansen filed a motion to dismiss the 36 false log charges.

Five months later, October 25, 1990, the Regional Director filed a reply in opposition to Hansen's motions, moving for summary judgment. Apparently deeming the charges admitted by Hansen, the Regional Director submitted no evidence in support of the 36 log falsification charges.

On May 21, 1991, I issued an order which, *inter alia,* dismissed the 36 charges against Hansen for allegedly requiring or permitting false entries on records of duty status. The Regional Director moved for reconsideration of that order on June 10, 1991. Hansen answered the Regional Director's motion on July 3, 1991, and the Regional Director's reply to Hansen's answer followed on July 11, 1991.

Discussion

Timeliness of the Regional Director's Motion for Reconsideration

In its answer to the Regional Director's motion, Hansen urges the Associate Administrator to deny the motion as untimely under 49 CFR 386.32(b) and 386.64. The carrier argues that, under the time computation language of 49 CFR 386.32(b), "the order was deemed served on the Regional Director on May 20, 1991," and therefore the Regional Director's June 11, 1991, motion was not served until one day after the 20-day time limit of 49 CFR 386.64. Hansen's Answer at 2. Without explanation, Hansen also asserts that "it does not appear that the Regional Director is entitled to an additional five (5) days under 49 CFR 386.32(c)(3)." *Id.* The Regional Director answered that he had served his order on the final day of the 20-day time period, according to his reading of 49 CFR 386.32(b).

Section 386.32(b) provides, "[i]n computing any period of time involving an order, the date of entry of the order shall be the date the order is served." The certificate of service on my earlier order in this case states the document was sent to the parties of record on May 21, 1991. This is the "date of entry" of the order under 49 CFR 386.32(b). To hold, as Hansen argues, that the order was deemed served on a date other than the date it was actually served is both illogical and contrary to the express language of 49 CFR 386.32(b). Accordingly, I find that the Regional Director's motion, filed 20 days after my May 21, 1991, order, is timely. Therefore, I find no need to rule on whether the provision for computation of time for delivery by mail applies in this case, because the Regional Director's reply was served within the general 20-day reply period.

Dismissal of 36 Log Falsification Charges

In his motion for reconsideration, the Regional Director provides no new evidence in support of the false log allegations, but cites an alleged error of law in the order. He argues that Hansen did not effectively deny the allegations, claiming that Hansen only denied that it required or permitted its drivers to falsify their logs, rather than deny that the logs were falsified. By accepting this "inadequate" denial as sufficient, the Regional Director asserts that the Associate Administrator improperly required the Regional Director to provide evidence showing that Hansen encouraged its drivers to falsify their logs, or that the carrier actively participated in the falsifications.

The Regional Director argues, in effect, that the record before the Associate Administrator at the time of the order was sufficient to prove the false log violations, had the law been correctly applied. He asserts that 49 CFR 395.8(e) requires proof that a driver's records of duty status are falsified, and prior decisions by the Associate Administrator hold that such driver falsifications are imputed to the motor carrier if the means were present to detect the violations.

The Regional Director has correctly stated the concept of liability which governs log falsification charges under 40 CFR 395.8(e). "When one or more of its drivers falsifies log records, a motor carrier is directly liable for the falsification under 49 CFR 395.8(e). In such cases, the motor carrier breached its own duty to verify drivers' logs. In failing to verify records of duty status, for example by comparing the logs to toll or other receipts, the carrier has permitted the log falsifications." *In re American Pacific Power Apparatus, Inc.,* No. OR–90–006–75, (FHWA March 11, 1992) (Order).

The Regional Director has not, however, persuasively argued that this liability standard was not correctly applied in my earlier order. In fact, in that opinion, I specifically addressed this question, stating,

> I recognize that there is an issue lurking here as to whether Hansen has denied that the records of duty status cited by the Regional Director were falsified by it (or by its drivers for whom it is responsible or,

viewed another way, who act as agents for it), or whether Hansen is merely denying that it "required or permitted" such violations to occur. However, I believe that Hansen is denying the charges as alleged in the Regional Director's notice of claim, and I do not believe that the Regional Director should be heard to complain that the Respondent [Hansen] has chosen to reply in the words used by the Regional Director.

In re Robert Hansen Trucking, Inc., No. R5–89–174, at 11–12, (FHWA May 20, 1991) (Order).

The charges in this case were dismissed because the Regional Director failed to provide evidence clearly establishing that the logs were false, not because he failed to show that Hansen was liable for its drivers' actions. In his motion for reconsideration, the Regional Director has again failed to submit evidence of log falsifications. Instead, he argues that the same record I found to be "devoid of evidence to support a *prima facie* case that Hansen violated the regulations" now clearly reveals that Hansen's records of duty status were false.

The Regional Director cites several passages from affidavits submitted with Hansen's May 25, 1990, denial of the charges and motion to dismiss, characterizing these statements as admissions. I specifically addressed these passages in my May 21, 1991, order. I deemed these statements to be ambiguous at best, and falling short of admissions, especially when contradicted by a clear and express denial in Hansen's reply. The Regional Director has provided no new evidence which would lead me to view these statements differently now.

Therefore, I again find that Hansen expressly denied that its drivers' records of duty status contained false entries, and that the Regional Director failed to provide any evidence to support the false log allegations. I have repeatedly held that when a carrier denies the charges against it, mere allegations of violations are insufficient to prove the charges. The Regional Director must clearly establish all of the essential elements of his claim. See, *e.g., In re American Pacific Power Apparatus*, No. OR–90–006–075, (FHWA March 11, 1992) (Order); *In re James Kelton, Sr.*, No. 90–AL–028–SA, (FHWA May 13, 1992) (Final Order).

In the cases cited above, each Regional Director, via pretrial motion for final order, attempted to show that there was no genuine issue of material fact, and that he was entitled to judgment as a matter of law, thereby obviating the need for a hearing. In both cases, I found that there were unresolved factual issues, and I therefore denied the motions, but did not dismiss the charges. Instead, I requested that the parties submit affidavits or other evidence in support of their allegations. I believed that this additional procedure was necessary for the development of a full record from which the merits of the charges could be weighed. In contrast, Hansen and the Regional Director had apparently presented a full record at the time of my May 21, 1991, ruling. That order was therefore a ruling on the merits and dismissal, for the reasons discussed above, was appropriate.

Time Limit for Submission of Evidence Under 49 CFR 386.14(c)

Finally, in defense of its late response to Hansen's request to submit written evidence in lieu of an oral hearing, the Regional Director argues that the 40-day time period provided in 49 CFR 386.14(c) for submission of evidence applies only to motor carriers, and that "[t]here is nothing in § 386.14 that relates in any way to the obligations of the agency * * *." Regional Director's Motion for Reconsideration at 8–9.

Again, the Regional Director has provided no evidence nor cited any legal error in my earlier opinion which would warrant a reversal of my holding that *all* evidence, including any evidence the Regional Director may wish to include to support his case, must be served in written form no later than the fortieth day following the service of the claim letter. This regulatory language is not ambiguous, and clearly provides that "all evidence," not merely the respondent's, must be submitted within the 40-day deadline. In addition, upon review of the final agency rule which revised 49 CFR 386.14, I find no support for the Regional Director's argument that this section was intended to apply to the motor carrier alone. See 50 FR 40304 (1985).

If I were to accept the Regional Director's interpretation of this provision, this would, in effect, leave him exempt from any response deadline in this situation where a respondent files a notice to submit evidence without an oral hearing. No public interest would be advanced by leaving the Regional Director without a deadline to submit his case when the respondent has asked for a review without a formal hearing. Indeed, such an open-ended procedure would hamper the speedy and efficient resolution of these proceedings. Finally, to require the respondent to submit all of its evidence within 40 days, while permitting the prosecuting Regional Director, who bears the burden of proof, to submit his or her evidence later appears to give the Regional Director an unfair procedural advantage. The Regional Director, if anyone, should first submit evidence sufficient to establish a *prima facie* case before the respondent is required to rebut.

Section 386.14(c), in my view, contemplates simultaneous filing and development of a full record for review within 40 days. Section 386.16(a) provides that the Associate Administrator may issue a final order on the evidence and arguments submitted. While I have said that I believe I can order a hearing when none is requested, §§ 386.14(c) and 386.16(a) envision a speedy resolution of a dispute on a full record as an alternative to a costly, time-consuming, and unnecessary oral hearing. To achieve this purpose, both parties must be required to submit all their evidence and arguments within 40 days. I believe that 40 days is adequate time for both parties. If either party needs additional time, or if active settlement negotiations are underway, an extension of time can be agreed to or requested. It is not the purpose of this ruling to obstruct settlement negotiations, since settlement whenever possible is favored.

Therefore, I decline to adopt the Regional Director's interpretation of 49 CFR 386.14, and I affirm my earlier holding that this section requires both parties to submit all evidence no later than the fortieth day following service of the notice of claim when the motor carrier has filed a notice of intent to present evidence without an oral hearing.

Conclusion

I have again reviewed the record in this proceeding, and I find that the Regional Director's motion for reconsideration is timely, but that he has failed to present any new evidence or persuasively argue any error of law which would warrant a modification of my earlier order dismissing the 36 log falsification charges.

It is hereby ordered, That my May 21, 1991, final order is affirmed, and the terms of that final order remain in effect.

Dated: July 14, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; American Pacific Power Apparatus, Inc.

This matter comes before me upon a renewed motion for final order by the Regional Director, Region 10, opposing American Pacific Power Apparatus, Inc.'s (American Pacific), request for a hearing and seeking a final order. This

proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

On March 10, 1992, I issued an order denying the Regional Director's motion for a final order on nine charges that American Pacific required or permitted its drivers to make false entries on records of duty status, in violation of 49 CFR 395.8(e). I found that the Regional Director had failed to prove a *prima facie* case of the violations where American Pacific denied the charges, but neither party provided evidence supporting its allegations. The March order permitted the Regional Director to renew the motion by submitting affidavits or other evidence tending to show log falsifications. American Pacific was advised that "failure to respond to the Regional Director's renewed motion or failure to produce any evidence rebutting the Regional Director's evidence may result in a final order for the Regional Director. 'Silence or mere denial will not meet respondent's burden to overcome the Regional Director's *prima facie* case.' " *In re American Pacific Power Apparatus, Inc.*, No. OR–90–006–075, at 5–6, (FHWA March 10, 1992) (Order) (quoting *In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 7 (FHWA December 5, 1991) (Order)).

The Regional Director filed a renewed motion for final order, requesting that the facts be found as alleged in the notice of claim, and seeking a penalty of $3,600. In addition, the Regional Director included an affidavit of a safety investigator and several exhibits documenting the charges against American Pacific. The carrier has not responded to this motion.

Discussion

The Regional Director's Renewed Motion for Final Order

I have held that a motion for final order is analogous to a motion for summary judgment. *E.G., Forsyth Milk Hauling Co., Inc.*, No. R3–90–037 (FHWA December 5, 1991), (Order). Accordingly, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Because American Pacific denies the allegations against it, but the Regional Director nevertheless seeks to obtain a final order on motion, the motion should be accompanied by evidence sufficient to establish a *prima facie* case of the violations charged. American Pacific bears the burden to rebut a *prima facie* case, and mere assertions, unsupported by evidence, cannot defeat an otherwise justified motion for final order.

The evidence presented by the Regional Director in her renewed motion supports the allegations made in the notice of claim and remains unrebutted by American Pacific. Although the Regional Director's evidentiary burden on a motion for final order is no less stringent when the motor carrier denies the allegations but provides no evidence, American Pacific's failure to fully participate in this proceeding is significant because it means the carrier has failed to rebut the Regional Director's *prima facie* case.

The evidence presented by the Regional Director is sufficient to prove the nine log falsification violations. Count one concerns a trip made by American Pacific driver David Gupton on November 16, 1989. David Sprecker, the FHWA safety investigator who documented the false logs in a May 1990 compliance review of American Pacific, stated in a sworn affidavit that Mr. Gupton's logs for this date showed Gupton as driving at Stanwood, Washington, at 12 p.m., while a Washington State scale receipt indicated that he was at the Ridgefield scale just minutes earlier, at 11:58 a.m., on this same date. Stanwood, Washington, is approximately 190 miles north of the scale at Ridgefield, Washington. (I view Mr. Sprecker's attestation that the Ridgefield scale is 190 miles north of Stanwood, Washington, as harmless error.)

The second and third counts involve a November 1989 trip by Gupton between Aurora, Oregon, and Morton, Mississippi. Included in exhibit two are Gupton's records of duty status for November 23, 1989, which indicate that he traveled from Grand Island, Nebraska, through St. Joseph, Missouri, to West Memphis, Arkansas, on this date. But a fuel receipt placed Gupton in Lamarie, Wyoming, on November, 23, 1989. Similarly, in exhibit three, Gupton's November 24, 1989, logs show a trip between West Memphis, Arkansas, and Morton, Mississippi, while a fuel receipt for this date reveals that Gupton was actually in Cabool, Missouri, on this date.

Exhibit four documents a trip made by Gupton on November 29, 1989. Gupton's logs for this day indicate that he left Wichita, Kansas, at 2:30 a.m., arriving in North Platte, Nebraska, at 3:30 p.m., at which time he went off duty for the remainder of the day. But a Kansas Turnpike receipt reveals that Gupton did not reach the southern terminal at Wichita until 3:47 a.m. on November 29. In addition, a fuel receipt for this date placed Gupton at Ogallala, Nebraska, 52 miles to the west of North Platte, revealing that Gupton actually drove further westward on this date than his logs indicate.

Count five concerns a March 26, 1990, trip by American Pacific driver Hugh Gammon, Jr., between Aurora, Oregon, and Chicago, Illinois. While his record of duty status for March 26 indicates that he was off duty from 10 a.m. until midnight, two Illinois toll receipts from 1 and 1:07 p.m. on this date reveal that Gammon was actually driving at these times.

Exhibit six reveals that American Pacific driver Millard Harrison made false entries on his January 16, 1990, record of duty status. His log indicates that he drove from Briggs Junction, Oregon, to Tonasket, Washington, and then to Aurora, Oregon, on this date, for a total of 200 miles. But his January 16 trip report and the company dispatch log reveal a trip to Tonasket, Washington, by Harrison which was not recorded on Harrison's log. Additionally, in the trip report, Harrison reported that he drove 923 miles on January 16.

Exhibit seven concerns a January 18, 1990 trip by Harrison. While his logs indicate that he drove from Aurora, Oregon, to Hermiston, Oregon, on this date, Harrison's trip report shows that he also took a three-hour local trip between Aurora, Oregon, and Sherwood, Oregon. This local trip was not recorded on Harrison's January 18, 1990, record of duty status.

In Exhibit eight, Harrison's January 24, 1990, logs indicate that he was on duty or driving for only two and one quarter hours, between Briggs Junction, Oregon, and Aurora, Oregon. But Harrison's trip reports and the company dispatch log for this day reveal that he took two additional trips, one between Aurora, Oregon, and Mollala, Oregon, and the second between Aurora, Oregon, and Longview, Oregon.

Finally, exhibit 9 reveals that American Pacific driver Gary Walthall made false entries on his March 5, 1990, record of duty status. Walthall's logs for this date indicate that he was off duty for the entire day, but his trip record for March 5 states that he delivered a fork lift to a company in Vancouver, Washington.

In spite of its denial of the charges and its assertion that the findings of the compliance review were erroneous, American Pacific has failed to produce any evidence supporting its assertion, failed to reply to the motion for final

order, and failed to rebut the evidence of these violations. Therefore, I find that American Pacific required or permitted its drivers to make false entries on their records of duty status in the nine instances cited in the notice of claim.

Penalty Assessment

The Regional Director assessed a total penalty of $3,600, or $400 per violation. Safety investigator Sprecker attested that the federal program manager reviewed all of the relevant statutory criteria under 49 U.S.C. 521(b) in establishing this amount. The Regional Director also submitted a copy of the penalty assessment worksheet used by the regional officer in assessing the $3,600 sum. Taking into account the factors listed in 49 U.S.C. 521(b)(2)(C) for determination of the penalty amount, I find that this amount is fully supported by the record, and is calculated to induce further compliance with the recordkeeping regulations.

It is hereby ordered, That the Regional Director's renewed motion for final order is granted, and American Pacific Power Apparatus, Inc., is directed to pay the sum of $3,600 to the Regional Director, Region 10, within 30 days of the date of this order, for requiring or permitting its drivers to make false entries on their records of duty status.

Dated: July 14, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; The Sommers Co., Inc.

This matter comes before me upon a motion for final order by the Regional Director, Region 4. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 CFR part 386.

Background

The Respondent, The Sommers Co., Inc. (Sommers), operates as a private carrier in interstate commerce. After a September 20, 1991, compliance review of Sommers' operations revealed violations of the Federal Motor Carrier Safety Regulations (FMCSRs), the Regional Director served the carrier with a notice of claim on November 6, 1991. The notice of claim charged Sommers with seven counts of violating 49 CFR 391.51(c) and 177.804, failing to properly maintain driver qualification file in accordance with § 391.51(c) while transporting a placardable quantity of hazardous material, and two counts of violating §§ 395.8(a) and 177.804, failing to require driver to make a record of duty status while transporting a placardable quantity of hazardous material. The Regional Director assessed a penalty of $500 for each violation, for a total civil forfeiture amount of $4,500.

In a timely reply dated November 25, 1991, Sommers requested a "formal hearing or compromise [negotiations]," and asked for mitigation of the penalty amount, claiming that it could not pay such an "excessive" fine. Sommers also made the following assertion:

> We do agree that the documendation [sic] was not on your forms; however, our records did indicate on each and every driver we had obtained an employment application; their previous work records checked, road test and training by our senior driver for a period of not less than three (3) days, drug testing in place, vehicles maintained, etc.

Sommers complained that it had not received "the appropriate forms" from the FHWA with which to maintain driver qualification files. The reply did not address the two record of duty status charges.

The Regional Director submitted a Motion for Final Order on December 24, 1991. Sommers has made no reply to this motion.

Discussion

1. Sommers' Request for an Administrative Hearing

The Rules of Practice require a motor carrier seeking a hearing to include in its reply "an admission or denial of each allegation of the claim * * * and a concise statement of facts constituting each defense * * *." 49 CFR 386.14(b)(1). The hearing request must also "list all material facts believed to be in dispute." 49 CFR 386.14(b)(2). Ordinarily, unless a respondent's reply complies with these basic requirements no hearing will be granted.

Although the notice of claim explained the requirements of § 386.14 quite clearly, Sommers' reply failed to establish the existence of a material factual dispute. It did not mention the alleged violations of the driver records of duty status regulations, and its statements concerning the driver qualification file violations were vague, at best.

The Regional Director asserts that Sommers' reply—particularly the portion quoted above—amounted to, "in effect," an admission to the driver qualification file charges. Motion for Final Order at 1. I believe that the reply is more fairly characterized as failing to deny the allegations of the notice of claim. Sommers merely claimed that its files contained some, but not all, of the information required under the FMCSRs and that the FHWA had failed to provide it with the "appropriate forms" on which to maintain its records. The violations charged in this case involve Sommers' inability to produce certain specific documents for the FHWA safety investigator at the time of the compliance review. The issue here is not the documents Sommers agrees it had, but the records the Regional Director specifically charged it did not have. Moreover, nothing in the FMCSRs requires the FHWA to provide motor carriers with forms for recording required information.

Because Sommers failed to point to a material factual issue in dispute, and also because it failed to deny any of the charges against it, I determine that Sommers' reply did not meet the requirements of the Rules of Practice (see § 386.14(b)(2)) and I deny Sommers' request for a formal hearing.

2. The Regional Director's Motion for Final Order

The moving party on a motion for final order bears a similar burden to that carried by a party seeking a summary judgment in a court of law: it must prove that no genuine issue of material fact exists, and also that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). I must draw all inferences in favor of the non-moving party, Sommers in this case.

a. The Driver Qualification File Charges

As I have already noted, while Sommers attempted in its reply to contest the driver qualification file charges it has not effectively denied any of the charges in the notice of claim. On the other hand, the Regional Director supports all of his allegations with exhibits that tend to bolster his case.

For the seven driver qualification file charges, the Regional Director submitted a copy of the Driver Qualification File Checklist prepared by the FHWA investigator at the time of the September 20, 1991, compliance review. The checklist catalogs the exact contents of each of Sommers' driver qualification files, and reveals that none of the carrier's files contained all of the records required by § 391.51. Both the FHWA safety investigator and one of Sommers' officials signed the checklist and certified that it "represent[ed] the *complete contents* of the driver qualification files" presented by Sommers for review. Exhibit A to Motion for Final Order (emphasis in original). Based on this record, I find that the Regional Director has met his burden with regard to the driver qualification file charges, and I now

grant his motion for a final order on those counts.

b. The Records of Duty Status Charges

As for the two alleged driver records of duty status violations, Sommers has not contested these charges, either in its reply or in any response to the motion for final order. For his part, the Regional Director submitted evidence that tends to show that two of Sommers' drivers made interstate trips on the dates in question. The evidence does not contain, however, any indication that records of duty status were not made and submitted by the drivers who made these trips. *Id.* at Exhibit C.

More importantly, the evidence presented by the Regional Director indicates that neither of the two trips allegedly made in violation of the records of duty status regulations required Sommers' drivers to go beyond a 100 air-mile radius from the company's Savannah, Georgia, headquarters. The FMCSRs exempt drivers from the records of duty status regulations if they operate within a 100 air-mile radius of the normal work reporting location, provided the drivers and the carriers they work for also meet certain other conditions. 49 CFR 395.8(1). Moreover, a copy of a 1987 safety review of Sommers' operations—included along with the Regional Director's motion—contains the following statement of the FHWA safety investigator: "These are 100 air-mile [sic] radius drivers—*no* logs *required*." *Id.* at Exhibit B (emphasis in original).

Faced with this conflict in the record, and absent any explanation from the Regional Director, I cannot grant a final order as to these two counts. The notice of claim charged Sommers with violating a regulatory requirement that the Regional Director's own evidence indicated might not apply to the carrier. Sommers may be subject to the record of duty status regulations—a carrier must meet several conditions to claim the exemption—but nothing in the record before me allows me to come to that conclusion. Therefore, I deny the Regional Director's motion as to the two driver records of duty status charges.

3. Penalty Determination

The Regional Director assessed a penalty of $500 for each of the nine violations charged in the notice of claim, for a total civil forfeiture amount of $4,500. Sommers complains that this amount is "excessive" and asks for a reduction because of an alleged inability to pay. Reply of Sommers Co. The Regional Director, on the other hand, alleges that Sommers is a $40 million company. Regional Director's Motion for Final Order at 4. The 1987 safety review lists the carrier's annual revenue as $25 million. Based on this record, I find no evidence of Sommers' alleged inability to pay.

After the further review of the nine penalty determination factors of 49 U.S.C. 521(b)(2)(C), I find the $500 per violation penalty reasonably calculated to induce Sommers' compliance with recordkeeping regulations. The record before me demonstrates that Sommers was involved in the transportation of hazardous materials at the time these violations occurred, a circumstance that I view as an aggravating factor warranting the imposition of a stringent penalty. Also, the Regional Director brought this action after both a safety and a compliance review revealed violations of the driver qualification file regulations. Sommers cannot simply ignore applicable regulations or refuse to cure violations identified in separate reviews. Therefore, I grant the Regional Director's motion for final order in the amount of $3,500. [1]

It is hereby ordered, That the Regional Director's request for a final order for counts one through seven is granted and denied for counts eight and nine. The Sommers Co., Inc., is directed to pay $3,500 to the Regional Director within 30 days of the date of this Order.

Dated July 14, 1992.

Richard P. Landis,

Associated Administrator for Motor Carriers.

Order; Gunther's Leasing Transport, Inc.

This matter comes before me upon a motion for declaratory relief by Gunther's Leasing Transport, Inc. [Gunther's]. In its motion, Gunther's asks whether the issuance of a compliance review report, notice of claim, and new safety rating constitutes the end of the FHWA's investigation of Gunther's activities during the period of October 1, 1991, through March 31, 1992. Gunther's seeks immediate action on this matter, because the carrier has 15 days in which to reply to the notice of claim, but it asserts that "it is patently unfair and a violation of any notion of due process to require the carrier to respond to such notice of claim—and in so doing, waive all of its other rights—when [the] FHWA will have the benefit of Gunther's response and then have the opportunity to make additional claims based on the same compliance review." [1] Gunther's Motion for Declaratory Relief at 4. The Regional Director, Region 3, responded by moving to dismiss Gunther's motion for declaratory relief.

Discussion

Gunther's appears concerned that it might still be subject to further investigation, and suggests that the issuance of a compliance review report, notice of claim, and safety rating should signal the end of this particular investigation. Typically, investigations of carriers do not continue after a notice of claim is issued, but not because such conduct is prohibited under any provision of 49 CFR part 386.

First, insofar as Gunther's is asking whether the Regional Director is continuing his investigation of Gunther's, the short answer is I do not know. That question is better directed to the Regional Director.

In my "quasi-judicial" role under 49 CFR part 386, I consider responses to notices of claim, rule on motions, request that administrative law judges hold hearings, and the like. In this role I know only that which is before me and, consequently, I do not know whether a Regional Office is continuing any particular investigation.

Moreover, I am unaware of any agency policy that provides that investigations are necessarily concluded by the issuance of compliance review reports, notices of claim, or safety ratings, either individually or collectively.

Second, the Regional Director's response to Gunther's motion suggests that Gunther's has not fully complied with the April 16, 1992, order of the Federal district court requiring Gunther's to make its records available to FHWA investigators. The response also suggests that Gunther's motion is an attempt to get the Associate Administrator to find that Gunther's has complied with that order.

Whether Gunther's has complied with the court order is not a matter which is properly before me. I believe it is for the Federal district court to decide, if asked, whether its order has been fully complied with, and I refuse to rule on this issue. Nothing in this order should be construed as expressing an opinion on this issue.

Third, Gunther's also argues in its motion that requiring it to reply to the

[1] I find the Regional Director's penalty assessment even more reasonable in light of the hazardous materials penalty provisions of 49 U.S.C. App. 1809 (a)(1), which allow fines of up to $25,000 per violation.

[1] Gunther's also objected when asked to reply to the compliance review report and sought an extension to the reply period. Contrary to the statement in its latest motion, the Associate Administrator responded to the May 18, 1992, motion by order dated June 4, 1992. A copy of that order is attached.

notice of claim abridges the carrier's due process rights. This claim may be based, in part, on an erroneous assumption, *i.e.*, that in its reply to the notice of claim Gunther's must "waive all of its other rights." Gunther's Motion at 4. The required contents of a reply to a notice of claim are set forth in 49 CFR 386.14. This section does not require a respondent to waive any rights, and I am confident that Gunther's can respond fully to the pending notice of claim without inadvertently waiving any of its rights.

I do not believe there is a due process issue in this case. Whether an investigation is concluded by issuing a compliance review report, notice of claim, or safety rating is, in my view, immaterial to any issue of due process. Assuming any investigation is deemed "closed," nothing prevents a Regional Director from reopening the investigation if he or she believes further investigation is warranted. In this regard, Gunther's is in the same position as any other recipient of a compliance review report, notice of claim, or safety rating. It is theoretically possible that a motor carrier's reply would provide information that would lead the agency to continue or reopen an investigation.[2] For that matter, Gunther's is in the same position as anyone charged with a violation of a law or regulation. The charging of a violation does not preclude the charging agency from subsequently citing a party for further violations if evidence of further violations is discovered.

Fourth, Gunther's seems to be arguing that it should not be required to respond to the June 22, 1992, notice of claim until it has been assured that its response will not be used against it by the Regional Director. There is no rule or policy that would preclude such action, nor do I believe there should be. In this regard, it appears that Gunther's is seeking some form of immunity from liability for any violations that are as yet undiscovered. No public interest would be furthered by routinely binding the agency to a position where previously undiscovered evidence could not be pursued.

Fifth, Gunther's also appears to be concerned about harassment or an abuse of investigatory or prosecutorial authority. However, Gunther's failed to cite to any specific conduct that would constitute harassment or abuse.

The record before me does indicate that Gunther's has been the subject of separate or continuing investigations by the FHWA Regional Office over the past three years. I also note, however, that the Regional Office appears to believe, as evidenced in part by the most recent notice of claim, that Gunther's compliance with the agency's safety regulations has been inadequate.

Conclusion

For the reasons discussed above, I deny Gunther's motion for a declaratory order finding the Regional Office's investigation of Gunther's motor carrier operations to be ended or ongoing.

Under 49 CFR 386.35(f), the pendency of a motion does not affect any time limits set under 49 CFR part 386. But in his motion to dismiss Gunther's motion, the Regional Director consented to an extension of the 15-day reply period. In the interest of equity, I will provide Gunther's with additional time to respond to the notice of claim.

It is hereby ordered, That Gunther's Leasing Transport's motion for declaratory relief is denied. Gunther's Leasing Transport has until Thursday, July 23, 1992, to respond to the Regional Director's June 22, 1992, notice of claim.

Dated: July 9, 1992.

Richard P. Landis,

Associated Administrator for Motor Carriers.

Order Regarding Objections to Requests for Admissions

In the matter of: John Steven Johnson, in his individual capacity as President of Steve Johnson and Sons Trucking, Inc.; and Steve Johnson and Sons Trucking, Inc., a corporation.

Served July 8, 1992.

On June 18, 1992, Respondent served FHWA Counsel with objections to a set of requests for admission which had been served upon Respondent on June 11, 1992. FHWA Counsel has now filed a reply thereto and requests that Respondent be ordered to respond to such requests.

Rule 386.38 of the FHWA Rules of Practice (49 CFR 386.38) defines the parameters of permissible discovery in this case. That rule provides for "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding * * *." (Rule 386.38(a)). It further provided that "[I]t is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (Rule 386.38(b)). The FHWA rule thus tracks Rule 26(b)(1) of the Federal Rules of Civil Procedure and must be construed in the same manner.

The question of relevancy at the discovery stage of the proceeding is much broader than at trial. At the discovery stage, "any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case" is discoverable. *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 353 (1978).

The Notice of Claim in this case charges Respondent, in his individual capacity, with certain violations of the regulations promulgated under the Motor Carrier Safety Act of 1984 and the Motor Carrier Act of 1980. As noted in my Order of May 26, 1992, the charge that Mr. Johnson was individually responsible for the violations in issue, necessarily entails the issues as to whether he comes within the definitions of a responsible person under the terms of the underlying statutes. Thus, any matter which has a bearing upon his status and responsibilities with respect to the violations in issue is discoverable matter. This is so, even if the specific matter sought in discovery may not, itself, be admissible in evidence at the hearing, so long as it might reasonably be expected to lead to the discovery of admissible evidence. (49 CFR 386.38(b)).

I have reviewed the objections of Respondent as they relate to the individual requests for admission served by FHWA Counsel. It is my determination that each objection must fail under the reasoning set forth hereinabove. Each of the matters to which admissions are sought bear some relevancy to the basic issues to be decided in this proceeding and can be expected to either provide information which would be admissible at the hearing, or lead to the discovery of such evidence.

To the extent the dates covered by the requests for admission go slightly beyond (by four months) the dates covered by the violations referred to in the Notice of Claim, FHWA Counsel have given good reason in the Reply why the period covered by the requests is either relevant in and of itself, or may lead to the discovery of relevant information. This is especially so, where the subject of discovery is the relationship between the Respondent and the Corporate Respondent, as well as the responsibilities and status of Respondent *vis-a-vis* the violations charged.

Accordingly, I find that the objections raised by Respondent to the Requests for

[2] For example, a notice of claim cites a carrier for requiring or permitting its drivers to drive for periods exceeding the hours of service limitations. The carrier responds by asserting that although its drivers' records of duty status indicated excess hours, the drivers actually complied with the hours-of-service regulations, but their logs were false. An ongoing investigation could be continued, or a terminated investigation reopened, to determine whether the carrier should be cited for requiring or permitting its drivers to make false entries on their records of duty status.

Admission filed on June 11, 1992, are without merit and must be overruled. Respondent is therefore ordered to file answer to such requests within ten (10) days of the service of this order.

So ordered.

John J. Mathias,

Chief Administrative Law Judge.

Order of Administrative Law Judge

In the matter of: John Steven Johnson, in his individual capacity as President of Steve Johnson and Sons Trucking, Inc.; and Steve Johnson and Sons Trucking, Inc., a corporation.

Served July 2, 1992.

By pleading dated June 30, 1992, FHWA Counsel opposes Respondent's Motion for Protective Order of June 18, 1992. Respondent's said motion was already ruled upon in my order of June 24, 1992, in that I extended the time for Respondent to file responses to certain discovery requests in view of the fact that up to that date there had been pending a motion of Respondent for reconsideration of my order of May 26, 1992, setting the procedural schedule herein. In view of some of the arguments raised in Agency Counsel's latest pleadings, it appears that some clarification and expansion of my order of June 24 may be in order.

Respondent's motion for protective order requested an order that the listed discovery not be had, or in the alternative, that such discovery be abated until such time as there was a ruling upon Respondent's Motion for Reconsideration. My order of June 24, 1992, granted the alternative relief—extending the time to respond to the discovery requests of the agency. By the same token, the request for an order precluding the discovery was denied. In view of the fact that the Motion for Reconsideration was denied in that same order, a specific date was set for responses to the outstanding discovery, and other procedural dates were extended accordingly.

Insofar as the request for an order precluding the discovery was concerned. Respondent's motion contained no support for the broad allegations that such discovery would cause Respondent "annoyance; embarrassment; oppression; and/or undue burden and expense. * * *" Therefore, having granted the alternative relief requested, no further note was made of such request in my order.

Attached to Respondent's motion for protective order was a separate pleading entitled "Objections to Request for Admissions." Such objections were not addressed in my order of June 24, 1992, in that I did not have before me any motion to compel from Agency Counsel. However, upon further review, the groundless nature of one of those objections requires a ruling at this time in order to avoid further delay in this proceeding. "General Objection Two" urges that the statutory and regulatory schemes for civil forfeitures requires all evidentiary matters to be in the possession of the Associate Administrator in advance of the issuance of a Notice of Claim involving a Civil Forfeiture. Such position is patently false. Nothing in the underlying statute, or the Agency's Rules of Practice, requires the Associate Administrator to have in his possession, at the time of issuance of a Notice of Claim, every piece of evidence necessary to prove the charges therein. In fact, the Agency's Rules of Practice specifically sets out the scope and means of discovery contemplated by each of the parties in such an action. (49 CFR 386.37 and 386.38). Under the circumstances, I hereby overrule such general obligation to the Agency's discovery requests.

I will not rule at this time on Respondent's "General Objection One," concerning the relevancy of discovery of matters during time periods outside the dates of the violations charged in the Notice of Claim, because I do not have enough information before me to determine the sufficiency of such objection.

So ordered.

John J. Mathias,

Chief Administrative Law Judge.

Order; WDP Transportation, Inc.

This matter comes before me on a motion by the Regional Director, Region 4, opposing the hearing request made by WDP Transportation, Inc. (WDP), and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

In an April 25, 1991, compliance review report, the FHWA cited WDP for several violations of the Federal Motor Carrier Safety Regulations (FMCSRs), and requested a written response from the carrier indicating the actions it was taking in response to the review. As requested, WDP wrote to the Region 3 office on April 25, 1991, explaining its efforts to comply with the regulations. On May 1, 1991, the carrier again wrote to the regional office, detailing its actions to ensure conformance with the FMCSRs.

By notice of claim dated May 14, 1991, the Regional Director charged WDP with 13 violations of 49 CFR 391.11(b)(6), 391.51(a), 394.9, and 395.3(a)(1), for using a physically unqualified driver, failing to maintain driver qualification files, failing to report an accident within 30 days, and requiring drivers to drive more than 10 hours following 8 hours off duty. WDP replied to the notice of claim, contesting one of the charges, requesting a hearing, and seeking a reduction in the penalty amount.

The Regional Director filed a motion for final order on January 8, 1992. He claimed that WDP had admitted to all of the violations in its letters written before the notice of claim was issued, and therefore could not later successfully deny any of the charges. WDP has not responded to the motion for final order.

Discussion

The Regional Director's Motion for Final Order

I have held that the moving party on a motion for final order bears the burden of proving that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3-90-037, at 2, (FHWA December 5, 1991) (Order). Where the motor carrier denies the allegations made in the notice of claim but the Regional Director nevertheless seeks to obtain a final order, the Regional Director's pleadings must be accompanied by affidavits or other evidence sufficient to establish a *prima facie* case of the violations. *In re American Pacific Power Apparatus, Inc.*, No. OR-90-006-075, (FHWA March 11, 1991) (Order).

In this case, the Regional Director did not include affidavits or other documentary evidence to support his motion for final order. Instead, he argued that WDP had admitted to all of the violations in its responses to the compliance review. When WDP later denied one of the unqualified driver violations in its response to the notice of claim, the Regional Director asserted that this denial was contradicted by WDP's earlier statements documenting its efforts to comply with the driver qualification regulations. Therefore, he concluded that the violation was "unsuccessfully and contradictorily disputed." Finally, the Regional Director concluded that WDP's statements regarding its post-review compliance efforts constituted admissions to the remaining 12 charges.

Upon review of the case as a whole, I find that there are several deficiencies

in the record. First of all, I question whether the claim letter provides WDP with real notice of the true nature of the charges against it. The notice of claim charged WDP "with 13 violations of 49 CFR 391.11(b)(6); 391.51(a); 394.9 and 395.3(a)(1), Using a Physically Unqualified Driver; Failing to Maintain Driver Qualification Files; Failing the [sic] Report an Accident Within 30 Days and Requiring Driver[s] to Drive More Than 10 Hour[s], contained in Exhibits A, B, C and D." The Regional Director assessed a penalty of "$400 for each recordkeeping violation and $750 for each violation of a serious pattern," and concluded that "the total amount owed to the government as a result of the documented violations is $5,900." Neither the text of the claim letter nor the four exhibits attached thereto inform the carrier of the number of each of the four types of violations that the carrier is cited for in the claim letter. Presuming that the unmarked exhibits correspond with the code sections in the order the sections are listed in the text of the claim letter, the penalty sum would not total the amount listed in the claim letter.

This leads to the second issue in this case, regarding how the $5,900 penalty sum was determined. The notice of claim does not inform the carrier of which violations cited are recordkeeping violations and which constitute a serious pattern of safety violations. Moreover, as noted above, even if the charges can be properly identified by the carrier as either recordkeeping or a serious pattern of safety violations, the notice of claim is still deficient. In assessing a $400 penalty for each of the six recordkeeping violations, $750 for each of the five excess hours violations constituting a serious pattern of safety violations, and $750 for both counts in a serious pattern of safety violations for using a physically unqualified driver, the penalty would total $7,650, not $5,900. The Regional Director provides no evidence to explain how this $5,900 penalty was determined, and no explanation is apparent.

Finally, I am reluctant to read WDP's pre-notice of claim statements as admissions to the charges later cited in the notice of claim, and I reject the Regional Director's assertion that WDP's earlier responses preclude the carrier from successfully contesting the charges at a later time. Instead, I view WDP's May 28 denial of one count of the driver qualification charges as an effective denial.

Although he bears the burden of proving that there is no genuine issue of material fact, the Regional Director provided no evidence in support of his motion for final order which would rebut WDP's denial and prove that the driver was not medically qualified. If the motor carrier has denied the violations and requested a hearing, "mere allegations by the Regional Director are not sufficient." *Id.* at 4. And where the evidence in support of the motion does not establish the absence of a genuine issue, the motion must be denied even if no opposing evidence is presented. See Fed. R. Civ. P. 56 (advisory committee notes). Therefore I find that the Regional Director has failed to meet his evidentiary burden with regard to one of the driver qualification charges and I cannot grant his motion for a final order as to this count at this time.

In addition, I do not deem WDP's replies to the compliance review, alone, as sufficient to find that the carrier has admitted to the charges. In past cases, where a motor carrier has replied to compliance review reports, explaining its efforts to ensure compliance with the regulations, and later has been charged for violations of the FMCSRs, I have held that its failure to contest the charges after the notice of claim was issued may result in an adverse final order.

In those cases, the carrier's reply to the compliance review report was followed by a notice of claim that clearly informed the carrier of the charges against it and the penalty assessed. See *In re Carroll Fulmer & Co., Inc.*, No. 91–FL–054–SA, at 3–4, (FHWA served June 4, 1992) (Final Order). In spite of this knowledge, the carrier failed to deny the charges or simply did not respond at all. But in this case, I find that the notice of claim was deficient and consequently WDP was not adequately informed of the charges against it. Therefore, its failure to fully respond to the deficient notice of claim is not dispositive.

Conclusion

Accordingly, I find that WDP's replies to the notice of claim do not constitute admissions to the remaining 12 violations. In the absence of an admission to the charges, the Regional Director's failure to include any affidavits or other evidence in support of his motion for final order is fatal. He has not met his burden of clearly establishing the essential elements of the violations.

If the Regional Director submits affidavits or other evidence to support the allegations made in the claim letter, I will reconsider his motion. WDP should note that failure to respond to the Regional Director's motion or failure to produce any evidence rebutting the Regional Director's evidence may result in a final order for the Regional Director. "Silence or mere denial will not meet respondent's burden to overcome [the] Regional Director's *prima facie* case." *In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 7, (FHWA December 5, 1991) (Order).

I note that WDP's denial of one of the driver qualification charges is an unresolved issue which could be sent to a hearing. But I decline to grant WDP's hearing request at this time. Instead, I direct the parties to address this issue, and to include evidence to support their assertions. After review of the supplemental pleadings, I will determine whether there is a material factual issue in dispute warranting a hearing on this count.

It is Hereby Ordered, That the Regional Director and WDP Transportation shall submit pleadings and supporting evidence within 30 days of the date of this Order, addressing the issues identified in this Order. Submissions shall be served in accordance with 49 CFR 386.61.

Dated: June 24, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Pioneer Pallets, Inc.

This matter comes before me upon a motion by the Regional Director, Region 3, opposing Pioneer Pallets, Inc.'s (Pioneer), request for a hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

After a March 25, 1991, compliance review of Pioneer revealed numerous violations of the Federal Motor Carrier Safety Regulations, a notice of claim was issued by the Regional Director on April 24, 1991, charging Pioneer with one violation of 49 CFR 391.23, failure to maintain in driver's qualification file the responses to inquiries into driver's driving record; three violations of 49 CFR 391.31, failure to maintain drivers' road test rating form and road test certificate; three violations of 49 CFR 391.51(b)(1), failure to maintain in driver's qualification file a medical examiners certificate; one violation of 49 CFR 391.51(c)(2), failure to maintain in driver's qualification file the driver's employment application; and six violations of 49 CFR 395.8(a), failure to require drivers to prepare and submit records of duty status.

On May 16, 1991, Pioneer responded to the notice of claim, contending that it was unable to produce the documents requested because it had recently undergone a disruptive audit by the Internal Revenue Service (I.R.S) and the documents were subsequently misfiled. The carrier did not contest the violations charged or ask for a hearing, but did request that no fine be imposed.

Attempts at reaching a settlement were unsuccessful, and on August 30, 1991, the Regional Director moved for a final order requesting a penalty assessment of $4,200 for the fourteen violations charged against the carrier. On September 17, 1991, the Regional Director agreed to an extension of time to respond to his motion for a final order until October 2, 1991, in accordance with the provisions of 49 CFR 386.33. This extension was agreed to because the Regional Director's case file did not reflect that the carrier was represented by counsel and Pioneer's counsel had not been served with the motion for final order.

Pioneer, through its counsel, filed an answer to the Regional Director's final order motion on October 1, 1991, in which it again disclaimed responsibility for the missing documents and attributed their absence to the disruption caused by "extensive third party access to and use of such files." The carrier blamed the I.R.S. audit, an audit by the its insurance carrier, and the movement of the files caused by a change in its business location for its inability to produce the requested documents. Pioneer requested that the charges against it be dismissed or that a hearing be held. On October 3, 1991, the Regional Director filed a response to the carrier's answer, opposing the hearing request as untimely and arguing that the answer failed to demonstrate any material factual issues in dispute. Pioneer did not respond to the Regional Director's opposition to the request for a hearing.

Discussion

1. Pioneer's Request for an Administrative Hearing

If a motor carrier contests the charges against it and seeks a hearing, it must make the request within 15 days after service of the claim letter. 49 CFR 386.14(b)(2). Failure to request a hearing within 15 days constitutes a waiver of any right to a hearing. Pioneer did not request a hearing until its October 1, 1991, answer to the Regional Director's motion for a final order. In that answer the carrier contends that its May 16, 1991, letter, which did not request a hearing, was not intended to forfeit that right because "the ambiguous wording of the three options set forth on page 2 of the Notice" led it to believe it could informally discuss a settlement of the claim without forfeiting its right to a formal hearing. As the Regional Director points out in his opposition to Pioneer's answer, both the Associate Administrator and the federal courts have found the identical language to be clear and unambiguous. See *U.S.* v. *Garfield Container Corp.*, No. 89–5323, slip op. (D.N.J. July 23, 1990).

The carrier also claimed there were procedural deficiencies in the conduct of the compliance review and that it was not given treatment consistent with similarly situated violators. The carrier failed to specify what the procedural deficiencies consisted of and provided no factual details to substantiate its allegation of unfair treatment.

Upon review of all of the pleadings submitted, I find that Pioneer did not request a hearing until its October 1, 1991, answer to the final order motion, more than five months after the notice of claim was served. Therefore, Pioneer failed to make a timely hearing request, and has waived any right to a hearing.

Moreover, the Rules of Practice require that a hearing request must demonstrate at least one material factual issue in dispute. 49 CFR 386.14(b)(2). Even if Pioneer's request for a hearing were timely, none of its responses raise a material factual issue in dispute warranting a hearing and it would not be entitled to a hearing.

In its October 1, 1991, answer to the Regional Director's final order motion, Pioneer disclaimed responsibility for the missing documents and attributed their absence to disruptions caused by the I.R.S., its insurance carrier, and a change in its business location. None of the reasons given by Pioneer excuses its failure to produce these records. Moreover, despite its repeated assertions that the records exist, with the exception of one copy of a medical certificate (produced after the notice of claim was issued), Pioneer has failed to produce any of the missing documents.

2. The Regional Director's Motion for Final Order

In an analogy to a summary judgment motion, I have held that the moving party on a motion for final order bears the burden of proving that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). All inferences must be drawn in favor of the non-moving party, Pioneer in this case.

Pioneer's responses, when viewed in a light most favorable to the carrier, must be viewed as admissions to these recordkeeping violations. In a signed statement, dated March 25, 1991, included in the supporting documentation for the compliance review (Exhibit E, Appendix C), the President of Pioneer admits that he did not maintain and could not produce the driver qualification files for which he was cited in the notice of claim. In the same statement, the President also admitted that he did not require drivers to submit daily duty status records and that he could not produce the missing records.

In its May 16, 1991, letter, the carrier stated, "It is true that I only had a minimal file of each driver on hand, and had only briefly checked their licenses and medical cards." Although Pioneer included with this letter a copy of one of the missing medical certificates, this does not alter the fact that it was unable to meet the requirement of producing the certificate at the time of the compliance review. Pioneer did not deny any of the charges and presented no other mitigating evidence.

In its October 1, 1991, answer to the Regional Director's final order motion, Pioneer again failed to deny the charges against it. Pioneer's failure to deny or otherwise adequately defend these charges constitutes a default by the motor carrier. Therefore these allegations will be taken as true. 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* Section 2688 (1983).

I note that the Regional Director's motion for final order is not supported by evidence sufficient to show a *prima facie* case, but in this instance such evidence is not required. Pioneer, in its March 25, 1991, statement, has admitted to all of the recordkeeping violations with which it has been charged and has never denied or contested the charges despite opportunities to do so. Therefore, I find there are no material factual issues in dispute, and the Regional Director is entitled to a judgment as a matter of law.

3. Penalty Assessment

The Regional Director assessed a penalty of $300 per violation, for a total penalty of $4,200 for the fourteen violations. After review of the nine penalty determination factors of 49 U.S.C. 521(b)(2)(C), I find the $4,200 penalty reasonably calculated to induce Pioneer's compliance with the recordkeeping regulations. The penalty amount is well within the statutory maximum of $500 per violation under 49 U.S.C. 521(b)(2)(A). Therefore, I grant

the Regional Director's motion for final order in the full amount, $4,200.

It is Hereby Ordered, That Pioneer Pallets, Inc.'s, hearing request is denied, the Regional Director's motion for final order is granted, and Pioneer Pallets, Inc., is directed to pay the sum of $4,200 to the Regional Director, Region 3, within 30 days of this order.

Dated: June 22, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Bill Carter Trucking, Inc.

This matter comes before me upon a motion by the Regional Director, Region 3, opposing Bill Carter Trucking, Inc.'s (Carter) request for a hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

A compliance review of Carter was initiated after U.S. Customs officials fined driver Ricky Hall for possession of 10.3 grams of marijuana while Hall was driving a commercial motor vehicle for Carter from the United States to Canada. The Regional Director issued a notice of claim on August 7, 1991, charging the carrier with two violations of 49 CFR 391.103(a) for using drivers without requring the drivers to submit to a pre-employment controlled substance test, two violations of 49 CFR 391.105(a) for using drivers without requiring the drivers to submit to a biennial controlled substance test, 16 violations of 49 CFR 395.8(e) for failing to ensure that its drivers do not make false entries on records of duty status, and five violations of 49 CFR 395.8(k) for failing to preserve a driver's records of duty status for six months. On August 27, 1991, Carter replied to the notice of claim, listing the corrective measures it had taken, and requesting a reduction in the penalty amount.

After settlement negotiations were unsuccessful, the Regional Director moved for a final order on December 4, 1991. He argued that because Carter neither contested the charges nor requested a hearing, there were no material factual issues in dispute and he was entitled to judgment as a matter of law. Carter replied to this motion on December 16, 1991, requesting both a reduction in the penalty amount and an administrative hearing "to determine whether or not the assessment is excessive." Carter's Response to Motion for Final Order, at 1. The Regional Director replied to Carter's motion, stating that the carrier had waived any right to a hearing by failing to make a timely hearing request under 49 CFR 386.14, and that Carter had failed to show good cause why its request should be granted in spite of the requirements of the section. Moreover, the Regional Director asserted that even if Carter's hearing request was considered timely, the carrier failed to allege any material issue in dispute warranting a hearing under 49 CFR 386.16(b).

Discussion

Carter's Hearing Request

If the motor carrier contests the charges against it and seeks a hearing, its reply "must contain * * * an admission or denial of each allegation of the claim * * * and a concise statement of facts constituting each defense * * *" 49 CFR 386.14(b)(1). In addition, "[a] request for a hearing must list all material facts believed to be in dispute. Failure to request a hearing within 15 days after the Claim Letter is served * * * shall constitute a waiver of any right to a hearing * * *." 49 CFR 386.14(b)(2).

Although the Regional Director clearly listed the requirements of § 386.14 in the notice of claim, none of Carter's responses comply with these provisions. Carter's August 27 reply simply details the corrective action it had taken since the compliance review to cure the violations. In its December 16 response, Carter does request a hearing, but this later pleading is deficient for two reasons.

First, the hearing request, coming more than four months after the notice of claim, is untimely under 49 CFR 386.14(b)(2). Carter argued that it was led to believe, "based upon prior practices of the Office of Motor Carriers" of Region 3, that the time period in which to request a hearing would be tolled during settlement negotiations. Carter's Response to Motion for Final Order, at 1. In his response to the hearing request, the Regional Director contended that the Regional Office had no practice of acting contrary to the language of the motor carrier regulations by suspending the 15-day time period. Carter provided no evidence to support its allegation, and I know of no such practice in the region. Therefore, I find that Carter's argument to justify its late request is without merit.

Second, if Carter's request were viewed as timely, the carrier failed to deny the charges or allege any material issue of fact requring a hearing under 49 CFR 386.16(b). In fact, Carter admits that it requests a hearing only "to determine whether or not the [penalty] assessment is excessive." I have repeatedly held that an objection to the penalty amount does not constitute a material issue which would merit a hearing. *E.g., In re Drotzmann, Inc.*, 55 FR 2929 (FHWA 1990) (Order Appointing Administrative Law Judge).

Therefore, I find that Carter's untimely hearing request does not raise any material factual issue in dispute warranting a hearing under 49 CFR 386.16(b), and that Carter has waived any right to a hearing by failing to submit a timely request.

The Regional Director's Motion for Final Order

I have held that a motion for final order is analogous to a motion for summary judgment. Therefore the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). All evidence presented must be viewed in a light most favorable to the non-moving party, Carter in this case.

For the purpose of the Regional Director's motion for final order, and the question of whether the Regional Director must provide evidence of the violations charged, Carter's responses to the allegations that it neither required drivers to submit to drug tests nor maintained records of duty status for driver Oval Ramsey must be viewed as admissions. Company president Bill Carter admits to the four drug testing charges in a statement taken at the time of the compliance review, where he concedes that "The reasons [sic] that [drivers] Hall, Truesdell, Ramsey, and Rowland were not drug tested is that I misunderstood the testing requirements." July 17, 1991, Statement of Bill Carter, at 1. In addition, Mr. Carter admits to the five charges that he failed to preserve records of duty status for Ramsey, stating, "I do not know what happened to Ramsey's logs, or even if he turned them in." *Id.* at 2. Despite repeated opportunities to do so, the carrier has not recanted these admissions or otherwise contested the violations. In the absence of a denial by the motor carrier, I do not believe that the Regional Director must submit documentary or other evidence to support his motion for final order. If Carter had denied that it failed to require drivers to submit to drug tests or failed to keep records of duty status, then the Regional Director would have been required to submit affidavits or other evidence supporting his charges.

As to the remaining 16 charges that Carter permitted drivers to make false entries on records of duty status, I find that the carrier has neither denied these charges nor rebutted the Regional Director's evidence proving the falsifications.

The evidence provided by the Regional Director fully supports all 16 allegations of log falsifications. Included in the Regional Director's exhibits 6–9, 11, 13–15, 17, 19, and 20 are records of duty status showing Carter drivers as "off duty" on certain days, while toll receipts and vehicle repair bills reveal that the drivers were in fact on duty and driving on those same days. Similarly, exhibits 5, 10, 12, 16, and 18 contain records of duty status which do not coincide with trip documents for the same dates. For example, driver Vince Rowland's May 31, 1991, records of duty status indicate that he was in the sleeper berth of his truck at Waynesburg, Pennsylvania, from 2:00 p.m. until 10:00 p.m., but his N. G. Island toll receipt revealed that Rowland was at Grand Island, New York, at 3:52 p.m. on this same date.

Based on Carter's admissions to the charges that it failed to require its drivers to submit to controlled substance tests, and that it failed to keep Ramsey's records of duty status for six months, I find that the carrier has committed these violations. In addition, I find that the evidence of log falsifications fully supports the 16 allegations made in the notice of claim, and is unrebutted by Carter. Therefore I find that there are no material factual issues in dispute, and the Regional Director is entitled to a judgment as a matter of law.

Penalty Assessment

The Regional Director assessed a penalty of $500 per drug testing violation, and $400 for each of the remaining violations, for a total penalty of $10,400, stating in the motion for final order that he considered the size of Carter's trucking operations and its financial condition when he determined the amount. Carter has objected to this amount, but has cited no reason why it believes the sum is excessive, nor asserted that it would be unable to pay this amount. Upon review of the nine penalty determination factors of 49 U.S.C. 521(b)(2)(C), especially the circumstances surrounding the drug testing violations, I find that $10,400 is reasonably calculated to induce Carter's compliance with the regulations.

It is hereby ordered, That Bill Carter Trucking, Inc.'s, hearing request is denied, the Regional Director's motion for a final order is granted, and Bill Carter Trucking, Inc., is directed to pay the sum of $10,400 to the Regional Director, Region 3, within 30 days of the date of this order.

Dated: June 22, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; LDM Trucking Co., Inc.

This matter comes before me upon a motion for final order by the Regional Director, Region 9. The Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 CFR part 386, govern this proceeding.

Background

The Respondent, LDM Trucking Co., Inc. (LDM), operates as an authorized, for-hire carrier in interstate commerce. The Regional Director served LDM with a notice of claim dated January 17, 1991. The notice of claim charged the carrier with 10 violations of the Federal Motor Carrier Safety Regulations (FMCSRs), including three violations of 49 CFR 391.51(c), failing to maintain complete driver qualification files for each driver; three violations of 49 CFR 395.3(b), requiring or permitting drivers to drive after having been on duty 60 hours in seven consecutive days; and four violations of 49 CFR 396.3(b), failing to keep minimum records of inspection and maintenance. The Regional Director assessed a penalty of $800 for each violation of § 391.51(c), $800 for each violation of § 395.3(b), and $400 for each violation of § 396.3(b), for a total civil forfeiture amount of $6,400.

In a timely reply to the notice of claim, LDM admitted to each of the charged violations and did not request an administrative hearing. LDM did, however, ask the Regional Director to reduce the penalty because, it claimed, "the 6,400 dollar violations [we] feel will put this co. out of business." Exhibit C to Regional Director's Motion for Final Order.

The Regional Director offered to settle the case for $2,400, but LDM did not execute the proposed settlement agreement or comply with its terms. The Regional Director then submitted his motion for final order on December 18, 1991.

Discussion

1. The Regional Director's Motion for Final Order

In an analogy to a summary judgment motion, I have held that the moving party on a motion for final order bears the burden of proving that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). All inferences must be drawn in favor of the non-moving party, LDM in this case.

LDM has admitted to all of the allegations in the notice of claim. Even so, the Regional Director's motion contained numerous exhibits, including: copies of drivers' records of duty status; carrier invoices documenting the trips allegedly made in violation of the regulations; two signed statements of LDM's president Larry D. Morris; and a declaration of FHWA Safety Specialist Warren Mallen (who conducted the compliance review of LDM's operations). All of these exhibits tend to affirm the charges leveled in the notice of claim.

The Regional Director has met his burden in this case. I find the facts to be as alleged in the January 17, 1991, notice of claim and grant the motion for a final order.

2. Penalty Determination

The notice of claim assessed a total fine of $6,400, charging $800 for each driver qualification file violation, $800 for each hours-of-service violation, and $400 for each inspection record violation. Although no material factual issues remain in dispute, one of the penalties assessed by the Regional Director presents a problem.

Based on the record before me and consideration of the nine penalty determination factors of 49 U.S.C. 521(b)(2)(C), I find the hours-of-service and inspection-report penalties reasonably calculated to induce LDM's compliance with the regulations. LDM asserts in its reply to the notice of claim that it cannot afford to pay the penalties assessed by the Regional Director. While a respondent's ability to pay and to continue to do business must be considered when determining a proper penalty level, LDM has failed to submit any evidence to buttress its assertions. In fact, the only evidence of LDM's financial condition in the record before me is a copy of the compliance review that led to the issuance of the notice of claim. That document, attached to the Regional Director's motion for final order, lists LDM's annual gross revenue for fiscal year 1990 as $500,000.

Furthermore, the Regional Director brought this action after both a safety and a compliance review revealed violations of the FMCSRs. LDM cannot simply ignore applicable regulations or refuse to cure violations identified in separate reviews. In addition, the hours-of-service violations constitute a "serious pattern of safety violations"

warranting the imposition of a stringent fine. 49 U.S.C. 521(b)(2)(A).

On the other hand, the record before me does not reveal any basis for the imposition of an $800 penalty for each violation of the driver qualification file regulations. The statutory civil penalty provision, 49 U.S.C. 521(b)(A), states that persons who violate recordkeeping requirements of the FMCSRs "shall be liable * * * for a civil penalty not to exceed $500 for each offense." While the statute does provide that "each day of a violation shall constitute a separate offense," allowing the imposition of a total penalty assessment of $2,500 for all offenses relating to a single violation, the record before me does not contain any indication that the Regional Director intended to impose such a multiple-day penalty.

In the absence of any justification from the Regional Director, I cannot agree to impose an $800 per count penalty for these recordkeeping violations. I have already noted my approval of the penalty assessed for the other recordkeeping violations in this case (for failure to maintain inspection and maintenance records). While these two types of recordkeeping violations are not identical, I find them similar enough to warrant imposition of the same $400 penalty for both types of charges, as each violation involves records which bear a direct relation to motor carrier safety.[1]

Furthermore, as with all of the other violations, a safety review revealed problems with LDM's qualification files nearly a year before the notice of claim was issued. Again, as I noted earlier, LDM cannot simply ignore applicable regulations or refuse to cure violations identified in separate reviews.

Finally, I do not find that LDM's unproven assertions of financial hardship warrant any further reduction in the penalty amount. LDM has not demonstrated its inability to pay despite several opportunities to do so, nor has it raised any other matters that justice and public safety may require me to consider. Accordingly, I order LDM to pay $400 for each driver qualification file violation. The total civil forfeiture amount owed by LDM is $5,200.

It Is Hereby Ordered, That the Regional Director's request for a final order is granted. LDM Trucking Co., Inc., is directed to pay $5,200 to the Regional Director within 30 days of the date of this order.

[1] Inspection reports can be used by a carrier to identify unsafe vehicles, while driver qualification files can be used to ensure a driver's fitness has been fully checked by a carrier.

Dated: June 10, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Carroll Fulmer & Co., Inc.

This matter comes before me upon a motion by the Regional Director, Region 4, opposing Carroll Fulmer & Co, Inc.'s (Fulmer), request for a hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

Fulmer is a for-hire motor carrier with 190 drivers, six terminals throughout the United States, and gross annual revenues of $33 million. After a compliance review of Fulmer, the Regional Director issued a notice of claim on August 3, 1991, citing the carrier for 13 violations of 49 CFR 395.3(a)(1) for requiring or permitting its drivers to drive more than 10 hours following eight hours off duty, and 11 violations of 49 CFR 395.3(b) for requiring or permitting its drivers to drive after having been on duty 70 hours in eight consecutive days.

Fulmer responded to the compliance review report on August 15, 1991, detailing the corrective action it would take to comply with the hours-of-service regulations. The carrier requested a hearing in its August 20, 1991, response to the notice of claim.

On January 6, 1992, the Regional Director moved for a final order, asserting that Fulmer was not entitled to a hearing because the carrier failed to deny the violations or otherwise allege any material factual issues in dispute warranting a hearing under 49 CFR 386.16(b). He also argued that Fulmer's efforts to comply with the regulations after the violations were discovered did not excuse its earlier noncompliance. Fulmer has not replied to the motion for final order.

Discussion

Fulmer's Hearing Request

If a motor carrier contests the charges against it and seeks a hearing, its reply "must contain * * * an admission or denial of each allegation of the claim * * * and a concise statement of facts constituting each defense * * *." 49 CFR 386.14(b)(1). In addition, "[a] request for a hearing must list all material facts believed to be in dispute." 49 CFR 386.14(b)(2).

Although the Regional Director clearly listed the requirements of § 386.14 in the notice of claim, Fulmer failed to comply with these provisions. Instead, Fulmer's replies simply list its attempts since the compliance review to cure the hours-of-service violations and request a hearing without contesting the charges in any manner. Therefore, I find that Fulmer's replies do not comply with the requirements of 49 CFR 386.14(b) because Fulmer has not admitted to nor denied the allegations in the notice of claim. I also find that Fulmer's hearing request does not raise any material factual issue in dispute warranting a hearing under 49 CFR 386.16(b). Accordingly, Fulmer's request for a hearing is denied.

The Regional Director's Motion for Final Order

In an analogy to a summary judgment motion, I have held that the moving party on a motion for final order bears the burden of proving that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.* No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). All inferences must be drawn in favor of the non-moving party, Fulmer in this case.

Where the motor carrier denies the allegations of the claim letter but the Regional Director nevertheless seeks to obtain a final order, the Regional Director's pleadings must be accompanied by affidavits or other evidence sufficient to establish a *prima facie* case. *In re American Pacific Power Apparatus, Inc.*, No. OR–90–006–075, (FHWA March 11, 1992) (Order). For the purposes of the Regional Director's motion for final order, and the question of whether the Regional Director must provide evidence of the violations charged, Fulmer's responses must be viewed as admissions. Rather than denying the allegations, Fulmer's August 15 letter listed its efforts to cure its past noncompliance. Fulmer's August 20 reply requested a hearing but did not contest any of the charges made in the notice of claim. Finally, the carrier simply failed to respond to the Regional Director's motion for final order.

Fulmer had repeated opportunities to deny or otherwise object to the charges against it, but failed to fully participate in this proceeding. The issue, then becomes what quantum of evidence must the Regional Director submit to support his motion for final order and avoid a hearing. Both *Forsyth Milk* and *American Pacific Power Apparatus* addressed those situations where the respondent denies the charges against it. In this case, I find that Fulmer has not denied the violations, and therefore I do not believe that the Regional Director must submit documentary or other

evidence to support its claims. If Fulmer had denied that its drivers drove in excess of the hours-of-service limits cited here, the Regional Director would have been required to submit affidavits or other evidence supporting his charges.

Finally, I do not believe that Fulmer can complain that the Regional Director has failed to produce substantive evidence of the violations charged. Fulmer has not only failed to deny that it violated the motor carrier safety regulations, it has also ignored opportunities to put the Regional Director to the test, including most recently by failing to respond to the Regional Director's motion for final order. Accordingly, I find there are no material factual issues in dispute, and the Regional Director is entitled to a judgment as a matter of law.

Penalty Assessment

The Regional Director assessed a penalty of $750 per violation, for a total penalty of $18,000. Fulmer has not objected to this amount, and after review of the nine penalty determination factors of 49 U.S.C. 521(b)(2)(C), I find that $18,000 is reasonably calculated to induce Fulmer's compliance with the hours-of-service regulations. This action was brought after three compliance reviews of Fulmer revealed violations of the hours-of-service limits. Fulmer cannot simply ignore applicable safety regulations or refuse to cure violations repeatedly identified in three compliance reviews.

It Is Hereby Ordered, That Carroll Fulmer & Co., Inc.'s, request for a hearing is denied, the Regional Director's motion for a final order is granted, and Carroll Fulmer & Co., Inc., is directed to pay the sum of $18,000 to the Regional Director, Region 4, within 30 days of this order, for requiring or permitting its drivers to drive more than 10 hours following eight hours off duty, and for requiring or permitting its drivers to drive after having been on duty 70 hours in eight consecutive days.

Dated: June 7, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order Appointing Administrative Law Judge; National Retail Transportation, Inc.

This matter comes before me upon National Retail Transportation's (NRT) request for an administrative hearing under 49 CFR 386.14(b)(2) of the Federal Motor Carrier Safety Regulations. Both NRT and the Regional Director assert that NRT's hearing request raises a material factual issue in dispute warranting a hearing under 49 CFR 386.16(b).

Background

By notice of claim dated January 21, 1992, the Regional Director cited NRT for 46 violations of 49 CFR 395.8(k) for failing to keep driver record of duty status supporting documents, and assessed a total penalty of $23,000, or $500 per violation. He asserted that NRT could not produce such documents at an October 1991 compliance review of the carrier.

NRT replied on January 30, 1992, denying that it failed to preserve these supporting documents and requesting an administrative hearing. NRT asserted that it intended to provide evidence contradicting the findings made in the notice of claim. The carrier stated that support documents were made available to the FHWA in its investigation of NRT, including "computerized Trip File Summaries, original Outbound Dispatch logs, [and] original Bills of Lading," and that NRT would provide these documents at the requested hearing. NRT's Reply and Request for Hearing, at 2.

Settlement negotiations between the two parties were unsuccessful, and on April 7, 1992, the Regional Director concurred in NRT's hearing request.

Conclusion

Upon review of the pleadings, I find that NRT's hearing request raises a material factual issue in dispute which should be addressed in an administrative hearing.

It Is Hereby Ordered, That National Retail Transportation's request for a hearing is granted. In accordance with 49 CFR 386.54(a), I hereby appoint an Administrative Law Judge, to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The appointed Judge is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: June 4, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order Denying Motion for Extension of Time; Gunther's Leasing Transport, Inc.; Complaint Investigation

This matter comes before me upon Gunther's Leasing Transport's (Gunther's) May 18, 1992, motion under 49 CFR 386.35(a) for an extension of time to respond to a compliance review report, and the Regional Director's motion to dismiss Gunther's motion.

As I held in my February 13, 1992, Order in this complaint investigation, there is no 49 CFR part 386 proceeding pending between the FHWA and Gunther's, Section 386.11 provides several methods to commence a part 386 proceeding, none of which were employed here. Instead, this case was initiated by the FHWA in a Federal district court to enforce an administrative subpoena issued by the Regional Director under 49 U.S.C. 502(d).

Because no 49 CFR part 386 proceeding has been commenced against Gunther's, it would be inappropriate for the Associate Administrator to grant Gunther's § 386.35(a) motion. Therefore I decline to do so. Gunther's request for additional time to respond to the findings in the compliance review should be made directly to the Regional Director, Region 3.

It is Hereby Ordered, That Gunther's Leasing Transport's motion under 49 CFR 386.35(a) is denied.

Dated: June 4, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Costello Industries, Inc.

This matter comes before me upon a motion for a final order by the Regional Director, Region 1. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

Background

Costello Industries, Inc. (Costello), is a Connecticut road construction company that operates motor vehicles in interstate commerce when its workers drive its large equipment to work sites in other states. The Regional Director, by notice of claim dated September 4, 1991, charged Costello with four violations of 49 CFR 391.51 for its failure to maintain a complete driver qualification file for each driver, four violations of 49 CFR 395.8 for failing to require drivers to make and submit records of duty status, and four violations of 49 CFR 396.17 for use of a commercial motor vehicle that was not periodically inspected. Costello submitted a timely reply to the notice of claim, seeking to settle the case and explaining its efforts to comply with the regulations. The carrier did not deny the allegations, request a hearing, or list any material issues it believed to be in dispute.

On October 4, 1991, after settlement negotiations were unsuccessful, Costello requested a hearing, citing three issues: its overall safety record, the "inherent inequality" of its classification as a

motor carrier, and the insufficient assistance and training it received from the FHWA. Costello supplemented its hearing request on October 22, 1991, stating that the penalty amount was excessive. In addition, the carrier argued that its hearing request was not late because it had implicitly reserved its right to request a hearing when it decided to pursue an informal settlement.

The Regional Director moved for a final order, stating that Costello was not entitled to a hearing. He argued that Costello's assertion that it had implicitly reserved its right to request a hearing was not a credible argument, and therefore the carrier had waived its right to a hearing under 49 CFR 386.14(b)(2). Moreover, if the request was viewed as timely, the Regional Director argued that Costello failed to deny the allegations or otherwise raise a material factual issue in dispute warranting a hearing under 49 CFR 386.16(b). Costello did not respond to the motion for final order.

Discussion

Costello's Hearing Request

If a motor carrier contests the charges against it and seeks a hearing, its hearing request must be made within 15 days after the claim letter is served. 49 CFR 386.14(b)(2). As the Regional Director Stated in his notice of claim, failure to request a hearing within 15 days constitutes a waiver of any right to a hearing. *Id.* There is no regulatory provision permitting a motor carrier to implicitly reserve its right to request a hearing after the 15 day period has elapsed, and I find no reason in this case to conclude that the carrier reserved its right, implicitly or otherwise.

Costello did not request a hearing until its October 8, 1991, letter to the FHWA federal program manager, more than one month after the notice of claim was served. Moreover, none of Costello's responses, including its objection to the amount of the penalty, raises a material factual issue in dispute warranting a hearing under 49 CFR 386.16(b). *E.g., In re Arthur Shelley, Inc.*, 55 FR 43288 (FHWA 1990) (Final Order). First, Costello claims to have an excellent motor carrier safety record, yet provides no evidence to support this allegation and admits to poor recordkeeping.

Next, Costello argues that it is unfair to classify it as a motor carrier, and to force a road contractor to obey the same motor carrier regulations as trucking or delivery businesses do. Costello does not assert, however, that it is not a motor carrier and therefore not subject to the FMCSRs. Instead, Costello claims it should not be subject to rules which it deems to be "irrelevant" to its construction business. Costello's October 8, 1991, Reply at 2.

Finally, Costello claims that a lack of agency assistance is the reason for its noncompliance. Even if true, this reason would not excuse Costello's violations; but there is evidence that the agency made several efforts to assist Costello in meeting the requirements of the FMCSRs. At both a 1987 compliance review and the August 1991 review, Costello received instructions on how to cure its violations and was advised to review the FMCSRs.

Costello's hostile attitude toward these regulations, insisting that it is "inequitable and unrealistic" to expect it to comply with them, appears to be the reason for its noncompliance. *Id.* Because Costello failed to make a timely hearing request, and because I do not believe that Costello has raised any material factual issues requiring a hearing to resolve, I decline to grant Costello an oral hearing in this case.

The Regional Director's Motion for Final Order

In an analogy to a summary judgment motion, I have held that the moving party on a motion for final order bears the burden of proving that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). All inferences must be drawn in favor of the non-moving party, Costello in this case.

Costello's responses, when viewed in a light most favorable to the carrier, must be viewed as admissions to the recordkeeping violations. In its August 15, 1991, letter, the carrier stated, "If the entire scope of the review is to determine administrative compliance, and administrative compliance is defined as keeping copies of travel logs, medical certificates, vehicle inspection reports, etc. in the home office, then yes, we have a deficiency." Costello did not deny or in any way contest the four charges that it used a motor vehicle that was not periodically inspected. Costello's failure to respond to or otherwise defend these four charges constitutes a default by the motor carrier. Therefore these allegations will be taken as true. 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* section 2688 (1983).

I note that the Regional Director's motion for final order is not supported by evidence sufficient to show a *prima facie* case, but in this instance such evidence is not required. Costello has admitted to the eight recordkeeping violations and failed to respond to the four vehicle inspection charges. In addition, Costello has not responded to the motion for final order. Therefore I find there are no material factual issues in dispute, and the Regional Director is entitled to a judgment as a matter of law.

Penalty Assessment

The Regional Director assessed a penalty of $300 per violation, for a total penalty of $3,600. Costello claimed this amount was excessive, but gave no reason for this objection. The penalty amount is well within the statutory maximum of $500 per violation under 49 U.S.C. § 521(b)(2)(A). In addition, Costello's defiant attitude toward compliance with the FMCSRs warrants no mitigation of the penalty amount, and I find that $3,600 is necessary to induce compliance.

It is Hereby Ordered, That Costello Industries' hearing request is denied, the Regional Director's motion for final order is granted, and Costello Industries is directed to pay the sum of $3,600 to the Regional Director, Region 1, within 30 days of this order.

Dated: June 4, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; PVH, Inc., d/b/a Aries Distributors

This matter comes before me upon a motion by the Regional Director, Region 1, for a final order. This proceeding is governed by the Federal Highway Administration's (FHWA) Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 CFR part 386.

Background

After a May 31, 1991, compliance review of PVH, Inc. (PVH), d/b/a Aries Distributors, revealed continuing violations of the Federal Motor Carrier Safety Regulations (FMCSRs), the Regional Director served PVH with a notice of claim letter on June 13, 1991. The notice charged PVH with two violations of 49 CFR 391.51, failure to maintain complete driver qualification files; six violations of 49 CFR 395.8, failure to require a driver to make or submit records of duty status; and four violations of 49 CFR 396.11, failure to require driver vehicle inspection reports. The Regional Director assessed a penalty of $300 per violation, for a total penalty of $3,600.

PVH replied to the notice of claim on June 27, 1991, and requested an administrative hearing. The carrier asserted that it had only one truck

subject to the FMCSRs and that it had not operated the truck during the period when the violations allegedly occurred. The reply also stated that PVH "[had] not had the opportunity to adequately set up proper D.O.T. files."

The parties tried without success to reach a settlement. The Regional Director then submitted a Motion for Final Order on October 21, 1991. PVH has not responded to this motion.

Discussion

1. PVH's Request for an Administrative Hearing

The Rules of Practice require a respondent to demonstrate the existence of a material factual dispute before being granted a hearing. 49 CFR 386.14(b)(2), 386.16(b). PVH claims that its one regulated truck did not operate during the period when the recordkeeping violations allegedly occurred. The Regional Director, however, has presented evidence—including copies of a Massachusetts inspection report and a bill for mechanical services—tending to show that the PVH truck travelled 12,977 miles in the 72 days preceding the compliance review, including the time of the violations cited in the notice of claim. PVH did not rebut this evidence.

The record before me in this case does not demonstrate the existence of a material factual issue in dispute. Because the Regional Director's evidence effectively refutes the carrier's mere assertions concerning its truck, I deny PVH's request for an administrative hearing.

2. The Regional Director's Motion for Final Order

A motion for final order is in the nature of a motion for summary judgment, and the moving party bears the burden of clearly establishing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. *E.g., In re Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, (FHWA Dec. 5, 1991) (Order). When a respondent denies the allegations against it but the Regional Director seeks to avoid a hearing and obtain a final order on motion, the motion should be accompanied by evidence sufficient to establish at least a *prima facie* case.

The Regional Director's evidence demonstrates that the carrier used a vehicle subject to the FMCSRs, but his motion is not accompanied by substantial evidence (such as affidavits of persons who inspected the carrier's records) establishing that the recordkeeping violations actually occurred. The record does contain, though, copies of the compliance review, the notice of claim, and other paperwork suggesting that the alleged violations occurred—paperwork that represents evidence that the Regional Director would produce if a hearing were held. This paperwork, served on PVH along with the motion for final order, also provided notice to PVH of the substance behind the allegations against it.

In this case, in contrast to *In re American Pacific Power Apparatus, Inc.*, No. OR–90–006–075, (FHWA March 11, 1992) (Final Order), and similar cases, PVH does not deny the conduct charged in the notice of claim, and indeed its reply may fairly be read as an admission that the carrier did not "adequately set up proper * * * files." The issue, then, becomes what quantum of evidence must the Regional Director submit to support his motion for final order and to avoid a hearing. The *Forsyth Milk* and *American Pacific Power* cases addressed those situations in which the respondent denies the charges against it. In the instant case, the record before me indicates that while PVH admits that it did not keep proper records, the carrier asserts that it did not use its one regulated vehicle during the time the violations allegedly occurred. As I have already noted, the evidence submitted by the Regional Director (unrebutted by PVH) conclusively establishes that this particular vehicle was in use during this time.

As for the recordkeeping violations themselves, I find that PVH has not denied that it failed to keep these records, and therefore I do not believe that the Regional Director must submit documentary or other evidence to support this element of his claim. If PVH had denied that it had failed to keep any of the records here cited, the Regional Director would have been required to submit affidavits or other evidence supporting his charges.

I do not believe that PVH can complain that the Regional Director has failed to produce substantive evidence of the violations alleged. PVH has not only failed to deny that it violated the FMCSRs, it has also ignored opportunities to put the Regional Director to the test, including most recently by failing to respond to the Regional Director's motion for final order.

In short, PVH has failed to rebut the Regional Director's case, whereas the Regional Director has provided evidence to counter the carrier's bald assertion that it did not use a motor vehicle subject to the FMCSRs. Accordingly, I find that the facts to be as alleged in the notice of claim.

As for the amount of the penalty assessed by the Regional Director, after review of the nine penalty determination factors of 49 U.S.C. 521(b)(2)(C) I find that $3,600 penalty reasonably calculated to induce PVH's compliance with the recordkeeping regulations. I also note that the penalty assessed by the Regional Director, $300 per violation, falls well below the maximum allowed by law. 49 U.S.C. 521(b). The Regional Director brought this action after both a safety and a compliance review revealed violations of the FMCSRs. PVH cannot simply ignore applicable regulations or refuse to cure violations identified in separate reviews. Therefore, I grant the Regional Director's motion for final order in the full amount, $3,600.

It is Hereby Ordered, That the Regional Director's request for a final order is granted. PVH, Inc., d/b/a Aries Distributors, is directed to pay $3,600 to the Regional Director within 30 days of the date of this order.

Dated: June 3, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order to Dismiss

Served June 2, 1992.

This proceeding was initiated by a Notice of Claim letter dated January 24, 1991, from the Regional Director of Region 3 to Kessel Lumber Supply, Inc. (Respondent), seeking a penalty in the amount of $10,000. The Associate Administrator for Motor Carrier Safety appointed an Administrative Law Judge by order dated February 18, 1992 (to be designated by the Chief Administrative Law Judge) to consider this matter.

The undersigned Judge was appointed by notice served February, 21, 1992. After various prehearing procedures, by petition for consent judgement received May 22, 1992, the Regional Director with the concurrence of Respondent, requests that a consent judgement be entered in accordance with the terms of a settlement agreement reached by the parties, which provides for payment by Respondent of $5,000 to the FHWA. We conclude that that petition should be granted and the proceeding dismissed on the basis of the settlement.[1]

[1] 49 C.F.R. 386.54(b)(6) was amended effective January 26, 1988 (53 FR 2036), to specify that the Judge can "consider and rule upon all procedural and other motions, including motions to dismiss, except motions which, under this part, are made directly to the Associate Administrator." Although 49 C.F.R. 386.22 provides that the parties "may" execute an appropriate agreement for disposing of the case by consent "for the consideration of the Associate Administrator," it is now settled that the

Accordingly, settlement have been reached between the parties, and that settlement appearing to be in the interest of the parties and the U.S. Department of Transportation,

It is Ordered, That the above-styled matter is hereby dismissed.

Dated: June 1, 1992.

Ronnie A. Yoder,

Administrative Law Judge.

Order of Administrative Law Judge Receiving in Evidence Administrative and Judicial Records, and Setting Procedural Schedule for a Hearing

In the matter of: John Steven Johnson, in his individual capacity as President of Steve Johnson and Sons Trucking, Inc.; and Steve Johnson and Sons Trucking, Inc., a corporation.

Served May 26, 1992.

By order served April 1, 1992, the parties in the above-referenced proceeding were directed to file for admission into the record: (a) the administrative record upon which the Federal Highway Administration ("FHWA") Associate Administrator for Motor Carriers issued the Final Order dated September 20, 1989; and (b) the judicial record upon which the United States Court of Appeals for the Ninth Circuit issued the Memorandum filed July 12, 1991. The two records were filed on April 13, 1992, with a statement signed by FHWA Counsel and by counsel for John Steven Johnson, as an individual, ("Respondent") attesting to the completeness and accuracy of the proffered records.

Accordingly, the aforementioned administrative and judicial records are hereby admitted into the evidentiary record of the instant proceeding.

In this proceeding, FHWA Counsel and Respondent ("the parties") have argued that an oral evidentiary hearing is not required because the administrative and judicial records contain facts which are dispositive of the question to be decided.[1]

I have reviewed the documents in the two records and the parties' arguments, and I conclude, for reasons given below, that an oral evidentiary hearing must be held.

Accordingly, the parties are hereby directed to adhere to the procedural schedule set forth at the conclusion of this Order.

I. The Issues

This proceeding was instituted "for the limited purpose of conducting a hearing to review the appropriateness of imposing the fine against Johnson." (Memorandum, supra, at 5. See also Final Order, *supra*, at 2.)

The alleged fine against Johnson, totaling $19,700, is based on:

(a) $700 for two recordkeeping violations of 49 CFR 394.9(a) and $2,000 for four recordkeeping violations of 49 CFR § 395.8(e);

(b) $3,500 for five safety violations of 49 CFR 395.3(a)(1) and $3,500 for five safety violations of 49 CFR 395.3(b); and

(c) $10,000 is for five financial responsibility violations of 49 CFR 387.7(a).

The recordkeeping and safety regulations in 49 CFR parts 394 and 395 were promulgated pursuant to the Motor Carrier Safety Act of 1984 ("1984 Act").[2] The financial responsibility regulation in 49 CFR part 387 was promulgated pursuant to the Motor Carrier Act of 1980 ("1980 Act").[3]

By Order served March 3, 1992, two possible issues in the proceeding were presented for comment by the parties. Taking into consideration their comments (FHWA Counsel, filed March 18, 1992; Respondent, filed March 26, 1992), and the evidentiary record presently before me, I find that those issues should be modified as follows.

With regard to the 1984 Act and the recordkeeping violations thereunder:

Whether Johnson, in his individual capacity at Steve Johnson and Sons Trucking, Inc., is a "person" within the meaning of sections 213(b) and 204(6) of the Motor Carrier Safety Act of 1984.[4]

With regard to the 1984 Act and the safety violations thereunder:

Whether Johnson, in his individual capacity at Steve Johnson and Sons Trucking, Inc., is a "person" or an "employee" or an "employer" within the meaning of sections 213(b) and 204(6), 204(2), and 204(3) of the Motor Carrier Safety Act of 1984.[5]

Section 204(6), codified at 49 app. U.S.C. 2503(6), provides that "'*person*' means any individual, partnership, association, corporation, business trust, and any other organized group of individuals * * *." [Emphasis added.]

See also note 4, *supra*, for section 204(6)'s definition of person.

Section 204(2), codified at 49 App. U.S.C. 2503(2), provides that "'*employee*' means * * * any individual other than an *employer* * * *." [Emphasis added.]

Section 204(3), codified at 49 App. U.S.C. 2503(3), provides that "'*employer*' means any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business or assigns employees to operate it * * *" [Emphasis added.]

With regard to the Motor Carrier Act of 1980 and the financial responsibility violations thereunder:

Whether Johnson, in his individual capacity at Steve Johnson and Sons Trucking, Inc., is a "person" who "knowingly violated" the financial responsibility regulations or an "employee" who "acted without knowledge" within the meaning of section 30(d)(1) of the Motor Carrier Act of 1980.[6]

II. The Facts Required To Resolve the Issues

In light of the issues in the case, three statutory categories—person, employee, employer—are involved in determining Respondent's liability for the recordkeeping, safety, and financial responsibility violations. Specifically, only the category, person, is relevant to liability for the recordkeeping

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Judge can also enter an order dismissing a proceeding pursuant to a settlement subject to review by the Associate Administrator, where the application is made to the Judge. See *In the Matter of Fulton Packing Co., Inc.*, FHWA Docket No. RI-86-60, Order dated June 10, 1987; *Rodgers Johnson/J and J Bus Service*, FHWA Docket No. R3-89-02, Order served May 4, 1989; *In Matter of Real Ice Cream Distributors, Inc.*, FHWA Docket No. RI-86-13, Order served October 26, 1987; *In the Matter of Alfa Express Co.*, FHWA Docket No. 86-65G, Order served December 28, 1987; *Bower Tiling Service, Inc.*, FHWA Docket No. R5-90-03, Order served June 18, 1990.

[1] See FHWA Counsel Pleadings filed February 4, and March 18 and 27, 1992; Respondent Pleadings filed February 6, March 19 and 26, and April 1, 1992.

[2] The Motor Carrier Safety Act of 1984 was enacted by Public Law No. 98-554, title II, 98 Stat. 2832 (Oct. 30, 1984).

[3] The Motor Carrier Act of 1980 was enacted by Public Law No. 96-296, 94 Stat. 793 (July 1, 1980).

[4] Section 213(b), codified at 49 U.S.C. 521(b)(2)(A), provides that:

[A]ny *person* who is determined * * * to have committed an act which is a violation of a *recordkeeping* requirement issued by the Secretary pursuant to section 3102 [of title 49] * * * or the Motor Carrier Safety Act of 1984 shall be liable to the United States for a civil penalty not to exceed $500 for each offense * * * [Emphasis added.]

[5] Section 213(b), quoted in note 4, *supra*, goes on to provide that:

If the Secretary determines that a serious pattern of *safety violations, other than recordkeeping requirements*, exists or has occurred, the Secretary may assess a civil penalty not to exceed $1,000 for each offense; except that the maximum fine for each such pattern of safety violations shall not exceed $10,000. * * * Notwithstanding any other provision of this section * * *, *except for recordkeeping violations*, no civil penalty shall be assessed under this section against an *employee* for a violation unless the Secretary determines that such employee's actions constituted gross negligence or reckless disregard for safety, in which case such employee shall be liable for a civil penalty not to exceed $1,000. [Emphasis added.]

[6] Section 30(d)(1) of the 1980 Act, codified at 49 U.S.C. 10927 note, provides that:

Any *person* (except an *employee* who acts *without knowledge*) who is determined by the Secretary * * * to have *knowingly violated* this section or a regulation issued under this section shall be liable to the United States for a civil penalty of not more than $10,000 for each violation, and if any such violation is a continuing one, each day of violation constitutes a separate offense. [Emphasis added.]

violations, while all three categories are relevant to liability for the safety and financial responsibility violations.

Respondent has spun a convoluted argument against holding an evidentiary hearing in this case based on the wording of the Notice of Claim dated June 2, 1989, concerning Respondent's "capacity".

Respondent points out that the only reference to Respondent John Steven Johnson, as distinguished from the corporate respondent, Steven Johnson and Sons Trucking, Inc., is in the address portion of the Notice of Claim (which is in letter form) and in the first paragraph. (Pleading filed March 19, 1992, at 4.) Because that language refers, respectively, to Johnson, "in his individual capacity as President of Steve Johnson and Sons Trucking, Inc.," and to Johnson, "in his individual capacity," Respondent contends that the agency failed to plead the charges against Respondent as an "employer". From this, Respondent ends up with the assertion that the only way Respondent can be held liable under the Notice of Claim is "upon a vicarious liability approach." In sum, Respondent rejects any application of the above cited statutory provisions because, according to Respondent, the provisions do not specifically provide "vicarious liability" for such entities as employer or employee. (Pleading filed March 26, 1992, at 2–7).

Respondent's reasoning is wholly misguided, for liability under the applicable motor carrier statutes adheres to "any person", a category which could apply to Respondent either as an individual or as President of the trucking company. To the extent, therefore, that employer or employee entities are involved in this case, it is the result of certain other language in the applicable statutory provisions which would exempt Respondent from liability as "any person", entirely or in part, if Respondent is shown to be an"employee", with that category being statutorily defined as "other than an employer".

It should be noted that the issues in the case are framed only in terms of Respondent, "in his individual capacity", because both the Ninth Circuit and the agency so directed. See Memorandum at 5; Final Order at 2. That "capacity", therefore, is a matter of proof in the proceeding and the applicability of the three statutory categories—person, employee, employer—to Respondent remains the question to be decided.

FAA Counsel argues that certain documents in the administrative and judicial records (both records now in the record in this proceeding, indexed, and hereinafter referred to as "the record"), resolve the question of how the categories apply to Respondent. FAA Counsel cites the record at: Index No. 23 (The FHWA Administrative Record on Review) at Tab I (Petitioners' Reply to Notice of Claim); Index No. 23 at Tab K (FHWA Compliance Review); and Index No. 6a at 12, 14 (Reply Brief of Petitioners on Review).

With the possible exception that the three documents, as well as other documents, in the record do provide a factual basis for determining Respondent's legal status, when the recordkeeping violations occurred, as "any person" within the meaning of sections 213(b) and 204(6) of the 1984 Act (*supra* note 4 ("person" equated with "individual")), I find that neither those documents nor any others presently in the record provide sufficient factual information for a legal finding on whether Respondent was an "employee" or an "employer" within the meaning of Sections 213(b), 204 (2) and (3) of the 1984 Act (*supra* note 5) and Section 30(d)(1) of the 1980 Act (*supra*) note 6) when the safety and financial responsibility violations occurred.[7]

Language in Petitioners' Reply to the Notice of Claim,[8] at best, comes close to an admission that Respondent made managerial decisions in connection with Steve Johnson and Sons Trucking, Inc., but even that would shed no light on Respondent as a person "engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business or assigns employees to operate it," the statutory definition of an employer.

In relying on "The FHWA Compliance Review", FHWA Counsel merely points to the fact that it contains Respondent's signature, with "President" printed underneath. The position, standing alone, does not fit within the statutory category of employer; nor, for that matter, do the positions listed in the Reply Brief of Petitions on Review,[9] even if the language surrounding the listing of the positions ("Shareholder", "President", "Officer", "Manager") is interpreted as an admission that Respondent held such positions at Steve Johnson and Sons Trucking, Inc., rather than as an argumentative statement. See Respondent Pleadings (March 26, 1992; April 1, 1992).[10]

I will do so because all of the definitions in 49 CFR 390.5 apply to the regulatory sections violated in this case. See 49 CFR 390.5 ("Definitions. In this subchapter [which includes Parts 387, 394, and 395 at issue herein]: * * * [specified term] means * * *."). I add, however, that while the regulation would include the term "employer" in the term "motor carrier", the reverse is apparently not the case. What is plainly significant is that § 390.5 also defines "employee" and "employer", and in terms identical to those in sections 204 ((2) and (3) of the 1984 Act, *supra*. Thus, any ambiguity, if it exists, about the definition of "employee" as used in section 30(d)(1) of the 1980 Act (see note 6, *supra*) may possibly be resolved by the regulation.

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[7] Respondent has indicated that Steven Johnson and Sons Trucking, Inc., is "long defunct" and that Respondent has had "no continuing relationship to it * * * for more than two years." (Pleading filed March 19, 1992, at 2). These circumstances, even if proven at the hearing, would have no bearing on Respondent's individual liability at the time of the violations.

[8] "* * * I [Johnson] deny that I knowingly violated 49 CFR 387.7(a). I admit the violation of 49 CFR 394.9, however, I personally did not know the violation took place and furthermore was not aware of the requirement to report such accidents. With respect to all other alleged violations, I deny all as Steven Johnson & Sons Trucking, Inc. or myself personally has not required such violation and the enforcement to not permit violation [sic] due to signed statements made by drivers would include asking them to *change* such statements after the fact. Steve Johnson and Sons Trucking, Inc. or myself have not in the past nor will we ever ask a driver to change *his* or *her* statement." (Index No. 23 at Tab I (emphasis in original).)

"Furthermore, my personal involvement with Steven Johnson and Sons Trucking, Inc. was very limited to the daily operation of same." (*Id.*)

[9] "Giving the Agency all of the benefits of the numerous doubts in this portion of its Brief, and giving recognition that the Corporate Petitioner was in fact a corporation under which the trucking company operated, the most that can be said from the record is that the Individual Petitioner was a Shareholder of the Corporate" Petitioner; the President, an Officer, of the Corporate Petitioner; and the Manager of the Corporate Petitioner." (Index No. 6a at 12.)

"Nothing in the applicable statutes or in the Agency's argument justifies extending the term *Employer* to an individual such as Individual Petitioner, who is no more than a *Corporate Shareholder*, a *Corporate Officer* or only a *Manager*. . . . Since an individual such as Individual Petitioner, who is a *Corporate Shareholder*, *Corporate Officer* or a *Manager* is not covered by the statutory definition in Section 2503(3), the proper characterization for these categories is *Employee* under Section 20503(2)." (*Id.*) at 14 (emphasis in original).)

[10] FHWA Counsel requests that I take judicial notice, in this proceeding, of the definition of "motor carrier" in the agency's regulations at 49 C.F.R. § 390.5. (Pleading (March 18, 1992) at 2). The definition provides that "motor carrier" means:

[A] for-hire motor carrier or a private motor carrier of property. The term 'motor carrier' includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of Subchapter B [Federal Motor Carrier Safety Regulations, including Parts 387, 394, and 395 at issue herein], the definition of '*motor carrier*' includes the terms '*employer*' and '*exempt motor carrier*.' [Emphasis in original.]

On the basis of the record before me at this time, I conclude that if Respondent is to be held liable for the safety and financial responsibility violations, as well as for the recordkeeping violations, facts will have to be presented in evidence, along with legal arguments pertaining thereto, which comport with the applicable statutory and regulatory provisions. This will require an oral evidentiary hearing.[11]

III. The Procedural Schedule

The hearing will be held in San Francisco, California, see Order served March 3, 1992, at a date to be set by further order. The procedural schedule prior to the hearing is as follows:

Discovery requests served by	June 12, 1992.
Responses thereto served	Within 30 days, but no later than July 13, 1992.
Depositions, if any, by	July 31, 1992.
Pretrial motions, if any, filed by	August 14, 1992.
Final witness lists, trial exhibits, and summaries of proposed testimony served by	September 11, 1992
Stipulations filed by	September 11, 1992.

All exchanges and filings shall be served upon the administrative law judge, as well as upon each other.

[11] Respondent advances the novel theory that an oral evidentiary hearing cannot be held because the language in the Ninth Circuit's Memorandum remanding the case to the agency restricted the proceeding to nothing more, in effect, than a review of the records before the agency and the Court when the agency imposed the fine against Respondent and Respondent appealed that decision. In other words, Respondent argues that I cannot "reopen" these evidentiary records, *see* Pleading (March 19, 1992) at 3–7, and any hearing in the case would be limited to oral argument, see pleading (February 6, 1992) at 4.

The word "review" does appear in the Court's Memorandum— "for limited purpose of conducting a hearing to review the appropriateness of imposing the fine against Johnson" (at 5)—but Respondent has attached a meaning to it which would lead to an absurd result. Obviously, the Court found the record before it inadequate to support the agency's action finding Respondent liable for the fine and, in terms, remanded that action "for further consideration by the FHWA." (Memorandum at 2). Respondent, therefore, is not presently liable and will only become liable for the fine, if at all, on the basis of the evidentiary record to be established in this proceeding. The Court, clearly, did not restrict the FHWA's "consideration" of the question to facts which had already been presented to the Court. Such a result would be wholly illogical, to say the least, the Court being well aware of what those facts were. Furthermore, Respondent's appeal in the Ninth Circuit was for the purpose of obtaining a hearing before the agency and in remanding the case, the Court has granted Respondent that relief, albeit solely on the question of Respondent's individual liability for the violations and not on the substance of the violations, as well. See also Order served March 3, 1992, at 4 n. 7.

So Ordered.

John J. Mathias,

Chief Administrative Law Judge.

Final Order; James Kelton, Sr. d/b/a Kelton Tours

Background

This matter comes before me upon a motion by the Regional Director, Region 4, opposing Kelton Tour's (Kelton) request for an administrative hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

FHWA conducted a review of Kelton on July 18, 1990, after a parent of one of Kelton's former passengers complained that Kelton was operating in excess of the agency's hours-of-service regulations. By notice of claim dated September 17, 1990, the Regional Director charged Kelton with 11 violations of 49 CFR 395.8(e) for requiring or permitting drivers to make false entries on records of duty status, and assessed a total penalty of $4,400.

Kelton replied to the notice of claim on October 6, 1990, admitting that its drivers' logs contained "inadvertent and unintentional errors, which were clerical in nature," but asserting that it did not knowingly maintain false records of duty status. Kelton also requested an administrative hearing, claiming that it could provide affidavits and lodging receipts which would establish that some of the drivers' logs were accurate and not falsified to conceal excess hours of service.

The Regional Director filed a motion for a final order on July 17, 1991, stating that Kelton's claim that it did not "knowingly" keep false records of duty status was an inadequate defense when Kelton knew its drivers operated in excess of the hours-of-service limitations, yet the drivers' logs maintained by the carrier did not reveal these excess hours. In addition, the Regional Director included several exhibits documenting the charges against Kelton. He asserted that these exhibits, uncontradicted by any evidence or affidavits by the motor carrier, established that there are no material factual issues in dispute and that Kelton's hearing request should therefore be denied and the motion for final order granted.

Kelton has neither replied to the motion for final order nor produced the promised affidavits and lodging receipts to show that its drivers' logs were not falsified.

Discussion

Hearing Request

Hearing requests must list all material factual issues believed to be in dispute. 49 CFR 386.14(b)(2). If the Regional Director opposes the hearing request with sufficient evidence, "then the motor carrier must do more than just deny the allegations of its pleadings. It must give sufficient evidence to support its allegations." *American Pacific Power Apparatus, Inc.* No. OR–90–006–075, at 2 (FHWA March 11, 1992) (Order).

In this case, Kelton has made a partial admission, but the carrier also asserted that it could provide sworn affidavits and lodging receipts which would "establish that, with certain admitted exceptions, the 'on duty' and 'driving' hours were proper." Kelton's Reply to Notice of Claim at 2. The promised evidence has not been produced, and Kelton's bare, partial denials are insufficient to meet its burden to show there is a dispute of fact as to counts 1, 2, and 5–11, where its hearing request is sufficiently opposed by the evidence presented by the Regional Director. Because Kelton has failed to competently identify any material factual issue in dispute as to counts 1, 2, and 5–11, its hearing request is denied as to these counts.

Counts 3 and 4 concern a trip made by Kelton drivers James Carroll and Robert Nelson from Guntersville, Alabama, to Daytona Beach, Florida, on April 26, 1990. Both drivers' logs for this day show an 8 hour "off duty" period in Jennings, Florida. The Regional Director's own evidence includes contradictory statements regarding whether one or both of the drivers did in fact take this 8 hour break. In a written transcript of an August 2, 1990, telephone interview with investigator David LeMaster, Mr. Danny Lancaster, a passenger on the April 26 trip, stated that the bus he was on did not stop in Jennings, Florida, or anywhere else, for 8 hours. Yet Mr. Carroll, a driver of one of the two Kelton buses that made the April 26 trip, stated that he slept in the back of the bus for 8 hours in Jennings, Florida, while the passengers waited on the bus with him. These transcripts do not reveal whether Mr. Lancaster was on the bus driven by Mr. Carroll or the one driven by Mr. Nelson.

I could grant Kelton's hearing request with regard to counts 3 and 4, because several unresolved issues remain as to these counts, but I decline to do so at this time. Instead, I direct the parties to address these issues, and include affidavits or other evidence in support of their pleadings. See, *e.g.*, *Gunther's*

Leasing Transport, Inc., No. R3–90–104 (FHWA September 30, 1991) (Order). After review of the supplemental pleadings, I will determine whether there is a material factual issue in dispute warranting a hearing on these two counts.

Motion for Final Order

A motion for final order is analogous to a motion for summary judgment. *Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Final Order). Therefore, the moving party bears the burden of proving that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. All evidence must be viewed in a light most favorable to the non-moving party, Kelton.

In this case, where Kelton has partially denied the allegations against it, but the Regional Director nevertheless opposes Kelton's hearing request and seeks a final order, the Regional Director's pleadings must be accompanied by evidence sufficient to establish a *prima facie* case of the violations. Because the purpose of a motion for final order is to "pierce the pleadings" and examine the evidence in order to determine whether there is a genuine need for trial, mere assertions in Kelton's pleadings, unsupported by evidence, cannot defeat an otherwise justified motion for final order. Fed. R. Civ. P. 56 (advisory committee notes).

The evidence presented by the Regional Director fully supports allegations 1, 2, and 5–11, and is unrebutted by Kelton. Exhibits 1 and 2 include records of duty status for Kelton drivers James Carroll and Robert Nelson for April 5, 1990, when the two were transporting passengers from Woodland, Alabama, to Washington, DC. These logs show an 8 hour "off duty" period in Wytheville, Virginia. Also included in these exhibits is a transcript from a July 18, 1990, interview conducted by FHWA investigator David Lemaster with James Carroll, where Carroll stated, "I'm not going to lie to you, we drove straight through" to Washington, DC, on April 5, 1990. In addition, exhibits 1 and 2 include a copy of the contract for the 850 mile trip, which reads, "Drivers will rest when you get to Washington, DC." This contract reveals the drivers' motivation for the falsification of their logs. A non-stop 850 mile journey would require approximately 15 continuous hours of driving, impossible to complete under the 10 hour limit imposed by the Federal Motor Carrier Safety Regulations (FMCSRs).

The Regional Director has not met his evidentiary burden on counts 3 and 4, which involve the April 26, 1990, trip by Kelton drivers between Guntersville, Alabama, and Daytona Beach, Florida. Because the Regional Director has failed to clearly establish all of the elements of these two counts, including whether one or both Kelton drivers took an 8 hour break while driving that day, I cannot grant a final order on these counts at this time.

Exhibit 5 documents a trip made by Mr. Nelson from Muscle Shoals, Alabama, to San Antonio, Texas, on May 3, 1990. Nelson's logs for this day show an 8 hour "off duty" period in Texarkana, Arkansas. A parent of one of the passengers of this bus monitored the progress of the bus via phone calls from her child from rest stops along the trip route. Her child called her on May 3 at 10:30 a.m. The bus had just arrived in Dallas, Texas, after leaving Muscle Shoals, Alabama, at 7:15 p.m. on May 2, 1990. Mr. Nelson had driven for over 15 hours and had stopped only for refueling.

Exhibit 6 reveals that Mr. Nelson also falsified his logs on the return trip from San Antonio, Texas, to Muscle Shoals, Alabama, on May 7, 1990. While Nelson's logs show an 8 hour "off duty" period in Little Rock, Arkansas, from 12:30 to 8:30 a.m., an Alabama driver/vehicle examination report reveals that the bus was actually over 300 miles past Little Rock, near Muscle Shoals, Alabama, only forty-five minutes later at 9:15 a.m. Significantly, Mr. Nelson was cited by the state inspector for failure to keep his records of duty status up to date, because his last log entry was made 5 days earlier.

Exhibits 7 and 8 concern a May 10, 1990, trip by Robert Nelson from Huntsville, Alabama, to Orlando, Florida, and the return trip on May 14, 1990. Nelson's May 10 records of duty status show an 8 hour "off duty" period in Valdosta, Georgia, and his May 14 logs show an 8 hour break in Oxford, Alabama. But these logs conflict with the transcript of an FHWA interview with a passenger on this trip, Mr. James Jackson. Jackson stated that the bus did not stop for eight hours in Valdosta on May 10, but drove overnight to Orlando. Again, Jackson reported that on the return trip on May 14, Mr. Nelson drove straight back to Huntsville, Alabama, and did not stop for an 8 hour period.

In exhibits 9 and 10, driver James Carroll admitted in an oral interview with FHWA investigator LeMaster that he falsified his records of duty status documenting his trip from Cedartown, Georgia, to Washington, DC, on June 8, 1990, and the return trip to Cedartown on June 11 and 12. Carroll's June 8 logs show that he was "off duty" between 5 p.m. and 3 a.m. in South Hill, Virginia, but Carroll admitted to LeMaster that he drove straight through from Cedartown to Washington, DC. Similarly, Carroll's logs for June 11 and 12 show an 8 hour "off duty" period at the South Carolina State line, but Carroll confessed that he did not take this break on the return trip, but that he drove directly to Cedartown, Georgia.

Finally, Exhibit 11 reveals that Mr. Nelson made false entries on his June 15, 1990, record of duty status. On that date, he was transporting a Girl Scout troop from Washington, DC to Carrollton, Georgia. Nelson's logs show that he departed Washington, DC, at 6 p.m. on June 14, was "off duty" for 8 hours at a roadside rest area from 5 a.m. to 1 p.m., and then arrived in Carrollton at 3 p.m. on June 15. But Ms. Susan Baskin, troop leader and a passenger on the bus trip, stated that the bus drove directly to Carrollton with only short break periods, arriving at 9 a.m. on June 15.

In spite of claims that it could and would produce affidavits and lodging receipts to establish that its drivers' logs were correct, Kelton has failed to produce any evidence supporting its assertions, failed to reply to the motion for final order, and failed to rebut the evidence of these violations. Although the Regional Director's evidentiary burden on a motion for final order is no less stringent when the motor carrier denies the allegations but provides no evidence, Kelton's failure to fully participate in this proceeding is significant because it means Kelton has failed to rebut the Regional Director's *prima facie* case as to counts 1, 2, and 5–11.

The Regional Director assessed a total penalty of $4,400, $400 per violation. Because I have deferred my decision on two of the eleven counts, the assessed penalty amount for the remaining nine counts is $3,600. Taking into account the factors listed in 49 U.S.C. 521(b)(2)(C) for determination of the penalty amount, I find that this amount is fully supported by the record, and is calculated to induce further compliance with the FMCSRs. These falsified records of duty status concealed the much more serious conduct of Kelton, its dangerous practice of sending single drivers on long, non-stop trips. Such actions are a serious threat to passenger safety and the traveling public. The fact that the passengers endangered by these trips were children reinforces the need for strict adherence to the hours-of-service regulations. The potential for disaster presented by fatigued drivers in this situation is great, and Kelton's actions cannot be tolerated.

It Is Hereby Ordered, That Kelton Tours' request for a hearing is denied as to counts 1, 2, and 5–11, the Regional Director's request for a final order is granted as to counts 1, 2, and 5–11, and Kelton Tours is directed to pay the sum of $3,600 to the Regional Director, Region 4, within 30 days of this order for having required or permitted its drivers to make false entries on their records of duty status, in violation of 49 CFR. § 395.8(e). The Regional Director and Kelton Tours shall submit pleadings and supporting evidence within 30 days of the date of this order, addressing the issues identified in this Order with regard to counts 3 and 4 of the notice of claim. Submissions shall be served in accordance with 49 CFR 386.31.

Dated: May 13, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Charles Meadows d/b/a Meadows Auto Sales

Background

This matter comes before me upon a motion by the Regional Director, Region 3, for a final order finding the facts to be as alleged in the April 15, 1991, notice of claim, and imposing a penalty of $2,000. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier and Hazardous Materials Proceedings, 49 CFR part 386.

After a March 21, 1991, compliance review of Meadows Auto Sales (Meadows) revealed numerous violations of the Federal Motor Carrier Safety Regulations, a notice of claim was issued, charging Meadows with 1 violation of 49 CFR 391.23(c), failing to maintain in its driver qualification file the responses to inquiries into its driver's driving record; 1 violation of 49 CFR 391.25, failing to maintain a written notation of annual review of its driver's driving record; 1 violation of 49 CFR 391.27(d), failing to maintain the list or certificate of its driver's convictions for violations of motor vehicle traffic laws; 1 violation of 49 CFR 391.31(g), failing to maintain the road test rating form and road test certificate of its driver; and 1 violation of 49 CFR 391.35(h), failing to maintain its driver's written exam certificate, the questions asked on the exam, and the driver's answers to those questions. In addition, the notice of claim cited Meadows for 5 violations of 49 CFR 395.3(a)(1), requiring or permitting a driver to drive more than 10 hours following 8 consecutive hours off duty.

Meadows replied to the notice of claim, contested each violation charged, but did not request a hearing. Instead, the carrier requested that all charges against it be dismissed. Meadows claimed that because it had only one driver, the carrier was able to keep an accurate mental record of his qualifications and driving record, and therefore met the goals of the driver qualification file regulations. In addition, Meadows claimed that it was exempt from the hours of service regulations under 49 CFR 395.8(l).

The two parties attempted to resolve the dispute, and in June 1991, Mr. Meadows informed the FHWA federal program manager that he had sold the carrier's truck and released its only driver. But settlement negotiations were unsuccessful, and the Regional Director moved for a final order, asserting that Meadows did not request a hearing or otherwise raise any material factual issues in dispute. Meadows' only response to this motion was by letter to the Associate Administrator, insisting the carrier had repeatedly requested a hearing in all of its correspondence with the Regional Director.

Discussion

Hearing Request

If a motor carrier contests the charges against it and seeks a hearing, its hearing request must be made within 15 days after the claim letter is served. 49 CFR 386.14(b)(2). As the Regional Director stated in his notice of claim, failure to request a hearing within 15 days constitutes a waiver of any right to a hearing. *Id.*

In its reply to the notice of claim, Meadows did not request a hearing, but objected to all of the charges and penalties, asking that they be dismissed.

Upon review of all of the pleadings submitted, including Meadows' June 28, 1991, letter informing the FHWA federal program manager that it had sold its truck and dismissed its driver, and its August 14, 1991, request that all charges against it be dismissed, I find that Meadows did not request a hearing until its September 30, 1991, letter to the Associate Administrator, more than five months after the notice of claim was served. Therefore, because Meadows failed to make a timely hearing request, the carrier has waived any right to a hearing. *Id.* Moreover, none of Meadows' responses raise a material factual issue in dispute warranting a hearing under 49 CFR 386.16(b).

Motion for Final Order

A motion for final order is analogous to a motion for summary judgment. *Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Final Order). Therefore, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. All evidence must be viewed in a light most favorable to the non-moving party, Meadows in this case.

Meadows' reply to the notice of claims was ambiguous, but since all inferences must be drawn in its favor, Meadows' response must be viewed as a denial of the violations. *American Pacific Power Apparatus, Inc.*, No. OR–90–006–075, at 4, (FHWA March 10, 1992) (Order). Because Meadows has in effect denied the allegations in the notice of claim, yet the Regional Director seeks a final order, the Regional Director's pleadings must be accompanied by evidence sufficient to establish a *prima facie* case of the violations. Meadows bears the burden to rebut a *prima facie* case, and mere assertions, unsupported by evidence, cannot defeat an otherwise justified motion for final order.

The Regional Director has met his burden of clearly establishing the essential elements of his claim, and Meadows' reply is insufficient to rebut this *prima facie* case.

First, the record before me supports the allegations that Meadows failed to maintain complete driver qualification files for its driver. A signed statement by Meadows owner Charles S. Meadows as representing "a true and accurate accounting of the driver qualification files" of the carrier reveals that its driver's file did not contain a written inquiry into the driver's driving record, a notation of annual review of the driver's driving record, the driver's road test rating form and road test certificate, the driver's written exam certificate, and the questions and answers to the exam. Yet exhibits 1–5 reveal that on the five occasions cited in the notice of claim, Meadows permitted its driver to operate in interstate commerce.

Meadows' argument that it was able to monitor its driver's driving record and qualifications without written documents is an attempt to justify its failure to maintain the required driver qualification documents, and it does not rebut Mr. Meadows' own admission that the carrier's driver qualification file was incomplete.

Second, the Regional Director has met his burden of proving that Meadows required or permitted its driver to drive more than 10 hours following at least 8 consecutive hours off duty. Exhibit 6, the record of duty status for driver Kenneth Wykle for October 31, 1990, reveals that Mr. Wykle drove 12 hours following at least 8 hours off duty. Similarly, exhibit 7, Mr. Wykle's

November 8, 1990, record of duty status, shows that he drove 13 hours following 8 consecutive hours off duty. Exhibit 8 includes Mr. Wykle's November 30, 1990, logs, and reveals that he drove 12 hours after at least 8 hours off duty on that date. Again, exhibit 9, Mr. Wykle's record of duty status for January 28, 1991, reveals that Mr. Wykle drove in excess of the hours of service regulations on that date, driving 12 hours after at least 8 consecutive hours off duty. Finally, exhibit 10 includes Mr. Wykle's March 6, 1991, record of duty status, and shows that he drove 12 hours following at least 8 hours off duty.

In response to the excess hours charges, Meadows did not deny that its driver drove in excess of 10 hours following 8 hours off duty, but claimed it was exempt from the hours of service regulations under 49 CFR 395.8(1), the 100 air-mile radius driver exemption. The carrier asserted that it complied with the provisions of the exemption because its driver returned to his work reporting location within 12 hours after reporting to work.

I find that 49 CFR 395.8(1) does not apply in this case to exempt Meadows from the hours of service limitations. This section relieves motor carriers from the duty to require drivers to submit records of duty status, and it does not apply to hours of service limitations themselves. In fact, the exemption expressly requires compliance with the 10-hour rule, stating, "A driver is exempt from the requirements of this section if * * * (iv) the driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty." In addition, I find that Meadows' driver did not return to his work location within 12 hours on the 5 occasions cited in the notice of claim, as claimed by the motor carrier. Mr. Wykle's records of duty status for these 5 dates indicate that he did not return to Meadows' office in Rupert, West Virginia, until at least 13 hours after he had departed.

Penalty Determination

In the notice of claim, the Regional Director assessed a total penalty of $4,000, $300 for each citation for missing driver qualification documents, and $500 for each hours-of-service violation. The Regional Director reduced the total penalty amount requested in his motion for final order to $2,000, "due to the fact that Meadows Auto Sales is no longer operating in interstate commerce, and due to the small size of the company and its financial condition." Motion for Final Order at 2.

Although Meadows argues that its actions of selling its truck and dismissing its driver warrant dismissal of the charges, I find that this conduct, which can be considered "corrective action," mitigates the need for a high penalty to induce compliance with the regulations, but it does not excuse Meadows' earlier noncompliance. Additionally, I find that Meadows' violations of 49 CFR 395.3(a)(1) constitute a serious pattern of safety violations. A serious pattern "connotes violations that are both repeated and detectable by reasonable diligence." *Used Equipment Sales, Inc.*, No. R1–91–03, at 57, (FHWA May 6, 1992) (Decision of Administrative Law Judge). The five hours-of-service violations occurred over a period of four months, and could have been detected by Meadows upon review of its sole driver's records of duty status.

Penalty assessments are to be calculated to "induce further compliance" with the regulations. 49 U.S.C. 521(b)(2)(c). In this case, Meadows asserts, and the Regional Director accepts, that it ceased its commercial motor vehicle operations. Thus, the potential for future violations is non-existent. However, I find that I cannot ignore Meadows' previous violations, and I am aware that it could resume commercial motor vehicle operations at any time. Accordingly, I find that a penalty of $50 per violation is reasonable.

It is Hereby Ordered, That Meadows Auto Sales' request for a hearing is denied, the Regional Director's request for a final order is granted, and Meadows Auto Sales is directed to pay the sum of $500 to the Regional Director, Region 3, within 30 days of this order.

Dated May 13, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Fikse & Company

This matter comes before me upon a motion by the Regional Director, Region 9, for a final order. The Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 CFR Part 386, govern this proceeding.

Background

The Respondent, Fikse & Company (Fikse), operates as a for-hire carrier in interstate commerce. An August 17, 1990, safety review revealed that Fikse had transported a listed hazardous material (paint) without having in effect the level of financial responsibility required by the Federal Motor Carrier Safety Regulations (FMCSRs). The Federal Highway Administration's (FHWA) regional office advised Fikse to increase its insurance coverage from $750,000 to $1,000,000 to meet the regulatory minimum, but a compliance review conducted on November 28, 1990, showed that the violations had not been cured. The Regional Director served the carrier with a notice of claim on March 1, 1991, charging the carrier with 10 counts of violating 49 CFR 387.7(a), operating a motor vehicle without having in effect the required minimum level of financial responsibility. The Regional Director assessed a penalty of $1,500 for each violation, for a total fine of $15,000.

Discussion

1. Fikse's Reply to the Notice of Claim

Fikse replied to the notice of claim on March 20, 1991. The carrier admitted to all of the charged violations, but offered three arguments in "mitigation of [the] violations." First, the carrier claimed that all hazardous materials were transported for a single shipper, and "Fikse had not otherwise engaged in the transportation of hazardous substances for which . . . insurance in excess of $750,000 [was] required". Second, Fikse contended that "the shipper maintained an umbrella liability policy with limits of $5,000,000" which Fikse believed satisfied the FMCSRs. Finally, the carrier submitted that it was in Chapter 11 bankruptcy and consequently could not afford to pay a large penalty. Fikse & Co.'s Reply to Notice of Claim at over 1–2.

Fikse did not request an administrative hearing, but reserved its right to do so in the future. In its reply, though, Fikse gave notice that it intended to "submit evidence without an oral hearing" in accordance with § 386.14(b)(2) and (c). *Id.* at 1. The Rules of Practice require that a party giving such notice serve "all evidence * * * in written form no later than the 40th day following service of the [notice of claim]." 49 CFR 386.14(c). The record does not indicate that Fikse submitted any documentary or other evidence before April 15, 1991, the last day of the regulatory deadline, or at any time after that date.

2. The Regional Director's Motion for Final Order

The Regional Director submitted a motion for final order on October 4, 1991. A motion for final order is in the nature of a motion for summary judgment. Consequently, the moving party bears the burden of clearly establishing that no genuine issue of material fact exists and that it is entitled

to a judgment as a matter of law. See *In the Matter of Laughlin Transport, Inc.*, No. R3–91–104 (FHWA March 10, 1992) (Final Order); *In the Matter of Forsyth Milk Hauling Co., Inc.*, No R3–90–037 (FHWA Dec. 5, 1991) (Order); see also 6 Moore's Federal Practice, 2d ed., at ¶56.15 [7]–[8] (1988). In this case, Fikse does not deny the allegations in the notice of claim. The Regional Director, on the other hand, supports his motion with a great deal of documentary evidence, including copies of the safety and compliance reviews, shipping papers documenting the trips allegedly made in violation of the financial responsibility regulations, copies of Fikse's liability insurance endorsement forms (showing the carrier's inadequate coverage), and the affidavits of several FHWA employees personally involved in the investigation which led to the charges brought against Fikse.

Fikse responded to the motion on October 25, 1991, and requested leave to rebut the Regional Director's arguments. The Regional Director asks that I reject this response as untimely, but although it was submitted after the deadline imposed by §§ 386.35(c) and 386.32(c)(3), I do not believe any prejudice will result if I consider it at this time.

In its response, Fikse claimed that "evidence was in fact submitted in the letter of counsel dated March 20, 1991." Fikse's Request for Leave to Respond at 2. This "evidence," said Fikse, was the set of mitigating arguments which the carrier made in its original reply to the notice of claim. The carrier then restated those arguments, and offered to pay a civil forfeiture amount of $5,000 over a period of five months. *Id.* at 4. The response also contained an insurance endorsement form purporting to show that Fikse had obtained the $1,000,000 in liability insurance required by the regulations. *Id.* at Exhibit 3.

Fikse's arguments in mitigation do not rebut the Regional Director's allegations, for as I have noted before, "[m]itigation alone is not a material factual issue in dispute * * *." *In the Matter of Tonawanda Tank Transport Service, Inc.*, 55 FR 43,279 (FHWA 1990) (Final Order). Neither Fikse's reply to the notice of claim nor its response to the motion for final order refute any of the evidence in the Regional Director's motion. I find that this evidence establishes a *prima facie* case against Fikse, and that the Regional Director has met his burden of clearly establishing the essential elements of his claim. Therefore, I grant the Regional Director's motion for final order.

3. Fikse's Arguments for Mitigation of the Penalty Amount

Fikse's arguments "in mitigation" of the violations charged against it fail to persuade me to reduce the amount of the penalty assessed by the Regional Director. Compliance with the FMCSRs is not contingent upon the number of customers a motor carrier has, and the financial responsibility regulations clearly state that the *motor carrier* must obtain and have in effect the minimum level of liability insurance, not the shipper. 49 CFR 387.7(a).

Fikse's post-review compliance with the financial responsibility regulations is similarly unavailing, for Fikse should have been in compliance with the regulations *before* the initiation of this action. See *In the Matter of Stanford & Inge*, 55 FR 43,296 (F.H.W.A. 1990) (Order Upon Reconsideration). The carrier had several contacts with the agency before the notice of claim was issued, and was put on notice of the deficiencies in its insurance coverage. No mitigation of the penalty is appropriate under these circumstances.

As for Fikse's argument that Chapter 11 bankruptcy reorganization prevents it from paying the full $15,000 penalty assessed by the Regional Director, the record before me indicates that the reorganization plan was put into effect in 1987, and that the carrier has failed to produce any documentation to show that it cannot meet its obligations so long after filing for protection from its creditors. In any case, civil forfeiture amounts are not dischargeable in bankruptcy. 11 U.S.C. 523(a)(7). Finally, I note that the $1,500 assessed by the Regional Director for each violation is considerably less than the $10,000 maximum penalty for violations of the financial responsibility regulations. 49 CFR 387.41.

Conclusion

The Regional Director has provided evidence clearly establishing the essential elements of his claim. Fikse, on the other hand, has failed to demonstrate any material factual issues in dispute, and also has failed to provide any reason for me to reduce the penalty charged by the Regional Director. Therefore, I hereby grant the Regional Director's motion for final order in the full amount of the claim, $15,000.

It Is Hereby Ordered That the Regional Director's request for a final order is granted. Fikse & Company is directed to pay the full amount of the claim, $15,000, to the Regional Director within 30 days of the date of this Order.

Dated: May 12, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Humlhanz Trucking, Inc.

This matter comes before me upon a motion by the Regional Director, Region 4, for a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 CFR part 386.

Background

The Respondent, Humlhanz Trucking, Inc. (Humlhanz), is an authorized for-hire carrier operating in interstate commerce. See 49 CFR 390.5. According to a compliance review conducted on January 31, 1991, Humlhanz employs 14 drivers to operate 14 truck tractors, 14 trailers, and one truck. The same compliance review indicates that the carrier has annual gross revenues of $3,500,000. Regional Director's Motion for Final Order (Appendix "C").

The compliance review revealed numerous violations of the Federal Motor Carrier Safety Regulations, and the Regional Director served Humlhanz with a notice of claim letter on March 14, 1991. The notice of claim charged Humlhanz with 20 violations of 49 CFR 395.8(e), requiring or permitting drivers to make false entries upon a driver's record of duty status. The Regional Director assessed a penalty of $300 for each violation, for a total penalty of $6,000.

Humlhanz replied to the notice of claim on March 28, 1991. The carrier denied the charges and requested a hearing, but argued that the "allegations [in the notice of claim] are insufficient to permit a concise statement of facts constituting each defense * * *." The reply concluded with a demand that the Regional Director provide Humlhanz with "strict proof" of all the allegations in the notice of claim. Humlhanz's Reply (March 28, 1991). The Regional Counsel sent Humlhanz copies of all of the exhibits on June 17, 1991. Letter from Regional Counsel to Attorney for Humlhanz (June 17, 1991) (discussing exhibits and settlement negotiations). The record before me contains no indication that Humlhanz made any response to these exhibits.

The parties engaged in settlement negotiations for a number of weeks, but these negotiations were ultimately unsuccessful. The Regional Director then submitted a Motion for Final Order on September 13, 1991. Humlhanz did not respond to the Regional Director's motion.

Discussion

1. Humlhanz's Request for an Administrative Hearing

Under the Rules of Practice, before a respondent may be granted a hearing it must demonstrate the existence of a material factual issue in dispute. 49 CFR 386.14(b)(2) and 386.16(b). As I have stated before, "[i]f the Regional Director opposes the hearing request, as in this case, the motor carrier must do more than just deny the allegations in its pleadings. It must give sufficient evidence to support its allegations." *In the Matter of American Pacific Power Apparatus, Inc.*, No. OR–90–006–075, at 2, (FHWA March 11, 1992) (Final Order); compare *In the Matter of Sined Leasing, Inc.*, No. 91–122 (FHWA March 12, 1992) (Order Appointing Administrative Law Judge).

Based on the record before me, I find that Humlhanz's denials do not establish the existence of a material factual dispute, and I deny the carrier's request for an administrative hearing. In its reply, Humlhanz claimed it could not frame a detailed reply to the notice of claim until it received "strict proof" of the allegations against it. But the carrier failed to submit such a reply even after the Regional Counsel supplied it with the requested information. The record before me reflects only the general denial found in Humlhanz's reply, and this cannot overcome the Regional Director's opposition to a hearing because it fails to carry the carrier's burden to show the existence of a material factual dispute. *American Pacific* at 3.

2. The Regional Director's Motion for Final Order

A motion for final order is in the nature of a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. *In the Matter of Laughlin Transport, Inc.*, No. R3–91–104 (FHWA March 10, 1992) (Final Order); *In the Matter of Forsyth Milk Hauling Co., Inc.*, No. R3–90–037 (FHWA Dec. 5, 1991) (Order); *see also* 6 Moore's Federal Practice, 2d ed., at ¶ 56.15 [7]–[8] (1988). When a respondent denies the allegations in the notice of claim but the Regional Director still seeks to avoid a hearing and obtain a final order on motion, that motion should be accompanied by affidavits or evidence sufficient to establish at least a *prima facie* case. Only in this way can I fulfill my responsibility to afford a respondent a fair review of the case against it before issuing a final agency order, which, if necessary, can be enforced in a United States District Court. 49 U.S.C. 521(b)(4); 49 CFR 386.65; *Laughlin Transport* at 2–3.

The Regional Director attached 29 exhibits supporting the violations alleged in the notice of claim. The 20 log-falsification charges are bolstered by copies of records of duty status, in combination with copies of other documents—typically signed filling station or toll receipts—which substantiate the charges. For example, the exhibit for count 10 contains a copy of driver Daniel Margot's record of duty status for October 10–11, 1990, which shows him off-duty or in the sleeper berth of his truck from 9 p.m. on October 10 until 6 a.m. on October 11. Although the truck supposedly was in Derby, Connecticut, the evidence presented by the Regional Director also includes a copy of a receipt for diesel fuel signed by Mr. Margot in Bordentown, New Jersey, at 10:47 p.m. on the same night, along with copies of toll receipts placing Mr. Margot on the New Jersey Turnpike at 11:26 p.m. on October 10, and New Rochelle, New York, at 2:02 a.m. on October 11. Regional Director's Motion for Final Order (Exhibit 10). Humlhanz has failed to rebut any of the evidence produced by the Regional Director.

Based on the record before me, I find that the Regional Director has established a *prima facie* case against Humlhanz, and that he has met his burden of clearly establishing the essential elements of his claim. In the absence of any rebuttal from Humlhanz, I grant the Regional Director's motion for final order.

3. Penalty-Determination

The Regional Director assessed a penalty of $300 for each of the 20 violations charged in this notice of claim, for a total penalty of $6,000. Although Humlhanz's reply to the notice of claim did not include a request for mitigation of this fine, on August 5, 1991, Humlhanz's attorney sent the Regional Counsel a letter asserting that Humlhanz could not pay the full amount of the fine and suggesting a reduction of the penalty amount to $2,000. The Regional Counsel wrote back to Humlhanz's attorney on August 12, 1991, asking for both a "detailed description of corrective actions taken by [] Humlhanz * * *," and the carrier's financial statements for the past three years, "in order to take [Humlhanz's] current financial hardship into consideration." Copies of both letters were attached to the Regional Director's motion for final order.

There is nothing in the record to indicate that Humlhanz ever responded to the Regional Counsel's request. In fact, the only evidence giving any indication of Humlhanz's financial status is the January 1991 compliance review report. Signed by company president Randy Humlhanz, this report states that the carrier had gross revenues of $3,500,000 in fiscal year 1989–90. *Id.* (Appendix "C").

Humlhanz's bald assertions of financial hardship, without more, cannot stand. I find no reason to reduce the penalty amount. The carrier has not provided any concrete information justifying a reduction in the penalty amount, even though it was requested to do so by the Regional Counsel. Furthermore, I note that the penalty assessed in this case, $300 per violation, is considerably less than the $500 allowed by the applicable statute. 49 U.S.C. 521(b). Therefore, I grant the Regional Director's motion in the full amount of the claim, $6,000.

It is hereby ordered, That the Regional Director's request for a final order is granted. Humlhanz Trucking, Inc., is directed to pay the amount of the claim, $6,000, to the Regional Director within 30 days of the date of this Order.

Dated: May 12, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Beier Enterprises d/b/a Oroweat Beier Enterprises

[OMCS No.: LA–90–042–204]

Background

This matter comes before me upon a motion by the Regional Director, Region 4, opposing Oroweat Beier Enterprises' (Oroweat) request for a hearing and seeking a final order. This civil forfeiture proceeding is governed by the Federal Highway Administrations' Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

An April 18, 1990, safety review of Oroweat identified several deficiencies in the carrier's efforts to comply with the Federal Motor Carrier Safety Regulations (FMCSRs). In the review report, the FHWA safety investigator recommended, in part, that Oroweat "monitor records of duty status to ensure against 10, 15, [and] 70 hours of service violations * * *." Safety Review Report at 4. In its April 24, 1990, reply to the safety review, Oroweat stated, "We will monitor records of duty status to insure against 10, 15, [and] 70 hours of service violations."

On November 8, 1990, a safety investigator revisited Oroweat and discovered several hours of service violations, and a notice of claim was issued against the carrier on December 17, 1990. The Regional Director charged Oroweat with 5 violations of 49 CFR 395.3(a)(1), requiring or permitting a driver to drive more than 10 hours following 8 hours off duty, and 5 violations of 49 CFR 395.3(a)(2), requiring or permitting a driver to drive after having been on duty for 15 hours following 8 hours off duty.

Oroweat replied to the notice of claim on January 7, 1991. The carrier requested a hearing, stating that it did not require or permit its driver to violate the hours of service regulations. Oroweat supplemented its reply by letter dated February 13, 1991, asserting that its driver drove in excess of the hours of service regulations without encouragement or permission from the carrier. Oroweat claimed that once these violations were discovered, the driver was told that he must cease this conduct or risk termination.

On August 19, 1991, the Regional Director filed a motion opposing Oroweat's hearing request and seeking a final order. In opposing the hearing request, the Regional Director asserted that Oroweat did require or permit the hours-of-service violations because the carrier had in its possession the information and means to detect the violations, but that it failed to do so.

Oroweat replied to the motion for final order on November 8, 1991, again denying that the carrier itself committed any violation, requesting a hearing, and asserting as a material factual issue in dispute whether by its conduct it required or permitted the hours of service violations to occur. Oroweat stated that during the two month period in which the violations occurred, May 16 to July 19, 1990, both its president and his secretary were unable to monitor driver logs because they were out of the office on vacation and sick leave. During that time, one of Oroweat's drivers interpreted the 10 hour rule to mean that he could drive 10 hours per day, with the day starting and ending at midnight. In late July 1990, the logs for the past two months were reviewed. The president then explained the hours of service rules to the driver and later fired the driver for his inability to follow these and other regulations.

The Regional Director amended his motion for a final order on November 29, 1991, stating that Oroweat's reply did not state any material factual issue in dispute warranting a hearing. He asserted that Oroweat did not deny the occurrence of the violations, but only claimed that it should not be liable for the violations because it dismissed the driver at fault.

Discussion

Hearing Request

Under 49 CFR 386.14(b)(2), a hearing request must list all material facts believed to be in dispute. If the Associate Administrator finds that there is a material factual dispute, the hearing request is granted. 49 CFR 386.16(b). In this case, Oroweat has denied responsibility for its driver's hours-of-service violations, asserting that it did not require or permit this conduct.

Oroweat has admitted that its driver operated in excess of the 10 and 15 hours-of-service rules during the two month period in which it did not monitor or verify driver records of duty status. Oroweat's attempt to disclaim liability for its driver's actions does not raise a material issue of fact warranting a hearing, because Oroweat is directly liable for its own failure to regularly review driver logs for such excess hours. In sum, I find that Oroweat has failed to competently identify any material factual in dispute in this case and its hearing request is therefore denied.

Motion for Final Order

In an analogy to a summary judgment motion, I have held that the moving party on a motion for final order bears the burden of proving that there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law. *E.g., Forsyth Milk Hauling Co., Inc.*, No. R3-90-037, at 2, (FHWA December 5, 1991) (Order). All inferences must be drawn in favor of the non-moving party, Oroweat.

The record before me fully supports the allegations made by the Regional Director in the notice of claim. In addition to Oroweat's admission that its driver was able to exceed the hours-of-service regulations while the carrier neglected to monitor driver records of duty status, the logs themselves clearly reveal the excess hours violations. If Oroweat had reviewed these logs, as it claimed to be doing in its letter to the FHWA only weeks before the violations began, then Oroweat would have discovered the violations. For example, Oroweat driver Richard Knight's records of duty status reveal that he drove from 9:00 a.m. on June 20, 1990, until 8 p.m. on June 21, 1990, without taking the requisite 8 hour break, driving a total of 18.5 hours following his last 8 hours off duty. In failing to review the records of duty status, Oroweat permitted the excess hours violations to occur and continue for two months.

Therefore, I find that the Regional Director has met his evidentiary burden in this case, while Oroweat has presented no evidence in rebuttal. Based on Orweat's admission that its May through July 1990 logs were not reviewed until late July, and the records of duty status showing excess hours of service, I find that Oroweat committed the violations with which it is charged.

Penalty Determination

In the notice of claim, the Regional Director assessed a penalty of $450 per violation, for a total of $4,500. The civil penalty provisions provide for a $1,000 maximum penalty per non-recordkeeping offense upon a determination that the carrier's actions constitute a serious pattern of safety violations. 49 U.S.C. 521(b)(2)(A).

I find that the 10 counts in this case constitute a serious pattern of safety violations, and that a penalty of $450 per count is reasonably calculated to induce compliance with the hours-of-service regulations. In spite of Oroweat's April 1990 assertions that it would make efforts to comply with the 10 and 15 hour rules, Oroweat later admitted that it failed to review its drivers logs for over a two month period beginning just weeks after its promised compliance. A later FHWA inspection documented several hours of service violations that were committed during this period, revealing that Oroweat had done little to cure its noncompliance. "If violations are continuing, then a clear pattern case will have been established." *Tonawanda Tank Transp. Serv., Inc.*, 55 FR 43279 (FHWA 1990) (Final Order).

It is Hereby Ordered, That Oroweat Beier Enterprises' request for a hearing is denied, the Regional Director's motion for final order is granted, and Oroweat Beier Enterprises is directed to pay the sum of $4,500 to the Regional Director, Region 6, within 30 days of this order.

Dated: May 12, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Iron Horse Equipment Corporation

Background

This matter comes before me upon a motion of the Regional Director, Region 9, opposing Iron Horse Equipment Corporation's (Iron Horse) request for a hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and

Hazardous Materials Proceedings, 49 CFR part 386.

In his May 6, 1991, notice of claim, the Regional Director charged Iron Horse with 14 violations of 49 CFR 395.8(e) for requiring or permitting its drivers to make false entries on records of duty status, and assessed a total penalty of $7,000.

Iron Horse replied to the notice of claim on May 20, 1991, stating that the penalty was too high, and asserting that the Regional Director's assessment of the maximum penalty for the motor carrier's first fine was unreasonable. Iron Horse did not deny the charges or request a hearing. On May 22, 1991, Iron Horse filed a written request for a hearing, but also admitted to all 14 violations.

The Regional Director responded to Iron Horse's reply on July 22, 1991. He asserted that Iron Horse's admission to the violations left no material facts in dispute. Therefore, the Regional Director argued, Iron Horse's hearing request should be denied and a final order granted. In addition, the Regional Director included several exhibits documenting the charges against the carrier. Iron Horse did not respond to this motion.

Discussion

Because Iron Horse admitted to all 14 violations, there is no material factual issue in dispute warranting a hearing under 49 CFR 386.14(b). Iron Horse's May 22, 1991, supplemental reply requests that the penalty be reduced, but an objection to the amount of a proposed fine does not constitute a material factual issue in dispute. *Drotzmann, Inc.*, 55 FR 2929 (FHWA 1990) (Order Appointing Administrative Law Judge). Therefore, Iron Horse's hearing request is denied.

In addition, evidence of the violations is substantial. Included in the Regional Director's exhibits 1, 3, 4, 7, 10, and 13 are records of duty status showing several Iron Horse drivers as "off duty" on certain days, while freight bills and pickup/delivery tickets reveal that the drivers were in fact on duty and driving on those same days. Similarly, exhibits 2, 5, 6, 8, 9, 11, 12, and 14 contain records of duty status which do not coincide with trip documents for the same dates.[1] Based on Iron Horse's written admission, and reinforced by the evidence presented by the Regional Director, I find that Iron Horse committed the 14 violations with which it is charged.

The Regional Director assessed a total penalty of $7,000, $500 for each violation. This is the maximum amount permitted for each recordkeeping violation under 49 U.S.C. § 521(b)(2)(A). Although this is the first enforcement action brought against Iron Horse, the carrier has been cited for log falsification offenses in the past. Iron Horse was the subject of two compliance reviews in 1989 which documented that several of the carrier's driver records of duty status contained false entries. This action was brought only after the third compliance review within a two year period revealed that 85 out of 400 driver's logs were falsified. Iron Horse cannot simply ignore applicable safety regulations or refuse to cure violations repeatedly identified in three compliance reviews. Therefore, I find that the $7,000 penalty is necessary to induce compliance with the regulations.

It is Hereby Ordered That Iron Horse Equipment Corporation's request for a hearing is denied, the Regional Director's motion for final order is granted, and Iron Horse Equipment Corporation is directed to pay the sum of $7,000 to the Regional Director, Region 9, within 30 days of this order for requiring or permitting its drivers to make false entries on records of duty status, in violation of 49 CFR 395.8(e).

Dated: May 12, 1992.

Richard P. Landis,

Association Administrator for Motor Carriers.

Aaron McGruder Trucking, Inc.; Final Order

This matter comes before me upon a motion by the Regional Director, Region 6, for a final order. The Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 C.F.R. Part 386, govern this proceeding.

Background

The Respondent, Aaron McGruder Trucking, Inc. (McGruder), operates in interstate commerce as both an authorized for-hire carrier and an exempt for-hire carrier. See 49 CFR 390.5. After a January 10, 1991, compliance review revealed numerous violations of the Federal Motor Carrier Safety Regulations (FMCSRs), the Regional Director served McGruder with a notice of claim letter on May 21, 1991. The notice of claim charged McGruder with 13 violations of 49 CFR 395.3(b), requiring or permitting a driver to drive after having been on duty 70 hours in eight consecutive days, and 34 violations of 49 CFR 395.8(e), requiring or permitting drivers to make false entries upon a driver's record of duty status. The Regional Director assessed a penalty of $765 for each hours-of-service violation and $500 for each record-falsification violation, for a total penalty of $26,945.

McGruder replied to the notice of claim on June 6, 1991. The carrier denied the charges and requested a hearing, claiming that it neither "require[d] or knowingly permit[ted] its drivers to exceed" the 70 hours rule, nor "require[d] or knowingly permit[ted] its drivers" to falsify their records of duty status.

The Regional Director submitted a Motion for Final Order on August 23, 1991. In his motion, the Regional Director dropped one of the record-falsification charges for lack of evidence and requested a final order for $26,445 on the 46 remaining counts. The record before me contains no indication that McGruder has responded to the Regional Director's motion.

Discussion

1. McGruder's Request for an Administrative Hearing

In order to be granted a hearing, the Rules of Practice require a respondent to demonstrate the existence of a material factual issue in dispute. 49 CFR 386.14(b)(2) and 386.16(b). Based on the record before me, I find that McGruder's denials do not demonstrate such a dispute, and therefore I deny the carrier's request for an administrative hearing. As I have stated before, "[i]f the Regional Director opposes the hearing request, as in this case, the motor carrier must do more than just deny the allegations in its pleadings. It must give sufficient evidence to support its allegations." *In the Matter of American Pacific Power Apparatus, Inc.*, No. OR-90-006-075, at 2, (FHWA March 11, 1992) (Final Order); *compare In the matter of Sined Leasing, Inc.*, No. 91-122 (FHWA March 12, 1992) (Order Appointing Administrative Law Judge). In short, McGruder's general denial is not sufficient to overcome the Regional Director's opposition to a hearing because it fails to carry the carrier's burden to show the existence of a factual dispute. *American Pacific* at 3.

2. The Regional Director's Motion for Final Order

A motion for final order is in the nature of a motion for summary judgment. Therefore, the moving party

[1] For example, driver William McDougal recorded on his record of duty status for January 2, 1991, that he was operating between Bakersfield and Antioch, CA. But a pick-up/delivery ticket and a bill of lading, signed by McDougal as the loading and unloading driver, revealed that he picked up a load in Nelson, AZ, and delivered it to Brawley, CA, on this same date. Exhibit 5.

bears the burden of clearly establishing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. *In the Matter of Laughlin Transport, Inc.*, No. R3–91–104 (FHWA March 10, 1992) (Final Order); *In the Matter of Forsyth Milk Hauling Co., Inc.*, No. R3–90–037 (FHWA Dec. 5, 1991) (Order); *see also* 6 Moore's Federal Practice, 2d ed., at ¶56.15 [7]–[8] (1988). In a case such as this one, where a respondent denies the allegations in the notice of claim but the Regional Director still seeks to avoid a hearing and obtain a final order on motion, that motion should be accompanied by affidavits or evidence sufficient to establish at least a *prima facie* case. Only in this way can I fulfill my responsibility to afford a respondent a fair review of the case against it before issuing a final agency order, which, if necessary, can be enforced in a United States District Court. 49 U.S.C. 521(b)(4); 49 CFR 386.65; *Laughlin Transport* at 2–3.

a. *The regional director's evidence.* Attached to the Regional Director's motion are more than 50 exhibits supporting each of the 46 violations for which a final order is sought. All 13 counts of hours-of-service violations are supported by copies of drivers' signed records of duty status documenting the charges. For example, the copy of driver Manuel A. Valdez's records of duty status substantiating hours-of-service count 11 reveals that he drove a total of 97.5 hours between November 19, 1990, and November 26, 1990, or 27.5 hours beyond the regulatory limit. Regional Director's Motion (Exhibit 14). The 33 log-falsification charges also are bolstered by copies of records of duty status, in combination with copies of other documents—typically signed filling station receipts—which substantiate the charges in the notice of claim. For instance, the exhibit for log-falsification count 12 contains driver William P. Thompson's record of duty status for August 29, 1990, which shows him driving from Willsboro, New York, to Buffalo, New York. The evidence presented by the Regional Director also includes, however, a copy of a receipt for diesel fuel signed by Mr. Thompson in Oklahoma City, Oklahoma, on the same date. *Id.* (Exhibit 27). McGruder has not rebutted any of the evidence produced by the Regional Director.

b. *McGruder's knowledge of the violations.* McGruder denied in its reply that it "knowingly permitted" the occurrence of either the hours-of-service or log-falsification violations. Liability under the FMCSRs does not depend upon a carrier "knowingly" violating the regulations. See 49 CFR 395.3(b) and 395.8(e). By failing to verify records of duty status, for example by comparing the records with fuel receipts, the carrier has permitted the falsifications. *American Pacific Power* at 3. By the same token, a carrier also is liable if its drivers exceed the maximum number of driving hours allowed by § 395.3, for then the motor carrier has breached its duty to supervise the actions of its employees.

c. *Conclusion.* Based on the record before me, I find that the Regional Director has established a *prima facie* case against McGruder, and that he has met his burden of clearly establishing the essential elements of his claim. In the absence of any rebuttal from McGruder, I grant the Regional Director's motion for final order in the amount requested, $26,445.

It is Hereby Ordered That the Regional Director's request for a final order is granted. Aaron McGruder Trucking, Inc., is directed to pay the amount of the claim, $26,455, to the Regional Director within 30 days of the date of this Order.

Dated: May 12, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

American Diversified Construction, Inc.; Final Order

This matter comes before me upon a motion by the Regional Director, Region 4, for a final order. The Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice), 49 CFR part 386, govern this proceeding.

Background

The Respondent, American Diversified Construction, Inc. (American Diversified), is a private motor carrier engaged in interstate commerce. After a September 6, 1990, compliance review of American Diversified's operations revealed violations of the Federal Motor Carrier Safety Regulations, the Regional Director served American Diversified with a notice of claim letter dated October 17, 1990. The notice of claim charged American Diversified with five violations of 49 CFR 391.8(k), failure to preserve a driver's record of duty status for six months, and five violations of 49 CFR 391.51(a), failure to properly maintain driver qualification files. The Regional Director assessed a civil penalty of $300 for each violation, for a total penalty of $3000.

American Diversified made a timely reply to the notice of claim on October 23, 1990. The reply acknowledged receipt of the notice of claim and argued that the Federal Highway Administration's "local representative ha[d] over reacted [sic] * * * and * * * ma[de] a minor infraction into a major violation." American Diversified expressed its desire to begin negotiations with the regional office and reserved its right to request an administrative hearing.

American Diversified sent the regional office a second letter dated November 2, 1990, which denied "allegations #1 thru [sic] 6" and requested an administrative hearing. The Regional Director, responding to American Diversified's replies in his Motion for Final Order, points out that American Diversified's second reply confused the compliance review report with the notice of claim letter—an explanation which may reveal why American Diversified's denials of violations "#1 thru 6" do not correspond to the ten charges in the notice of claim.

Discussion

1. American Diversified's Request for an Administrative Hearing

The Rules of Practice require that respondents demonstrate at least one material factual issue in dispute before being granted a hearing. 49 CFR 386.14(b)(2) and 386.16(b). American Diversified's November 2, 1990, letter does contain a statement denying violations listed in the compliance review report, but it does not refer directly to the notice of claim. The Regional Director, in his motion for final order, argues that this incongruity renders American Diversified's replies unresponsive, and no hearing should be granted because the carrier "has failed to raise any factual issues as to these ten violations." Regional Director's Motion at 2.

Reviewing the record before me as a whole, I find that American Diversified's statements in its second letter amount to a denial of the claims against it. An examination of the compliance review report (a copy of the pertinent pages of which was attached to the Regional Director's motion) reveals that the document contained the substance of all of the changes made in the notice of claim, and that each report entry included at least one example which corresponded to one of the violations charged in the notice of claim. American Diversified's mistaken reference to the compliance review report is immaterial, since the second letter denied the same violations later charged in the notice of claim. Therefore, I conclude that the carrier's November 2, 1990, letter constitutes a

valid denial of the Regional Director's allegations.

I do not find, however, that these denials demonstrate material factual disputes requiring a hearing, and therefore I deny American Diversified's request for an administrative hearing. As I stated in a case similar to the one now before me, "[i]f the Regional Director opposes the hearing request, as in this case, the motor carrier must do more than just deny the allegations in its pleadings. It must give sufficient evidence to support its allegations." *In the Matter of American Pacific Power Apparatus, Inc.*, No. OR–90–006–075, at 2, (FHWA March 11, 1992) (Final Order); *compare In the Matter of Sined Leasing, Inc.*, No. 91–122 (FHWA March 12, 1992) Order Appointing Administrative Law Judge). In short, American Diversified's general denial is not sufficient to overcome the Regional Director's opposition to an administrative hearing because it fails to carry the carrier's burden to show the existence of a factual dispute. *American Pacific* at 3.

2. The Regional Director's Motion for Final Order

A motion for final order is in the nature of a motion for summary judgment. Consequently, the moving party bears the burden of clearly establishing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. See *In the Matter of Laughlin Transport, Inc.*, No. R3–91–104 (FHWA March 10, 1992) (Final Order); *In the Matter of Forsyth Milk Hauling Co., Inc.*, No. R3–90–037 (FHWA Dec. 5, 1991) (Order); *see also* 6 Moore's Federal Practice, 2d ed., at ¶ 56.15 [7]–[8] (1988). In a case like the one before me today, where a respondent denies the allegations in the notice of claim but the Regional Director still seeks to avoid a hearing and obtain a final order on motion, that motion should be accompanied by affidavits or evidence sufficient to establish at least a *prima facie* case. Only in this way can I fulfill my responsibility to afford a respondent a fair review of the case against it before issuing a final agency order, which, if necessary, can be enforced in a United States District Court. 49 U.S.C. § 521(b)(4); 49 CFR 386.65; *Laughlin Transport* at 2–3.

This dispute presents a problem that I have encountered before, most recently in the *American Pacific* case. In that case the respondent denied the allegations against it, but did not provide any evidence to support its position. Here, neither American Diversified's two replies to the notice of claim nor its response to the Regional Director's motion contain any support for the carrier's contentions that it did not commit the charged violations. Furthermore, and more important to my consideration of the instant motion, the Regional Director, like his counterpart in *American Pacific*, "did not carry his burden of proving that there is no genuine issue of material fact." *American Pacific* at 4.

In *American Pacific*, I held that "the Regional Director must succeed on the strength of his own evidence." *Id.* at 5. American Diversified's unsupported denials would not rebut a *prima facie* case of violations, but the Regional Director has failed to present a *prima facie* case. *Id.* The Regional Director attached seven "Exhibit Abstracts" to his motion, five of which correspond to the five charged violations of § 391.51(c) and purport to describe those items which were missing from American Diversified's driver qualification files. These "Abstracts" are printed on plain bond paper, are not attested, and do not have any other documents attached to them. The two remaining abstracts contain documents which tend to show American Diversified's knowledge of the motor carrier regulations, but do not correspond to specific charges in the notice of claim. Without more, I cannot hold that the Regional Director has met his burden of clearly establishing the essential elements of his claim, and therefore I must deny the motion for final order. *Id.*; see Fed. R.Civ.P. 56 (advisory committee notes).

If the Regional Director submits affidavits or other evidence tending to show that American Diversified committed the charged violations, I will reconsider his motion. American Diversified should note that if it fails either to respond to the Regional Director's renewed motion, or to produce any evidence rebutting the Regional Director's evidence, that failure may result in a final order for the Regional Director.

This ruling requiring the Regional Director to submit affidavits or evidence to the Associate Administrator should not be viewed as requiring a change in the practice of retaining evidence at the appropriate FHWA office. This ruling applies only to the type of factual situation presented by this case: a Regional Director seeks a final order from the Associate Administrator without a hearing and the respondent denies the alleged violations. In such a case, "the Regional Director's motion must be accompanied by sufficient evidence to support a *prima facie* case, which will shift the burden of production to rebut to the respondent." *Forsyth Milk* at 7. If the respondent fails to rebut the *prima facie* case, the Regional Director's motion will be granted. *Id.*

It is hereby ordered That American Diversified's request for a hearing is denied; the Regional Director's request for a final order is denied, with leave to renew this motion.

Dated: May 12, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Used Equipment Sales, Inc.;

Decision of Administrative Law Judge Robert I. Barton, Jr.

[FHWA DOCKET NO. R1–91–03] (Motor Carrier Safety)

Appearances

Sheila O'Sullivan, Esq., Federal Highway Administration, Leo O'Brien Federal Building, Room 719, Clinton Ave./N. Pearl Street, Albany, New York 12207; Eric Kuwana, Esq., Federal Highway Administration, U.S. Department of Transportation, HCC–20, room 4217, 400 Seventh Street, SW., Washington, DC 20590, for Complainant.

William E. Kenworthy, Esq., Rea, Cross & Auchincloss, Suite 420, 1920 N. Street, NW., Washington, DC 20036; Frank T. Weiner, Esq., 15 Court Square, Boston, Massachusetts 02108, for Respondent.

Pursuant to the Notice of Assignment of Proceeding herein, dated January 29, 1991, and the Notice of Claim in this matter dated November 21, 1990, this is the Administrative Law Judge's decision under Rule 386.61 of the Federal Highway Administration's rules of practice and procedure, 49 CFR 386.61.

The Notice of Claim in this matter charges Respondent, Used Equipment Sales, Inc., with the following violations: (1) Thirteen instances in which it used a disqualified driver, in violation of 49 CFR 391.15; (2) one instance in which it failed to report an accident, in violation of 49 CFR 394.9; (3) two instances in which it required or permitted a driver to drive after having been on duty more than 70 hours in 8 consecutive days, in violation of 49 CFR 395.3; (4) eight instances in which it failed to require a driver to forward within 13 days of completion the original of the record of duty status, in violation of 49 CFR 395.8; and (5) eight instances in which it failed to retain a driver vehicle inspection report for at least 3 months, in violation of 49 CFR 396.11.[1] The Notice of Claim further

[1] The Notice of Claim did not specify the exact subsections of each of the sections of the Federal Motor Carrier Safety Regulations which Respondent was charged with having violated. The appropriate

provided that the Federal Highway Administration ("FHWA") had found that the violations of 49 CFR 391.15 constituted substantial health and safety violations and that the violations of 49 CFR 395.3 constituted a serious pattern of safety violations.[2] The FHWA seeks a total penalty of $75,500.

Neither 49 U.S.C. 521, the statute pertaining to civil penalties in FHWA Motor Carrier Safety cases, nor its legislative history addresses the question of whether the statutory language "substantial health and safety violation" or "serious pattern of safety violations" is part of a prima facie case of proving a violation or is to be considered when assessing a penalty. At the hearing, Complainant's counsel contended that the question of "substantial health and safety violation" and "serious pattern of safety violations" goes only to the issue of penalty and not the underlying violation. (Tr. 311). Respondent does not assert otherwise, and I agree with Complainant's contention.

This decision is based upon the entire record of this proceeding, including: The evidentiary record compiled at the hearing; the parties' proposed findings of fact and conclusions of law; the parties' Post Hearing Briefs; and the parties' Reply Briefs.[3] I have also taken into account my observation of the witnesses who appeared before me and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

My findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.[4]

I. Findings of Fact

A. Respondent and Prior Compliance Reviews

1. Used Equipment Sales, Inc. ("Respondent") is a for hire common carrier, with its principal office in North Dartmouth, Massachusetts and transports heavy machinery and other general commodities in interstate commerce, and as such, is subject to the Federal Motor Carrier Safety Regulations (the "Regulations"), 49 CFR part 390. (Cicero, Tr. 27; CPF 1; RPF 1).

2. Mr. Peter Vaz is the president and 100% stockholder of Respondent. (P. Vaz, Tr. 275).

3. Mr. Vaz resides in Memphis, Tennessee, has a full office and staff in Memphis, and is at Respondent's principal office in Massachusetts approximately once a month. (P. Vaz, Tr. 293).

4. Mr. Vaz oversees the operations of Respondent by communicating on a regular basis with employees in Respondent's corporate office in Florida. (P. Vaz, Tr. 293).

5. During the time that Mr. Vaz is not present at Respondent's principal office in Massachusetts, Eric Johansen, the operations manager of Respondent, is responsible for the daily operations of Respondent. (P. Vaz, Tr. 294).

6. Ms. Judith Vaz served as corporate clerk of Respondent during the years of 1988, 1989, and 1990. (J. Vaz, Tr. 225).

7. In the state of Massachusetts, the corporate clerk is an officer of the corporation and is similar to the Secretary of the corporation. (J. Vaz, Tr. 226).

8. As corporate clerk, Judith Vaz handled all of the drivers' files and accident reports. (J. Vaz, Tr. 225).

9. Up until January of 1989, Ms. Vaz was living in Massachusetts and was at Respondent's principal office approximately twelve hours a day. (P. Vaz, Tr. 226).

10. Ms. Vaz moved to Florida in January of 1989 and after that visited Respondent's principal office in Massachusetts approximately twice a month. (J. Vaz, Tr. 226).

11. While Ms. Vaz was living in Florida, Ms. Vaz kept in regular contact with Respondent's principal office in Massachusetts by speaking to her assistant there, Ms. Botelho, every day. (J. Vaz, Tr. 227).

12. Mr. Gerard O'Brien is president of a consulting company for motor carrier safety and hazardous material regulations and as such assists and guides motor carriers in passing D.O.T. audits with a favorable rating. (O'Brien, Tr. 190).

13. As a consultant to motor carriers, Mr. O'Brien educates motor carriers about the Regulations and periodically monitors carriers to ensure that they are complying with the Regulations. (O'Brien, Tr. 191).

14. Mr. O'Brien was hired by Respondent as a safety consultant in early 1989 to ensure that Respondent was complying with the Regulations. (O'Brien, Tr. 191).

15. As safety consultant to Respondent, Mr. O'Brien visits Respondent's principal office in Massachusetts twice a month, meets with Respondent's safety director, Mr. Pereira, and then personally reviews all kinds of records, including driver qualification files, driver logs, driver maintenance records and vehicle inspection reports. (O'Brien, Tr. 194).

16. Mr. Anthony Cicero ("Cicero") is a motor carrier safety specialist for the Federal Highway Administration, Office of Motor Carriers, and is assigned to the division office in Cambridge, Massachusetts. (Cicero, Tr. 24).

17. The duties of a motor carrier safety specialist include: conducting safety reviews, the results of which determine a carrier's safety rating; conducting compliance reviews, which are more detailed audits of the carrier's records and list specific violations; and conducting skills performance evaluations in conjunction with driver waiver. (Cicero, Tr. 26).

18. Cicero has conducted approximately 75 compliance reviews and, more specifically, has conducted two compliance reviews of Respondent, the most recent of which was conducted in July, 1990. (Cicero, Tr. 26, 27).

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citations to the Regulations of which Respondent is charged with having violated, including subsections, are set forth in the appendix of this Decision.

[2] Section 521(b)(2) of the Motor Carrier Safety Act of 1984, 49 U.S.C.A. 521(b)(2) (West Supp. 1991), relates to civil penalties and provides that anyone who is determined by the Secretary, after notice and opportunity for a hearing, to have committed an act which is in violation of a recordkeeping requirement shall be liable to the United States for a civil penalty not to exceed $500 for each offense and that each day of a violation shall constitute a separate offense, except that the total of civil penalties assessed against any violator for all offenses relating to any single violation shall not exceed $2,500. Section 521(b)(2) further provides that if the Secretary determines that a serious pattern of safety violations, other than recordkeeping requirements, exists or has occurred, the Secretary may assess a civil penalty not to exceed $1,000 for each offense; except that a maximum fine for each such pattern of safety violations shall not exceed $10,000. Section 521(b)(2) finally provides that if the Secretary determines that a substantial health or safety violation exists or has occurred which could reasonably lead to, or has resulted in, serious personal injury or death, the Secretary may assess a civil penalty not to exceed $10,000 for each offense.

[3] On January 24, 1992 I issued an Order requiring Complainant and Respondent to submit Reply Briefs to me by February 7, 1992 addressing certain issues and indicating which party had the burden of proof with regard to each of those issues. *See* Order of Administrative Law Judge, FHWA Docket No. R1-91-03 (Motor Carrier Safety), Served January 24, 1992.

[4] The following abbreviations are used in this decision:

Tr.—page of hearing transcript, usually preceded by name of witness.

CX—Complainant's exhibit.

RX—Respondent's exhibit.

CPF—Complainant's proposed finding of fact.

RPF—Respondent's proposed finding of fact.

CCL—Complainant's proposed conclusion of law.

RCL—Respondent's proposed conclusion of law.

CPB—Complainant's post hearing brief.

RPB—Respondent's post hearing brief.

CRB—Complainant's reply brief.

RRB—Respondent's reply brief.

19. Before conducting the July, 1990 compliance review of Respondent, Cicero reviewed Respondent's carrier file and looked over its prior compliance reviews. (Cicero, Tr. 27).

20. Compliance reviews conducted on Respondent on 5/13/81, 7/18/84, 2/14/85, 10/5–6/88, and 6/28/89 asserted that there had been several violations of the Regulations, including driver qualification violations, hours of service violations, recordkeeping violations, and failing to report accidents. (Cicero, Tr. 27–32; CPF 2, 3, 5, 6, 8; CX 1; CX–2; CX–4; CX–5; CX–6).

21. The compliance reviews dated 10/5–6/88 and 6/28/89 each recommended that Respondent receive a rating of "unsatisfactory". (Cicero, Tr. 31, 32; CPF 7, 9; CX–5, CX–6).

22. In July, 1990, Cicero conducted the audit of Respondent which led to the charges in this case; this audit entailed reviewing driver qualification files, records of accidents for the prior year, vehicle inspection reports and maintenance records. (Cicero, Tr. 34).

B. The Notice of Claim

23. On November 21, 1990, the Federal Highway Administration, Office of Motor Carriers, Region One, Albany, New York issued to Respondent a claim letter (the "Notice of Claim") stating that the investigation of Respondent had revealed the following violations: 13 instances in which Respondent used a disqualified driver in violation of 49 CFR 391.15; 1 instance in which Respondent failed to report an accident in violation of 49 CFR 394.9; 2 instances in which Respondent required or permitted a driver to drive after having been on duty more than 70 hours in 8 consecutive days in violation of 49 CFR 395.3; 8 instances in which Respondent failed to require a driver to forward within 13 days of completion the original record of duty status in violation of 49 CFR 395.8; and 8 instances in which Respondent failed to retain a driver vehicle inspection report for at least 3 months in violation of 49 CFR 396.11 (CPF 11; CX–8).

24. The Notice of Claim stated that pursuant to 49 U.S.C. 521(b), the Office of Motor Carriers had found that Respondent's violations of 49 CFR 391.15 (using a disqualified driver) constituted substantial health and safety violations which subjected Respondent to a maximum fine of $10,000 per violation and that Respondent's violations of 49 CFR 395.3 (requiring or permitting a driver to drive after having been on duty more than 70 hours in 8 consecutive days) constituted a serious pattern of safety violations which subjected Respondent to a maximum fine of $1,000 per violation, not to exceed $10,000 per pattern. (CX–8).

25. The Notice of Claim further stated that the maximum civil penalty to which Respondent is subject for the violations of 49 CFR 394.9 (failure to report an accident), 395.8 (failure to require a driver to forward within 13 days of completion the original record of duty status), and 396.11 (failure to retain a driver vehicle inspection report for a least 3 months) is $500 per violation and $500 for each additional day the violations continue, up to a maximum of $2,500 per violation. (CX–8).

26. The Notice of Claim finally stated that upon consideration of the seriousness of Respondent's violations, past history, financial status, and other factors, the Office of Motor Carriers had decided to assess Respondent's civil penalty at $5,000 for each of the 13 violations of 49 CFR 391.15; $1,000 for each of the 2 violations of 49 CFR 395.3; and $500 for each of the 17 violations of 49 CFR 394.9, 395.8, and 396.11 and that consequently, the total amount owed by Respondent to the United States Government as a result of these 32 violations was $75,500. (CX–8).

C. First Claim: Using a Disqualified Driver in Violation of 49 CFR 391.15(a) and (b)

27. A letter of disqualification dated November 20, 1987 for Douglas Bradley, driver for Respondent, was sent to Bradley by the Office of Motor Carrier Safety and stated that he was not qualified to drive in interstate or foreign commerce under Part 391.15(b) of the Regulations because his Alabama and Rhode Island driver's licenses had been suspended, that his privileges to drive in Connecticut, Maine, and Virginia had been suspended, and that his privilege to drive in Wisconsin had been suspended. (Cicero, Tr. 44; CX–20).

28. The letter of disqualification dated November 20, 1987 (CX–20) sent to Bradley does not indicate that it was either addressed to Respondent or that a carbon copy of such letter was sent to Respondent. (Cicero, Tr. 45).

29. Company policy, which was communicated to employees of Respondent, was that disqualified drivers absolutely were not to be used. (P. Vaz, Tr. 285).

30. The first notice to Respondent of Bradley's disqualification occurred on October 17, 1989 when Judith Vaz, corporate clerk for Respondent, received a copy of Bradley's 1987 disqualification letter from Barry Rubenstein, Federal Hazardous Materials Manager in the regional office of the Federal Highway Administrator in Albany, New York. On October 17, 1989 Judith Vaz phoned and advised Respondent's dispatcher, Richard DeMoranville, that Bradley had been disqualified from driving in interstate commerce and that Bradley should not be used anymore. (Cicero, Tr. 47; RPF 5; CX–10).

31. On or about October 18, 1989, Judith Vaz told Kathleen Botelho, a secretary for Respondent, that Bradley had been disqualified from driving in interstate commerce. On or about October 18, 1989, Ms. Botelho notified DeMoranville that Bradley had been disqualified from driving in interstate commerce. (CX–14).

32. Although DeMoranville had been told that Bradley had been disqualified from driving in interstate commerce, DeMoranville continued to use Bradley and signed Bradley's payroll check on January 5, 1990. (Cicero, Tr. 48; CX–12).

33. Ms. Vaz did not know that DeMoranville had continued to use Bradley. (Cicero, Tr. 47; CX–10).

34. The records of duty status for Bradley for the time periods of 12/1/89–12/3/89; 12/11/89–12/13/89; 12/14/89–12/16/89; 12/21/89–12/23/89; and 1/1/90–1/3/90 and fuel receipts dated 12/2/89; 12/12/89; 12/15/89; 12/22/89 and 1/2/90 indicate that Bradley was driving for Respondent in interstate commerce while he was disqualified. (CPF 12; CX–30; CX–31; CX–32; CX–33; CX–34; CX–35; CX–36; CX–37; CX–38; CX–39).

35. After DeMoranville dispatched disqualified drivers, he was demoted from his position as dispatcher and was temporarily separated from the company for a period of about three months, before being reinstated, as an owner-operator. (P. Vaz, Tr. 284–285).

36. Driver Michael DeVasto and Respondent were sent a certified letter dated May 14, 1990 from the Office of Motor Carriers, Federal Highway Administration, Region One stating that DeVasto was not qualified to drive in interstate commerce because his driver's licenses for California and Virginia had been suspended. (CPF 18; CX–22).

37. On May 18, 1990, Ms. Botelho told dispatcher Johansen and corporate clerk Judith Vaz of DeVasto's disqualification. (CX–14).

38. While Johansen was aware on or about May 19, 1990 that DeVasto had been disqualified from driving in interstate commerce, Johansen decided to pay DeVasto's fines and decided to continue dispatching him. Johansen acknowledged that this was an error in his judgment. (CX–13).

39. The records of duty status for DeVasto indicate that he made interstate trips for Respondent on 6/7/90; 7/18/90; 7/20/90; 7/23/90 and 7/31/90 while

disqualified to drive in interstate commerce. (CX–65 I and J; CX–66).

40. On April 8, 1990 John MacDonald, a driver for Respondent, was stopped for a vehicle inspection at the scale house on I90 near the Minnesota State Line by the South Dakota Highway Patrol who discovered that MacDonald's Vermont driver's license was suspended. At that point, MacDonald surrendered his license to the South Dakota Highway Patrol. (CX–11).

41. After MacDonald surrendered his license to the South Dakota Highway Patrol, MacDonald called and informed dispatcher Johansen that MacDonald needed $100 to pay for the citation he had received for the suspended license. (CX–11).

42. Johansen was the only person at Respondent who was aware that MacDonald's driving privileges had been suspended. (CPF 16; CX–11).

43. Johansen continued dispatching MacDonald until MacDonald returned to No. Dartmouth, MA on April 20, 1990, at which time MacDonald told Johansen that he needed time off to clear up his license in Vermont. (CX–13).

44. The records of duty status for MacDonald for the periods of 4/8/90–4/10/90; 4/15/90; 4/17/90–4/19/90 and bills of lading dated 4/9/90 and 4/16/90 indicate that MacDonald was driving for Respondent in interstate commerce at a time when he was disqualified. (CX–23; CX–24; CX–25; CX–26; CX–27; CX–28; CX–29).

45. Johansen received a letter from Peter D. Vaz, President of Respondent, reprimanding him for dispatching disqualified drivers and stating that he can only use qualified drivers who meet all the requirements of the Department of Transportation and who are on the company's list of approved drivers. (RX–4).

46. As a result of Johansen's conduct in dispatching disqualified drivers, a letter was sent to all of Respondent's employees stating that it was Respondent's goal to achieve 100% compliance with the Department of Transportation regulations and that Mr. Pereira, the company's safety director, would be producing daily a list of available qualified drivers and that only those individuals on the list could be dispatched. (P. Vaz 286; RX–5).

D. Second Claim: Failing to Report an Accident in Violation of 49 CFR 394.9(a)

47. DeVasto was involved in a motor vehicle accident on July 23, 1990 in Memphis, Tennessee at a time that he was disqualified from driving in interstate commerce. (CPF 20; CX–22; CX–63).

48. DeVasto's July 23, 1990 accident was reported to the Department of Transportation by Ms. Botelho on July 26, 1990. (CPF 21; CX–63).

49. DeVasto was involved in a motor vehicle accident on July 25, 1990 in Chicago, Illinois at a time that he was disqualified from driving in interstate commerce. (CX–50; CX–60).

50. Ms. Botelho, Respondent's secretary, had no knowledge of the cost of repairs and was told by Cicero that DeVasto's July 25, 1990 accident in Chicago, Illinois was supposed to be a reportable accident and there was supposedly $6,500 in property damage. (Tr. 260; CX–14).

51. DeVasto's July 25, 1990 accident was reported to the Department of Transportation on October 10, 1990, more than 30 days after the occurrence of the accident. (CPF 24; CX–50).

E. Third Claim: Requiring or Permitting Drivers to Drive after Having Been on Duty More Than 70 Hours in 8 Consecutive Days in Violation of 49 CFR 395.3(b)(2)

52. Records of duty status for Michael Raposa for the period of June 9, 1990 through June 23, 1990 indicate that he was on duty for 77 hours in 8 consecutive days. (CPF 25; RPF–15; CX–51, CX–52, CX–53).

53. Records of duty status for Richard DeMoranville for the period of July 11, 1990 through July 20, 1990 indicate that he was on duty for 76¾ hours in 8 consecutive days. (CPF 26; CX–54, CX–55).

54. Respondent's company policy was that some violations of the 70-hour regulations would occur and that when such violations did occur Respondent would take responsibility. (CRB, p. 8; O'Brien, Tr. 215–216).

F. Fourth Claim: Failing to Require a Driver to Forward Within 13 Days of Completion the Original of the Record of Duty Status In Violation of 49 CFR 395.8(a), (i), and (k)

55. On two occasions during the course of his 1990 compliance review Cicero checked Respondent's files for the records of duty status of DeVasto dated 6/7/90; 6/24/90; 6/28/90; 7/18/90; 7/20/90; 7/23/90; 7/26/90 and 7/31/90 and found no such records on file at Respondent's place of business. (CPF 27; Cicero, Tr. 102–105).

G. Fifth Claim: Failing To Retain a Driver Inspection Report For At Least 3 Months In Violation of 49 CFR 396.11(1)(2)

56. Cicero checked Respondent's files for vehicle inspection reports corresponding to the interstate trips of DeVasto of 6/7/90; 6/24/90; 6/28/90; 7/18/90; 7/20/90; 7/23/90; 7/26/90 and 7/31/90 and found no such corresponding vehicle inspection reports on file at Respondent's place of business. (CPF 28; Cicero, Tr. 106).

II. Opinion

A. Liability

1. First Claim: 13 Instances of Using a Disqualified Driver in Violation of 49 CFR 391.15 (a) and (b)

The first claim cited in the Notice of Claim charges Respondent with thirteen instances in which it used disqualified drivers to drive in interstate commerce in violation of 49 CFR 391.15 (a) and (b). The Notice of Claim further provides that Respondent's alleged violations of 49 CFR 391.15 (a) and (b) constitute substantial health and safety violations which subject Respondent to a civil penalty of $5,000 for each of the thirteen violations.

At the beginning of the hearing in this case, Complainant and Respondent agreed that the applicable legal standard of liability with respect to violations of 49 CFR 391.15 (a) and (b) is whether Respondent "knew" or "should have known". (Tr. 6). Thus, in order to conclude that Respondent violated 49 CFR 391.15 (a) and (b), I must find that Respondent either "knew" or "should have known" that it was using disqualified drivers to drive in interstate commerce. The evidence indicates, and Respondent has admitted, that the three drivers in question, Douglas Bradley, Michael DeVasto, and John MacDonald, made interstate trips for Respondent at a time that they were disqualified to drive commercial motor vehicles in interstate commerce. (Tr. 6; Findings 34, 39, 44).

It is important to note that "know" and "should have known" are different legal concepts. *Contract Courier* v. *Research & Special Programs Administration*, 924 F.2d 112 (7th Cir. 1991). "To know" refers to actual knowledge, while "should have known" refers to imputed knowledge, which means lack of knowledge accompanied by circumstances that lead the legal system to treat ignorance the same way it treats knowledge. *Id.* at 114. The "should have known" concept requires inquiry and the law treats a person as possessing whatever knowledge inquiry would have produced. *Id.*

Respondent is a corporate entity and can obtain knowledge only through its officers, employees or agents. Thus, in determining whether Respondent knew or should have known that disqualified drivers were being dispatched, the

following two questions must be considered:

(1) Whether the knowledge and actions of the dispatchers, who are employees of Respondent, can be imputed to the company?

(2) Whether the responsible company officials of Respondent, namely, Mr. Vaz, its president; Ms. Vaz, its corporate clerk (both of whom are officers of the corporation); or Mr. O'Brien, its safety consultant, knew or should have known that disqualified drivers were being dispatched to drive in interstate commerce?

(a) *Imputed knowledge and actions.* In determining the liability of Respondent under 49 CFR 391.15(a) and (b), the first question which I will consider is whether the knowledge of dispatchers DeMoranville and Johansen that disqualified drivers were being dispatched to drive in interstate commerce and the actions of the dispatchers in dispatching disqualified drivers to drive in interstate commerce may be imputed to Respondent.

In examining the actions of Respondent's dispatchers, the evidence indicates that with regard to driver Bradley, although dispatcher DeMoranville had been notified by both Ms. Vaz and Ms. Botelho that Bradley had been disqualified to drive in interstate commerce and could not be used anymore, DeMoranville continued to dispatch Bradley contrary to instructions and without informing company management of his actions. (Findings 30, 31, 32). Furthermore, Respondent continued to pay Bradley as evidenced by a payroll check he received on January 5, 1990 signed by DeMoranville. (Finding 32). Ms. Vaz did not know that DeMoranville had continued to use Bradley. (Finding 33).

With regard to driver DeVasto, the evidence indicates that although dispatcher Johansen had been informed of DeVasto's disqualification by Ms. Botelho, Johansen decided to pay DeVasto's fines and continued dispatching him. (Findings 37, 38). Johansen acknowledged that he alone decided to continue dispatching DeVasto and that this was an error in his judgment. (Finding 38).

With regard to driver MacDonald, the evidence indicates that on April 8, 1990, MacDonald surrendered his license to the South Dakota Highway Patrol after a South Dakota Highway Patrol discovered that MacDonald's Vermont license had been suspended. (Finding 40). After MacDonald surrendered his license to the South Dakota Highway Patrol, MacDonald called and informed Johansen that he needed $100 to pay for the citation he had received for the suspended license. (Finding 41). Johansen, who was the only person at Respondent who was aware that MacDonald's driving privileges had been suspended, dispatched MacDonald to drive in interstate commerce. (Finding 42).

In its Post Hearing Brief, Complainant contends that having delegated important responsibilities to its employees, Respondent cannot disclaim responsibility for the actions of those employees. (CPB, p. 10). Complainant contends that within the context of the Regulations, employers are liable for the actions of their employees, citing *Trinity Transportation Inc.*, FHWA Docket No. R9–90–001.

In *Trinity Transportation Inc.*, FHWA Docket No. R9–90–001, the FHWA brought suit against Trinity Transportation Inc. for requiring or permitting a driver to drive more than 10 hours following 8 consecutive hours off duty, requiring or permitting a driver to drive after 15 on-duty hours following 8 hours off duty, and requiring or permitting a driver to make false entries upon a driver's record of duty status all in violation of the Regulations. In his Decision, Judge Kolko addressed the issue of whether the actions of drivers operating on behalf of Trinity, so as to be in violation of the Regulations, could be imputed to Trinity. In his Decision, Judge Kolko stated that it was well settled that a corporation is charged with the acts of its employees and that a corporation cannot insulate itself from liability when its employees act within the scope of their employment.

In its Post Hearing Brief, Respondent argues that it should not be liable for the acts of its dispatchers since they were acting contrary to the express orders of company management and contrary to communicated company policy. (RPB, p. 5).

Respondent analogizes this case to the case of *Horne Plumbing & Heating Co.* v. *OSHRC*, 528 F.2d 564 (5th Cir. 1976), where two experienced foremen were working in an unshored portion of a trench contrary to specific instructions. In *Horne Plumbing*, the 5th Circuit Court of Appeals rejected the Secretary of Labor's argument that knowledge on the part of the foreman could be imputed to the company and held that the employer is not required to personally remain on the scene and that it could not be held responsible for the derelictions of experienced and knowledgeable foreman. Furthermore, the court opined that if employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage such actions and that an employer who would otherwise be found in violation due to the actions and knowledge of a supervisor should be permitted to defend on the basis that it took all necessary precautions to prevent the occurrence of the violation.

In determining the liability of Respondent, I conclude that based on the rationale in *Horen Plumbing*, knowledge on the part of the dispatchers that disqualified drivers were being dispatched to drive in interstate commerce should not be imputed to Respondent since in dispatching disqualified drivers to drive in interstate commerce the dispatchers defied specific instructions and communicated company policy. Furthermore, I note that Respondent, after it became aware that Bradley and DeVasto had been disqualified, sought to comply with 49 CFR 391.15 by promptly notifying its dispatchers that such drivers had been disqualified and should not be used anymore.

Further, unlike the *Trinity Transportation, Inc.* case where Judge Kolko concluded that the actions of drivers at Trinity should be imputed to the company since its drivers were acting within the scope of their employment, here the evidence indicates that Respondent's dispatchers, employees of the company, ignored explicit verbal warnings and ignored communicated company policy. I, therefore, conclude that the dispatchers were acting outside the scope of their employment when they dispatched disqualified drivers to drive in interstate commerce. Furthermore, I concluded that the actions of the dispatchers constituted unforeseen misconduct.

I have also taken into account the fact that the evidence indicates that Respondent did not condone or adopt its dispatchers' actions after it learned of their disobedience. For example, Respondent's officers disapproved of DeMoranville's action and as a result of his disobedience in dispatching disqualified drivers, he was removed from his position as a dispatcher and temporarily separated from the company for a period of about three months before being reinstated as an owner-operator. (Finding 35). Furthermore, after dispatching DeVasto and MacDonald, Johansen received a letter from Mr. Vaz, president of Respondent, reprimanding him and stating that he could only use qualified drivers who met all the requirements of the Department of Transportation and who were on the company's list of

approved drivers.[51] (Finding 45). Finally, as a result of Johansen's conduct in dispatching disqualified drivers, a letter was sent to all of Respondent's employees stating that it was Respondent's goal to achieve 100% compliance with all of the Department of Transportation regulations and that only those drivers who were certified by Mr. Pereira, the company's safety director, on a daily basis as being qualified drivers, could be dispatched. (Finding 46).

A finding of liability on the part of Respondent would ignore the fact that Respondent neither authorized nor adopted its dispatchers actions in dispatching disqualified drivers and would also tend to discourage actions on the part of employers in attempting to take all necessary precautions in an effort to prevent violations of the Regulations.

Finally, in determining the liability of Respondent, I have also considered cases in the area of agency law. Those cases indicate that an employer will be liable for the acts of its employees only so long as such acts are within the course of the employee's employment. *Eberhardy* v. *General Motors Corp.*, 404 F. Supp. 826 (M.D. Fla. 1975). Such case law also indicates that a violation of instructions of the employer may constitute a departure from the scope of the employment. *Wright* v. *Southern Bell Tel. Co.*, 605 F.2d 156 (5th Cir. 1979); *Porter* v. *Jack's Cookie Company*, 127 S.E. 2d 313 (Ga. App. 1962).

Although not every violation of instructions of the employer will take the employee out of the scope of his employment, *Wright*, 605 F.2d at 159; *Porter*, 127 S.E. 2d at 316, an employee's acts will be considered outside his scope of his employment if the employee also acts in contravention of the employer's regulations or policy. *Wright*, 605 F.2d at 158. Here, while it might be arguable that DeMoranville's and Johansen's dispatching of disqualified drivers to drive in interstate commerce was in prosecution of Respondent's business, and was not entirely disconnected from Respondent's business, their actions were outside their course of employment since DeMoranville and Johansen acted in direct contravention of communicated company policy as well as in direct contravention of 49 CFR 391.15 (a) and (b).

I, therefore, conclude that the knowledge of the dispatchers that disqualified drivers were being dispatched and the actions of Respondent's dispatchers in dispatching disqualified drivers to drive in interstate commerce should not be imputed to Respondent so as to hold Respondent liable for violating 49 CFR 391.15 (a) and (b).

(b) *Know or should have known.* In determining the liability of Respondent under 49 CFR 391.15 (a) and (b), the next question which I will consider is whether responsible company officials of Respondent; namely, Mr. Vaz, its president; Ms. Vaz, its corporate clerk (both of whom are officers of the corporation); or Mr. O'Brien, its safety consultant, knew or should have known that disqualified drivers were being dispatched to drive in interstate commerce. As discussed previously in this Decision, the evidence indicates that with regard to Bradley, although DeMoranville had been notified by both Ms. Vaz and Ms. Botelho that Bradley had been disqualified to drive in interstate commerce and could not be used anymore, DeMoranville continued to dispatch Bradley contrary to instructions and without informing responsible company officials of his actions. (Findings 32, 33). With regard to DeVasto, the evidence indicates that although Johansen had been notified by Ms. Botelho of DeVasto's disqualification, Johansen continued to dispatch DeVasto contrary to instructions and without informing responsible company officials of his actions. (Findings 37, 38). With regard to MacDonald, the evidence indicates that Johansen was the only person at Respondent who was aware that MacDonald's driving privileges had been suspended. (Finding 42).

Thus, the evidence indicates that none of the responsible company officials of Respondent, namely Mr. Vaz, its president; Ms. Vaz, its corporate clerk; or Mr. O'Brien, its safety consultant; knew that disqualified drivers were being dispatched to drive in interstate commerce. Therefore, I will now consider whether Respondent's officials "should have known" that disqualified drivers were being dispatched to drive in interstate. More specifically, it is necessary to determine whether they inquired or made any effort to determine if disqualified drivers were being dispatched to drive in interstate commerce.

Case law establishes that a corporate entity is deemed to have knowledge of regulatory violations if the means are present to detect the violations. *Riss & Co.* v. *U.S.*, 262 F.2d 245, 250 (8th Cir. 1958); *U.S.* v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 739 (W.D. Va. 1974); *Trinity Transportation, Inc.*, FHWA Docket No. R9–90–001.

In *Riss & Co.* v. *U.S.*, the United States brought suit against Riss & Co., Inc., a motor carrier, with an office in St. Louis, Missouri and headquarters in Kansas City, Missouri, for permitting its drivers to drive excessive hours in violation of the regulations of the Interstate Commerce Commission ("ICC"). The 8th Circuit Court of Appeals found that the carrier's log clerk in the St. Louis office either failed to discover excessive driving hours or completely ignored them and refrained from reporting the findings to her supervisors. The court, however, found that drivers' logs had been forwarded to the carrier's headquarters in Kansas City, Missouri where they were available for inspection by superiors of the carrier.

The court held that although the excessive and prohibited driving hours were readily discoverable upon a mere glance at the logs, no one at the company's headquarters discovered the recorded excessive driving hours until months after the violations had been committed. In holding Riss & Co., Inc. liable for knowingly and willfully violating the I.C.C. regulations, the court held that the means were present by which the carrier could have detected the infractions and its failure to do so under the existing circumstances could not absolve it of liability as a matter of law.

In *U.S.* v. *T.I.M.E.-D.C.*, the United States brought suit against T.I.M.E.-D.C., Inc., an interstate carrier, for violating a regulation of the I.C.C. by permitting a driver to operate carrier vehicles, while the driver's ability or alertness was so impaired, or so likely to become impaired, through illness, as to make it unsafe for the driver to operate a motor vehicle. In holding T.I.M.E.-D.C., Inc. liable for violating the I.C.C. regulation, the court held that the carrier had sufficient information available to it to know that driver Carlton Brown was impaired, or likely to become impaired, so as to make it unsafe for him to begin his trip.

The court held that the carrier had the means to detect the violation of the I.C.C. regulation by having instituted a program regarding drivers mark-offs for illness pursuant to which a driver calling to inform the carrier's dispatcher that he would be absent due to illness was required to submit a doctor's slip or similar verification of his illness. The court noted that the wife of driver Brown had telephoned the carrier's dispatcher to ask him to mark her husband off for work that evening because he had an ear infection and was

[51] The evidence does not indicate how Mr. Vaz learned that disqualified drivers were being dispatched to drive in interstate commerce.

going to see a doctor. After having gone to a hospital emergency room, Brown provided the carrier with a doctor's certificate confirming his ailment. The court, therefore, held the carrier liable for violating the I.C.C. regulation and reached the conclusion that the carrier had sufficient information to know that driver Brown's ability to drive was impaired or likely to become impaired so as to make it unsafe for him to make a trip, in violation of the I.C.C. regulation.

Just as means were present in the *Riss & Co.* and *T.I.M.E.-D.C.* cases to detect violations of pertinent regulations, here the means were present whereby Respondent could have detected violations of 49 CFR 391.15 (a) and (b). The evidence shows that Respondent's company was one where important responsibilities were delegated to employees of the company. (Finding 5). Peter Vaz, president of Respondent, and Judith Vaz, corporate clerk for Respondent, spent a substantial amount of time away from the Massachusetts company office and relied on the employees to carry out day to day responsibilities. (Findings 3, 10). Mr. O'Brien was hired by Respondent as a safety consultant in early 1989 to ensure that Respondent was complying with the Regulations. (Finding 14). Mr. O'Brien visited Respondent's principal office in Massachusetts twice a month and personally reviewed all kinds of records of Respondent, including driver qualification files. (Finding 15). Thus, the means were present whereby Respondent could have detected violations of 49 CFR 391.15 (a) and (b). The company president, corporate clerk, and the safety consultant should have monitored more closely the actions of Respondent's employees. With more extensive oversight of company records and operations, Respondent would have known that disqualified drivers were being dispatched to drive in interstate commerce in violation of explicit verbal orders and in violation of communicated company policy. Since the primary responsibility for conducting the operations of Respondent's company was with its responsible company officials, it was the duty of such officials to take effective measures to supervise the performance of the employees.

I hold Respondent liable for the thirteen instances in which it used disqualified drivers to drive in interstate commerce in violation of 49 CFR 391.15 (a) and (b) since responsible company officials "should have known" that disqualified drivers were being dispatched to drive in interstate commerce in violation of express verbal orders and in violation of communicated company policy.[6]

2. Second Claim: 1 Instance of Failing to Report an Accident in Violation of 49 CFR 394.9(a)

The second claim cited in the Notice of Claim charges Respondent with one instance in which it failed to report the accident of July 25, 1990 involving DeVasto within 30 days after it learned or should have learned that a reportable accident occurred, in violation of 49 CFR 394.9(a). The evidence indicates that DeVasto's July 25, 1990 accident was reported to the Department of Transportation on October 10, 1990, more than 30 days after the occurrence of the accident. (Finding 51). 49 CFR 394.3 defines "reportable accident" and provides, *inter alia*, that the term "reportable accident" means an occurrence involving a commercial motor vehicle engaged in the interstate, foreign, or intrastate operations of a motor carrier who is subject to the Department of Transportation Act resulting in total damage to all property aggregating $4,400 or more based upon actual costs or reliable estimates.

Complainant has the burden of proving at the outset that a "reportable accident" did occur, more specifically that the July 25, 1990 accident involving DeVasto occurred at a time when DeVasto was driving a vehicle of Respondent "engaged in interstate, foreign, or intrastate operations" and that such accident in fact resulted in total damage to all property aggregating $4,400 or more based upon actual costs or reliable estimates and, second, that Respondent learned or should have learned that a "reportable accident" occurred.

Complainant has shown that the July 25, 1990 accident involving DeVasto occurred at a time when DeVasto was driving Respondent's vehicle and was "engaged in interstate, foreign, or intrastate operations." (Findings 39, 49). DeVasto's record of duty status or "log" for July 25, 1990 indicates that the accident occurred while he was driving for Respondent. (CX–60; CRB, p. 1). DeVasto's July 25, 1990 record of duty status specifically states that DeVasto was driving a UES vehicle (number 5–4879) between midnight and 1 o'clock a.m. when he hit a low bridge. (CX–60; CRB, p. 1). DeVasto indicates on his log that he went on "Off Duty" status until he tried to move the truck at 5:00 a.m. (CX–60; CRB, p. 2). His log then indicates that he was eventually able to "change over load" at an Illinois terminal later that morning, an indication that his truck was loaded with cargo he was transporting for Respondent. (CX–60; CRB, p. 2).

Furthermore, the MCS–50T accident report submitted by Respondent on October 10, 1990 contains a space for qualifying an accident (BOX 27), and no indication was made that DeVasto was not conducting company business at that time (CX–50; CRB, p. 2). The accident report even indicates that the truck driven by DeVasto was carrying non hazardous materials in cargo with a weight of 45,000 lbs. at the time of the accident. (CX–50; CRB, p. 2).

In addition to the fact that DeVasto's log and the accident report indicate that he was driving Respondent's vehicle and was engaged in interstate commerce at the time of the accident, there is no evidence in the record to indicate that DeVasto was not driving for Respondent when the accident occurred. (CRB, p. 3). Furthermore, at no time during Cicero's review of Respondent or during the hearing was there any suggestion made that DeVasto was on a personal mission at the time of the accident. (CRB, p. 2.)

While Complainant has shown that the July 25, 1990 accident involving DeVasto occurred at a time when he was driving Respondent's vehicle in "interstate operations," Complainant has failed to show that such accident resulted in total damage to all property aggregating $4,400 or more based upon actual costs or reliable estimates. There is no credible evidence in the record concerning the nature or extent of damage to the trailer, or when the repair was performed so that the cost could be determined or estimated.

Cicero testified that he was told by Ms. Botelho, a secretary for Respondent, that the repairs cost about $6,500, (Cicero, Tr. 93). However, Ms. Botelho testified that she had no knowledge concerning the cost of the repairs and that she had inserted the phrase "supposedly $6,500" in her voluntary statement given to Cicero at the time of his audit of Respondent because Cicero had given her that figure as the cost of the repairs (Finding 50). I agree with Respondent that neither of these witnesses had any actual knowledge as to the cost of repairs, and that the record is totally devoid of any credible evidence regarding actual costs or reliable estimates of the repairs. (RRB, p. 2).

While Complainant has shown that the July 25, 1990 accident involving DeVasto occurred at a time when DeVasto was driving Respondent's vehicle in "interstate operations,"

[6] The issue of "substantial health and safety violation" as it relates to the assessed penalty for violations of 49 CFR 391.15 (a) and (b) is discussed in Section II (C) of this Decision.

Complainant has failed to show that such accident resulted in total damage to all property aggregating $4,400 or more based upon actual costs or reliable estimates. Thus, Complainant has failed to meet its burden of proving that a "reportable accident" did occur, and accordingly, I find no liability on the part of Respondent with regard to its alleged violation of 49 C.F.R. 394.9(a).[7]

3. Third Claim: 2 instances of requiring or permitting drivers to drive after having been on duty more than 70 hours in 8 consecutive days in violation of 49 CFR 395.3(b)(2)

The third claim cited in the Notice of Claim charges Respondent with two instances in which it required or permitted a driver to drive after having been on duty more than 70 hours in 8 consecutive days in violation of 49 CFR 395.3(b)(2).[8] At the beginning of the hearing the parties agreed that the language of 49 CFR 395.3(b)(2) requires the Complainant to prove that the alleged violations were either "required" or "knowingly permitted." The Notice of Claim further provides that Respondent's alleged violations of 49 CFR 395.3(b)(2) constitute a serious pattern of safety violations.

The records of duty status for driver Raposa for the period of June 9, 1990 through June 23, 1990 indicate that he was on duty for 77 hours in 8 consecutive days, (Finding 52). The records of duty status for driver DeMoranville for the period of July 11, 1990 through July 20, 1990 indicate that he was on duty for 76¾ hours in 8 consecutive days. (Finding 53).

In its Post Hearing Brief, Respondent claims that some of the on-duty time logged by DeMoranville may have been off-duty time during which the driver made meal stops. Respondent notes that on cross-examination, Cicero admitted that DeMoranville logged meal time as on duty, although Respondent had authorized its drivers to log off duty during meal breaks. (Cicero, Tr. 99, 101). Respondent further notes that at the hearing, Mr. O'Brien, Respondent's safety consultant, testified that if DeMoranville had logged his time properly in accordance with the carrier's written policy, there would not be any hours of service violation. (O'Brien, Tr. 210). By failing to call driver DeMoranville as a witness at trial, Respondent has failed to show that DeMoranville incorrectly logged meal time as on duty time and that as a result of his incorrectly logging meal time as on duty time, driver DeMoranville did not drive after having been on duty more than 70 hours in 8 consecutive days.

In any event, Respondent's contentions regarding the alleged improper logging of DeMoranville's logs are not central to the issue of whether Respondent violated 49 CFR 395.3(b)(2) with respect to DeMoranville. Even if the 2½ hours of eating stops marked on DeMoranville's logs as "on duty" are subtracted from the total on-duty and driving time set forth on DeMoranville's logs, that leaves 74 and ¼ hours. (CX–54; CX–55; CRB, p. 7). Thus Respondent exceeded the permissible 70 hour limitation by 4¼ hours within that 8 day period. (CX–54; CX–55; CRB, p. 7).

Here, I find that Respondent violated 49 CFR 395.3(b)(2) by knowingly permitting Raposa and DeMoranville to drive after having been on duty more than 70 hours in 8 consecutive days.[9]

4. Fourth Claim: 8 instances of failing to require a driver to forward within 13 days of completion the original of the record of duty status in violation of 49 CFR 395.8 (a), (i), and (k)

The fourth claim cited in the Notice of Claim charges Respondent with eight instances where it failed to require a driver to forward within 13 days of completion the original of the record of duty status and failed to maintain such records for a period of six months in violation of 49 CFR 395.8 (a), (i) and (k). On two occasions during the course of his 1990 compliance review of Respondent, Cicero checked Respondent's files for the records of duty status of DeVasto dated 6/7/90, 6/24/90, 6/28/90, 7/18/90, 7/20/90, 7/23/90, 7/26/90, and 7/31/90 and found no such records on file at Respondent's place of business. (Finding 55).

At the hearing, Complainant asserted that a violation of 49 CFR 395.8 imposes strict liability on Respondent, while Respondent asserted that it meets its legal obligation under 49 CFR 395.8 by having a system in place to obtain the records and by acting reasonably under the circumstances. (Tr. 318).

49 CFR 395.8(a) provides that every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24-hour period. 49 CFR 395.8(i) provides that the driver shall submit or forward by mail the original driver's record of duty status to the regular employing motor carrier within 13 days following the completion of the form. 49 CFR 395.8(k) provides that a driver's records of duty status for each calendar month may be retained at the driver's home terminal until the 20th day of the succeeding calendar month. Such records shall then be forwarded to the carrier's principal place of business with all supporting documents for a period of six months from date of receipt.

In its Post Hearing Brief, Complainant notes that Cicero testified that in the course of his investigation of Respondent, he obtained the pertinent records of duty status from DeVasto himself. (Cicero, Tr. 103). Cicero further testified that he copied these documents and returned them to DeVasto. (Cicero, Tr. 105–106). Respondent contends that it never had DeVasto's records of duty status in its possession because DeVasto failed to submit such records of duty status to Respondent. Respondent concludes that Respondent cannot be charged with failure to retain DeVasto's records of duty status if it never had them in its possession.

I note that 49 CFR 395.8(a) and 49 CFR 395.8(k) impose duties upon the carrier, while 49 CFR 395.8(i) imposes a duty upon the driver. In my Order served on the parties on January 24, 1992, I required both Complainant and Respondent to submit Reply Briefs to me addressing the question of whether to prove violations of 49 CFR part 395, Complainant must show that either the regulations impose a duty upon Respondent to require its drivers to forward within 13 days of completion the original record of duty status or that under the regulations, a driver's failure to turn in his records of duty status may be imputed to the motor carrier.

I agree with Complainant that while § 395.8(i) does not specify that the motor carrier itself has a duty to make sure that a driver's records are turned in, the Regulations do specify that duty clearly in a general requirement at 49 CFR 390.11. (CRB, p. 9). 49 CFR 390.11 is entitled "Motor Carrier to Require Observance of Driver Regulations" and provides:

[7] Given this conclusion, I do not reach the question of whether Respondent learned or should have learned that a "reportable accident" occurred.

[8] 49 CFR 395.2 defines "on duty time" as all time from the time a driver begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work. The Regulations provide that "on duty time" shall include, *inter alia*, all driving time as defined in paragraph(b) of 49 CFR 395.2 of the Regulations. 49 CFR 395.2(b) of the Regulations provides that the terms "drive" and "driving time" shall include all time spent at the driving controls of a motor vehicle in operation.

[9] With respect to hours of service violations, Respondent's company policy was that some violations of the 70 hour regulations would occur and that when such violations did occur, Respondent would take responsibility. (Finding 54; CRB p. 8; O'Brien, Tr. 215–216). Furthermore, the issue of "serious pattern of safety violations," as it relates to the assessed penalty for violations of 49 CFR 395.3(b)(2) is discussed in Section II(D) of this Decision.

Whenever in Part 325 of Subchapter A or in this subchapter a duty is prescribed for a driver or a prohibition is imposed upon the driver, it shall be the duty of the motor carrier to require observance of such duty or prohibition.

49 CFR 390.11 is a general requirement set forth under subchapter B of the Regulations and applies to the whole of subchapter B, including 49 CFR 395.8. The Regulations, therefore, impose a duty on Respondent to require observance of the Regulations at 49 CFR 395.8 and elsewhere by its drivers.[10] Thus, Respondent is responsible for DeVasto's failure to turn in his records of duty status.

In its Post Hearing Brief, Complainant asserts that even assuming that Respondent did not have an absolute duty to collect and maintain driver's records of duty status, but needed only to have acted reasonably in attempting to comply with the Regulations, Respondent failed to have a safety program in place such that it could "reasonably" ensure that records of duty status would be regularly collected. (CPB, p. 21).

A safety program must not only exist on paper, but it must have teeth. See *Drotzman* (Docket No. R10–89–11) and *E. L. Lawson* (Docket No. R1–89–015). I agree with Complainant that the evidence fails to show that Respondent had a system in place whereby drivers were penalized or reprimanded for failure to turn in their records of duty status. Furthermore, I agree with Complainant that it is unclear from Respondent's safety organization or system, who, if anyone in particular, had the responsibility of making sure these records of duty status were collected on a regular basis.

Mr. O'Brien testified that in regard to safety matters, everyone had various duties. (O'Brien, Tr. 218). For some matters, Mr. Johansen was in charge, for other matters safety director Rui Pereira was in charge. (O'Brien, Tr. 218). Ms. Botelho, Respondent's secretary, testified that the handling of driver paperwork was a "strange process." (Botelho, Tr. 271). According to her testimony, drivers' paperwork sits in assorted files in various departments, and if a driver doesn't turn in his paperwork, the process is halted at that point. (Botelho, Tr. 272). She also explained that the Respondent's safety policy was not as well coordinated prior to Cicero's latest review of Respondent. (Botelho, p. 271).

Mr. Vaz also explained that for a six month period there was a lapse in anyone having direct control over driver paperwork, and that while Respondent had knowledge of the Regulations, it lacked personnel to put that knowledge to work. (P. Vaz, Tr. 279). Furthermore, Respondent's safety program lacked continuity with its director changing every six months. (P. Vaz, Tr. 276–280).

I agree with Complainant that Respondent failed to have a system in place such that it could "reasonably" ensure that records of duty status would be regularly collected and maintained.

I, therefore, find Respondent liable for the eight instances where it failed to require driver DeVasto to forward within 13 days of completion the original of the records of duty status and failed to maintain such records for a period of six months in violation of 49 CFR 395.8 (a), (j) and (k).

5. Fifth Claim: 8 Instances of Failing To Retain a Driver Inspection Report for At Least 3 Months in Violation of 49 CFR 396.11(c)(2)

The fifth claim cited in the Notice of Claim charges Respondent with 8 instances in which it failed to retain a driver vehicle inspection report for at least 3 months in violation of 49 CFR 396.11(c)(2). During Cicero's inspection of Respondent, Cicero checked Respondent's files for vehicle inspection reports corresponding to the interstate trips of driver DeVasto of 6/7/90, 6/24/90, 6/28/90, 7/18/90, 7/20/90, 7/23/90, 7/26/90, and 7/31/90 and found no such corresponding vehicle inspection reports on file at Respondent's place of business. (Finding 56). Furthermore, at the hearing, Cicero testified that he had received no vehicle inspection reports from DeVasto. (Cicero Tr. 106). I, therefore, find Respondent in violation of 49 CFR 396.11(c)(2) based on 8 instances in which it failed to retain a driver inspection report for at least 3 months.

B. Assessment of Penalties

The statutory scheme pertaining to civil penalties in FHWA motor carrier safety cases is set forth in 49 U.S.C. 521. 49 U.S.C. 521 provides for a hierarchal approach. The statute provides that "recordkeeping violations" may result in civil penalties not to exceed $500 per offense and that each day of a violation shall constitute a separate offense, except that the total of civil penalties assessed against any violator for all offenses relating to any single violation shall not exceed $2,500. The next level of assessment is a "serious pattern of safety violations" which may result in civil penalties not to exceed $1,000 for each offense; except that the maximum fine for each such pattern of safety violations shall not exceed $10,000. The most serious type of violations are "substantial health or safety violations" which could reasonably lead to, or have resulted in, serious personal injury or death. Such violations may result in civil penalties not to exceed $10,000 for each offense.

49 U.S.C. 521(c) provides that the amount of a civil penalty shall be determined by taking into account the following nine factors: (1) Nature of the violation; (2) Circumstances of the violation; (3) Extent of the violation; (4) Gravity of the violation; (5) Degree of culpability; (6) History of prior offenses; (7) Ability to pay; (8) Effect on ability to continue to do business; and (9) Such other matters as justice and public safety may require. Furthermore, the June 23, 1989 Revised Civil Penalty Guidelines of the FHWA (the "Guidelines") enumerate and discuss these nine factors. The Guidelines also recommend that written documentation of how penalty assessments are determined should be kept in order to promote greater confidence in the motor carrier enforcement program. The Guidelines specifically state:

> The FHWA motor carrier safety and hazardous materials enforcement program has been criticized for failure to adequately document the basis for initial and final assessments in civil forfeiture cases. Greater confidence in the integrity and fairness of the enforcement program will be fostered if the case files contain documentation explaining in detail the basis for the assessments. (CX–62).

In administrative law cases, the burden of proof in establishing a violation and the appropriate penalty is on the government agency. *Bosma* v. *United States Dep't. of Agric.*, 754 F.2d 804 (9th Cir. 1983). The burden of proof, in its primary sense, rests on the party who asserts the affirmative of an issue; and it remains there until termination of the action. *Kalkowski* v. *Ronko, Inc.*, 424 F. Supp. 343 (N.D. Ill. 1976). Thus, the burden of proof is on the FHWA to establish the justification for and amount of the penalties assessed in this action.

In recommending penalties to be assessed against Respondent for the violations set forth in the Notice of Claim, Fred Gruin, the FHWA's Federal Programs Manager, relied on the Guidelines devised by the agency for that purpose. (CX–62; Gruin, Tr., p.

[10] I note that in its Reply Brief, Respondent contends that 49 CFR 395.8 imposes the duty upon the carrier to require its drivers to complete logs and that the duty to transmit the logs is clearly imposed upon the drivers. Respondent further contends that this is entirely appropriate since it is the driver who has possession and control of the logs at that point. (RRB, p. 4). I disagree with Respondent's contention that under the Regulations a carrier has no responsibility until the logs are in its possession.

145). At the hearing, Mr. Gruin testified that although he considered all nine factors listed in 49 U.S.C. 521(c) and the Guidelines in calculating Respondent's penalty assessment, he kept no written documentation or checklist of his penalty calculations. (Gruin, Tr. 155).

Thus, Complainant has acknowledged that it failed to comply with its own Guidelines with respect to documenting its penalty assessments. A government agency's failure to comply with its own internal guidelines or regulations can be grounds for invalidating its action. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959).[11]

Based on the holding in *Vitarelli*, I conclude that Complainant's recommendations as to the amount of penalties with regard to each of the claims set forth in the Notice of Claim should be invalid and of no effect since Complainant did not comply with its own guidelines with respect to documenting its penalty assessments. Consequently, in rendering my Decision with regard to penalties, I have independently taken into account each of the nine factors set forth in 49 U.S.C. 521(c) and the Guidelines, and have independently determined the appropriate penalty. I will now discuss each of such nine factors.

1. Nature of the Violation

This factor is taken into account in determining the appropriate category of penalty. Here, Complainant has charged Respondent with substantial health and safety violations (49 CFR 391.15(a) and (b)); a serious pattern of safety violations (49 CFR 395.3(b)(2)); and recordkeeping violations (49 CFR 394.9(a); 49 CFR 395.8 (a), (i), and (k); 49 CFR 396.11(c)(2)).

2. Circumstances of the Violation

The Guidelines state that mitigating and aggravating variables are factors concerning the conditions, factors, or events accompanying the violations that reflect on the culpability of Respondent. The Guidelines state that persistent and serious noncompliance reflects a disregard for safety, which in turn will increase the frequency of imminently hazardous conditions and eventually result in accidents. The Guidelines further state that timely correction of violation patterns may bring about compliance and prevent the imminent hazards from developing. Here, mitigating factors exist which indicate that Respondent attempted to timely correct violations so as to bring about compliance and prevent the imminent hazards from developing. I have taken these mitigating factors into account in assessing penalties against Respondent.

Following the July, 1990 compliance review of Respondent, Peter Vaz, President of Respondent, sent a letter dated October 11, 1990 to Mr. Fred Gruin, Federal Programs Manager for Region One, Motor Carrier Safety, Albany, New York, setting forth changes to be implemented at Respondent so as to ensure future compliance with the Regulations. (RX–3). This letter stated that some of the changes which would take place were as follows: an allotment of more office space and two additional employees for a department that will handle only D.O.T. and insurance paperwork; a reduction in Respondent's fleet by a third so as to decrease Respondent's need for drivers and so as to allow Respondent to retain the best drivers to drive the new fleet of tractors that it has ordered and for which it expects delivery on January 1, 1991; the development of a separate division for "brokerage" so as to take up the slack during peak demands for equipment and drivers and so as to allow Respondent to comply with driver requirements for logs more effectively; and the installation of a new computer and software paperwork to expedite the flow of information and to help meet D.O.T. paperwork requirements more effectively.

At the end of his October 11, 1990 letter to Mr. Gruin, Mr. Vaz stated his commitment to achieve total compliance with Department of Transportation regulations.

I view the specific changes set forth in Peter Vaz's October 11, 1990 letter as evidence that after the July, 1990 compliance review, Respondent sought to achieve full compliance with the Regulations. Furthermore, Mr. O'Brien, Respondent's safety consultant, testified that subsequent to the July, 1990 compliance review, Respondent was in approximately 100% compliance with the Regulations. (O'Brien, Tr. 220). While Mr. O'Brien, as Respondent's safety consultant, obviously is not a disinterested witness, his statement was not challenged by Complainant.

With regard to the charges against Respondent of using disqualified drivers in violation of 49 CFR 391.15(a) and (b), I believe there are specific mitigating factors. First, after receiving notice of Bradley's disqualification on October 17, 1989, Judith Vaz, corporate clerk for Respondent, promptly called and advised Respondent's dispatcher, Richard DeMoranville, that Bradley had been disqualified from driving in interstate commerce and could not be used anymore. (Finding 30). Furthermore, on or about October 18, 1989, Judith Vaz told Kathleen Botelho, a secretary for Respondent, that Bradley had been disqualified from driving in interstate commerce and on that same day, Ms. Botelho notified DeMoranville that Bradley had been disqualified from driving in interstate commerce. (Finding 31). Second, subsequent to DeMoranville's dispatching of disqualified drivers, he was demoted from his position as dispatcher and was temporarily separated from the company of a period of about three months, before being reinstated as an owner-operator. (Finding 35). Third, after DeVasto and Respondent were sent a letter dated May 14, 1990 from the FHWA regarding DeVasto's disqualifcation, Ms. Botelho, on May 18, 1990, informed dispatcher Johansen and corporate clerk Judith Vaz of DeVasto's disqualification. (Finding 37). Fourth, as a result of Johansen's dispatching disqualied drivers, Peter Vaz, president of Respondent, sent Johansen a letter reprimanding him for his actions and stating that only qualified drivers who met all of the requirements of the Department of Transportation and who were on the company's list of approved drivers could be used. (Finding 45). Fifth, as a result of Johanson's conduct in dispatching disqualified drivers, a letter was sent to all of Respondent's employees stating that it was the goal of Respondent to achieve 100% compliance with the Department of Transportation regulations and that Mr. Pereira, the company's safety director, would be producing daily a list of available qualified drivers and that only those individuals on the list could be dispatched. (Finding 46).

I view the changes set forth in Peter Vaz's October 11, 1990 letter and the aforementioned five factors as mitigating factors.

3. Extent of the Violation

The Guidelines explain that the extent of the violation depends on its magnitude, scope, frequency, and range. The Guidelines provide that to quantify these factors, two main points should be considered:

(1) The sampling methods required in chapter 7 of the OMCS Training Text. The closer the sampling method is followed, the more accurate the picture given, and the greater the extent of the violation; the less the sampling method is followed, the more distorted the

[11] In *Vitarelli*, a former employee of the Department of Interior brought suit against the Secretary of Interior for reinstatement and a declaration that his dismissal had been illegal and ineffective. The Court held that the employee's dismissal was in fact illegal and of no effect since the Department of Interior did not follow applicable agency guidelines in dismissing the employee.

picture given, and the lesser the extent of the violation.

(2) Ratio of violations found to the number of records, vehicles or employees checked. The larger this ratio, the larger the extent; the lesser this ratio, the smaller the extent.

I agree with Respondent that Complainant did not introduce any evidence concerning Cicero's compliance with the sampling methods of the OMCS Training Text or any evidence as to what those sampling methods recommend. (RPB, p. 21). Furthermore, the OMCS Training Text was not made part of the evidentiary record. In addition, I agree with Respondent that Cicero did not keep accurate track of the number of logs that were checked. Cicero's estimate was 265 logs (Cicero, Tr. 96) while O'Brien estimated that the number was closer to 1,000 during the 17+ days of the investigation. (O'Brien, Tr. 199). Consequently, I agree with Respondent that it is difficult, if not impossible, to assign any weight to this factor. Therefore, I find that Complainant has failed to show the magnitude, scope, frequency, and range in accordance with this own guidelines.

4. Gravity of the Violation

The Guidelines indicate that gravity is an evaluation of the seriousness of the violation as measured by the likelihood of the occurrence of the event against which a standard is directed, and the severity or seriousness of the event if it occurred or were to occur. The Guidelines further indicate that the probability of occurrence should be judged on a scale of "unlikely" to "reasonably likely" to "highly likely" to "occurred." The severity of occurrence should be judged on a scale of "little" to "moderate" to "severe" potential or actual impact on public safety and health.

With regard to Respondent's use of disqualified drivers in violation of 49 CFR 391.15 (a) and (b), although no serious injury or death did in fact occur, serious injury or death was "reasonably likely" or "highly likely" to occur as a result of Respondent's frequent and recurring use of disqualified drivers. With regard to the severity of such occurrences, there was "severe" potential impact on public safety and health because Bradley, DeVasto, and MacDonald were disqualified for safety reasons. (CX–20; CX–22; CX–69). I agree with Complainant that the purpose of the regulation is to remove unsafe drivers from the road and to protect the traveling public from injury or death. (CPB, p. 34). Repeatedly breaking the speed limit, repeated vehicular accidents, and driving with suspended licenses are serious safety matters and the fact that disqualified drivers were continually dispatched by Respondent constitutes a severe potential impact on public safety. (CPB, p. 34). Thus, I believe that Bradley, DeVasto and MacDonald posed serious threats to the traveling public.

With regard to respondent's culpability relating to its violations of 49 CFR 391.15 (a) and (b), Respondent has been "moderately culpable." The Guidelines state that "moderate culpability" exists when a violator knew or should have known of the violative condition, but there are some mitigating factors. As discussed in Section II(A)(1)(b) of this Decision, Respondent "should have known" that disqualified drivers were being dispatched to drive in interstate commerce. However, as discussed previously, there are some mitigating factors.

With regard to recordkeeping violations, the Guidelines provide that instead of determining gravity based on the probability and severity of occurrence, the gravity shall be determined based upon the extent to which enforcement is obstructed by the violation. For instance, failure to maintain records of duty status hinders the discovery of hours of service violations. Here, Cicero's investigation of Respondent was not hindered due to the fact that DeVasto possessed his records of duty status.

5. Degree of Culpability

The Guidelines provide that culpability is an evaluation of the blameworthiness of the violator's conduct or actions. While Complainant alleges that Respondent exhibited "high culpability," Respondent alleges that no culpability should be assigned to Respondent. I do not agree with either party's contention. Because of the mitigating factors set forth in Section II(B)(2) of this Decision ("Circumstances of the Violation"), the level of culpability exhibited by Respondent was "low to moderate."

6. History of Prior Offenses

The Guidelines consider a carrier's history of prior offenses to be a major factor in the determination of an appropriate penalty because such history provides an indication of both an awareness of the safety obligations and the willingness to comply with the Regulations.

In its Post Hearing Brief, Complainant takes the position that the prior audits of Respondent constitute a history of prior offenses, even when Respondent did not pay a fine. Complainant notes that Respondent had previously been cited and assessed penalties for its failure to report accidents and violations of the 70 hours in 8 days regulations, and it had been cited without penalty for using disqualified drivers and failure to have on file records of duty status and vehicle inspection reports. (*Used Equipment Sales*, FHWA Docket Nos. 89–1 and 89–181). Complainant further notes that Respondent had been cited and penalties assessed for dissimilar violations of the Regulations including making false entries on records of duty status. (Used Equipment Sales, FHWA Docket Nos. 89–1 and 89–181).[12]

Complainant has not shown that such audits of Respondent constitute a history of prior offenses. I note that neither the Regulations nor 49 U.S.C. 3102, the authorizing statute pursuant to which the Regulations were promulgated, provide that as a matter of law the payment of an assessment constitutes a finding of a violation of the Regulations. Furthermore, in the absence of an admission of liability on the part of Respondent or an explicit finding of a violation by Respondent, the payment by Respondent of an assessment is in the nature of a compromise or settlement agreement. Case law indicates that a compromise agreement is substituted for the antecedent claim and the antecedent claim is extinguished. *U.S.* v. *Baus*, 834 F.2d 1114 (1st Cir. 1987). Case law further indicates that a valid compromise and settlement is final, conclusive, and binding upon the parties, and regardless of what the actual merits of the antecedent claim may have been, they will not afterward be inquired into and examined. *American Sec. Vanlines, Inc.* v. *Gallagher*, 782 F.2d 1056 (D.C. Cir. 1986). In the absence of an explicit finding of a violation by Respondent, or an admission of liability on the part of Respondent, I can not conclude that the previous audits of Respondent constitute prior offenses.

7. and 8. Ability To Pay and Ability To Do Business

The Guidelines provide that the violator's size, gross revenues, resources, and the standards in 49 CFR part 103 (Standards for Compromise of Claims: Inability To Pay) should be taken into consideration in making a determination whether to charge the total potential assessment. While Respondent has acknowledged that it is

[12] FHWA Docket Nos. 89–1 and 89–181 were not made part of the record, were not published, and were not otherwise publicly available. Therefore, I can not consider these dockets in making a determination of prior offenses.

a small carrier, Respondent has not asserted inability to pay or that payment of assessed penalties would threaten its ability to stay in business.

9. Such Other Matters As Justice and Public Safety May Require

The Guidelines provide that other matters, not specifically covered by one of the other factors, can either be aggravating or mitigating and should be taken into account, if, in the interests of justice and public safety, they require either a reduction or an increase in the amount of the assessment in order to achieve the purposes of the Motor Carrier Safety Act. I consider Respondent's cooperation with the FHWA in its compliance review and Respondent's positive attitude towards compliance with the Regulations to be mitigating factors which should reduce the amount of the assessment against Respondent. Furthermore, I agree with Respondent that another factor which should be taken into consideration in assessing penalties against Respondent is the degree to which penalties are consistent with those assessed against other carriers for similar alleged violations. (RPB, p. 25). The Guidelines indicate that their intent is to promote greater consistency among the Regions, to prevent "unwarranted disparity," and "to promote a fair and equitable enforcement process." Additionally, at the hearing, Mr. Gruin acknowledged that consistency in enforcement action is a desirable goal. (Gruin, Tr. 169–170).[13]

With regard to the charge against Respondent of thirteen instances of using disqualified drivers to drive in interstate commerce, Complainant seeks a penalty against Respondent in the amount of $65,000 ($5,000 per violation). At the hearing, Mr. Gruin was examined concerning recent penalty collections announced by Region One. Respondent further discussed such collections in its Post Hearing Brief.

In Docket No. 91–014 Complainant collected $1,000 from a carrier of medical and hazardous waste for one instance of using a disqualified driver. (Gruin, Tr. 172, 173). In Docket No. 91–154 Complainant collected a total of $1,700 from Carl Harz Furniture Co. for, among other things, using a physically unqualified driver, failing to report an accident, and failing to require preparation of vehicle inspection reports. The disqualified driver had vision in only one eye. (Gruin, Tr. 173, 174). In Docket No. 91–032 Complainant collected $40,500 from a carrier, Lisanti Foods, for a large number of violations which were deemed so aggravated that the FHWA for the first time in its history also exercised its power to issue a cease and desist order. (Gruin, Tr. 173). In Docket No. 91–139 the FHWA collected $1,300 from a carrier for using a driver who was an insulin dependent diabetic and, therefore, physically unqualified. (Gruin, Tr. 175–176). In docket No. 89–316, the FHWA had the U.S. Attorney file a civil action to collect $6,000 from Northeast Bulk Cartage Inc. for a variety of infractions, including use of a driver with a false medical examiner's certificate, failure to report an accident, and hours of service violations of the 10-hour rule, the 15-hour rule and the 70-hour rule. (Gruin, Tr. 177). In Docket 90–248, Complainant collected a total of $24,500 for violations which included use of a disqualified driver, failing to require drivers to submit logs and failing to require vehicle inspection reports. (Gruin, Tr. 177).

I have considered the alleged violations and the aggravating factors in the aforementioned cases, and I conclude that the penalty sought by Complainant is excessive, whether viewed in its totality or for each separate violation. For example, assessing a $5,000 penalty against Respondent for each instance of using a disqualified driver is excessive in comparison to the penalties assessed against the carriers in the aforementioned cases. For example, the use of a driver who is initially physically unqualified to drive is more serious than the use of a subsequently disqualified driver, yet in Docket No. 91–139 the FHWA collected only $1,300 from the carrier for using an insulin dependent diabetic, and therefore, physically unqualified driver. Furthermore, I note that in Docket No. 91–032, while the violations were so aggravated that the FHWA exercised its power to issue a cease and desist order, the FHWA collected a total of $40,500 from the carrier, an amount which is less than the total of $65,000 ($5,000 per penalty) which the FHWA is seeking here for Respondent's 13 instances of using disqualified drivers to drive in interstate commerce. A total penalty of $65,000 against Respondent for using disqualified drivers is excessive, especially in the absence of certain aggravating factors which might have caused the FHWA to issue a cease and desist order.

C. Substantial Health and Safety Violations—Penalty for Violations of 49 CFR 391.15 (a) and (b)

The Notice of Claim states that the FHWA had found that Respondent's violations of 48 CFR 391.15 (a) and (b) relating to Respondent's use of disqualified drivers constituted substantial health and safety violations. The guidelines provide that substantial health or safety violations should be charged when the likelihood of resultant serious injury or death is demonstrable. Furthermore, 49 U.S.C. 521(2) provides that if the Secretary determines that a substantial health or safety violation exists or has occurred which could reasonably lead to, or has resulted in serious personal injury or death, the Secretary may assess a civil penalty not to exceed $10,000 for each offense. Additionally, the Guidelines set forth a Violation Schedule which provides that substantial health and safety violations should be charged when the likelihood of resultant injury or death is demonstrable through the occurrence of accidents, the seriousness of the condition, or the disposition of the carrier toward compliance as determined in a compliance review.

I consider the dispatching of disqualified drivers to drive in interstate commerce to be a serious matter. While Respondent contends that the disqualifications of drivers Bradley, DeVasto and MacDonald resulted from failure to pay fines or appear in court, the evidence shows that Bradley and DeVasto were disqualified for serious driving infractions. Bradley was cited for various driving infractions for which he failed to pay fines and continued to drive without a license. (CPB, p. 13; CX–20D–L). On many occasions, Bradley was cited for speeding violations, often for driving 20 or more miles over the speed limit. (CX–20D; G, I, J and K). With regard to DeVasto, Complainant correctly points out that while DeVasto's driving record does show an entry for his failure to pay excise taxes, it also indicates that he was involved in numerous vehicle accidents, including his leaving the scene of a personal injury accident, that he refused to take a chemical test, that he had speeding violations, and that he was in the DWI alcohol program. (CX–64).

With regard to MacDonald, Complainant notes that his disqualification problems concern his suspended Vermont license. (CX–64, CX–11, CX–13). Complainant has failed, however, to set forth evidence

[13] Complainant argues that each case must be considered on its own merits. While that is true, consistency and fairness is required. Courts have held in other contexts that federal agencies must be consistent in the application of sanctions. *Essery* v. *Dept. of Transportation*, 857 F.2d 1286 (9th Cir. 1988).

establishing why MacDonald's Vermont license was suspended. Thus, although MacDonald was in fact disqualified to drive in interstate commerce, I am unable to conclude that MacDonald's disqualification constituted a serious driving infraction.

Complainant seeks a penalty of $65,000 ($5,000 each) for the 13 violations of 49 CFR 391.15 (a) and (b). In its Post Hearing Brief, Respondent contends that, although Respondent is charged with using three disqualified drivers, Complainant improperly seeks to impose penalties for sequential days of the alleged violations, for a total of 13 separate violations. (RPB, p. 7). Respondent contends that this attempt to impose cumulative per diem penalties goes beyond the Administrator's authority under 49 U.S.C. 521(b)(2). (RPB, p. 7). Respondent notes that while the statute provides that recordkeeping violations may be assessed a civil penalty not to exceed $500 for each offense and specifically provides that "each day of a violation shall constitute a separate offense," no similar language appears for violations other than recordkeeping matters. (RPB, p. 8). Respondent concludes that Complainant has exceeded statutory authority in attempting to impose per diem penalties upon the alleged violations of 49 CFR 391.15 (a) and (b).

I do not agree with Respondent's contentions. Each separate dispatch of an unqualified driver, cited in the Notice of Claim, constitutes a separate and distinct offense in violation of 49 CFR 391.15 (a) and (b). 49 U.S.C. 521(2) provides that if the Secretary determines that a substantial health or safety violation exists, the Secretary may assess a civil penalty not to exceed $10,000 for "each" offense. Where a statutory penalty is imposed for "each" offense, multiple penalties are recoverable for a multiplicity of occurrences subject to such penalty. *People* v. *Abramson*, 101 N.E. 849, (N.Y. App. Div. 1913). Thus, Respondent may be assessed a penalty for each of the 13 violations of 49 CFR 391.15 (a) and (b).

After taking into account the nine factors set forth in 49 U.S.C. 521(c) and the Guidelines, and after taking into account mitigating factors with regard to Respondent's violations of 49 CFR 391.15 (a) and (b), I assess penalties of $2,500 for each of the five dispatches of Bradley and $2,500 for each of the 5 dispatches of DeVasto. With regard to MacDonald, I again note that because of Complainant's failure to set forth evidence establishing why MacDonald's Vermont license had been suspended, I am unable to conclude that MacDonald's disqualification constituted a serious driving infraction and, therefore, I assess penalties of $1,500 for each of the three dispatches of MacDonald. Thus, I assess a total penalty in the amount of $29,500 against Respondent with regard to its 13 violations of 49 CFR 391.15 (a) and (b).

D. Serious Pattern of Safety Violations—Penalty for Violations of 49 CFR 395.3(b)(2)

The Notice of Claim states that the FHWA had found that Respondent's violations of 49 CFR 395.3(b)(2) constitute a serious pattern of safety violations which subjects Respondent to a penalty of $2,000 ($1,000 each) for the two violations. The legislative history of the Motor Carrier Safety Act (the "Act") has largely determined the meaning of "pattern" in the statutory context. The Committee on Commerce, Science and Transportation (S.R. 98–424) stated that a "serious pattern of safety violations" are violations that are not isolated human errors, but are tolerated patterns of equipment violations of operative conduct that any responsible business entity could detect and correct if it wanted to meet its full safety responsibility to the public. Furthermore, the Guidelines provide that while a pattern is more than an isolated violation, a pattern does not require a prescribed number of violations. "[I]f violations are continuing, then a clear pattern case will have been established * * *" (*Tonawanda Tank Transport Service, Inc.*, Docket No. R1–88–130, Final Order dated July 5, 1990; *see also Drotzmann, Inc.*, Docket No. R10–89–11, Final Order dated June 20, 1990, p. 2). Thus, a "serious pattern" under the Act connotes violations that are both repeated and detectable by reasonable diligence.

Here, I find Respondent's two violations of 49 CFR 395.3(b)(2), in requiring or permitting driver Raposa and driver DeMoranville to drive after having been on duty more than 70 hours in 8 consecutive days, to constitute a serious pattern of safety violations. I find that more than one isolated violation exists and that the violations could have been detected with a minimum of reasonable effort. Additionally, I consider Respondent's company policy that some violations of the 70-hour regulation would occur, and that when such violations did occur Respondent would take responsibility (Finding 54), to evidence a conscious disregard on the part of Respondent to comply with the hours of service regulation.[14]

Based upon my finding that Respondent's two violations of 49 CFR 391.15 (a) and (b) constitute a serious pattern of safety violations and that there are no specific mitigating circumstances with respect these offenses, I hereby assess a penalty of $2,000 ($1,000 for each violation) against Respondent.

E. Recordkeeping Violations—Penalties for Violations of 49 CFR 395.8 (a), (i) and (k) and 49 CFR 396.11(c)(2)

Respondent's recordkeeping violations, as cited in the Notice of Claim, include its failure to report an accident, in violation of 49 CFR 394.9(a); its failure to require a driver to forward within 13 days of completion the original of the record of duty status and its failure to maintain such records for a period of six months, in violation of 49 CFR 395.8 (a), (i), and (k); and its failure to retain a driver vehicle inspection report for at least 3 months, in violation of 49 CFR 396.11(c)(2). The Guidelines provide that recordkeeping violations are violations of the administrative requirements of the Regulations, including failure to make, require or keep records or the falsification of entries thereon, required by the Regulations. The Violation Schedule of the Guidelines provides that failure to produce accurate records to be prepared, verified or maintained by the carrier, result in violations which should be charged against the carrier and that failure of the driver to prepare and maintain records as required result in violations which should be charged against the driver only on the roadside. The Violation Schedule further provides that it is primarily the carrier's responsibility to assure compliance by the driver.

With regard to the charge against Respondent of failing to report an accident in violation of 49 CFR 394.9(a), I find no liability on the part of Respondent for the reasons discussed in Section II(A)(2) of this Decision.

With regard to the eight instances of failing to require a driver to forward within 13 days of completion the original of the record of duty status and

[14] In its Post Hearing Brief, Complainant takes the position that prior audits of Respondent, whereby Respondent was either assessed penalties for violating the 70-hour regulation or was merely cited for violating such regulation, warrant a finding that Respondent's violations of 49 CFR 395.3(b)(2) constitute a serious pattern of safety violations. For the reasons set forth in section II(B)(6) of this Decision ("History of Prior Offenses"), these prior audits are not evidence of prior violations and thus cannot be considered in determining whether there is a serious pattern of safety violations.

failing to maintain such records for a period of six months in violation of 49 CFR 395.8 (a), (i) and (k), Complainant seeks a penalty of $4,000 ($500 for each of the eight violations). Complainant also seeks a penalty of $4,000 ($500 for each of the eight violations) with regard to the charge against Respondent of eight instances of failing to retain a driver inspection report for at least 3 months in violation of 49 CFR 396.11(c)(2).

In assessing a penalty against Respondent for the eight violations of 49 CFR 395.8 (a), (i), and (k) and the eight violations of 49 CFR 396.11(c)(2), I agree with Complainant that it is very important that records of duty status and vehicle inspection reports are on file as required at a carrier's principal place of business so that a carrier can monitor, and be monitored, for hours of service violations and for vehicle defects. (CPB, p. 41.) However, the changes implemented by Respondent subsequent to the July, 1990 compliance review (set forth in Peter Vaz's October 11, 1990 letter to Mr. Gruin) constitute mitigating factors which justify imposition of somewhat less than the maximum penalty of $500 per offense. Therefore, I hereby assess a penalty of $3,200 ($400 each) for the eight violations of 49 CFR 395.8 (a), (i), and (k) and $3,200 ($400 each) for the eight violations of 49 CFR 396.11(c)(2).

III. Conclusion

With regard to the first claim, I find Respondent liable for the thirteen instances in which it used disqualified drivers in violation of 49 CFR 391.15(a) and (b) and assess a penalty in the amount of $29,500 for such violations. With regard to the second claim, I find no liability on the part of Respondent with regard to its alleged failure to report an accident in violation of 49 CFR 394.9(a) and, therefore, assess no penalty with regard to this claim. With regard to the third claim, I find Respondent liable for the two instances in which it required or permitted drivers to drive after having been on duty more than 70 hours in 8 consecutive days in violation of 49 CFR 395.3(b)(2) and assess a penalty in the amount of $2,000 for such violations. With regard to the fourth claim, I find Respondent liable for the eight instances in which it failed to require a driver to forward within 13 days of completion the original records of duty status and its failure to maintain such records for a period of six months in violation of 49 CFR 395.8 (a), (i) and (k) and assess a penalty in the amount of $3,200 for such violations. With regard to the fifth claim, I find Respondent liable for the eight instances in which it failed to retain a driver inspection report for at least 3 months in violation of 49 CFR 396.11(c)(2) and assess a penalty in the amount of $3,200 for such violations. Thus, I assess a total penalty in the amount of $37,900 against Respondent.

Robert L. Barton, Jr.,
Administrative Law Judge

Appendix

A. 49 CFR 391.15 Disqualification of Drivers

49 CFR 391.15(a) provides that: A driver who is disqualified shall not drive a commercial motor vehicle. A motor carrier shall not require or permit a driver who is disqualified to drive a commercial motor vehicle.

49 CFR 391.15(b) provides that: A driver is disqualified for the duration of his loss of his privilege to operate a commercial motor vehicle on public highways, either temporarily or permanently, by reason of the revocation, suspension, withdrawal, or denial of an operator's license, permit, or privilege, until that operator's license, permit, or privilege is restored by the authority that revoked, suspended, withdrew or denied it.

B. 49 CFR 394.9 Reporting of Accidents

49 CFR 394.9(a) provides that: Within 30 days after a motor carrier learns or should have learned that a reportable accident occurred, the motor carrier must file the original and two copies of Form MCS 50–T (property) or Form MCS 50–B (passengers), completed as specified in paragraph (b) of this section, with the Director of the Regional Motor Carrier Safety Office of the Federal Highway Administration region in which the carrier's principal place of business is located.

C. 49 CFR 395.3 Maximum Driving and On-Duty Time

49 CFR 395.3(b)(2) provides that: No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates motor vehicles every day of the week.

D. 395.8 Driver's Record of Duty Status

49 CFR 395.8(a) provides that: Every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24-hour period using the methods prescribed in either paragraphs (a) (1) or (2) of this section.

49 CFR 395.8(i) deals with filing driver's record of duty status and provides that: The driver shall submit or forward by mail the original driver's record of duty status to the regular employing motor carrier within 13 days following the completion of the form.

49 CFR 395.8(k) deals with retention of driver's record of duty status and provides that: Driver's records of duty status for each calendar month may be retained at the driver's home terminal until the 20th day of the succeeding calendar month. Such records shall then be forwarded to the carrier's principal place of business where they shall be retained with all supporting documents for a period of 6 months from date of receipt.

E. 49 CFR 396.11 Driver Vehicle Inspection Report(s)

49 CFR 396.11(c)(2) deals with corrective action and provides that: Prior to operating a motor vehicle, motor carriers or their agent(s) shall effect repair of any items listed on the vehicle inspection report(s) that would be likely to affect the safety of operation of the vehicle. Motor Carriers shall retain the original copy of each vehicle inspection report and the certification of repairs for at least 3 months from the date the report was prepared.

Final Order; S–W Mills, Inc.,

This matter comes before me upon a motion by Respondent S–W Mills, Inc. ("S–W Mills"), for an involuntary dismissal, and a cross-motion of the Regional Director, Region 5, opposing S–W Mills' motion and requesting a final order. The parties have submitted arguments and have asked that I determine whether S–W Mills qualifies for exemptions to the Federal Motor Carrier Safety Regulations ("FMCSRs") which would relieve it of liability for alleged violations of these regulations. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier and Hazardous Materials Proceedings, 49 CFR part 386.

Background

S–W Mills is an interstate carrier located in Archbold, Ohio. It "owns farms from which it harvests hay, rents fields for the season from which it harvests hay and harvests hay from fields where hay is purchased 'by the ton.'" S–W Mills' Motion to Dismiss at 1. The alleged violations of the FMCSRs involve motor carrier operations relating to S–W Mills' rented fields and fields from which hay is purchased.

An August 1989 safety review resulted in the carrier receiving an "unsatisfactory" rating. After a November 1, 1990, compliance review disclosed numerous violations of the FMCSRs, a notice of claim was sent to S–W Mills on February 19, 1991. The carrier was charged with 22 violations: 21 counts of violating 49 CFR 395.8 (failing to require drivers to make and submit records of duty status), and one count of violating 49 CFR 394.9 (failing to report an accident). The Regional Director assessed a penalty of $350 for each violation, for a total penalty of $7,700.

S–W Mills does not deny that it committed the acts which led to the

charges. Instead, the carrier argues that it is not subject to the regulations in question, raising in its defense two exemptions contained in the regulations: the "farm-to-market agricultural transportation" exemption of 49 CFR 394.1(c) (to both sets of charges), and the "100 air-mile radius" exemption of 49 CFR 395.8(1) (to the hours-of-service recordkeeping violations only).

The first of these exemptions, for farm-to-market agricultural transportation, provides: "The rules [governing notification and reporting of accidents] do not apply to farm-to-market agricultural transportation as defined in § 390.5." 49 CFR 394.1(c). The definition of farm-to-market agricultural transportation found in § 390.5 states (in pertinent part) that the term includes:

the operation of a motor vehicle controlled and operated by a farmer who:

(a) Is a private motor carrier of property; [and]

(b) Is using the vehicle to transport agricultural products from a farm owned by the farmer, or to transport farm machinery or farm supplies to or from a farm owned by the farmer.

Section 390.5 also defines the term "farmer" as:

* * * any person [including a corporation] who operates a farm or is directly involved in the cultivation of land, crops, or livestock which—

(a) Are owned by that person; or

(b) Are under the direct control of that person.

The second exemption claimed by S–W Mills is found in § 395.8(1). It releases a carrier from the duty to require drivers to submit records of duty status if:

(i) The driver operates within a 100 air-mile radius of the normal work reporting location; [and]

(ii) The driver * * * returns to the work reporting location, and is released from work within 12 consecutive hours * * *.

Discussion

1. The Hours-of-Service Recordkeeping Violations (§ 395.8)

S–W Mills claims that either of the exemptions should excuse it from liability for all 21 violations of § 395.8. Although the farm-to-market exemption is found only in part 394, the carrier contends that the exemption "should apply in the same manner to part 395 as it applies to other parts of the Motor Carrier Regulations." Position of S–W Mills at 4. The Regional Director, on the other hand, notes that S–W Mills does not contend that it is able to find language comparable to 49 CFR 390.5 and 394.1 in the hours-of-service requirements. In his motion for final order, the Regional Director argues that since the exemption is explicitly stated in the accident reporting regulations (part 394), if the exemption were meant also to apply to the recordkeeping requirements, then it would be listed there, as well. Regional Director's Motion at 7.

I find that the regulations do not support the position advocated by S–W Mills. The exemption (as opposed to the definition) for farm-to-market agricultural transportation appears only in part 394. Until 1988, when the regulations were amended, the farm-to-market *definition* also appeared only in part 394. See, *e.g.*, 49 CFR part 394 (1987). No other part, including part 395, contains any reference to the farm-to-market exemption. Based on the record before me, I find that the farm-to-market agricultural transportation exemption of part 394 does not extend to part 395 of the FMCSRs.

As noted earlier, S–W Mills also claims that it is covered by the 100 air-mile exemption to § 395.8. While the parties agree that none of the farms involved in this matter is more than 30 miles from the carrier's factory, and thus fall within subsection (i) of the exemption, S–W Mills admits that its drivers frequently are not released from work within the 12 hours prescribed by the exemption. In fact, I find documented in the record before me driver workdays of 14, 15, and even 17 hours. The carrier argues, though, that the exemption should be interpreted to take into account workers who, like those at S–W Mills, spend only part of their workday driving. S–W Mills' Motion at 4. The Regional Director, on the other hand, argues that the rule does not differentiate between driving and non-driving hours.

Based on the record before me, and a careful study of the regulatory language, I find that the exemption granted by § 395.8(l) is narrow in scope and that S–W Mills does not meet the requirements of the regulation. In order to claim the exemption from the requirement that drivers prepare records of duty status, a carrier must operate within a 100 air-mile radius of its principal place of business and also release its drivers from duty within 12 hours after they report to work. This S–W Mills admits it did not do. Therefore, I conclude that the plain language of both exemptions claimed by S–W Mills to the hours-of-service recordkeeping violations exclude the carrier from their coverage, and consequently I now grant that part of the Regional Director's Motion for Final Order which concerns the 21 counts against S–W Mills for violations of 49 CFR 395.8, and direct S–W Mills to pay the full amount of those claims, $7,350.

2. The Accident-Reporting Violation (§ 394.9)

S–W Mills claims that it was involved in farm-to-market transportation when the unreported accident occurred, and therefore was not required to report the accident to the Regional Office under § 394.1(c). Despite the farm-to-market definition's reference to "a farm *owned by* the farmer" (emphasis added), S–W Mills claims that the exemption should apply to its rental operations because "what is intended by the exemption language in § 390.5 is not ownership of land, but ownership of the crop, and, accordingly, hauling from rented land should also qualify for the exemption." S–W Mills claims that any other result would constitute discrimination against renters and "would certainly be struck down by the courts as * * * arbitrary and capricious. * * *" S–W Mills' Motion at 3.

The Regional Director, while conceding that S–W Mills comes within the definition of "farmer" in § 390.5, argues that "the critical test [of the applicability of the farm-to-market exemption] is whether the land which is the focal point of the transportation is owned by the 'farmer' whose vehicle is involved in the relevant transportation." Regional Director's Motion at 8. In this case, the vehicle which was involved in the unreported accident was on its way to land which was owned by another person, and only rented by S–W Mills. According to the Regional Director, the important point is not who qualifies as a "farmer," but rather, it is the relationship between the farmer and the land involved in the transportation. "The farmer involved in the transportation must also be the owner of the land which is the object of the particular transportation." *Id.*

The Regional Director suggests that the "ownership" criteria for this exemption serves to exclude custom-harvesting operations. *Id.* at 9. The Regional Director further asserts that "S–W Mills may well meet the definition of a custom-harvester * * *." *Id.* However, the record before me does not prove that to be the case, and it is just as likely that S–W Mills is a "tenant farmer." Moreover, I note that the "farm custom operations" exemption referred to by the Regional Director is contained in part 391, not part 394.

I find that as a matter of law that S–W Mills violated the accident-reporting provisions of part 394. S–W Mills

cannot claim the protection of the farm-to-market exemption because that definition excludes from its coverage farmers who are not owners, but instead are renters or purchasers of produce. As noted earlier, none of the farms at issue in this matter were owned by S–W Mills.

Nothing, however, in the record indicates why the farm-to-market definition should be limited to farmers who own the land they farm. I question the need for this limitation, and by copy of this order I direct the Office of Motor Carrier Standards to review this regulation and recommend whether this exemption should be enlarged to encompass those who lease farmland.

While S–W Mills must comply with the accident-reporting regulations, under these circumstances I find that it is not necessary to assess a penalty to induce compliance with these regulations. Accordingly, I decline to order S–W Mills to pay any civil penalty for its failure to report the accidents cited by the Regional Director. S–W Mills is, however, on notice that it is required under the FMCSRs to report accidents like the one giving rise to this dispute until such time as there is a change in the regulations and continued failure to report such accidents may result in the imposition of civil penalty intended to induce compliance with these regulations.

Therefore, *It is Hereby ordered* That the request of Respondent S–W Mills', Inc., for an involuntary dismissal is denied, and the Regional Director's Motion for Final Order is granted. Respondent S–W Mills, Inc., is hereby directed to pay the amount of $7,350 to the Regional Director within 30 days of the date of this order.

Dated: April 21, 1992.

Richard P. Landis,

Associated Administrator for Motor Carriers.

Final Order; Estelle Robertson

This matter comes before me upon a motion by the Regional Director, Region 6, opposing Respondent Estelle Robertson's ("Robertson") request for an administrative hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings ("Rules of Practice"), 49 CFR part 386.

Background

The Respondent, Estelle Robertson ("Robertson"), is an individual operating an exempt for-hire motor carrier engaged in interstate commerce. A May 11, 1989, safety review of Robertson's operations resulted in the company receiving an "unsatisfactory" rating. Robertson was advised of the need to comply with the Federal Motor Carrier Safety Regulations ("FMCSRs") and the company was placed in the Selective Compliance and Enforcement Program ("SCE Program"). A compliance review of Robertson's operations was conducted on May 1, 1990, and, after continuing violations of the FMCSRs allegedly were discovered, the company was served with a notice of claim on June 29, 1990.

The notice of claim cited Robertson for ten violations of 49 CFR 395.8, failing to require drivers to prepare and submit records of duty status. The notice of claim assessed a penalty of $300 for each violation, for a total fine of $3,000.

Robertson, through counsel, filed a timely reply on July 13, 1990. The reply denied each allegation and in addition alleged, without elaboration, that Robertson "was discriminated against and unjustly singled out for investigation and enforcement." Robertson requested an administrative hearing in order "to demonstrate [its] compliance with the Act on each count and to further demonstrate the discriminatory manner in which [it] was investigated and penalized." Robertson further stated that it "* * * had complied with all record keeping regulations of the Motor Carrier Safety Act, having submitted in accordance with said Act, records of duty status of [Robertson's] drivers." Reply of Estelle Robertson at 1. Alternatively, Robertson proposed negotiations to discuss the terms of payment or settlement of the amount claimed. *Id.* at 2. The parties engaged in prolonged settlement negotiations, but no agreement was reached.

The Regional Counsel submitted an Opposition to Request for Hearing and Motion for Final Order on June 24, 1991. Despite Robertson's denials of the violations, the Regional Director argued that no material factual issues were in dispute, and that the Region was entitled to a final order in the full amount of the claim.

Discussion

Robertson has requested an administrative hearing. In order to be granted a hearing, the Rules of Practice require that a respondent demonstrate a material factual issue in dispute. 49 CFR 386.14(b).

Robertson has been charged with failing to require its drivers to prepare records of duty status as required by 49 CFR part 395. Part 395 contains an exemption from its requirement for driver records of duty status, for transportation within 100 air miles of the carrier's place of business. 49 CFR 395.8(1). All of Robertson's operations take place within 80 miles of the company's principal place of business. In order to take advantage of the exemption, however, a carrier must keep records on its drivers' activities and maintain these records for a period of six months. 49 CFR 395.8(l)(v). The Regional Director alleges that since these alternate reports were not kept, Robertson cannot claim the exemption and, thus, Robertson's failure to require its drivers to prepare records of duty status was a violation of the FMCSRs.

Attached to the Regional Director's motion was a signed statement by Estelle Robertson, the company's owner, made at the time of the compliance review in May 1990. In the statement, Ms. Robertson declared that she "did not understand that [she] had to have time records showing" the information required under § 395.8(l)(v), and that she thought that the company's drivers "did not have to prepare the [records of duty status] because they operate within a 100 miles radius." Statement of Estelle Robertson at 3–4; Motion for Final Order at 2. The Regional Director argued that Robertson had been advised to prepare the documents needed to comply with § 395.8(l)(v) as early as the 1989 safety review. The motion went on to declare that despite this warning, the documents were not made available at the time of the 1990 compliance review, nor were they—despite Robertson's assertion to the contrary—submitted to either the regional or the division office. *Id.*

The 100 air-mile radius exemption requires compliance with a condition (the alternate reports), and the record before me indicates that the company did not keep these records. Robertson has failed to produce any evidence to rebut the Regional Director's *prima facie* case. Based on the evidence before me, I find that Robertson has not demonstrated a material factual issue in dispute, and therefore I decline to grant an administrative hearing on this issue.

As for Robertson's allegations of discrimination, the record before me is bare of any plausible grounds on which to base such an assertion. The Regional Director argues in his motion that, "It is completely clear that all agency procedures were followed in this matter. [Robertson] has offered no proof at anytime [sic] nor has [Robertson] made any other statements regarding 'discrimination.'" *Id.* at 3.

A safety review is a standard procedure for carriers subject to the FMCSRs. The 1989 safety review in this

case resulted in an "unsatisfactory" rating for the company. Accordingly, the carrier was entered into the SCE Program. The instant enforcement case resulted when the compliance review disclosed continuing violations.

I find nothing in the record before me to support Robertson's assertion that it is the object of any discrimination. Thus, I find that there are no grounds for a hearing on this issue, either.

Turning to the motion for final order, I find that the record before me fully supports the Regional Director in this matter. Estelle Roberston's statement is properly regarded as an admission that the company did not meet the conditions of the 100 air-mile exemption. Further evidence in support of the Regional Director's position is provided by the affidavit of George T. Walker, a Safety Investigator in the Federal Highway Administration's Louisiana division office. Mr. Walker conducted both the May 1989 and the May 1990 reviews of Robertson's operations, and declares that "there were no [records of duty status] on file with the carrier," and that the alternate records "did not meet the requirements of" § 395.8(l)(v). Finally, I note that there is no evidence in the record of any response by Robertson to the Regional Director's Motion for Final Order.

The record before me fully supports the charges brought against Robertson in the June 29, 1990, notice of claim. I also note that the penalty assessed by the Regional Director in this case is well within the maximum allowed by law. 49 U.S.C. § 521(b). For the reasons set out above, I now grant the Regional Director's motion in the full amount of the claim, $3,000.

Accordingly, *It is hereby ordered* That the request for a hearing by Respondent Estelle Robertson is denied, and the Petitioner Regional Director's request for a final order is granted. Respondent Estelle Robertson is hereby directed to pay the full amount of the claim, $3,000, to the Regional Director within 30 days of the date of this Order.

Dated: April 9, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Wayne P. Bryant and Mark Bryant d/b/a Bryant Trucking; Respondent

Final Order

Docket No. R7–90–020

Background

This matter comes before me upon a motion for final order by the Regional Director, Region 7, opposing Bryant Trucking's (Bryant) request for a hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceeding, 49 CFR part 386.

A notice of claim was issued on February 1, 1990, charging Bryant with three violations of 49 CFR 391.51(a), failing to maintain driver qualification files; two violations of 49 CFR 395.3(a)(1), requiring or permitting a driver to drive more than 10 hours following 8 consecutive hours off duty; three violations of 49 CFR 395.8(a), failing to require every driver to make records of duty status; and two violations of 49 CFR 396.11(a), failing to require every driver to prepare driver vehicle inspection reports.

Bryant replied to the notice of claim on February 13, 1990. The motor carrier requested a hearing, denied all of the charges, and asserted that its operations were "not within the jurisdiction of the Department of Transportation in that they were private farm operations by the owner/operator carrying goods only owned by him, and were not conducted as public operations." Bryant also asserted that the material factual issue in dispute was whether it committed the conduct that is alleged to have violated the regulations.

On June 27, 1991, the Regional Director filed a motion to deny Bryant's hearing request and a motion for final order, stating that Bryant failed to state any material factual issue in dispute. Bryant did not respond to the motion for final order.

Discussion

Under 49 CFR 386.14(b)(2), hearing requests must list all material facts believed to be in dispute. If the Regional Director opposes the hearing request with evidence of the violations, then the motor carrier must do more than just deny the allegations in its pleadings. It must give sufficient evidence to support its assertions. *American Pacific Power Apparatus, Inc.*, No. OR–90–006–075, at 2, (FHWA March 11, 1992) (Final Order). In this case, Bryant produced no affidavits or other evidence to support its assertions.

Bryant's bare assertion that the regulation of its operations is not within the jurisdiction of the Department of Transportation raises a question of law, not fact, and therefore fails to raise a material factual issue in dispute. In any event, this defense is without merit. The evidence before me indicates that Bryant is a private motor carrier of property (49 CFR 390.5) which operates commercial motor vehicles across State lines, and, thus, in interstate commerce. 49 U.S.C. § 3102; 49 U.S.C. App. 2505; 49 CFR 390.3(a). Exhibits 1 and 2 to the 1989 Compliance Review report, Kansas Clearance Certificates, show that Bryant drivers operated in interstate commerce, hauling cattle between Texas and Missouri to Kansas. Exhibit B to the Compliance Review report consists of State driver/vehicle examination reports from Arkansas, Kansas, Missouri, and Tennessee, citing Bryant for numerous violations of the safety regulations and showing that the motor carrier operates in interstate commerce. Finally, none of the statutory or regulatory exemptions to the safety rules appear to apply to Bryant's commercial motor vehicle operations. See, *e.g.*, 49 CFR 390.3(f).

There is also evidence that Bryant had actual knowledge that it must comply with the FMCSRs. By letter dated November 10, 1964, the Interstate Commerce Commission (the Department of Transportation's predecessor agency then regulating interstate truck and bus safety) advised Bryant and Kirkman (now Bryant Trucking) that private carriers of property engaged in interstate commerce are subject to the Federal motor carrier safety regulations.

Because Bryant has failed to carry its burden of showing a material factual issue to be in dispute, its hearing request is denied.

When the motor carrier denies the allegations of the claim letter, but the Regional Director nevertheless seeks to avoid a hearing and obtain a final order, the Regional Director's pleadings must be accompanied by evidence sufficient to establish a *prima facie* case. The Regional Director has met his burden of clearly establishing the essential elements of his claim and Bryant's reply is insufficient to rebut this *prima facie* case.

First, the record before me supports the allegations that Bryant failed to maintain complete driver qualification files for its drivers. Exhibit abstracts 1 through 3 attached to the 1989 Compliance Review report include a signed statement by driver/owner Mark Bryant, stating that the motor carrier "has no driver qualification files for any driver." Also included is a worksheet listing the documents required for each driver qualification filed, showing that the sole driver qualification document produced by Bryant at the compliance review was an expired medical exam certificate for Mark Bryant. This worksheet was signed by Mark Bryant as representing a true and accurate accounting of Bryant's driver qualification files.

Second, the Regional Director has met his burden of proving the two allegations that Bryant required or permitted its drivers to drive more than

10 hours following 8 consecutive hours off duty. Compliance Review report exhibit 4, the records of duty status for driver Mark Bryant for August 7–8, 1989, clearly reveals that Mr. Bryant drove 18 hours following 8 hours off duty. Similarly, exhibit 5, Mr. Bryant's August 20–21, 1989, records of duty status, shows that Mr. Bryant drove 19.5 hours following 8 consecutive hours off duty.

Third, the record supports the allegations that Bryant failed to require driver Kent Craig to make records of duty status. Exhibits 6 through 8 include trip documents showing that Mr. Craig operated a motor vehicle for Bryant in interstate commerce on May 16, June 21, and July 9, 1989. Also included is a list of the motor carrier's interstate trips, their dates, and the drivers. This list, which cited the three trips by Mr. Craig, was signed by Mark Bryant, certifying that it was true and accurate. Finally, in his signed statement taken at the compliance review, Mark Bryant stated, "We do not have any records of duty status for Kent Craig."

Finally, the evidence provided by the Regional Director supports the charges that Bryant failed to require driver Mark Bryant to prepare vehicle inspection reports. Exhibits 9 and 10 include a signed statement of Mark Bryant declaring that the motor carrier did not have any daily vehicle condition reports because it does not require their completion.

The Regional Director assessed a total penalty of $3,600 for the 10 violations: $400 for each of the three violations of § 391.51(a); $500 for both of the violations of § 395.3(a)(1), finding that these violations constituted a serious pattern; $300 each for the three violations of § 395.8(a); and $250 each for the two violations of § 396.11(a). These amounts are well within the statutory maximums. 49 U.S.C. § 521(b).

I find that the violations fully warrant the assessed penalty. Bryant has presented no evidence which would warrant mitigation of the amount, and the driver/vehicle enforcement records of several States reveal that Bryant has been repeatedly cited for numerous safety violations, yet it has done little to cure this noncompliance.

I also find that the 3 violations of § 395.3(a)(1) constitute a serious pattern of safety violations. The state enforcement reports include citations for violations of the 10-hour rule by Bryant drivers in 1986 in Kansas, and in 1989 in Tennessee. "If violations are continuing, then a clear pattern case will have been established."

Tonawanda Tank Transp. Serv., Inc., 55 FR 43279 (FHWA 1990) (Final Order).

It is Hereby Ordered that Bryant Trucking's request for a hearing is denied, the Regional Director's request for a final order is granted, and Bryant Trucking is directed to pay the sum of $3,600 to the Regional Director, Region 7, within 30 days of this order.

Dated: April 9, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

James Guest Respondent; Final Order

Docket No. 91–GA–025–SA

Introduction

This matter comes before me upon a motion by the Regional Director, Region 4, opposing James Guest's (Guest), request for a hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

By notice of claim dated March 25, 1991, the Regional Director charged motor carrier Guest with one violation of 49 CFR 387.7(b), operating a motor vehicle without having the required minimum levels of financial responsibility; six violations of 49 CFR 391.51(a), failing to maintain driver qualification files in accordance with 391.51(c); two violations of 49 CFR 394.9(a), failing to report an accident, and eleven violations of 49 CFR 395.8(a), failing to require drivers to maintain records of duty status. The Regional Director assessed a total penalty of $8,200.

On April 9, 1991, Guest replied to the notice of claim and requested a hearing. The motor carrier denied that it operated a motor vehicle without the minimum level of financial responsibility, and asserted that "some of the driver files [were] complete and some of the log books were complete." Guest did not provide any affidavits or other evidence in support of its hearing request and denials.

The Regional Director responded on August 6, 1991, opposing the hearing request and requesting a final order. On December 20, 1991, the Regional Director filed a supplemental motion, a declaration by safety investigator Anthony Dixon, and several exhibits documenting the charges against Guest. Guest did not reply to the motion for final order or the supplemental motion.

Background

These charges resulted from a February 13, 1991, compliance review of Guest which revealed several violations of the Federal Motor Carrier Safety Regulations, 49 CFR 350–399. At the time of the review, Mr. James Guest, Sr., president of Guest, gave a written statement to safety investigator Dixon, in which Mr. Guest stated that he was unable to provide any more driver qualification files than were documented on a checklist prepared by Dixon. Mr. Guest also stated that he was unable to provide more than approximately 22 driver records of duty status out of the 150 sought by Mr. Dixon.

The driver checklist prepared by Mr. Dixon, which apparently documented the specific items missing from Guest's driver qualification files, was misplaced and therefore was not forwarded by the Regional Director to the Associate Administrator. To reconstruct the missing checklist, the Regional Director submitted a declaration by Mr. Dixon. This affidavit stated that "the lists of missing items appearing in abstracts #2–7 accurately reflect the list of missing items which appeared in the checklist." Declaration of Anthony L. Dixon, at 2. Exhibit abstracts 2 through 7 describe the specific documents required to be in each driver qualification file but which were missing from the files of 6 Guest drivers.

The Regional Director also provided 11 other exhibit abstracts in support of the 11 charges of failing to keep driver records of duty status. These abstracts describe documents which reveal that Guest drivers transported goods in interstate commerce, yet Guest could not provide records of duty status for these trips. Mr. Dixon attested that these exhibits accurately documented the driver log violations he discovered in his February 1991 compliance review of Guest.

In support of the financial responsibility charge, the Regional Director submitted copies of Guest's insurance policy and a Guest freight bill showing a January 9, 1991, shipment from Mableton, Georgia, to Plainfield, New Jersey. The insurance document reveals that Guest's insurance has a specific mileage limitation. The insurance does not apply if any trips of the insured vehicles exceed a 150 mile radius of where the vehicles are principally garaged in Comer, Georgia.

Discussion

Section 386.14(b) states that a hearing request must list all material facts believed to be in dispute. In this case, Guest asserted that it provided a copy of its insurance policy to Mr. Dixon to prove that it had the required level of financial responsibility. The motor carrier also stated that some of its driver

qualification files and records of duty status were complete. No affidavits or other evidence in support of these statements have been provided.

Upon review of the case as a whole, I find that Guest has failed to carry its burden of showing a material factual issue in dispute. Guest's statement that it was able to produce a copy of its insurance policy does not negate the violation that this same document reveals. Guest held no insurance for trips beyond a 150 mile radius from Comer, Georgia, yet the motor carrier permitted a driver to drive to Plainfield, New Jersey, on January 9, 1991. Similarly, Guest's ambiguous denial of some of the driver qualification file and driver record of duty status violations, when opposed by Mr. Dixon's affidavit and other documentary evidence, fails to clearly establish a material factual issue in dispute warranting a hearing under 49 U.S.C. 386.14(b).

A motion for final order is analogous to a motion for summary judgment. *Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, at 2, (FHWA December 5, 1991) (Order). Therefore, the moving party bears the burden of proving that there is no genuine issue of material fact, and all evidence presented must be viewed in a light most favorable to the non-moving party, Guest.

Guest's failure to respond to or otherwise defend the two charges of failing to report an accident constitutes a default by the motor carrier. Therefore these allegations will be taken as true. 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* 2688 (1983).

Because Guest has in effect denied the remaining allegations but the Regional Director nevertheless opposes its hearing request and seeks a final order, the Regional Director's pleadings must be accompanied by affidavits or other evidence sufficient to establish a *prima facie* case. This evidentiary standard is no less stringent when the motor carrier has denied the allegations against it but fails to submit evidence in opposition to the motion. *American Pacific Power Apparatus* No. OR–90–006–075, at 5, (FHWA March 10, 1992) (Order). The Regional Director has met this evidentiary burden of clearly establishing the essential elements of his claim and Guest's reply is insufficient to rebut this *prima facie* case.

The record before me fully supports the remaining allegations that Guest did not have the required level of financial responsibility, failed to maintain complete driver qualification files, and failed to require its drivers to keep records of duty status for every trip. First of all, Guest's insurance policy clearly shows that the carrier held no insurance for trips beyond a 150 mile radius from its Comer, Georgia, office, yet a January 17, 1991, freight bill documents a trip by a Guest driver from Mableton, Georgia, to Plainfield, New Jersey, clearly outside of the 150 mile radius. Secondly, exhibits 2 through 7, certified by safety investigator Dixon as accurately reflecting Guest's driver qualification files at the time of the compliance review, reveal that there were several items missing from the files of six Guest drivers. Finally, exhibits 10 through 20 cite freight bills and invoices evidencing 11 trips by Guest drivers, yet Mr. Guest conceded in his statement taken at the compliance review that he was unable to produce any records of duty status for these trips. Therefore, the Regional Director's motion is supported by evidence sufficient to prove a *prima facie* case, and Guest's bare denials of these violations do not meet its burden to rebut this case.

The final issue in this case is the determination of the penalty amount. The Regional Director assessed a penalty of $2,500 for the charge of operating a motor vehicle without the required minimum level of financial responsibility. This amount is well within the $10,000 maximum amount provided for in 49 CFR 387.17, and I find no reason to reduce this penalty.

Guest was assessed $300 for each of the 19 remaining violations. The general civil penalty provisions of 49 U.S.C. 521(b)(2)(A) permit penalties of up to $500 for each offense. Although this is the first time that Guest has been cited for violations of the FMCSRs, James Guest Trucking, Inc., also with Mr. James Guest, Sr. as president, was the subject of a 1987 safety review. The 1987 review report identified several of the same violations for which the carrier is now charged, including its failure to report an accident and failure to maintain complete driver qualification files. Recommendations were made at that time to facilitate compliance with the regulations. The 1991 compliance review revealed that, despite actual notice of the requirements of the safety regulations, Mr. Guest has done little to bring his trucking company into compliance.

Guest has made no claim that it is financially unable to pay the $8,200 penalty, or otherwise addressed the factors used in determining the penalty amount, nor has it offered any evidence in mitigation of this penalty. Therefore I find that the $8,200 total penalty amount is reasonable to induce compliance with the regulations.

It is Hereby Ordered That James Guest's request for a hearing is denied, the Regional Director's motion for final order is granted, and a civil penalty of $8,200 is awarded. James Guest is directed to pay the sum of $8,200 to the Regional Director, Region 4, within 30 days of this order, for violations of 49 CFR 387.7(b), 391.51(a), 394.9(a) and 395.8(a).

Dated: April 7, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order Withdrawing Final Order of March 10, 1992; Laughlin Transport, Inc.

On March 10, 1992, I issued a Final Order in this matter. On March 16, 1992, however, the Regional Director, Region 3, submitted a motion "Requesting Withdrawal and/or Reconsideration" of that order. Apparently, this matter already had been settled, in accordance with a settlement agreement dated November 4, 1991, and payment of the settlement amount had been made in full. In the instant motion, the Regional Director states that there was an inadvertent failure at that time to file a request for withdrawal of the Regional Director's Renewed Motion for a Final Order.

In light of these developments, the Regional Director's Motion for Withdrawal is granted, and I hereby withdraw my final order of March 10, 1992, and accept the settlement agreement of November 4, 1991.

Dated: March 25, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; James M. Montague

Introduction

This matter comes before me upon a motion for final order by the Regional Director, Region 3, to find the facts as alleged in the notice of claim and to impose a $500 penalty. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR Part 386.

By notice of claim dated November 7, 1990, the Regional Director charged Mr. James M. Montague (Montague) with one count of failing to notify his employer of the suspension of his driving privileges by the end of the next business day after learning of the suspension, in violation of 49 CFR 383.33, and two counts of operating a motor vehicle while the privilege to drive was suspended, in violation of 49 CFR 391.15(a). The Regional Director assessed a total penalty of $1,000. This

claim letter was issued more than one year after the violations it documented.

Montague responded to the notice of claim on January 16, 1991. He did not request a hearing or deny the alleged violations, but he did present information about his financial situation, seeking a reduction in the penalty amount.

On September 24, 1991, the Regional Director moved for a final order. He asserted that Montague's response did not request a hearing or otherwise raise any material factual issue in dispute. Montague did not reply to this motion.

Background

These charges resulted after Montague's driver's license was suspended for a three day period in August 1989. On August 7, 1989, Montague received a letter from the Maryland Department of Motor Vehicles, stating that his license was suspended. It seems from Montague's DMV report that Montague's license was suspended because he failed to appear in court to answer to a charge of "failure to drive on roadway in designated lane." Maryland Driver Record of James M. Montague. Montague did not inform his employer of the suspension.

Montague's records of duty status for August 7–10, 1989, reveal that Montague continued to drive after receiving the suspension notice. On August 8, 1989, Montague drove from Front Royal, Va., to Baltimore, Md., and on August 10, 1989, he drove between Baltimore, Md., and Spring Grove, Pa. These two trips are the basis of the two 49 CFR 391.15(a) charges.

On the afternoon of August 10, 1989, Montague returned to Baltimore and paid his fine to the Maryland DMV. His license was reinstated on this same day.

Montague was the subject of an August 17, 1989, safety investigation. In a signed statement made to a safety investigator on this day, Montague stated that he knew he was not permitted to drive with a suspended license and that he was required to notify his employer of the suspension. Montague explained that he did not tell his employer about his suspended license because he believed if he paid his fine as quickly as possible "everything would be O.K." August 17, 1989, Statement of James MacArthur Montague.

Discussion

Because Montague neither denied the charges nor requested a hearing, there is no material factual issue in dispute. In fact, Montague admitted in his August 17, 1989, statement that he failed to inform his employer of suspension of his driving privileges and that he drove after receiving notice of the suspension. In his January 16, 1991, response to the notice of claim, Montague stated that he was willing to settle the case, but was financially unable to pay the $1,000 fine. The amount of a proposed fine does not constitute a material factual issue in dispute. *Drotzmann, Inc.*, 55 FR 2929 (FHWA 1990) (Order Appointing Administrative Judge). Therefore, no hearing is warranted under 49 CFR 386.14(b).

The Regional Director's notice of claim assessed a total penalty of $1,000 (later reduced to $500), citing the $2,500 maximum CDL penalty provision of 49 U.S.C. 521(b)(6)(B), and the $1,000 maximum penalty amount of 49 U.S.C. 521(b)(2)(A) for employee actions constituting gross negligence or reckless disregard for safety. Section 391.15 was issued pursuant to 49 U.S.C. 3102 and the Motor Carrier Safety Act of 1984, so the general civil penalty provisions, not the CDL penalties, apply to violations of this driver qualification regulation. Therefore, in order to be subject to a civil penalty of up to $1,000, Montague's conduct of driving with a suspended license must constitute gross negligence or reckless disregard for safety.

I find on the record before me that Montague's conduct does not rise to the level of gross negligence or reckless disregard for safety. Montague drove after receiving notice that his license was suspended for failure to appear for a relatively routine traffic violation.[1] The period of suspension lasted for only three days and was lifted upon Montague's full payment of his fine. The Regional Director has not brought to my attention any factors which would lead me to conclude that Montague was unfit to drive or otherwise posed an unreasonable risk to safety during this limited time. Therefore, the two 49 CFR 391.15(a) charges are dismissed.

Based on Montague's August 17, 1989, written admission, I find that he has committed the remaining violation with which he is now charged, failing to notify his employer of the suspension of his driving privileges. The final issue in this case is the determination of the penalty amount for this violation. Although the amount of an assessed penalty does not constitute a material factual issue in dispute, the motor carrier's ability to pay is relevant to the determination of the penalty amount. In his January 16, 1991, response to the notice of claim, Montague stated that his annual income was approximately $2,500. Montague submitted evidence of his salary and living expenses with this letter, but this evidence was not forwarded to the Associate Administrator.

Upon review of the case as a whole, and specifically considering Montague's financial situation, I find that the $500 total penalty requested by the Regional Director in his motion for final order is inappropriate. First of all, two of the three counts against Montague have been dismissed.[2] Secondly, this penalty, constituting 20% of Montague's gross income, would be greatly disproportionate to the penalties assessed in the majority of enforcement cases brought under the Federal Motor Carrier Safety Regulations. Montague's conduct is not so egregious that it would mandate a drastic departure from past penalty determinations. Therefore, I find that a $100 penalty is sufficient to induce compliance with the regulations.

It is hereby ordered That the Regional Director's motion for final order is denied as to the two 49 CFR 391.15(a) counts, and these two counts are dismissed; the Regional Director's motion for final order is granted as to the 49 CFR 383.33 violation, and Montague is directed to pay the sum of $100 to the Regional Director, Region 3, within 30 days of this order for having failed to notify his employer of the suspension of his driving privileges by the end of the next business day after learning of the suspension.

Dated: March 25, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Sunrise Fiberglass Engineering, Inc., Respondent; Final Order

Docket No. 91–21

Background

This matter comes before me upon a motion by the Regional Director, Region 10, opposing Sunrise Fiberglass Engineering, Inc.'s (Sunrise), request for a hearing and seeking a final order. This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386.

By notice of claim dated November 27, 1990, the Regional Director asserted that Sunrise committed 7 violations of

[1] I note that Montague's conduct would be viewed quite differently if his driving privileges were suspended for driving while under the influence of alcohol or a controlled substance.

[2] The Regional Director's notice of claim assessed a $500 penalty for the § 383.33 violation and $250 each for the § 391.15(a) violations, but when the Regional Director reduced his penalty request to $500 in his motion for final order, he did not specify the penalty amount allocated to each of the 3 violations.

49 CFR 395.3(a)(1) by requiring or permitting a driver to drive more than 10 hours following 8 hours off duty, and 11 violations of 49 CFR 395.3(a)(2) by requiring or permitting a driver to drive after having been on duty for 15 hours following 8 hours off duty.

Sunrise's February 5, 1991, reply was untimely. Sunrise denied the allegations and asserted that driver carelessness in preparing the log sheets created the appearance that the drivers violated the 10 and 15 hour rules when in fact they did not. Sunrise did not request a hearing at that time.

On February 22, 1991, the Regional Director sent a letter to Sunrise, stating that the notice of claim had become a final order under 49 CFR 386.14(e) because Sunrise failed to reply to the notice of claim within 15 days as required by 49 CFR 386.14(a). The Regional Director requested payment of the $10,800 penalty. Sunrise refused to sign for this certified letter, so the Regional Director sent an identical letter on March 22, 1991.

On June 20, 1991, Sunrise requested an administrative hearing. The Regional Director responded to this request on July 1, 1991, opposing the request and seeking a final order. Sunrise did not reply to this motion.

Discussion

Sunrise's actions in this case constitute a default. The motor carrier failed to reply within 15 days after the notice of claim was served, thereby waiving any right to a hearing according to 49 CFR 386.14(b)(2), and allowing the notice of claim to become a final order under 49 CFR 386.14(e). The question is whether justice would require a different result. In viewing the case as a whole, I find no reason to depart from the result reached under the regulations.

Sunrise's hearing request is both procedurally and substantively flawed. Aside from being five months late, the request consists of a bare denial. Although Sunrise blames driver carelessness for the appearance of violations in its drivers' records of duty status, it produced no evidence to support this allegation. A bald assertion is insufficient to negate the hours-of-service violations that its own documents reveal. Therefore Sunrise has failed to carry its burden of clearly establishing that there is a material factual issue in dispute warranting a hearing.

Because Sunrise did not reply to the claim letter before the expiration of the 15 day time limit set forth in 49 CFR 386.14(a)(2), the claim letter became a final agency order 25 days after it was served, under 49 CFR 386.14(e). The Regional Director informed Sunrise of this by letter dated March 22, 1991. Based on the agency's March 22, 1991, letter, the Regional Director could have sent this case directly to the United States Attorney for enforcement in a federal district court. 49 CFR 386.65. Because Sunrise replied to the notice of claim, albeit late, the Regional Director chose to send this matter to the Associate Administrator.

Upon review of the case as a whole, I find that it is appropriate to grant the Regional Director's motion for final order. *Transurface Carriers, Inc.*, No. R1–90–294 (FHWA March 12, 1992) (Final Order). I note that the motion is not supported by evidence sufficient to show a *prima facie* case, but in this instance such evidence is not required. Here the Regional Director requests a final order based on the default of Sunrise and the passage of time, rather than upon the strength of his own evidence. In light of Sunrise's own actions in this case, this result is not unjust. I further note that since the Regional Director filed this motion for final order, the motor carrier has not replied or provided any evidence to support its earlier denials.

The maximum penalty amount permitted for each violation in a serious pattern of non-recordkeeping safety violations is $1,000. 49 U.S.C. 521(b)(2)(A). The Regional Director assessed a $600 penalty for each of the 18 violations in this case. I find that this $10,800 penalty is appropriate if Sunrise does not act quickly to comply with the hours of service regulations. This is the second enforcement case involving multiple hours violations against Sunrise in one year. Sunrise settled an earlier claim for $5,300. Sunrise's repeated violations reveal that the earlier penalty was insufficient to induce compliance with the regulations. Therefore, absent a change in future conduct by Sunrise, I find no reason to reduce this $10,800 penalty.

It is hereby ordered That Sunrise's request for a hearing is denied, the Regional Director's motion for final order is granted, and a civil penalty of $10,800 is awarded. Sunrise is directed to pay the sum of $7,200 to the Regional Director, Region 10, within 30 days of this order for requiring or permitting its drivers to drive more than 10 hours following 8 consecutive hours off duty, in violation of 49 CFR 395.3(a)(1), and for requiring or permitting its drivers to drive after having been on duty for 15 hours following 8 consecutive hours off duty, in violation of 49 CFR 395.3(a)(2). The Regional Director is directed to revisit Sunrise in 30 days. If the Regional Director finds that Sunrise is then in compliance with the hours-of-service regulations, the remaining $3,600 penalty is dismissed. If Sunrise is not found to be in compliance, then, upon motion by the Regional Director, I will order the payment of the remaining $3,600. Moreover, if the Regional Director finds continuing violations by Sunrise, then the Regional Director shall take appropriate action to compel the cessation of violations.

Dated: March 25, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Shetakis Wholesalers, Inc.

This matter comes before me upon request of the Regional Director, Region 9, for a final order finding the facts to be as alleged in a claim letter dated April 8, 1991, and for the imposition of a civil penalty in the amount of $4,000. Having reviewed the record before me, I grant the Regional Director's request for the reasons set forth below.

Background

The Respondent, Shetakis Wholesalers, Inc. ("Shetakis"), is a private carrier of food products and chemicals. A compliance review of Shetakis' operations was conducted on November 6, 1990, and as a result of that review a notice of claim was sent to the carrier on February 6, 1991, charging Shetakis with eight violations of the Federal Motor Carrier Safety Regulations ("FMCSRs"). Specifically, the Regional Director alleged that Shetakis had committed one violation of 49 CFR 394.9(a) (failing to report an accident); and seven violations of 49 CFR 392.2 (requiring or permitting a motor vehicle to be operated not in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated). The latter seven charges involved allegations that Shetakis had transported hazardous materials through the State of Nevada without having the required State permit.

The procedural history of this case is complex, but for the purposes of this order it is sufficient to note that on June 21, 1991, the Regional Director submitted a "Response in Opposition to Respondent's Request for a Hearing and Motion for Summary Judgment and Final Order." After this motion was filed, Shetakis admitted to all the charged violations, withdrew its contest of the claim and requested that negotiations begin to settle the claims, preferably for a lower amount. In mitigation of the charges against it, Shetakis claimed that as late as September 1989, it "did not understand

itself to be involved in the transportation of hazardous materials * * *."

In a final pleading dated July 10, 1991, the Regional Director declined to discuss a settlement. The pleading pointed out that although Shetakis disclaimed knowledge that it transported hazardous materials, shipping papers included among the exhibits attached to the first motion clearly indicated the hazardous nature of the materials being transported by the carrier on the dates of the charged violations.

Conclusion

Since Shetakis has admitted to all of the charges against it, the sole remaining dispute concerns the amount of the fine proposed by the Regional Director. I conclude that the record fully supports the position of the Regional Director, and I grant the motion for a final order in the full amount of the claim.

The failure of a motor carrier to report an accident is a serious matter, one for which it is appropriate to levy a stringent penalty. The Regional Director has assessed a fine of $500 for this offense, and I do not believe that a reduction in that amount is warranted in this case.

The seven violations of § 392.2 constitute a serious pattern of violations which subjects the carrier to fines not to exceed $1000 per violation, with the total fine not to exceed $10,000. 49 U.S.C. 521(b)(2)(A). In this case, the Regional Director has set a fine of $500 per violation, or $3,500. This amount is well less than the maximum amount allowed under the law, and I agree that it is reasonable.

Therefore, based on the record before me, I find that the penalties levied in this case are appropriate. Specifically, I note that Shetakis' own records indicate that hazardous materials were being transported. Most notably, copies of shipping papers attached as part of Exhibit D to the Regional Director's Motion for Final Order plainly state that items being transported by Shetakis were "HAZARDOUS MATERIAL". With such documentation in the record, I am not prepared to reduce the fines as assessed by the Regional Director.

Therefore, *It Is Hereby Ordered* That the Petitioner Regional Director's request for a final order is granted. Respondent Shetakis Wholesalers, Inc., is directed to pay the full amount of the claim, $4,000, to the Regional Director within 30 days of the date of this Order.

Dated: March 20, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; A.M. & Wade Cox

This matter comes before me upon a motion of the Regional Director, Region 4, in opposition to a request for a hearing and asking for a final order finding the facts to be as alleged in a notice of claim dated April 10, 1989. The motion also requests the imposition of a civil penalty in the amount of $3,000. To date, there has been no reply to this motion from the Respondent, A.M. & Wade Cox ("Cox"). Having reviewed the record before me, I now grant the Regional Director's request for the reasons set forth below.

Background

The Cox partnership is a motor carrier whose principal cargo is logs. The Regional Director sent a notice of claim to Cox on April 10, 1989, charging the carrier with six violations of the Federal Motor Carrier Safety Regulations ("FMCSRs"). Specifically, the notice of claim charged that Cox had committed six violations of 49 CFR 391.51(a) (failing to maintain driver qualification files).

Cox, through its attorney, replied on April 24, 1989. The reply does not deny the charges, but does request an oral hearing. In support of its request, Cox makes three allegations which it believes rise to the level of "material factual disputes" under 49 CFR part 386, Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, and therefore entitle it to a hearing. First, Cox claims that Regional officials failed to "fully explain to [Cox] all of [Cox's] obligations pursuant to the regulations." Second, Cox disputes the charge of the Regional Director that Cox operated in interstate commerce and therefore was subject to the recordkeeping regulations. Finally, the reply states that "the fact that [Cox is] now in full and complete compliance with the regulations should be considered in mitigation of any penalty which may be assessed against [it]."

After prolonged settlement negotiations yielded no results, the Regional Director submitted the instant motion for final order on June 21, 1991. The motion contained exhibits, and answered each of the assertions contained in the carrier's reply of April 24. Cox has not replied to this motion.

Discussion

After reviewing the record before me, I conclude that there are no material factual issues in dispute in this case, and therefore I deny Cox's request for a hearing. Moreover, since the exhibits attached to the Regional Director's motion strongly support the allegations made against Cox, I find that the Regional Director has met his burden for obtaining a final order.

Knowledge of the FMCSRs is attributed to all motor carriers. This general principle is reinforced in this case by two of the exhibits attached to the Regional Director's motion. The first is a 1987 letter from the Regional Office to Cox explaining the applicability of the FMCSRs to the carrier's operations. The second is a copy of a safety review of Cox's business undertaken in 1987. Taken together, this evidence is sufficient to show Cox's knowledge of the obligations imposed on it by the FMCSRs.

As for the interstate nature of the carrier's operations, the record before me fully supports the Regional Director's contention that the violations occurred while Cox was engaged in interstate commerce. Several exhibits support the Regional Director's assertions, and nothing in the record disputes their authenticity. The Regional Director attached copies of the daily records of duty status for the driver whose qualification file was alleged to be deficient. On their face, these records show that the driver made trips between Tennessee, Missouri, and Mississippi on the days the violations were alleged to have occurred. Also attached to the motion was a signed statement of A.M. Cox, dated February 28, 1989, admitting both to the incompleteness of the file in question and to the interstate nature of the trips giving rise to the charges.

Cox has asked for mitigation of the penalty based upon its post-review compliance with the FMCSRs. Cox should have been in compliance with the regulations *before* the initiation of this action. *See In the Matter of Stanford & Inge*, 55 FR 43,296 (F.H.W.A. 1990) (Order Upon Reconsideration). The carrier had several contacts with the agency before the notice of claim was issued, and was put on notice of the deficiencies in its recordkeeping operations. No mitigation of the penalty is appropriate under these circumstances.

Therefore, *It Is hereby ordered* That the request for a hearing by Respondent A.M. & Wade Cox is denied, and the Petitioner Regional Director's request for a final order is granted. Respondent A.M. Cox is hereby directed to pay the full amount of the claim, $3,000, to the Regional Director within 30 days of the date of this Order.

Dated: March 20, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

RKM Equipment and Trucking, Inc. Respondent; Final Order

Docket No. R9–90–039

Introduction

This matter comes before me upon a motion by the Regional Director, Region 9, opposing RKM Equipment and Trucking, Inc.'s (RKM), request for a hearing and seeking a final order pursuant to 49 CFR 386.16(b) and 386.35 of the Federal Motor Carrier Safety Regulations (FMCSRs).

A September 20, 1990, notice of claim charged RKM with five counts of requiring or permitting an employee to operate a commercial motor vehicle during a period in which the employee has more than one commercial motor vehicle driver's license, in violation of 49 CFR 383.37(b). The dates of the alleged violations are March 8 and 31, April 18, and May 5 and 19, 1990.

On October 3, 1990, RKM replied to the notice of claim, denied the violations, and requested a hearing. The Regional Director responded on May 22, 1991, opposing the hearing request and requesting a final order. On June 26, 1991, RKM answered the Regional Director's motion, but failed to serve the Associate Administrator with this answer. The Regional Director replied to this answer on July 8, 1991, asserting that a final order should be granted because there are no material factual issues in dispute and the Regional Director is entitled to judgment as a matter of law. RKM responded on August 14, 1991. The motor carrier asserted that it had taken all of the steps necessary to verify the existence or non-existence of the licenses.

Background

These multiple license charges resulted from two safety and compliance reviews of RKM. In a May 31, 1989, safety review, FHWA Safety Investigator Randy Moseley noted in his report "[y]ou are hereby given notice of suspension of driving privileges for driver Glen Hess. Inquiry May 26, 1989, revealed D. L. Calif. A1215184 suspended." RKM Sales/Marketing Manager Dane Meyer signed and received a copy of this report on behalf of RKM. After this safety review, RKM permitted Hess to continue driving. On March 20, 1990, Moseley conducted a compliance review of RKM. The report on this review states that "[i]t was discovered that the carrier did have one driver who may possess multiple driver's licenses. Investigation is continuing to substantiate * * *." RHM President Rick Howard signed and received a copy of this report on the same day the review was conducted.

Both RKM and Moseley made efforts to determine whether Hess in fact held two licenses. On March 23, 1990, RKM obtained a certification from driver Glen Hess that he "would" possess only Arizona commercial driver's license number Y00011202. On March 24, 1990, Moseley confirmed through Hess' Arizona and California DMV records that Hess did have two commercial driver's licenses. RKM obtained an MVR report from DAC Services on this same day. This report indicated Hess did not have any commercial license, suspended or effective, other than his Arizona one. Later this same day, Moseley called RKM's Dane Meyer and informed Meyer that he had confirmed that Hess held licenses from both California and Arizona. The parties disagree on whether Moseley was told of or ever received a copy of the DAC Services report. RKM continued to use Hess as a driver after March 24, 1990.

Discussion

This case presents five issues. The first three are raised by RKM in its hearing request. The fourth issue concerns an April 10, 1990, phone call between RKM and Safety Investigator Moseley. Finally, there is the legal issue of the determination of the penalty amount.

"In deciding whether to grant a motion for a final order, I must review the whole record before me." *Forsyth Milk Hauling Co., Inc.*, No. R3–90–037, (FHWA December 5, 1991) (Order). Because RKM has failed to serve the Associate Administrator with his answer to the motion for final order, that answer is not part of the record and cannot be considered in addressing the five issues raised in this case. RKM was repeatedly reminded of the need to serve all of its pleadings on the Associate Administrator.[1] RKM did not correct this omission, and its answer was never received by the Associate Administrator.

Under 49 CFR 386.14(b)(2), hearing requests must list all material facts believed to be in dispute. In this case, RKM has made a general denial of the alleged violations and asserted that three factual issues are in dispute: (1) Whether RKM took all actions required by the relevant regulations and statute in determining whether Hess had more than one commercial driver's license, through the use of the commercial reporting service and by reliance on the certification by Hess that he would only hold one license, (2) whether RKM had knowledge of Hess' multiple driver's licenses, and (3) whether Hess fraudulently concealed from RKM the existence of his second license. No affidavits or other evidence in support of these statements have been provided.

A review of the case file reveals that RKM received actual notice from the FHWA that Hess had two licenses and that RKM continued to use Hess as a driver in spite of this notice. RKM admits as much in its August 14, 1990, pleading: RKM "[does] not deny that they were put on notice that Mr. Hess may have possessed multiple licenses." Response to Supplemental Declaration of Randy Moseley, at 2–3. With this knowledge, RKM permitted Hess to drive, as evidenced by Hess' records of duty status for March 8–13, March 31–April 4, April 18–25, May 1–10, and May 19–25, 1990. Therefore, the issue of whether RKM knew that Hess possessed two licenses is no longer in dispute.

The remaining two disputed issues, whether RKM took all required actions to determine if Hess had more than one license, and whether Hess fraudulently concealed his second license, are immaterial in this case in determining whether RKM violated 49 CFR 383.37(b). Even if these allegations were supported by sufficient evidence, they would not exonerate RKM. Hess was permitted to drive while RKM knew he had two licenses, and this conduct violates of 49 CFR 383.37(b).

RKM's reliance on the commercial driver's report and the certification by Hess that Hess had only one license was not justified, in light of the direct and actual notice to the contrary that RKM received from Moseley in his March 24, 1990, phone call. RKM asserts that it used the commercial driving report because "[i]t would be impractical for a motor carrier [to] obtain official DMV records from every state for each one of its drivers." *Id* at 3. There was no need to check the driving record of every driver in every state. The safety and compliance reviews revealed a problem with only one driver and two states. Therefore this assertion of impracticality by RKM is no justification for its conduct.

The fourth issue in this case involves an April 10, 1990, phone call between RKM and Moseley. RKM claims that during this conversation Moseley

[1] The Assistant Regional Counsel called RKM counsel on July 3, 1991, to advise that service must be made on the Associate Administrator and that RKM should follow the May 22, 1991, service list attached to the Regional Director's motion for final order. In its July 8, 1991, pleading, the Regional Director again alerted RKM to the fact that it had failed to serve its answer upon the Associate Administrator.

authorized them to continue to use Hess as a driver. Moseley denies this claim.

This issue apparently was originally identified in RKM's missing pleading. Based on the limited record before me, I do not believe that the phone call is a material factual issue in dispute warranting a hearing. The question of whether or not Moseley gave RKM approval to use Hess as a driver is immaterial. Even if RKM's version of the telephone conversation is correct, as a matter of law, this does not exonerate the motor carrier. RKM received actual notice of Hess' multiple licenses on March 24, 1990. When RKM persisted in using Hess as a driver after knowledge of Hess' multiple licenses, the motor carrier acted at its own risk. RKM cannot successfully assert at this time that Moseley's authorization somehow exonerated or negated its prohibited conduct.

A motion for a final order is analogous to a motion for summary judgment. *Forsyth Milk*, at 2. Therefore, the moving party bears the burden of proving that there is no genuine issue of material fact, and all evidence presented must be viewed in a light most favorable to the non-moving party, RKM. In cases such as this, where the respondent denies the allegations in the claim letter, but the Regional Director nevertheless opposes a hearing request and seeks a final order, the Regional Director's pleadings must be accompanied by affidavits or other evidence sufficient to establish a *prima facie* case. The Regional Director has met this evidentiary burden of clearly establishing the essential elements of his claim. RKM's pleadings, standing alone, are insufficient to rebut this *prima facie* case.

The record before me fully supports the allegations made against RKM in the notice of claim. Exhibit D, Hess' DMV records for Arizona and California, clearly shows that Hess was issued a California commercial driver's license on October 16, 1987, to expire on June 5, 1990, and that the license was suspended on February 19, 1989. That exhibit also shows that Hess was issued an Arizona commercial driver's license on April 4, 1989, to expire on June 11, 1992. Exhibit A, the record of the May 31, 1989 safety/compliance review, reveals that Safety Investigator Moseley alerted RKM to the fact that Hess' *California* license was suspended, at a time when RKM's own records showed that Hess possessed an *Arizona* license. Exhibit B, the March 20, 1990, compliance review report, clearly states that RKM had one driver who may have had multiple drivers licenses. Moseley's affidavit in support of the Regional Director's motion for final order reveals that Moseley called RKM on March 24, 1990, and confirmed that Hess did in fact have two commercial driver's licenses. Finally, RKM in effect admits to "the fact that Mr. Hess did drive the vehicle on the alleged occasions while possessing two drivers licenses." Response to Supplemental Declaration of Randy Moseley, at 4. Therefore, the record before me supports a finding that RKM required or permitted Hess to operate a motor vehicle during a period in which Hess possessed more than one commercial driver's license, in violation of 49 CFR 383.37(b) of the FMCSRs.

The final issue in this case is the determination of the penalty amount. The Regional Director assessed civil penalties of $2,500 for each of the five violations, the maximum amount permitted by statute. As to the March 31, April 18, and May 5 and 19 violations, I find that this amount is reasonable. RKM was advised almost one year before these four violations occurred that Hess had a suspended California license. The second compliance review in March 1990 indicated that Hess may have been in possession of two licenses. Finally, Safety Specialist Moseley's March 24, 1990, telephone call to RKM, confirming via DMV reports that Hess possessed two commercial driver's licenses again notified RKM that Hess had both Arizona and California licenses. Despite repeated notice, RKM permitted Hess to drive on at least four more occasions. "A motor carrier cannot ignore applicable safety regulations, nor can it assign such a low priority to compliance with those regulations that, after a year, no significant progress has been made to comply with them." *Kerr Drug Stores, Inc.*, No. 91–NC–008–SH, at 6 (FHWA July 3, 1991) (Final Order). Such actions are willful violations of the FMCSRs, warranting the maximum penalty.

The $2,500 penalty for the March 8, 1990, violation is unduly harsh. Although after the 1989 safety review, this violation was before the more definitive notice of March 20 and 24, 1991. The May 1989 review put RKM on notice that Hess may have possessed two commercial driver's licenses, but permitting Hess to drive on March 8, 1990, notwithstanding this notice, is not as egregious as the later 4 violations, where RKM had actual knowledge that Hess had two licenses. A penalty of $500 for this violation is reasonable to induce compliance with the regulations.

Conclusion

Once RKM had notice that Hess held two licenses, yet permitted Hess to drive, RKM was in violation of 49 CFR 383.37(b). The Regional Director has met his burden of clearly establishing the multiple license violations. The issues asserted by RKM in its pleadings do not exonerate or mitigate this conduct. Therefore RKM has failed to assert any material issue in dispute warranting a hearing.

It is hereby ordered That RKM's request for a hearing is denied; the Regional Director's request for a final order is granted, and RKM is directed to pay the sum of $10,500 to the Regional Director, Region 9, within 30 days of this order for having required by permitted an employee to operate a commercial motor vehicle during a period in which the employee has more than one commercial motor vehicle driver's license, in violation of 49 CFR 383.37(b) of the FMCSRs.

Dated: March 16, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Jagpal Transport, Inc.

Background

This matter comes before me upon a motion by the Regional Director, Region 9, in opposition to Jagpal Transport, Inc.'s (Jagpal), request for a hearing and motion for final order pursuant to 49 CFR 386.35 and 386.16(b) of the Federal Motor Carrier Safety Regulations (FMCSRs).

In his February 6, 1991, notice of claim, the Regional Director charged Jagpal with 19 violations of the FMCSRs and assessed a total penalty of $11,100. The alleged violations included 1 count of requiring or permitting a driver whose driving privileges are suspended, revoked or canceled to drive a commercial motor vehicle, in violation of 49 CFR 391.15(a), $900 penalty; 6 counts of failing to maintain complete driver qualification files for each employed driver, in violation of 49 CFR 391.51(c), $900 penalty for each count; 1 count of failing to report a reportable accident within 30 days after the motor carrier learned of the accident, in violation of 49 CFR 394.9(a), $400 penalty for each count; 7 counts of failing to preserve drivers' records of duty status for six months, in violation of 49 CFR 395.8(k)(1), $400 penalty for each count; and 4 counts of failing to keep minimum records of inspection and maintenance of its motor vehicles, in violation of 49 CFR 396.3(b), with a $400 penalty for each of these four counts.

These charges resulted from the last of three safety and compliance reviews of Jagpal over a one and one-half year period. In a July 21, 1989, safety review of Jagpal, a California Highway Patrol

safety investigator found several violations of the FMCSRs. In his review report, the investigator recommended that Jagpal require its drivers to complete records of duty status and keep them on file for six months, establish and maintain a complete driver qualification file for each driver, and establish vehicle maintenance records. After this review, Mr. Nijjar, Jagpal's operations manager, and Mr. Warren Stevens, a consultant to Jagpal hired to bring Jagpal into compliance with the FMCSRs, wrote to the Office of Motor Carriers, detailing their efforts to correct the violations discovered in the 1989 safety review.

A June 22, 1990, safety review by an FHWA safety specialist revealed many of the same types of violations that had been discovered in the 1989 safety review. The safety specialist recommended, in part, that Jagpal require all drivers to prepare complete, accurate records of duty status, maintain all duty status records on file for at least six months, and require all drivers to prepare a written inspection report for each day a vehicle is operated. When the safety specialist conducted a November 7, 1990, compliance review of Jagpal he found 12 different types of violations. Some of these were the same types of violations that had been discovered in the two previous safety reviews.

The Regional Director's 19 count notice of claim was issued on February 6, 1991. On February 7, 1991, FHWA federal program manager Danny L. Swift received a phone call from Mr. Gurmail Jagpal in response to the notice of claim. Mr. Jagpal requested that the civil penalty be substantially reduced and claimed that Jagpal was financially unable to pay the $11,100 penalty. Although Mr. Swift told Mr. Jagpal that he could submit financial records supporting his allegations, Mr. Jagpal did not offer any evidence of Jagpal's inability to pay.

Jagpal filed a timely written reply to the notice of claim, denying that it required or permitted a driver who is disqualified to drive a commercial motor vehicle, in violation of 49 CFR 391.15(a). Jagpal claimed that it was not aware that driver Roberto Reyes' license was suspended. Jagpal requested a hearing on this alleged violation. Jagpal admitted to the remaining 18 violations.

On July 8, 1991, the Regional Director moved for a final order, dismissing the 391.15(a) claim for insufficient evidence, thereby reducing the civil penalty by $900 to $10,200. The Regional Director asserted that the six violations of 391.51(c), failing to maintain driver qualification records, constitutes a "serious pattern of safety violations" under 49 U.S.C. 521(b)(2)(A). Section 521(b)(2)(A) provides that if a motor carrier's actions are found to constitute a serious pattern of safety violations, then a civil penalty of up to $1,000 per violation, up to a maximum penalty of $10,000 per pattern, may be assessed against the motor carrier.

Discussion

Because the Regional Director has dismissed the only count to which Jagpal has not admitted, there is no material factual issue in dispute warranting a hearing under 49 CFR 386.14(b). Jagpal's February 7, 1991, phone call to the federal program manager, requesting that the penalty be reduced, does not raise a material factual issue in dispute. *Drotzmann, Inc.*, 55 FR 2929 (FHWA 1990) (Order Appointing Administrative Law Judge). Based on Jagpal's written admission, I find that Jagpal has committed the 18 FMCSR violations with which it is now charged.

I also find that the violations fully warrant the assessed penalty of $10,200, and that this amount is calculated to induce further compliance with the FMCSRs. First of all, Jagpal has offered no defense and presented no evidence which would warrant mitigation of the penalty. Secondly, Jagpal has been the subject of three safety and compliance reviews, and at each, the same violations have been documented. Therefore, Jagpal has a history of prior offenses, yet the maximum penalty allowed under 49 U.S.C. 521(b) was not assessed for any of the violations.

More specifically, I find that the 6 violations of 49 CFR 591.51(c), failing to maintain complete driver qualification files for each driver, constitute a "serious pattern of safety violations" under 49 U.S.C. 521(b)(2)(A). "If violations are continuing, then a clear pattern case will have been established." *Tonawanda Tank Transp. Serv., Inc.*, 55 FR 43279 (FHWA 1990) (Final Order). Section 391.51(c) violations were documented in each of the 3 safety and compliance reviews over a 16 month period. Despite repeated notice, Jagpal failed to cure these violations. Jagpal cannot ignore applicable safety regulations, nor can it assign such a low priority to compliance with these regulations that, after three reviews and one and one-half years, no significant progress has been made to comply with them. See *Kerr Drug Stores, Inc.*, No. 91–NC–008–SH (FHWA Order July 3, 1991) (Final Order).

It is Hereby Ordered That Jagpal's request for a hearing is denied, the Regional Director's request for a final order is granted, and Jagpal is directed to pay the sum of $10,200 to the Regional Director, Region 9, within 30 days of this order, in full satisfaction of the Notice of Claim dated February 6, 1991.

Dated: March 12, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Transurface Carriers, Inc.

This matter comes before me upon request of the Regional Director, Region 1, for a final order finding the facts to be as alleged in a claim letter dated October 18, 1990, and for the imposition of a civil penalty in the amount of $5,000. Having reviewed the record before me, I now grant the Regional Director's request for the reasons set forth below.

Background

Region 1 initiated an enforcement action after an August 9, 1990, compliance report cited Transurface for numerous alleged violations of the Federal Motor Carrier Safety Regulations ("FMCSRs"). On October 18, 1990, the Regional Director issued a claim letter and a notice of investigation, and personal service was made upon Transurface's President on November 5, 1990. The claim letter alleged one violation of 49 CFR 387.7 (operating a motor vehicle without having the required proof of financial responsibility on file at Transurface's principal place of business); two violations of 49 CFR 391.11 (using a disqualified driver); one violation of 49 CFR 391.51(a) (failing to maintain a qualification file for each driver used or employed); four violations of 49 CFR 391.51(b) and (c) (failing to maintain a complete qualification file for each driver used or employed); two violations of 49 CFR 392.2 (requiring or permitting a motor vehicle to be operated not in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated); three violations of 49 CFR 395.8 (failing to preserve a driver's record of duty status for at least six months); and one violation of 49 CFR 396.7 (operating a motor vehicle in such a condition as likely to cause an accident or breakdown). The claim letter assessed a total penalty of $5,000 for the 14 alleged violations of the FMCSRs.

Transurface made no reply to the claim letter before the expiration of the 15-day time limit set forth in 49 CFR 386.14(a), Rules of Practice For Motor Carrier Safety and Hazardous Materials Proceedings. Subsection (e) of § 386.14

states that "[i]f the respondent does not reply to a Claim Letter within the time prescribed in this section, the Claim Letter becomes the final agency order in the proceeding 25 days after it is served." Therefore, the claim letter served on Transurface became a final order no later than November 30, 1990 (25 days after personal service on Transurface's President).

The Regional Director advised Transurface by letter dated January 23, 1991, that the claim letter had become a final order, and demanded payment of the $5,000 penalty. At no time prior to this date did Transurface make any reply to the regional office.

The record shows that between the next day, January 24, 1991, and February 18, 1991, Mr. Nicholas J. Naples, the president of Transurface, sent five letters to the regional office. These letters did not contain a request for a hearing, and on the whole were unresponsive to the charges made by the Regional Director. Nothing in the record indicates that Transurface has paid the $5,000 fine assessed by the Region, nor is there any evidence tending to show Transurface's subsequent compliance with the FMCSRs.

Having received no adequate response from Transurface, the Regional office filed a motion for final order on April 9, 1991. It is this motion which is before me today. As with the October 1990 claim letter, there is no indication in the record that Transurface has made any reply to the Region's motion.

Conclusions

Ordinarily, when a respondent fails to respond within 30 days to a final order (including a notice of claim which becomes a final order through a respondent's default), the Regional Director, through Regional Counsel, may refer the case to the United States Attorney with a request that an enforcement action be brought in a United States District Court. 49 CFR 386.65. Here, the Regional Director has decided not to take that route and has instead come to this office asking for a new final order based upon the original claim letter. It is important to stress at this point that the Regional Director is not asking that this office enforce the January 23, 1991, letter but rather is asking for an order which presumably would supersede the January 23 letter.

Having reviewed the entire record before me, I believe that the Regional Director's motion should be granted, and that Transurface should be ordered to pay the full amount of the October 18, 1990, claim letter, $5,000. I find that there has been a total default on the part of Transurface: It did not reply to the claim letter on time; its late response did not go to the merits of the allegations against it, but it has not denied the alleged violations; it has not paid the assessed fine; and it has shown little compliance with the FMCSRs.

In the face of Transurface's complete noncompliance with the demand of the Regional Director in his letter of January 23, 1991, and given the serious nature of the charges against it, I believe that it is appropriate that an order be issued in this matter.

Accordingly, *it is Hereby ordered* that the Regional Director's request for a final order is granted. Respondent Transurface Carriers, Inc., is directed to pay the full amount of the claim, $5,000, to the Regional Director within 30 days of the date of this Order.

Dated: March 12, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Docket No. 91–122

Sined Leasing, Inc., Respondents; Order Appointing Administrative Law Judge

Introduction

This matter comes before me upon a request for an oral hearing. The parties agree that there are material factual issues in dispute, and that pursuant to the provisions of 49 CFR part 386, Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings ("Rules of Practice"), an oral hearing is required for their resolution.

Background

In a notice of claim dated May 23, 1991, the Regional Director alleged that Respondent Sined Leasing, Inc. ("Sined"), committed a total of 24 violations of the Federal Motor Carrier Safety Regulations ("FMCSRs"). Specifically, the Regional Director charged Sined with one violation of 49 CFR 391.11 (using a physically unqualified driver); one violation of § 391.105 (failing to require a driver to be tested in accordance with biennial testing requirements); two violations of § 394.9 (failing to report an accident), 14 violations of § 395.8 (requiring or permitting driver to make false entries upon a record of duty status report); and 6 violations of § 396.11 (failing to require a driver to prepare a vehicle inspection report). The Regional Director assessed a civil penalty of $12,000 against Sined.

In a reply dated June 7, 1991, Sined denied each of the charged violations, requested an oral hearing and listed all factual issues believed to be in dispute. Sined claimed that: (1) It did not use a disqualified driver, citing "medical reports of a satisfactory nature" pertaining to the driver in question; (2) it did in fact require all of its drivers to be tested; (3) it did require all accidents "meeting the criteria established in [§ 394.9]" be reported, but in the case of the first charged accident it lacked information necessary for determining if the accident was reportable, and in the case of the second charged accident a report *was* sent to the Department of Transportation, but the report contained an error; (4) it did direct all drivers to prepare vehicle inspection reports, and instructed its drivers in how to complete the reports; and (5) Sined disputed the amounts of the penalties assessed against it, calling the fines "duplicative" and "confiscatory."

The parties attempted to negotiate a settlement, but without success. It appears that the Regional Director does not oppose Sined's request for a hearing, and this matter has been referred to me.

Conclusion

The record before me shows that instead of simply denying the allegations against it, Sined set down in considerable detail its version of the facts underlying the charges. The carrier's reply met all the requirements of § 386.14 of the Rules of Practice by setting forth specific denials of the charges made against it. I also note that the Regional Director has not opposed the request for a hearing. For these reasons, I conclude that the request should be granted. Sined's allegations raise several material factual disputes which can only be addressed in a formal, trial-type administrative hearing.

Therefore, I hereby appoint an Administrative Law Judge in accordance with 49 CFR 386.54(a), to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: March 12, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order; In the Matter of American Pacific Power Apparatus, Inc.

Background

This matter comes before me upon a motion of the Regional Director, Region 9, to deny American Pacific Power Apparatus, Inc.'s (American Pacific), request for a hearing and to grant the Regional Director's motion for a final agency order. An April 1990 compliance review of American Pacific revealed

several violations of the Federal Motor Carrier Safety Regulations, 49 CFR parts 350–399. Thirty-five of the forty-eight records of duty status examined were allegedly falsified. In his October 15, 1990, notice of claim, the Regional Director charged American Pacific with 9 violations of 49 CFR 395.8(e), alleging that American Pacific required or permitted its drivers to make false entries upon records of duty status, and a $3,600 penalty was assessed.

On October 31, 1991, American Pacific responded to the notice of claim and requested a hearing. The carrier specifically denied that it required or permitted drivers to falsify log records, asserting that the investigation of its log books was incomplete and therefore the findings of falsifications were erroneous. American Pacific asserted that the material factual issue in dispute was whether it "required or permitted" its drivers to falsify their records of duty activities. In a November 23, 1990, letter, the Regional Director informed American Pacific that under the doctrine of respondeat superior, an employer is responsible for the actions of its employees. In December 1990, American Pacific initiated settlement discussions, but these proved to be fruitless.

On May 15, 1991, the Regional Director filed a motion requesting a final order and a response in opposition to American Pacific's request for a hearing. In opposing the hearing request, the Regional Director asserts that both the regulations and the case law on respondeat superior clearly hold that "an owner is responsible for civil fines which result from an employee's log falsification—49 CFR 395.8(e). [American Pacific's] defense is a question of law and therefore does not raise a material issue in dispute" sufficient to warrant a hearing under 49 CFR 386.14(b)(2). Motion for Final Order at 4. American Pacific did not respond to this motion.

Discussion

Under 49 CFR 386.14(b)(2), hearing requests must list all material facts believed to be in dispute. If the Associate Administrator determines there is a material factual dispute, a hearing is granted. 49 CFR 386.16(b). If the Regional Director opposes the hearing request, as in this case, then the motor carrier must do more than just deny the allegations in its pleadings. It must give sufficient evidence to support its allegations.

In this case, American Pacific has made a general denial of the alleged violations and asserted that "the investigation of the log books of Respondent's drivers was incomplete and the findings thereof were erroneous." Respondent's Request for Formal Hearing, at 1. American Pacific disputes "that respondent made false reports in connection with duty activities," claiming that it was not liable for its drivers actions. *Id.* No evidence of this assertion was provided, nor is such evidence necessary, because this defense is a question of law, not of fact, and does not raise a material factual issue in dispute.

When one or more of its drivers falsifies log records, a motor carrier is directly liable for the falsifications under 49 CFR 395.8(e). In such cases, the motor carrier breached its own duty to verify drivers' logs. In failing to verify records of duty status, for example by comparing the logs to toll or other receipts, the carrier has permitted the log falsifications.

In sum, American Pacific has simply failed to competently identify any material factual issue in dispute. Because it has failed to carry its burden to show there is a dispute of fact, American Pacific's hearing request is denied.

"A motion for a final order is in the nature of a motion for summary judgment. Accordingly, the moving party has the burden of clearly establishing that there is no genuine issue of material facts." *In the Matter of Forsyth Milk Hauling Co., Inc.*, Docket No. R3–90–037, Order of Associate Administrator for Motor Carriers, p. 2, December 5, 1991. In cases such as this, where the respondent denies the allegations of the claim letter but the Regional Director nevertheless seeks to avoid a hearing and obtain a final order, the Regional Director's pleadings must be accompanied by affidavits or other evidence sufficient to establish a *prima facie* case. Because the respondent has denied the violations and requested a hearing, mere allegations by the Regional Director are not sufficient. *Id.* at 7; *see Laughlin Transport, Inc.*, Docket No. R3–91–104, Order of Associate Administrator for Motor Carriers, March ____, 1992. The burden is on the moving party, the Regional Director, to establish that there is no material factual issue in dispute, and all evidence presented must be viewed in a light most favorable to the non-moving party, American Pacific.

American Pacific did not respond to the Regional Director's motion for final order. Its reply to the notice of claim was ambiguous, but because all inferences must be drawn to favor the non-moving party, American Pacific's response must be viewed as a denial of the violations.

In seeking a final order, the Regional Director did not carry its burden of proving that there is no genuine issue of material fact. A material fact is a part of the claim in issue, "the establishment of which requires proof of each unadmitted essential element, as defined by the substantive law. A material fact is thus an essential element of a claim * * *." Louis, *Federal Summary Judgment doctrine: A Critical Analysis*, 83 Yale L. J. 745, 746–7 (1974). Therefore, if the moving party bears the burden of proof at trial, he must clearly establish all essential elements of his claim. In his motion for final order, the Regional Director addressed at length the doctrine of respondeat superior but did not address any other potential factual disputes.

The real factual issue in this case is whether the log entries of American Pacific's drivers were false. Because American Pacific does not admit that the records of duty status contained falsifications, the Regional Director must clearly establish this element of his claim, rather than simply allege that American Pacific would be liable if his employees did in fact falsify their logs. This evidentiary standard is no less stringent when the non-moving party has denied the allegations against him but fails to submit evidence in opposition to the motion. The Regional Director must succeed on the strength of his own evidence.

American Pacific's denial of the violations, unsupported by evidence, would not rebut a *prima facie* case of violations, but the Regional Director has failed to present a *prima facie* case. *Forsyth Milk* at 6. "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing matter is presented." Fed. R. Civ. P. 56 (advisory committee notes). Because the Regional Director's motion did not address the real factual issue in this matter and he has not provided evidence clearly establishing the essential elements of his claim, he has not met his burden and I cannot grant his motion for a final order at this time.

If the Regional Director submits affidavits or other evidence tending to show log falsification violations, I will reconsider his motion. American Pacific should note that failure to respond to the Regional Director's renewed motion or failure to produce any evidence rebutting the Regional Director's evidence may result in a final order for the Regional Director. "Silence or mere denial will not meet respondent's burden to overcome Regional Director's *prima facie* case." *Id.* at 7.

This ruling requiring the Regional Director to submit affidavits or evidence to the Associate Administrator should not be viewed as requiring a change in the practice of retaining evidence at the appropriate FHWA office. Instead, this ruling applies only to the specific factual situation of this case. Here a Regional Director seeks a final order from the Associate Administrator without a hearing when the respondent denies the alleged violations. In such case, "the Regional Director's motion must be accompanied by sufficient evidence to support a *prima facie* case, which will shift the burden of production to rebut to the respondent." *Id.* If the respondent fails to rebut the *prima facie* case, the Regional Director's motion will be granted. *Id.*

It is Hereby Ordered That American Pacific's request for a hearing is denied; the Regional Director's request for a final order is denied, with leave to renew this motion.

Dated: March 10, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; Laughlin Transport, Inc.

This matter comes before me upon a "Renewal of Motion For a Final Order and In Opposition To Request For a Hearing" filed by the Regional Director for Region 3. The Regional Director asks that the facts be found as alleged in the notice of claim letter dated February 25, 1991, and that a civil penalty of $7,500 be imposed.

The notice of claim alleges that Respondent Laughlin Transport, Inc. (Laughlin), is responsible for 10 violations of the Federal Motor Carrier Safety Regulations. Specifically, the Regional Director alleges that on 10 separate occasions Laughlin "permit[ted] or require[d]" its drivers to drive "more than 10 hours following 8 consecutive hours off duty * * *" in violation of 49 CFR 395.3(a)(1) (1991).

Laughlin responded to the notice of claim by a letter dated March 14, 1991. The reply requested a hearing but neither denied any of the charges made by the Regional Director nor alleged any material factual issue in dispute. Laughlin's reply does not meet the requirements of section 386.14(b) of the Federal Highway Administration's ("FHWA") Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings ("Rules of Practice"). See 49 CFR 386.14(b). Laughlin has not responded to the Regional Director's opposition to the request for a hearing. Because Laughlin has failed to identify any material factual issues in dispute as required by section 386.14(b) of the FHWA's Rules of Practice, and because the record before me fails to disclose any material factual issues in dispute, I hereby deny Laughlin's request for a hearing.

The Regional Director has also moved for a final order. Such a motion is in the nature of a motion for summary judgment. Accordingly, the moving party has the burden of clearly establishing that there is no genuine issue of material facts. *See In the Matter of Forsyth Milk Hauling Co., Inc.*, Docket No. R3–90–037, Order of the Assoc. Admin. for Motor Carriers, Dec. 5, 1991; see also 6 Moore's Federal Practice, 2d ed., at ¶ 56.15 [7]–[8] (1988).

These proceedings are governed by the Rules of Practice, and not the Federal Rules of Civil Procedure. However, mindful that final orders issued by the Associate Administrator are appealable directly to the United States Courts of Appeals (49 U.S.C. § 521(b)(8); 49 CFR 386.67), I believe that in cases where the respondent denies the allegations of the claim letter but the Regional Director nevertheless seeks to avoid a hearing and obtain a final order on motion, that motion should be accompanied by affidavits for evidence sufficient to establish at least a *prima facie* case. Only in this way can I fulfill my responsibility to afford a respondent a fair review of the case against it before a final agency order is issued, which, if necessary, can be enforced in a United States District Court. 49 U.S.C. 521(b)(4); 49 CFR 386.65; *see also Forsyth Milk.* A respondent's reply to such a motion would be required to contain more than mere denials or allegations tending to contradict the Regional Director's evidence. The burden would be on the respondent to oppose the motion with that quantum of evidence needed to support an assertion that there is a material issue in dispute warranting a hearing. *Forsyth Milk.*

In this case, the record before me fully supports the allegations made against Laughlin in the Regional Director's notice of claim. First, Laughlin has failed to deny the allegations of the claim letter as required by 49 CFR 386.14. Second, the Regional Director's motion is supported by copies of the compliance reviews which led to the charges and, more importantly, copies of driver's records of duty status documenting each of the 10 alleged violations of 49 CFR 395.3(a)(1). The Regional Director has met his burden in this matter—that is, to establish at least a *prima facie* case against Laughlin Transport, Inc. Laughlin, as noted earlier, has offered no rebuttal to the Regional Director's very serious allegations against it.

Accordingly, *It Is Hereby Ordered* That Laughlin's request for a hearing is denied and the Regional Director's request for a final order is hereby granted. Respondent Laughlin Transport, Inc., is hereby directed to pay the full amount of the claim, $7,500, to the Regional Director within 30 days of the date of this Order.

Dated: March 10, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Final Order; R.M. Black, Jr. Produce, Inc.

Background

This matter comes before me upon request of the Regional Director, Region 4, for a final order finding the facts to be as alleged in a notice of claim letter dated March 15, 1990, and for the imposition of a civil penalty in the amount of $16,500.

The notice of claim alleges that Respondent R.M. Black, Jr. Produce, Inc. ("Black"), committed a total of 32 violations of the Federal Motor Carrier Safety Regulations ("FMCSRs"). Specifically, the Regional Director charges Black with 7 violations of 49 CFR 383.37(a) (driving while license revoked or suspended), 1 violation of § 394.7 (failure to report a fatal accident), 4 violations of § 394.9(a) (failure to report an accident), 10 violations of § 395.3(b) (requiring or permitting driver to drive more than 70 hours in eight consecutive days), and 10 violations of § 395.8 (failure to make driver's record of duty status).

Black made a timely reply to the notice of claim on April 2, 1990. The reply contained a request for a hearing, as well as a denial of any violations of §§ 383.37(a), 394.7, or 394.9(a). Black also denied 8 of the 10 counts of violating § 395.3(b), admitted to the other 2 charges under that section, and admitted to all the charges made under § 395.8. Attached in support of its position were three police reports on motor vehicle accidents which corresponded to three of the violations charged under §§ 394.7 and 394.4(a). The reply did not include evidence regarding the remainder of the violations included in the denial, although there was a reference to the existence of additional documents presently unavailable but which "* * * [would] be utilized by the respondent in support of its position and such documents will be made available when obtained * * *." Lastly, the reply argued that the fines imposed for the "70 hours" violations

(§ 395.3(b)), as well as those for the recordkeeping violations (§ 395.8), were "inconsistent with these violations."

The parties engaged in intermittent negotiation of the claim through April 1991 without reaching a settlement, and the Regional Director filed Motion For Final Order on May 29, 1991. In that motion, the Regional Director argued that the police reports which Black attached to its reply were irrelevant, because the FMCSRs require motor carriers to report accidents to the Regional Director, not to the police. The motion also points out that the rest of the denials contained in Black's reply were unsupported by any evidence, and that the so-called "supporting documents" which the reply mentioned had not been forthcoming. Because of this lack of support for Black's denials, the Regional Director contends that Black is not entitled to a hearing because it has not raised any material factual issues in dispute as required by 49 CFR part 386, Federal Highway Administration Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings ("Rules of Practice"). No reply to this motion has been received from Black.

The Regional Director filed a Supplemental Motion on December 24, 1991, in which he submitted further evidence of the alleged violations. First, attachments to the supplement include documents supporting each of the 32 violations charged against Black, including police accident reports, repair estimates, insurance drafts, driver's records, driver's records of duty status, carrier freight bills, and more. Second, the supplement contains the declaration of Christopher M. Hartley, the Safety Specialist of FHWA who conducted the compliance review which discovered the violations. Mr. Hartley states that no accident reports were filed with FHWA corresponding to the motor vehicle accidents which are the subject of several of the alleged violations. Black never responded to this supplemental motion.

Discussion

In light of all of the evidence presented by the Regional Director, Black's blanket denials of the allegations against it are inadequate to entitle it to a hearing under the FHWA's Rules of Practice. Those Rules require that a respondent demonstrate a material factual dispute before a hearing may be granted. 49 CFR 386.14 (b)(2), (d). Black's reply to the notice of claim complained that some of the fines were "inconsistent with the violations" charged. The rule is well settled, however, that the amount of the fine alone is insufficient to constitute such a material factual issue in dispute. *See Drotzmann, Inc.*, Docket No. R10–89–11, 55 FR 2929, 2930 (Jan. 29, 1990); *see also North East Express, Inc.*, Docket No. 85–113FR, 55 FR 2965 (Jan. 29, 1990).

Turning to the violations charged in this case, the record before me fully supports the allegations made against Black in the notice of claim. As noted above, the Regional Director's two motions were accompanied by a great deal of documentary evidence, evidence which was very prejudicial to Black's position. The Regional Director has met his burden in this matter—that is, to establish at least a *prima facie* case against Black. As noted earlier, Black has offered no rebuttal to the Regional Director's allegations against it. These are very serious charges, and it is not an adequate response to reply to them with mere denials and little else in the way of evidence.

The record before me makes it clear that R.M. Black, Jr. Produce, Inc., has been in substantial non-compliance with the FMCSRs. The serious safety violations present in this case cannot be tolerated and warrant the imposition of the stringent fines assessed by the Regional Director.

Accordingly, *It is Hereby Ordered*, That the request for a hearing by Respondent R.M. Black, Jr. Produce, Inc., is denied, and the Petitioner Regional Director's request for a final order is granted. Respondent R.M. Black, Jr. Produce, Inc., is hereby directed to pay the full amount of the claim, $16,500, to the Regional Director within 30 days of the date of this Order.

Dated: March 10, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order of Administrative Law Judge Requesting Further Filings on Issues and Procedures

In the matter of: John Steven Johnson, in his individual capacity as President of Steve Johnson and Sons Trucking, Inc.; and Steve Johnson and Sons Trucking, Inc., a corporation

Served March 3, 1992.

By Order served December 23, 1991, the parties in the above-referenced proceeding were directed to file either an agreed-upon joint procedural schedule or separate proposed procedural schedules for the proceeding, along with a statement of the issues to be heard in the proceeding. Separate procedural schedules were filed on February 4 and 6, 1992, respectively, by Federal Highway Administration (FHWA) Counsel and Respondent John Steven Johnson, in his individual capacity as President of Steve Johnson and Sons Trucking, Inc.[1] The filings also show disagreement as to the issues in the proceeding and provide different approaches as to how the proceeding should be conducted. This Order, requesting further filings from the parties, is intended to clarify these matters.

As indicated in the Order served December 23, 1991, the proceeding arises by way of a Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, dated July 12, 1991, remanding in part the Final Order of the Associate Administrator for Motor Carriers, dated September 20, 1989, ordering Respondent and Corporation to pay a civil penalty in the amount of $19,700. The Court of Appeals stated:

> Because we believe that the FHWA may have exceeded its statutory and regulatory authority in imposing this fine against Johnson individually, we remand to the FHWA for the limited purpose of conducting a hearing to review the appropriateness of imposing the fine against Johnson. *See* 49 U.S.C. 521(b)(2)(A). [Memorandum Opinion at 5.]

In the order of remand, the "fine" the Court referred to was the "$19,700 fine" to which the FHWA had held "Johnson, in his individual capacity, and the company liable * * *." (Memorandum Opinion at 5.) The $19,700 civil penalty amount imposed against both Corporation and Respondent by the September 20, 1989 Final Order is based upon violations of recordkeeping and safety regulations (49 CFR parts 394 and 395, respectively) promulgated pursuant to the Motor Carrier Safety Act of 1984[2] and upon violations of the financial responsibility regulation (49 CFR part 387) promulgated pursuant to the Motor Carrier Act of 1980.[3]

Specifically, the $19,700 represents $700 for two recordkeeping violations of 49 CFR 394.9(a); $3,500 for five safety violations of 49 CFR 395.3(a)(1), $3,500 for five safety violations of 49 CFR 395.3(b), and $2,000 for four safety violations of 49 CFR 395.8(e); in all,

[1] Hereinafter in the proceeding, "Respondent" will refer only to John Steven Johnson, in his individual capacity as President of Steve Johnson and Sons Trucking, Inc. The corporate respondent, Steve Johnson and Sons Trucking, Inc., will be referred to as "Corporation".

[2] The Motor Carrier Safety Act of 1984 was enacted by Pub. L. No. 98–554, Title II, 98 Stat. 2832 (Oct. 30, 1984).

[3] The Motor Carrier Act of 1980 was enacted by Pub. L. No. 96–296, 94 Stat. 793 (July 1, 1980). Authority for regulating motor carrier financial responsibility was added to the 1980 Act by Pub. L. No. 97–261, 96 Stat. 1120 (Sept. 20, 1982). The authority is codified at 49 U.S.C. § 10927 note.

$9,700 for 16 recordkeeping and safety violations. The remaining $10,000 is for five financial responsibility violations of 49 CFR 387.7(a).

Accordingly, it is necessary to determine the question of Respondent's liability under two separate statutes, the Motor Carrier Safety Act of 1984 and the Motor Carrier Safety Act of 1980. The definitions of responsible parties differ somewhat in the wording as between these two Acts.

I. The Issues in the Proceeding

The Motor Carrier Act of 1984 provides that:

[A]ny person who is determined * * * to have committed an act which is a violation of a recordkeeping requirement issued by the Secretary [of Transportation] pursuant to section 3102 [of title 49] * * * or the Motor Carrier Safety Act of 1984 shall be liable to the United States for a civil penalty not to exceed $500 for each offense * * *. If the Secretary determines that a serious pattern of safety violations, other than recordkeeping requirements, exists or has occurred, the Secretary may assess a civil penalty not to exceed $1,000 for each offense; except that the maximum fine for each such pattern of safety violations shall not exceed $10,000 * * *. Notwithstanding any other provision of this section * * *, *except for recordkeeping violations, no civil penalty shall be assessed under this section against an employee for a violation unless the Secretary determines that such employee's actions constituted gross negligence or reckless disregard for safety, in which case such employee shall be liable for a civil penalty not to exceed $1,000.* [49 U.S.C. 521(b)(2)(A) (emphasis added).] [4]

The 1984 Act also contains the following definitions:

['E]mployee' means—

(A) an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle);

(B) a mechanic;

(C) a freight handler; and

(D) any individual other than an employer; who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety * * *. [49 App. U.S.C. 2503(2).]

* * * * *

['E]mployer' means any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it * * *. [49 App. U.S.C. 2503(3).] [5]

The Motor Carrier Act of 1980 provides that:

Any person (except an employee who acts without knowledge) who is determined by the Secretary * * * to have knowingly violated this section or a regulation issued under this section shall be liable to the United States for a civil penalty of not more than $10,000 for each violation, and if any such violation is a continuing one, each day of violation constitutes a separate offense. [49 U.S.C. 10927 note (emphasis added).] [6]

In addressing the question presented by the Court of Appeals for this remand proceeding; namely, whether the FHWA exceeded its statutory and regulatory authority in imposing a $19,700 fine against Mr. Johnson, individually; [7] it is thus necessary to determine whether Mr. Johnson may be held individually responsible, separately, under each of these statutes. Therefore, it appears that the issues to be decided herein are as follows:

1. Whether Mr. Johnson, as president of Steve Johnson and Sons Trucking, Inc., is an employee of Steve Johnson and Sons Trucking, Inc., within the meaning of 49 App. U.S.C. 2503(2) or an employer within the meaning of 49 App. U.S.C. 2503(3).

2. Whether Mr. Johnson, as president of Steve Johnson and Sons Trucking, Inc., is an employee of Steve Johnson and Sons Trucking, Inc., or a "person" who "knowingly violated" the Motor Carrier Act of 1980.

With regard to the foregoing two issues, the parties are directed to respond, on or before March 20, 1992, indicating their agreement or disagreement that these are the issues in the proceeding. The parties shall also present any other issues purportedly in the proceeding. Any disagreement with the two issues or any additionally presented issues must be supported by detailed argument and appropriate citations.

II. Procedures for the Proceeding

Both of the issues just discussed involve the factual question of the relationship between Respondent and Corporation and of the duties and activities Respondent performs in relation to Corporation. Therefore, the proceeding is not immediately susceptible of disposition by motion for summary judgment as presently proposed by FHWA Counsel. It may be possible, however, for the parties to stipulate to such relationship and duties and activities. It is also noted that FHWA Counsel refers to the "Administrative Record" in this case and to evidence in that record on such matters.[8] It may be possible, therefore, for the parties to stipulate that the factual evidence contained in the Administrative Record regarding such relationships and duties and activities shall serve as the evidentiary record in this proceeding.

If such matters are agreed to and stipulated, an oral evidentiary hearing should not be necessary and the legal issues in the case should be susceptible of submission and argument by the parties on brief.

Accordingly, the parties are directed to respond, on or before March 20, 1992, as to whether it is possible to stipulate as to the relationship between Respondent and Corporation and as to the duties and activities Respondent performs in relation to Corporation.

If stipulation of the above facts is not possible, an oral evidentiary hearing will be held in San Francisco, California, and procedural dates for discovery and for filing stipulations, witness lists, summaries of proposed testimony of witnesses, and for exchange of exhibits, as well as a hearing date, will be set by further order.

So ordered.

John J. Mathias,

Chief, Administrative Law Judge.

Order Appointing Administrative Law Judge; Kessel Lumber Supply, Inc.

This matter comes before me upon a request, dated October 10, 1991, of the Regional Director, Office of Motor Carrier Safety, Region 3, for the appointment of an Administrative Law Judge. The Regional Director, by Notice of Claim dated January 24, 1991, alleged that Respondent Kessel Lumber Supply, Inc. (Kessel), had failed to equip one of its "cargo-carrying vehicle[s] * * * with a headerboard or similar device of sufficient strength to prevent load shifting and penetration or crushing of the driver's compartment" in violation of 49 CFR 393.106(a)(1) of the Federal Motor Carrier Safety Regulations (FMCSR).

Kessel replied on February 8, 1991, by denying the allegation and requesting an administrative hearing. In its reply, Kessel contended that it was exempt from the requirements of 49 CFR 393.106(a)(1) because its vehicle fell

[4] 49 U.S.C. 521(b)(2)(A) is the codification of section 213(b) of the Motor Carrier Safety Act of 1984, Pub. L. No. 98–554, 98 Stat. 2842.

[5] 49 App. U.S.C. 2503(2) and (3) are the codification of sections 204(2) and (3) of the Motor Carrier Safety Act of 1984, Pub. L. No. 98–554, 98 Stat. 2833.

[6] The above quoted provision from 49 U.S.C. 10927 note is the codification of section 18(e)(1) of the Motor Carrier Act of 1980, Pub. L. 97–261, Stat 1121.

[7] In Respondent's February 6, 1992 response, the question is raised as to what "remaining" violations are being charged against Respondent. FHWA Counsel's February 4, 1992 response makes clear that, in its view, no violations are at issue in this proceeding, the Court of Appeals having affirmed the Associate Administrator's Final Order finding the facts concerning the violations to be as alleged in the June 2, 1989 Notice of Claim. I so find.

[8] See FHWA Counsel Response (February 4, 1992) at 3 (citing AR Tabs I, K) and 6.

within the scope of 49 CFR 393.106(g)(1), which exempts from the headerboard requirement those vehicles "designed and used exclusively to transport other vehicles* * * ." Specifically, Respondent contended that the vehicle in question was designed and used exclusively to transport construction equipment used in Respondent's business operations.

Efforts to reach a compromise lasted several months, but in the end no settlement was reached. The Regional Director had originally opposed Kessel's request for an administrative hearing on the grounds Kessel's contentions were primarily legal in nature and therefore did not present a material factual issue in dispute as required by 49 CFR 386.14. However, in October 1991, the parties agreed that the issues in this case presented mixed questions of fact and law and the instant request for the appointment of an Administrative Law Judge soon followed.

Having reviewed the pleadings, I have decided that the case does present a material factual issue in dispute. The factual question to be resolved is whether the vehicle in question "is designed and used exclusively to transport other vehicles * * *" in accordance with the exemption granted in 49 CFR 393.106(g)(1). Expert testimony, and a view of the commercial motor vehicle and the construction equipment that was being transported at the time of the alleged violation, may be necessary to resolve this matter.

Accordingly, I hereby appoint an Administrative Law Judge in accordance with 49 CFR 386.54(a), to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: February 18, 1992.

Richard P. Landis,

Associate Administrator for Motor Carrier Safety.

Order Denying Motion to Quash Subpoena Background; Gunther's Leasing Transport, Inc.

This matter comes before me upon a motion by Gunther's Leasing Transport, Inc. (Gunther's), to quash a subpoena issued by the Regional Director, Region 3, in furtherance of a complaint investigation.

On February 3, 1992, the Regional Director issued an administrative subpoena against Gunther's seeking to investigate two written complaints that Gunther's violated the Federal Motor Carrier Safety Regulations. The Regional Director asserted authority to issue the subpoena under 49 U.S.C. 502(d), but noted that pursuant to 49 CFR part 386 Gunther's had the right to file a motion to quash or modify the subpoena.

Gunther's responded on February 6, 1992, with a motion to quash the subpoena. One of Gunther's arguments is that, in the absence of a formal 49 CFR part 386 investigation or proceeding, the Regional Director cannot use the provisions of § 386.53 to issue a subpoena.

On February 11, 1992, the Regional Director filed a motion to dismiss or transfer Gunther's motion to quash.

Discussion

In effect, the Regional Director has opposed the motion to quash. Notwithstanding the 49 CFR part 386 notice in the subpoena, the subpoena was not issued under part 386. Section 386.11 of the FHWA's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings provides for three types of proceedings: (a) Driver qualification proceedings, (b) civil forfeitures, and (c) notices of investigation. This complaint investigation is none of the three.

Moreover, the subpoena issued by the Regional Director is not a 49 CFR 386.53 subpoena. This section requires that "applications for the issuance of subpoenas must be submitted to the Associate Administrator * * * or the Administrative Law Judge." In this case, the subpoena was not submitted to either the Associate Administrator or an Administrative Law Judge, nor should it be in the absence of any proceeding before them. Because the subpoena was not issued by the Associate Administrator under § 386.53, it would be inappropriate for the Associate Administrator to quash the subpoena.

The subpoena was issued by the Regional Director in furtherance of a complaint investigation, pursuant to delegated authority. The statutory basis for this subpoena power is 49 U.S.C. 502(d). This authority has been delegated to Regional Directors pursuant to FHWA Order M 1100.1, Part I, Ch. 7, Par. 6. Section 502(d) governs the enforcement of this subpoena if Gunther's chooses to resist the subpoena. If Gunther's resists, the Regional Director may petition a Federal district court to enforce the subpoena. Gunther's could then seek to have the subpoena modified or quashed by the district court.

The Associate Administrator is aware that if the Regional Director insists upon the production of the documents here in question, and Gunther's continues to resist producing the same, a judicial proceeding may be necessary to enforce the subpoena. The Associate Administrator views this as costly and encourages the Regional Director to explore less burdensome ways of conducting the complaint investigation. Similarly, the Associate Administrator encourages Gunther's to cooperate fully with the Regional Director in concluding this complaint investigation in the least costly manner possible.

Conclusion

Because this complaint investigation is not a 49 CFR part 386 proceeding and the subpoena was not issued pursuant to 49 CFR 386.53, it would be inappropriate for the Associate Administrator to quash the subpoena. Therefore I decline to do so. This denial of Gunther's motion to quash also disposes of the Regional Director's motion to dismiss or transfer the motion to quash.

It is hereby ordered, That Gunther's Leasing Transport's motion to quash the Regional Director's subpoena is denied.

Dated: February 13, 1992.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order

In the Matter of John Steven Johnson, in his individual capacity as President of Steve Johnson and Sons Trucking, Inc.; Steve Johnson and Sons, Inc., Respondents.

This matter comes before me upon a motion for appropriate relief from the Regional Director, Region 9, of the Federal Highway Administration. This motion was served by mail on November 6, 1991. No reply from Respondents has been received.

The Associate Administrator issued a Final Order in this case on September 20, 1989, ordering Respondents to pay a penalty of $19,700 to the Regional Director. On October 20, 1989, Respondents petitioned for reconsideration of the Final Order. Reconsideration was denied on December 20, 1989, and Respondents appealed to the United States Court of Appeals for the Ninth Circuit. By Memorandum Opinion filed on July 12, 1991, the Ninth Circuit Court of Appeals affirmed in part and remanded in part "for further consideration of the appropriateness of the fine against Johnson, the individual petitioner." Memorandum at 5. The Regional Director's motion of November 6, brings the decision of the Ninth Circuit to the Associate Administrator's attention for action.

Accordingly, I hereby appoint an Administrative Law Judge in accordance with 49 CFR part 386 (1990), the Federal

Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, to be designated by the Chief Administrative Law Judge of the Department of Transportation. The Administrative Law Judge so appointed in this matter is requested to conduct a proceeding for the limited purpose of reviewing the appropriateness of imposing the fine against Johnson in his individual capacity. To accomplish this purpose, the Administrative Law Judge shall have the powers and duties specified in 49 CFR 386.54(b).

Dated: December 11, 1991.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Decision; Dan Trease Distributing

A Motion for Final Order was filed in this matter on October 1, 1987, to which respondent replied on October 15, 1987. Through inadvertence, this Motion was never brought before me. Because of the passage of such a long period of time, and remaining issues in dispute which arguably could only be resolved through evidentiary hearing, I am hereby ordering that the case be dismissed in the interest of justice.

Dated: December 5, 1991.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Order; Forsyth Milk Hauling Company, Inc.

This matter comes before me upon request of the Regional Director, Region 4, for a final order finding the facts to be as alleged in the notice of claim dated May 14, 1991, and imposing a civil penalty of $4,500.

This notice of claim alleges that Forsyth Milk Hauling Company, Inc., is responsible for fourteen (14) violations of § 391.51(a) of the Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR 391.51(a)), failing to properly maintain driver qualification files for its drivers, and one violation of § 394.9(a) (49 CFR 394.9(a)), failing to report a reportable accident to the Federal Highway Administration (FHWA). 49 CFR 394.9(a).

Forsyth responded, through counsel, on or about May 24, 1991, denying the violations and requesting a hearing. Forsyth also expressed an interest in discussing settlement of this case, but apparently no settlement was reached. Motion for Final Order at 2.

The Regional Director has now moved for a final order asking that I find the facts to be as alleged in the notice of claim and impose a civil penalty in the amount of $4,500, the full amount assessed in the notice of claim. Forsyth has not responded to the Regional Director's motion.

A motion for a final order is in the nature of a motion for summary judgment. Accordingly, the moving party has the burden of clearly establishing that there is no genuine issue of material facts. See, e.g., 6 Moore's Federal Practice, 2d ed., at ¶ 56.15[7]–[8] (1988). While this proceeding is governed by the FHWA's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (49 CFR part 386), rather than the Federal Rules of Civil Procedure, I am mindful of the fact that appeals of final orders issued by the Associate Administrator, subject to motions for reconsideration (49 CFR 386.64), are appealable directly to the United States Courts of Appeals. 49 U.S.C. 521(b)(8); 49 CFR 386.67. For this reason I believe, as discussed *infra*, that in cases where the Regional Director seeks to avoid a hearing and obtain a final order on motion, that motion should be accompanied by affidavits or evidence sufficient to at least established a *prima facie* case. Only in this way can I fulfill my responsibility to afford a respondent a fair review of the case against it before a final agency order is issued, which, if necessary, can be enforced in a Federal District Court. 49 U.S.C. 521(b)(4); 49 CFR 386.65. That is especially true in a case such as this one where the respondent has denied the violations and requested a hearing.

In deciding whether to grant a motion for a final order, I must review the whole record before me. Respondent Forsyth has failed to reply to the Motion for a Final Order, and thus I turn my attention to Forsyth's May 24 response to the notice of claim which makes ten points.

1. Forsyth alleges that the notice of claim "did not comply with the due process requirements of the United States Constitution." Section 386.11(b) of the FHWA's Rules of Practice (49 CFR 386.11) provides that civil forfeiture procedures, such as this one, are commenced by the issuance of a notice of claim letter. That section sets forth the requirements of a notice of claim. 49 CFR 386.11(b)(1). Upon review, I find that the May 14 notice of claim comports with the requirements of this section. Insofar as Forsyth seeks to challenge the constitutionality of the FHWA's motor carrier safety regulations, including the FHWA's Rules of Practice, I agree with the Regional Director that this is not the proper forum for such a challenge; such review must be obtained in the United States Court of Appeals. See, e.g., *Cousins* v. *Secretary of the Department of Transportation*, 880 F.2d 603 (1st Cir. 1989) (en banc).

2. Forsyth asserts that the notice of claim was defective because it did not include a service list. I agree with the Regional Director that § 386.11(b) sets forth the requirements of a notice of claim, and that this provision does not require the inclusion of a service list with the notice of claim.

Section 386.31(b), cited by Respondent Forsyth, refers to the first pleading sent to the Associate Administrator in a contested matter. The first pleading sent by the Regional Director in this matter to the Associate Administrator, when the matter was contested, was the Regional Director's Motion for a Final Order, to which was attached a proper service list. This met the requirement of § 386.31(b).

Respondent Forsyth has not shown in what way it has been adversely affected by the absence of a "service list" with the notice of claim letter. Forsyth has not denied receipt of the notice of claim letter. Until the notice of claim is contested, no other party need see it; the Associate Administrator has no need to see notices of claim issued by Regional Directors which are not contested.

3 and 4. Forsyth asserts that the amendment of part 386 of the FMCSRs, the Rules of Practice, which was published in the **Federal Register** on October 2, 1985 (50 FR 40304 (1985)), contained a major rule within the meaning of Executive Order 12291 and violated it for failing to provide prior notice and opportunity for comment. Forsyth also appears to allege that 49 CFR part 386, is defective because the 1985 amendment, presumably, was unaccompanied by a "full regulatory evaluation" and "has a significant economic impact on a substantial number of small entities."

The short answer to this challenge is that, again, challenges of this type alleging some defect in regulations adopted pursuant to 49 U.S.C. 3102 must be brought in the United States Courts of Appeals. See *Counsins, supra.*

I note, however, that the Federal Highway Administrator, in adopting the 1985 amendment to part 386, determined that the amendment was not a major rule under Executive Order 12291; that the economic impacts of the rulemaking, if any, were minimal and that, accordingly, a full regulatory evaluation was not required; that good cause under the Administrative Procedure Act (APA) existed to waive prior notice and opportunity for comment under the APA, as well as to waive the usual 30-day delay in effectiveness of an amendment; and that, under the Regulatory Flexibility

Act, the amendment would not have a significant economic impact on a substantial number of small entities. 50 FR at 40305.

5. Forsyth states that it is interested in discussing settlement of this case. This is a point for Forsyth to pursue directly with the Regional Director rather than in this forum.

6 and 7. Forsyth appears to assert that Mr. and Mrs. Sanders, officers of Forsyth Milk Hauling Company, Inc., were not personally familiar with certain files of the corporation, and that other individuals had been employed by the corporation to maintain the required records. Forsyth further denies that it failed to maintain the required driver qualification files.

For purposes of considering the Regional Director's Motion for a Final Order, I am reviewing this matter as a case against Forsyth Milk Hauling Company, Inc. I believe that it is a fair reading of the Regional Director's motion that he seeks an order against Forsyth Milk Hauling Company, Inc., and not personally against Mr. or Mrs. Sanders. While the assertion that Mr. and Mrs. Sanders were not personally familiar with certain files of the corporation may be relevant insofar as the notice of claim sought to find them personally liable for violations of the FMCSRs, I do not perceive this denial of personal knowledge as more than marginally relevant to the issue of whether Forsyth Milk Hauling Company, Inc., maintained or failed to maintain certain records. In the absence of further argument on this point by Forsyth, I decline to rule that this assertion alone raises a material factual issue in dispute requiring a hearing to resolve.

Paragraph 6 of Forsyth's May 24 reply suggests that the required files could not be found at the time the FHWA investigator's review of Respondent's records, as alleged by the Regional Director. Additionally, Forsyth's counsel's letter of March 7, 1991, could be read as admitting to this violation: "We have now located the driver qualification files for each driver and the new lady is checking to make sure they contain all the required information." While negative inferences can be drawn from these documents submitted by Forsyth, I do not believe that, on a motion for a final order to which Respondent has not replied, that these inferences overcome Respondent's express denial contained in paragraph 7 of its reply of May 24.

The burden is on the moving party to establish that there is no material factual issue in dispute. The Regional Director has alleged that certain files were required to be kept and that those files were not kept. Respondent Forsyth has denied the violation. Forsyth's mere denial in paragraph 7 that it failed to maintain driver qualification files would ordinarily fail to rebut a *prima facie* case of violations. Because the Regional Director's motion is unaccompanied by any affidavit or documentary or other evidence supporting his claim, I do not believe that he has carried his burden and, thus, I cannot at this time grant his Motion for a Final Order with respect to the allegedly missing driver qualification files.

If the Regional Director submits an affidavit or other evidence tending to show driver qualification file violations, I will reconsider his motion with respect to these counts. Respondent Forsyth is hereby notified that failure to respond to the Regional Director's renewed motion, or failure to produce any evidence rebutting the Regional Director's evidence, will result in issuance of an order adversely affecting Forsyth. Silence or mere denial will not meet Respondent's burden to overcome Regional Director's *prima facie* case.

Finally, this ruling requiring the Regional Director to submit affidavits or evidence to the Associate Administrator should be read in the context of the facts of this case. This ruling does not mean that the practice of retaining evidence at the appropriate FHWA office needs to be changed. It simply means that if a Regional Director seeks a final order from the Associate Administrator without a hearing when the respondent denies the alleged violations, then the Regional Director's motion must be accompanied by sufficient evidence to support a *prima facie* case which will shift the burden of production to rebut to the respondent. A respondent's failure to rebut such a *prima facie* will result in the granting of the Regional Director's motion.

In the case before me, I have insufficient evidence supporting the Regional Director's claim that the required driver qualification files were not maintained.

8. Forsyth denies that it failed to report an accident as required. Unlike with the driver qualification files discussed *supra*, I believe that the record before me supports a finding that Respondent Forsyth did not report this accident as required. Forsyth's denial of this charge is ambiguous. In paragraph 8 of its May 24 reply, Forsyth states that, "Respondents deny that they failed to report a reportable accident as stated in the notice of Claim but shows that when claimant contended that the same was a reportable accident they promptly reported the same." I agree with the Regional Director that this statement actually constitutes an admission that the accident was not reported in a timely manner. Insofar as Forsyth's statement in paragraph 8 can be construed as alleging ignorance of the FHWA's accident reporting requirements (49 CFR part 394), I find such a defense to be unavailing. For this reason, and in view of Forsyth's failure to further explain its position in response to the Regional Director's motion, I am granting the Regional Director's motion with respect to this count and will direct Forsyth to pay a civil penalty of $300 to the Regional Director for this violation within thirty (30) days.

9. Forsyth requested a hearing in this case asserting that the material factual issues in dispute are whether Respondent Forsyth failed to maintain driver qualification files and whether Respondent failed to report a reportable accident. The Regional Director opposes the request for a hearing. Because I believe that Respondent has effectively admitted that it failed to report a reportable accident, I do not believe that this issue is in dispute and, thus, no hearing is required.

Because I have declined to grant the Regional Director a final order on the driver qualification file counts, I could sent this issue to a hearing. However, in view of Respondent Forsyth's failure to respond to the Regional Director's motion, I do not see what is to be gained by ordering a hearing on this issue at this time. I have left it with the Regional Director to decide whether to renew his motion for a final order supported as I have outlined here. If the Regional Director renews his motion, I will consider it. If the Regional Director renews his motion, the burden will be on Respondent to oppose the motion with that quantum of evidence needed to support Respondent's assertion that there is a material issue in dispute warranting a hearing. If Respondent meets this burden, I will send this matter for a hearing at that time. If Respondent does not meet this burden, an order may issue against Respondent.

10. Forsyth asserts that a hearing is needed to decide whether the Regional Director complied with 49 CFR 386.31(b). Insofar as this is a reiteration of Respondent's assertion that the notice of claim is defective for failure to include a service list, I have addressed that issue *supra*. I believe that the notice of claim in this case comports with the applicable regulations, 49 CFR 386.11(b), and no hearing is necessary.

Accordingly, it is hereby ordered, That Respondent Forsyth's request for a

hearing is denied; the Regional Director's request for a final order is granted, in part, and Respondent Forsyth is directed to pay the sum of $300 to the Regional Director within 30 days of the date of this Order for having failed to report a reportable accident to the FHWA as alleged in the notice of claim; and the Regional Director's motion is denied in all other respects, with leave to renew this motion.

Dated: December 5, 1991.

Richard P. Landis,

Associate Administrator for Motor Carrier Safety.

Order; Gunther's Leasing Transport, Inc.

Background

This matter comes before me on a motion for a final order by the Regional Director, Region 3, of the Federal Highway Administration (FHWA).

On September 17, 1990, the Regional Director issued a notice of claim to Gunther's Leasing Transport, Inc., alleging that Gunther's committed twelve (12) violations of the Federal Motor Carrier Safety Regulations (FMCSRs). These violations consisted of eleven (11) counts of requiring or permitting drivers to exceed the maximum hours of service allowed under the regulations (49 CFR 391.95(a)(1)) and one (1) count or requiring or permitting a driver to falsify a record of duty status (49 CFR 395.8(e)). The Regional Director alleged that the 11 counts of requiring or permitting drivers to exceed the maximum hours of service represented a pattern of violations, and accordingly assessed a penalty of $900 for each violation cited. Section 521(b) of title 49, United States Code, provides that, if the agency establishes that a motor carrier has engaged in a pattern of safety violations, then a civil penalty of up to $1,000 per violation, up to a maximum penalty of $10,000 per pattern, may be assessed against the offending motor carrier. (In his motion for a final order, the Regional Director dropped the recordkeeping count from this case, and that count will not be discussed further.)

Gunther's, through counsel, responded to this notice of claim on October 3, 1990. In this initial reply, Gunther's did not deny that the violations occurred, nor did it request an oral hearing; however, it did request additional time to prepare a more complete response. On October 16, 1990, Gunther's submitted its further response in this matter. It again neither denied that the violations occurred nor did it request an oral hearing. Nevertheless, Gunther's argued that no penalty should be assessed against it because (1) the violations discovered did not reflect a pattern of violations and (2) Gunther's neither required nor permitted these violations to occur.

On December 14, 1990, the Regional Director filed a motion for a final order asking that I find that Gunther's violated 49 CFR 391.95(a)(1) on 11 occasions as alleged in the notice of claim and that I assess a civil penalty of $9,900 for those 11 violations.

On December 20, 1990, Gunther's responded to the Regional Director's motion opposing it and asking for an oral hearing. Gunther's complained about what it viewed as procedural irregularities in the initiation and prosecution of the enforcement case against it. Gunther's does not deny the violations alleged in the notice of claim occurred, but argues that it neither required nor permitted the drivers to exceed the maximum hours of service set forth in the applicable regulations; that it has effective management controls in place to detect and correct such violations; and that in this case it in fact did discover and correct these violations. Gunther's argues, further, that the violations discovered were essentially isolated instances which only appear to present a pattern of violations because of an allegedly improper review of company records.

Similarly, Gunther's complains that the compliance review itself which led to the discovery of these violations was outside the scope of articulated agency review procedures. Gunther's appears to believe that, because its commercial motor vehicle operations had been assigned to a satisfactory safety rating, it should not have been reviewed when it was. Gunther's requested that I grant it an oral hearing and an opportunity to show that it should not be penalized for the violations discovered.

On December 21, 1990, the Regional Director responded to Gunther's opposition to the Regional Director's Motion for a Final Order. In this response, the Regional Director in turn opposed Gunther's request for a hearing arguing that the request is untimely under the FHWA's procedural regulations and, in any event, that there are no material factual issues in dispute. On December 26, 1990, Gunther's filed a motion to strike the Regional Director's December 21 response as not authorized by the FHWA's Rules of Practice. On December 27, The Regional Director requested additional time to respond to Gunther's motion to strike, and on January 2, 1991, the Regional Director filed his response opposing Gunther's motion to strike. Gunther's responded to this on January 7, 1991, by writing to me directly, with a copy to the Regional Director, complaining about the Regional Director's handling of this case.

On January 11, 1991, the Regional Director served a request for admissions on Gunther's, to which Gunther's responded on January 17, with a motion for a protective order, which motion the Regional Director opposed on January 22, 1991.

Finally, on March 8, 1991, both parties wrote to me. The Regional Director wrote to advise me of the enactment of a law by Congress on November 3, 1990, which the Regional Director believes evidences congressional intent that enforcement cases of this type be prosecuted by the agency. Gunther's responded again complaining about what it considers to be unauthorized filings by the Regional Director in this case.

Discussion

A review of the multitude of paper which has been filed in this case reflects that more heat is being generated over this matter than light shed on it. Moreover, I find that the rhetorical flourishes contained in some of these filings obscure the actual issues, substantive and procedural, which I must resolve. As I see it, the basic issues which I must resolve are whether the violations alleged to have been committed by Gunther's were in fact committed by it, and whether the Regional Director was correct in finding that these violations constituted a pattern of violations within the meaning of 49 U.S.C. 521(b) so that the assessment of a civil penalty is authorized by statute. Obviously, in order to resolve these basic issues, I must first turn my attention to certain subsidiary matters. I do not intend, however, to address every incipient issue which might be gleaned from the numerous filings submitted to me, because I do not believe that to be necessary for me to resolve the fundamental issues of this case.

The objective of this proceeding is to review the Regional Director's initiation and prosecution of an enforcement case which, in turn, is intended to secure Gunther's compliance with the FMCSRs. See 49 CFR 386.1. To that end, the FHWA's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR part 386, are intended to provide a guide for an orderly, efficient, and effective presentation of the issues for resolution. I do not believe these Rules of Practice establish cumbersome or convoluted procedures which trap the unwary or

trip up those lacking prescience, and I will not read the Rules of Practice in a way that produces such results.

Request for an Oral Hearing

The Rules of Practice provide that civil forfeiture proceedings, such as this one, are commenced by the issuance of a claim letter. 49 CFR 386.11(b). Responses to notices of claim are due within 15 days and must contain, "if the respondent contests the claim, a request for a formal, trial-type administrative hearing or notice of intent to submit evidence without a formal hearing." 49 CFR 386.14(b)(2). By requesting a hearing in a timely fashion, the respondent preserves his or her "right" to a hearing, if there is a material factual issue in dispute. See 49 CFR 386.16(b).

On the other hand, the FHWA's Rules of Practice also provide that, "if the reply submitted does not request an oral hearing, the Associate Administrator may issue a final decision and order based on the evidence and arguments submitted." 49 CFR 386.16 (emphasis supplied). I believe that this provision is written in a permissive way (i.e., "may issue a final decision") so as to enable the Associate Administrator to order further procedures as may be warranted before issuing a final order. These may include additional briefing or oral argument (see, e.g., 49 CFR 386.35(d)).

Thus, I do not read the Rules of Practice as barring me from ordering a hearing if, for example, I am convinced that a material factual issue in dispute exists, despite the parties' failure to identify it. I also believe that I have the inherent authority to send a matter for a hearing if I believe a hearing will enhance my ability to make a decision in a particular case or otherwise serve the interests of justice.

In this case, I do not now believe that there is a material factual issue in dispute requiring a hearing to resolve it. The ultimate facts which must be ascertained involve whether the alleged violations occurred. Respondent Gunther's has not denied that these violations occurred. What it appears to me that Gunther's is arguing relates to the legal significance of these facts. In this respect, certain subsidiary facts may be important; for example, the size or the selectivity of the record sample reviewed by the investigator from which these violations were identified may be relevant to the issue of whether a pattern of violations exists.

But I am not convinced that an oral hearing is necessary for Gunther's to make its argument or to establish the "subsidiary" facts which would tend to support such an argument.

Appendix B to the Regional Director's Motion for a Final Order is a copy of the investigator's enforcement report. This report indicates that the investigator checked 375 records of duty status for compliance with 49 CFR 395.3(a)(1); discovered 39 violations of this provision; and documented 11. The 39 violations discovered reportedly involved 11 different drivers of a total driver population of 18. (This latter number is presumably the number of drivers for whom records were checked. The investigator's enforcement report indicates that Gunther's uses a total of 86 drivers subject to the FMCSRs.) Of the 11 violations cited in the notice of claim letter, 7 different drivers were involved.

Gunther's argues that it believes that FHWA's sampling method in this case "was so severely flawed as to violate any notion of proper procedure, due process, or FHWA's own standards." Gunther's December 20 Opposition to Motion for Final Order, at 3. Apparently, Gunther's believes that the decision to revisit Gunther's, which had received a "satisfactory" safety rating, was "flawed," as was the method by which the investigator selected certain records to review. *Id.* at 8.

Gunther's has also argued that it neither required nor permitted the violations to occur because it, in fact, discovered these violations soon after they occurred, and took disciplinary action against the drivers involved.

These are the issues which I believe must be resolved, and I am not now convinced that a hearing is necessary to resolve them. Thus, I decline to order a hearing at this time. However, despite all the words which have so far been written on this matter, I do not believe the fundamental issues have been fully joined by the parties. Before I decide this matter, therefore, I wish to afford the parties a final opportunity to succinctly express their views on the issues which I must decide.

If Gunther's wishes to argue that the violations cited do not represent a pattern within the meaning of 49 U.S.C. 521(b), then I want to hear that argument now, along with any authority which might support that position. Similarly, if Gunther's believes that it should not be penalized for violations it discovered and took action to correct, or at least to avoid their recurrence, then I want to see some evidence or authority to support that.

For the convenience of the parties, they are reminded that previous decisions of the Associate Administrator have been published in the **Federal Register** at 55 FR 2924 (January 29, 1990) and 55 FR 43264 (October 26, 1990). Finally, I note that Gunther's has complained of the Regional Director's reference to past enforcement actions taken against Gunther's. Gunther's should be aware that its past compliance history may be relevant to several factors the agency is statutorily required to consider in determining the amount of the penalty. See 49 U.S.C. 521(b)(2)(C).

I am hereby directing the parties to submit, within thirty (30) days of the date of this order, all evidence which they wish me to consider in this matter, as well as all arguments that they wish to make. These submissions must be no more than 50 pages, including all attachments, appendices, and exhibits, typed double space on 8½" x 11" paper. The parties may then submit final rebuttals no later than 15 days thereafter. Rebuttal submissions shall be limited to no more than 20 pages in length, including all attachments, appendices, and exhibits, typed double space on 8½" x 11" paper. Deviations from these criteria will be permitted only for good cause shown. Pleadings not in conformity with these criteria will be rejected.

It is my intent to issue a final decision and order after considering these final submissions, although I reserve the right to send this matter to a hearing if I determine that it is necessary to resolve a material factual issue in dispute. I do not intend to send disputed factual issues to a hearing if those issues are not material, i.e., essential, to the resolution of the fundamental issues in this case. Nor do I intend to call a hearing to consider the significance of undisputed facts. I expect the parties to address themselves to these issues at this time.

Request for Admissions

The Regional Director has also filed a Request for Admissions from which Gunther's, in turn, has sought a protective order from me. I am holding Gunther's motion for a protective order in abeyance while I await the parties' response to this order. The discovery sought by the Regional Director would be appropriate if this matter goes to a hearing, subject to any appropriate objections Respondent Gunther's might be able to make to individual questions asked. I do not believe that Gunther's request for a broad protective order is warranted. While Gunther's has invested much time and effort in arguing what it perceives to be procedural irregularities on the part of the Regional Director, I note that requests for admissions are expressly authorized by the Rules of Practice. If this matter should be sent to a hearing, I will refer Gunther's request for a

protective order to the administrative law judge, although I will note that in my view the Regional Director would be entitled to insist upon answers to properly posed requests for admissions. Inasmuch as I am not sending this matter to a hearing at this time, however, I do not believe that it is necessary at this time to either direct Gunther's to answer the Regional Director's request for admissions or to issue a protective order, in whole or in part.

Accordingly, it is hereby ordered, That the Regional Director and Gunther's Leasing Transport, Inc., shall submit within 30 days of the date of this order arguments and supporting material, as specified in this Order, addressing the fundamental issues identified in this Order. Submissions will be served in accordance with 49 CFR 386.31. Rebuttal submissions must then be submitted within 15 days (5 additional days may be added if the initial submission is made by mail).

Dated: September 30, 1991.

Richard P. Landis,

Associate Administrator for Motor Carrier Safety.

[FR Doc. 93–7171 Filed 3–30–93; 8:45 am]

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federal register

Wednesday
March 31, 1993

Part III

Office of Management and Budget

Economic Classification Policy Committee Issues Papers

Solicitation of Comments; Notice

OFFICE OF MANAGEMENT AND BUDGET

Economic Classification Policy Committee Issues Papers

AGENCY: Office of Management and Budget.

ACTION: Notice of solicitation of comments.

SUMMARY: Under title 44 U.S.C. 3504, the Office of Management and Budget (OMB) is announcing its process for revising the economic classification system, currently known as the Standard Industrial Classification (SIC) system, and is soliciting public comment on the first two of a series of issues papers prepared by the Economic Classification Policy Committee (ECPC), a body chartered by OMB to develop a new classification system and plan for its implementation in the late 1990's. The due date for receipt of comments on the issues papers is May 28, 1993. Additional public comment periods, after major milestone events in the revision process, are planned. The revision is tentatively scheduled for implementation in January 1997.

DATES: To assure consideration in development of the conceptual framework for the revision of the classification structure, all comments on the first two ECPC issues papers must be received on or before May 28, 1993.

ADDRESSES: Please send written comments to Jack E. Triplett, Chairman, Economic Classification Policy Committee, Bureau of Economic Analysis (BE–42), U.S. Department of Commerce, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Peggy L. Burcham, Bureau of Economic Analysis, telephone number (202) 523–0873.

SUPPLEMENTARY INFORMATION:

History

In 1937, the Central Statistical Board established an Interdepartmental Committee on Industrial Classification "to develop a plan of classification of various types of statistical data by industries and to promote the general adoption of such classification as the standard classification of the Federal Government."[1] The List of Industries for manufacturing was first available in 1938, with the List of Industries for nonmanufacturing following in 1939.

Before the development of the SIC, each U.S. Government agency collected and classified data according to its own needs. Standardization was desired because:

> various agencies collecting industrial data used their own classifications, and thus a given establishment might be classified in one industry by one agency and in another by a second agency. Such a situation made the comparison of industrial data prepared by different agencies difficult and often misleading.[2]

Since the inception of the SIC, the system has been revised periodically. The latest version is the 1987 SIC.[3] For the most part, changes to the SIC have resulted in adding new and growing industries, deleting or combining declining industries, and rearranging industries within the existing industry groups.

Background

The SIC is a major statistical classification system used to promote the comparability of establishment data describing various facets of the U.S. economy. The SIC's basic classification unit is the establishment, i.e., an economic unit, generally at a single geographical location, where business is conducted or where services or industrial operations are performed. The SIC covers the entire field of economic activities by defining industries in accordance with the composition and structure of the economy. It is revised periodically to reflect the economy's changing industrial composition and organization. The 1987 SIC Manual contains the current classification of industries.

Rapid changes in both the U.S. and world economies have brought the U.S. SIC under increasing criticism. The 1991 International Conference on the Classification of Economic Activities in Williamsburg, Virginia, provided a forum for exploring the issues, and for considering new approaches to classifying economic activity. Papers presented at the conference and the discussion and insights that they generated strongly indicate that the time has arrived to take a fresh look at the concepts, methodologies, procedures, and uses of economic classifications for statistical purposes.[4]

In July 1992, the Office of Management and Budget established an Economic Classification Policy Committee (ECPC) chaired by the Bureau of Economic Analysis, U.S. Department of Commerce, with representatives from the Bureau of the Census, U.S. Department of Commerce, and the Bureau of Labor Statistics, U.S. Department of Labor. The Office of Management and Budget is represented on the ECPC in an *ex officio* status.

The ECPC is charged with a "fresh slate" examination of economic classifications for statistical purposes, including industrial classifications, product classifications, and product code groupings. This is a large undertaking with basic implications for the accuracy and utility of all establishment-based, enterprise-based, or product-oriented economic data. The Committee's charge includes: (1) identifying the essential statistical uses of economic classifications; (2) identifying and developing, if needed, economic concepts, new structures, and statistical methodologies that address such statistical uses; (3) developing classification system(s) based on those concepts; (4) planning the implementation of the new classification system(s); and (5) ensuring that there is ample opportunity for widespread public participation in the entire process.

Work Plan

The ECPC intends to identify the essential statistical uses of data produced from economic classifications through research, experiences of statistical producers, information obtained through an outreach process, and information obtained from data users concerning the actual and potential uses of data that are produced with economic classification systems. The outreach process will be structured around a set of issues papers, the first two of which are published with this announcement. Others will be made available for distribution to current and potential users of economic data and the interested public. Background material and requests for comment will be distributed through this and subsequent announcements in the **Federal Register**, as well as directly through professional organizations, industry groups, and other vehicles.

In addition to the public outreach process, the ECPC will establish two committees of Federal Government agencies to provide input to the classification examination process. One committee will be composed of Federal statistical agencies that collect or compile data that are classified by

[1] Pearce, Esther, "History of the Standard Industrial Classification," Executive Office of the President, Office of Statistical Standards, U.S. Bureau of the Budget, Washington, DC, July 1957 (mimeograph).

[2] Ibid.

[3] Copies of the *Standard Industrial Classification Manual, 1987*, are available for sale from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161. (703) 487–4650. Order Number PB 87–100012.

[4] Copies of the *Proceedings* of the 1991 International Conference on the Classification of Economic Activities can be obtained on request from Ms. Carole Ambler, Bureau of the Census, U.S. Department of Commerce, room 2069–3, Washington, DC 20233. (301) 763–5450.

economic classifications. Membership in this committee will be designated by OMB. The second committee will be composed of government agencies that use data that are classified by economic classifications. Membership in the user committee is open to any interested Federal Government agency and also to any interested State or other governmental agency. The ECPC outreach process will also include international statistical agencies, statistical agencies of the North American Free Trade Agreement Signatories, and those of other countries.

Once major statistical uses have been identified through agency research and the outreach process, the ECPC intends to identify and develop, if needed, economic concepts, new structures, and statistical methodologies that address those uses through in-house and contract research. The research will concentrate on core issues developed from the papers and discussions of the Williamsburg conference as well as the issues surfaced through the ECPC's domestic and international outreach efforts.

Drawing upon the input of the public and other government agencies obtained through the outreach process, the ECPC will evaluate alternative classification structures giving appropriate weight to the following criteria (not necessarily in priority order): (1) Analytical usefulness and conceptual appropriateness; (2) policy relevance; (3) use of appropriate classification unit(s), including enterprise, division, establishment, and/or individual product or service; (4) ease of historical comparability; (5) compatibility with international classification, to facilitate analysis of domestic data and data of other countries as well as international trade data; (6) geographic coverage and detail; and (7) feasibility in implementation, including data availability, respondent reporting burden, classification ease, and cost.

The ECPC will manage the development of a classification system(s) based on the concepts and criteria discussed above. The ECPC will seek the advice and comments of users and the public in the development process. Technical expertise and other support for the development of the classification system(s) will be provided by the agencies that are represented on the ECPC and by other agencies with an interest in economic classification to the extent possible given agency resource availability.

The ECPC will develop an implementation plan for the new classification system(s) after widespread consultation with affected domestic and international agencies.

The ECPC will ensure that there is ample opportunity for widespread public participation in the entire process through a comprehensive and open outreach process that welcomes domestic and international participation in every phase of the project. Participants are expected to include public- and private-sector domestic and international users of economic statistics, data providers and survey respondents, as well as Federal and State statistical agencies, United Nations statistical bodies, the Statistical Office of the European Community, and statistical units of the North American Free Trade Agreement Signatories.

ECPC Work Plan Schedule

A schedule outlining the process and mileposts that the ECPC will use to assess its progress toward achieving its goals follows.

(1) Public comments due on **Federal Register** notice of ECPC work plan and first two issues papers. (May 28, 1993)

(2) Research and development to determine framework for industry classification system. This includes conceptual framework, principles, procedures, and hierarchical structure, if any, concluding with **Federal Register** notice for public comment. (December 1993)

(3) Development of new economic classifications, concluding with **Federal Register** notice for public comment. (September 1995)

(4) Review comments and revise classification proposals (Concurrently, beginning with public comment phase, draft detailed industry descriptions, index items, etc.). (November 1995)

(5) Public comment on final proposals and OMB review. (December 1995)

(6) Final OMB decisions. (March 1996)

(7) Implementation of revised SIC. (January 1997)

(8) Restructuring of the SIC will be a continuing process. Research will proceed throughout the revision process. Additional changes to the industry classification structure may be made as a result of this ongoing research or as the result of data collected in the 1997 Economic Censuses, but any such proposals will be circulated for public comment before being adopted.

Issues Papers

To facilitate public comment, the ECPC has prepared issues papers on key areas of decision leading to a new classification structure. Issues Paper No. 1, Conceptual Issues, plays a pivotal role in basic decisions regarding the extent and form of the classification structure revision and is appended to this announcement. Issues Paper No. 2, Aggregation Structures and Hierarchies, is closely related to Issues Paper No. 1 and is also appended. The other papers listed below will be completed in the near future and will be available on request:

Issues Paper No. 3—Collectibility of Data
Issues Paper No. 4—Criteria for Determining Industries
Issues Paper No. 5—Time Series Continuity
Issues Paper No. 6—Service Classifications
Issues Paper No. 7—International Comparability
Issues Paper No. 8—Detailed Product Code Classifications

Requests for these issues papers should be addressed to: Economic Classification Policy Committee, Bureau of Economic Analysis (BE–42), U.S. Department of Commerce, Washington, D.C. 20230. Information on availability of issues papers and other matters can be obtained by calling (202) 523–0873.

Comment Procedure

Interested parties are invited to comment in writing to the Economic Classification Policy Committee. Comments may be in reference to questions posed in the issues papers, the ECPC work plan and public outreach proposals, or any other topic associated with economic classifications. The Committee particularly solicits comments on present and future uses of data that are produced using economic classification systems, with emphasis on the strengths and weaknesses of the present SIC system in meeting those needs.

Availability of Comment Materials

All written comments and materials received in response to this notice will be available throughout 1993 during normal business hours, 8:30 a.m. to 5 p.m. in room 709, 1401 K Street NW., Washington, DC. Individuals wishing to inspect these materials must call (202) 523–0873 to obtain an appointment to enter the building.

James B. MacRae, Jr.,

Acting Administrator and Deputy Administrator for Information and Regulatory Affairs.

Economic Classification Policy Committee; Issues Paper No. 1—Conceptual Issues

At the 1991 International Conference on the Classification of Economic Activities at Williamsburg, Virginia ([1], hereafter, "Williamsburg Conference"),

many participants stated that economic classification systems, including the U.S. Standard Industrial Classification (SIC) system, need to be based on economic concepts, or need an improved conceptual foundation. This call for an economic concept was a major departure from recent past discussions of economic classifications.

Classification Systems

Many economic classification systems exist. All of them group economic data.

Some classification systems group individual transactions. The Harmonized Commodity Description and Coding System (HS), for example, groups individual international trade transactions into product-code groupings for tariff and trade negotiations. The Census Bureau "7-digit" product codes group the value of shipments of individual manufacturing products. In principle, such groupings could provide an exhaustive list of the commodities and services produced in the economy (though in practice, even the most detailed codes must combine commodities that differ to an extent).

Other classification systems group or aggregate producing units into industries. The U.S. 4-digit SIC codes are an example of such an industry system. The SIC system also aggregates the 4-digit industries into higher level aggregations, the SIC 3-digit and 2-digit industry groups. The International Standard Industrial Classification of all Economic Activities (ISIC), of the United Nations, is another industry classification system.

Many of the most difficult issues of classification systems concern the principles for forming industry aggregations. For this reason, Issues Paper No. 1 focuses its attention on these conceptual questions.

Questions concerning the grouping of "industries" or other first-level aggregates into higher-level aggregates are discussed in Issues Paper No. 2. Issues in forming the product- or commodity-level detail itself are discussed in Issues Paper No. 8. However, the topics discussed in Issues Papers Nos. 2 and 8 are closely related to these addressed in Issues Paper No. 1, and for this reason Paper No. 1 is crucial for the other two.

1.1 The Purpose of an Economic Classification System

To those most familiar with economic classifications, their purpose may seem obvious. Yet, an explicit statement of purpose—the underlying objective of a classification system—is essential for many of the topics discussed in the Economic Classification Policy Committee (ECPC) issues papers.

The literature on economic classifications presents several general answers to the question of purpose. In all of the following, some listing of detailed commodities and services is presumed to exist, and the discussion concerns the formation of some first-level aggregation system, that is, an SIC industry, or some analogous or similar aggregation.

(a) *To facilitate use of the data.* For many analyses, economic data are grouped in order to reduce the amount of unmanageable detail. When detailed commodity data are available, some users will prefer to group the data for themselves. Other users, however, prefer that statistical agencies group the data into product or industry categories, either because of the expense of doing it for themselves or because they may lack the expertise to group data for their purposes. A standardized grouping, or classification, system is therefore a service to the data user and provides a valuable reference point even for those users who decide they wish to depart from the standard system in some way. In addition, microdata are not always available, because of confidentiality, sampling considerations, or other reasons; in these cases, statistical agencies must provide data in grouped formats.

In past approaches to classification, the objective has been to find a general purpose classification system that will meet all major user needs, or provide the maximum accommodation to the variety of needs for data. In the earliest U.S. economic classifications, different statistical agencies adopted their own systems, presumably in part because each agency's system was tailored to a specific statistical agency purpose or objective. Because many analyses require economic statistics produced by different agencies, demand arose for a standard classification system that would render all statistical agency outputs comparable, yet meet in some manner the specific purposes for which individual classification systems had been developed previously.

What seems new in the Williamsburg Conference is the view that, though standardization across statistical agencies should be maintained, different standardized classification systems corresponding to different uses of economic data may be needed. These uses, in a kind of short-hand expression, may be divided into "supply-side" or "production-oriented" classification systems versus "demandside" or "commodity-oriented" classification systems (see the development of these terms in section 1.2, below).

(b) *Structure of the economy.* Frequently encountered in the economic classification literature is the statement that the classification system should "reflect the structure of the economy." Joseph Duncan commented that "A good classification system * * * need[s] to reflect the current structure of the economy in order to assist in analysis of important changes" (Williamsburg Conference [6], pp. 19–20), and other participants expressed similar views. It is often remarked that the structure of the economy provides a kind of snapshot view of the economy at one time, which implies that time series will show how the structure changes.

Unfortunately, the term "structure of the economy" has not been well defined or explained. In one view, the structure of the economy encompasses what industries exist, where they are located, what inputs they use, what outputs they produce, and what markets they serve. Yet, the current (1987) U.S. SIC may not adequately indicate the industries that exist: Three-fifths (574) of the SIC 4-digit industries are goods producing (of which 459 are manufacturing), while the remaining two-fifths (430) 4-digit SIC's relate to the entire nongoods producing sector. The U.S. nongoods producing sector is larger than the goods producing sector by most measures. It has often been stated that the distribution of current SIC 4-digit industries does not seem to reflect the structure of the economy.

Another definition of the structure of the economy refers to the organization of production units for marketing goods or services, including the degree of vertical integration. For example, two separate meat processing industries are recognized in the current SIC (2011, Meat Packing Plants; and 2013, Sausages and Other Prepared Meat Products). The two produce virtually the same output, meat products, but meat packing plants slaughter the animals that they use in the production of meat products, while the sausage and other prepared meats plants produce meat products from purchased carcasses and other meats. As the meat packing example illustrates, the degree of vertical integration is sometimes recognized as an aspect of structure in the current SIC. In other instances, differences in vertical integration are ignored, e.g., Poultry Slaughtering and Processing (SIC 2015), where slaughtering and processing are combined regardless of whether or not the producer actually slaughters the poultry.

Moreover, the SIC system has been criticized for reflecting changes in vertical integration, when in some sense or for some purposes it should not. Conflicting statements and differences in treatment in the present system suggest the need for a more coherent statement of how vertical integration is to be treated in economic classifications.

A third example of structure concerns the combination of activities. The Hotels and Motels (SIC 7011) industry encompasses many distinct economic activities. For example, a hotel generally includes a restaurant, bar, the rental of rooms, a gift shop, etc., some of which exist separately in other 4-digit SIC's. In the U.S. SIC, the structure that is embedded in the SIC hotel industry pertains to the combination of related economic activities. In some other countries, classification systems distinguish between hotels that serve food and beverages and those that do not. Structure in the sense of this example thus admits to alternative interpretations.

Another criticism of the current SIC system structure is that new or emerging industries are not recognized very rapidly. Thus, the present system lags in recording these kinds of changes in the structure of the economy.

(c) *For use in sampling.* Most statistical programs are based on sample surveys. The requirements of sample surveys provide another reason for developing economic classification systems.

Samples may not be large enough to support estimates at the detailed commodity level or even at the 4-digit industry level of detail. Classification systems have traditionally determined how commodity detail will be collapsed for sampling purposes into more aggregated estimates, such as 4-digit, 3-digit, or 2-digit industries. For some statistical surveys, sampling at the commodity-detail level may not make sense: Because they are produced jointly, one cannot collect wage and employment information for granulated sugar or for molasses, for example, though labor information for sugar products is both collectible and useful. The sampling process often requires stratification by relevant economic variables, among which are the variables employed in economic classification systems. Both sample frame development and estimates from sample surveys thus depend on economic classification systems.

(d) *Comparability.* The expressed purpose of the U.S. SIC system is to ensure that industry statistics provided by various agencies are comparable and consistent across agencies. Comparability is crucial because the U.S. system is decentralized. However, even if the system were centralized, comparability across surveys would be required: One might want, for example, to use data from labor market surveys in the same analysis with information on product sales or receipts.

Similarly, if one wants to draw comparisons among different countries, it is important that data be collected and reported on some standardized basis. The National Academy of Sciences ([14]), emphasizes the importance of comparability between international trade data and data on domestic production.

One can thus conceive of a classification system as a device for organizing in a comparable way data sets produced from different surveys, or by different statistical agencies, or by statistical agencies in different countries. Reg Ward (Williamsburg Conference [27], pp. 88–9) speaks of a classification system promoting "communication" among data sets.

The Committee's Position

This section lists four possible purposes for a classification system. For the reasons set out in the following, the Committee believes that the first of the four—facilitating the use of economic data—should be the primary purpose of an economic classification system.

Comparability is clearly necessary for a classification system to be useful. It is also clear, however, that comparability is not sufficient, and one must look beyond comparability to specify the purposes of a classification system. The SIC system serves to make data produced by different U.S. statistical agencies comparable, but comparability has not precluded extensive criticism of it. Criticism of the U.S. SIC implies that users are concerned with the utility or usefulness of an economic classification system, beyond its provision of comparability. Shaila Nijhowne (Williamsburg Conference [15], p. 560) drew attention to the fact that "We have come a long way since the Standard Industrial Classification was used simply to achieve data comparability between federal government departments, for a limited number of data series. The SIC's now serve a multiplicity of needs." In the Committee's judgment, comparability must be coupled to the requirement that classification systems be designed so that they meet user needs. Adopting some existing system merely because it provides comparability is not consistent with the Committee's charge to conduct a "fresh slate" examination of economic classification systems.

Survey use—providing a statistical framework for collapsing product and industry detail when conducting sample surveys—is an important reason that statistical agencies develop and maintain economic classification systems. The sampling use of classifications focuses attention on the ultimate purposes for which the data are used, because the data programs for which samples are selected have themselves differing ultimate uses. A classification system that is used to facilitate drawing samples needs to be consistent with the purposes for which samples are drawn.

The Committee recognizes the long tradition that states that classifications systems are intended to portray the structure of the economy. There is validity in many complaints that the current system does not portray the structure of the economy (its failure to record emerging industries soon enough, for example). However, the phrase "structure of the economy" seems to mean different things to different users, perhaps because they have differing analyses in mind when they discuss structure. If so, the elements of structure that matter for one use of SIC-grouped data are not those that matter for another use, and may even conflict. In any event, ambiguity in the use of the term suggests the need for a more rigorous definition of "structure," one that could be applied consistently across all the industries in the classification system.

Request for Comment

The Committee invites comments on the foregoing discussion, particularly its view that data use provides the primary rationale for an economic classification system.

1.2 The Idea That an Economic Classification System Should be Based on a Consistent Conceptual Framework

At the Williamsburg Conference, there was widespread recognition that the present U.S. SIC system does not correspond to any single concept for grouping or aggregation. Critics of the present system suggest that the absence of a consistent conceptual framework creates anomalies within the system. Particular concern was also voiced at the Williamsburg Conference that there is no discernible concept in the services categories: "In general, there seems to be no consistent definition or classification concept underlying decisions on what to include in services or on how to arrange the categories within services. The resulting conglomerate is too diverse to be analytically useful"

(Courtenay Slater, Williamsburg Conference [20], p. 150).

On the other side of this issue are those who, while recognizing the validity of many of the criticisms of the current system, question use of a single concept for constructing a classification system. They believe that classification systems must incorporate multiple concepts, both because industries are actually organized on varying principles, and because classification systems must be the source of data for different types of analysis.

The following section explains the economic concepts that have been proposed for economic classifications. The positions taken on the concepts question and the issues that arise under it are reviewed in the subsequent subsection.

Background: Economic Concepts for Classification Systems

Proponents of adopting a consistent conceptual framework for economic classifications have focused on two alternative general approaches, which may be referred to as the supply-side approach and the demand-side approach.

A supply-side, or production-oriented, concept aggregates according to similarity in the production processes that are used to make them. In the technical language of economists, one would group establishments together if each establishment has the same or closely similar production function.

A demand-side, or commodity-oriented, classification concept, in contrast, yields a classification system based on use of the commodity or service. Commodities or services that serve similar purposes, that are used together, or that are functionally related in use, are grouped together.

Both general approaches—supply-side or demand-side—are derived from economic theory, specifically the economic theory of aggregation. The conceptual approach to economic classifications is developed in a paper by Jack Triplett [23] that was published prior to the Williamsburg Conference. That paper contains more information on the conceptual approaches described in the following paragraphs.

The supply-side or production-oriented concept. For the purposes of this paper, the technical term production function needs more explanation and needs to be related to other terms that have been employed in the classification literature.

Production involves an activity in which inputs are used to fabricate some material good or to render a service. A production function describes how the amount of the product (or service) depends upon all the inputs used in its production, given the state of the art, or "technology." All of the inputs matter, not just the major input (e.g., leather or plastics). The list of inputs includes in principle the types of labor and their skills, the types of capital equipment, as well as intermediate materials, and, in many cases, intangible inputs may be important, especially in the production of services. The substitution of one input for another is inherently part of many production processes, and that information, too, is incorporated into the production function. The production function should be understood as an abstract description of the engineering principles for a production process, or as a description of the production technology, and not just a list of inputs. In principle, it is engineering information about the production process that determines if establishments are sufficiently similar to justify grouping them by a supply-side concept.

In the international literature on classifications, the term "activity" is used to convey ideas that are very similar to the terms production function or production process, as these terms are used in ECPC issues papers. Peter Struijs (Williamsburg Conference [21], p. 367) remarked: "* * * [C]onstructing an SIC is to define similarity of businesses. As the SIC is used for the statistical description of the production process as carried out by businesses, it is the kind of economic activity of businesses that determines their similarity." Struijs then goes on to note several possible "criteria" of classification, one of which is: "The production process criterion refers to the way in which inputs are transformed into outputs. This depends mainly on the technology used" (ibid., pp. 368–9).

Similarly, the usage of the term "activity" in the International Standard Industrial Classification (ISIC), Rev. 3, of the U.N. Statistical Office [24] is also consistent with the meaning of the production function term, as used in the ECPC issues papers: "* * * [T]he term 'activity' is to be understood as a process, i.e., the combination of actions that result in a certain set of products. In other words, an activity can be said to take place when resources such as equipment, labour, manufacturing techniques or products are combined, leading to specific goods or services. Thus, an activity is characterized by an input of resources, a production process and an output of products" (ibid., p. 9, para. 29). The following example from the same source is illuminating: "If, for example, pens and pencils are produced in the same enterprise, using, however, different inputs and different production techniques, the enterprise may be considered to carry out two activities * * *" (ibid., para. 32). Although the ISIC use of the term "activity" is consistent with the production function concept, this does not necessarily imply that the ISIC in practice actually implements a supply-side concept.

The Demand-Side or Commodity-Oriented Concept. The demand-side concept is more intuitively understandable than is the supply-side concept, but, at the same time, is technically more difficult to define. Under a demand-side concept, one would group together commodities or services that have similarities in use, that belong together or are used together for some purpose, or that define market groupings.

A quite old idea is that demand groupings can be formed by considering the nature of substitutions. Very close substitutes belong together; commodities or services that are not good substitutes belong in different categories. Granulated cane sugar and granulated beet sugar, for example, are probably indistinguishable in use (they are perfect substitutes) and accordingly belong together on the close-substitutes rule. The close substitutes method is sometimes known as the "gaps in nature" approach: To define demand-side categories one looks for pronounced gaps in the chain of substitutes. Empirically, finding gaps in the substitute chain has proven difficult.

A somewhat related idea is examining the movement of prices. If the prices of two goods move together, then they may be combined in a demand-side category. This is often known as "Hicksian aggregation," because it appeared in the work of Nobel laureate Sir John Hicks. The products granulated cane sugar and granulated beet sugar probably conform to Hicksian aggregation, because it is difficult to comprehend how the prices of such close substitutes could differ. Hicksian aggregation has the advantage that it can be examined empirically using available government price indexes: One study by Theodore Jaditz [10], for example, employs detailed Producer Price Indexes to determine if conditions for Hicksian aggregation are met.

Demand relationships extend beyond close substitutes or goods whose prices move together. Cases where commodities are used together need to be included in a demand-side concept. Such relationships are sometimes called "Leontief" aggregation (from the work of

another Nobel prize-winning economist, Wassily Leontief): Demand-side groupings can be formed from goods that are used in fixed relation to one another.

Still more general is the demand-side aggregation known as "functional aggregation." In this case, one aggregates commodities if demand patterns among them—whether substitution or joint use—are independent of the use of other commodities. The technical condition is that demands for commodities included in a group should depend only on the prices of commodities within the group, and on consumer income (in the case of consumer goods). This form of demand-side aggregation imposes conditions that are highly technical, and that are not easy to explain in intuitive language.

Another approach to demand-side groupings is to consider marketing relationships. If commodities are commonly sold together through similar channels, some users will request that information on them be combined. One example appears to be "Hand and Edge Tools" (SIC 3423), which groups together most of the tools found in a typical hardware store.

From this discussion, it may be understood that one technical problem inherent in applying a demand-side concept for classifications is that the alternative demand-side rules noted above will not necesserily yield the same groupings.

Additional Discussion

The classification of sugar products is an old example that illustrates some of the differences between supply-side and demand-side conceptual bases for aggregation or grouping. The present U.S. SIC distinguishes granulated sugar (as well as molasses and other sugar products) made from sugar cane and puts these sugar products in a different industry from the same sugar products that are produced from sugar beets; sugar products that are made from raw cane sugar are yet another separate industry (these three industries are, respectively, SIC's 2061, 2063, and 2062).

One could argue that the present SIC grouping makes sense as a supply-side or production-oriented concept, on the grounds that sugar cane and sugar beets require different production processes in the sugar refinery, and that refining of sugar from purchased raw sugar also implies a difference in the production process (because the first stage of processing will be absent in these latter establishments). If sugar production processes are adequately distinguished by the groupings in SIC's 2061, 2062, and 2063, then this supply-side grouping of sugar products is appropriate for the analysis of production processes for sugar, the analysis of productivity in sugar production, and so forth. For production and productivity analyses, an economist wants the data grouped so that they represent similar production processes, and does not want the data grouped by similarity in use of the product.

The present SIC grouping of sugar products does not, however, conform to a demand-side grouping concept. Granulated sugar produced in SIC 2061 is probably indistinguishable in use from the granulated sugar that is produced in SIC's 2062 and 2063, and the same statement undoubtedly holds for powdered (icing) sugar, or molasses. No matter the raw material from which they are made or the process used for refining, there is little evidence in the marketing or use of sugar that any attention needs to be paid to the production processes distinguished in the present 4-digit SIC's.

The distinction between supply-side and demand-side classification concepts is sometimes identified with the distinction between an industry classification system and a product or commodity classification system.

A commodity classification system aggregates only commodities—that is, only the outputs of the collection unit are aggregated, and not the inputs. If only the outputs are aggregated, one could group molasses, say, wherever produced into a single commodity group, and place it, if appropriate, in a completely different category from granulated sugar. A demand-side, commodity, classification system is not limited or constrained by the necessity for grouping inputs (capital equipment, employment, or materials used) along the same lines.

An industry classification system, on the other hand, must be capable of grouping both establishment outputs and inputs by the same system. In a supply-side classification system, putting molasses and powdered sugar into different categories would not be feasible. Neither the labor inputs, nor the machinery, nor the sugar cane or sugar beet inputs can be allocated uniquely to molasses or powdered sugar.

Another similar distinction is the one between industry and market. James McKie [13], writing nearly 30 years ago, noted that economists frequently assume that the limits of the industry and the market coincide: "Marshallian economics envisioned a structure of single-stage industries producing single products. For analytical purposes, the boundary of the industry is still usually assumed to be the same as the boundary of the market. * * * But such a concept is too simple to serve as a framework for statistical reporting." If industry and market boundaries coincide, then the conceptual questions in classifications will have little practical importance—one will obtain similar groupings whether supply-side or demand-side aggregation concepts are employed. Generally, the industry and the market do not always coincide, which means that supply-side and demand-side groupings may well differ.

In some of the discussions at the Williamsburg Conference, the distinction between product and industry classification systems was not clearly maintained, or the distinction was not drawn as it has been in the present paper. Some of the participants envisioned a demand-side aggregation, a market-oriented commodity classification system that would also collect data on inputs, and so could be used simultaneously both for market analysis and for production analysis. This vision is, of course, precisely the historical goal of the current SIC system—to construct a classification system that can simultaneously meet the demands of all uses of economic data.

1.3 What Grouped or Classified Data Do Users Need?

Though statistical programs must always be adapted to user needs for data, statistical agencies sometimes find it difficult to stay abreast of evolving uses of statistics because data needs change, and sometimes they change quite rapidly. Determining actual and potential statistical uses of classified data, and the major users of classified data, is particularly difficult. Data classification systems affect the programs of nearly all statistical agencies.

Within the decentralized U.S. statistical system, there is no single place to which information on the uses of classified data flows.

One view expressed at the Williamsburg Conference holds that uses of classified data can be separated into supplyside analyses or uses of data and demand-side analyses or uses of data. Use of grouped data for marketing studies, for example, is generally a demand-side use, because marketing studies require that data be grouped by use patterns or by patterns of close substitutes. Production analysis or productivity studies are supply-side uses, because they require grouping by similarity of production processes.

It is not clear, however, that these distinctions between supply-side and demand-side uses were developed out

of a sophisticated and comprehensive overview of user requirements for classified data. The distinctions seem to have been drawn, instead, from the distinctions made in economic theory, combined with generalized discussion of how the data might be used. But even if the theoretical distinctions are entirely the relevant ones, the Committee would still need to compile information about major uses to determine which of the groupings that are derived from economic theory are the most relevant ones for the major uses of the data.

A survey of uses of economic data is particularly difficult in this case. Tabulations of inquiries to statistical agencies (see the table in Tom Petska, Fritz Scheuren, and Bob Wilson [16], p. 57) are generally useful, but are not practical for gathering information on classifications. Files of complaints from users about aspects of past classification systems have been built up, more or less on an anecdotal basis, but these files never have been assembled in a way that relates them systematically to major uses of classified data. Samples drawn from statistical agency mailing lists may also fail to reach the appropriate audience because many users of statistical agency data are not on agency direct mailing lists.

The Committee's Position

The Committee believes that more information about user needs for classified data must be assembled, regardless of the difficulties.

Request for Comment

The Committee invites comments from users, especially on the uses they make of classified data. Particularly relevant to the Committee's deliberations is information on problems with existing (SIC) classified data in serving user needs, especially analyses that are inhibited by inadequacies in existing classifications. The Committee also invites comment on the view that major uses of classified data can themselves be grouped into supply-side or demand-side categories for the purpose of the Committee's investigation.

1.4 Should Classification Systems Conform to a Consistent Conceptual Framework?

Whether economic classification systems should conform to a consistent conceptual framework brought forth a number of views, of which the following are the major contending positions.

(a) *A single economic concept should be applied consistently throughout an economic classification system.* The view that economic classifications require a conceptual framework drawn from economic theory was endorsed by a number of participants at the Williamsburg Conference, including Joel Popkin [17], Frank Gollop [8], Marilyn Manser [11], Ernst Berndt [3], Jack Triplett [22], and Cardiff, Kokaski, Smith, and Zieschang [4].

The case for a single economic concept for economic classifications has several interrelated parts.

- Without a consistent economic concept for grouping and classifying data, users will find that the data are not always grouped appropriately for any purpose. Inconsistencies arise in the system, and users may not know where they are. The present system contains examples. Sugar products are grouped by the supply-side concept into three separate SIC's because of differences in production processes. However, some other products (such as Hand and Edge Tools, SIC 3423, or Musical Instruments, SIC 3931) that are produced by different production processes are grouped into a single industry by what appears to be a demand-side concept. Similarly, presumably a demand-side concept justifies separating timeclocks and time recording devices (which are placed in SIC 3579, Office Machines, Not Elsewhere Classified) from the clocks and watches industry (SIC 3873).
- Equally important, without a consistent economic concept, whoever constructs a classification system must inevitably choose from among competing requirements. Lack of a consistent underlying concept may lead to arbitrary decisions or decisions that seem arbitrary, and may cause unnecessary reclassifications among 4-digit categories (see Edward Denison [5] for the position that SIC reclassifications have made economic data less useful).
- In presenting the system to the public, an economic concept facilitates explaining why data are grouped in one way rather than in another. Without a consistent concept, the system as a whole cannot be understood by users, which leads not only to inadvertent misuse of the data, but also to controversies and criticisms that arise from misunderstandings. The system needs a consistent concept to provide a coherent framework for criticizing the system in order to improve it.
- If the multiple uses of economic data cannot be accommodated within one conceptually consistent system, then the solution may be to create multiple classification systems, each one conceptually oriented toward a particular use of the data. At minimum, this would entail an industry classification system based on a supply-side concept and a commodity classification system based on a demand-side concept. Constructing a single classification system that is intended to accommodate all uses creates, on this view, too many compromises, so that data produced under the system do not meet user needs.

(b) *The system needs concepts, but a single concept may not be either desirable or feasible.* Others believe that the classification system must provide multi-purpose statistical groupings and that there can be no single underlying concept. Accordingly, the system must be a balance, and a compromise if necessary, among competing requirements for data.

This view notes that the multiple concepts embedded in the current U.S. SIC are dictated by the fact that in the economy some units are organized on the basis of inputs or production (e.g., Aluminum Die-Castings, SIC 3363; and Cotton Textile Finishers, SIC 2261) and others on the basis of marketing patterns or uses (e.g., Hand and Edge Tools, Except Machine Tools and Handsaws, SIC 3423; and Dolls and Stuffed Toys, SIC 3942). The defenders of the current U.S. classification system suggest that requiring the system to conform to a single concept may result in data that are less useful, accurate, and comparable across time and among agency programs.

The current SIC system attempts to implement concepts to the extent permitted by establishment input and output patterns. Widespread emphasis is given in the current SIC to products, market categories, and stage of processing. Economic concepts may have provided guidelines but they did not define a standard.

This system has been criticized because in application it results in inconsistencies of concept. But those who question the acceptability of a single concept state that these apparent inconsistencies exist because of variations in output patterns in the economy which result in groupings that are not conceptually consistent. In this context, inconsistency is a valid criticism only if consistency is the major objective of the classification system.

Many advocates of the current system point out that the units of some current SIC industries cannot be grouped according to a demand-side concept. For example, as noted above, the aluminum die-castings industry (SIC 3363) is currently categorized on the basis of the material used and the production process. Aluminum die-castings establishments produce an unlimited

range of products, the mix of which can change from year to year or week to week. From a practical standpoint, the establishments may not even maintain records by product. If these establishments were to be classified on the basis of outputs, it would be difficult to obtain accurate data, diminish the stability of classification over time, and lessen agreement among agencies in their classifications.

This view recognizes that both production process and outputs are important in a classification system. A grouping, however, should not be based exclusively on the production process if that results in grouping outputs that are highly dissimilar in use. There is probably little similarity in the production processes for pianos, piccolos, and ocarinas, but that does not mean that the musical instruments industry (SIC 3931) ought to be separated along production process lines.

Under this view, the mixing of concepts in different parts of the classification system is inevitable and in some instances desirable, because then such a system represents differences in industrial production processes and marketing arrangements among industries. It is suggested that these differences should be carefully considered when contemplating a commitment to a single concept.

The Committee's Position

The Committee believes that the current U.S. approach to classifications is problematic, and that an approach or approaches that implement an underlying economic concept or concepts must be considered. However, the overriding objective for a classification is to develop a system that meets user needs. A major part of the disagreement between those who advocate the current approach and those who advocate a conceptual basis arises out of differing assessments of the usefulness of the present SIC system. Many see the present system as useful, though not perfect, in meeting the needs of users, and these individuals see criticisms of it as misunderstandings of the system's objectives. Those who advocate conceptual development emphasize that the present SIC's objectives are not clearly stated and that users have expressed problems with the present system. The Committee's task is to sort out these arguments and to form an assessment on the merits and demerits of the present system and of proposed alternatives.

Request for Comment

The Committee invites comments on the issue of adopting a consistent conceptual framework for the economic classification system. Relevant to the Committee's work are assessments from data users about the usefulness of the present SIC system as well as indications of problems with it. The Committee recognizes that parallel evaluations of conceptually-based systems cannot be rendered at this point, but anticipates public review later in the process of developing any proposed revised classification system. Preliminary responses about the suitability of the supplyside concept, the demand-side concept, or the current approach to classifications are appropriate and are solicited.

1.5 If a Conceptually-Based Approach is Chosen, Which Specific Classification Approach or Approaches Should be Adopted?

As discussed previously, a substantial body of economic theory relates to how economic data should be grouped for various purposes. There is thus considerable basis for implementing any of the approaches discussed. Further research, however, would be needed to support actual implementation of either of the two conceptual approaches presented above. The basic question is whether either, or both, of the conceptual approaches should be adopted, or whether the traditional framework—suitably modified—should be retained.

(a) *Should there be a supply-side classification system?* A supply-side, or production-oriented, structure would group together commodities that have similar production processes, or as it is frequently stated in economics, similar production functions. A production-based structure would be essential for international comparisons similar to the examples listed by Jacob Ryten (Williamsburg Conference [18], p. 473): "* * * to compare across national boundaries the volumes and values of inputs required to produce the same outputs; the degree to which the relative intensity of labour and capital varies from one country to another; the inter-country differences in the scale of operations typical of any particular grouping; and perhaps most importantly, the different returns to capital employed in the same industry but in different countries."

A production-oriented structure is also essential for carrying out productivity studies. Productivity studies compare efficiency relationships between inputs and outputs, and the framework for such studies implies that the units that are grouped together share identical, or similar, production processes. Improving data for productivity analysis was a major priority of the Federal Government's recent Economic Statistics Initiative (see *Survey of Current Business*, February 1990, page 2).

In aggregating establishment data, the concept of joint production is important. Joint production occurs when an establishment's labor force and/or other inputs cannot uniquely be divided among the various products the establishment produces. The case of joint production is different from the situation where establishments do not maintain records on inputs into producing separate products, although it is likely that joint production is often the reason behind the lack of availability of such records.

Frank Gollop (Williamsburg Conference [8], p. 496) states that, in contrast to the demand-side case, statistical agencies must form supply-side aggregates because joint production is prevalent: "If all producers of goods and services were single-product producers, there would be no need for the Census Bureau to provide supply-based aggregates. * * * [However], multiple-output producers report the dollar distribution of shipments by detailed product code but do not (and most often, cannot) allocate inputs to the various products or services produced under conditions of joint production. * * * If data for multipleoutput establishments are to be reported at all, the Bureau * * * must aggregate over products within multiple-output establishments* * *."

However, Popkin (Williamsburg Conference [17], pp. 187–8) suggests that "* * * the production-based approach presents considerably more hurdles [than the commodity-oriented approach] on the road to implementation. For example, to group establishments by similarity of production structure, their production structure must first be identified. In other words, to clean the data, the data must first be clean. * * * A restaurant, for example, might look more like a food manufacturing plant than a retail store, when viewed from the production function approach."

Others disagreed with Popkin's assessment, or with parts of it. The first part of Popkin's statement implies that only formal, data-based technical procedures would be used to discriminate among industries, rather than the full range of information about industry production that is in fact used in all countries for classification

decisions. Triplett (Williamsburg Conference [22], p. 28) notes that adopting a consistent conceptual approach for economic classification does not mean that SIC classification committees must necessarily carry out complex statistical or econometric analyses. Instead, it "* * * means only that the classification committee is instructed to follow a consistent principle—and only one principle—in constructing classifications."

Nevertheless, implementing a production-oriented classification concept does imply gathering information about production processes, perhaps beyond the information that is now available (see ECPC Issues Paper No. 3).

(b) *Should there be a demand-side classification system?* Studies of the demand for various goods and services, of market share, and so forth require a demand-side classification concept. A demand-based structure would group together commodities that are close substitutes in use, or are functionally related in use. A demand-side system pertains both to households buying commodities for consumption and to firms buying commodities as inputs into their production process.

The need for such a demand-based system was addressed by Popkin (Williamsburg Conference [17], p. 159), who recommended that "* * * the classification concept be one that classifies items by the markets in which they compete and are sold." He (ibid., pp. 186–7) reasons that "[t]he main advantages of a consumption based approach lie in the analysis of the market structure of an economy. Any demand-based analysis would clearly be facilitated by the aggregation of outputs."

Others do not see the necessity for statistical agencies to produce a demand-side system, because, they maintain, the detailed commodity data are already provided so that demand-side users can aggregate those data for themselves. Data on establishment shipments, sales, revenue, and so forth are available by Census detailed product classifications. For example, the shipments data required to form a sweetener category or a fastener category exist, at least in Economic Census years, and can be combined by any users who need them. Consequently, Michael Gort (Williamsburg Conference [9]) and Frank Gollop (Williamsburg Conference [8]) contend that there is little need for a statistical agency to expend resources on demand-side aggregations.

Gollop (ibid., p. 497) is also concerned that consensus on the methods for demand-side aggregation will not be reached. He notes: "First, there is no single 'correct' aggregation scheme. * * * There are a number of demand-side aggregation techniques—no two of which would necessarily lead to the same set of SIC aggregates. * * * The supremacy of each is driven by the particular research question being asked. Second, even if economists were to agree on a particular method, there would likely be significant disagreement over the process of applying the method."

Another view emphasizes the distinction between a commodity classification system, or a commodity-based aggregation system, and an industry classification system. That is, it emphasizes the difference between aggregating detailed product or commodity codes and aggregating establishments.

If users require data on a sweetener aggregation for market-share studies, for example, this need could be met by aggregating over the relevant commodities from SIC's 2046, 2061, 2062, 2063, 2099, and 2869. Such a commodity aggregation system need not imply that inputs from these same industries be combined, for presumably users do not need aggregated information on inputs for demand-side purposes. A commodity system, if needed, could then supplement, not replace, an industry classification system, which would continue to be used to group all data, inputs and outputs, from the establishments included in the grouping.

(c) *Is more than one classification system desirable?* Several participants at the Williamsburg Conference pointed out the need for more than one classification system. William Seltzer (Williamsburg Conference [19], p. 487) emphasized that multiple classification systems already exist for some purposes and endorsed extending this idea: "In the language that we seemed to have adopted at this Conference, while 1,000 flowers may be beyond the resources of the Suitland Plantation, certainly the Census Bureau and the SIC can produce more than a single flower." Marilyn Manser (Williamsburg Conference [10], p. 522) recommended that "* * * users would be well served if one production-based and one demand-based aggregation system were developed." Some other participants expressed similar views.

One reason for endorsing two aggregation systems is to permit maintaining a clear focus on the purposes of a classification system. Paula Young (Williamsburg Conference [28], p. 427) points out that "* * * data users whose focus is on commodity analysis have targeted the SIC as the vehicle for meeting their needs." She views this as having weakened the SIC's analytical foundation (which is, in her view, for supply-side analyses): "For industry analysis, this foundation must reflect the production process and the commonality of input structure among establishments, not the end use of the commodity" (ibid.). In support of her production-oriented interpretation of the present SIC, Young quotes from the 1987 SIC Manual ([25], p. 11), which states that the purpose of the SIC is "* * * for use in the classification of establishments by type of activity in which they are engaged * * *." Young calls for the establishment of a second, commodity-oriented, classification system integrated with the SIC.

The Committee has research underway that examines the present 4-digit SIC industries which will identify the number of these industries that already fit into either the supply-side or the demand-side approaches. When this research is completed a report will be made available.

The Committee's Position

The precise concept or concepts to be implemented are not yet clear. The resolution of this issue is perhaps the major undertaking of the ECPC project's research phase.

Request for Comment

The Committee invites comments on any aspect of this issue, including the importance of providing alternative classification systems and on problems that might arise if alternative systems were to be adopted. Proposals for research that would clarify or resolve the economic issues, or provide new or extended methodology that could be applied in developing a system based on either supply-side or demand-side approaches, are also encouraged. Also relevant to this topic are assessments on the advisability of replacing the current approach to classifications with an approach based on economic concepts.

1.6 The Classification Unit

What is the unit of classification? Does it depend on the concept implemented in the classification system?

An establishment is defined as a production entity in a single location. Two establishments may occupy the same or adjacent space if the data available are separable by activity, physical identification, and recordkeeping. The establishment concept has been integral to the U.S. SIC system since its beginning. A key issue

in revising the economic classification system is whether the establishment should continue to be the basic unit that is classified.

Concern has been expressed that U.S. business operations have become less establishment-based (Charles Waite, Williamsburg Conference [26], p. 11). Popkin (Williamsburg Conference [17], p. 192) recommends the basic business unit for the new system be changed to "the DDS, the division, department, or subsidiary," a unit determined by the management structure within each firm that reflects its way of doing business. He believes that increasingly firms do not keep records, or report some types of data, at the establishment level. And Popkin also believes that many of the inputs that have become more important in an advanced economy (business services, for example) are increasingly provided at the enterprise, rather than the establishment level. If so, even a supply-side classification concept must use the DDS as the unit, rather than the traditional establishment.

Ernst Berndt (Williamsburg Conference [3], p. 494) notes that in many industries, especially in recent decades, the extensive activity involving mergers and restructuring of companies and divisions implies that the DDS could involve a great deal of instability over time. Robert McGuckin (Williamsburg Conference [12], pp. 394–5) recommends against moving from the establishment as the basic unit for an industry unless absolutely necessary. Much of the detail on production relationships that one gets from establishments would be lost in consolidation to the DDS level. Also, the establishment represents a fixed location, independent of ownership status: When establishments are the units, the ability to link microdata over time does not depend on the ability to track changes in ownership and management structures, as it will if the DDS is the unit. Marilyn Manser (Williamsburg Conference [11], pp. 524–5) notes that the need for geographic detail is important, and that differing after-tax prices across areas is a reason to refrain from aggregating units across geographic lines.

Some of the examples cited to show the declining relevance of the establishment may simply represent misapplication of the concept (Triplett [22], p. 29). For instance, in banking, ATM's do not correspond to a production unit and should not be considered an establishment. In other examples as well, including pipelines, courier services, and communications, providing a network is the essence of the production process; defining the production unit in one location (the pipeline's pumping station) ignores the most essential aspect of the network.

The question of the classification unit arises in work on classifications outside the United States. Struijs (Williamsburg Conference [21], p. 366) proposes that "The answer to [questions about the classification unit] depends on which parts of the organization act independently, i.e., where autonomy of action resides. . . . For example, a franchising chain, say a chain of restaurants, could be seen as an autonomous unit with regard to advertising, while the franchises could all be considered separate [units] where the selling of food is concerned." He goes on to point out that the unit chosen must be one for which records are available, though mere availability does not imply that the recordkeeping center is the appropriate unit. The unit must be a decision-making entity, not just one that holds information.

Some participants at the Williamsburg Conference, while generally agreeing that the establishment should remain the statistical unit, note some qualifications. Stanley Feldman (Williamsburg Conference [7], pp. 269; 294–6) would retain the establishment as the statistical unit, for the most part. He discussed particular issues relating to the application of the establishment concept in banking and insurance. It was also noted that although there are reasons that we should not drop the establishment classification, we may want to supplement it (Waite, Williamsburg Conference [26], p. 11).

A key point for Issues Paper No. 1 is whether the choice of unit is determined by the conceptual basis that is adopted for the classification system. Triplett (Williamsburg Conference [22], p. 28) suggests that for a supply-side, or production-oriented concept, collection of inputs linked with outputs is essential. In this case, the choice of unit is determined by the availability of information on the inputs that are important to production. Whether the DDS or the establishment is the correct unit depends on whether the growth of nontraditional inputs provided by the enterprise has become dominant in modern production. This is an empirical issue, on which there seems no current consensus.

For a commodity-oriented, or demand-side, classification system, on the other hand, the unit is probably not the establishment. A demand-side aggregation system would aggregate commodities or services, no matter where produced, and would by definition not be concerned with inputs. Data could therefore be collected for any level that is convenient, either below the establishment level or at some higher level, such as the DDS.

The Committee's Position

In the Committee's judgment, the choice of unit cannot be considered in isolation from the concept employed. Under a supply-side concept, the establishment might remain the unit. If, however, the establishment is no longer a decision unit, or if business services and other essential inputs cannot be allocated uniquely to establishments, then the establishment is no longer the relevant unit for production analysis, and some other unit is appropriate for classification purposes. For a demand-side system, or other approaches, the choice of the classification unit may be less clear. The ultimate decision on this issue also depends on where business records are kept and on what information is collectible (see Issues Paper No. 3).

Request for Comment

The Committee invites comments on the choice of classification unit, including information on the extent to which inputs are shared across physical locations, whether the establishment remains a meaningful concept, and on instances where the existing establishment concept is inappropriately applied. The Committee also invites comment on the unit that is appropriate for a classification system that arranges data for market-share analyses or other demand-side purposes.

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Economic Classification Policy Committee; Issues Paper No. 2—Aggregation Structures and Hierarchies

The present U.S. Standard Industrial Classification (SIC) system is hierarchical in that each level of the system provides an aggregation of detail at the next lower level. The SIC system arrays the economy into 11 divisions, that are divided into 83 2-digit major groups, that are further subdivided into 416 3-digit industry groups, and finally disaggregated into 1,005 4-digit industries.

2.1 Classification Hierarchies

Overview

What role should hierarchies have in a revised economic classification system? One way of organizing the discussion of this question is to distinguish between "top-down" and "bottom-up" approaches to constructing a classification system.

A top-down approach is one that begins from the division or 2-digit level—that is to say, from a hierarchical concept of classification—and assigns 3-digit or 4-digit industries to major sectors and industry groups. The top-down approach probably originated in the habit of partitioning the economy into "primary" (agriculture, mining), "secondary" (manufacturing), and "tertiary" (nongoods producing) sectors, sectors which can be distinguished clearly in the SIC. With a top-down approach, the hierarchy is inherently a vital part of the classification system.

In contrast, a bottom-up approach concentrates on forming 4-digit industries from the individual producing units. Thus, a bottom-up approach implies that the second or third-level aggregations—grouping industries into hierarchies—involve questions that are primarily extensions of questions that are confronted when the first-level aggregations are determined. If hierarchies of the basic 4-digit industries are to be formed at all, they are formed to facilitate in some way the use of the full classification system.

Conceptual and Data Use Positions on the Question of Hierarchies

At the International Conference on the Classification of Economic Activities at Williamsburg, Virginia ([1], hereafter, "Williamsburg Conference"), some participants explicitly stated that a hierarchical structure was needed, or implicitly assumed its importance in the context of explaining an existing classification system and/or of constructing a revised system.

From an analytical perspective, Paula Young (Williamsburg Conference [26], seconded by Allan Young (Williamsburg Conference [25], p. 573), urges that emphasis be accorded to the hierarchical structure. She:

- Stresses that "The present SIC, although designed as a hierarchy, in fact does not provide a hierarchical structure useful for analysis. Past revisions to the SIC seem to have focused on adding (or eliminating) 4-digit SIC's rather than reviewing the overall structure of the classification system * * *" (Paula Young, Williamsburg Conference [26], p. 433).
- Recommends that "The major emphasis of the next SIC revision should be placed on * * * the 2-digit and 3-digit structures [which] require a complete review * * *. The guideline that these 2-digit and 3-digit groupings must be relevant and useful in economic analysis must be enforced" (ibid.).

After reviewing how units should be aggregated in the SIC to industries (these users specify industries based primarily on their inputs), after tracing the aggregation of 4-digit SIC industries into 3-digit industry groups and thence to 2-digit major groups, and after noting anomalies at higher levels of the current hierarchy (such as the absence of 2-digit major groups to reflect the importance of plastics and electronics), these

Conference participants see an improved hierarchy as the priority for future improvement of the classification system. Moreover, because they viewed the formation of the hierarchy as a requirement for analytical use of economically classified data, they therefore viewed it as a conceptual issue.

Joel Popkin and Stanley Feldman assume the need for a hierarchy, and for each the hierarchy was a cornerstone in improving classification systems. Popkin (Williamsburg Conference [19], p. 160) proposes a relatively major revision for the system's hierarchy, while Feldman (Williamsburg Conference [6], p. 267) stresses that his hierarchy would "represent * * * an extension of the current SIC structure and not its abandonment." Both devoted major portions of their papers to reviewing the existing hierarchical structure and to explaining their respective proposed new or improved hierarchies.

Other Williamsburg Conference participants took the position that the formation of hierarchies should be of secondary importance in future classification systems. Michael Gort (Williamsburg Conference [8], p. 491) stresses the importance of microdata and relegates the issue of hierarchical structure to a level of "minor interest," except to ensure aggregations that will permit comparisons across countries, or for production of derived data such as income originating, capital stocks, and productivity measures. Again reducing the issue to one of priority, William Johnston (Williamsburg Conference [9], p. 78) discourages the search for a "perfect hierarchy," because he wishes statistical agencies "* * * to create a data structure that can be aggregated and disaggregated at will."

Jack Triplett (Williamsburg Conference [23], p. 30) also contends that hierarchies should receive diminished attention, presenting several complementary points:

• For some classification concepts, hierarchies may not be appropriate and/or may be of limited use. For example, a classification system that groups by similarity in production processes (a supply-side or production-oriented aggregation concept—see ECPC Issues Paper No. 1) will group establishments that share similar or identical production processes or technologies within a 4-digit industry; these industries are distinguished from one another by their having different production processes. Whether one finds sufficient production similarities across 4-digit industries to justify grouping them into higher-level aggregations by a production aggregation concept is a research issue that should not be decided at the beginning of the classification design process.

• He urges that the perceived need for a hierarchy not be used to eliminate a conceptual classification contender: "Sometimes one hears that a hierarchical structure is a requirement: If a particular classification concept does not yield a hierarchical structure . . . that concept is rejected. That puts the cart before the horse * * *."

• The guiding concept is foremost and the hierarchy—if appropriate—is secondary: "Within the appropriate theoretically consistent framework * * * does a hierarchical structure make sense? * * * I suspect that eventually we will place far less emphasis on classification hierarchies than we have in the past."

In summary, one group urges that major attention be paid to constructing a hierarchy, because they feel the hierarchy is necessary for conceptual reasons and because of the requirements they see for the analytical use of the data. The other group feels that hierarchies have little intrinsic analytical use in themselves, and emphasizes the bottom-up approach to classifications. This latter group's position on the question of classification hierarchies is not so much opposition to classification hierarchies, as such. Rather, they question whether hierarchies should receive a high priority in designing a classification system. The hierarchy may be necessary for pragmatic or statistical reasons, on this view, but it is not the part of the system to be emphasized in developing its conceptual foundation.

Pragmatic and Statistical Considerations

Some participants stressed the practical context for forming hierarchies—the decentralized nature of the U.S. statistical system, the differences among agency missions, and the historically overriding objective to ensure comparability among the data provided/used by the several agencies. Some statistical agencies cannot collect information on 4-digit industries and accordingly use the 2-digit or 3-digit groupings for sampling, coding, and publication. Sidney Marcus (Williamsburg Conference [12], p. 153) comments that the differing reasons for collecting data among Federal statistical agencies are bound to continue to result in differing "data wish lists." Walter Neece (Williamsburg Conference [15], p. 510) points to the different levels of detail needed by various agencies as helping to explain "why we have a hierarchy." If a common hierarchical structure did not exist, each agency might group data uniquely. This could be both an advantage and a disadvantage.

From an international vantage point, William Seltzer (Williamsburg Conference [20], p. 486) explicitly recognizes the past, present, and likely continued future importance of a hierarchical system. Stressing the need to keep in mind more than one function of a given statistical classification scheme, he noted in the context of data grouping/hierarchy: "* * * its being first, a system for grouping units in an ordered way for the purpose of data collection and storage, and second, a hierarchical system of grouping units for the purpose of aggregation, tabulation and analysis." Recognizing the spread of microcomputers, Seltzer further noted that the groupings no longer need to be the same for both functions.

Rather more implicitly, but just as pragmatically, Shaila Nijhowne and Gérard Côté (Williamsburg Conference [16], p. 410) support the importance of a hierarchy through extensive description of the two classification systems developed in Canada; through a focus similar to U.S. speakers on the contributions of a hierarchical scheme to both data compilation and to data analyses at several levels of detail; and through frequent reference to the "customary," "traditional," and widespread acceptance of, and reliance upon, hierarchies in classification work.

In summary, this group of participants stressed the practical, statistical, and programmatic needs for a hierarchy. They do not necessarily take a position on the question of the conceptual importance of a hierarchy, or on the top-down compared with bottom-up methods for forming economic classification systems.

The Committee's Position

The Economic Classification Policy Committee anticipates that a hierarchical scheme will probably be reflected in a restructured economic classification system. The issues to be resolved seem to be ones of priority. Is constructing the hierarchy of major importance for the analytical use of classified data? Or should emphasis be placed on the first-order groupings (e.g., 4-digit industries)? Should the development of the hierarchy be a major focus of the Committee's conceptual/economic phase, or is the hierarchy a pragmatic issue relating to sample selection, when agency resources or program objectives limit sample sizes? To put it another way, should the new

classification system be constructed from top-down or bottom-up principles?

Request for Comment

The Committee invites comment on the role that should be accorded to a hierarchy in classification scheme(s) of the future, whether the hierarchy is important for the analytical uses of classified data, and whether a top-down or bottom-up approach is most appropriate. Examples where hierarchies are essential to analysis even when detail is available (for example, analytical use of 2- or 3-digit information even when 4-digit information is available) would help to establish whether hierarchies have conceptual importance, or if they should be considered primarily as pragmatic methods for the presentation of data when detailed estimates do not exist.

2.2 Are Multiple Classification Hierarchies Needed?

The discussion in 2.1, combined with the topics addressed in Issues Paper No. 1, suggests an extension: If a hierarchy is needed, and deemed important in the overhaul of the classification system, then "which one" should it be?

The uses of economically classified data are numerous and varied and range from production and productivity analysis to market-share analysis. Each of the uses may demand a different aggregation structure, or hierarchy, if the resulting data are to be meaningful and useful. For example, a hierarchy of industries, similar to the present SIC system, could be constructed. Alternatively, one can envision a parallel hierarchy that groups products, wherever made, along use categories (for example, a sweetener aggregate that combines refined sugar and molasses from the sugar industries with corn sweeteners, artificial sweeteners and honey). In some cases, the two principles for forming hierarchies would result in quite different arrays of data.

Does the classification system provide a hierarchy to satisfy those users who need to do production-related analysis, or is it to be designed for demand or market studies? Is it possible to satisfy both groups of users, either within a single system, or by providing alternative hierarchies?

Frank Gollop (Williamsburg Conference [7], pp. 497) draws a distinction between supply-side and demand-side hierarchies: "The [Census] Bureau's demand-side responsibility is to preserve and present as much product detail as possible and, in ways that do not compromise legitimate disclosure concerns, provide access to interested users. Users can create whatever demand-side aggregates are required by their research." In contrast, he (ibid.) argued that "* * * multiple-output production and disclosure concerns prevent the Bureau from abdicating its obligation to form supply-side aggregates * * *." On this reasoning, one might conclude that where data users can construct their own aggregations, this reduces the value of traditional classification hierarchies; but traditional systems must be maintained for other situations for which user aggregation is not practical.

The Committee's Position

The ultimate answer to this question may come in part from research among data users. It must come, in large part, as a logical consequence of the answers to similar questions that have been raised in Issues Paper No. 1, that is: Should there be a conceptual framework for economic classifications, and, if so, "which one?" In parallel with the discussion in Issues Paper No. 1, it is quite conceivable that multiple hierarchies—an industry hierarchy and a product hierarchy—are needed, to correspond to different uses of the data. It is also conceivable that a hierarchy might be appropriate for one use of the data, and therefore for one conceptual basis for economic classification, and not for another. For example, a hierarchy might be more appropriate for a demand-side classification concept than for a supply-side classification concept (see Issues Paper No. 1 for a discussion of classification concepts).

Request for Comment

In addressing the question of hierarchies, the Committee is also interested in public input on the type of hierarchy, if any, that is relevant for the uses of economically-classified data. The Committee recognizes that views on this point are largely determined by positions taken on issues 1.3, 1.4, 1.5, and 2.1.

2.3 Should the System Have a Flexible Aggregation Structure?

Overview

Some Williamsburg Conference participants proposed going much further along the multiple classifications path, and proposed that the system should encompass completely flexible aggregation schemes. "Essentially, the task is to create a data structure that can be aggregated and disaggregated at will. Instead of trying to find the perfect hierarchy for our data, we should be creating a vast relational database to which we can add fields as needed" (William Johnston, Williamsburg Conference [9], p. 78). Completely flexible aggregation was referred to at the Williamsburg Conference as the "let a thousand flowers bloom" approach: Statistical agencies should provide detailed data and let the user aggregate any way at any time.

Flexible aggregation raises a number of issues, which were sometimes intermingled at the Williamsburg Conference. The following are the major topics and questions.

(a) *Enhanced capability for flexible aggregation makes traditional classification systems obsolete.* With the advent of the computer age, data users need not be bound to data that are pre-aggregated by a statistical agency. Some data users feel that if microdata sets were made available, users could manipulate them for their own purposes, and would not require traditional classification systems. Michael Gort (Williamsburg Conference [8], p. 483], for example, noted that the publication of data in computer-readable form greatly increases the potential for flexibility in aggregation; accordingly, he stated that "* * * data producers must focus [on] what data to collect and not how to aggregate them. Aggregation should increasingly be left to the user." While noting the limitations of confidentiality, Henry Kelly (Williamsburg Conference [10], p. 106) strongly echoes the conclusion that "* * * the problem of aggregation should be left largely to consumers."

A flexible aggregation system for microdata may be the most desirable way to make statistical agency data available to users (see the following section). However, for a number of reasons, traditional economic classification systems will remain relevant, even in the computer age.

First, the availability of microdata is often limited by disclosure problems, which force grouping of micro-observations into product or industry groupings. Even product groupings—the Census Bureau "7-digit" product codes and Current Industrial Reports (CIR) product codes, and Bureau of Labor Statistics Producer Price Index codes, for example—can in some circumstances create disclosure problems in cases where only a small number of producers account for the bulk of production, and, in many cases, detail that is collected must be suppressed for publication. Classification systems are therefore required to provide meaningful publishable groupings.

Second, even when micro-observations are available, some users

will prefer that statistical agencies group the data into product or industry categories because of the expense of doing it for themselves, and because they may lack the expertise to know how data are best grouped for their purposes (Courtenay Slater, [22]). Having available a standardized grouping, or classification, system produced by the statistical agency is, therefore, a service to the user and will be a valuable reference point even for users who decide they wish to depart from the standard system in some way.

Third, most statistical programs are sample surveys. Samples may not be large enough to support estimates at the detailed product level; classification systems have traditionally determined how product detail will be collapsed for sampling purposes into more aggregated estimates. The sampling process often requires stratification by relevant economic variables, among which are the variables employed in economic classification systems (4-digit industry or a higher-level aggregation, for example). Both sample frame development and estimates from sample surveys thus depend on economic classification systems.

To summarize this exchange of views, it is useful to distinguish conceptual considerations from pragmatic considerations, or what is the same thing in this case, requirements arising out of the use of economic data from requirements for collection and processing of data. There was no disputing at the Williamsburg Conference the value of flexible aggregation for the use of data, that when users need conceptual aggregates they should be tailored to specific data uses. But pragmatic considerations—disclosure and sample sizes—mean that the availability of microdata may sometimes be limited, so that methods for collapsing cells and aggregating data will be required. And complete flexibility in aggregation, which is desired by some users, should not preclude "standardized" aggregation systems or hierarchies provided by statistical agencies for other classes of users who will still need them, even in a computer-literate, "thousand flowers" environment.

The Committee's Position

The Committee believes that, regardless of the capabilities of statistical agencies for flexible aggregation, standardized aggregation or classification systems will be maintained by statistical agencies, for the reasons noted above, and does not plan to recommend that they be discontinued. The Committee is accordingly not requesting comment on this matter, though if there are users who disagree with the Committee's analysis, the Committee would like to be so informed and might, depending on the nature of the comment, conduct further investigation.

(b) *Statistical agencies should develop flexible aggregation capabilities to supplement the "official" classification system or systems.* The idea that computer capability has made it technologically feasible to provide multiple groupings of economic data was widely endorsed at the Williamsburg Conference. For statistical agencies to create the capability for groupings "on demand" from users poses issues for statistical agency procedures, for the maintenance of data bases, and for maintaining confidentiality, all of which extend beyond the topic of economic classifications.

First, as Robert McGuckin (Williamsburg Conference [13]), points out, for flexible aggregation to work, statistical agencies must collect and maintain data at the most detailed commodity level possible. There was general agreement at the Williamsburg Conference that statistical agencies need to collect as much detail as possible. As already noted, however, in some cases sampling and other concerns mean that detail must be restricted or collapsed.

Second, product detail needs to be comparable across statistical agencies. If product detail is not comparable, if product codes do not match across agencies, or do not match over time, the ability to use computing power in the aid of flexible aggregation is lost. The Committee has established a task force to work on improving statistical agency product codes. Issues concerning product classification codes are discussed in Issues Paper No. 8.

Finally, flexible aggregation may be limited by what is collectible (refer to Issues Paper No. 3 for discussion of this point). Assembling data for the "tourism" industry provides an example of collectibility limitations. In principle, it is not difficult to determine which economic activities should be included in a "tourism" category. However, many of these categories require information that is not readily collected from establishments. Hotels cannot readily distinguish business travel from tourism; restaurants may be unable to distinguish local residents from those diners who come from out of town, let alone divide the latter into tourists and business travelers. Because the required information cannot be collected from establishments, tourism has not been accepted as an SIC industry.

However, data can be collected from a variety of sources, and a classification system that can encompass alternative aggregations, such as "tourism," may be desirable. The Committee is mindful of the frequent requests for such data, and would like to consider the classification aspects of these requests in its work, though also it emphasizes that establishing such categories involves issues that extend well beyond the limits of the Committee's work on classifications.

Flexible aggregation might also be useful to manage the difficulties caused by vertical integration. In some industries in the present SIC, different stages of processing are distinguished and kept separate. For example, two meat products industries exist (SIC's 2011 and 2013) which are distinguished by the degree of vertical integration. In other cases, different stages of process are placed together. For example, production of automobile bodies is placed with final assembly of complete cars in SIC 3711. There are some purposes for which complete vertical integration (for example, providing data on "fishing" from the fish farm or the fishing boat all the way to the retail store) would be useful. For other purposes, such an aggregation obscures too much detail. Though a consistent treatment of vertical integration in a conceptually-based classification system is desirable, any decision on the treatment of vertical integration will satisfy one need for data at the expense of the other. A flexible aggregation system might facilitate construction of alternative groupings across stage-of-processing lines. It might be useful to form alternative hierarchies that cut across the economic system to integrate different stages of process for the same commodity or that integrate production with different levels of distribution.

The Committee's Position

The Committee is conscious of requests for alternative aggregations that have been presented in various SIC revisions of the past. It believes that more flexible systems should be developed in an attempt to meet more of the needs that have been expressed but have not been satisfied. At the moment, this seems an issue that will require substantial work, innovation, and research. The precise methods for implementing flexible aggregation have not been worked out, nor have all of the implications that flexible aggregation raises for data-collection, confidentiality, and statistical agency operations been developed. This is a task that lies ahead.

Request for Comment

The Committee requests comments from potential users on the subject of alternative aggregations that might be valuable and the uses for which they are necessary. It would be helpful in the Committee's work if proposals for aggregations similar to those mentioned above (i.e., tourism, or fishing) be accompanied by proposals for how the requisite data should be collected and stored. The Committee is interested in innovative proposals on these lines, but feels that all aspects of the data-collection system, and not just a proposal for the classification part, must be considered before implementing a flexible system.

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[2] Aanestad, James, "Floor Discussion," Williamsburg Conference, p. 502.

[3] Berndt, Ernst R., "Alternative Approaches to Classifying Economic Activity: Panelist Remarks," Williamsburg Conference, pp. 494–5.

[4] Cremeans, John, "Floor Discussion," Williamsburg Conference, pp. 425–6.

[5] Dulberger, Ellen, "Floor Discussion," Williamsburg Conference, p. 503.

[6] Feldman, Stanley, "Moving Towards an Improved Micro-Based Classification of Economic Activity: A Report on the Structure and Implementation of a Revised SIC and Related Economic Clusters," Williamsburg Conference, pp. 217–359.

[7] Gollop, Frank M., "Panel Discussion on Alternative Approaches to Classifying Economic Activity: Discussion," Williamsburg Conference, pp. 496–501.

[8] Gort, Michael, "Comments on Industrial Classifications Systems for the Future," Williamsburg Conference, pp. 491–3.

[9] Johnston, William B., "Four Questions Economic Data Should Answer," Williamsburg Conference, pp. 75–9.

[10] Kelly, Henry, "The Global Economy in the Year 2000," Williamsburg Conference, pp. 94–108.

[11] Manser, Marilyn E., "Alternative Approaches to Classifying Economic Activity," Williamsburg Conference, pp. 520–30.

[12] Marcus, Sidney, "Floor Discussion," Williamsburg Conference, p. 153.

[13] McGuckin, Robert H., "Multiple Classification Systems for Economic Data: Can a Thousand Flowers Bloom? and Should They?" Williamsburg Conference, pp. 384–407.

[14] _____, "Floor Discussion," Williamsburg Conference, p. 426.

[15] Neece, Walter, "Panel Discussion on Alternative Approaches to Classifying Economic Activity: A Government Perspective: Discussion," Williamsburg Conference, pp. 509–17.

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[17] Parker, Robert P., "Floor Discussion," Williamsburg Conference, p. 502.

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[21] _____, "Floor Discussion," Williamsburg Conference, p. 503.

[22] Slater, Courtenay, "Floor Discussion," Williamsburg Conference, p. 462.

[23] Triplett, Jack E., "Perspectives on the SIC: Conceptual Issues in Economic Classification," Williamsburg Conference, pp. 24–37.

[24] _____, "Floor Discussion," Williamsburg Conference, pp. 504–5.

[25] Young, Allan H., "Where Do We Go from Here?," Williamsburg Conference, pp. 573–4.

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[FR Doc. 93–7432 Filed 3–30–93; 8:45 am]

BILLING CODE 3110–01–P

federal register

Wednesday
March 31, 1993

Part IV

Department of the Interior

Bureau of Indian Affairs

Indian Gaming; Notice

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact.

SUMMARY: Pursuant to 25 U.S.C. 2710, of the Indian Gaming Regulatory Act of 1988 (Pub. L. 100–497), the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III (casino) gambling on Indian reservations. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, has approved the Ak-Chin Indian Community and the State of Arizona Gaming Compact of 1993, enacted on February 5, 1993.

DATES: This action is effective March 31, 1993.

FOR FURTHER INFORMATION CONTACT:

Hilda Manuel, Director, Indian Gaming Management Staff, Bureau of Indian Affairs, Washington, DC 20240, (202) 219–4068.

Dated: March 19, 1993.

Eddie F. Brown,

Assistant Secretary—Indian Affairs.

[FR Doc. 93–7388 Filed 3–30–93; 8:45 am]

BILLING CODE 4310–02–M

federal register

Wednesday
March 31, 1993

Part V

Federal Emergency Management Agency

Changes to the Hotel and Motel Fire Safety Act National Master List; Notice

FEDERAL EMERGENCY MANAGEMENT AGENCY

Changes to the Hotel and Motel Fire Safety Act National Master List

AGENCY: United States Fire Administration, FEMA.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA or Agency) gives notice of additions and corrections/changes to, and deletions from, the national master list of places of public accommodations which meet the fire prevention and control guidelines under the Hotel and Motel Fire Safety Act.

EFFECTIVE DATE: April 30 1993.

ADDRESSES: Comments on the master list or any changes to the master list are invited and may be addressed to the Rules Docket Clerk, Federal Emergency Management Agency, 500 C Street SW., room 840, Washington, DC 20472, (fax) (202) 646–4536.

FOR FURTHER INFORMATION CONTACT: Larry Maruskin, Office of Fire Prevention and Arson Control, United States Fire Administration, Federal Emergency Management Agency, National Emergency Training Center, 16825 South Seton Avenue, Emmitsburg, MD 21727, (301) 447–1141.

SUPPLEMENTARY INFORMATION: Acting under the Hotel and Motel Fire Safety Act of 1990, 15 U.S.C. 2201 note, the United States Fire Administration has worked with each State to compile a national master list of all of the places of public accommodation affecting commerce located in each State that meet the requirements of the guidelines under the Act. FEMA published the national master list in the **Federal Register** on Tuesday, November 24, 1992, 57 FR 55314, and published changes three times previously.

Periodically FEMA will update and redistribute the national master list to incorporate additions and corrections/changes to the list, and deletions from the list.

Each update contains or will contain three categories: "Additions;" "Corrections/changes;" and "Deletions." For the purposes of the updates, the three categories mean and include the following:

"Additions" are either names of properties submitted by a State but inadvertently omitted from the initial master list or names of properties submitted by a State after publication of the initial master list;

"Corrections/changes" are corrections to property names, addresses or telephone numbers previously published or changes to previously published information directed by the State, such as changes of address or telephone numbers, or spelling corrections; and

"Deletions" are entries previously submitted by a State and published in the national master list or an update to the national master list, but subsequently removed from the list at the direction of the State.

Copies of the national master list and its updates may be obtained in writing to the Government Printing Office, Superintendent of Documents, Washington, DC 20402–9325. When requesting copies please refer to stock number 069–001–00049–1.

The update to the national master list follows below.

Dated: March 18, 1993.

William C. Tidball,

Acting Director.

HOTEL AND MOTEL FIRE SAFETY ACT NATIONAL MASTER LIST MARCH 24, 1993 UPDATE

ADDITIONS				
Alaska				
Anchorage Chelsea Inn Corp DBA Chelsea Inn.		3836 Spenard Road	Anchorage, AK 99517.	
Ingersoll Hotel		303 Mission Street	Ketchikan, AK 99901.	
Alabama				
Athens Travelodge		1325 Hwy 72 E	Athens, AL 35611	205–233–1446
Holiday Inn Gadsden		801 Cleveland Avenue	Attalla, AL 35954	205–538–7861
Days Inn		12960 Hwy 431 S	Boaz, AL 35957	205–593–0000
Holiday Inn—Decatur		1101 6th Avenue N	Decatur, AL 35601	205–355–3150
Hampton Inn Dothan		3071 Ross Clark Circle SW	Dothan, AL 36301	205–671–3700
Courtyard By Marriott Homewood		500 Shades Creek Pkwy	Homewood, AL 35209	205–879–0400
Fairfield Inn By Marriott—Homewood.		155 Vulcan Drive	Homewood, AL 35209	205–945–5600
Tom Bevill Center		1100 N Loop Road	Huntsville, AL 35816.	
Days Inn South		1705 Dauphin Island Pkwy	Mobile, AL 36605	205–471–6114
Mobile Days Inn		5550 I—10 Service Road	Mobile, AL 36619	205–661–8181
Red Roof Inn #98		33 S Beltline Hwy	Mobile, AL 36606	205–476–2004
Courtyard By Marriott Montgomery.		5555 Carmichael Road	Montgomery, AL 36117	205–272–5533
Econo Lodge		1105 Columbus Pkwy	Opelika, AL 36801	205–749–8377
Days Inn		26032 Perdido Beach Blvd	Orange Beach, AL 36561	205–981–9888
J & W Motel		206 West Willow Street	Scottsboro, AL 35768	205–574–2330
Scottsboro Days Inn		1106 John T. Reid Pkwy	Scottsboro, AL 35768	205–574–1212
Arkansas				
Holiday Inn Express		3508 S Moberle Lyne	Bentonville, AR 72712	501–273–2222
Fayetteville Hilton		70 N East Avenue	Fayetteville, AR 72701	501–442–5555
Holiday Express—Fayetteville		1251 N Shiloh Drive	Fayetteville, AR 72701	501–444–6006
Holiday Inn Civic Center		700 Rogers Avenue	Fort Smith, AR 72901	501–783–1000
Sheraton Inn		5711 Rogers Avenue	Fort Smith, AR 72903	501–452–4110
Avanelle Motor Lodge		1204 Central Avenue	Hot Springs, AR 71901	501–321–1332
Holiday Inn		3006	Jonesboro, AR 72401	501–935–1625
Holiday Inn West		201 S Shackleford	Little Rock, AR 72211	501–223–3000
Red Roof Inn—Little Rock		7900 Scott Hamilton Drive	Little Rock, AR 72209	501–562–2694

HOTEL AND MOTEL FIRE SAFETY ACT NATIONAL MASTER LIST MARCH 24, 1993 UPDATE—Continued

Best Western Regency		I—55 US 64	Marion, AR 72364	501–739–3278
Melbourne Motel Inc		Hwy 9 N	Melbourne, AR 72556	501–368–4355
Mountain Home Holiday Inn		1350 Hwy 62 S W	Mountain Home, AR 72653	501–425–5101
Best Western Inn		210 N Blake Street	Pine Bluff, AR 71601	501–534–7222
Holiday Inn—Texarkana		5100 Stateline	Texarkana, AR 75502	501–774–3521
Days Inn		100 Ingram Blvd	West Memphis, AR 72301	501–735–8600
Hampton Inn West Memphis		2003 Service Road	West Memphis, AR 72301	501–732–1102
Arizona				
Wyndaham Chandler		7475 W Chandler Blvd	Chandler, AZ 85226	602–961–4444
Holiday Inn Chinle (Garcias Trading Post).		Bia Rt 7	Chinle, AZ 86503.	
Cottonwood Quality Inn		302 W Hwy 89A	Cottonwood, AZ 86326	602–634–4207
Quality Suites Hotel		706 S Milton Road	Flagstaff, AZ 86001	602–774–4333
Residence Inn By Marriott		3440 N Country Club	Flagstaff, AZ 86004	602–526–5555
Comfort Inn		2602 E Navajo Blvd	Holbrook, AZ 86025	602–524–6131
Econo Lodge		2596 Navajo Blvd	Holbrook, AZ 86025	602–542–1448
Holbrook Super 8 Motel		1989 Navajo Blvd	Holbrook, AZ 86025	602–524–2871
Holiday Inn Kayenta		Jct 160 & 163	Kayenta, AZ 86033	602–697–3221
Holiday Inn Mesa		1600 S Country Club	Mesa, AZ 85210	602–964–7000
Holiday Inn		287 N Lake Powell Blvd	Page, AZ 86040	602–645–8851
Comfort Inn North		1711 W Bell Road	Phoenix, AZ 85023	602–866–2089
Holiday Inn North Central		4321 N Central Avenue	Phoenix, AZ 85012	602–277–6671
Holiday Inn West		1500 N 51st Avenue	Phoenix, AZ 85043	602–484–9009
Wyndaham North Phoenix		2641 W Union Hills Drive	Phoenix, AZ 85027	602–978–2222
Wyndaham Phoenix Airport		427 N 44th Street	Phoenix, AZ 85008	602–220–4400
Holiday Inn Old Town Scottsdale		7353 E Indian School Road	Scottsdale, AZ 85251	602–994–9203
Residence Inn By Marriott—Scottsdale.		6040 N Scottsdale Road	Scottsdale, AZ 85253	602–948–8666
Wyndaham Paradise Valley		5401 N Scottsdale Road	Scottsdale, AZ 85250	602–947–5400
Quality Inn And Suites		1635 N Scottsdale Road	Tempe, AZ 85281	602–947–3711
Rodeway Inn Phoenix Airport East.		1550 S 52 Street	Tempe, AZ 85281	602–967–3000
Holiday Inn Palo Verde		4550 S Palo Verde Blvd	Tucson, AZ 85714	602–746–1161
Quality Inn University And Conference Center.		1601 N Oracle Road	Tucson, AZ 85705	602–623–6666
Residence Inn By Marriott—Tucson.		6477 E Speedway	Tucson, AZ 85710	602–721–0991
Roadway Inn North		1365 W Grant Road	Tucson, AZ 85745	602–622–7791
Holiday Inn Express		3181 S 4th Avenue	Yuma, AZ 85364	602–344–1420
California				
Quality Inn Alhambra		2221 W Commonwealth Avenue	Alhambra, CA 91803	818–300–0003
Quality Hotel Maingate		616 Convention Way	Anaheim, CA 92802	714–750–3131
Quality Inn—Anaheim West		727 S Beach Blvd	Anaheim, CA 92804	714–220–0100
Quality Inn—Brookhurst		711 S Brookhurst Avenue	Anaheim, CA 92804	714–999–1200
Arcata Super 8 Motel		4887 Valley West Blvd	Arcata, CA 95521	707–822–8888
Comfort Inn Arcata		4701 Valley West Blvd	Arcata, CA 95521	707–826–2827
Banning Super 8 Motel		1690 W Ramsey Street	Banning, CA 92220	909–849–6887
Comfort Inn		1865 Lincoln Avenue N	Calistoga, CA 94515	707–942–9400
Campbell Inn	PO Box 925	1995 S Bascom Avenue	Campbell, CA 95009	408–559–4300
Pruneyard Inn	PO Box 925	1995 S Bascom Avenue	Campbell, CA 95009	408–559–4300
Residence Inn By Marriott—San Jose.		2761 S Bascom Avenue	Campbell, CA 95008	408–559–1551
Wyndham Commerce		5757 Telegraph Road	Commerce, CA 90040	213–887–8100
Holiday Inn Orange County Airport.		3131 S Bristol Street	Costa Mesa, CA 92626	714–557–3000
Friendship Inn		410 N Hwy 101	Encinitas, CA 92024	619–436–4999
Comfort Inn—Eureka		2014 4th Street	Eureka, CA 95501	707–444–0401
Holiday Inn Express		1859 Alamar Way	Fortuna, CA 95540	707–725–5500
Holiday Inn—Fresno Airport		5090 E Clinton	Fresno, CA 93727	209–252–3611
Holiday Inn Centre Plaza		2233 Ventura Avenue	Fresno, CA 93720	209–268–1000
Friendship Inn—Regal Lodge Motel.		200 W Colorado Street	Glendale, CA 91204	818–246–7331
Ramada LAX Airport South		5250 W El Segundo Blvd	Hawthorne, CA 90250	310–536–9800
Comfort Suites		16301 Beach Blvd	Huntington Beach, CA 92647	714–841–1812
Huntington Beach Holiday Inn		7667 Center Avenue	Huntington Beach, CA 92647	714–891–0123
Quality Inn		800 Pacific Coast Hwy	Huntington Beach, CA 92648	714–536–7500
Indio Super 8 Motel		81753 Hwy 111	Indio, CA 92201	619–342–0264
Holiday Inn Irvine Orange County Airport.		17941 Von Karman Avenue	Irvine, CA 92714	714–863–1999
Comfort Inn—La Mesa		8000 Pkwy Drive	La Mesa, CA 91942	619–698–7747
Holiday Inn Gateway Plaza		14299 Firestone Blvd	La Mirada, CA 90638	714–739–8500

HOTEL AND MOTEL FIRE SAFETY ACT NATIONAL MASTER LIST MARCH 24, 1993 UPDATE—Continued

Residence Inn By Mariott La Mirada.		14419 Firestone Blvd	La Mirada, CA 90638	714–523–2800
Comfort Inn		118 N Cherokee Lane	Lodi, CA 95240	209–367–4848
Quality Inn & Executive Suites		1621 N H Street	Lompoc, CA 93436	805–735–8555
Best Western The Mayfair		1256 W Seventh Street	Los Angeles, CA 90017–2315	213–484–9789
Hotel Inter-Continental Los Angeles.		251 S Olive Street	Los Angeles, CA 90012	213–617–3300
Quality Hotel Los Angeles Airport		5249 W Century Blvd	Los Angeles, CA 90045	310–645–2200
Residence Inn By Mariott Manhattan Beach/LAX.		1700 N Sepulveda	Manhattan Beach, CA 90266	310–546–7627
Holiday Inn San Jose North (Silicon Valley).		777 Bellew Drive	Milpitas, CA 95035	408–321–9500
Monterey Carmel Travelodge		2030 N Fremont Street	Monterey, CA 93940	408–373–3381
Econo Lodge		1100 Main Street	Morro Bay, CA 93442	805–772–5609
Clarion Inn Napa Valley		3425 Solano Avenue	Napa, CA 94558	707–253–7433
Quality Inn—Marin		215 Alameda De Prado	Novato, CA 94949	415–883–4400
Holiday Inn Oakland Airport		500 Hegenberger Road	Oakland, CA 94621	510–562–5311
Holiday Inn Ontario International Airport.		1801 E G Street	Ontario, CA 91764	909–983–3604
Holiday Inn Express—Palm Desert.		74–675 Hwy 111	Palm Desert, CA 92260	619–340–4303
Quality Inn—Palm Springs		1269 E Palm Canyon	Palm Springs, CA 92264	619–323–2775
Wyndham Palm Springs Hotel		888 E Tahquitz Canyon Way	Palm Springs, CA 92262	619–322–6000
Quality Inn		5100 Montero Way	Petaluma, CA 94954	707–664–1155
Pleasanton Hilton		7050 Johnson Drive	Pleasanton, CA 94588	510–463–8000
Red Bluff Super 8 Motel		203 Antelope Road	Red Bluff, CA 96080	916–527–8882
Grand Manor Inn		850 Mistletoe Lane	Redding, CA 96002	916–221–4472
Holiday Inn Crowne Plaza Redondo Beach.		300 N Harbor Drive	Redondo Beach, CA 90277	310–318–8888
Days Inn—Downtown		200 Jibbon Street	Sacramento, CA 95814	916–448–8100
Guest Suites		2264 Cottage Way Suite 1	Sacramento, CA 95825	916–925–4247
Holiday Inn Capitol Plaza—Sacramento.		300 J Street	Sacramento, CA 95814	916–446–0100
San Bernardino Hilton		285 Hospitality Lane	San Bernardino, CA 92408	714–889–0133
Comfort Suites		3701 S El Camino Real	San Clemente, CA 92672	714–361–6600
Holiday Inn San Clemente		111 S Avenue De Estrella	San Clemente, CA 92672	714–361–3000
Comfort Inn Old Town San Diego Airport.		1955 San Diego Avenue	San Diego, CA 92110	619–543–1130
Holiday Inn—Montgomery Field		8110 Aero Drive	San Diego, CA 92123	619–277–8888
Holiday Inn—San Diego North		9335 Kearny Mesa Road	San Diego, CA 92126	619–695–2300
Holiday Inn Express		3950 Jupiter Street	San Diego, CA 92110	619–226–8000
Holiday Inn Harbor View		1617 First Avenue	San Diego, CA 92101	619–239–6171
Holiday Inn, Mission Valley Hotel Circle.		595 Hotel Circle South	San Diego, CA 92108	619–291–5720
Hyatt Islandia Hotel		1441 Quivira Road	San Diego, CA 92109–7898	619–224–1234
Residence Inn By Mariott—San Diego.		5400 Kearny Mesa Road	San Diego, CA 92111	619–278–2100
Residence Inn By Marriott—San Diego North.		11002 Rancho Carmel Drive	San Diego, CA 92128	619–673–1900
Sheraton Harbor Island Hotel		1380 Harbor Island Drive	San Diego, CA 92101	619–692–2215
Wyndham North San Diego		5975 Lusk Blvd	San Diego, CA 92121	619–558–1818
Grand Hyatt San Francisco On Union Square.		345 Stockton Street	San Francisco, CA 94108	415–398–1234
Holiday Inn Union Square		480 Sutter Street	San Francisco, CA 94108	415–398–8900
Quality Hotel and Conference Center.		1101 Van Ness Avenue	San Francisco, CA 94109	415–776–8900
Holiday Inn		330 N Bayshore Blvd	San Mateo, CA 94401	415–344–3219
Holiday Inn Express		350 N Bayshore Blvd	San Mateo, CA 94401	415–344–6376
Comfort Suites—John Wayne Airport.		2620 Hotel Terrace Drive	Santa Ana, CA 92705	714–966–5200
Holiday Inn—Mission De Oro		13070 S Hwy 33	Santa Nella, CA 95322	209–826–4444
Selma Super 8 Motel		3142 Highland Avenue	Selma, CA 93662	209–896–2800
Clarion Hotel—Simi Valley		1775 Madera Road	Simi Valley, CA 93065	805–584–6300
Comfort Suites		121 East Grand Avenue	South San Francisco, CA 94080	415–589–7766
Holiday Inn Stockton		111 E March Lane	Stockton, CA 95207	209–474–3301
Quality Inn		1280 Persian Drive	Sunnyvale, CA 94089	408–744–0660
Wyndham Sunnyvale		1300 Chesapeake Terrace	Sunnyvale, CA 94089	408–747–0999
Torrance Holiday Inn		21333 Hawthrone Blvd	Torrance, CA 90503	310–540–0500
Truckee Super 8 Lodge		11506 Deerfield Drive	Truckee, CA 96161	916–587–8888
Holiday Inn—Union City East Bay.		32083 Alvarado Niles Road	Union City, CA 94587	510–489–2200
Holiday Inn		1000 Fairgrounds Drive	Vallejo, CA 94533	707–644–1200
Econo Lodge		1400 S Mooney Blvd	Visalia, CA 93277	209–732–6641
Comfort Inn		2804 E Garvey Avenue S	S West Covina, CA 91791	818–916–6077

HOTEL AND MOTEL FIRE SAFETY ACT NATIONAL MASTER LIST MARCH 24, 1993 UPDATE—Continued

Willows Super 8 Motel		457 N Humboldt Avenue	Willows, CA 95988	916–934–2871
Comfort Inn		1562 E Main Street	Woodland, CA 95695	916–666–3050
Yucca Valley Super 8 Motel		57096 Twentynine Palms Hwy	Yucca Valley, CA 92284	619–228–1773
Colorado				
The Little Nell Hotel		675 East Durant Avenue	Aspen, CO 81611	303–920–4600
Breckenridge Hilton		550 Village Road	Breckenridge, CO 80424	303–453–4500
Days Inn Fort Collins		3625 East Mulberry Street	Fort Collins, CO 80524	303–221–5490
Foothills Executive Lodging		6565 West Jewell Street #4b	Lakewood, CO 80232	303–936–3070
District of Columbia				
Comfort Inn (Downtown)		500 H Street NW	Washington, DC 20001	202–289–5959
Sheraton City Centre		1143 New Hampshire Avenue NW.	Washington, DC 20037	202–775–0600
The Georgetown Dutch Inn		1075 Thomas Jefferson St NW	Washington, DC 20007	202–337–0900
Delaware				
Holiday Inn—Dover		348 North Dupont Hwy	Dover, DE 19901	302–734–5701
Florida				
Comfort Inn Mayport		2401 Mayport Road	Atlantic Beach, FL 32233	904–249–0313
Econo Lodge		28090 Quail's Nest Lane	Bonita Springs, FL 33923	813–947–3366
Quality Inn Nautilus		1538 Cape Coral Parkway	Cape Coral, FL 33904	813–542–2121
Clearwater Central		21030 US 19N	Clearwater, FL 34625	813–797–8173
Comfort Inn Clearwater/St. Petersburg.		3680 Ulmerton Road	Clearwater, FL 34622	813–573–1171
Holiday Inn Express Gateway		13625 Icot Blvd	Clearwater, FL 34620	813–536–7275
Holiday Inn Gulfview		521 South Gulfview Blvd	Clearwater Beach, FL 34632	813–447–6461
Econo Lodge		3220 North Cocoa Blvd	Cocoa, FL 32926	407–632–4561
Holiday Inn University of Miami		1350 South Dixie Drive	Coral Gables, FL 33146	305–662–5611
Comfort Inn		4486 N Suncoast Blvd	Crystal River, FL 34428	904–563–1500
Holiday Inn Boardwalk Oceanfront.		400 North Atlantic Avenue	Daytona Beach, FL 32118	904–255–0251
Holiday Inn & Convention Center Deland.		350 E International Speedway	Deland, FL 32724	904–738–5200
Holiday Inn Destin		1020 Hwy 98 East	Destin, FL 32541	904–837–6181
Comfort Inn		8425 South Hwy 17–92	Fern Park, FL 32730	407–339–3333
Holiday Inn Surfside		2600 North A–1–A	Fort Pierce, FL 34949	407–465–6000
Holiday Inn Fort Walton Beach		1110 Santa Rosa Blvd	Fort Walton Beach, FL 32548	904–243–9181
Best Western Cypress Creek Road.		999 W Cypress Creek Road	Ft. Lauderdale, FL 33309	305–491–7666
Comfort Suites Fort Lauderdale		1800 South Federal Highway	Ft. Lauderdale, FL 33316	305–767–8700
Holiday Inn Ocean Club & Marina.		440 Seabreeze Blvd	Ft. Lauderdale, FL 33316	305–462–5555
Holiday Inn Central		2431 Cleveland Avenue	Ft. Myers, FL 33901	813–332–3232
Comfort Inn		2435 SW 13th Street	Gainesville, FL 32608	904–373–6500
Holiday Inn University Center		1250 West University Avenue	Gainesville, FL 32601	
Holiday Inn Bay Beach		51 Gulf Breeze Parkway	Gulf Breeze, FL 32561	904–932–2214
Econo Lodge Motor Inn And Restaurant.		1504 US Hwy 27 South	Haines City, FL 33844	813–422–8621
Holiday Inn Hialeah Miami Lakes		6650 West 20 Avenue	Hialeah, FL 33016	305–362–7777
Comfort Inn Oceanfront		1515 North First Street	Jacksonville, FL 32250	904–241–2311
Comfort Suites Hotel		8333 Dix Ellis Trail	Jacksonville, FL 32256	904–739–1155
Holiday Inn East And Conference Center.		5865 Arlington Expressway	Jacksonville, FL 32211	904–724–3410
Holiday Inn Oceanfront		1617 North First Street	Jacksonville, FL 32250	904–247–9071
Howard Johnson Airport Lodge		1153 Airport Road	Jacksonville, FL 32229	904–741–4600
Holiday Inn of Jennings/Inn of Lake City.	Post Office 9	I–75 & State Road #143	Jennings, FL 32053	904–938–3501
Holiday Inn Key Largo Resort & Marina.		99701 Overseas Highway	Key Largo, FL 33037	305–451–2121
Holiday Inn La Concha		430 Duval Street	Key West, FL 33040	305–296–2991
Sheraton Suites Key West		2001 South Roosevelt Blvd	Key West, FL 33040	305–292–9800
Comfort Inn Main Gate		7671 W Irlo Bronson Mem. Hwy	Kissimmee, FL 34747	407–396–7500
Comfort Inn, Maingate South		14 & US 27 North	Kissimmee, FL 34745–0850	813–424–2811
Holiday Inn Main Gate East		5678 Irlo Bronson Highway	Kissimmee, FL 34746	407–396–4488
Holiday Inn Maingate West		7601 Black Lake Road	Kissimmee, FL 34747	407–396–1100
Quality Inn Lake Cecile		4944 W Irlo Bronson Mem. Hwy	Kissimmee, FL 34746	407–396–4455
Sleep Inn Maingate		8536 W Irlo Bronson Hwy	Kissimmee, FL 34747	407–396–1600
Travelodge Hotel—Walt Disney World.		2000 Hotel Plaza Blvd	Lake Buena Vista, FL 32830	407–828–2424
Quality Inn North		2025 State Road 434	Longwood, FL 32759	407–862–4000
Friendship Inn		Route 1 Box 3095	Madison, FL 32340	904–973–2504

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Holiday Inn Calder/Joe Robbie Stadium.		21485 NW 27th Avenue	Miami, FL 33056	305–621–5801
Howard Johnson Convention Center.		200 SE 2nd Avenue	Miami, FL 33131	305–374–3000
Quality Shawnee Beach Resort		4343 Collins Avenue	Miami Beach, FL 33140	305–532–3311
Holiday Inn Golden Glades		148 NW 167th Street	N Miami, FL 33169	305–949–1411
Quality Inn Golf & Country Club		4100 Golden Gate Parkway	Naples, FL 33999	813–455–1010
Friendship Inn		626 John Sims Parkway	Niceville, FL 32578	904–678–4164
Comfort Inn Orlando		8421 S Orange Blossom Trail	Orlando, FL 32809	407–855–6060
Econo Lodge Central		3300 W Colonial Drive	Orlando, FL 32808	407–293–7221
Holiday Inn Centroplex		929 West Colonial Drive	Orlando, FL 32804	407–843–1360
Holiday Inn Express/Midtown		3330 W Colonial Drive	Orlando, FL 32811	407–299–6710
Holiday Inn L.B.V		13351 State Road 535	Orlando, FL 32830	407–239–4500
Holiday Inn Orlando Airport		5750 T.G. Lee Blvd	Orlando, FL 32822	407–851–6700
Holiday Inn Universal Studios		5905 Kirkman Road	Orlando, FL 32819	407–351–3333
Holiday Inn University Of Central Florida.		12125 High Tech Avenue	Orlando, FL 32817	407–275–9000
Ramada Hotel Resort		7400 International Drive	Orlando, FL 32819	407–351–4600
Rodeway Inn/Convention Center		9956 Hawaiian Court	Orlando, FL 32819	407–351–5100
Quality Inn Plaza		9000 International Drive	Orlando, FL 32819	407–345–8585
Quality Hotel Orlando Airport		3835 McCoy Road	Orlando, FL 32812	407–859–2711
Holiday Inn Winter Park		626 Lee Road	Orlando, FL 32810	407–645–5600
Holiday Inn Sarasota—South		1660 South Tamiami Trail	Osprey, FL 34229	813–966–2121
Holiday Inn Riverfront		201 North First Street	Palatka, FL 32177	904–328–3481
Holiday Inn Palm Beach Gardens		4431 P.G.A. Blvd	Palm Beach Gardens, FL 33410	407–622–2260
Econo Lodge		32000 US Hwy 19 North	Palm Harbor, FL 34684	813–786–2529
Holiday Inn Beach Resort (Hilton, Inc.).		11127 Front Beach Road	Panama City, FL 32407	904–234–1111
Holiday Inn Mall		2001 North Cove Blvd	Panama City, FL 32405	904–769–0000
Residence Inn By Marriott		7230 Plantation Road	Pensacola, FL 32504	904–479–1000
The Pensacola Grand Hotel		200 East Rgory Street	Pensacola, FL 32501	904–433–3336
Holiday Inn Ft. Lauderdale, Plantation.		1711 North University Drive	Plantation, FL 33322	305–472–5600
Holiday Inn Pompano Beach		1350 S Ocean Blvd	Pompano Beach, FL 33062	305–941–7300
Quality Inn Oceanside Resort		1208 N Ocean Boulevard	Pompano Beach, FL 33062	305–782–5300
Comfort Inn Of Port Richey		11810 US Hwy 19	Port Richey, FL 34668	813–863–3336
Holiday Inn Sanford		530 North Palmetto Avenue	Sanford, FL 32771	407–232–1910
Super 8 Motel, Orlando North		4750 State Road 46 W	Sanford, FL 32771	407–323–3443
Holiday Inn Sarasota/Bradenton Airport/Marina.		7150 North Tamiami Trail	Sarasota, FL 34243	813–355–2781
Days Inn Satellite Beach		180 Highway A–1–A	Satellite Beach, FL 32937	407–777–3552
Holiday Inn		6525 US 27 North	Sebring, FL 33870	813–385–4500
Ponce De Leon Golf & Conference Resort.		4000 US Hwy 1 North	St. Augustine, FL 32095	904–824–2821
Econo Lodge & Tennis Resort		3000 34th Street South	St. Petersburg, FL 33711	813–867–1111
Holiday Inn St. Petersburg Beach		5300 Gulf Blvd	St. Petersburg Beach, FL 33706	813–360–6911
Budgetel Inn		602 South Faulkenburg Road	Tampa, FL 33619	813–684–4002
Comfort Inn		2106 E Busch Blvd	Tampa FL 33612	813–931–3313
Crowne Plaza Sabal Palm		10221 Princess Palm Avenue	Tampa, FL 32610	813–623–6362
Holiday Inn Busch Gardens		2701 East Fowler Avenue	Tampa, FL 33612	813–971–4710
Quality Suites Hotel		3001 University Center Drive	Tampa, FL 33612	813–971–8930
Shoney's Inn		8602 Merris Bridge Road	Tampa, FL 33617	813–985–8525
Wyndham Harbour Island		725 South Harbour Island Blvd	Tampa, FL 33602	813–229–5000
Holiday Inn Kennedy Space Center.		4951 S Washington Avenue	Titusville, FL 32780	407–269–2121
Holiday Inn Palm Beach Intl. Airport.		1301 Belvedere Road	West Palm Beach, FL 33405	407–659–3880
Iowa				
Holiday Inn		2501 Williams Blvd SW	Cedar Rapids, IA 52404	319–365–9441
Holiday Inn—Davenport		5202 Brody	Davenport, IA 52806	315–391–1230
Holiday Inn—Merle Hwy		5000 Merle Hwy Road	Des Moines, IA 50322	515–278–0271
Ft. Dodge Holiday Inn	PO Box 1336	2001 US Hwy 169 S	Ft. Dodge, IA 50501	515–955–3621
Comfort Inn		410 5th Street SW	Mason City, IA 50401	515–423–4444
Econo Lodge		86 9th Street Circle NE	Sioux Center, IA 51250	712–722–4000
Waterloo Holiday Inn—Civic Center.		4th & Commercial Street	Waterloo, IA 50704	319–233–7560
Illinois				
Cambridge Inn		1605 N State Street	Belvidere, IL 61008	815–544–7111
Ho—Jo Inn		401 Brock Drive	Bloomington, IL 61701	309a829–3100
Ramada Inn West		403 Brock Drive	Bloomington, IL 61701	309–829–7602
Byron Motel		511 W Blackhawk Drive	Byron, IL 61010	815–234–4500
Lakeside Motel		5440 N Sheridan Road	Chicago, IL 60640	312–275–2700

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Cove Motel		2019 S Cicero Avenue	Cicero, IL 60650	708–656–2260
Karavan Motel		1620 S Cicero Avenue	Cicero, IL 60650	708–656–4220
Best Western Inn Of Countryside		5631 S Lagrange Road	Countryside, IL 60525	708–352–8480
Green Valley Motel		145 W Pershing Road	Decatur, IL 62526	217–877–3123
Super 8 Motel—Dixon		1800 S Galena	Dixon, IL 61021	815–284–1800
Royal Inn		1010 S Jefferson Street	Duquoin, IL 62832	618–542–4335
Holiday Inn Express Chicago		933 S Route 83	Elmhurst, IL 60126	708–279–0700
Indian Mound Motel		4700 Collinsville Road	Fairmont City, IL 62201	618–279–5700
Abe Lincoln Motel		10841 W Lincoln Hwy	Frankfort, IL 60423	815–469–5114
Westerfield House Inn		8059 Jefferson Road	Freeburg, IL 62243	618–539–5643
Carl Johnson Gallery Gallery Guest Suite.		202 S Main Street	Galena, IL 610362227	815–777–1222
2 Acres Motel & Restaurant		I–70 & Rt. 127	Greenville, IL 62246	618–664–3131
Sweet Basil Hill Farm		15937 W Washington	Gurnee, IL 60031	708–244–3333
Inn Keeper Motel Hwy		140 & I–55	Hamel, IL 62046	618–633–2111
Red Roof Inn—Joliet		1750 McDonough	Joliet, IL 60436	815–741–2304
Holiday Inn—Lagrange Countryside.		6201 Joliet Road	Lagrange, IL 60525	708–354–4200
Red Roof Inn #078		2450 E 173rd Street	Lansing, IL 60438	708–895–9570
Moline Comfort Inn		2600 52nd Avenue	Moline, IL 61265	309–762–7000
Riverside Inn Motel	Box 429	Rt. 5	Murphysboro, IL 62966	618–687–2244
Best Western Mark Twain Hotel		225 NE Adams	Peoria, IL 61602	309–676–3600
Best Western Heritage Inn		420 S Murray Road	Rantoul, IL 61866	217–892–9292
Quality Inn At O'Hare		6810 N Mannheim Road	Rosemont, IL 60018	708–297–1234
Continental Motel	Rt. 50 E	1600 E Main Street	Salem, IL 62881	618–548–3090
Spillway Motel	Box 1	R.R. 1	Shelbyville, IL 62565	217–774–9591
Watseka Motel		814 E Walnut Street	Watseka, IL 60970	815–432–2426
Red Roof Inn—Willowbrook	Rt. 83	7535 Kingery Hwy	Willowbrook, IL 60521	708–323–8811
Wyndham Wood Dale		1200 N Nittel Blvd	Wood Dale, IL 60191	708–860–2900
Louisiana				
Quality Inn Marina		5353 Paris Road	Chalmette, LA 70043	504–277–5353
Holiday Inn Westbank		100 Westbank Expressway	Gretna, LA 70053	504–366–2361
Comfort Inn NO Airport		1700 I—10 Service Road	Kenner, LA 70065	504–464–1300
Holiday Inn—Laplace		3900 Main Street	Laplace, LA 70068	504–652–5544
Holiday Inn Express		2503 SE Evangeline Thwy	Lafayette, LA 70508	318–234–2000
Holiday Inn North		2716 NE Evangeline Thwy	Lafayette, LA 70507	318–233–0003
Holiday Inn Lake Charles		505 N Lakeshore Drive	Lake Charles, LA 70601	318–433–7121
Comfort Inn		5650 Frontage Road	Monroe, LA 71202	318–345–2220
Massachussetts				
Howard Johnson Lodge		1271 Boylston Street	Boston, MA 02215	617–267–8300
Holiday Inn Brockton		Westgate Mall	Brockton, MA 02401	508–588–6300
Comfort Inn		235 Elm Street	Dedham, MA 02026	617–326–6700
Mariner Motel		555 Main Street	Falmouth, MA 02540	508–548–1331
Red Roof Inn Inc.		650 Cochichuate Road	Framingham, MA 01701	508–872–4499
Holiday Inn		Rt. 132	Hyannis, MA 02601	508–775–6600
Holiday Inn Leominster/Fitchburg		One Lindell Avenue	Leominster, MA 01453	508–537–1661
Susse Chalet Hotel—Seekonk		341 Highland Avenue	Seekonk, MA 02771	508–336–7900
Quality Inn Colonial		Rt 20	Sturbridge, MA 01566	508–347–3306
Maryland				
Econo Lodge Of Aberdeen		820 W Bel Air Avenue	Aberdeen, MD 21001	410–272–5500
Susse Chalet		4 Philadelphia Court	Baltimore, MD 21237	410–574–8100
Residence Inn By Marriott		7335 Wisconsin Avenue	Bethesda, MD 20814	301–718–0200
Holiday Inn Columbia		7900 Washington Blvd	Columbia, MD 20794	410–799–7500
Econo Lodge		5895 Bonnieview Lane	Elkridge, MD 21227	410–796–1020
Fairlingers Hotel Gunter		11 West Main Street	Frostburg, MD 21532	301–689–6511
Holiday Inn Gaithersburg		2 Montgomery Village Avenue	Gaithersburg, MD 20879	301–948–8900
Comfort Inn—Germantown		20260 Golden Rod Lane	Germantown, MD 20874	301–428–1300
Comfort Inn		118 Limestone Road	Hancock, MD 21750	301–678–6101
Susse Chalet Jessup		7300 Crestmount Road	Jessup, MD 20794	410–799–1500
Holiday Inn Capital Centre		9100 Basil Ct	Landover, MD 20785	301–773–0700
301 Property Management Ventures/Econo Lodge.	PO Box 1661	Rtes 301 & 6	Laplata, MD 20646	301–934–1400
Holiday Inn Laurel		3400 Ft Meade Road	Laurel, MD 20724	301–498–0900
Susse Chalet B W I		1734 West Nursery Road	Linthicum, MD 21090	410–859–2333
Red Roof Inn #140		827 Elkridge Landing Road	Linthicum Hts, MD 21090.	
Days Inn		4201 Coastal Hwy	Ocean City, MD 21842	410–289–6488
Ocean Park Motel		1701 Atlantic Avenue	Ocean City, MD 21842	410–289–7262
Oceanic Motel		710 S Philadelphia Avenue	Ocean City, MD 21842	410–289–6494
Plim Plaza Hotel		109 N Boardwalk	Ocean City, MD 21842	410–289–6181
Quality Inn Beachfront		3301 33rd Street	Ocean City, MD 21842	410–289–1234
Sandyhill Motel		1710 Baltimore Avenue	Ocean City, MD 21842	410–289–6151

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Seabonay Motel		2711 Atlantic Avenue	Ocean City, MD 21842	410–289–9194
Stardust Motel		3200 Baltimore Avenue	Ocean City, MD 21842	410–289–6444
Susse Chalet		6363 Oxon Hill Road	Oxon Hill, MD 20745	301–839 0001
Econo Lodge Princess Anne		10936 Market Lane	Princess Anne, MD 21853	410–651–9400
Holiday Inn—Salisbury	Rt 11 Bx 226	US Rt 13 N	Salisbury, MD 21801	410–742–7194
Holiday Inn Timonium Plaza		2004 Greenspring Drive	Timonium MD 21093	410–252–7373
Sheraton Baltimore North Hotel		903 Dulaney Valley Road	Towson, MD 21204	410–321–7400
Minnesota				
Wyndham Bloomington		4460 W 78th Street Circle	Bloomington, MN 55435	612–831–3131
Holiday Inn		2115 S 6th Street	Brainard, MN 56401	218–829–1441
Holiday Inn Burnsville		14201 Nicollet Avenue S	Burnsville MN 55337	612–435–2100
Duluth Super 8 Motel		4100 W Superior Street	Duluth, MN 55807	218–628–2241
Mankato Days Inn		1285 Range Street	Mankato MN 56001	507–387–3332
Holiday Inn—Plymouth		3000 Harbor Lane	Plymouth, MN 55447	612–559–1222
Radisson Hotel Centerplace		150 South Broadway	Rochester, MN 55904	507–281–8000
Holiday Inn St. Paul—Roseville		2540 N Cleveland Avenue	Roseville, MN 55113	612–636–4567
Holiday Inn—St. Paul E		2201 Burns Avenue	St. Paul, MN 55117	612–731–2220
Holiday Inn—New Section		75 S 37th Avenue	St. Cloud, MN 56301	612–253–9000
Montana				
Holiday Inn Billings Plaza		5500 Midland Road	Billings, MT 59101	406–248–7701
Bozeman Comfort Inn		1370 N 7th Avenue	Bozeman, MT 59715	406–587–2322
Holiday Inn		5 Baxter Lane	Bozeman, MT 59715	406–587–4561
Sheraton Hotel		400 10th Avenue	Great Falls, MT 59405	406–727–7200
Best Western Hamilton Inn		409 S First Street	Hamilton, MT 59840	406–363–2142
Days Inn 2001		2001 Prospect Avenue	Helena, MT 59601	406–442–3280
Helena Comfort Inn		750 Fee Street	Helena, MT 59623	406–443–1000
Holiday Inn Parkside		700 S Pattee	Missoula, MT 59802	406–721–8550
Pine Lodge Quality Inn		920 Spokane Avenue	Whitefish, MT 59937	406–862–7600
North Carolina				
Econo Lodge East		I–40 Exit 55	Asheville, NC 28815	704–298–5519
Holiday Inn Tunnel Road		201 Tunnel Road	Asheville, NC 28805	704–252–4000
Lloyd's On The River	PO Box 429	Hwy 19 North	Bryson City, NC 28713	704–488–3767
Comfort Inn—Hatteras Island	PO Box 1089	Old Lighthouse And State 12	Buxton, NC 27920	919–995–6100
Comfort Inn Of Canton	PO Box 866	I–40 At Exit 31 Champion Drive	Canton, NC 28716	704–648–4881
Holiday Inn	US 15–501	Eastgate 1301 N Fordham Blvd	Chapel Hill, NC 27514	919–929–2171
Charlotte University Red Roof Inn.		5116 N I–85	Charlotte, NC 28206	704–596–8222
Holiday Inn Center City		230 N College Street	Charlotte, NC 28202	704–335–5400
Holiday Inn Express		575 Clanton Road	Charlotte, NC 28217	704–523–0633
Holiday Inn Woodlawn		212 Woodlawn Road	Charlotte, NC 28217	704–525–8350
Hyatt Charlotte		5501 Carneige Blvd	Charlotte, NC 28209	704–554–1234
Red Roof Inn—Charlotte Coliseum (#124).		131 Red Roof Drive	Charlotte, NC 28217	704–529–1020
Residence Inn By Marriott Tyvola Executive P.		5800 Westpark Drive	Charlotte, NC 28217	704–527–8110
Wyndham Charlotte		4200 Wilmount Road	Charlotte, NC 28208	704–357–9100
Holiday Inn—Cherokee	PO Box 1929	Hwy 19 West	Cherokee NC 28719	704–497–9181
Friendship Inn		2451 Kannapolis Hwy	Concord, NC 28025	704–788–8550
Holiday Inn Durham West		3460 Hillsborough Road	Durham, NC 27705	919–383–1551
Red Roof Inn #155		4405 Hwy 55 East	Durham, NC 27713	919–361–1950
Red Roof Inn—Durham II		2000 I -85 Service Road	Durham, NC 27705	919–471–9882
Holiday Inn		522 S Hughes Blvd	Elizabeth City, NC 27909	919–338–3951
Comfort Inn		1957 Cedar Creek Road	Fayetteville, NC 28301	919–323–8333
Econo Lodge I–95		1952 Cedar Creek Road	Fayetteville, NC 28302	919–433–2100
Holiday Inn Fayettevelle I–95	PO Box 2245	1944 Cedar Creek Road	Fayetteville, NC 28302	919–323–1600
Holiday Inn Airport		550 Airport Road	Fletcher, NC 28732	704–684–1213
Econo Lodge		I–85 & Bessemer City Road	Gastonia, NC 28052	704–867–1821
Red Roof Inn #99		2101 West Meadowview Road	Greensboro, NC 27403	919–852–6560
Red Roof Inns		615 Regional Road	Greensboro, NC 27409	919–271–2636
Residence Inn By Marriott		2000 Veasley Street	Greensboro, NC 27407	919–294–8600
Holiday Inn		I–85 & Parham Road	Henderson, NC 27536	919–492–1126
Comfort Suites		1125 13th Avenue Drive SE	Hickory, NC 28602	704–323–1211
Best Western Eldreth Inn At Mt. Jefferson.		Hwy US 221 & NC 88	Jefferson, NC 28640	919–246–8845
Holiday Inn Laurinburg		15401 By Pass	Laurinburg, NC 28352	919–276–6555
Comfort Suites Of Lexington		1620 Cotton Grove Road	Lexington, NC 27292	704–352–2333
Comfort Inn At Lincolnton	PO Box 814	1550 E Main Street	Lincolnton, NC 28092	704–732–0011
Comfort Suites		215 Wintergreen Drive	Lumberton, NC 28358	919–739–8800
Holiday Inn North		5201 Fayetteville Road	Lumberton, NC 28358	919–671–1166
Comfort Inn		848 Soco Road	Maggie Valley, NC 28751	704–926–9106
Sleep Inn		2400 A South Sterling Street	Morganton, NC 28655	704–433–9000

HOTEL AND MOTEL FIRE SAFETY ACT NATIONAL MASTER LIST MARCH 24, 1993 UPDATE—Continued

Comfort Inn NC 160		Hwy 114 64 West	Murphy, NC 28906	704–837–8030
Econo Lodge		3804 Newbern Avenue	Raleigh, NC 27610	919–231–8818
Hampton Inn Crabtree		6209 Glenwood Avenue	Raleigh, NC 27612	919–782–1112
Red Roof Inns		3520 Maitland Drive	Raleigh, NC 27610	919–231–0200
Residence Inn By Marriott—Raleigh.		1000 Navaho Drive	Raleigh, NC 27609	919–878–6100
Holiday Inn Reidsville		2100 Barnes Street	Reidsville, NC 27320	919–342–0341
Holiday Inn—Raleigh Durham Airport.		I–40 & Exit 282 Page Road	Research Triangle P, NC 27709	919–941–6000
Comfort Inn		1911 Weldon Road	Roanoke Rapids, NC 27870	919–537–5252
Comfort Inn—Gateway		200 Gateway Blvd	Rocky Mount, NC 27804	919–937–7765
Holiday Inn—Dortches	PO Box 7215	I–95 5350 Dortches Blvd	Rocky Mount, NC 27804	919–937–6300
Holiday Inn Salisbury	PO Box 1925	530 Jake Alexander Blvd S	Salisbury, NC 28144	704–638–0311
Sleep Inn		321 Bondix Drive	Salisbury, NC 28146	404–633–5961
Holiday Inn—Southern Pines		US Hwy 1 At Morganton Road	Southern Pines, NC 28387	919–692–8585
Comfort Inn		1214 Greenland Drive	Statesville, NC 28677	704–873–2044
Red Roof Inn #113		1508 E Broad Street	Statesville, NC 28677	704–878–2051
Clarion Resort At Sea Trail Plantation.		211 Clubhouse Road	Sunset Beach, NC 28468	919–579–4350
Friendship Inn		1201 E Casmell Street	Wadesboro, NC 28170	704–694–4616
Econo Lodge		1202 Russ Avenue	Waynesville, NC 28786	704–452–0353
Holiday Inn—Express		1700 Winkler Street	Wilkesboro, NC 28697	919–838–1800
Comfort Inn—Williamston		Hwy 64 By Pass	Williamston, NC 27892	919–792–8400
Holiday Inn—West Intwe		2008 S Hawthorne Road	Winston Salem, NC 27103	919–765–6670
Holiday Inn		1706 N Lumina Avenue	Wrightsville Beach, NC 28480	919–256–2231
North Dakota				
Comfort Inn		1030 Interstate Avenue	Bismarck, ND 58501	701–223–1911
Fleck House		122 East Thayer	Bismarck, ND 58501	701–255–1450
El Vu Motel		Hwy 12 & 85 S	Bowman, ND 58623	701–523–5224
Budget Inn of Dickinson Inc.	I–94 Exit 6	1529 12th Street W	Dickinson, ND 58601	701–225–9123
Comfort Inn		493 Elks Drive	Dickinson, ND 58601	701–264–7300
Evergreen Inn		2143 6th Avenue W	Dickinson, ND 58601	701–225–6606
Red Coach Inn		71 W 12th Street	Dickinson, ND 58601	701–227–4310
Motel 66	PO Box 116		Drayton, ND 58225	701–454–6464
Comfort Inn East		1407 35th Street S	Fargo, ND 58103	701–280–9666
Doublewood Inn		3333 13th Avenue S	Fargo, ND 58103	701–235–3333
Expressway Inn		1340 21st Avenue S	Fargo, ND 58103	701–235–3141
Radisson Hotel Fargo		201 5th Street N	Fargo, ND 58102	701–232–7363
Super 8 Motel		3518 Interstate Blvd	Fargo, ND 58103	701–232–9202
Ramada Inn		1205 North 43rd Street	Grand Forks, ND 58203	701–775–3951
Select Inn		1000 N 42nd Street	Grand Forks, ND 58201	701–775–0555
Central Flyway Outfitters		RR Box K6	Kramer, ND 58748	701–359–4422
Best Western Safari Inn		1510 26th Avenue SW	Minot, ND 58701	701–852–4300
Days Inn—Minot		2100 4th Street SW	Minot, ND 58701	701–852–3646
Econo Lodge		1937 N Broadway US Hwy 83	Minot, ND 58701	701–852–5600
Holiday Inn—Minot		2315 N Broadway	Minot, ND 58701	701–852–4161
Lincoln Park Motel		94 Lincoln Avenue	Underwood, ND 58576	701–442–3486
Super Eight Motel		822 11th Street SW	Valley City, ND 58072	701–845–1140
Super 8 Motel		825 E Main	West Fargo, ND 58078	701–282–7121
Super 8 Lodge		2324 2nd Avenue W	Williston, ND 58801	701–572–8371
The Kensington		1001—W 24th Street	Williston, ND 58801	701–774–0424
Nebraska				
Econo Lodge		4402 Dakota Avenue	South Sioux City, NE 68776	402–494–4114
New Jersey				
Atlantic City—Diplomat		115 Chelsea Avenue Boardwalk	Atlantic City, NJ 08401	609–348–2200
Holiday Inn Bridgewater		1260 Rt 22	Bridgewater, NJ 08807	908–526–9500
Sheraton Meadowlands		2 Meadowlands Plaza	East Rutherford, NJ 07073	201–896–0500
Holiday Inn At Raritan Center		125 Raritan Center Pkwy	Edison, NJ 08837	908–225–8300
Econo Lodge		2016 Rt 37 W	Lakehurst, NJ 08733	908–657–7100
Howard Johnson Lodge		2991 Brunswick Pike	Lawrenceville, NJ 08648	609–896–1100
Red Roof Inn—Princeton North		208 New Road	Monmouth Junction, NJ 08852	908–821–8800
Econo Lodge University Center		26 US Hwy 1 N	New Brunswick, NJ 08901	908–828–8000
Parsippany Hilton		One Hilton Ct	Parsippany, NJ 07054	201–267–7373
Sheraton Tara Hotel		199 Smith Road	Parsippany, NJ 07054	201–515–2000
Hyatt Regency Princeton	Rt. 1	102 Carnegie Ctr	Princeton, NJ 08850	609–987–1234
Residence Inn—Princeton	PO Box 8388	4225 Rt 1	Princeton, NJ 08543	908–329–9600
Holiday Inn Harmon Meadow		300 Plaza Drive	Secaucus, NJ 07094	201–348–2000
Comfort Inn South Plainfield		101 New World Way	South Plainfield, NJ 07080	908–561–4488
Quality Inn		101 Grove Road	Thorofare, NJ 08086	609–848–4111
Holiday Inn At Tinton Falls		700 Hope Road	Tinton Falls, NJ 07724	908–544–9300

HOTEL AND MOTEL FIRE SAFETY ACT NATIONAL MASTER LIST MARCH 24, 1993 UPDATE—Continued

Sheraton Inn—Atlantic City West		6821 Black Horse Pike	West Atlantic City, NJ 08232	609–272–0200
Nevada				
Ceasar's Palace		3570 Las Vegas Blvd South	Las Vegas, NV 89109	702–731–7368
Holiday Inn		325 E Flamingo Road	Las Vegas, NV 89109	702–732–9100
Pahrump Station Days Inn	PO Box 38	2021 E Loop Road	Pahrump, NV 89041	702–727–5100
Holiday Inn Convention Center		5851 S Virginia Street	Reno, NV 89502	702–825–2940
Rodeway Inn		2050 Market Street	Reno, NV 89502	702–786–2500
New York				
Comfort Suites—Buffalo Airport		901 Dick Road	Buffalo, NY 14225	716–633–6000
Sheraton Inn—Buffalo Airport		2040 Walden Avenue	Buffalo, NY 14225	716–681–2400
Holiday Inn Crowne Plaza Laguardia Airport.		104–04 Ditmars Blvd	East Elmhurst, NY 11369	718–457–6300
Westview Lodge		3998 Harbor Road	Henderson Harbor, NY 13651	315–938–5722
Holiday Inn—JFK Airport		144–02 135th Street	Jamaica, NY 11436	718–659–0200
Grandview Holiday Inn		1 Olympic Drive	Lake Placid, NY 12946	518–523–2550
Comfort Inn		866 Albany—Shaker Road	Latham, NY 12110	518–783–1900
Magnolia Hotel		RD #2 Box 257	Mayville, NY 14757	716–789–2935
Holiday Inn—Utica		1777 Burrstone Road	New Hartford, NY 13413	315–797–2131
Holiday Inn Crowne Plaza		1605 Broadway	New York, NY 10019	219–977–4000
Holiday Inn Downtown		138 Lafayette Street	New York, NY 10013	212–966–8898
New York Helmsley Hotel		212 E 42nd Street	New York, NY 10017	212–490–8900
New York Renaissance Hotel		2 Times Square	New York, NY 10036	212–765–7676
Holiday Inn—Convention Center		231 Third Street	Niagara Falls, NY 14303	716–282–2211
Holiday Inn Express		341 S Road	Poughkeepsie, NY 12601	914–473–1151
Holiday Inn		173 Sunrise Hwy	Rockville Centre, NY 11570	516–678–1300
Adirondack Comfort Inn		148 Lake Flower Avenue	Saranac Lake, NY 12983	518–891–1970
Inn At Saratoga		231 Broadway	Saratoga Springs, NY 12866	518–583–1890
Sheraton Saratoga Springs Hotel & Conf Center.		534 Broadway	Saratoga Springs, NY 12866	518–584–4000
Sheraton Smithtown Hotel		110 Vanderbilt Motor Pkwy	Smithtown, NY 11788	516–231–1100
Holiday Inn Syracuse—Fairgrounds.		State Fair Blvd & Farrell Rd	Syracuse, NY 13209	315–457–8700
Holiday Inn—Watertown		300 Washington Street	Watertown, NY 13601	315–782–8000
Stouffer Westchester Hotel		80 W Red Oak Lane	White Plains, NY 10604	914–694–5400
Oklahoma				
Holiday Inn Ardmore		2705 West Broadway	Ardmore, OK 73401	405–223–7130
Ramada Inn		2700 West Broadway	Ardmore, OK 73401	405–226–1250
Holiday Inn		1410 SE Washington Blvd	Bartlesville, OK 74006	918–333–8320
Econo Lodge		1401 N Elm Place	Broken Arrow, OK 74012	918–258–6617
Holiday Inn		2015 N Hwy 81	Duncan, OK 73533	405–252–1500
Holiday Inn—East		5701 Tinker Diagonal	Midwest City, OK 73110	405–737–4481
Holiday Inn		801 S Meridian	Oklahoma City, OK 73108	405–942–8511
Lexington Hotel Suites		1200 S Meridian Avenue	Oklahoma City, OK 73108–1706	405–943–7800
Holiday Inn		2215 N 14th	Ponica City, OK 74601	405–762–8311
Best Western Trade Winds Central Inn.		3141 E Skelly Drive	Tulsa, OK 74107	918–749–5561
Econo Lodge		11620 E Skelly Drive	Tulsa, OK 74128	918–437–9200
Hoilday Inn Express		3131 East 51st	Tulsa, OK 74105	918–743–9811
Holiday Inn Tulsa Center I–44		8181 East Skelly	Tulsa, OK 74129	918–663–4541
Holiday Inn Tulsa East Airport		1010 N Garnett Rd	Tulsa, OK 74116	918–437–7660
Comfort Inn West		321 N Mustang Rd	Yukon, OK 73099	405–324–1000
Oregon				
The Riverhouse		3075 N Hwy 97	Bend, OR 97701	503–389–3111
Harbor Inn Motel		15991 Hwy 101 S	Brookings, OR 97415	503–469–3194
Shanieo Inn		1113 NW 9th	Corvallis, OR 97330	503–754–7474
Holiday Inn		225 Coburg Road	Eugene, OR 97401	503–342–5181
Quality Inn		1545 NE Burnside Street	Gresham, OR 92030	503–666–9545
Best Western Beachfront Inn		16008 Boat Basin Road	Harbor, OR 97418	504–469–7779
Best Western Klamath Inn		4061 S 6th Street	Klamath Falls, OR 97603	503–882–1200
Comfort Inn		2500 S 6th Street	Klamath Falls, OR 97601	503–884–9999
Econo Lodge		75 Main Street	Klamath Falls, OR 97601	503–884–7735
Quality Inn At Rogue Valley		2345 Crater Lake Hwy	Medford, OR 97504	503–770–1234
Hotel Newport		3019 N Coast Hwy 101	Newport, OR 97365	503–265–9411
Sylvia Beach Hotel		267 NW Cliff Street	Newport, OR 97365	503–265–5428
The Waves Motel		820 NW Coast Street	Newport, OR 97365	503–265–4661
Best Western Salbasgeon Inn Of Reedsport.		1400 Hwy Avenue	Reedsport, OR 97467	503–271–4831
Salbasgeon Inn Of Umpqua		45209 Hwy 38	Reedsport, OR 97467	503–271–2025
Comfort Inn		8855 SW Citizens Drive	Wilsonville, OR 97070	503–682–9000
Flying M Ranch		23029 NW Flying M Road	Yamhill, OR 97148	503–662–3222

HOTEL AND MOTEL FIRE SAFETY ACT NATIONAL MASTER LIST MARCH 24, 1993 UPDATE—Continued

Pennsylvania				
Red Roof Inn		1846 Catasaqua Road	Allentown, PA 18103	215–264–5404
Hojo Inn		1500 Sterling Street	Altoona, PA 16602	814–946–7601
Red Roof Inn		1454 Beers School Road	Coraopolis, PA 15108	412–264–5678
Holiday Inn		US 219 & I 80	Du Bois, PA 15801	814–371–5100
Red Roof Inn		7865 Perry Hwy	Erie, PA 16509	814–868–5246
Sheraton Great Valley Hotel		707 Lancaster Pike	Frazer, PA 19355	215–524–5500
Red Roof Inn		400 Corporate Circle	Harrisburg, PA 17110	717–657–1445
Holiday Inn		Rt 309	Hazleton, PA 18201	717–455–2061
Days Inn Huntingdon	PO Box 353	4th Street & US Rt 22	Huntingdon PA 16652	814–643–3934
Red Roof Inn		2729 Mosside Blvd	Monroeville, PA 15146	412–856–4738
Courtyard Philadelphia		8900 Bartram Avenue	Philadelphia, PA 19153	215–365–2200
Holiday Inn		440 Arch Street	Philadelphia, PA 19106	215–923–8660
Red Roof Inn		6404 Steubenville Pike	Pittsburgh, PA 15205	412–787–7870
Holiday Inn Bucks County		4700 Street Road	Trevose, PA 19053	215–364–2000
Red Roof Inn		1399 W Chestnut Street	Washington, PA 15301	412–228–5750
Courtyard By Marriott		1100 Drummers Lane	Wayne, PA 19087	215–687–6700
Red Roof Inn		1035 Hwy 315	Wilkes—Barre, PA 18702	717–829–6422
Holiday Inn		334 Arsenal Road	York, PA 17402	717–845–5671
York Travelodge Motel		132–140 N George Street	York, PA 17401	717–843–8974
South Carolina				
Comfort Inn		5055 N Arco Lane	Charleston, SC 29418	803–554–6485
Comfort Inn		499 Piney Grove Road	Columbia, SC 29210	803–798–0500
Red Roof Inn Columbia West		10 Berryhill Road	Columbia, SC 29210	803–798–9220
Residence Inn		150 Stone Ridge Drive	Columbia, SC 29210	803–779–7000
Holiday Inn Express		I–95 Exit 193 & Sc Hwy 9	Dillon, SC 29536	803–774–5111
Holiday Inn Express		103 Redbank Road	Goose Creek, SC 29445	803–572–9500
Red Roof Inn #095		2801 Laurens Road	Greenville, SC 29607	803–297–4458
Holiday Inn—Camden		Hwy 1 & 601 S	Lugoff, SC 29078	803–438–9441
Holiday Inn Oceanfront		415 S Ocean Blvd	Myrtle Beach, SC 29577	803–448–4481
Charleston Super 8 Motel		2311 Ashley Phosahate Road	North Charleston, SC 29418	803–572–2228
Holiday Inn Rock Hill		2640 N Cherry Road	Rock Hill, SC 29730	803–329–1122
Howard Johnson Resort Hotel	PO Box 130	I–95 Exit 102 Road 400	Santee, SC 29142	803–478–7676
Washington				
Bellevue Inn		11211 Main Street	Bellevue, WA 98004	206–455–5240
Quality Inn Baron Suites		100 E. Kellogg Road	Bellingham, WA 98226	206–647–8000
Wyndham Bothell		19333 N Creek Parkway	Bothell, WA 98011	206–485–5557
Econo Lodge		3518 Pacific Hwy E	Fife, WA 98424	206–982–0550
Holiday Inn Renton		800 Rainier Avenue S	Renton, WA 98055	206–226–7700
University Inn		4140 Roosevelt Way NE	Seattle, WA 98105	202–632–5055
Wyndham Sea—Tac		18118 Pacific Hwy S	Seattle, WA 98188	206–244–6666
Holiday Inn		4212 Sunset Blvd	Spokane, WA 99204	509–747–2021
Quality Inn Oakwood		N 7919 Division Street	Spokane, WA 99208	509–467–4900
Holiday Inn of Yakima		9 N 9th Street	Yakima, WA 9901	509–452–6511
Wisconsin				
Best Western Midway Hotel		780 Packer Drive	Green Bay, WI 54304	414–499–3161
Midway Hotel		3710 E Washington Avenue	Madison, WI 53704	608–244–2424
Red Roof Inn		6360 S 13th Street	Oak Creek, WI 53154	414–764–3500
Wyoming				
Holiday Inn Casper		300 West F Street	Casper, WY 82601	307–235–2531
Comfort Inn at Buffalo Bill Cody Village.		1601 Sheridan Avenue	Cody, WY 82414	307–587–5556
Ramada Limited Gillette		608 E 2nd Street	Gillette, WY 82716	307–682–9341
Holiday Inn Sheridan		1809 Sugarland Drive	Sheridan, WY 82801	307–672–8931
CORRECTIONS				
Alabama				
Voyager Inn Motel		100 Mobile Road	Aliceville, AL 35442	205–373–6344
#426 Bessemer, AL Motel 6		1000 Shiloh Lane	Bessemer, AL 35020	205–426–9646
Hojo Inn of Florence		1241 Florence Blvd	Florence, AL 35632	205–764–5421
Courtyard Marriott		4804 University Drive	Huntsville, AL 35816	205–837–1400
Monroe Motor Court	PO Box 519		Monroeville, AL 36480	205–575–3177
Ramsay Conference Center	Sta 6280	University of Montevallo	Montevallo, AL 35115	205–665–6280
Courtyard By Marriott		1824 Montgomery Hwy South	Hoover, AL 35244	205–988–5000
Connecticut				
Holiday Inn		1070 Main Street	Bridgeport, CT 06604	
District of Columbia				
Holiday Capitol Inn		550 C Street SW	Washington, DC 20024	202–479–4000

HOTEL AND MOTEL FIRE SAFETY ACT NATIONAL MASTER LIST MARCH 24, 1993 UPDATE—Continued

Illinois				
Wyndham Northwest Chicago		400 Park Blvd	Itasca, IL 60143	708–773–4000
Iowa				
Sheraton Inn Des Moines		11040 Hickman Road	Des Moines, IA 50325	515–278–5575
Kentucky				
Econo Lodge—Renfro Valley		1375 Richmond Road	Mt. Vernon, KY 40456	
Maryland				
Waldorf Holiday Inn		1 St Patrick Drive	Waldorf, MD 20603	301–645–8200
Comfort Inn Westminster		451 Wmc Drive	Westminster, MD 21158	410–857–1900
Pennsylvania				
Comfort Inn		3660 Street Road	Bensalem, PA 19020	215–245–0100
Bechtel Mansion Inn		400 West King Street	East Berlin, PA 17316	717–259–7760
Penn Motel		2921 Lincoln Hwy	Trevose, PA 19047	215–639–5200
DELETIONS				
(None)				

[FR Doc. 93–6718 Filed 3–30–93; 8:45 am]
BILLING CODE 6718–26–P

federal register

Wednesday
March 31, 1993

Part VI

Federal Emergency Management Agency

State Contacts for the Hotel and Motel Fire Safety Act National Master List; Notice

FEDERAL EMERGENCY MANAGEMENT AGENCY

State Contacts for the Hotel and Motel Fire Safety Act National Master List

AGENCY: United States Fire Administration, FEMA.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA or Agency) gives notice of the State contacts for the Hotel and Motel Fire Safety Act national master list. The offices or officials listed are responsible for compiling the respective State listings of properties which comply with the Hotel and Motel Fire Safety Act, and should be contacted directly for any changes to the national master list.

EFFECTIVE DATE: March 31, 1993.

ADDRESSES: Comments on the State contact list or the national master list or any changes to the master list are invited and may be addressed to the Rules Docket Clerk, Federal Emergency Management Agency, 500 C Street SW., room 840, Washington, DC 20472, (fax) (202) 646–4536.

FOR FURTHER INFORMATION CONTACT: Larry Maruskin, Office of Fire Prevention and Arson Control, United States Fire Administration, Federal Emergency Management Agency, National Emergency Training Center, 16825 South Seton Avenue, Emmitsburg, MD 21727, (301) 447–1141.

SUPPLEMENTARY INFORMATION: Acting under the Hotel and Motel Fire Safety Act of 1990, 15 U.S.C. 2201 note, the United States Fire Administration has worked with each State to compile a national master list of all of the places of public accommodation affecting commerce located in each State that meet the requirements of the guidelines under the Act. FEMA published the national master list in the **Federal Register** on Tuesday, November 24, 1992, 57 FR 55314, and makes periodic changes to the list.

Each State and Territory or other participating jurisdiction is responsible for compiling its respective listings of properties which comply with the Hotel and Motel Fire Safety Act. If you own or represent a property in compliance with the Act, and want to include the property in the national master list or to make an addition, deletion, or other change to a listing on the national master list, please contact the appropriate office in the State or jurisdiction where the property is located.

Copies of the national master list and its updates may be obtained by writing to the Government Printing Office, Superintendent of Documents, Washington, DC 20402–9325. When requesting copies please refer to stock number 069–001–00049–1.

The State contacts for the national master list follow below.

Dated: March 18, 1993.

William C. Tidball,

Acting Director.

STATE CONTACTS FOR HOTEL AND MOTEL FIRE SAFETY ACT MASTER LIST, MARCH 16, 1993

State	Office	Address	Phone	FAX
Alabama	Fire Marshal's Office	135 S Union Street, Room 140, Montgomery, AL 36130–3401.	205/269–3575	205/240–3194
Alaska	State Fire Marshal's Office	5700 E Tudor Road, Anchorage, AK 99507–1225.	907/269–5604	907/338–4375
American Samoa	Department of Public Safety	Fire Services Division, American Samoa Government, Pago Pago, American Samoa 96799.	684/633–1111	684/633–7035
Arizona	Office of the State Fire Marshal	1540 W Van Buren Street, Room 235, Phoenix, AZ 85007.	602/255–4964	602/255–4961
Arkansas	Arkansas State Police	Fire Marshal's Section, 3 Natural Resources Drive, Little Rock, AR 72215.	501/221–8258	501/224–5006
California	State Fire Marshal	7171 Bowling Drive, Suite 500, Sacramento, CA 95823.	916/427–4196	916/262–1942
Colorado	Colorado Division of Fire Safety	PO Box 158, Palisade, CO 81526–0158	303/464–0728	303/464–0729
Commonwealth of the Northern Mariana Islands.	Office of the Governor	Capitol Hill, Saipan, MP/USA 96950	670/322–5091	670/322–5096
Connecticut	Bureau of State Fire Marshal	Division of Fire and Building Safety, 294 Colony Street, Meriden, CT 06450.	203/238–6625	203/238–6148
District of Columbia	DC Fire Prevention Division	613 G Street NW, Room 810, Washington, DC 20001.	202/673–3344	202/628–5306
Delaware	State Fire Marshal	RD2, Box 166A, Dover, DE 19901	302/739–5665	302/739–3696
Florida	Division of State Fire Marshal	Department of Insurance, 101 E Gaines Street, Rm 660, Tallahassee, FL 23299–0300.	904/922–3172 x3629	904/922–2553
Georgia	State Fire Marshal	2 Martin Luther King Jr. Drive, Suite 620 West, Atlanta, GA 30334.	404/656–0418	404/656–7628
Guam	Fire Department	Pedro's Plaza, 287 W O'Brien Drive, Agana, Guam 96910.	671/477–3473	671/477–4385
Hawaii	State Fire Council	1455 S Beretania, Room 305, Honolulu, HI 96814.	808/942–9167	808/943–3322
Idaho	State Fire Marshal	500 S 10th Street, Boise, ID 83720	208/334–4288	208/334–2298
Illinois	Illinois State Fire Marshal	1035 Stevenson Drive, Springfield, IL 62703–4259.	217/785–5620	217/782–1062
Indiana	Office of the State Fire Marshal	402 W Washington Street, Room E241, Indianapolis, IN 46204.	317/232–2222	317/232–0146
Iowa	Iowa State Fire Marshal	Des Moines, IA 50319	515/281–5821	515/242–6299
Kansas	State Fire Marshal Department	700 SW Jackson Street, Suite 600, Topeka, KS 66603–3714.	913/296–3401	913/296–0151
Kentucky	Division of Fire Prevention	1047 US 127 South, Frankfort, KY 40601	502/564–3626	502/564–6799

STATE CONTACTS FOR HOTEL AND MOTEL FIRE SAFETY ACT MASTER LIST, MARCH 16, 1993—Continued

State	Office	Address	Phone	FAX
Louisiana	Dept. of Public Safety and Corrections.	5150 Florida Blvd, Baton Rouge, LA 70806.	504/925–4911	504/925–4241
Maine	State Fire Marshal's Office	317 State Street, Station #52, Augusta, ME 04333–0052.	207/287–3473	207/287–5163
Marshall Islands	Office of the Commissioner	PO Box 1222, Majaro, Republic of the Marshall Islands, MH 96960.	692/9–3233	692/625–5134
Maryland	State Fire Marshal's Office	106 Old Court Road, Suite 300, Pikesville, MD 21208.	410/764–4324	410/764–4576
Massachusetts	State Fire Marshal's Office	1010 Commonwealth Avenue, Boston, MA 02215.	617/566–4500	617/566–2600
Michigan	Michigan Fire Marshal Division	7150 Harris Drive, Lansing, MI 48913	517/322–5454	517/322–2908
Minnesota	State Fire Marshal Division	450 N Syndicate, Suite 285, St. Paul, MN 55104.	612/643–3098	612/643–3095
Mississippi	Mississippi Emergency Mgmt Agency.	PO Box 4501, Jackson, MS 39296–4501	601/960–9013	601/352–8314
Missouri	Division of Fire Safety	301 W High Street, #860, Jefferson City, MO 65101.	314/751–2930	314/751–1744
Montana	Fire Prevention and Investigation.	303 N Roberts, Helena, MT 59620	406/444–2050	406/444–4722
National Government of the Federated States of Micronesia.		PO Box PS53, Palikir, Pohnpei, Eastern Carolina Islands, 96941.	691/320–2649	691/320–2785
Nebraska	State Fire Marshal's Office	246 S 14th Street, Lincoln, NE 68508–1804.	402/471–2027	402/471–3118
Nevada	State Fire Marshal's Office	Capitol Complex, Carson City, NV 89710	702/687–4290	702/687–5122
New Hampshire	State of New Hampshire Dept. of Safety.	Division of Fire Service, 91 Airport Road, Concord, NH 03301.	603/271–3294	603/271–3903
New Jersey	Bureau of Fire Safety	CN 809, Trenton, NJ 08625	609/633–6115	609/633–6134
New Mexico	New Mexico State Fire Marshal's Office.	PO Box Drawer 1269, Santa Fe, NM 87504–1269.	505/827–3550	505/827–3778
New York	Office of Fire Prevention and Control.	162 Washington Avenue, Albany, NY 12231.	518/473–9590	518/474–3240
North Carolina	Fire and Rescue Service Division.	111 Seaboard Avenue, PO Box 26387, Raleigh, NC 27603.	919/733–5435	919/733–9076
North Dakota	Consumer Protection Division	PO Box 937, Bismarck, ND 58502–0937	701/221–6147	701/221–5363
Ohio	Division of State Fire Marshal	8895 E Main Street, Reynoldsburg, OH 43068.	614/752–8200	614/752–7213
Oklahoma	State Fire Marshal's Office	4030 N Lincoln Blvd, Suite 100, Oklahoma City, OK 73105.	405/424–4371	405/424–0926
Oregon	Office of State Fire Marshal	4760 Portland Road NE, Salem, OR 97305–1760.	503/378–3473	503/373–1825
Pennsylvania	Pennsylvania Emergency Mgmt Agency.	PO Box 3321, Harrisburg, PA 17105	717/783–5061	717/772–6917
Puerto Rico	Puerto Rico Fire Department	PO Box 13325, Santurce, PR 00908–3325	809/725–3444	
Republic of Palau	National Emergency Management.	Office of the Vice President, PO Box 100, Koror, Republic of Palau 96940.	680/488–2249	680/488–1725
Rhode Island	State Fire Marshal's Office	1270 Mineral Spring Avenue, North Providence, RI 02904.	401/277–2335	401/726–9633
South Carolina	Division of State Fire Marshal	1201 Main Street, Suite 810, Columbia, SC 29201.	803/737–0660	803/737–0675
South Dakota	South Dakota Department of Health.	Division of Public Health, 523 E Capitol, Pierre, SD 57501.	605/773–3364	605/773–5904
Tennessee	Division of Fire Protection	500 James Robertson Parkway, Volunteer Plaza, 3rd Floor, Nashville, TN 37243.	615/741–2981	615/741–1583
Texas	Texas Commission on Fire Protection.	3006–B Longhorn Blvd, Austin, TX 78768	512/873–1875	512/873–1740
Utah	Office of the Fire Marshal	4501 South 2700 West, Salt Lake City, UT 84119.	801/965–4353	801/965–4756
Vermont	Fire Prevention Director's Office	Department of Labor and Industry, Montpelier, VT 05620–3401.	802/828–2288	802/828–2288
Virginia	Dept of Housing & Community Develop.	501 N 2nd Street, Richmond, VA 23219–1321.	804/371–7153	804/371–7092
Virgin Islands	Virgin Islands Fire Service	Universal Plaza, 8A Estate Thomas, Charlotte Amalie, St. Thomas, VI 00802.	809/774–7610	809/774–4718
Washington	Department of Community Development.	Fire Protection Services, 4317 6th Avenue SE, PO Box 48350, Olympia, WA 98504–8350.	206/493–9440	206/493–2648
West Virginia	Office of the State Fire Marshal	Inspection Division, 2100 Washington St. E, PO Box 51040, Charleston, WV 25305–0140.	304/558–2191	304/558–2537

STATE CONTACTS FOR HOTEL AND MOTEL FIRE SAFETY ACT MASTER LIST, MARCH 16, 1993—Continued

State	Office	Address	Phone	FAX
Wisconsin	Bureau of Buildings and Structures.	Safety and Building Division, 20 E Washington Avenue, Room 103, Madison, WI 53707.	608/267-9706	608/267-9566
Wyoming	Dept of Fire Prev. and Electrical Safety.	Herschler Building, 1st Floor West, Cheyenne, WY 82002.	307/777-7288	307/777-7119

[FR Doc. 93-6719 Filed 3-30-93; 8:45 am]

BILLING CODE 6718-26-P-M

federal register

Wednesday
March 31, 1993

Part VII

Department of Transportation

Federal Aviation Administration

14 CFR Parts 121, 125, and 135
Flight Attendant Duty Period Limitations and Rest Requirements; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121, 125, 135

[Docket No. 27229; Notice No. 93–3]

RIN AD–50

Flight Attendant Duty Period Limitations and Rest Requirements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes duty period scheduling limitations and rest requirements for flight attendants engaged in air transportation and air commerce. This proposal would establish flight attendant duty period scheduling limitations and rest requirements. The proposal results from public and congressional interest in regulating flight attendant work hours and from data contained in a recent FAA study of current industry practice relating to flight attendant flight, duty, and rest times. The objective of the proposal is to contribute to an improved aviation safety system by ensuring that flight attendants are sufficiently rested to perform their routine and emergency safety duties.

DATES: Comments must be received on or before June 1, 1993.

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC–10), Docket No. 27229, 800 Independence Avenue SW., Washington, DC 20591. Comments delivered must be marked Docket No. 27229. Comments may be examined in room 915G on weekdays between 8:30 a.m. and 5 p.m., except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Donell Pollard, Project Development Branch, AFS–240, Air Transportation Division, Flight Standards Service, 304B, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8096.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments, and by commenting on the possible environmental, economic, and federalism- or energy-related impact of the adoption of this proposal. Comments concerning the proposed implementation and effective date of the rule are also specifically requested.

Comments should carry the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket address specified above. All comments received and a report summarizing any substantive public contact with FAA personnel on this rulemaking will be filed in the docket. The docket is available for public inspection both before and after the closing date for receiving comments.

Before taking any final action on this proposal, the Administrator will consider the comments made on or before [60 days after publication in the **Federal Register**], and the proposal may be changed in light of the comments received.

The FAA will acknowledge receipt of a comment if the commenter includes a self-addressed, stamped postcard with the comment. The postcard should be marked "Comments to Docket No. 27229". When the comment is received by the FAA, the postcard will be dated, time stamped, and returned to the commenter.

Availability of the NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA–430, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–3484. Communications must identify the notice number of this NPRM.

Persons interested in being placed on a mailing list for future FAA NPRM's should request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes application procedures.

Background

In the mid-1980's, the FAA received two petitions for rulemaking on flight and duty period limitations for flight attendants. The first petition, from the Association of Flight Attendants (AFA), was received on December 19, 1984, and was summarized in the **Federal Register** (50 FR 6185) on February 14, 1985. The second petition, from the Joint Council of Flight Attendant Unions (JCFA), was received on April 23, 1985, and was summarized in the **Federal Register** (50 FR 25252) on June 18, 1985.

In its petition, the AFA requested the introduction of flight and duty time regulations, equivalent to those currently applying to flight crewmembers, into 14 CFR parts 121 and 135. In addition, the AFA sought the limitation of flight time to no more than 8 hours, with a minimum rest period of 9 hours in a single daily duty period.

The AFA also addressed the potential costs and benefits of its proposal. The AFA did not foresee its proposal as having a major cost impact on the industry because many unions have contracts regarding flight attendant work hours that are more restrictive than the flight crewmember flight time limitations and rest requirements of 14 CFR parts 121 and 135. Additionally, the AFA asserted that its proposal would "ensure that flight attendants are rested enough to perform safely in an emergency. * * *"

The JCFA submitted a more complex proposal that recommended the establishment of specific maximum duty time limits, minimum release-to-report rest periods, minimum numbers of monthly 24-consecutive-hour rests at domicile, and at least one 24-consecutive-hour rest period every 7 consecutive days.

Both petitioners contended that such rules are necessary to protect flight attendants since some air carriers require extremely long and exhausting duty periods. The petitioners pointed out that not all flight attendants are represented by unions. Moreover, the petitioners stated that the unrepresented flight attendants have no protection from excessive duty hours. In its proposal, the JCFA stated that excessive duty hours often lead to flight attendant fatigue and can diminish the ability of flight attendants to adequately perform their safety function in air transportation.

Because of the petitions' common subject matter, the FAA considered the two petitions jointly in a single docket, No. 24397. Commenters in support of the petitions and in factor of regulating flight attendant hours of service included the petitioners, union members of JCFA, individual flight attendants, the National Transportation Safety Board (NTSB), the Air Line Pilots Association (ALPA), the International Airline Passengers Association, the Director of Aerospace Medicine at Wright State University, and several members of Congress. While not citing any studies specifically related to flight attendant duties, supporters of the rulemaking agreed with the petitioners that fatigue does have an effect on performance and that flight attendants perform an important safety function in air transportation.

The NTSB, in its comment to Docket No. 24397, stated that the Board "believes that flight attendant fatigue can be detrimental to passenger safety." In its investigation of a January 21,

1985, Galaxy Airlines L–188 accident in Reno, Nevada, the Board disclosed scheduling practices that could be detrimental to passenger safety. At the time of the accident, two of the three flight attendants had been on duty for 18 hours 39 minutes. Their estimated total hours on duty, had they completed the flight to their scheduled destination, would have exceeded 25 hours. While the NTSB investigators did not attribute the cause of the accident and subsequent fatalities to the flight attendants' possible fatigue, the Board was concerned that such long duty periods "could impair the flight attendant's ability to perform the physical and mental tasks required" in an emergency.

The Air Transport Association, People Express Airlines, and the National Air Carrier Association expressed opposition to the initiation of rulemaking for flight attendant flight, duty, and/or rest limitations. These organizations saw no safety basis for rulemaking action by the FAA and believed that, if a problem exists, it is a labor/management problem and should be resolved as such.

After considering the comments submitted, the FAA issued a Denial of Petition on January 23, 1989, basing its determination on lack of evidence of any correlation among flight attendant duty time, flight attendant safety duties, and risk to passengers. No safety justification was found for adopting more stringent daily flight time limitations and daily minimum rest requirements for flight attendants, as proposed, than the current FAR applicable to flight crewmembers. Further, the FAA found no reasonable method of determining requirements for cost-beneficial flight attendant duty times directly related to safety. The FAA concluded that the costs to the carriers to administer the proposed rules and to the FAA to enforce them, could not be justified based on any empirical or reasonably estimated safety benefit.

Later in 1989 both the House of Representatives and the Senate introduced bills to provide for the establishment of limitations on duty time for flight attendants.

On May 17, 1989, the Subcommittee on Aviation of the House Committee on Public Works and Transportation held a public hearing on the House version of the bill. At that hearing the FAA's Associate Administrator for Regulation and Certification advised the subcommittee of its intent to initiate further studies of current flight attendant scheduling practices.

The FAA completed a "Report on the Study of Current Industry Practice-Flight Attendant Flight, Duty, and Rest Times" (hereinafter referred to as the "Industry Study") on September 12, 1989. A copy of the Industry Study has been placed in the docket and is available for review. The information contained in the study, which was submitted to the House Subcommittee on Aviation, reflects a comprehensive view of current U.S. air carrier industry practices. The data collected for the study indicated that certain types of problems related to flight attendant duty hours may occur more frequently in certain industry segments than in others because of the nature of their operations. The study also noted that a variety of mechanisms are in place throughout the industry to respond to such problems. However, the results of the study suggest the need for regulatory action, which is provided by this NPRM.

On March 13, 1991, a hearing was held by the Aviation Subcommittee (Transportation Committee, House of Representatives) on the subject of flight attendant duty and rest. The FAA did not recommend rulemaking at that hearing. Subsequently, legislation pending, now H.R. 14, was voted out of committee and passed the House. In 1992, a provision was added to both the House and Senate versions of FAA's appropriations bill which incorporated the language of H.R. 14, but the provision was deleted in conference. On January 5, 1993, H.R. 14 was reintroduced by Congressman Mineta.

General Discussion

Historical Review

The Civil Aeronautics Act of 1938 (52 Stat. 1007; as amended by 62 Stat. 1216, 49 U.S.C. 551) and subsequently, the Federal Aviation Act of 1958 (72 Stat. 775, 49 U.S.C. 1421) addressed the issue of regulating flight crewmember hours of service. The 1958 Act, as amended, empowers and directs the Secretary of Transportation to promote the safety of civil air flight in air commerce by prescribing and revising from time to time "reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees." This section of the Act has been cited in arguments for establishing flight and/or duty and rest limitations for flight attendants, who are required crewmembers [1] aboard certain commercial aircraft, but who are not defined as flight crewmembers.

Flight time limitations and rest requirements for domestic air carrier flight crewmembers were revised in 1985 (50 FR 29319; July 18, 1985). At the time of that rulemaking, a number of commenters pointed out that the proposed rule for flight crewmembers did not apply to flight attendants and that regulations should be enacted to cover those employees. Recognizing the unique duties and responsibilities held by flight attendants, the FAA chose to consider flight attendant work limits as a separate issue.

14 CFR 121.391, 125.269, and 135.107 require flight attendants on certain passenger-carrying airplanes. Other regulations require flight attendants to meet specific and recurrent training requirements dealing with normal safety duties, emergency evacuation procedures, and hijacking incidents. Flight attendants perform essential safety duties, including the following: (1) Identifying the location and using emergency exits, fire extinguishers, first aid kits, flotation devices, oxygen masks, and slides, (2) employing land and water evacuation procedures, including issuing evacuation commands, redirecting all passengers, and removing nonambulatory passengers; (3) responding to in-flight emergencies such as smoke or fire in the cabin, turbulence, medical emergencies, airplane decompressions, and airplane hijackings; and (4) using nonemergency safety procedures, including checking emergency equipment before flight, ensuring that baggage is correctly stowed so it will not block any exit in case of an emergency evacuation, securing galleys, briefing the passengers on safety equipment, emergency evacuation, and crash landing procedures, and ensuring compliance with all other applicable safety regulations. In recognition of their safety-sensitive role as crewmembers, flight attendants are subject to the alcohol and drug use regulations (§ 91.11, new § 91.17 effective August 18, 1990), and to regulations on drug testing (§§ 121.429, 121.455, 121.457, 135.249, 135.251, 135.353).

Because such safety regulations are applied to flight attendants as well as flight crewmembers, there is a growing complaint about the absence of duty and rest requirements for flight attendants. Flight attendants are the only safety-sensitive aviation group that does not have such rules.

Industry Study

The Industry Study focused on air carrier's scheduling practices and on

[1] Section 1.1 of the FAR, General definitions, distinguishes between a flight crewmember (pilot, flight engineer, or flight navigator) and a crewmember (person assigned to perform duty in an aircraft during flight time). The FAR contain rest and duty requirements only for flight crewmembers.

flight attendant's actual work hours. The study divided the air carrier industry into four categories: Majors, nationals, regionals, and supplementals. Each category generally differs in route structure and provides varying levels of service to the traveling public. Rather than serve as a general survey of industry practice, the Industry Study was designed to review current industry practice to identify extreme cases when contract/work rule limits were exceeded and where there were no work rules.

According to figures provided by airlines, unions, and the FAA field offices, approximately 83,000 flight attendants are employed in these four segments of the U.S. air carrier industry. Carriers selected for this review represented a cross section of the industry and the various types of operations. The study examined the work rules and policies of 36 U.S. air carriers, including the findings from 21 on-site visits, and provided detailed information concerning flight attendant work schedules. The work hours of flight attendants employed by these carriers are governed by union contracts, company work rules, or guidelines determined by the carrier. The Industry Study verified that scheduling guidelines vary considerably within the industry because of fundamental operational differences among the carriers.

Preliminary input was obtained from the FAA principal operations inspectors (POI's) assigned to monitor the operations of 74 air carriers throughout the country. The Industry Study noted that, even though the POI's work with flight attendants is limited to issues of cabin safety rather than duty hours, the POI's receive flight attendant complaints and comments about conditions that may affect cabin safety.

The information from the POI's indicated that most air carriers, including all majors and nationals, had union contracts or written work rules governing flight attendant scheduling. The carriers' recordkeeping practices varied widely, as was confirmed by the study. The POI's reported that, in about one-fifth of the 74 carriers, they had observed or been told about potential problem areas of long duty periods or minimum rest periods. Some of the POI's emphasized the need for flight attendants to be well-rested in order to respond effectively in emergency situations.

Parameters chosen for analysis in the Industry Study were based on a variety of established guidelines, including flight crewmember flight and duty time, and rest requirements in FAR parts 121 and 135. Normal and minimum scheduling limits were based on industry practice and on the current flight crewmember regulations. Data collected targeted longer-than-average duty days, below minimum rest periods, and instances of a high number of flight hours in a day, week, month, or year. The study revealed examples outside the boundary of normal industry practice. These "extreme" cases included lengthy work days, inadequate rest periods, and a high number of consecutive days worked. The study noted that, while certain extremes did not occur frequently, they could be expected to occur under circumstances such as weather, mechanical, air traffic control (ATC), and other types of operational delays typical of air transportation. Other extremes noted were a result of flight attendants voluntarily exceeding company-prescribed limits to receive extra pay or days off, or to avoid adjustments to their work schedule.

Listed below are the parameters chosen for analysis and a summary of findings regarding each parameter:

• Union Representation and the Existence of Contract/Work Rules

The FAA estimates that approximately 78 percent of all U.S. flight attendants have scheduling guidelines implemented through union contracts that establish wages, work hours, and working conditions. The remaining flight attendants have their hours of service set by their employers, usually based on written work rules, policies, or guidelines. As noted in congressional testimony and in the Industry Study, flight attendants may be subject to lengthy duty periods and inadequate rest when flights are delayed due to weather, mechanical problems, or carrier scheduling problems. Although a unionized flight attendant can follow established grievance procedures if a carrier exceeds his or her union contract's flight, duty, and rest limits, these procedures can be lengthy and may result in the flight attendant's suspension from service until the matter is resolved. Nonunion flight attendants have limited recourse for excessive work hour assignments.

• Guidelines or Policies for Scheduling a Flight Attendant's Work Day, Domestically and Internationally

Flight attendant records reviewed in the Industry Study showed that the number of actual work hours per day ranged from as few as 4 to more than 20. Typical actual duty periods for domestic operations were 14 hours or less; for international operations they ranged between 14 and 16 hours. A small percentage of the actual duty periods documented were more than 20 hours. Lengthy work days are typically a result of delays due to air traffic control, weather, mechanical, or operational difficulties. While each industry segment experienced such problems, supplemental carriers appeared to have the highest occurrence of lengthy work periods, primarily because of their geographically widespread operations and limited operational flexibility due to fewer crew bases or maintenance facilities, or fewer aircraft.

• Number of Scheduled Flights per Duty Day

The number of scheduled flights per duty day did not appear to be an industry problem because the number of flights are effectively limited by the number of scheduled work hours. Regional carriers were found to be more susceptible to scheduling a high number of flights per day because of their route structures and the short duration of their flight segments.

• Scheduled Rest Periods

Limited air carrier documentation of actual flight attendant rest periods was available. Generally, the records reflected actual flight and duty hours rather than the actual length of rest periods. Eight hours to nine hours appeared to be the standard minimum rest received in domestic operations. Twelve hours minimum was common in international operations. However, some cases in which rest periods fell below 8 hours because of operational irregularities were documented.

• Flight Attendants Voluntarily Exceeding Set Work and Rest Limitations

A majority of the carriers allowed flight attendants to voluntarily waive carrier or contract flight and duty limits and certain rest limits to make scheduling adjustments or work extra hours for additional pay. This provision allows carriers and flight attendants increased scheduling flexibility.

• Maximum Number of Flight Hours Scheduled per Week/Month

The maximum number of flight hours scheduled per week and month were not restricted by the majority of carriers reviewed. Few cases of flight hours exceeding 14 CFR parts 121 and 135 flight crewmember flight time limits were documented. Instances in which flight hours exceeded FAR or company guidelines appeared to be a result of flight attendants voluntarily working additional flight hours.

• Number of Consecutive Days Worked

The number of consecutive days worked was limited by a majority of the carriers, which required that flight attendants be relieved for at least 24 consecutive hours every 7 days. Excesses found in this area were attributed to flight attendants voluntarily waiving their time off.

The variations noted in duty time and rest hours resulted from air carriers exceeding their established operational guidelines and flight attendants voluntarily exceeding limits. The Industry Study confirmed that, whether voluntarily or at the direction of the carrier, contract/work rule limits are exceeded limits are exceeded on a limited but consistent basis.

The FAA also reviewed foreign civil aviation regulations on the limitation of flight attendant flight, duty, and rest requirements. The FAA obtained information from foreign embassies, foreign civil aviation authorities, foreign air carriers, and the International Civil Aviation Organization (ICAO) Circular, "Flight Crew Fatigue and Flight Time Limitations" (25–AN/47/6, 1984). Generally, countries that do regulate flight attendant work hours apply similar limitations to flight crewmembers and flight attendants. Yet, while similar, flight attendant limitations are typically less restrictive than flight crewmember limitations.

Several foreign government civil aviation authorities cite aeromedical information as the basis for their regulations on flight attendant work hours, although none cited specific studies on flight attendant work hours, rest, or safety issues. Six of the countries reviewed established limits specifically to control fatigue.

Flight Attendant Duty, Rest

The proposals contained in this notice would limit flight attendants' work by scheduled duty hours rather than by flight hours. In addition, the proposals would establish rest period requirements for flight attendants.

The duty-hour approach is based on the flight attendant's typical work day. For the purposes of assignments involving flight time, the duty period includes the total elapsed time between when the flight attendant reports for a flight assignment, as required by the air carrier, and when the flight attendant is relieved from duty by the air carrier. Flight attendant duties include pre- and post-flight safety-related duties.

Pre-flight safety duties include aircraft emergency equipment checks and passenger boarding. The Industry Study noted that air carriers vary in how early they require flight attendants to check in to begin their duty periods and pre-flight duties. This check-in or report time varies depending on the type of equipment flown and the flight destination. Carriers typically require flight attendants to arrive 30 minutes to 1 hour before scheduled departure. The Industry Study noted that some carriers require flight attendants to report for duty up to 2 hours before departure on international flights.

Post-flight safety duties include the safe deplaning of passengers, duties related to securing the aircraft, and administrative responsibilities such as reporting inoperative cabin safety equipment to maintenance personnel. Typically, flight attendants are required to remain on duty after the aircraft arrives at the gate to accomplish these post-flight duties before they are relieved from duty. Thus, a flight attendant's work is not solely a function of whether the aircraft is airborne, because they perform very important safety duties during boarding and deplaning.

Under the proposal, if a flight attendant reported for duty as required and found that the flight assignment was incorrectly scheduled or that the flight was delayed or canceled, a duty period nevertheless would have begun. For example, a flight attendant may report for duty as scheduled, only to find that the assigned report time is incorrect and that duty actually begins 2 hours later. The carrier could either keep the flight attendant on duty or release the flight attendant for a complete rest period under the applicable section of this proposed rule.

Training, gate duties (such as assigning seats, collecting tickets and boarding passes), or other ground duties not directly associated with a particular flight assignment, such as ticketing or reservations, are not considered as assignments involving flight time for purposes of this proposal. The proposed rules are intended to regulate activities that are normally performed by flight attendants. The rules are not intended to regulate activities unrelated to normal flight attendant duties; nevertheless, these types of duties could not be performed for a carrier during a required rest period.

A major issue in establishing limitations for flight attendants is the compatibility of the proposed flight attendant limitations with the flight, duty, and rest limitations for flight crewmembers. The proposed regulation for flight attendants is based on duty periods, while the current regulations for flight crewmembers are based on flight hours. Under certain conditions, current flight crewmember regulations, particularly for flag and supplemental operations, may permit extremely long duty periods, as much as 30 hours or more. These are based on flight hours and formulas that may require extended rest periods in case of extended flights. Some flight crewmember regulations also are based on substantially augmented crews and adequate sleeping quarters on the airplanes. It is therefore difficult to compare the flight crewmember rules with the proposed international limits for flight attendants. Most rest and scheduling provisions in the proposed rule appear compatible with most flight crewmember scheduling provisions, and the concept of augmented crews is carried over from the flight crewmember regulations as well. But while sections of this proposed regulation are compatible with the flight crewmember rules, the FAA is not aware of a reliable formula or ratio for absolutely matching flight hours to duty hours.

The intent of this proposed rule is to ensure that flight attendants are rested, through properly scheduled duty periods and rest periods, without causing major recordkeeping or staffing burdens to the air carriers, the flight attendants, or the FAA. The proposal would do this, in part, by having carriers set schedules based on past operating experience. Regular delays on certain routes or deviations from certain schedules would indicate that the schedules need to be adjusted to comply with the proposed limitations. As with current pilot regulations, the proposal acknowledges that certain delays, such as adverse weather, cannot be anticipated. For example, § 121.471(g) states that "A flight crewmember is not considered to be scheduled for flight time in excess of flight time limitations if the flights to which he is assigned are scheduled and normally terminate within the limitations, but due to circumstances beyond the control of the air carrier (such as adverse weather conditions), are not at the time of departure expected to reach their destinations within the scheduled time." Nevertheless, carriers would be expected to recognize when certain schedules need adjustment due to regularly experienced delays. The addition of recordkeeping requirements for flight attendants, as proposed, would assist both the carriers and the FAA in monitoring the effectiveness of the scheduling process.

The FAA recognizes that the current regulations for flight crewmembers are inconsistent among themselves regarding disincentives for exceeding scheduled duty time (for example, there

are differences in the rest requirements in the domestic, flag, and supplemental rules). The FAA solicits comments on establishing compensatory rest periods for flight attendants in the event that scheduled duty periods are exceeded.

This proposal is a preventive measure designed to address the potential safety problems that may occur if fatigued flight attendants work extended duty hours or receive inadequate rest because of air carrier scheduling or flight attendants voluntarily scheduling their own work hours in excess of reasonable limits. This proposal is not a response to specific accidents. Data are not available to demonstrate a link between flight attendant fatigue and the outcome of accidents in which flight attendants have exercised their safety duties. Since flight attendants are required crewmembers and need to be alert and exercise judgment in performance of routine and emergency safety duties, the air safety system would be enhanced by limiting the potential for fatigue. This proposed measure would place limitations on flight attendant hours of service by requiring certain scheduling limitations and minimum rest periods.

Possible Alternative Procedure

Although the FAA does not expect the lack of a formula to present scheduling problems, carriers may prefer the option of scheduling flight attendants under the same flight, duty, and rest requirements that exist for flight crewmembers. Therefore, the FAA invites comments on the possibility of modifying the proposal, as presented in this NPRM, to add an option for air carriers, commuters, and other operators to either follow the proposed duty and rest requirements set forth in this NPRM or apply flight crewmember requirements to flight attendants. Because there are differences in the rest requirements among the flight crewmember regulations (i.e., domestic, flag, and supplemental regulations), persons interested in applying the flight crewmember regulations to flight attendants as an alternative should submit detailed concepts and plans, to include estimated cost data, on how such an option would work. These comments should include consideration of the flight crewmember flight time and rest regulations applicable to domestic, flag, and supplemental air carriers under 14 CFR part 121 and the flight time and rest regulations applicable to air taxi operators under 14 CFR part 135. The FAA will evaluate all concepts and may include such an option in any final rule.

Discussion of the Proposals

The proposed rule would establish duty, rest, and recordkeeping requirements for flight attendants under parts 121, 125, and 135.

The proposed regulatory limitations for Parts 121 and 135 were based in part on current industry practice as reflected in the Industry Study. These proposed amendments should be compatible with air carrier operations and should meet the objective of providing reasonable, basic limitations that are conducive to safety. The proposed regulatory requirements for Part 125 flight attendants are the same as the Part 125 requirements for flight crewmembers.

Proposed §§ 121.466(a) and 135.273(a) of this NPRM contain a list of terms and definitions applicable to the proposed amendments. Under the proposals, "duty period" is defined as the period of elapsed time between when the flight attendant reports for an assignment involving flight time, and ends when the air carrier or certificate holder releases the flight attendant from duty. The proposed rule is intended to ensure that flight attendants are rested between duty periods that entail flight assignments. Hence, the scheduling limitations apply only to duty periods entailing flight assignments, rather than assignment to training or ground duties. The FAA believes that restricting the applicability of this notice to duty periods entailing flight assignments will not pose problems of carriers scheduling flight attendants to ground duty followed by flight duty. The agency solicits comments, however, on this issue.

The proposed rule defines a "rest period" as a period free of all restraint or duty for the certificate holder, and free of all responsibility for work or duty should the occasion arise. A rest period is considered personal time. For example, a flight attendant could not be released from duty for a required rest period while on board an airplane on a long international flight, since, clearly, the flight attendant would be under restraint by the carrier and the flight attendant would be on the airplane at the direction of the carrier. Thus, deadhead transportation as described in § 121.466(m) and § 135.273(m) could not occur during a required rest period.

Under the proposal, a "flight attendant" is considered to be an individual, other than a flight crewmember, assigned to duty in an aircraft during flight time and whose duties include, but are not necessarily limited to, cabin safety responsibilities. Thus, all flight attendants, including required and nonrequired (those assigned in accordance with the required minimum complement of flight attendants required for a particular flight under § 121.391, § 135.107, or the carrier's operations specifications, and flight attendants in excess of that minimum complement), would be covered by the proposed rule. All assigned flight attendants are crewmembers, whether required or nonrequired, and would be expected to respond to emergencies or routine passenger safety duties, regardless of whether they were part of the minimum required flight attendant crew.

For clarification purposes, the proposal defines "calendar day" as the period of elapsed time, using Coordinated Universal Time or local time, that begins at midnight and ends 24 hours later at the next midnight.

Part 121 and Part 135

The Addition of Flight Attendant Duty Limitations and Rest Requirements—Part 121, Subpart P, (All Certificate Holders); Part 135, Subpart F, (All Certificate Holders)

Duty Limitations

The basic duty period scheduling limitation in all operations would be 14 hours, under proposed §§ 121.466(b) and 135.273(b). Longer duty periods could be scheduled if a longer rest period is scheduled and additional flight attendants were assigned to each flight on which the flight attendant worked. These additional flight attendants would be over the minimum complement required under the carrier's or the certificate holder's operations specifications. This minimum complement is established under § 121.391. Section 121.391 requires one flight attendant for every 50 passenger seats. However, as specified in § 121.391(c), if the certificate holder uses more than the minimum number of flight attendants to conduct the emergency evacuation demonstration required under § 121.291, then the number of flight attendants used in the demonstration is set forth in the certificate holder's operation's specifications as the minimum complement required for the aircraft.

Under the proposed duty period regulation, additional flight attendants would be required as follows:

- For a duty period scheduled for more than 14 hours, but no more than 16 hours, 1 additional flight attendant. (Proposed §§ 121.466(e) and 135.273(e)).
- For a duty period scheduled for more than 16 hours, but no more than 18 hours, 2 additional flight attendants. (Proposed §§ 121.466(f) and 135.273(f)).

• For a duty period scheduled for more than 18 but no more than 20 hours, 3 additional flight attendants. (Proposed §§ 121.466(g) and 135.273(g).)

The longer scheduled duty periods are contingent upon the assignment of additional flight attendants in order to provide an extra measure of safety by distributing the workload and permitting more rest. This will ensure that flight attendants are more alert and can contribute to safer operations. It is important to note that if a flight attendant were scheduled for a duty period longer than 14 hours, the appropriate number of additional flight attendants would have to be present on every flight segment to which that flight attendant was assigned. In practical terms, the FAA expects that this would occur on larger aircraft and, generally, long-haul operations with relatively few flight segments. This result would be consistent with the intent of the proposal and consistent with current industry practice. Normally, it was found that flight attendants on domestic operations were scheduled for 14 hours or less of duty, and that longer duty periods occurred on international flights.

The provision for additional flight attendants on longer international flights is intended to provide an extra measure of rest, particularly on prolonged flights, which may extend to 14 or more hours of flight time. The FAA recognizes that it is common industry practice for air carriers to provide flight attendants in addition to the FAA minimum complement when operating long-range nonstop international flights. In addition, the FAA believes that most airplanes on which long-haul operations would be conducted already provide adequate designated flight attendant seats, so that air carriers and operators would seldom need to block revenue passenger seats to accommodate the additional flight attendants.

No duty period could be scheduled for more than 20 hours, regardless of the nature of the air carrier operation. Duty periods could be extended under conditions in which unforeseen operational delays, including unforecast adverse weather, ATC, or mechanical delays, occur in flight or at the time of departure. Unforeseen delays include any unanticipated delays that exceed the reach or control of an operator and that disrupt an otherwise properly scheduled flight.

These proposed flight attendant scheduling limitations parallel flight and duty limitations and rest time requirements for flight crewmembers, which are also predicated on the assumption that the scheduled flights normally terminate within the limitations. Scheduling would be expected to be based on what the carrier's experience showed to be a normal timeframe for a given flight or duty period. This is described in proposed §§ 121.466(o) and 135.273(o). These sections state that a flight attendant is not considered to be scheduled for duty in excess of the duty limitations if the flights to which the flight attendant is assigned are scheduled and normally terminate within the limitations, but due to circumstances beyond the control of the air carrier or operator, such as adverse weather conditions, are not at the time of departure expected to reach their destination within the scheduled time.

Rest

Under proposed §§ 121.466(c) and 135.273(c), an air carrier or certificate holder would be required to schedule a rest period of at least 9 hours for any flight attendant who worked a duty period scheduled for 14 hours or less. This rest period would have to occur between the completed duty period and the next duty period.

Proposed §§ 121.466(d) and 135.273(d) would permit this rest period to be scheduled or reduced to a minimum of 8 consecutive hours, provided that the flight attendant was scheduled to receive a subsequent rest period of at least 10 consecutive hours. In no case the actual rest period be less than 8 consecutive hours. The subsequent rest period must be scheduled to begin within 24 hours of commencement of the reduced rest period and must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period. This rest provision is comparable to the domestic flight crewmember limitations in current §§ 121.471 (b)(1) and (c)(1), and 135.265 (b)(1) and (c)(1).

For any duty period scheduled for more than 14 hours, flight attendants would be required to receive a scheduled rest period of at least 12 consecutive hours, in accordance with proposed §§ 121.466(h) and 135.273(h). The rest period would be required to be given following the duty period, and prior to the next duty period. Under proposed §§ 121.466(i) and 135.273(i), the rest period could be scheduled or reduced to 10 consecutive hours, provided the flight attendant received a subsequent rest period of at least 14 consecutive hours. In no case could the actual rest period be less than 10 consecutive hours. The subsequent rest period must be scheduled to begin no later than 24 hours after the commencement of the reduced rest period and must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

Both the 8-hour and 10-hour reduced rest periods could be planned, under the proposal. However, under no circumstances would flight attendants be permitted to receive any less than 8 consecutive hours of rest following a scheduled duty period of 14 hours or less, or any less than 10 consecutive hours of rest following a duty period of more than 14 scheduled hours. The provision for a longer rest period subsequent to any reduced rest period would prevent a flight attendant from receiving two consecutive minimum rest periods.

To facilitate the provision of the compensatory rest period following the 10-hour reduced rest period, §§ 121.466(j), and 135.273(j) are proposed. These paragraphs state that, notwithstanding the permitted duty periods of up to 20 scheduled hours, flight attendants cannot be scheduled for duty periods of 14 or more hours during the 24-hour period commencing after the beginning of the reduced period.

Allowances for reduction in rest would permit carriers to make scheduling adjustments in case of operational delays. The subsequent longer rest of 10 or 14 consecutive hours, like the flight crewmember limits, is intended to provide safeguards if the basic scheduled rest period is reduced, and to minimize the effects of fatigue.

A rest period must be prospective in nature, with the flight attendant knowing the rest period is scheduled and will be of a specified duration. The rest periods required by this proposal would be required to be taken over a period of consecutive hours at the flight attendant's domicile or away from their base, but may not be taken on the air carrier's aircraft. The FAA's intention is that the rest period be continuous, that is, uninterrupted by duty with the carrier.

Proposed §§ 121.466(l) and 135.273(l) would preclude any carrier from assigning any type of duty, including nonflight assignments (such as training or ground duties), to any flight attendant during a required rest period. However, the FAA requests comment on the most appropriate way to address reserve status, stand-by status or any similar assignments. Current industry practice varies in regard to the use of these terms and their relationship to duty or rest. The definition of rest period, as

proposed, would preclude not only the assignment of duty during a required rest period but also the scheduling of reserve status or similar assignments during a required rest period. Public input will be considered in the clarification of terms and in determining the appropriate treatment of this issue in the final rule.

Weekly rest requirements are set forth in proposed §§ 121.466(n) and 135.372(n), which state that each flight attendant engaged in air transportation shall be relieved from all duty for at least 24 consecutive hours during any 7 consecutive calendar days. Similar provisions currently apply to mechanics, dispatchers, and flight crewmembers. The proposed 24-hour rest could be taken during a layover. As the Industry Study indicated, it is already common practice among a majority of the carriers to provide 24 hours free from duty in a 7-day period. Requiring 24 hours rest within a 7-day period, in combination with the other minimum rest requirements, should help ensure that flight attendants are adequately rested prior to undertaking a flight assignment; the requirement is not intended to ensure that the flight attendants are adequately rested for training or other non-flight related activities. The 24-hour rest requirement could be postponed if a delay occurs during a duty period at the end of a period of 6 consecutive days worked, and the circumstance surrounding the delay is unforeseen and beyond the control of the carrier. The 24-hour rest period would immediately follow the completion of that duty period.

Proposed §§ 121.466(m) and 135.273(m) define deadhead transportation in a manner consistent with the use of the term in current pilot flight, duty, and rest regulations. Deadhead transportation is considered transportation, not local in character, that an air carrier requires of a flight attendant and provides to transport the flight attendant to an airport at which the flight attendant is to serve on a flight as a crewmember, or from an airport at which the flight attendant was relieved from duty to return to the flight attendant's home station. Time spent in deadhead transportation is not considered part of a rest period.

The proposal would place shared responsibility on air carriers and flight attendants for ensuring that the flight attendant has received minimum rest prior to assigning or accepting assignment for a duty period. This is reflected in proposed §§ 121.466(k) and 135.273(k). These include both daily and weekly rest requirements.

General

The FAA considered a number of options prior to proposing those outlined here. This proposal takes a combined approach based on duty scheduling limitations, daily and weekly rest requirements, and augmented flight attendant crews. The single set of scheduling limitations was selected for all types of affected operations for several reasons as explained below.

Another alternative was setting lower scheduling limitations, or setting different limitations for different types of operations. This proposal, however, was designed to be as simple as possible to follow and monitor, and at the same time provide effective parameters for duty schedules and rest. The proposal sets one basic scheduled duty and rest limitation, based on typical industry practice, of 14 hours of scheduled duty and 9 hours of scheduled rest. Carriers would have additional flexibility under the proposal to increase the scheduled duty periods, but only under certain conditions. Comments are invited regarding this approach.

In particular, consideration was given to setting shorter duty period limitations and rest requirements for domestic operations, and longer duty period limitations and rest requirements for international operations. It was recognized that much domestic flying, especially regional and commuter flights, may entail flight segments of only 2 hours or less, while flag and supplemental operations may entail flights for more than 4 hours. Thus, separate regulations may be feasible. Many carrier contracts and work rules are based on these assumptions, which are also a basis for differing pilot flight, duty, and rest regulations. However, the distinction between domestic and international operations is not always useful. International flights to Canada, Mexico, or the Caribbean may be short haul. These can be completed in shorter duty periods, requiring shorter minimum rest periods, and using smaller airplanes. Transcontinental domestic flights may bear more resemblance to long haul transoceanic flights, requiring longer duty periods and correspondingly longer rest periods.

Permitting longer duty periods is expected to allow the carriers flexibility based on the nature of the operation rather than whether it crosses international borders. Although the same regulations are contained in part 135 as in part 121, this has been done mainly for the sake of standardization. It is not expected that most regionals operating small aircraft will find it feasible to add 1 to 3 flight attendants to their short-haul flights simply to schedule longer duty periods. However, this option would be feasible for flights on large and, especially wide-body, aircraft on long-haul flights in which actual flight time may be as much as 14 hours.

These proposals are intended to provide basic scheduling limitations, and ensure at least minimum rest. If carriers intended to use longer scheduling limitations, they would have to meet certain safety-oriented conditions.

Part 125, Subpart B—Certification Rules and Miscellaneous Requirements

The Addition of Flight Attendant Duty Limitations and Rest Requirements

14 CFR part 125 was not addressed in the Industry Study, the petitions for rulemaking. As of February 1990, FAA statistics show that there are 48 active part 125 operators.

The proposed duty and rest limits for flight attendants were designed to address the needs of air carriers transporting revenue passengers. To apply the parts 121 and 135 proposed amendments to part 125 operators would be inappropriate because these operators have different scheduling concerns. The FAA acknowledges these operational differences and has instead included flight attendants in § 125.37 which is entitled "Duty time limitations."

Section 125.37(a) currently requires that each flight crewmember be relieved from all duty for at least 8 consecutive hours during any 24-hour period. This proposal would extend these provisions to part 125 flight attendants. Current § 125.37(b) allows the Administrator to specify rest, flight time, and duty time limitations, other than the limits listed in paragraph (a), in the carrier's operations specifications. This notice proposes no change to § 125.37(b); however, since paragraph (a) extends its provisions to flight attendants, paragraph (b) would apply to flight attendants as well.

Recordkeeping Requirements, Parts 121, 125, and 135

Present §§ 121.683 and 135.63 require that a certificate holder maintain current records of each crewmember's flight time records. Section 121.683(a)(1) currently requires certificate holders, supplemental air carriers, and commercial operators to maintain crewmember records, including those showing compliance with flight time requirements. The proposed revision to § 121.683(a)(1) would add duty and rest

requirements to the list of items carriers need to track. Carriers would need to maintain records of flight attendant daily duty and rest periods as well as weekly rest periods. The proposed revision to § 135.63 would add a subparagraph (a)(5) to require that certificate holders maintain records on flight attendant duty periods and rest periods in sufficient detail to determine compliance with the duty period limitations and rest requirements. The proposed records requirements will aid the carriers and the FAA in monitoring compliance with the proposed duty time and rest requirements.

The proposal to include flight attendants in § 125.37 would automatically incorporate recordkeeping requirements for flight attendants into the current recordkeeping requirements for crewmembers as described in § 125.401.

Additional Changes and Changes to Subpart Titles

For simplicity in the regulation, the FAA proposes to address all duty period limitations and rest requirements for all flight attendants in part 121 operations under a revised subpart P. This would require retitling the subpart, which currently addresses dispatchers only. The new title of the subpart would be "Aircraft Dispatcher Qualifications and Duty Time Limitations: Domestic and Flag Air Carriers; Flight Attendant Duty Period Limitations and Rest Requirements: Domestic, Flag and Supplemental Air Carriers and Commercial Operators." Section 121.461, "Applicability," would be revised to include the flight attendant duty period limitations and rest requirements.

Also under this proposal, the heading of part 135, subpart F, would be revised to eliminate the reference solely to "flight crewmembers," to reflect that the subpart would pertain to flight crewmembers and flight attendants. A new paragraph (e) on applicability would be added to § 135.261 to introduce a new section relating to flight attendant duty period limitations and rest requirements. Proposed § 135.273 would incorporate the duty limitations and rest requirements for flight attendants.

Paperwork Reduction Act

Information collection requirements for parts 121, 125, and 135 have been previously approved by the Office of Management and Budget (OMB) under the provisions of the paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned OMB Control Numbers as follows: For part 121, OMB Control Number 2120–0008; for part 125, OMB Control Number 2120–0085; and for part 135; OMB Control Number 2120–0039. The FAA is preparing changes to these control numbers to reflect the additional paperwork requirements proposed herein and will submit those changes to OMB.

Regulatory Evaluation Summary

The FAA's initial regulatory evaluation of the proposed amendments is summarized here. A copy of the complete evaluation has been included in the regulatory docket opened for the NPRM, along with the initial Regulatory Flexibility Determination and International Trade Impact Assessment.

The proposed amendments would establish flight attendant scheduled duty period limitations and rest requirements as provided for by the Federal Aviation Act of 1958, as amended, which empowers and directs the Secretary of Transportation to regulate rules concerning hours of service of "airmen and other employees" in the interest of safety. The proposed rule seeks to address insufficient rest that could affect safety in commercial aircraft, without imposing major economic burdens or alterations to the carriers' operations. The proposed rule follows extensive debate on the issue, and responds to concern expressed in Congress, the National Transportation Safety Board, and the industry.

The intent of this evaluation is to examine and, to the extent feasible, quantify the costs of the proposed rule. Cost estimates are considered for a 15-year period, and monetary values are based on 1992 dollars discounted at an annual effective rate of 7 percent.

This initial regulatory evaluation of the proposed rule to establish scheduled duty period limitations and rest requirements for flight attendants indicates that costs to operators would be incurred in the areas of recordkeeping and higher personnel costs in order to augment flight attendant crews. It is expected that the proposed rule would have its greatest effect on supplemental carriers.

Potential benefits are examined from a qualitative perspective, considering a variety of factors. The FAA expects the proposal, if enacted, to help ensure that flight attendants are rested and alert when performing both emergency and routine safety-related duties, thereby reducing passenger and crew injuries and fatalities in air carrier accidents. The proposal seeks to take the initiative rather than be reactive. That is, the FAA is proposing to act when the earliest symptoms appear in order to prevent a safety problem from occurring. In this case, the symptom is duty time and inadequate rest periods for flight attendants and it creates a potential safety problem because it could impede their performance during emergency evacuations or during routine safety duties requiring a high degree of alertness.

The proposed rule would establish scheduled duty period limitations and rest requirements for flight attendants under parts 121 and 135 of the FAR and would add flight attendants to the part 125 rest and recordkeeping requirements for flight crewmembers. Under parts 121 and 135, the FAA proposes to do the following: (1) Establish maximum scheduled duty periods; (2) establish minimum scheduled rest requirements; (3) allow reduced rest with provisions for compensatory rest; (4) establish at least a 24-consecutive-hour rest period during any 7 consecutive calendar days; and (5) require records to be maintained for each flight attendant on the proposed duty period limitations and rest requirements. The proposal would require one flight attendant in addition to the minimum crew for flights in scheduled duty periods of more than 14 hours but no more than 16 hours; two more than the minimum crew for flights in scheduled duty periods of more than 16 hours but no more than 18 hours; and three more than the minimum crew for flights in scheduled duty periods of more than 18 hours but no more than 20 hours.

The FAA recognizes that there is a great deal of uncertainty associated with determining the benefits and costs of this action. The FAA invites comments on the evaluation. Persons submitting comments are requested to provide specific economic and trade data along with their comments about the costs or benefits of the proposal. In addition, the FAA invites recommendations for better methods of achieving the objectives of the rule changes proposed in this notice.

Costs

The FAA estimates that over 15 years, the proposed amendments could cost the air carrier industry from $11.0 million to $32.2 million, discounted, in 1992 dollars. This cost range is because of uncertainty regarding the impact of certain of the proposed requirements, particularly for augmented flight attendant crews on flights in duty periods scheduled for more than 14 hours. The FAA believes that costs to most carriers in the current air carrier environment would be limited to recordkeeping and, in some cases, increasing flight attendant staffing on

certain flights to provide the augmented crew that would be required for scheduled duty periods of more than 14 hours. Augmented flight attendant crews are already common in the industry, but the proposed rule would require carriers to augment crews more frequently than they do now.

The lower end of the range reflects recordkeeping costs, which would be incurred by all affected operators. This lower end cost estimate assumes that a large number of carriers are already in compliance in varying degrees. The higher end of the range includes recordkeeping costs plus increased personnel costs that would be incurred in order to augment flight attendant crews. The upper end cost assumes that carriers are largely in compliance with the proposed requirements, but that a minority of carriers schedule flight attendants for duty periods longer than 14 hours on flights with only the minimum crew required under § 121.391 and the carrier's operations specification. The FAA requests additional information with documentation, if available, on any costs that would be incurred if the proposal is adopted as a rule.

The costs are based on the following FAA estimates: (1) The number of active flight attendants; (2) salary levels for flight attendants; (3) the initial cost of modifying an existing recordkeeping system to include flight attendants; and (4) the recurrent cost of maintaining records of flight attendant duty and rest times. Because supplemental carriers are expected to be disproportionately affected by the proposed rule, their costs are examined separately.

The actual cost of modifying the recordkeeping system tracking flight, duty, and/or rest time for flight crewmembers and other operations personnel to include flight attendants is expected to vary from carrier to carrier. These actual costs are based on the number of flight attendants employed by the air carrier, the sophistication of the carrier's present recordkeeping system, the adaptability of that recordkeeping system to include flight attendant records, and whether a system to monitor flight, duty, and/or rest times for flight attendants already exists.

In conducting research for the Industry Study, the FAA found that carriers use automated, semi-automated, and manual recordkeeping systems to monitor flight, duty, and rest times for operations personnel. Carriers often include flight attendants in their tracking systems to ensure and monitor compliance with company or union restrictions, to maximize utilization, or for payroll purposes.

The total cost of modifying recordkeeping systems industry-wide is estimated to be approximately $462,000, nondiscounted in 1992 dollars, for the industry's approximately 83,000 flight attendants. This would include approximately $6,700 for flight attendants employed by supplemental air carriers, and approximately $455,600 for the rest of the industry. The recurring cost to update an existing flight attendant record has been estimated to be approximately $1.16 million per year. This includes approximately $16,700 for supplemental air carriers and $1.14 million for the rest of the industry.

The Industry Study found that most carriers have contracts or rules addressing duty and rest requirements for both domestic and international operations. The FAA's comparison of the proposed amendments to the findings in the study indicates that most of the carriers reviewed during the study employed scheduled duty limitations equal to or more restrictive than those in the proposed rule. Thus, the scheduled duty period limitations contained in the proposal are not expected to have a significant effect on operators guided by union contracts or work rules.

A comparison of the proposed rest requirements to the findings in the Industry Study shows that most of the domestic operators contacted have rules that meet or exceed the proposed minimum rest requirements. (Although international layovers often were found to be 24 hours or longer, little information was available on air carrier scheduled rest period policies for international operations.) Therefore, the FAA is of the opinion that the proposed rest periods would not cause an economic burden to the air carrier industry.

The Industry Study found that most operators provide flight attendants with at least 24 consecutive hours of rest in any 7 consecutive days. The few operators that currently have no provision ensuring that flight attendants receive 24 consecutive hours of rest in any 7 consecutive calendar days could probably comply with the proposal by redistributing shifts rather than by hiring additional flight attendants.

Contracts and work rules reviewed show that most carriers, including supplementals, already staff longer flights with more than minimum flight attendant crews. However, exceptions appear to exist. For example, if flight attendants are assigned but do not show up for work, a flight may depart with a minimum crew. A minimum crew could be used for flights on which minimum passenger service is planned. Therefore, the proposed requirements for augmented flight attendant crews is expected to affect certain carriers, but on relatively few flights.

The FAA does not have sufficient data on how often flights are scheduled for more than 14 hours but are not actually staffed with more than the minimum flight crew. Therefore, the FAA has limited data with which to estimate the impact of the proposal to require additional flight attendants above the minimum complement required by the air carriers' operations specifications. However, besides recordkeeping, this appears to be the only provision that would entail costs to the industry.

The FAA estimates that the air carrier industry could need as many as 10,000 additional scheduled duty periods per year in order to meet the proposal. Because supplemental air carriers were found to have longer scheduled duty periods, the FAA estimates that even though only 1,200 flight attendants are employed by supplemental air carriers (approximately one percent of the estimated 83,000 active flight attendants in the air carrier industry), as many as 60 percent of the additional scheduled duty periods would affect supplemental air carriers.

Based on an annual salary, including fringe benefits, of $35,075, the cost of a flight attendant per scheduled work day, excluding per diem, is estimated to be $234 ($35,075 annually divided by 150 average duty periods per year). By using this amount, the FAA estimates the recurring cost of an additional 6,000 scheduled duty periods for all supplemental carriers to be approximately $1,404,000, nondiscounted. The rest of the industry would account for the remainder of the additional duty periods, or 4,000 per year. This would entail a recurring cost of approximately $936,000, nondiscounted.

Based on the preceding discussion, the FAA estimates that the recordkeeping cost for supplemental operators over 15 years would be approximately $158,400, discounted. The cost for supplemental operators to assign up to 6,000 additional scheduled duty periods per year over 15 years would be approximately $12.8 million, discounted. Thus, the total cost to all supplemental operators over 15 years would range from approximately $158,400, discounted (recordkeeping only), to approximately $12.9 million, discounted (recordkeeping), to approximately $15.5 million, discounted (recordkeeping and additional scheduled duty periods).

The FAA estimates that the recordkeeping costs for scheduled major, national, and regional operators over 15 years would be approximately $10.8 million, discounted. The costs for these operators to assign up to 4,000 additional scheduled duty periods per year over 15 years would be approximately $8.5 million, discounted. Thus, the total cost to all scheduled major, national, and regional operators over 15 years would range from approximately $19.3 million, discounted (recordkeeping), to approximately $15.5 million, discounted (recordkeeping and additional scheduled duty periods). When the costs for supplemental and scheduled air carriers are combined, total discounted costs over the next 15 years are $11.0 million to $32.2 million.

Benefits

Potential benefits are examined in the context of previous accident and incident experience. This provides a frame of reference for instances in which flight attendants may have exercised their safety responsibilities in potential life-and-death situations. Even though no studies have been performed to find a direct correlation between flight attendant duty and rest times and their performance in accidents and incidents, a decrease in the number or severity of injuries to passengers and crewmembers could occur over time, because of increased alertness and judgment as well as improved performance of gross motor skills.

Flight attendants have been recognized as essential crewmembers, and are required on certain passenger carrying flights. The FAA requires flight attendants to complete specific and recurrent training in safety duties, emergency evacuation procedures, and security-related procedures. Some airlines include flight attendants in cockpit resource management (CRM) training programs for flight crewmembers to promote efficiency and communication between flight and cabin crews.

The NTSB cites several occasions during which flight attendants were instrumental in assisting passengers after an accident or incident. Although it is difficult to assess an exact number of lives the flight attendants may have saved on these occasions, it is reasonable to conclude that passengers survived as a result of the flight attendants' actions. Such occurrences illustrate the vital role flight attendants play in passenger safety.

As required crewmembers in passenger-carrying operations, flight attendants also perform essential safety duties other than those associated with major emergencies. Such situations include emergency landings, evacuations, bomb threats, and injuries to people aboard the aircraft, including flight crewmembers and other flight attendants. In reviewing FAA and NTSB accident and incident data from 1975 through 1989, the FAA found at least 405 evacuations or evacuation-related occurrences. (Evacuation-related occurrences are those for which the data does not clearly state whether an evacuation occurred, but the circumstances appeared to have warranted an evacuation or emergency procedures.) The occurrences counted by the FAA in this review include accidents, emergency landings, and fires. However, this evaluation does not include accidents in which most of the people aboard were fatally injured, because in such an accident a flight attendant could provide little assistance to passengers and other crewmembers. These occurrences also do not include "false alarm" emergency landings that did not result in an evacuation.

Due to the uncertainties of ascribing specific results of evacuations to flight attendant actions, the potential benefits of the proposed rule are difficult to quantify. The 15-year record of evacuations and evacuation-related occurrences in which flight attendant response was a factor in passenger survival indicates losses approximately, on average of $160 million per year due to injuries and fatalities. However, this 15-year record of evacuations and evacuation-related occurrences is an indicator of the number of passengers annually exposed to emergency evacuations. This record shows that throughout the industry, over 15 years, approximately 38,000 passengers were aboard airliners that experienced evacuations or on which evacuation-related occurrences took place. Approximately 2,500 of these passengers were aboard supplemental carriers.

Evacuations may occur because of bomb threats, aircraft fires or suspected fires, takeoffs or landings in which the aircraft skids off the runway, off-airport crashes, or other reasons. Industry experience shows that regardless of whether the emergency itself turns out to be significant, evacuations themselves are potentially hazardous actions. Injuries often occur regardless of the reason for the evacuation. Such injuries may be limited to friction burns, lacerations, and abrasions during slide use, or may include fractures and more serious injuries. When the evacuation takes place amid the stress and confusion of an actual emergency, the potential for serious injury greatly increases. Flight attendants are called upon not only to react automatically in response to training. They must also exercise rapid judgment under conflicting pressures: avoid unnecessary evacuations, but execute evacuations without delay if warranted.

Every evacuation is unique. Smoke and/or fire may be present inside or outside the cabin. Rain, high winds, or other environmental factors may complicate escape from the aircraft by making doors difficult to open or overwing exits potentially treacherous. The airplane may come to rest on a hill or at a steep angle, making certain exits especially dangerous or blocked, and certain slides unusable. Passengers may panic or insist on taking carry-on luggage with them. Although other factors such as aircraft configuration and the environment and circumstances of the evacuation influence passenger egress from the airplane, flight attendants play a key role. Their response depends on training, their own injuries, degree of alertness, and the efficacy of crew communication.

In addition to the passengers exposed to evacuations and evacuation-related occurrences during the 15-year period reviewed, approximately 14,000 people were aboard the 120 aircraft on which injuries occurred in flight. Most of these injuries were the result of severe turbulence.

In-flight injury to crewmembers or passengers could require the attention of at least one flight attendant. Such occurrences could be followed by an emergency landing during which the full attention and good judgment of flight attendants is necessary to ensure the safety of all crewmembers and passengers.

The incapacitation of a flight crewmember or flight attendant could create a potentially dangerous situation. In a case in which a flight crewmember is incapacitated during an emergency, the remaining flight crewmembers would need to perform an emergency landing with less than the minimum flight crew. The attention of at least one flight attendant would probably be directed toward the incapacitated crewmember rather than toward the passengers during the emergency landing. In reviewing NTSB data from 1975 through 1989, the FAA found that 17 flight crewmembers and two flight attendants had become incapacitated during a flight.

Flight attendants perform other security-related functions that demand alertness and judgment but cannot be quantified in monetary terms. These include handling passengers who are

unruly or under the influence of alcohol or drugs, passengers who are ill in flight, and incidents of depressurization.

The FAA has examined pertinent evacuations and other incidents over 15 years to develop a framework from which to gauge flight attendants' potential contributions to aviation safety. If flight attendants are protected through duty period limitations and rest requirements from excessive fatigue, they may be able to contribute to decreased injuries or fatalities in some future accident or incident, or to contribute to safety in less dramatic circumstances through alertness and vigilance in routine safety duties.

Based on the qualitative evaluation of the proposal, the FAA believes that the proposal is cost-beneficial. The proposed rule changes to Parts 121, 125, and 135 contained in this Notice are warranted because they would contribute to an overall enhancement of transport category airplane safety and utility that would both promote and enhance the U.S. air transportation system.

Initial Regulatory Flexibility Determination

Congress enacted the Regulatory Flexibility Act (RFA) of 1980 (Pub. L. 96–354) to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. The RFA requires agencies to review proposed rules that may have a significant impact on a substantial number of small entities.

Regulatory Flexibility Criteria and Guidance, FAA Order 2100.14A, sets guidelines for determining whether small entities are significantly affected by regulations. The fleet size for an operator of aircraft for hire to be considered a small entity is nine or fewer aircraft. The threshold annualized cost levels for operators of aircraft for hire in 1992 dollars are $114,700 for scheduled operators whose fleets have aircraft with seating capacities of more than 60, $63,500 for scheduled operators whose fleets have aircraft with seating capacities of 60 or less (other scheduled operators), and $4,450 for unscheduled operators. The proposals in the NPRM would affect air carriers that provide passenger-carrying operations in aircraft for which flight attendants are required. Other types of aviation companies would not be affected.

According to FAA records of small entity air carriers that provide passenger-carrying operations in aircraft that require flight attendants, there are 21 operators that could be affected by the proposal. Of these 21 operators, 10 are scheduled operators whose aircraft have seating capacities of more than 60, 5 are other scheduled operators, and 6 are unscheduled operators.

As discussed in the cost section of this evaluation, the FAA estimates that increased personnel costs for augmented flight attendant crews for the purpose of complying with the proposed amendments would disproportionately affect supplemental, or charter, operations.

The FAA estimates that because scheduled operators whose aircraft have seating capacities of over 60 do operate some international charter flights, such operators may incur additional cabin crew costs. As noted earlier, some unscheduled operators provide international charter operations.

As noted above the threshold annualized cost levels in 1992 dollars is $114,700 for scheduled operators whose fleets have aircraft with seating capacities of more than 60, $63,500 for scheduled operators who fleets have aircraft with seating capacities of 60 or less (other scheduled operators), and $4,450 for unscheduled operators. The FAA estimates that the cost for the 10 scheduled operators whose aircraft have seating capacities of more than 60 and 5 other scheduled operators (all of which are small entities) to comply with the proposal, if adopted, would be less than $114,700 or $63,500 annually. However, the FAA estimates that the six unscheduled operators that are small entities could incur costs more than $4,450 annually. Therefore, these operators could be affected by the proposals. However, under the guidelines presented in FAA Order 2100.14A, the FAA has determined that the proposed rule would not affect a substantial number of small entities—that is, at least 11 and more than one-third of the 21 small entities subject to the proposed rule. Therefore, the FAA has determined that a regulatory flexibility analysis is not necessary.

International Trade Impact Assessment

The FAA has determined that the proposed amendments to Parts 121, 125, and 135 would not have a significant affect on international trade. The FAA does not expect the proposals to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States. The proposed rule would primarily affect U.S. operators of aircraft for hire that provide both domestic and international service. Furthermore, the proposed amendments are consistent with section 1102(a) of the Federal Aviation Act of 1958, as amended, which requires the FAA to exercise and perform its power and duties consistently with any obligation assumed by the United States in any agreement that may be in force between the United States and any foreign country or countries.

Federalism Implications

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

Conclusion

For reasons discussed in the preamble and based on the findings in the Regulatory Flexibility Determination, the Regulatory Flexibility Analysis, and the International Trade Impact Analysis, the FAA has determined that the proposed amendments are not considered major under Executive Order 12291, dated February 17, 1981. I certify that the proposed amendments would not have a significant effect on a substantial number of small entities under the criteria of the Regulatory Flexibility Act and guidelines of FAA Order 2100.14A. This proposal is considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). The regulatory evaluation of these proposed amendments, including a Regulatory Flexibility Determination and an International Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under **FOR FURTHER INFORMATION CONTACT.**

List of Subjects

14 CFR Part 121

Air carriers, Aircraft, Aircraft pilots, Airmen, Airplanes, Aviation safety, Safety.

14 CFR Part 125

Aircraft, Airmen, Hours of work, Pilots.

14 CFR Part 135

Air carriers, Aircraft, Airmen, Aviation safety, Pilots, Safety.

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend parts 121, 125, and 135 of title 14 of the Code of Federal

Regulations (14 CFR parts 121, 125, and 135) as follows:

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g).

2. The heading for subpart P is revised to read as follows:

Subpart P—Aircraft Dispatcher Qualifications and Duty Time Limitations: Domestic and Flag Air Carriers; Flight Attendant Duty Period Limitations and Rest Requirements: Domestic, Flag, and Supplemental Air Carriers and Commercial Operators

3. Section 121.461 is revised to read as follows:

§ 121.461 Applicability.

This subpart prescribes—

(a) Qualifications and duty time limitations for aircraft dispatchers for domestic and flag air carriers.

(b) Duty period limitations and rest requirements for domestic, flag, and supplemental air carriers and commercial operators conducting, and any flight attendant participating in, domestic, flag, and supplemental air carrier and commercial operations.

4. Section 121.466 is added to subpart P to read as follows:

§ 121.466 Flight attendant duty period limitations and rest requirements: Domestic, flag, and supplemental air carriers and commercial operators.

(a) For purposes of this section—

Calendar day means the period of elapsed time, using Coordinated Universal Time or local time, that begins at midnight and ends 24 hours later at the next midnight.

Duty period means the period of elapsed time between reporting for an assignment involving flight time and release from that assignment by the domestic, flag, or supplemental air carrier or commercial operator. The time is calculated using either Coordinated Universal Time or the local time of the flight attendant's home base, to reflect the total elapsed time.

Flight attendant means an individual, other than a flight crewmember, who is assigned by a domestic, flag, or supplemental air carrier or commercial operator, in accordance with the required minimum crew complement under the certificate holder's operations specifications or in addition to that minimum complement, to duty in an aircraft during flight time and whose duties include but are not necessarily limited to cabin safety-related responsibilities.

Rest period means the time period free of all restraint or duty for a domestic, flag, or supplemental air carrier or commercial operator and free of all responsibility for work or duty should the occasion arise.

(b) Except as provided in paragraphs (e), (f), and (g) of this section, no domestic, flag, or supplemental air carrier or commercial operator may assign, nor may any flight attendant accept, a scheduled duty period of more than 14 hours.

(c) Except as provided in paragraph (d) of this section, a flight attendant scheduled to a duty period of 14 hours or less as provided under paragraph (b) of this section must be given a scheduled rest period of at least 9 consecutive hours. This rest period must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(d) The rest period required under paragraph (c) of this section may be scheduled or reduced to 8 consecutive hours if the flight attendant is provided a subsequent rest period of at least 10 consecutive hours; this subsequent rest period must be scheduled to begin no later than 24 hours after the beginning of the reduced rest period and must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(e) A domestic, flag, or supplemental air carrier or commercial operator may assign a flight attendant to a scheduled duty period of more than 14 hours, but no more than 16 hours, if the air carrier or commercial operator has assigned to the flight or flights in that duty period at least one flight attendant in addition to the minimum flight attendant complement required for the flight or flights in that duty period under the air carrier's or the commercial operator's operations specifications.

(f) A domestic, flag, or supplemental air carrier or commercial operator may assign a flight attendant to a scheduled duty period of more than 16 hours, but no more than 18 hours, if the air carrier or commercial operator has assigned to each flight or flights in that duty period at least two flight attendants in addition to the minimum flight attendant complement required for the flight or flights in that duty period under the air carrier's or the commercial operator's operations specifications.

(g) A domestic, flag, or supplemental air carrier or commercial operator may assign a flight attendant to a scheduled duty period of more than 18 hours, but no more than 20 hours, if the air carrier or commercial operator has assigned to the flight or flights in that duty period at least three flight attendants in addition to the minimum flight attendant complement required for the flight or flights in that duty period under the air carrier's or the commercial operator's operations specifications.

(h) Except as provided in paragraph (i) of this section, a flight attendant scheduled to a duty period of more than 14 hours but no more than 20 hours, as provided in paragraphs (e), (f), and (g) of this section, must be given a scheduled rest period of at least 12 consecutive hours. This rest period must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(i) The rest period required under paragraph (h) of this section may be scheduled or reduced to 10 consecutive hours if the flight attendant is provided a subsequent rest period of at least 14 consecutive hours; this subsequent rest period must be scheduled to begin no later than 24 hours after the beginning of the reduced rest period and must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(j) Notwithstanding paragraphs (e), (f), and (g) of this section, if a domestic, flag, or supplemental air carrier or commercial operator elects to reduce the rest period to 10 hours as authorized by paragraph (i) of this section, the air carrier or commercial operator may not schedule, nor may any flight attendant accept a schedule, for a duty period of 14 or more hours during the 24-hour period commencing after the beginning of the reduced rest period.

(k) No domestic, flag, or supplemental air carrier or commercial operator may assign, nor may any flight attendant accept, any duty period with the air carrier or commercial operator unless the flight attendant has had at least the minimum rest required under this section.

(l) No domestic, flag, or supplemental air carrier or commercial operator may assign, nor may any flight attendant accept, an assignment to perform any duty with the air carrier or commercial operator during any required rest period.

(m) Time spent in transportation, not local in character, that a domestic, flag, or supplemental air carrier or commercial operator requires of a flight

attendant and provides to transport the flight attendant to an airport at which that flight attendant is to serve on a flight as a crewmember, or from an airport at which the flight attendant was relieved from duty to return to the flight attendant's home station, is not considered part of a rest period.

(n) Each domestic, flag, or supplemental air carrier shall relieve each flight attendant engaged in scheduled air transportation and each commercial operator shall relieve each flight attendant engaged in air commerce from all further duty for at least 24 consecutive hours during any 7 consecutive calendar days.

(o) A flight attendant is not considered to be scheduled for duty in excess of duty time limitations if the flights to which the flight attendant is assigned are scheduled and normally terminate within the limitations, but due to circumstances beyond the control of the domestic, flag, or supplemental air carrier or commercial operator (such as adverse weather conditions), are not at the time of departure expected to reach their destination within the scheduled time.

5. Section 121.683 is amended by revising paragraph (a)(1) to read as follows:

§ 121.683 Crewmember and dispatcher record.

(a) * * *

(1) Maintain current records of each crewmember and each aircraft dispatcher (domestic and flag air carriers only) that show whether or not the crewmember or aircraft dispatcher complies with the applicable sections of this chapter, including, but not limited to, proficiency and route checks, airplane and route qualifications, training, any required physical examinations, flight, duty, and rest time records;

* * * * *

PART 125—CERTIFICATION AND OPERATIONS: AIRPLANES HAVING A SEATING CAPACITY OF 20 OR MORE PASSENGERS OR A MAXIMUM PAYLOAD CAPACITY OF 6,000 POUNDS OR MORE

6. The authority citation for Part 125 is revised to read as follows:

Authority: 49 U.S.C. 1354, 1421 through 1430, and 1502; 49 U.S.C. 106(g).

7. Section 125.37 is amended by revising the heading and paragraph (a) to read as follows:

§ 125.37 Duty period limitations.

(a) Each flight crewmember and flight attendant must be relieved from all duty for at least 8 consecutive hours during any 24-hour period.

* * * * *

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

8. The authority citation for Part 135 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g).

9. Section 135.63 is amended by revising paragraphs (a)(3) and (a)(4)(x), adding a new paragraph (a)(5), and revising paragraph (b) to read as follows:

§ 135.63 Recordkeeping requirements.

(a) * * *

(3) A current list of the aircraft used or available for use in operations under this part and the operations for which each is equipped;

(4) * * *

(x) The date of the completion of the initial phase and each recurrent phase of the training required by this part; and

(5) An individual record for each flight attendant used in operations under this part, including the flight attendant's duty periods and rest periods, maintained in sufficient detail to determine compliance with the duty period limitations and rest requirements of this part.

(b) Each certificate holder shall keep each record required by paragraph (a)(3) of this section for at least 6 months, and each record required by paragraphs (a)(4) and (a)(5) of this section for at least 12 months.

* * * * *

10. Subpart F is amended by revising the heading to read as follows:

Subpart F—Crewmember Flight Time and Duty Period Limitations and Rest Requirements

11. Section 135.261 is amended by revising the introductory text of the section and by adding a new paragraph (e) to read as follows:

§ 135.261 Applicability.

Sections 135.263 through 135.273 prescribe flight time limitations, duty period limitations, and rest requirements for operations conducted under this part as follows:

* * * * *

(e) Section 135.273 prescribes duty period limitations and rest requirements for flight attendants in all operations conducted under this part.

12. Section 135.273 is added to Subpart F to read as follows:

§ 135.273 Duty period limitations and rest time requirements.

(a) For purposes of this section—

Calendar day means the period of elapsed time, using Coordinated Universal Time or local time, that begins at midnight and ends 24 hours later at the next midnight.

Duty period means the period of elapsed time between reporting for an assignment involving flight time and release from that assignment by the certificate holder. The time is calculated using either Coordinated Universal Time or the local time of the flight attendant's home base, to reflect the total elapsed time.

Flight attendant means an individual, other than a flight crewmember, who is assigned by the certificate holder, in accordance with the required minimum crew complement under the certificate holder's operations specifications or in addition to that minimum complement, to duty in an aircraft during flight time and whose duties include but are not necessarily limited to cabin safety-related responsibilities.

Rest period means the time period free of all restraint or duty for the certificate holder and free of all responsibility for work or duty should the occasion arise.

(b) Except as provided in paragraphs, (e), (f), and (g) of this section, no certificate holder may assign, nor may any flight attendant accept, a scheduled duty period of more than 14 hours.

(c) Except as provided in paragraph (d) of this section, a flight attendant scheduled to a duty period of 14 hours or less as provided under paragraph (b) of this section must be given a scheduled rest period of at least 9 consecutive hours. This rest period must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(d) The rest period required under paragraph (c) of this section may be scheduled or reduced to 8 consecutive hours if the flight attendant is provided a subsequent rest period of at least 10 consecutive hours; this subsequent rest period must be scheduled to begin no later than 24 hours after the beginning of the reduced rest period and must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(e) A certificate holder may assign a flight attendant to a scheduled duty period of more than 14 hours, but no more than 16 hours, if the certificate holder has assigned to the flight or flights in that duty period at least one flight attendant in addition to the minimum flight attendant complement required for the flight or flights in that

duty period under the certificate holder's operations specifications.

(f) A certificate holder may assign a flight attendant to a scheduled duty period of more than 16 hours, but no more than 18 hours, if the certificate holder has assigned to the flight or flights in that duty period at least two flight attendants in addition to the minimum flight attendant complement required for the flight or flights in that duty period under the certificate holder's operations specifications.

(g) A certificate holder may assign a flight attendant to a scheduled duty period of more than 18 hours, but no more than 20 hours, if the certificate holder has assigned to the flight or flights in that duty period at least three flight attendants in the addition to the minimum flight attendant complement required for the flight or flights in that duty period under the certificate holder's operations specifications.

(h) Except as provided in paragraph (i) of this section, a flight attendant scheduled to a duty period of more than 14 hours but no more than 20 hours, as provided in paragraphs (e), (f), and (g) of this section, must be given a scheduled rest period of at least 12 consecutive hours. This rest period must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(i) The rest period required under paragraph (h) of this section may be scheduled or reduced to 10 consecutive hours if the flight attendant is provided a subsequent rest period of at least 14 consecutive hours; this subsequent rest period must be scheduled to begin no later than 24 hours after the beginning of the reduced rest period and must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(j) Notwithstanding paragraphs (e), (f), and (g) of this section, if a certificate holder elects to reduce the rest period to 10 hours as authorized by paragraph (i) of this section, the certificate holder may not schedule, nor may any flight attendant accept a schedule, for a duty period of 14 or more hours during the 24-hour period commencing after the beginning of the reduced rest period.

(k) No certificate holder may assign, nor may any flight attendant accept, any duty period with the certificate holder unless the flight attendant has had at least the minimum rest required under this section.

(l) No certificate holder may assign, nor may any flight attendant accept, an assignment to perform any duty with any certificate holder during any required rest period.

(m) Time spent in transportation, not local in character, that a certificate holder requires of a flight attendant and provides to transport the flight attendant to an airport at which the flight attendant is to serve on a flight as a crewmember, or from an airport at which that flight attendant was relieved from duty to return to the flight attendant's home station, is not considered part of a rest period.

(n) Each certificate holder shall relieve each flight attendant engaged in scheduled air transportation from all further duty for at least 24 consecutive hours during any 7 consecutive calendar days.

(o) A flight attendant is not considered to be scheduled for duty in excess of duty time limitations if the flights to which the flight attendant is assigned are scheduled and normally terminate within the limitations, but due to circumstances beyond the control of the certificate holder (such as adverse weather conditions), are not at the time of departure expected to reach their destination within the scheduled time.

Issued in Washington, DC, on March 26, 1993.

David R. Harrington,

Acting Director, Flight Standards Service.

[FR Doc. 93–7433 Filed 3–29–93; 8:45 am]

BILLING CODE 4910–13–M

federal register

Wednesday
March 31, 1993

Part VIII

Environmental Protection Agency

40 CFR Parts 700 et al.

Premanufacture Notification; Revisions of Notification Regulations, Exemptions for Chemicals in Quantities of 1,000 Kilograms or Less, and for Polymers, and Amendment to Expedited Process for Issuing Significant New Use Rules; Proposed Rule; Extension of Comment Period

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 700, 720, 721 and 723

[OPPTS–50593A, 50594A, 50595A, 50596A; FRL–4579–7]

Premanufacture Notification; Revisions of Notification Regulations, Exemptions for Chemicals in Quantities of 1,000 Kilograms or Less, and for Polymers, and Amendment to Expedited Process for Issuing Significant New Use Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rules; notice of public hearing and extension of comment period.

SUMMARY: This document extends to May 24, 1993, the comment period for persons who want to submit comments on EPA's proposed revisions of the Toxic Substances Control Act (TSCA) section 5 premanufacture notification (PMN) regulations, exemptions for chemicals in quantities of 1,000 kilograms or less and for polymers, and an amendment to the expedited process for issuing significant new use rules (SNURs), which were published in the **Federal Register** on February 8, 1993 (58 FR 7646–7701). EPA will also hold a public hearing in Washington, DC on April 26 and 27, 1993.

DATES: Written comments must be received by May 24, 1993. A public hearing will be held from 9:30 a.m. to 5 p.m. on April 26 and 27, 1993, in Washington, DC. Requests to make an oral presentation at the public hearing must be received by April 21, 1993.

ADDRESSES: Further information on procedures for submitting comments, including "Confidential Business Information" (CBI), is provided in the proposed rules (see **Federal Register** of February 8, 1993 (58 FR 7646–7701)). Public hearing. The April 26 and 27, 1993 public hearing will be held at the Regional Office Building Auditorium, room 1041, first floor, National Capital Region, General Services Administration, 7th and D Streets, SW., Washington, DC 20407.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (TS–799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–543–B, 401 M St., SW., Washington, DC 20460, Telephone: (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: **Electronic Availability:** This document is available as an electronic file on *The Federal Bulletin Board* at 9:00 a.m. on the date of publication in the **Federal Register**. EPA's proposed Premanufacture Notification; Revisions of Notification Regulations, Exemptions for Chemicals in Quantities of 1,000 Kilograms or Less, and for Polymers, and Amendment to Expedited Process for Issuing Significant New Use Rules published as a separate part III in the **Federal Register** of February 8, 1993 (58 FR 7646) is available on *The Federal Bulletin Board*. By modem dial (202) 512–1387 or call (202) 512–1530 for disks or paper copies. These files are available in Postscript, Wordperfect and ASCII.

EPA published its proposed amendments to the PMN regulations, exemptions for chemicals in quantities of 1,000 kilograms or less, exemption for polymers, and an amendment to expedited process for issuing SNURs on February 8, 1993 (58 FR 7646–7701). Subsequent to the publication of the proposed amendments, the Chemical Manufacturers Association (CMA) and the Synthetic Organic Chemical Manufacturers Association Inc. (SOCMA) requested an extension of the comment period and a public hearing on the proposed regulations. CMA and SOCMA's letters cited a long-standing interest in these proposed amendments and the considerable analysis of complicated technical and legal issues required before comments could be drafted. EPA is extending the comment period until May 24, 1993 and will hold a public hearing in Washington, DC on April 26 and 27, 1993.

Any person wishing to present an oral statement at the public hearing should contact the TSCA Assistance Information Service by phone (202) 554–1404 (Fax: 202–554–5603). Each request to present an oral statement at the public hearing must identify the speaker; organization represented, if any; daytime telephone number; and the anticipated length of the presentation, not to exceed 10 minutes per session, as discussed below. Written text of the oral statement should be presented to the hearing officer prior to the oral presentation.

The April 26, 1993 public hearing will address the following proposed amendments:

Session 1. The proposed revisions of exemptions for polymers (OPPTS–50594, 58 FR 7679–7701).

Session 2. The proposed revisions of premanufacture notification regulations (OPPTS–50593, 58 FR 7661–7676).

The April 27, 1993 public hearing will address the following proposed amendments:

Session 1. The proposed revision of exemption for chemical substances manufactured in quantities of 1,000 kilograms or less per year (OPPTS–50596, 58 FR 7646–7661).

Session 2. The proposed amendment to expedited process for issuing significant new use rules (OPPTS–50595, 58 FR 7676–7679).

The hearings may conclude before 5 p.m. on each day if all persons wishing to testify have been heard.

Dated: March 25, 1993.

Mark Greenwood,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 93–7421 Filed 3–30–93; 8:45 am]

BILLING CODE 6560–50–F

federal register

Wednesday
March 31, 1993

Part IX

Department of the Interior

Bureau of Indian Affairs

List of Rejected Statute of Limitations Claims; Notice

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

List of Rejected Statute of Limitations Claims

AGENCY: Bureau of Indian Affairs.

ACTION: Correction.

SUMMARY: This document corrects notice document 92–31410 beginning on page 62112 in the issue of Tuesday, December 29, 1992.

FOR FURTHER INFORMATION CONTACT:

Muskogee Area Director, Bureau of Indian Affairs, 5th & West Okmulgee, Muskogee, OK 74401–4898, Telephone (918) 687–2296.

SUPPLEMENTARY INFORMATION:

Background

On December 29, a notice was published in the **Federal Register** listing certain potential pre-1966 damage claims which had been rejected for litigation by the Secretary of the Interior pursuant to the Indian Claims Limitation Act of 1982, Public Law 97–394 (96 Stat. 1966, 1976).

Need for Correction

Nine claims, which have not been rejected by the Secretary of the Interior, were erroneously included in the published list.

Correction of Notice

On page 62113, delete "MUSKOGEE AREA REJECTED CLAIMS:" and the nine claims prefixed "G09–" listed thereunder.

Dated: March 25, 1993.

Eddie F. Brown,

Assistant Secretary—Indian Affairs.

[FR Doc. 93–7480 Filed 3–30–93; 8:45 am]

BILLING CODE 4310–02–M

federal register

Wednesday
March 31, 1993

Part X

Department of Agriculture

Animal and Plant Health Inspection Service

7 CFR Part 340

Genetically Engineered Organisms and Products; Notification Procedures for the Introduction of Certain Regulated Articles; and Petition for Nonregulated Status; Final Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 340

[Docket No. 92-156-02]

Genetically Engineered Organisms and Products; Notification Procedures for the Introduction of Certain Regulated Articles; and Petition for Nonregulated Status

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: This document amends the regulations pertaining to the introduction of certain genetically engineered organisms and products to provide for a notification process for the introduction of certain plants with which APHIS has had experience. The introduction of certain regulated articles under notification may be allowed provided that the introduction is in accordance with the provisions of this rule.

This document also amends the regulations to provide for a petition process allowing for a determination that certain plants are no longer regulated articles. The amendments provide a procedure for the release from regulation of such plants which do not present a plant pest risk and therefore should no longer be regulated

These actions supplement the existing permitting requirements for the introduction of certain genetically engineered plants by adding two alternatives. The effect of these actions is to provide standardized procedures for notification of the introduction of regulated articles in accordance with eligibility criteria and performance standards and a petition for the determination of nonregulated status.

EFFECTIVE DATE: April 30, 1993.

FOR FURTHER INFORMATION CONTACT: Terry L. Medley, Director, Biotechnology, Biologics, and Environmental Protection, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, room 850, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-7602.

SUPPLEMENTARY INFORMATION:

Background

On November 6, 1992, the Animal and Plant Health Inspection Service (APHIS) published in the **Federal Register** a proposed rule on Genetically-Engineered Organisms and Products; Notification Procedures for the Introduction of Certain Regulated Articles; and Petition for Nonregulated Status (See 57 FR 53036-53053 Docket No. 92-156-1). This rule proposed amendments to 7 CFR part 340. APHIS solicited comments for 60 days with the comment period ending January 5, 1993.

Summary and Analysis of Comments

APHIS received 84 comments on the proposed amendments from State, Territorial, and Commonwealth officials, universities, industry, environmental and consumer organizations, business and professional associations, members of Congress, Federal agencies, individuals, and unions. In general, the comments were well-researched and constructive. After a careful analysis of the information and views presented by the commenters, APHIS has made a number of modifications in the amendments as proposed on November 6, 1992. The most significant changes were made in proposed § 340.3(b), in which the second alternative in proposed § 340.3(b)(2) allowing a researcher to determine eligibility after consultation was eliminated, and in proposed § 340.3(d), in which a 10-day interval prior to interstate movement and a 30-day interval prior to importation and release have been added to provide for notification and review by State officials. Minor changes have been made in the eligibility requirements and performance standards in response to commenters' requests for clarification and definition of terms. In the proposed petition requirements in § 340.6, certain wording changes have been made, and the total response time has been extended to 180 days to accommodate a now specified, initial 60-day period for public comments. A general discussion of the comments appears below, followed by a section-by-section response to comments and explanation of modifications.

Comments on Reduced Regulation

A majority of the commenters expressed either general support for the proposed amendments, or qualified support based on suggested changes. The commenters favoring a measure of reduced regulation represented industry, the university research community, and State governments. A small number of commenters opposed the amendments for a variety of reasons, ranging from concerns that their scope was too broad, to conclusions that they were premature. The two proposed provisions that elicited the largest number of comments were the proposal to allow a researcher to determine eligibility through consultation with an "appropriate Institutional Biosafety Committee," and the proposal that notification could be made on the day of introduction. In each case, a majority of the commenters expressed opposition to these proposals. There was general agreement among these commenters, who represented State governments, industry, universities, Federal agencies, and environmental and consumer groups, that these two provisions represented an abrupt or premature move toward deregulation and/or self-regulation by researchers. APHIS has accordingly maintained the overall intent of the proposed notification and petition amendments, while adding additional procedural constraints to ensure uniformity and accountability.

Comments on Eligibility Criteria for Notification (§ 340.3(b))

Eligibility Criterion 1 (§ 340.3(b)(1))

Several comments explicitly expressed approval of the list of six crops in § 340.3(b)(1)(i) that were proposed as eligible for notification. Approximately sixteen commenters proposed a variety of additions to the list. Some of the suggested list additions were to pertain to interstate movement or importation only, while others were to pertain specifically to release into the environment. Several commenters suggested that all common crop species be eligible for notification for interstate movement or importation.

APHIS wishes to clarify that the provisions of § 340.3(b)(1)(ii) in the proposed rule also allowed for notifications for "any additional plant species that BBEP determines may be safely introduced in accordance with the eligibility criteria set forth in paragraphs (b)(2) through (b)(6) and the performance standards set forth in paragraph (c) of this section." For an organism to be approved according to this clause, all of the other eligibility criteria in § 340.3(b) must be met, and evidence would need to be presented that the organism would be introduced in accordance with the performance criteria set out in § 340.3(c). This clause provides for additional flexibility in broadening the set of organisms eligible for notification. Such a determination would be based on consultation with the responsible individual and designated State regulatory officials. APHIS will make determinations upon request as to whether any additional plant in a particular proposed introduction is eligible for notification.

With regard to other suggested modifications to the list of plants eligible for notification for release, it should be noted that in many instances,

commenters suggested including on the list those organisms with which they had particular familiarity. A sample of crops suggested by commenters for addition to the list included walnuts, carrots, endive, artichokes, sunflowers, lettuce, sugarbeets, wheat, beans, canola, apples, and oats. No single crop was identified by more than a few commenters as appropriate for inclusion on the list, and there was no scientific consensus on any additional species that are appropriate for the notification provision. Accordingly, no additional species have been added to the list in the final rule. This is not to imply that these six species will remain the only species eligible for introduction by the notification alternative or that these are the only six species that can meet the eligibility criteria and the performance standards for notification; these six crops have been the most actively field tested and have been individually considered by APHIS and found to be appropriate for notification. APHIS is receptive to receiving information which will support the addition of other species to the list in § 340.3(b)(1)(i). These additions would be made through notice and comment rulemaking.

Justification for the Six Crops

Several commenters expressed the opinion that APHIS has not adequately justified the choice of the six plant species eligible for introduction by the notification alternative on either a biological or experience basis. We will therefore take this opportunity to address these concerns. Under the current regulations in 7 CFR part 340, a permit is required to introduce a regulated article. Between 1987 and March 2, 1993, we have granted 365 environmental release permits and 1,301 movement permits of transgenic organisms developed with genetic material from known plant pests. We have had the most experience with evaluating field tests for these six plant species, with percentages of total permits issued as follows: Corn (19%), cotton (10%), potato (20%), soybean (18%), tobacco (5%), or tomato (13%). This evaluation includes review of the application for field testing and other relevant information from the scientific literature and the field data reports. The data reports should verify that genetically engineered crops present the same types of ecological concerns (i.e., weediness, competitiveness, toxicity) associated with other plants. The permitted field tests have been safe and have not presented plant pest or environmental risks because these tests have been performed under appropriate confinement conditions imposed in the introduction permit. These confinement conditions form the basis for the performance standards stipulated in the notification process. In addition, the information provided by permittees in data reports from their respective field tests have confirmed our assessment that the confined field tests do not pose a risk of introduction or dissemination of a plant pest and do not present a significant impact on the quality of the human environment. The majority of the organisms that are the subject of these reports are transgenic plants that would meet the eligibility requirements in the notification amendment. Additionally, these field tests have been performed using agricultural practices that are encompassed by the proposed performance standards. That is to say, the tests have not resulted in viable progeny persisting in the environment or the introduction and dissemination of a plant pest. To date, APHIS has received 71 percent of the data reports that are due. These reports are available from APHIS upon request. The data reports will be available for public review in the Reading Room, suite 7, 6505 Belcrest Rd., Hyattsville, Maryland. APHIS will periodically publish a notice of their availability in the **Federal Register**.

The six plant species listed in § 340.3(b) have been carefully considered by APHIS. APHIS has already specifically considered any potential plant pest risks posed by the cultivation of certain tomatoes. APHIS made an assessment of the potential for gene transfer from a transgenic tomato when a petition for determination of regulatory status of a particular type of genetically engineered tomato was requested (57 FR 47608–47616, October 19, 1992). APHIS has also brought panels of world experts together in workshops to address issues of gene transfer and safeguards for planned introductions of corn (Conference Report: Workshop on Safeguards for Planned Introduction of Transgenic Corn and Wheat, December 6–8, 1990, Keystone, Colorado), potatoes (Meeting Report: Workshop on Safeguards for Planned Introduction of Transgenic Potatoes, August 16–17, 1991, St. Andrews, Scotland), and tomatoes ((report in preparation) Workshop on the Safeguards for Planned Introductions of Transgenic Tomatoes, August 19–20, 1992, Davis, California). The outcrossing frequency is known to be negligible for soybeans (Wilcox, J. (ed.), Soybeans: Improvement, Production, and Uses, 1987, American Society of Agronomy, Madison, Wisconsin) and tobacco (Durbin, R. (ed.), *Nicotiana*. Procedures for Experimental Use, 1979, USDA, Technical Bulletin Number 1586). Given the performance standards required under notification, there should be no gene transfer from these six plant species to other cultivated crops of the same species that results in the generation of progeny that can persist in the environment. Performance standard § 340.3(c)(5) specifically addresses gene transfer. When one considers both the biology and plant breeding practices of these six crops, any introgression by unique genes from genetically engineered plants to other nontransgenic breeding stock of the crop would be negligible. Breeders are very concerned about the maintenance of genetically pure lines. Hybrid off-types involving transgenic plants and breeders plants may be evident in some crops whenever the next generation of seed was grown and would be removed. With the exception of cotton, these crops lack volunteers that persist in the environment.

What follows is scientific evidence to demonstrate that the risk of gene transfer from these six plant species to a sexually compatible plant that results in the generation of progeny that can persist in the environment is negligible. APHIS has analyzed which of these six species has wild relatives (defined as species that are both sexually compatible with the six crop species without human intervention and whose hybrid progeny can persist in the environment), or has wild populations (defined as members of the same species that are both sexually compatible with a crop species and present in populations that can persist in the environment) in the United States. While potato and cotton have such wild relatives, wild populations only exist in the United States for cotton relatives. APHIS has also identified which of these six plant species has weedy relatives (defined as different species that are capable of receiving, incorporating, and maintaining genetic material via sexual reproduction from a crop species, that form populations that can persist in the environment, and that are so identified as weeds by expert organizations such as the Weed Society of America) in the United States. According to these definitions, we have devised the following table:

Crop	Wild relatives	Wild populations	Weedy relatives
Corn	None	None [1]	None.
Cotton	Hawaii [2]	Florida [3, 4]	None.[2]
Potato	AZ, NM, TX [5]	None [1]	None.
Soybean	None	None [6]	None.[6]
Tobacco	None [7]	None	None.[7]
Tomato	None	None [1 8]	None.[8]

Notes:

[1] Corn (Conference Report: Workshop on Safeguards for Planned Introduction of Transgenic Corn and Wheat, December 6–8, 1990, Keystone, Colorado), potato (D.S. Correll, The Potato and its Wild Relatives, 1962, Texas Research Foundation, Renner, Texas), and tomato (Atherton, J., Rudick, G. (eds.), The Tomato Crop: A Scientific Basis for Improvement, 1986, Chapman and Hall, New York) occasionally volunteer with a frequency depending on weather, location, and agronomic practices.

[2] *G. tomentosum* occurs in Hawaii. There is evidence for the possible historic introgression into *G. tomentosum* by other cultivated non-genetically engineered cottons as observed by Dr. Jonathan Wendel (personal communication, Iowa State University) and indicated by Dr. Paul Fryxell (The Natural History of the Cotton Tribe, 1979, Texas A&M University Press, College Station, Texas). Thus, cultivated cotton (*G. hirsutum* and *G. barbadense* are cultivated in the United States) in general, regardless of whether it is genetically engineered, presents a gene transfer risk. *G. tomentosum* is not an agricultural weed. Indeed, it is just the opposite; from loss of habitat due to human activities, it is in a precarious position for survival. We have no scientific evidence to demonstrate that field tests of genetically engineered cotton in Hawaii will present any further gene transfer risk. However, field tests of cotton in Hawaii will not qualify for notification unless all the eligibility criteria and performance standards are met. Our performance standards would preclude gene movement via pollen which could result in viable progeny persisting in the environment.

[3] Because *Gossypium tomentosum* is a different species, it is not included here. *G. tomentosum* occurs in Hawaii; *G. thurberi* occurs in Arizona. *G. thurberi* and cultivated cotton (*G. hirsutum* and *G. barbadense*) do not naturally form viable hybrids as the chromosomal types are incompatible. Although *G. tomentosum* is sexually compatible with cultivated cotton, cross pollination seems unlikely as published reports suggest they do not have common pollinators or common time periods during which their flowers are receptive (P. Fryxell, The Natural History of the Cotton Tribe, 1979, Texas A&M University Press, College Station, Texas).

[4] R. Long, O. Lakela, A Flora of Tropical Florida, 1976, Banyan Books, Miami, Florida.

[5] *Solanum tuberosum* can produce fertile hybrids with some wild *Solanum* species that grow in Arizona, New Mexico, and Texas (D.S. Correll, The Potato and its Wild Relatives, 1962, Texas Research Foundation, Renner, Texas; Meeting Report: Workshop on Safeguards for Planned Introduction of Transgenic Potatoes, August 16–17, 1991, St. Andrews, Scotland). However, field tests of potato in these States will not qualify for notification unless all the eligibility criteria and performance standards are met. Our performance standards would preclude gene movement via pollen which could result in viable progeny persisting in the environment.

[6] Polhill, R., Raven, P. (eds.) Advances in Legume Systematics, Part 1, 1981, Royal Botanic Gardens, England.

[7] Native *Nicotiana* spp. occur in the United States, but successful introgression that results in populations that can persist in the environment is extremely unlikely. Most common wild species in the United States, such as *N. glauca*, have somatic chromosome counts of 24, as contrasted to the cultivated tobacco with counts of 48 (Kartesz, J., Kartesz, R., A Synonymized Checklist of the Vascular Flora of the United States, Canada, and Greenland, 1980, University of North Carolina Press, Chapel Hill; Durbin, R. (ed.), *Nicotiana*. Procedures for Experimental Use, 1979, USDA, Technical Bulletin Number 1586). Hybrids between wild and cultivated *Nicotiana* would exhibit abnormal chromosome behavior at meiosis, be sterile under normal conditions (Durbin, R. (ed.), *Nicotiana*. Procedures for Experimental Use, 1979, USDA, Technical Bulletin Number 1586), and would perish with the first generation of offspring. Such hybrids would also be unlikely to survive because of the genetic contribution of the cultivated parent, which is known to perish in almost all areas of the United States. There are no reports of such natural hybrids in the literature.

Holm et al. (Holm, L., Pancho, J., Herberger, J., Plucknett, D., A Geographical Atlas of World Weeds, 1979, John Wiley and Sons, New York) give an undocumented report of *N. tabacum* as a common weed in Hawaii. Although the plant grows wild to a limited extent in Hawaii, its weedy nature is not supported by the experience of botanists in Hawaii, and is not supported by other published works such as Neal (Neal, M., In Gardens of Hawaii, 1965, Bishop Museum Press, Honolulu) and Wagner et al. (Wagner, W., Herbst, D., Sohmer, S., Manual of the Flowering Plants of Hawaii, 1990, University of Hawaii Press et Bishop Museum Press, Honolulu).

[8] Cherry tomato, *Lycopersicon esculentum* var. *cerasiforme* occurs in Texas and Florida, but is not considered a weed pest. It can cross with the cultivated tomato, *L. esculentum* var. *esculentum*. However, introgression within the United States is not likely since the rate of outcrossing in var. *esculentum* is low (Rick, 1949, Proceedings of the American Society of Horticultural Science 54:237–284; C.M. Rick, personal communication) and var. *cerasiforme* is not present in areas of the United States that are devoted to large scale production of tomatoes (J. Scott, personal communication). There are no published reports that visible traits of cultivated tomato have introgressed into var. *cerasiforme* from cultivated tomatoes in areas where the wild cherry tomato commonly grows.

Environmental releases under notification will take place in a variety of environments. APHIS believes that the performance standards will provide for safe field testing regardless of the environment. The field trial environment needs to be carefully considered by the applicant in order to assure that the performance standards are being met and address any specific local concerns.

Comments on General Criteria for Eligibility

More than half of all commenters specifically addressed the provisions proposed in § 340.3(b)(2) for decentralizing determinations that particular organisms are eligible for introduction under notification. Approximately 12 commenters strongly endorsed the proposal to allow a researcher to determine eligibility for notification in consultation with an Institutional Biosafety Committee (IBC). The majority of the commenters favoring the use of IBCs represented the research communities of major universities, and included a university biosafety officer and the faculty chair of an IBC. However, the vast majority of the commenters opposed the general criteria of § 340.3(b)(2), and specifically, the proposal that IBCs be given the authority to make determinations about eligibility for notification. Most commenters were of the opinion that this authority should remain with APHIS. The commenters expressing these views represented State departments of agriculture, members of Congress, Federal agencies, unions, industry, environmental organizations, and IBCs. Several commenters expressed the opinion that IBCs and State authorities lack the expertise to make such determinations. Two commenters expressed concern that the proposed provisions would amount to self-regulation by researchers, while another expressed concern that IBCs would have no public accountability for their actions. A further comment identified three other potential shortfalls: "a. Lack of consistency in the reviews of different IBC's. b. Inadequate protection of confidential business information. c. Liability problems arising from IBC decisions." APHIS agrees with the general substance of these comments, and accordingly § 340.3(b)(2) of the proposed rule has been deleted. Since paragraph (b)(2) was removed from the proposed amendment, the remaining eligibility criteria are renumbered with Arabic

numerals 2–6, replacing the corresponding Roman numerals i–vi.

Eligibility Criterion 2 (§ 340.3(b)(2))

Several commenters expressed reservations regarding the use of the term "stably integrated." One commenter objected to the fact that researchers would, under certain circumstances, be able to make a determination regarding this eligibility criterion without oversight from APHIS. This objection has been addressed by the deletion of the proposed § 340.3(b)(2) which provided for decentralized determinations regarding eligibility for introduction. The other commenters on this section felt that "stably integrated" is imprecisely defined. These commenters felt that explanatory information contained in the preamble to the proposed rule, which provided examples of modifications that either fit or do not fit the definition of "stably integrated", should be provided in the final rule. APHIS agrees with the commenters. Although no change to the wording of the definition has been made, we are providing the following clarification. The intent of this criterion is to exclude from notification regulated articles that have been modified to contain genetic material: maintained in an extrachromosomal manner, whether on plasmids or on viral vectors; or maintained on transposable elements. Field tests utilizing regulated articles of these types would continue to require a permit. Genetic instability resulting from insertion of genetic material at a particular site in the recipient plant genome, or resulting from genetic mechanisms intrinsic to chromosomal maintenance in recipient plant cells, such as spontaneous deletion, rearrangement, and gene conversion, would not be grounds for exclusion from eligibility under this criterion. These types of genetic mechanisms occur in all plant cells regardless of whether they are genetically transformed.

Eligibility Criterion 3 (§ 340.3(b)(3))

Two commenters expressed the opinion that the phrase "well characterized" in the eligibility criterion in § 340.3(b)(3) is ill-defined; one of these commenters also felt that the phrase "results in plant disease" is also imprecise. In response, APHIS notes that the intent of the proposed eligibility criterion was to identify for notification those organisms that had new genetic material of which the function was understood, and that function was one not involved in pathogenesis. (APHIS believes that the concept of "plant disease" in the Federal Plant Pest Act (FPPA) and the Federal Plant Quarantine Act (PQA), and in the 7 CFR part 340 regulations, is both scientifically and legally clear.) The sense of "well characterized" is, therefore, characterized with respect to its cellular or organismal role. To clarify this intent, we have rephrased this criterion as follows:

"The function of the introduced genetic material is known and its expression in the regulated article does not result in plant disease." For example, if the nucleotide sequence encodes a protein, then the enzymatic reaction it carries out, or its structural or other intracellular role, should be known. On the other hand, a nucleotide sequence whose sole identification and/or characterization is the fact that it is expressed in response to a particular chemical or physical stimulus would not be considered to fit this eligibility criterion.

One commenter suggested that this criterion be modified to exclude genes that cause the regulated article to exhibit increased "weediness", but acknowledged that it would be difficult to define "weediness". APHIS agrees that the term "weediness" is a difficult term to define in a precise way. APHIS believes that the performance standards will preclude any risk associated with plants which may exhibit increased "weediness". However, if increased "weediness" is observed, it should be reported in accordance with the provisions for unusual occurrences in paragraph (d)(5) of this section.

Eligibility Criterion 4 (§ 340.3(b)(4))

One commenter suggested that we define "infectious entity" found in paragraph (b)(4)(i) of this criterion. APHIS believes that the meaning of this term is clear. Paragraph (b)(4)(i) will ensure that the plants introduced under notification have not been modified to produce a plant virus, an animal virus, a human virus, a viral satellite RNA, a defective interfering RNA molecule, or other entities which have not previously been introduced under permit.

A total of eight comments were received that specifically addressed paragraph (b)(4)(ii) of this eligibility criterion as it was stated in the proposal. In general, the commenters requested that the proposed terms "new to the plant" and "toxic to nontarget organisms" be better defined. Several of these commenters suggested that it would be very difficult to determine when a constituent is "new to the plant" and "toxic to nontarget organisms" and that such a determination may not be feasible. One commenter pointed out that the proposed wording would exclude plants from notification that express toxins that affect nontarget organisms that do not feed or live on that plant species. APHIS agrees with the commenters and has modified the criterion in paragraph (b)(4)(ii) to read the introduced genetic material does not encode substances that are known or likely to be toxic to nontarget organisms known or likely to feed or live on the plant species. This allows the notification alternative for plants expressing a toxin which may be toxic to nontarget organisms that are not likely to feed or live on that plant species. This would generally not allow the introduction of plants via notification that have been purposely modified to encode substances toxic to such nontarget organisms. APHIS considers the term "known" to mean "generally recognized", and the term "likely" to mean "supported by evidence strong enough to establish presumption if not proof."

There were a total of six commenters who questioned why pharmaceutical-producing plants would be eligible for introduction by the notification alternative. APHIS interpreted criterion (4) to be a trigger for pharmaceutical-producing plants, and did not intend that such plants would be introduced under notification. We have therefore modified this criterion to state specifically that in paragraph (b)(4)(iii) the introduced genetic material does not encode products intended for pharmaceutical use. If the applicant observes or finds that the introduced genetic material causes the production of an infectious entity or substances toxic to nontargets or having pharmaceutical activity, or the encoded substances are toxic to nontargets or have pharmaceutical activity, then such effects should be reported to APHIS in accordance with paragraphs (d) (4) and (5) of this section. If uncertain, an applicant can refer to the Federal Food Drug and Cosmetic Act (21 U.S.C. 321(g)) for clarification about substances with pharmaceutical use.

Eligibility Criterion 5 (§ 340.3(b)(5))

Two commenters on this eligibility criterion suggested that APHIS has had insufficient experience with the field testing of plants expressing plant virus genes to allow field testing of such genes under notification. In response APHIS has modified criterion (5) of the rule in paragraph (b)(5) to establish that to ensure the introduced genetic sequences do not pose a significant risk of the creation of any new plant virus, they must be: (1) Noncoding regulatory sequences of known function, or (2)

sense or antisense genetic constructs derived from viral coat protein genes from plant viruses that are prevalent and endemic in the area where the introduction will occur and infect plants of the same species, or (3) antisense genetic constructs derived from noncapsid viral genes from plant viruses that are prevalent and endemic in the area where the introduction will occur and infect plants of the same species. These changes clarify which sequences derived from plant viruses can be engineered into plants introduced by the notification alternative. The function of any noncoding regulatory sequences must be known; the DNA sequence must be known, for example, to be a promoter, enhancer, intron with enhancer activity, upstream activating sequence, polyadenylation site, or transcription terminator. The second and third elements of the criterion are intended to preclude the construction or reconstruction of viruses other than those that are prelavent and endemic in the area where the introduction will occur and infect plants of the same host species. These elements will also prevent the transmission of viruses by insect vectors that would not normally come in contact with a virus encapsidated by an exotic, nonendemic, or nonrevalent coat protein derived from a virus that does not normally infect the recipient plant. The third element of modified criterion (5) eliminates the release of transgenic plants expressing sense constructs to viral genes, other than the coat protein gene, under the notification alternative. Certain of these constructs, when introduced into plants, have been reported in the scientific literature to result in disease symptom expression. In addition, the precise function of many of the noncapsid genes and their encoded proteins is unknown. Plants expressing sense noncapsid plant viral proteins can still be introduced under permit. In the future, APHIS will seek input from the public on the inclusion under notification of plants expressing sense constructs from all other noncapsid viral genes from plant viruses. Of introductions under permit to date, nearly 100% of the plants have contained noncoding regulatory sequences derived from plant viruses. Of those plants introduced under permit that express plant virus genes, at least 95% have expressed sense viral coat protein genes, or antisense genes to coat protein and other viral genes from plant viruses that are prevalent and endemic in the area where the introduction will occur and infect plants of the same species.

Eligibility Criterion 6 (§ 340.3(b)(6))

Six comments were received on eligibility criterion (6). Five of these commenters objected to the exclusion from notification of plants expressing nonpathogenic proteins from animal and human pathogens. One of the commenters suggested alternate language for this criterion, and the sixth commenter found the descriptor "functionally intact" to be confusing. APHIS agrees with these commenters, and has modified this criterion to establish that the plant has not been modified to contain the following genetic material from animal and human pathogens: (1) Any nucleic acid sequence derived from an animal or human virus, or (2) coding sequences whose products are known or likely causal agents of disease in animals or humans. The terms "known" and "likely" mean the same as they do in eligibility criterion (4). APHIS believes the exclusion from notification of plants containing any nucleic acid sequence derived from animal or human virus or sequences encoding products pathogenic to animals or humans is prudent because of our lack of experience with the introduction of plants expressing such sequences, and thereby, the possible need for additional containment measures to address potential new risk issues posed by such plants. Furthermore, we believe it is necessary to eliminate from notification all plants expressing any nucleic acid sequence from an animal or human virus because of the potential misperceptions by the public that animal and human "viruses" are being produced in plants and that these plants are subject to insufficient government oversight. Two commenters stated that APHIS may be "duplicating existing federal authority" by "regulating human pathogens" whose introduction into the environment is covered by the Public Health Service Act. APHIS disagrees with the commenters. APHIS is not "duplicating existing federal authority" or "regulating human pathogens", but rather overseeing the introduction of plants containing such genetic material that has never been expressed in a plant before.

Other Comments on Eligibility

APHIS specifically solicited comment on whether a regulated article that does not necessarily meet each of the eligibility criteria may nonetheless be safely introduced under the notification procedure based on the performance standards or additional confinement measures. While several commenters expressed the view that a regulated article could be safely introduced under the notification alternative even though it did not "technically" meet each of the eligibility criteria, APHIS believes it is prudent to be consistent in applying the criteria for introduction under notification. Therefore, to qualify for notification, a regulated article must meet all six of the eligibility requirements stipulated in paragraph (b) and the performance standards set forth in paragraph (c) of this section.

Several commenters suggested that the eligibility requirements for notification should be modified to include as one criterion for eligibility that an organism had been previously field tested under permit. APHIS disagrees. A major purpose of this rule is to establish safe conditions based on familiarity for field testing of a set or organisms that only have a restricted range of new introduced traits. If the eligibility criteria for notification and the performance standards for introductions are adequate to provide for safe field testing, then there should be no need for the imposition of an additional permitting requirement. APHIS believes that the specific revisions it has made to the eligibility criteria and performance standards, in response to comments, ensure this safe field testing.

Comments on Performance Standards (§ 340.3(c))

Procedure

Ten general comments were received on § 340.3(c) of the proposed notification amendment entitled "Performance standards for introductions under the notification procedure". Two commenters thought the performance standards were adequate; one thought they were too stringent, and the remaining seven thought they were too general and too vague. APHIS has sought to clarify some of the performance standards by considering issues raised for the individual performance standards by specific commenters. There were no comments directed toward performance standard 3 (§ 340.3(c)(3)).

Unique Ecology

Several commenters expressed the opinion that the proposed performance standards fail to take into account the potential effects of the introduction of regulated articles into unique environments. APHIS disagrees. The performance standards for introduction of regulated articles under notification are designed to prevent the persistence

of any organism which could have an effect on the surrounding environment, whether "unique" or otherwise. Moreover, the modifications to the proposed performance standards embodied in the final rule clarify what is required of the responsible persons to ensure safety. It should be emphasized, however, that the specific environment at the test site must be considered when the applicant determines how to comply with the performance standards.

Performance Standard 1 (§ 340.3(c)(1))

New § 340.3(c)(1) of the final rule establishes that the regulated article "* * * must be maintained at the destination facility such that there is no release into the environment." The proposed rule provided that "destination facilities shall provide for adequate containment of the regulated article(s)." Three commenters requested clarification and more detail as to what was meant by "adequate containment." APHIS does not believe that it is practical to define "adequate containment", since what is considered adequate will vary according to the subject organism. Adequate containment depends not only on the specific facilities on site and the physical containment measures employed, but also the biology of the plant and, if it is artificially infested or inoculated, the organism used in the challenge. Interested persons should consult the National Institutes of Health Guidelines at 51 FR 16958, "Appendix G—Physical Containment", for guidance on appropriate methods of physical containment. It remains the responsibility of the responsible person to ensure that appropriate measures are employed to prevent inadvertent release. APHIS believes that it is part of its responsibility to inspect these facilities, and it has been its practice to perform these inspections as provided in section § 340.4(d). The requirements for shipping in § 340.8(b)(1–3) must be adhered to when shipping regulated articles.

Performance Standard 2 (§ 340.3(c)(2))

New § 340.3(c)(2) establishes that "the regulated article must be planted in such a way that they are not inadvertently mixed with non-regulated plant materials of any species which are not part of the environmental release." One commenter questioned whether mixing refers to mixture with a non-regulated article or with other plant species. APHIS has therefore added the words "of any species" to clarify that the regulated article not be mixed with plant materials of any species which are not part of the environmental release. This does not preclude the mixture of the regulated article with non-regulated plant species that are part of the environmental release.

Performance Standard 4 (§ 340.3(c)(4))

Two commenters suggested modifications to performance standard (4). One of the commenters suggested that the statement be clarified to read that the introduction not contain a viable vector agent. APHIS believes that it is clear from the context of the performance standards that we intend that no viable vector agent be introduced along with the regulated article. The other commenter suggested that the statement be clarified to read that no transgenic vector agent be associated with the regulated article. Again, we believe that our intent is clear that no transgenic vector agent be introduced along with the regulated article.

Performance Standard 5 (§ 340.3(c)(5))

New § 340.3(c)(5) establishes that the field trial must be conducted such that neither the regulated article nor any offspring derived from the regulated article can "persist in the environment." What APHIS means by "persisting in the environment" is producing feral or sustained populations of the regulated article or its offspring that can persist in agricultural or nonagricultural habitats without human intervention. This standard does not necessarily preclude the conduct of controlled genetic crosses or open pollination as part of a field test. In cases where open pollination is employed, any hybrid progeny produced outside the test site cannot be used for agricultural seed, and these progeny must not be capable of forming feral or sustained populations. When the regulated article is male fertile and allowed to flower, it must be separated from any foundation or breeder seed production of non-regulated plant material of the same species, by at least the isolation distances for foundation seed production given in 7 CFR 201.76. The change to this standard was in response to three commenters who either objected to the proposed standard terms "significant probability" and "minimized", the vagueness of the standard, or expressed the opinion that it was not based on experience and it was unclear how it would be implemented. APHIS does not believe that pollen movement can or need necessarily be prevented, but rather that progeny produced as a result of such pollen movement should not persist in the environment, as stated above. We also believe that we have had extensive experience with the imposition of these standards with the six crops eligible for introduction by the notification alternative, as 85% of environmental release permits have been with these six crops and there have been no reports of their persistence. We agree with another commenter that based on the biology of these six crops there is little opportunity for persistence in the environment without sustained human intervention.

Performance Standard 6 (§ 340.3(c)(6))

The content of performance standard six has not been changed; however, it has been punctuated for clarification. One commenter expressed the opinion that it is not based on experience and it is unclear how it would be implemented. Again, 85% of APHIS' environmental release permits have been with the six crops eligible for introduction under notification and agricultural practices have been developed to eliminate the potential for volunteers or remove them if they appear. As with performance standard (5), the regulated article or viable propagative material derived from it must not persist in the environment.

Comments on Procedural Requirements (§ 340.3(d))

Procedural Requirement 2 (§ 340.3(d)(2))

All or most of the information requested in the notification letter described in § 340.3(d)(2) may be used by APHIS for recordkeeping purposes. APHIS intends to provide the public with examples of such notification letters so that it is clear what information we require in order to verify that the regulated article is eligible for introduction by the notification alternative.

In response to a single comment on § 340.3(d)(2)(ii), the section was amended to specify the information APHIS believes is necessary to identify the regulated article. APHIS believes this clarifies section (2)(ii). Subsection (A) provides the name and phenotype of the organism; e.g., *Solanum tuberosum*, potato cultivar Russet Burbank, virus resistant. Subsection (B) provides the identify of the introduced genetic material, the encoded protein and/or function, and the donor organisms; e.g., promoter: enhanced *35S* 5′ from Cauliflower Mosaic Virus; coding sequence: antisense coat protein from Potato Virus Y, strain N; terminator: *nos* 3′ from the *Agrobacterium tumefaciens* T–DNA nopaline synthase gene; and promoter: *35S* 5′, coding sequence: *uidA;* encoding β-glucuronidase from *Escherichia coli*; terminator: *nos* 3′.

Other sequences that should be identified include all noncoding regulatory sequences associated with the coding DNA. Subsection (C) identifies the mode of transformation, e.g., via disarmed *A. tumefaciens* or microprojectile bombardment. The information provided for by these subsections will allow APHIS to determine that the regulated article meets the eligibility criteria set forth in § 340.3(b). Subsection (C) will also allow APHIS to ascertain when a modified plant is not a regulated article. APHIS has also modified § 340.3(d)(2)(iii) to include the size of the introduction. APHIS believes this information is necessary for inspection officials who may visit the introduction sites or facilities.

Procedural Requirement 3 (§ 340.3(d)(3))

Approximately 48 commenters commented specifically on the provision in proposed § 340.3(d)(3) that notification occur on the day of introduction. Virtually the only support for this provision was expressed for movement only, by a small number of commenters representing industry. Several of these same commenters suggested that same-day notification for movement be extended to other crop varieties, and/or all regulated articles. In contrast, approximately 37 commenters representing State governments, industry, environmental and consumer organizations, and members of Congress expressed strong opposition to same-day notification for introduction, based on concern about public perception and the need for State review. The intervals suggested ranged from 10–15 days for release to 60 days for all introductions, with suggested variations falling between these extremes. Approximately 17 commenters expressly requested advance notification for State review prior to introduction.

APHIS agrees that notification should precede introduction to accommodate both Federal and State review. Therefore proposed § 340.3(d)(3) has been changed to require that notification must be submitted to BBEP 10 days prior to the day of an interstate movement, and 30 days prior to an importation or environmental release. The rationale for these time intervals is discussed in detail in response to "Comments on Administrative Action § 340.3(e)."

Procedural Requirement 4 (§ 340.3(d)(4))

A sentence was added to § 340.3(d)(4) regarding the submission of data reports pursuant to field trials approved under notification. The added sentence, "Final reports for those field tests lasting more than 12 months are due 6 months after the termination of the field test," was added to clarify APHIS' intent that a final field test report is due after the completion of a field test with a duration of longer than 12 months. APHIS specifies that this report be submitted 6 months after the termination of such a test. APHIS believes the 6 month time period to be a reasonable length of time for the applicant to review relevant data and compose a field test report. APHIS views these data reports as critical to the substantiation of safety, and expects that these documents will also be essential components in petition submissions under § 340.6. APHIS agrees with the commenter who suggested that the reports be submitted 11 months after the start of the test, but have not changed the initial reporting time from 12 months. APHIS believes that it is prudent that it receive the data reports from an applicant prior to, whenever possible, their next notification for the environmental release of the same or similar material so that we can review the report and request additional information if necessary. The submission of data reports within the time specified is essential for compliance with the final rule. The data reports will be available for public review in the Reading Room, suite 7, 6506 Belcrest Rd., Hyattsville, Maryland. APHIS will periodically publish a notice of their availability in the **Federal Register**.

In response to one commenter's inquiry concerning the content of the field test reports, we have modified the paragraph to require that the APHIS reference number given in the acknowledgement of receipt of the notification, as well as "methods of observation, resulting data, and analysis regarding all deleterious effects on plants, nontarget organisms, or the environment", be included. By these modifications APHIS intends that applicants provide APHIS with information about how its observations were made, and provide their analysis of the significance of them. We encourage the inclusion of other types of data, such as new information acquired regarding the phenotype of the regulated article as given in § 340.6(c)(4), if the applicant anticipates submission of a petition for determination of regulatory status for their regulated article. One commenter was interested in what the information in the data reports will be used for. In addition to ensuring that APHIS is informed of the progress of the field trial, this information will be utilized to fulfill our commitment to adjust regulations based on experience gained.

Procedural Requirement 5 (§ 340.3(d)(5))

Several State officials favored changed language to require a specified reporting time to the Federal Government of any unusual occurrence. APHIS agrees with these comments. The reporting periods for such occurrences for introductions under permit are also appropriate for notification. New § 340.3(d)(5) provides that the Director, BBEP, shall be notified "of any unusual occurrence within the time periods and in the manner specified in § 340.4(f)(10)."

Comments on Administrative Action (§ 340.3(e))

To provide for State notification and review, § 340.3(e)(1) has been changed to include a provision that the Director, BBEP, will notify State regulatory officials within 5 business days of receipt of notification. Section 340.3(e)(2), (3), and (4) were modified to establish that the Director, BBEP, will provide acknowledgement within 10 days of receipt for interstate movement, or 30 days of receipt for importation and environmental release that the introduction is appropriate under notification. These intervals were selected based on the estimated average time required to process a typical permit application for the introduction of a regulated article that meets the eligibility requirements for notification. In the case of importation, the 30 day interval will allow adequate time for the administrative requirements associated with importation of regulated articles, including consulting with State and other APHIS officials, printing special importation labels, contacting port inspectors, and inspecting the imported material for plant pests. When APHIS determines the introduction can not be made under notification, the applicant will be notified of denial of notification and the need to obtain a permit. The applicant can then request a permit for introduction of that regulated article without prejudice, as provides by § 340.3(e)(5).

APHIS will maintain an updated list of all notifications submitted. In the interest of providing the public access to information regarding the field trials that have been judged by APHIS to be eligible for notification, APHIS will periodically publish a notice in the **Federal Register** announcing the availability of such a list. Several commenters requested that a list of the

notifications be published in the Federal Register. APHIS will instead, on request, directly provide the list of interested parties in a timely manner, either by mail or through the use of electronic equipment. APHIS has made arrangements with the National Biological Impact Assessment Program (a free biotechnology data base) which is administered by USDA's Cooperative State Research Service, to make available current lists of notifications for release, that are pending and those which have been acknowledged by APHIS. The public may also review such lists in the Reading Room, suite 7, 6505 Belcrest Rd., Hyattsville, Maryland.

Petition for Determination of Nonregulated Status

Apart from the eleven comments that expressed general approval for the entire proposed rule as written, another twenty-one comments addressed the proposed petition process in § 340.6 directly. Of the twenty-one comments, eleven were in favor of the petition rule as proposed. Ten comments requested amendments to, or deletion of, the proposed petition rule.

Two comments requested that the proposed petition process be withdrawn. One of these comments gave no clear rationale for the request. The second comment expressed the opinion that the proposed petition process would provide inadequate oversight of the commercialization of transgenic plants and that the indicated data requirements were inadequate to address the known risks of commercialization. The commenters also stated that petitions were currently being reviewed by APHIS on an "ad hoc" basis and the new process would be one without scope or standards. The commenter specifically requested that proposed § 340.6(b)(A) be amended to specify that a petitioner shall include all data and not just one type of data that is relevant to a petition.

APHIS wishes to clarify that the FPPA and PQA are intended to protect American agriculture and the environment against the introduction and dissemination of plant pests. They are not statutes for the commercialization or marketing of plants. Therefore, the petition process allows APHIS to determine, based upon the review of data, whether certain transgenic plants which are regulated articles should continue to be regulated. Currently prior to commercialization new plant varieties, including those varieties produced through biotechnology, must comply with State and Federal marketing statutes such as State seed certification laws, the Federal Food, Drug, and Cosmetic Act (FFDCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In this regard, the Food and Drug Administration and the Environmental Protection Agency which administers these statutes have published policy or proposed policy statements in the Federal Register (57 FR 22984–23005; May 29, 1992) and 57 FR 55531–2; November 25, 1992). The petition process, which addresses the initial field testing of transgenic plants, supplements these commercialization requirements. To the extent the petition process is viewed as addressing commercialization, it should be viewed as an interim measure pending adoption of the Administration's policy for reviewing and approving applications to commercialize genetically engineered plants and other products.

With regard to the petition process acting in a supplementary capacity to the above marketing statutes as a means of addressing plant pest issues, APHIS believes that the data elements in the proposed petition process specifically relating to the new phenotype of the transgenic plant, outlined in § 340.6(c)(4) including, but not limited to:

> plant pest risk characteristics, disease and pest susceptibilities, expression of the gene product, new enzymes, or changes to plant metabolism, weediness of the regulated article, impact on the weediness of any other plant with which it can interbreed, agricultural or cultivation practices, effects of the regulated article on nontarget organism, indirect plant pest effects on other agricultural products, transfer of genetic information to organisms with which it cannot interbreed, and any other information which the Director believes to be relevant to a determination.

specifically address any substantive pest issues that might conceivably be raised in consideration of a new plant variety.

APHIS has recently reviewed a petition that a determination be made that an organism which had been a regulated article, the FLAVR SAVR™ tomato from Calgene, Inc., be given nonregulated status under 7 CFR part 340 based on evidence that it posed no plant pest risk, and published an interpretive ruling on that petition in the Federal Register on October 19, 1992. This ruling was based on analysis of the same types of issues presented in § 340.6(c)(4) based on scientific literature, laboratory data, field test data derived during three years of field testing, and public comments. APHIS is currently in the process of reviewing another such petition, received from Upjohn, Inc., regarding certain varieties of virus-resistant squash. The proposed rule formalizes a process analogous to that which has been operating for the first two petitions received by the agency. In response to the comment that review of petitions was being conducted on an "ad hoc" basis, APHIS notes that prior to the finalization of this rule, APHIS published notices of intent to issue interpretive rulings in the Federal Register in response to two petitions, and solicited public comment on these proposed actions. Once this proposed rule is finalized, its procedures for review of petitions will become codified in the regulations.

APHIS also disagrees with the comment that the proposed petition process for transgenic plants has no scope and no standards. APHIS believes that the issues that petitioners need to consider to fulfill the data requirements of § 340.6(c)(4) illuminate the full range of substantive risks that might conceivably be presented by a transgenic plant. With respect to standards, APHIS has followed the procedural requirements under the National Environmental Policy Act (NEPA) and existing USDA authorities to identify any plant pest risk posed by a transgenic plant under the FPPA. Based on these facts, and on its experience in having completed one determination of nonregulated status, APHIS does not believe that its review under the petition process provides inadequate oversight; nor that the data requirements are inadequate. No changes to the regulations are made in specific response to any of these comments. However, several small changes to wording describing information requirements for submission have been made, and these will be discussed below.

Four commenters expressed the desire that the public be allowed to comment on any proposed petitions under this section. Several of these commenters stated that 60 days, or a minimum of 60 days, should be afforded the public for their input. APHIS utilized a 45 day comment period in its interpretive rulemaking process for Calgene's petition concerning the FLAVR SAVR™ tomato, and in its ongoing review of another petition concerning virus-resistant squash from Upjohn, Inc. APHIS published notices of proposed interpretive rulemaking in the Federal Register (57 FR 31170, July 14, 1992; 57 FR 40632, September 4, 1992) with a request for public comment regarding determination of the regulatory status of the organisms that were the subject of these petitions. Many of the comments received on these two petitions have proven extremely useful in APHIS'

analyses. APHIS recognizes the valuable role that can be played by public input in this process. Accordingly, we have added a provision for a 60-day public comment period. The amended section, § 340.6(d)(2), reads as follows:

After the filing of a petition, APHIS shall publish a notice in the **Federal Register**. This notice shall specify that comments will be accepted from the public on the filed petition during a 60 day period commencing with the date of the notice. During the comment period, any interested person may submit to the Director, BBEP, written comments, regarding the filed petition, which shall become part of the petition file.

APHIS has also modified the proposed regulations to lengthen the review period for petitions from 120 days to 180 days. This change has been made to allow for adequate review of public comments after the new 60 day public comment period.

APHIS disagrees with one commenter's contention that an exemption from regulated status deprives the public of access to information regarding releases of transgenic plants. This statement does not accurately represent the history of organisms determined to have nonregulated status. This determination of safety for a transgenic plant is based upon scientific evidence, which may include successful field tests that have been approved after Agency environmental assessments and findings of no significant impact, and other scientific data and public comment indicating that the constructs pose no significant plant pest risk. There is a history of public access and involvement throughout the regulatory processes utilized by APHIS. Notices are published in the **Federal Register** when a permit application for a field trial is received, and when an environmental assessment has been prepared for than field trial. In addition, in an effort to be responsive to public interest in field tests performed under the notification process, APHIS will make a list of notification for release available on request. APHIS has now also modified the proposed regulation to include a specified public comment period in the petition process; if significant issues are identified that cannot be satisfactorily addressed in that process, a petition for determination of nonregulated status will not be successful and the transgenic plant will remain under regulated status.

One commenter offered the opinion that a public participation in APHIS' decision making process is also inadequate because the public has inadequate access to information protected as Confidential Business Information (CBI) by a petitioner, particularly during the appeals process for CBI determinations. APHIS disagrees. Its requirements for substantiation of CBI claims by petitioners and public access to non-confidential materials comply fully with the Freedom of Information Act (FOIA) (5 U.S.C. 552). APHIS balances the need for confidentiality against the publics right to know. All non-confidential data submitted in support of a petition is available for public inspection in a reading room provided by APHIS. Thus, APHIS, believes that adequate opportunity is provided for public participation in the determination. No change to the rule has been made in response to these comments.

Three comments expressed the opinion that establishment of the petition process for determination of nonregulated status is premature and is not founded on adequate information or data. APHIS disagrees. APHIS believes that valid procedures have been proposed to ensure that adequate data and justification be provided before APHIS makes a determination that an organism should be exempted from the regulations. The new procedures include an opportunity for public comment and public review of the data that has been submitted to APHIS in support of a petition for determination of nonregulated status. State regulatory agencies, academic institutions, and individual research scientists will have the opportunity to present all relevant information to the agency pertaining to a specific organism prior to a determination of nonregulated status by APHIS. Thus, no changes are made to the regulations in response to these comments.

One commenter expressed the opinion that data reviewed in the petition process must necessarily include "peer reviewed scientific studies". APHIS disagrees with this contention. Data related to the safety of the regulated article must be submitted with the petition and be reviewed by APHIS' scientific staff and the data made available to the public. Public comment and the review process utilized by APHIS provide for adequate peer review of submitted data. Although the precise meaning of the phrase "peer reviewed scientific studies" is not entirely clear, one interpretation is that the commenter is suggesting that these data need to be published in the scientific literature. APHIS believes it would place unreasonable temporal and monetary burdens on applicants to require that their studies be published in this way, particularly all of those studies that indicate no new or scientifically interesting characteristics for the regulated article. Moreover, such a provision would deny applicants the ability to protect CBI as provided under FOIA.

Another comment relating to data requirements suggested that APHIS should generally require that petitions be substantiated by data, rather than descriptive information. APHIS disagrees with this comment at least in part. APHIS believes that descriptive information is, in fact, data. Much of the useful agronomic information that has been collected over the years on crop plants has been collected through "description." Nonetheless, while not all useful observations are easily presented in the form of tables and statistics, it is important to point out to petitioners that accurate recording of when, how, and how often particular observations are made can be critical to the validity of their observations. It should also be pointed out, however, that for particular transgenic plants, experiments may sometimes need to be designed expressly to address particular issues that may be raised by use of those plants. These experiments might conceivably be of a type that will require field testing under permit rather than notification, even for crops listed as eligible for notification.

In response to a specific request that proposed § 340.6(b)(A) be amended to include all data relevant to a petition, APHIS notes that the proposed regulations in § 340.6(b)(A) stated:

The petitioner shall include copies of scientific literature, copies of unpublished studies, or data from tests performed upon which to base a determination.

It was the intent of APHIS, by using the disjunctive "or", to require all available data. In order to clarify this requirement, APHIS is amending the regulations to indicate explicitly that all three types of data shall be required with a petition if they are available. The regulations are amended accordingly in the final rule in response to this comment.

Another commenter argued that the scope of the petition section of the proposed rule is ambiguous. The comment argued that the scope of the rule might not be limited to plants because some "regulated articles" which might be the subject of petitions are microorganisms. If the rule is to apply to organisms other than plants, the commenter continued, the appropriate data requirements must be specified. The commenter is correct in noting that the data elements listed in § 340.6(c) apply specifically to characteristics of plants, rather than

microorganisms. APHIS notes that it is stated in the summary to the proposed rule that the petition process is designed to apply to "a petition process allowing for a determination that certain transgenic plants are no longer considered regulated articles." To further clarify the intent of the proposed rule, we have also amended the petition data element proposed in § 340.6(c)(1) by substituting the word "plant" for "organism". The section redesignated as § 340.5 in the proposed rule, "Petition to amend the list of organisms," would still apply if an applicant wishes that the regulatory status of a particular microorganism be considered by APHIS.

Several minor changes have been made to § 340.6(c) for clarification or in response to comments. We have further amended § 340.6(c)(1) by adding the words, "and information necessary to identify the recipient plant in the narrowest taxonomic grouping applicable," in order to indicate to petitioners the requirement that they specify exactly those species, varieties, cultivars, or transformat lines to which the petition applies.

Another commenter noted that the language setting out data requirements for specifying the genotype of a regulated article in § 340.6(c)(3) seemed open-ended. It would often be difficult and irrelevant, the commenter contended, to provide a detailed genotype of the parental organism, and it would make more sense to focus on that subset of genotype information that could be relevant to the determination. APHIS concurs, and accordingly, the first sentence of this section has been modified to read, "A detailed description of the differences in genotype between the regulated article and the nonmodified recipient organism."

One commenter noted that it would be helpful for investigators if there were some comment in the rule regarding the significance of the traits imparted to plants as a criterion for risk. Accordingly, the following sentence has been added to § 340.6(c)(4):

> Any information known to the petitioner that indicates that a regulated article may pose a greater plant pest risk than the unmodified recipient organism shall also be included.

Executive Order 12778

Twenty-five comments were received related to the statement made under Executive Order 12778, Civil Justice Reform, that appeared on page 57 FR 53040 of the proposed rule. Twenty-two of these comments objected to the statement that the proposed Federal regulations preempted State regulations that were inconsistent with this rule. Three comments raised concerns or requested clarification of the statement pertaining to preemption.

In general, the comments stated that States and Federal Territories need to retain the authority to impose restrictions and advance notification requirements that are more strict than Federal standards to address local plant pest or disease conditions, to keep their constituencies informed, and to ensure their adequate protection. Federal preemption would discourage State involvement and undermine cooperation between State and Federal governments. The comments further stated that the language under Executive Order 12778 was in conflict with a recent court decision which held that Federal preemption authority was divested from the PQA by the 1926 amendment to the Act.

APHIS wishes to clarify its role in cooperating with the States during the permitting and notification processes for introduction of regulated articles. Since 7 CFR part 340 went into effect in July, 1987, APHIS has generally enjoyed a fruitful collaborative relationship in the evaluation of introductions of genetically engineered organisms, and input from officials of the States and Federal Territories has been invaluable in determining prudent courses of action with regard to proposed field trials throughout the United States. APHIS expects that this relationship will continue, and looks forward to additional assistance from the States and Territories whenever a significant issue arises.

With regard to APHIS' interpretation of its actual authority regarding plant protection issues, Congress has given to the Secretary of Agriculture, through the PQA and the FPPA, the sole responsibility for protecting the horticulture and agriculture of the United States from the importation into the United States of plant pests and diseases. Under these Acts, the States are precluded from imposing restrictions on plants and plant products while they are in foreign commerce, or which would be an unreasonable burden on such commerce. Additionally, the Secretary has been given authority under the PQA and FPPA to promulgate regulations to prevent the movement in interstate commerce of plant pests or diseases. Pursuant to those Acts, State regulations would be preempted only if they are inconsistent with any Federal orders or regulations promulgated pursuant to those Acts. It is APHIS' position that where the Secretary of Agriculture has established an interstate quarantine or regulation under either Act, neither the States nor Territories can establish additional requirements concerning the particular subject matter regulated thereby. It should be noted, however, that even where the Secretary has issued a quarantine or regulations on articles in interstate commerce, States may still establish parallel quarantines and regulations which do not impose requirements in addition to those imposed by the Secretary.

Thus, the issuance of final rules does not *per se* prohibit State regulation of the intrastate movement of genetically engineered plants. Whether State or Territorial regulation is preempted would depend on whether the State or Territorial regulation is viewed as being different than, or otherwise inconsistent with, the provisions of the final rule. The procedures adopted herein retain provisions for providing information to the States or Territories, for their review, about notifications pending within their borders. APHIS will welcome responses from the States and Territories. States and Territories are requested to inform APHIS if they have any information that gives them any reason to believe that a particular organism is not eligible for notification. APHIS looks forward to continuing its close relationship with the States or Territories as it addresses any new risk-based issues in its regulation of genetically engineered plants.

Four commenters raised the issue of preemption specifically with regard to the 1988 Court of Appeals decision in Guam Fresh, Inc. (here and after *Guam Fresh* v. *Ada*), which considered whether the 1926 amendments to the Federal Plant Quarantine Act (hereinafter, the Act) divested Federal preemptive authority from the Act. One commenter expressed the opinion that this holding allows States to regulate plant pests more strictly than they are regulated under Federal law. A reading of Guam Fresh, however, indicates that the regulatory authority of the States in a particular instance hinges on whether "the Secretary has acted" or "has found it necessary to impose a Federal quarantine in the same area". The Ninth Circuit held in Guam Fresh that States may "impose a quarantine on any articles not specifically interdicted by a Federal quarantine". The legislative history of the 1926 amendments to the Act stated:

> [t]he purpose of this measure is simply to permit the States to continue such regulations where they are not in conflict with the regulations of the United States government or where the regulations of the United States government do not cover the

particular plant or thing which the State laws undertake to cover.

The House report further noted that:

[t]he USDA advised and encouraged the placing of State quarantines [and] issued and administered its quarantines as to particular pests and diseases in the belief that the States might legally take similar action with reference to subjects not covered by a Federal quarantine.

Moreover:

* * * the Secretary of Agriculture is authorized, whenever he deems such action advisable and necessary to carry out the purposes of this chapter, to cooperate with any State, Territory, or District, in connection with any quarantine. * * *

Thus, the Secretary may cooperate with the States when the Secretary deems it necessary:

* * * in order to avoid duplication of functions, facilities, and personnel, and to attain closer coordination and greater effectiveness and economy of administration of Federal and State laws and regulations.

In holding in Guam Fresh that the 1926 amendments to the Act divested the Act of its preemptive authority, there was in effect the conclusion that "the Secretary had not acted" to impose a Federal quarantine which covered the same articles as those covered by the Guam regulation. In that instance, State regulation "supplements" Federal law by restricting pests of "peculiarly local concern" and is not preempted by Federal law. With regard to the notification provisions in question, if the State identifies a specific plant or article of local concern upon which the Secretary has not acted, a State's actions would "supplement" those of the Federal government and would not be subject to preemption. However, it is APHIS' expectation that the process established under this rule will enable, with continued cooperation by the States, identification and communication of any issues of state or local concern, so that those issues will be directly considered as part of the Federal actions under notification.

Compliance With the National Environmental Policy Act

Several commenters expressed the opinion that APHIS has failed to comply with the requirements of NEPA by failing to provide an environmental analysis of its proposed rule at the time of its publication. APHIS disagrees. With regard to the notification provision of this final rule, APHIS has prepared an environmental assessment which is available upon request. The rationale for this analysis was also set forth in an abbreviated form in the preamble of the proposed rule. For organisms approved under notification, however, APHIS continues to believe that the constraints imposed by the eligibility criteria and the performance standards effectively eliminate the potential for significant impact to the environment that would occasion any case-by-case analysis.

The testing of novel organisms not fitting the eligibility criteria for notification and the use of field testing protocols not strictly in conformance with the performance standards will continue to be regulated under the permitting procedures. APHIS stated in its regulations at 52 FR 22892 on June 16, 1987, that the issuance of all permits for the introduction of a genetically engineered organism would be in accordance with NEPA, USDA regulations, and APHIS Guidelines implementing NEPA. APHIS indicated that it would prepare environmental assessments and, where necessary, environmental impact statements prior to issuing permits for the release of regulated articles into the environment.

APHIS has prepared environmental assessments (EA's) and findings of no significant impact (FONSI's) for some 365 permit applications as of March 2, 1993. Each of these assessments has entailed the evaluation of scientific data and other information submitted by interested persons, review of State comments on each proposed release, and sometimes consideration of other comments provided to APHIS by members of the public, regarding not only the potential for plant pest risk, but also a broad range of other potential effects on the human environment. Our analyses, documented in these evaluations and supported by the field trial reports submitted by applicants after the conclusion of their field trials, indicate that certain actions will not have a significant environmental effect. APHIS' action, establishing performance standards and eligibility criteria applicable to notification of introduction of a limited number of regulated articles in lieu of permitting requirements, is a reflection of our experience with these field trials. APHIS has derived the eligibility criteria and performance standards to be used for notification in this rule from the criteria that APHIS has used previously in its environmental assessments to determine that genetically engineered plants pose no significant impact on the environment. APHIS believes that full compliance with the eligibility requirements and performance standards for notification would lead to a finding of no significant impact for the introduction of such genetically engineered plants.

The D.C. Circuit's decision in *FET* v. *Heckler*, stated that "NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment" (756 F.2d 143, D.C. Cir. 1985). With regard to the petition provision of this final rule, APHIS has concluded that the "point of commitment" occurs when the agency takes action on each individual petition for determination of nonregulated status of a genetically engineered plant. This petition process is similar to APHIS' actions regarding a petition for nonregulated status received from Calgene, Inc., regarding its FLAVR SAVR™ tomato. Through an analysis of data submitted from Calgene and public comments, APHIS made the determination that the FLAVR SAVR™ tomato should no longer be a regulated article. To illustrate the considerations involved in making this determination, the following conclusions are derived from that determination. FLAVR SAVR™ tomatoes were found to: (1) Exhibit no plant pathogenic properties; (2) be no more likely to become weeds than their non-engineered parental varieties; (3) be unlikely to increase the weediness potential for any other cultivated plant or native wild species with which the organisms can interbreed; (4) not cause damage to processed agricultural commodities; and (5) be unlikely to harm other organisms, such as bees, that are beneficial to agriculture. APHIS also concluded that there is no reason to believe that new progeny FLAVR SAVR™ tomato varieties bred from these lines will present a plant pest risk, i.e., have properties substantially different from those observed for the FLAVR SAVR™ tomato lines already field tested, or those observed for tomatoes in traditional breeding programs.

APHIS will make similar analyses in full compliance with NEPA to determine plant pest risk for other organisms for which petitions are received under § 340.6. APHIS expects to receive petitions concerning a wide range of organisms that exhibit a wide range of properties. By virtue of the potential variation in considerations between different petitions, each will need to be considered individually. The final rule does not irrevocably commit APHIS to any decision regarding any petition for nonregulated status.

The petition process is merely a procedural provision which may result in an organism no longer being regulated after a thorough and comprehensive plant pest and environmental analysis. As a procedural provision it advises persons what data to submit in a petition so that the

Agency can decide *if* a determination of nonregulated status can be made. This is the same rationale which appeared in the Agency's Special Environmental Assessment that was prepared analyzing the impact of 7 CFR part 340, when it was published as a final rule on June 16, 1987 (see FR 22906). Thus, APHIS is incorporating the Special Environmental Assessment into the present assessment it is preparing for this final rule.

Changes to the Final Rule Which Reflect Internal Agency Management

We have amended the rule in response to comments only in those portions addressed in the November 6, 1992, proposed rule (*See* 57 FR 53036–53043), and have made miscellaneous changes related to administrative organization within APHIS. The latter changes pertain to internal agency management and are thus exempted from notice and comment rulemaking under the Federal Administrative Procedure Act (5 U.S.C. 553).

Executive Order 12291 and Regulatory Flexibility Act

This final rule is issued in conformance with Executive Order 12291 and has been determined to be not a "major rule." Based on information compiled by the Department, it has been determined that the final rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The effect of this final rule is to (1) provide for a notification procedure for the introduction of regulated articles in accordance with performance standards, and (2) formalize a petition procedure for a determination that an article is not regulated under part 340. Currently, the regulations do not provide for such a petition procedure. The notification procedure for the introduction of a regulated article would be used in place of a permit application when the field test, interstate movement, or importation would be performed in accordance with the eligibility requirements and performance standards in this document. The petition procedure was devised in response to comments received by APHIS. The notification procedure should result in a savings of time and expense that would ordinarily be associated with the preparation of a permit application and would eliminate the delay associated with permit application review. Eighty-five percent of current field tests could be conducted under the notification procedure, with the result that the current 120-day waiting period for a release permit would be eliminated. The majority of movement that is currently conducted under permit could also be conducted under the notification procedure, with the result that the current 60-day waiting period of movement would be eliminated.

It is expected that the notification and petition procedures would affect several hundred research scientists, some of whom may be operating small businesses that would be deemed small "entities" under the Regulatory Flexibility Act. When the final rule was issued in 1987 it was estimated that the initial cost associated with submission of a permit application was $5,000. However, APHIS has subsequently learned that the cost of preparing a permit application has dropped significantly (by as much as 90%) once an applicant has made more than one permit submission to APHIS. We have estimated that the notification procedure should reduce by 95% the cost associated with permit preparation. Thus, each person utilizing the notification procedure in lieu of a permit should immediately realize an initial savings of at least $4750 for a person who is preparing a permit application for the first time. However, this savings would be less than $4750 when the cost of preparing a permit application is less than $5000.

APHIS believes that the initial cost of preparing a notification should not be significant since the type of information called for in a notification is basic data that a researcher or company has already collected. The cost of preparing a notification will further decrease as persons become more familiar with the preparation of notification letters. APHIS further believes that there should be no additional cost associated with the collection of data required for a petition for non-regulated status. The Agency believes that the data required in a petition is the data a company or researcher would routinely collect to assess the development potential of a new variety. APHIS acknowledges that there may be some slight additional cost associated with the actual preparation of the petition. APHIS believes that this cost would be minimal.

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

Executive Order 12778

In order to ensure that State regulatory programs are in harmony with this regulation, the Department will continue to consult with State regulatory officials regarding specific local ecological concerns that may be affected by plants to be introduced under the notification procedures. The Department also intends to provide the public with notice of its proposed actions and the deliberations with the States. This process should assure, with continued cooperation of the States, that State concerns will be considered as part of the Federal notification process. If newly identified issues suggest any modifications of these regulations, the Department will be able to address these concerns through the notice and comment rulemaking process, or through emergency regulation as appropriate. These cooperative measures should go far to harmonize Federal and State regulatory activities in this area.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. Pursuant to the United States Constitution and applicable Federal statutes, any State or local laws, regulations, or policies that are inconsistent with this rule are preempted. This rule does not preempt any existing State or local law which is consistent with it. This rule has no retroactive effect. This rule does not require the exhaustion of administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

Information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 0579–0085.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372 which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

List of Subjects in 7 CFR Part 340

Administrative practice and procedure, Biotechnology, Genetic engineering, Imports, Packaging and

containers, Plant diseases and plant pests, Transportation.

Accordingly, we are amending 7 CFR 340 as follows:

PART 340—INTRODUCTION OF ORGANISMS AND PRODUCTS ALTERED OR PRODUCED THROUGH GENETIC ENGINEERING WHICH ARE PLANT PESTS OR WHICH THERE IS REASON TO BELIEVE ARE PLANT PESTS

1. The authority citation for 7 CFR part 340 continues to read as follows:

Authority: 7 U.S.C. 150aa–150jj, 151–167, 1622n; 31 U.S.C. 9701; 7 CFR 2.17, 2.51, and 371.2(c).

2. In § 340.0, paragraph (a) and its footnote are revised to read as follows:

§ 340.0 Restrictions on the introduction of regulated articles.

(a) No person shall introduce any regulated article unless the Director, BBEP, is:

(1) Notified of the introduction in accordance with § 340.3, or such introduction is authorized by permit in accordance with § 340.4, or such introduction is conditionally exempt from permit requirements under § 340.2(b); and

(2) Such introduction is in conformity with all other applicable restrictions in this part.[1]

* * * * *

3. In § 340.1, the definitions for *Deputy Administrator* and *Plant Protection and Quarantine* are removed; the following definitions *Animal and Plant Health Inspection Service (APHIS), Director, BBEP,* and *State regulatory official* are added in alphabetical order; and *Courtesy permit, Inspector, Permit,* and *Regulated article* are revised to read as follows:

§ 340.1 Definitions.

* * * * *

Animal and Plant Health Inspection Service (APHIS). An agency of the United States Department of Agriculture.

Courtesy permit. A written permit issued by the Director, BBEP, in accordance with § 340.4(h).

Director, BBEP. The Director, or designee of the Director, of the Biotechnology, Biologics, and Environmental Protection (BBEP) division of the Animal and Plant Health Inspection Service.

* * * * *

Inspector. Any employee of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, or other person, authorized by the Director, BBEP, in accordance with law to enforce the provisions of this part.

* * * * *

Permit. A written permit issued by the Director, BBEP, for the introduction of a regulated article under conditions determined by the Director, BBEP, not to present a risk of plant pest introduction.

* * * * *

Regulated article. Any organism which has been altered or produced through genetic engineering, if the donor organism, recipient organism, or vector or vector agent belongs to any genera or taxa designated in § 340.2 and meets the definition of plant pest, or is an unclassified organism and/or an organism whose classification is unknown, or any product which contains such an organism, or any other organism or product altered or produced through genetic engineering which the Director, BBEP, determines is a plant pest or has reason to believe is a plant pest. Excluded are recipient microorganisms which are not plant pests and which have resulted from the addition of genetic material from a donor organism where the material is well characterized and contains only non-coding regulatory regions.

* * * * *

State regulatory official. State official with responsibilities for plant health, or any other duly designated State official, in the State where the introduction is to take place.

* * * * *

§ 340.1 [Amended]

4. In § 340.1 the definition heading for *Well-characterized and contains only non-coding regulatory regions (e.g. operators, promoters, origins of replication, terminators, and ribosome binding regions)* is italicized.

§ 340.2 [Amended]

5. In § 340.2, paragraph (b)(1)(i) the phrase "§ 340.6(b)(3) of this part" is revised to read "§ 340.8(b)(3)".

6. In § 340.2, paragraph (b)(2)(i) the phrase "§ 340.6(b)(1), (2), and (3) of this part" is revised to read "§ 340.8(b) (1), (2), and (3)."

§§ 340.3 through 340.7 [Redesignated as §§ 340.4, 340.5, 340.7, 340.8 and 340.9]

7. Sections 340.3, 340.4, 340.5, 340.6, 340.7 are redesignated §§ 340.4, 340.5, 340.7, 340.8, and 340.9 respectively.

8. A new § 340.3 is added to read as follows:

§ 340.3 Notification for the introduction of certain regulated articles.

(a) *General.* Certain regulated articles may be introduced without a permit, provided that the introduction is in compliance with the requirements of this section. Any other introduction of regulated articles require a permit under § 340.4, with the exception of introductions that are conditionally exempt from permit requirements under § 340.2(b) of this part.

(b) *Regulated articles eligible for introduction under the notification procedure.* Regulated articles which meet all of the following six requirements and the performance standards set forth in paragraph (c) of this section are eligible for introduction under the notification procedure.

(1) The regulated article is:

(i) One of the following plant species:

corn (*Zea mays* L.);
cotton (*Gossypium hirsutum* L.);
potato (*Solanum tuberosum* L.);
soybean (*Glycine max* [L.] Merr.);
tobacco (*Nicotiana tabacum* L.);
tomato (*Lycopersicon esculentum* L.); or

(ii) Any additional plant species that BBEP has determined may be safely introduced in accordance with the eligibility criteria set forth in paragraph (b)(2) through (b)(6) of this section and the performance standards set forth in paragraph (c) of this section.

(2) The introduced genetic material is "stably integrated" in the plant genome, as defined in § 340.1.

(3) The function of the introduced genetic material is known and its expression in the regulated article does not result in plant disease.

(4) The introduced genetic material does not:

(i) Cause the production of an infectious entity, or

(ii) Encode substances that are known or likely to be toxic to nontarget organisms known or likely to feed or live on the plant species, or

(iii) Encode products intended for pharmaceutical use.

(5) To ensure the introduced genetic sequences do not pose a significant risk of the creation of any new plant virus, they must be:

(i) Noncoding regulatory sequences of known function, or

[1] Part 340 regulates, among other things, the introduction of organisms and products altered or produced through genetic engineering which are plant pests or which there is reason to believe are plant pests. The introduction into the United States of such articles may be subject to other regulations promulgated under the Federal Plant Pest Act (7 U.S.C. 150aa *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*) and the Federal Noxious Weed Act (7 U.S.C. 2801 *et seq.*) and found in 7 CFR parts 319, 321, 330, and 360. For example under regulations promulgated in 7 CFR "Subpart-Nursery Stock" (7 CFR 319.37) a permit is required for the importation of certain classes of nursery stock whether genetically engineered or not. Thus, a person should consult those regulations prior to the importation of any nursery stock.

(ii) Sense or antisense genetic constructs derived from viral coat protein genes from plant viruses that are prevalent and endemic in the area where the introduction will occur and that infect plants of the same host species, or

(iii) Antisense genetic constructs derived from noncapsid viral genes from plant viruses that are prevalent and endemic in the area where the introduction will occur and that infect plants of the same host species.

(6) The plant has not been modified to contain the following genetic material from animal or human pathogens:

(i) Any nucleic acid sequence derived from an animal or human virus, or

(ii) Coding sequences whose products are known or likely causal agents of disease in animals or humans.

(c) *Performance standards for introductions under the notification procedure.* The following performance standards must be met for any introductions under the notification procedure.

(1) If the plants or plant materials are shipped, they must be shipped in such a way that the viable plant material is unlikely to be disseminated while in transit and must be maintained at the destination facility in such a way that there is no release into the environment.

(2) When the introduction is an environmental release, the regulated article must be planted in such a way that they are not inadvertently mixed with non-regulated plant materials of any species which are not part of the environmental release.

(3) The plants and plant parts must be maintained in such a way that the identity of all material is known while it is in use, and the plant parts must be contained or devitalized when no longer in use.

(4) There must be no viable vector agent associated with the regulated article.

(5) The field trial must be conducted such that:

(i) The regulated article will not persist in the environment, and

(ii) No offspring can be produced that could persist in the environment.

(6) Upon termination of the field test:

(i) No viable material shall remain which is likely to volunteer in subsequent seasons, or

(ii) Volunteers shall be managed to prevent persistence in the environment.

(d) *Procedural requirements for notifying APHIS.* The following procedures shall be followed for any introductions under the notification procedure:

(1) Notification should be directed to Director, BBEP, c/o Deputy Director, Biotechnology Permits, Biotechnology, Biologics, and Environmental Protection, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, Maryland 20782.

(2) The notification shall include the following:

(i) Name, title, address, telephone number, and signature of the responsible person;

(ii) Information necessary to identify the regulated article(s), including:

(A) The scientific, common, or trade names, and phenotype of regulated article,

(B) The designations for the genetic loci, the encoded proteins or functions, and donor organisms for all genes from which introduced genetic material was derived, and

(C) The method by which the recipient was transformed;

(iii) The names and locations of the origination and destination facilities for movement or the field site location for the environmental release; and the size of the introduction,

(iv) The date and, in the case of environmental release, the expected duration of the introduction (release); and

(v) A statement that certifies that introduction of the regulated article will be in accordance with the provisions of this section.

(3) Notification must be submitted to BBEP:

(i) At least 10 days prior to the day of introduction, if the introduction is interstate movement.

(ii) At least 30 days prior to the day of introduction, if the introduction is an importation.

(iii) At least 30 days prior to the day of introduction, if the introduction is an environmental release.

(4) Field test reports must be submitted to the Director, BBEP, within 12 months after the start of the field test, and every 12 months through the duration of the field test. Final reports for those field tests lasting more than 12 months are due 6 months after the termination of the field test. Field test reports shall include:

(i) The APHIS reference number; and

(ii) Methods of observation, resulting data, and analysis regarding all deleterious effects on plants, nontarget organisms, or the environment.

(5) The Director, BBEP, shall be notified of any unusual occurrence within the time periods and in the manner specified in § 340.4(f)(10).

(6) Access shall be allowed for APHIS and State regulatory officials to inspect facilities and/or the field test site and any records necessary to evaluate compliance with the provisions of paragraphs (b) and (c) of this section.

(e) *Administrative action in response to notification.* (1) The Director, BBEP, will notify the appropriate State regulatory official(s) for notification and review within 5 business days of receipt of notification.

(2) The Director, BBEP, will provide acknowledgement within 10 days of receipt that the interstate movement is appropriate under notification.

(3) The Director, BBEP, will provide acknowledgement within 30 days of receipt that the importation is appropriate under notification.

(4) The Director, BBEP, will provide acknowledgement within 30 days of receipt that the environmental release is appropriate under notification.

(5) A person denied permission for introduction of a regulated article under notification may apply for a permit for introduction of that regulated article without prejudice.

9. A new § 340.6 is added to read as follows:

§ 340.6 Petition for determination of nonregulated status.

(a) *General.* Any person may submit to the Director, Biotechnology, Biologics, and Environmental Protection (BBEP), a petition to seek a determination that an article should not be regulated under this part. A petitioner may supplement, amend, or withdraw a petition in writing without prior approval of the Director, BBEP, and without affecting resubmission at any time until the Director, BBEP, rules on the petition. A petition for determination of nonregulated status shall be submitted in accordance with the procedure and format specified in this section.

(b) *Submission procedures and format.* A person shall submit two copies of a petition to the Director, BBEP, c/o the Deputy Director, Biotechnology Coordination and Technical Assistance, BBEP, APHIS, USDA, 6505 Belcrest Road, Federal Building, Hyattsville, MD 20782. The petition shall be dated and structured as follows:

Petition for Determination of Nonregulated Status

The undersigned submits this petition under 7 CFR 340.6 to request that the Director, BBEP, make a determination that the article should not be regulated under 7 CFR part 340.

(Signature) _____

A. Statement of Grounds

A person must present a full statement explaining the factual grounds why the

organism should not be regulated under 7 CFR part 340. The petitioner shall include copies of scientific literature, copies of unpublished studies, when available, and data from tests performed upon which to base a determination. The petition shall include all information set forth in paragraph (c) of 7 CFR 340.6. If there are portions of the petition deemed to contain trade secret or confidential business information (CBI), each page of the petition containing such information should be marked "CBI Copy". In addition, those portions of the petition which are deemed "CBI" shall be so designated. The second copy shall have all such CBI deleted and shall have marked on each page where the CBI was deleted: "CBI Deleted." If a petition does not contain CBI, the first page of both copies shall be marked: "No CBI."

A person shall also include information known to the petitioner which would be unfavorable to a petition. If a person is not aware of any unfavorable information, the petition should state, "Unfavorable information: NONE."

B. Certification

The undersigned certifies, that to the best knowledge and belief of the undersigned, this petition includes all information and views on which to base a determination, and that it includes relevant data and information known to the petitioner which are unfavorable to the petition.

(Signature) _____

(Name of Petitioner) _____

(Mailing Address) _____

(Telephone Number) _____

(c) *Required data and information.* The petition shall include the following information:

(1) Description of the biology of the nonmodified recipient plant and information necessary to identify the recipient plant in the narrowest taxonomic grouping applicable.

(2) Relevant experimental data and publications.

(3) A detailed description of the differences in genotype between the regulated article and the nonmodified recipient organism. Include all scientific, common, or trade names, and all designations necessary to identify: the donor organism(s), the nature of the transformation system (vector or vector agent(s)), the inserted genetic material and its product(s), and the regulated article. Include country and locality where the donor, the recipient, and the vector organisms and the regulated articles are collected, developed, and produced.

(4) A detailed description of the phenotype of the regulated article. Describe known and potential differences from the unmodified recipient organism that would substantiate that the regulated article is unlikely to pose a greater plant pest risk than the unmodified organism from which it was derived, including but not limited to: Plant pest risk characteristics, disease and pest susceptibilities, expression of the gene product, new enzymes, or changes to plant metabolism, weediness of the regulated article, impact on the weediness of any other plant with which it can interbreed, agricultural or cultivation practices, effects of the regulated article on nontarget organisms, indirect plant pest effects on other agricultural products, transfer of genetic information to organisms with which it cannot interbreed, and any other information which the Director believes to be relevant to a determination. Any information known to the petitioner that indicates that a regulated article may pose a greater plant pest risk than the unmodified recipient organism shall also be included.

(d) *Administrative action on a petition.*

(1) A petition for determination of nonregulated status under this part which meets the requirements of paragraphs (b) and (c) of this section will be filed by the Director, BBEP, stamped with the date of filing, and assigned a petition number. The petition number shall identify the file established for all submissions relating to the petition. The BBEP will promptly notify the petitioner in writing of the filing and the assigned petition number. If a petition does not meet the requirements specified in this section, the petitioner shall be sent a notice indicating how the petition is deficient.

(2) After the filing of a completed petition, APHIS shall publish a notice in the **Federal Register**. This notice shall specify that comments will be accepted from the public on the filed petition during a 60 day period commencing with the date of the notice. During the comment period, any interested person may submit to the Director, BBEP, written comments, regarding the filed petition, which shall become part of the petition file.

(3) The Director, BBEP, shall, based upon available information, furnish a response to each petitioner within 180 days of receipt of a completed petition. The response will either:

(i) Approve the petition in whole or in part; or

(ii) deny the petition.

The petitioner shall be notified in writing of the Director's decision. The decision shall be placed in the public petition file in the offices of BBEP and notice of availability published in the **Federal Register**.

(e) *Denial of a petition; appeal.* (1) The Director's written notification of denial of a petition shall briefly set forth the reason for such denial. The written notification shall be sent by certified mail. Any person whose petition has been denied may appeal the determination in writing to the Administrator within 10 days from receipt of the written notification of denial.

(2) The appeal shall state all of the facts and reasons upon which the person relies, including any new information, to show that the petition was wrongfully denied. The Administrator shall grant or deny the appeal, in writing, stating the reasons for the decision as promptly as circumstances allow. An informal hearing may be held by the Administrator if there is a dispute of a material fact. Rules of Practice concerning such a hearing will be adopted by the Administrator.

§ 340.4 [Amended]

10. In newly redesignated § 340.4 the words "Plant Protection and Quarantine" are removed and the phrase "Biotechnology, Biologics, and Environmental Protection" is added in its place:

a. Paragraph (a), both times it appears.

b. Paragraph (b), three times it appears.

c. Footnote 6.

d. Paragraph (c), introductory paragraph, three times it appears.

e. Paragraph (c)(1), in the 5th and 8th sentences.

f. Paragraph (c)(2).

g. Paragraph (e), both times it appears.

h. Paragraph (f)(9).

i. Paragraph (f)(10).

j. Paragraph (f)(11)(ii).

k. Paragraph (h)(2).

l. Paragraph (h)(3), both times it appears.

11. In newly redesignated § 340.4 the words "Deputy Administrator" are removed and the words "Director, BBEP" are added in their place:

a. Paragraph (f), introductory paragraph.

b. Paragraph (f)(7).

c. Paragraph (f)(8).

d. Paragraph (g), the three times it appears.

e. Paragraph (h)(1).

12. In newly redesignated § 340.4, paragraph (a) first sentence, the words "the Biological Assessment Support Staff, (Biotech Unit)" are removed and the words "Biotechnology Permit Unit" are added in their place.

13. In newly redesignated § 340.4, footnote 6, the words "the Biological Assessment Support Staff" are removed and the words "Biotechnology Permit Unit" are added in their place.

§ 340.5 [Amended]

14. In newly redesignated § 340.5, paragraph (b), in the introductory paragraph and under the subheading PETITION TO AMEND 7 CFR 340.2, the words "Plant Protection and Quarantine" are removed and the phrase "Biotechnology, Biological, and Environmental Protection" are added in their place.

15. In newly redesignated § 340.5 the words "Deputy Administrator" are removed and the words "Director, BBEP" are added in their place:

a. Paragraph (a), the three times it appears.

b. Paragraph (b), in the introductory paragraph and under the subheading PETITION TO AMEND 7 CFR 340.2.

c. Paragraph (c)(3) the introductory text and (c)(3)(i).

16. In newly redesignated § 340.5, paragraph (c)(3)(ii) the words "Deputy Administrator's" are removed and the words "Director, BBEP's" are added in their place.

17. In newly redesignated § 340.5, paragraph (b), the words "in care of the Director of the Biotechnology and Environmental Coordination Staff" are removed.

18. In newly redesignated § 340.5 the words "the Biotechnology and Environmental Coordination Staff" are removed and the words "Biotechnology, Biologics, and Environmental Protection" are added in their place.

a. Paragraph (c)(1), both times it appears.

b. Paragraph (c)(2).

c. Paragraph (c)(3)(ii).

§ 340.7 [Amended]

19. In newly redesignated § 340.7, paragraph (b) the words "Plant Protection and Quarantine" are removed and the phrase "Biotechnology, Biologics, and Environmental Protection" are added in its place.

Done in Washington, DC, this 29th day of March 1993.

Kenneth C. Clayton,

Acting Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 93–7517 Filed 3–30–93; 8:45 am]

BILLING CODE 3410–34–M

federal register

Wednesday
March 31, 1993

Part XI

Department of Health and Human Services

45 CFR Part 96

Substance Abuse Prevention and Treatment Block Grants; Interim Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 96

Substance Abuse Prevention and Treatment Block Grants

AGENCY: Substance Abuse and Mental Health Services Administration, PHS, HHS.

ACTION: Interim Final Rule.

SUMMARY: Sections 1921 to 1954 of the Public Health Service (PHS) Act, authorize the Secretary to provide Block Grants to States for the purposes of prevention and treatment of substance abuse which includes alcohol and other drugs. Among other things, the Act requires that the funding agreements with the States provide for a number of provisions relating to intravenous substance abuse, tuberculosis and human immunodeficiency virus (HIV) testing and services, group homes for recovering substance abusers, and peer review requirements. This interim final rule establishes standards specifying the circumstances in which the Secretary will consider an application for a grant under section 1921 of the PHS Act to be in accordance with the law .

DATES: *Effective Date:* March 31, 1993.

Comment Date: The Secretary is requesting written comments which must be received on or before (insert date 60 days after publication).

ADDRESSES: Written comments on this interim final rule may be sent to Susan L. Becker, Director, Division of State Programs, Center for Substance Abuse Treatment (CSAT), Rockwall II Building, 10th Floor, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Susan L. Becker, telephone No. (301) 443–3820.

SUPPLEMENTARY INFORMATION: Sections 1921 to 1954 of the PHS Act, 42 U.S.C. 300x–21—300x–35, provide for allotments each year to States for the purposes of planning, carrying out, and evaluating activities to prevent and treat substance abuse which is defined at section 96.121 to include the abuse and/or illicit use of alcohol and other drugs. The Block Grant funds may be expended to provide for a wide range of activities to prevent and treat substance abuse and may be expended to deal with the abuse of alcohol, the use or abuse of illicit drugs, the abuse of licit drugs and the use or abuse of tobacco products.

In order for the Secretary to award Block Grants, the States and eligible Indian tribes must apply for the Block Grant and the application must be in accordance with the law. These interim final regulations establish standards specifying the circumstances in which the Secretary will consider an application for a grant to be in accordance with the law. Based on the criteria established in law and implemented by this regulation, there is only one Indian tribe that is currently eligible for funds under this program.

All of the statutory requirements for the Substance Abuse Prevention and Treatment Block Grant are applicable to fiscal year 1993 Block Grants, except section 1926 of the PHS Act. It is the Department's view that good cause exists to show that notice and comment are "impracticable, * * * or contrary to the public interest," 5 U.S.C. 553(b)(B), since pursuant to section 1932(d) of the PHS Act Block Grant funds for substance abuse may not be provided to States for fiscal year 1993 on or after January 1, 1993 if the rule is not issued. These Block Grants are the major source of Federal funds to States to be used to establish and supplement various substance abuse prevention and treatment programs and an interruption or a delay in such funding could have a profound impact on the States ability to provide substance abuse prevention and treatment, a result which is contrary to the War on Drugs and the public interest.

For similar reasons, this regulation is effective immediately. Delaying the effective date for a period of thirty days is contrary to the public interest. Requiring States that have submitted an acceptable application to wait an additional thirty days for payment would only compound the problem of delay and burden the States further in their provision of substance abuse prevention and treatment programs. Although the regulations are published as an interim final rule and are effective immediately, the Secretary requests comments on the regulations and is particularly interested in comments on alternative ways the law may be implemented. The Secretary will consider all comments and, after such consideration, make any amendments to the regulations by January 1, 1994, in a final rule.

The Application and Assurances

45 CFR 96.122 and 96.123 are added to describe what is to be provided in the application and the necessary assurances that the States (which includes the District of Columbia and the territories) will provide to ensure the Secretary that it will carry out the purposes of and expend the Block Grant in accordance with the law. In applying for Block Grants for fiscal year 1993, applicants must submit an application containing information which conforms to all of the elements of the regulations.

Beginning in fiscal year 1994, applicants are required to use the standard application form prescribed by HHS with the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. Upon submission to OMB for review, a copy of this application may be obtained from the Center for Substance Abuse Treatment, Division of State Programs, Rockwall II Bldg., 5600 Fishers Lane, Rockville, MD 20857. The contract person is Susan L. Becker. The Secretary has had preliminary discussions and will have further discussions with General Accounting Office (GAO) and the States about the reporting requirements under section 1942(a) of the PHS Act which is part of the application. However, the public is encouraged to formally comment on all of the information collection requirements contained in the standard form under the Paperwork Reduction Act. These comments will be carefully considered by OMB and the Secretary and, as a result of these comments, any changes to the rule will be made by January 1, 1994, or shortly thereafter.

The State in its application, as required by section 1932(a) of the PHS Act, is to submit the necessary assurances, as well as the State plan and the report required by sections 1932(b)(1) and 1942(a) of the PHS Act, respectively. Section 1932(b)(1) of the PHS Act provides that the States are to submit a State plan describing how the State plans to implement the requirements of the Act, such as those relating to the provision of tuberculosis and HIV services and services to pregnant women which are described in more detail below. It also provides that the States are to describe how the Block Grant is to be expended. 45 CFR 96.122(g) sets forth the information States are to provide the Secretary under the State plan.

Section 1942(a) of the PHS Act requires the States to submit a report which describes the purposes for which the grant received by the State for the preceding fiscal years was expended, a description of the activities of the State under the program, and the recipients of amounts provided in the grant. 45 CFR 96.122(f) sets forth the information that is to be submitted to the Secretary in the report.

In addition, the regulations, applicable to the report, require States to submit information on the use of Block Grant funds over a several year period. For example, for fiscal year

1993, specific information is to be submitted for Federal fiscal years 1990, 1991 and 1992, as well as for the most recent twelve month State expenditure period for which expenditure information is available. Information from earlier years is necessary because it often takes States two to three years to acquire actual expenditure, and other data. The Secretary believes it is essential that actual data (rather than simply estimates) be acquired for monitoring the Block Grant funds to ensure that the funds are expended for authorized purposes and in accordance with the law.

Also, when information is requested for fiscal years 1990, 1991 and 1992, applicants are to provide information relating to substance abuse prevention and treatment activities under the Alcohol, Drug Abuse and Mental Health Services (ADMS) Block Grant formerly authorized by sections 1911 and 1926 of the PHS Act. Although those sections have been amended, the Department will review those expenditures to ensure that the Block Grant funds were expended in accordance with the law in effect for those fiscal years.

As has been the case under the ADMS Block Grant, the funding agreements and assurances in the application are to be made through certification by the chief executive officer personally, or by an individual authorized to make such certification on behalf of the chief executive officer. If a delegation has occurred, a copy of the current delegation of authority must be submitted with the application.

The application (in substantial compliance with the statutory and regulatory provisions) is to be submitted for fiscal year 1993 no later than ninety days after publication of these regulations, and, for subsequent years, no later than March 31 of the fiscal year for which the State is applying for funds. The Secretary believes this will allow States sufficient time to complete the applications and, as to the March 31 deadline, allow for a more orderly process. The term "fiscal year" refers to the Federal fiscal year. This will make the HHS review process more efficient and may expedite the process of reviewing applications and awarding the grants.

The Secretary will approve an application with a State plan, assurances and report which satisfy the requirements of the Act and the regulations. The State is required to provide descriptions of how the State is implementing the provisions of the Act and the regulations. Unless provided otherwise by the regulations, the Secretary will approve procedures which are provided as examples in the regulations, or the State may submit other procedures which the Secretary determines to reasonably implement the requirements of the Act and the regulations.

Certain Allocations and Primary Prevention

45 CFR 96.124 and 96.125 are added to implement the provisions of Section 1922 of the PHS Act which requires States to expend the Block Grant on various programs. Specifically, the State is required to expend not less than 35 percent of the Block Grant for prevention and treatment activities regarding alcohol and not less than 35 percent for treatment and prevention activities relating to other drugs.

In addition, not less than 20 percent of the grant is to be expended for primary prevention activities. Section 96.125 is added which requires States to develop a comprehensive prevention program which provides a broad array of prevention activities and services including such activities and services to discourage the use of alcoholic beverages and tobacco products by minors. These activities and services must be provided in a variety of settings for both the general population, as well as targeted subgroups who are at high risk for substance abuse. Section 96.125 provides examples of strategies the States may use in developing a comprehensive primary prevention program. Under each strategy, examples of acceptable programs are listed.

The Secretary believes the examples of acceptable strategies and activities are important to alleviate any confusion in the prevention field as to acceptable primary prevention activities under the Block Grant. This is particularly important because of the major change in how prevention for purposes of the 20 percent set aside is defined in the Block Grant—that is, primary prevention *only* as compared to prevention and early intervention.

It should be noted, however, that the "primary prevention" definition is for purposes of the "Substance Abuse Prevention and Treatment Block Grant" regulations *only*. This definition does *not* apply to other programs administered by SAMHSA or the Center for Substance Abuse Prevention, such as the High Risk Youth programs, which include intervention activities which go beyond activities authorized by these regulations.

The Secretary assures States that early intervention activities which counted as part of the 20 percent prevention set aside prior to passage of the Alcohol, Drug Abuse and Mental Health Administration Reorganization Act, Public Law 102–321, July 10, 1992, are allowable activities under the Block Grant but do not now count as primary prevention.

Section 96.124 implements section 1922 of the PHS Act which provides for specific allocations to increase the availability of treatment services designed for pregnant women and women with dependent children. Under § 96.124, the State is required to expend not less than 5 percent of the fiscal year 1993 grant to increase (relative to fiscal year 1992) such services, consistent with the base described at § 96.124(c). This requirement may be waived upon the request of the State if the Secretary determines that the State is providing an adequate level of services for this population. In determining whether an adequate level does exist, the Secretary will review the extent to which a State is providing services to this population and will consider whether the minimum level of services stipulated in § 96.124(e) are being provided for pregnant women and women with dependent children who are being served.

At a minimum, the Secretary requires States to ensure that treatment programs receiving funding from the Block Grant set aside for pregnant women and women with dependent children for such services also provide or arrange for the following: (1) Primary medical care for women who are receiving substance abuse services, including prenatal care, and while women are receiving such treatment, child care; (2) primary pediatric care for their children including immunizations; (3) gender specific substance abuse treatment and other therapeutic interventions for women that may address issues of relationships, sexual and physical abuse and parenting, and child care while the women are receiving these services; (4) therapeutic interventions for children in custody of women in treatment which may, among other things, address their developmental needs, and their issues of sexual and physical abuse and neglect; and (5) sufficient case management and transportation services to ensure that women and their children have access to the services provided by (1) through (4).

Because of the important health issues relating to the provision of treatment services to pregnant women and women with dependent children, the Secretary strongly encourages the States to require all programs that provide services to women to also provide a comprehensive range of services to such women and their children, either directly or through linkages with community based organizations. These services include

case management to assist in establishing eligibility for public assistance programs provided by Federal, State or local governments; employment and training programs; education and special education programs; drug-free housing for women and their children; prenatal care and other health care services; therapeutic day care for children; Head Start; and other early childhood programs.

In addition to providing the minimum services, the State is to require that all programs which provide substance abuse treatment services to pregnant women and women with dependent children using funds from the Block Grant amount set aside for such purposes must treat the family as a unit and therefore admit both women and their children into treatment, when appropriate. Such an admission may not be appropriate, however, if, for example, the father of the child is able to adequately care for the child. In addition, the amount set aside for such services must be expended on individuals who have no other financial means in obtaining such services as provided by § 96.137. This is important so as to increase the level of service to pregnant women and women with dependent children.

Finally, women with dependent children for the purposes of section 96.124 include women in treatment who are attempting to regain custody of their children. The Secretary believes that this is important, because often a court has custody of the children and regaining custody is dependent on successful substance abuse treatment. Regaining custody of their children may serve as an incentive to these women to successfully complete treatment and to remain alcohol and drug free.

Capacity of Treatment for Intravenous Substance Abusers

45 CFR 96.126 is added to implement section 1923 of the PHS Act which provides that, as a condition of receiving Block Grant funding, the State must require programs that receive funding under the grant and that treat individuals for intravenous substance abuse to inform the State when they reach 90 percent of capacity. The Secretary requires States, as a condition of receipt of a grant, to establish a capacity management program which reasonably enables a program to readily report to the State when it reaches 90 percent capacity. The requirement for a capacity management system is an important change in the substance abuse and prevention block grant program and the Secretary requests comments on efficient but cost effective means to implement this section.

In addition, section 1923 of the PHS Act requires the State to ensure that each individual who requests and is in need of treatment for intravenous drug abuse be admitted to the program not later than 14 days after making the request for admission to such a program, or 120 days after the date of such request, if no such program has the capacity to admit the individual on the date of such request and if interim services are made available to the individual not later than 48 hours after such request.

In carrying out these provisions, the Secretary requires the State to establish a waiting list management program which provides systematic reporting of treatment demand. The State is to require any program receiving funding from the grant for the purposes of treating injecting drug abusers to establish a waiting list which includes a unique patient identifier for each injecting drug abuser seeking treatment, including those receiving interim services, while awaiting admission to such treatment. For individuals who cannot be placed in comprehensive treatment within 14 days, the State is to ensure that individuals receive interim services and to develop a mechanism for maintaining contact with the individuals awaiting admission. Whatever mechanism is developed, it must ensure that patients on waiting lists are transferred at the earliest possible time to a program providing treatment within a reasonable geographic area.

However, if a person cannot be located for admission into treatment or if a person refuses treatment, such individuals may be taken off the waiting lists, and the States are not obligated to provide treatment to those individuals within 14 or 120 days, whichever is applicable under § 96.126. The Secretary believes that to have a continuing obligation to provide treatment to such individuals would result in programs having unoccupied slots so as to be able to fulfill its obligations. This result, the Secretary believes, would not promote treatment.

The Secretary is considering whether regulations should be issued requiring States not only to establish a capacity management program which will monitor available slots in treatment programs, but to establish a central registry to track individuals so as to make available treatment in a timely fashion. A central registry may also be useful to make available treatment to pregnant women as provided in § 96.131. The Secretary seeks comments on the central registry concept and any alternatives to a central registry.

Interim services for the purposes of section 96.126 may entail any number of services, including interim methadone maintenance as authorized by section 1976 of the PHS Act and the applicable regulations. The Secretary, however, requires that at a minimum interim services include counseling and education about HIV and tuberculosis, about the risks of needle-sharing, about the risks of transmission to sexual partners and infants, and about steps that can be taken to ensure that HIV transmission does not occur, as well as referral for HIV and TB treatment services, if necessary. For pregnant women, the Secretary believes it is essential that interim services also include counseling on the effects of alcohol and drug use on the fetus, as well as referrals for prenatal care. These provisions are consistent with the thrust of the Block Grant—to prevent the spread of HIV infection and to treat substance abuse.

Section 1923 of the PHS Act also requires States to ensure that any entity that receives funding for treatment services for intravenous drug abuse carry out activities to encourage individuals in need of such treatment to undergo such treatment. In carrying out this provision, the Secretary requires the States to use outreach models that are scientifically sound, so as to optimally maximize these outreach programs, or if no such models are available which are applicable to the local situation, to use an approach which reasonably can be expected to be an effective outreach method. Examples of scientifically sound models include the following: (1) The standard intervention model as described in *The NIDA Standard Intervention Model for Injection Drug Users: Intervention Manual*, National AIDS Demonstration Research (NADR) Program, National Institute on Drug Abuse, Feb. 1992; (2) the health education model as described in Rhodes, F. Humfleet, G.L., *et al.*, *AIDS Intervention Program for Injection Drug Users: Intervention Manual*, (Feb. 1992); and (3) the indigenous leader model as described in Wiebel, W., Levin, L.B., *The Indigenous Leader Model: Intervention Manual* (Feb. 1992).

As part of the outreach programs, the Secretary, among other things, also requires the States to ensure that such entities promote awareness among injecting drug abusers about the relationship between injecting drug abuse and communicable diseases and select, train and supervise outreach workers. These measures ensure quality outreach programs and will prevent the

use of less effective strategies, such as simply having persons without an understanding of substance abuse handing out flyers.

Requirements Regarding Tuberculosis and HIV

45 CFR 96.127 and 96.128 are added to provide for the provisions of section 1924 of the PHS Act regarding tuberculosis and HIV treatment services. Under the PHS Act, States are to require any entity receiving amounts from the Block Grant for operating a program of treatment for substance abuse (1) to, directly or through arrangements with other public or nonprofit private entities, routinely make available tuberculosis services as defined in section 96.121 to each individual receiving treatment for such abuse; and (2) in the case of an individual in need of such treatment who is denied admission to the program on the basis of the lack of the capacity of the program, to refer the individual to another provider of tuberculosis services.

In carrying out this tuberculosis provision, the Secretary requires that the principal agency of a State, in consultation with the State Medical Director for Substance Abuse Services, and in cooperation with the Tuberculosis Control Officer of the State Department of Health, develop written procedures to implement these provisions, as well as protocols to be implemented by the programs to prevent the transmission of tuberculosis, such as screening patients. In addition, the principal agency is to develop a plan establishing linkages with other health providers to ensure that tuberculosis services are routinely made available.

The Secretary is requiring the State to also develop an effective system for monitoring program compliance with this section. This system should be developed in conjunction with those systems required for services to injecting drug abusers under section 96.126(b) and for ensuring that services are being provided to pregnant women under section 96.131(f). The Secretary believes it is critical that pregnant women who are addicts be provided substance abuse and other treatment as early as possible both because of the health of the mother and the effects of the addiction on the fetus. Close monitoring is thus important to insure compliance by treatment providers. The Secretary also believes that turberculosis and HIV are health problems of enormous consequence and therefore programs must be monitored closely to ensure provision of such services in accordance with the regulation. Although the regulation does not prescribe a system for monitoring the provision of these services, the States are to develop effective systems that will ensure to the maximum extent possible that these services are being provided. The State may wish to consider routine inspections of providers as a way of carrying out this requirement. The Secretary seeks comments on procedures to implement these provisions that will be both efficient and cost effective.

As to HIV, some States are to carry out one or more projects to make available to individuals early intervention services for HIV disease as defined by section 96.121 at the sites at which the individuals are undergoing treatment. This requirement is applicable only to a State whose rate of cases of acquired immune deficiency syndrome is 10 or more such cases per 100,000 individuals (as indicated by the number of such cases reported to and confirmed by the Director of the Centers for Disease Control for the most recent calendar year for which the data are available) and the amount to be expended is the amount prescribed at section 1924 of the PHS Act.

Further, if the State plans to carry out 2 or more such projects, the State is to carry out one of the projects in a rural area of the State, unless the requirement is waived. The Secretary will waive the requirement if the State certifies to the Secretary that there is insufficient demand in the State to carry out a project in any rural area, or there are no rural areas in the State.

The Secretary requires the State to ensure that the programs participating in the project establish linkages with a comprehensive community resource network of related health and social services organizations to ensure a wide-based knowledge of the availability of these services and to facilitate referral. All individuals with active TB shall be reported to the appropriate State official as required by State law.

Section 1924(b)(6) of the PHS Act also requires States to ensure that, with respect to the provision of early intervention services for HIV disease to an individual, such services will be undertaken voluntarily by, and with the informed consent of, the individual and undergoing such services will not be required as a condition of receiving treatment services for substance abuse or any other services. Designated States are to establish a plan to carry out these provisions and are required to develop effective strategies for monitoring program compliance with this section.

As to both TB and HIV services, section 1924 of the PHS Act requires that the Block Grant be used for such services as "payor of last resort." Furthermore, for both HIB services (if a designated State) and TB services, the State is to maintain Statewide expenditures (rather than expenditures only through the principal agency) of non-Federal amounts for such services at a level that is not less than the average level of such expenditures maintained by the State for a 2-year period preceding the first fiscal year for which the State receives such a grant. The Secretary requires States to establish a reasonable funding base for fiscal year 1993 and use the defined base consistently in establishing future compliance with this section.

Revolving Funds for Establishment of Homes in Which Recovering Substance Abusers May Reside

45 CFR § 96.129 is added to implement requirements relating to the revolving funds for the establishment of homes in which recovering substance abusers may reside. These requirements, however, do not apply to any territory of the United States other than the Commonwealth of Puerto Rico.

Section 1925 of the PHS Act requires that the State establish and provide for the ongoing operation of a revolving fund for the purpose of making loans for the costs of establishing programs for the provision of housing in which individuals recovering from alcohol and drug abuse may reside in groups of not less than six individuals. Not less than $100,000 is to be available for the revolving fund and loans made from the revolving fund are not to exceed $4,000. The loans are to be repaid to the revolving fund not later than 2 years after the date on which the loan is made and each such loan is to be repaid by such residents through monthly installments by the date specified in the loan agreement involved. Such loans are made only to nonprofit private entities agreeing to a number of provisions including that, in the operation of the program established pursuant to the loan, the use of alcohol or any illegal drug in the housing provided by the program will be prohibited and the costs of the housing, including fees for rent and outlets, will be paid by the residents of the housing.

In addition, the Secretary has provided further requirements that States are to follow to ensure the integrity of the program and to place borrowers on notice of what is expected of them. The Secretary expects the State to (1) identify and clearly define legitimate purposes for which funds

will be spent; (2) establish reasonable criteria for selecting a fund management group, if the State plans to indirectly manage the fund; (3) set reasonable criteria in determining the eligibility of prospective borrowers; (4) establish a procedure and process for applying for a loan under the program; (5) provide clear written instructions to applicants concerning what is expected of them, such as timelines, required documentation, and notification of reasonable penalties and recourse for default; and (6) keep a written record of the number of loans and amount of loans provided, the identities of borrowers and the repayment history of each borrower. For instructional information on group homes, refer to *Self-Run, Self-Supported Houses for More effective Recovery from Alcohol and Drug Addiction*, DHHS Publication No. (ADM) 90–1678 (1990), which is available through the National Clearinghouse for Alcohol and Drug Information (NCADI).

Treatment Services for Pregnant Women

45 CFR 96.131 is added to implement regulations for treatment services for pregnant women as required by section 1927 of the PHS Act. Section 1927 requires the State to ensure that each pregnant woman in the State who seeks or is referred for and would benefit from such services is given preference in admissions to treatment facilities receiving funds pursuant to the grant. In carrying out this provision, the Secretary requires the State to ensure that the availability of treatment to pregnant women is publicized by public service announcements (radio/television), or street outreach programs.

In addition, the Secretary requires the State to ensure that entities that serve women and who are receiving such funds provide preference to pregnant women. The State shall require that programs which serve an injecting drug abuse population and who receive Block Grant funds shall give preference to treatment as follows: (i) pregnant injecting drug users; (ii) pregnant substance abusers; (iii) injecting drug users; and (iv) all others. The Secretary believes it is essential that pregnant women receive preferential treatment because of the added risk to the fetus of contracting HIV from the mother's use of injecting drugs.

The State is to also require that a facility which serves women refer pregnant women to the State if the treatment facility has insufficient capacity to provide treatment services to any such pregnant women who seeks the services from the facility. The Secretary proposes that this may be accomplished by establishing a toll-free number or other reasonable means to implement this provision.

The State is to then refer the pregnant woman to a treatment facility that has the capacity to provide treatment services to the pregnant woman or, if on treatment facility has the capacity to admit the pregnant woman, to make available interim services, as defined in § 96.121, to the pregnant woman not later than 48 hours after she seeks the treatment services. This means that the State is required to have a capacity tracking system which tracks all open treatment slots available to pregnant women in the State. Such a system must be continually updated to identify treatment capacity for any such pregnant woman. The State may wish to coordinate the capacity tracking system required under § 96.131 with the capacity tracking system required under § 96.126 for injecting drug abusers.

Procedures for the implementation of this section are to be developed in consultation with the State Medical Director for Substance Abuse Services. The State is also to develop effective strategies for monitoring program compliance with § 96.131.

Additional Agreements

45 CFR 96.132 is added to implement sections 1928 and 1943(b) of the PHS Act regarding additional requirements relating to substance abuse. With respect to individuals seeking treatment services, the State is required to improve (relative to fiscal year 1992) the process in the State for referring the individuals to treatment facilities that can provide to the individuals the treatment modality that is most appropriate for the individuals. The regulations provide examples of ways to implement this provision, including the utilization of a toll-free number for programs to report available capacity and waiting list data and/or the implementation of a capacity management/waiting list management system.

With respect to any facility for treatment services or prevention activities that is receiving amounts from a Block Grant, continuing education in such services or activities (or both, as the case may be) is to be made available to employees of the facility who provide the services or activities. The States are to require programs to include a provision in its funding agreement with the State concerning continuing education for employees of the facility.

The State is to coordinate prevention and treatment activities with the provision of other appropriate services (including health, social, correctional and criminal justice, education, vocational rehabilitation, and employment services). The regulations specify that the Secretary, in monitoring compliance with this section, will consider such factors as the existence of memoranda of understanding between various service providers or agencies and evidence that the State has included prevention and treatment service coordination in its grants and contracts. The Secretary believes that improving service coordination and integration of services is an important objective. It is particularly important in the area of substance abuse, because many of the individuals involved are either served by or need to receive services from a variety of systems. The Secretary is interested in receiving comments about additional ways that might be used to strengthen the service coordination provision. For example, should States be required to have an internal mechanism for monitoring service coordination, such as receiving reports from treatment programs that do not get cooperation from other service systems? Should preference be given to funding treatment programs that do make arrangements for service coordination?

Section 1928 of the PHS Act also provides for a waiver, at the request of the State, of any or all of the requirements established above but only if the Secretary determines that, with respect to services for the prevention and treatment of substance abuse, the requirement involved is unnecessary for maintaining quality in the provision of such services in the State. In determining whether to grant a waiver, the Secretary will rely on information drawn from the independent peer review/quality assurance activities conducted by the State and such other information as the Secretary deems necessary.

Finally, the State is required to have in effect a system to protect from inappropriate disclosure patient records maintained by the State in connection with an activity funded under the program involved or by any entity which is receiving amounts from the grant. The Secretary requires that the system is to include provisions for employee education on the confidentiality requirements and employees are to be informed of the fact that disciplinary action may occur upon inappropriate disclosures.

Submission to Secretary of Statewide Assessment of Needs

45 CFR § 96.133 is added to require a State to submit to the Secretary an assessment of the need in the State for authorized activities, both by locality

and by the State in general as required by section 1929 of the PHS Act. The assessment must include the incidence and prevalence in the State of drug abuse and the incidence and prevalence in the State of alcohol abuse and alcoholism. Setting-up information systems to obtain such data may take time and will likely require technical assistance from HHS. Therefore, in carrying out this provision, the Secretary requires the States to submit for fiscal years 1993 through 1996, its best available data on the incidence and prevalence of drug and alcohol abuse and alcoholism. The State is also to provide a summary describing the weaknesses and bias in the data and a description on how the State plans to strengthen the data in the future.

With regard to fiscal year 1997 and subsequent years, the Secretary is considering requiring the States to provide incidence and prevalence data which is supported by quantitative studies, using generally accepted methods of research. The State could determine the appropriate methodology to be used in gathering the information. The data, however, would have to be collected and reported by age, sex and race/ethnicity and at the State level and at sub-State level (as defined by the State). The data at a minimum would have to be collected and reported on five code substance abuse problems: marijuana (including hashish), cocaine (including Crack), hallucinogens (including PCP), heroin and alcohol. The Secretary is also considering requiring the use of common diagnostic criteria for dependence that characterize the cluster of cognitive, behavioral, and physiological symptoms that indicate the person has impaired control of substance abuse and continues use of the substance despite adverse consequences. The Secretary specifically requests comment on the barriers the State would face for fiscal year 1997 and subsequent years including the cost of such collection if these requirements were imposed. The Secretary seeks reasonable alternatives that are consistent with legislation and are cost effective.

Section 1929 of the PHS Act also requires the State to provide a detailed description of current prevention and treatment activities in the State. For fiscal year 1993, the State is required to provide its best available data on current prevention and treatment activities in the State in such detail as it finds reasonably practicable given its own data collection activities and records. For fiscal years 1994 and subsequent years, the Secretary requires that the report include a detailed description of the intended use of the funds relating to prevention and treatment, as well as a description of treatment capacity. As to primary prevention activities, the activities must be broken down by strategies used, such as those provided in section 96.125. The State must provide the following data, if available: the specific activities conducted; the specific risk factors being addressed by activity; the age, race/ethnicity and gender of the population being targeted by the prevention activity; and the community size and type where the activity is carried out. As to all treatment and prevention activities, including primary prevention, the State must provide the identities of the entities that provide the services and describe the services provided. The State is to submit information on treatment utilization to describe the type of care and the utilization according to primary diagnosis of alcohol or drug abuse, or a dual diagnosis of drug and alcohol abuse.

Section 1929 of the PHS Act requires the State to also describe in detail its efforts to improve substance abuse treatment and prevention activities. The Secretary requires that this report include the State's strategy to improve existing programs, as well as a description of the new programs created, activities taken to remove barriers, and actions taken to improve such activities.

Section 1929 of the PHS Act requires the State to submit a detailed description on the extent to which the availability of prevention and treatment activities is insufficient to meet the need for the activities, the interim services to be made available under sections 96.126 and 96.131, and the manner in which such services are to be so available. In carrying out this provision, the Secretary requires the State to submit documentation describing the results of the State's management information system pertaining to capacity and waiting lists, as well as a summary of such information for admissions and, when available, discharges. As to prevention activities, the report must include a description of the populations at risk, by risk factor, gender, age and ethnicity. Populations at risk include, among others, children of substance abusers, pregnant women, school dropouts, and homeless and run-away youth.

Maintenance of Effort regarding State Expenditures

45 CFR 96.134 is added to implement section 1930 of the PHS Act which requires the principal agency of the State to maintain aggregate State expenditures by the principal agency for authorized activities at a level that is not less than the average level of such expenditures maintained by the State for the two year period preceding the fiscal year for which the State is applying for the grant.

In addition to the maintenance of effort by the principal agency, the Secretary requires the States not to use the Block Grant to supplant State funding of substance abuse prevention and treatment programs. The Secretary believes it is essential in combating the war on drugs and other substances that the Block Grant be expended to increase services rather than using the funds to maintain the current level of such programs.

The Secretary may upon a request by the State, waive all or part of these requirements only if the Secretary determines that extraordinary economic conditions in the State justify the waiver. If a waiver is issued, it will be applicable only to the fiscal year involved. The Secretary defines "extraordinary economic conditions" as a financial crisis in which the total tax revenue declines at least one and one-half percent, and either unemployment increases by at least one percentage point, or employment declines by at least one and one-half percent. The Secretary seeks comments on this and other criteria.

In making a Block Grant to a State for a fiscal year, the Secretary must also make a determination of whether, for the previous fiscal year or years, the State maintained material compliance with all agreements made under this section. If the Secretary determines that a State has failed to maintain such compliance, the Secretary will reduce the amount of the allotment for the State for the fiscal year for which the grant is being made by an amount equal to the amount constituting such failure for the previous fiscal year.

To support the maintenance of effort requirement, States must provide the dollar amount reflecting the aggregate State expenditures by the principal agency for authorized activities for each of the two State fiscal years preceding the fiscal year for which the State is applying for the grant. The base must be calculated using Generally Accepted Accounting Principles and the composition of the base must be applied consistently from year to year.

Restrictions on Expenditure of Grant

45 CFR 96.135 is added to implement section 1931 of the PHS Act which requires that States not expend the Block Grant on a number of activities.

For example, a State is not to expend grant money for inpatient hospital substance abuse programs, except in the case that such treatment is a medical necessity for the individual involved, and the individual cannot be effectively treated in a community based, nonhospital, residential treatment program. If such circumstances occurs, section 1931 requires that the daily rate of payment provided to the hospital for providing the services cannot exceed the comparable daily rate provided by a residential treatment program.

In carrying out this section, the Secretary allows grant funds to be used for this purpose only if a physician makes a determination that: (1) The primary diagnosis of the individual is substance abuse and the physician certifies this fact; (2) the individual cannot be safely treated in a community-based, nonhospital, residential treatment program; (3) the service can reasonably be expected to improve an individual's condition or level of functioning; and (4) the hospital-based substance abuse program follows national standards of substance abuse professional practice. In addition, grant money may be expended for such services only to the extent that it is medically necessary, i.e., only for those days that the patient cannot be safely treated in a residential, community-based program.

Section 1931 of the PHS Act also provides that grant money may not be used to purchase or improve land, purchase, construct, or permanently improve (other than minor remodeling) any building or other facility, or purchase major medical equipment. The PHS Act provides, however, that the Secretary may grant a waiver to a requesting State of the restriction on expending a grant for the construction of a new facility or rehabilitation of an existing facility, but not for land acquisition.

The Secretary may approve a waiver only if (1) the State demonstrates to the Secretary that adequate treatment cannot be provided through the use of existing facilities and that alternative facilities in existing suitable buildings are not available; (2) the State has carefully designed a program that will minimize the costs of additional beds; and (3) the State agrees, with respect to the costs to be incurred by the State in carrying out the purpose of the waiver, to make available non-Federal contributions in cash toward such costs in an amount equal to not less than $1 for each $1 of Federal funds provided under section 1931. In granting a waiver, the Secretary will allow the use of a specified amount of funds to construct or rehabilitate a specified number of beds for residential treatment and a specified number of slots for outpatient treatment, based on reasonable estimates by the State of the costs of construction or rehabilitation. Section 96.135 sets out the information that is needed to request a waiver.

Numerous other restrictions on expenditures of the grant are provided by law including expenditures on activities (1) to satisfy any requirement for the expenditure of non-Federal funds as a condition for the receipt of Federal funds; (2) to provide financial assistance to any entity other than a public or nonprofit private entity; (3) to make payments to intended recipients of health services; and (4) to carry out any program prohibited by section 256(b) of the Health Omnibus Programs Extension of 1988 (42 U.S.C. 300ee–5), relating to the provision of hypodermic needles to injecting drug users.

The State is also to limit expenditures on certain activities. The State is not to expend more than 5 percent of the grant to pay the costs of administering the grant. The State is not to, in expending the grant for the purpose of providing treatment services in penal or correctional institutions of the State, expend more than an amount prescribed by section 1931(a)(3) of the PHS Act.

Independent Peer Review

45 CFR 96.136 is added which requires the State, for the fiscal year which the grant is provided, to provide for independent peer review to assess the quality, appropriateness, and efficacy of treatment services provided in the State to individuals under the program involved, and ensure that at least 5 percent of the entities providing services in the State under such program are reviewed.

The purpose of independent peer review is to review the quality and appropriateness of treatment services. The review is to focus on treatment programs and the substance abuse service system rather than on the individual practitioners. The intent of the independent peer review process is to continuously improve the treatment services to alcohol and drug abusers within the State system.

The regulations require the independent peer reviewers to be individuals with expertise in the field of alcohol and drug abuse treatment. Because treatment services may be provided by multiple disciplines, the individual peer reviewers must be representative of the various disciplines utilized, must be knowledgeable about the treatment settings and differences in treatment approaches, and must be sensitive to cultural and environmental issues that may influence the quality of the services provided.

As part of the independent peer review, the reviewers are required to review a representative sample of patient/client records to determine quality and appropriateness of treatment services, as well as admission criteria/intake process, assessments, treatment planning, documentation of implementation of treatment services, and discharge and continuing care planning.

The regulations also require the State to ensure that the peer review will not involve practitioners or providers reviewing their own programs, or programs in which they have administrative oversight, and ensure that there is a separation of peer review personnel from funding decisionmakers.

Direct Application for Grant by Indian Tribes

45 CFR 96.46(c) is amended to establish criteria prescribed by the Secretary as is required by section 1933(d)(3) of the PHS Act. It establishes criteria that Indian tribes or tribal organizations which are eligible for a direct grant must follow. Essentially, these entities must abide by all the statutory provisions and accompanying regulations except for the following provisions of the PHS Act: section 1923 which relates to provisions on intravenous substance abuse; section 1925 which provides for group homes for recovering substance abusers; section 1926 regarding State laws on the sale of tobacco products to minors; section 1928 regarding funding agreements for improving referrals, continuing education, and coordination of activities in the State; section 1929 regarding submission of Statewide assessment of needs; and section 1943(a)(1) relating to peer review of treatment programs.

The Department believes these provisions are too burdensome for Indian tribes and not really feasible. The Department believes, however, that it is essential that these entities expend the funds for purposes for which they are intended and any Indian tribe or tribal organization that is eligible for a direct grant will be subject to the technical review requirements of section 1945(g) and the audit requirements of section 1942 of the PHS Act.

45 CFR 96.46 (a) and (b) are also amended to reflect technical changes such as statutory citation changes.

Economic Impact

In crafting these regulations, the Secretary sought to minimize cost and

burden both to States and to service providers. The Secretary recognizes that there are a number of areas in which requirements are tougher compared to the predecessor Block Grant, either because of the statute or the Department's judgment as to what is needed for effective programs. In none of these areas, however, has the Secretary imposed any requirement which would increase cost drastically or unreasonably. Nor does the Secretary believe that a well run service program should have a major difficulty in meeting the new requirements. For example, an astutely designed outreach program can be operated effectively without incurring many additional hours of effort in most circumstances. However, the Secretary welcomes comment on cost or burden and will seek to eliminate any unnecessarily costly provisions in the final rule.

For these reasons, this rule does not have cost implications for the economy of $100 million or otherwise meet the criteria for a major rule under Executive Order 12291, and therefore does not require a regulation impact analysis. Further, these regulations will not have a significant impact on a substantial number of small entities, and therefore do not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980.

Paperwork Reduction Act

This proposed rule contains information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. The title, description, and respondent description applicable to the information collection requirements are shown below with an estimate of the annual reporting and record-keeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Substance Abuse Prevention and Treatment Block Grant.

Description: This action requires States to annually submit an application for allotments under a formula grant to the States.

Description of Respondents: State or local governments.

Section	Number of respondents	Number of responses per year	Number hours per response	Total hours
Reporting:				
Standard Form and Content:				
96.122(c)				
Annual Report:				
96.122(f)	60	1	152	9120
96.134(d)	60	1	16	960
State Plan:				
96.122(g)	60	1	162	9720
96.124(c)(1)	60	1	40	2400
96.127(b)	60	1	8	480
96.131(f)	60	1	8	480
96.133(a)	60	1	80	4800
Waivers:				
96.132(d)*	60	1	16	960
96.134(b)*	60	1	40	2400
96.135(d)*	60	1	8	480
Total	60	1	530	**31,800

Section	Number of recordkeepers	Number hours per respondent	Total hours
Recordkeeping Burden:			
96.129(a)(13)	60	16	960
Total	60	16	960
Combined Burden—45 CFR 96:		546	32,760

* For the purpose of calculating burden it has been assumed that all States could apply for each waiver.

The Department of Health and Human Services will submit a copy of this rule to OMB for its review of these information collection requirements. Organizations and individuals desiring to submit comments on the information collection requirements and the estimated burden should direct such comments to the agency official designated for this purpose whose name appears in this preamble, and to: SAMHSA Desk Officer, Allison Eydt, Office of Information and Regulatory Affairs, OMB, New Executive Office Building, room 3001, 725 17th St. NW., Washington, DC 20503. It should be noted that the standard application form which is required to be used beginning fiscal year 1994, the annual report, and all other paperwork required under the rule will not be effective until approved by OMB pursuant to the Paperwork Reduction Act.

List of Subjects in 45 CFR Part 96

Alcohol abuse, Alcoholism, Drug abuse, Confidentiality, Health records.

For the reasons set out in the preamble, 45 CFR part 96 is amended as set forth below.

Dated: March 10, 1993.

Approved March 24, 1993.

Audrey F. Manley,

Acting Assistant Secretary for Health.

Donna E. Shalala,

Secretary.

PART 96—BLOCK GRANTS

1. The authority citation for part 96 is revised to read as follows:

Authority: 42 U.S.C. 300w et seq.; 42 U.S.C. 300x et seq.; 42 U.S.C. 300y et seq.; 42 U.S.C. 701 et seq.; 42 U.S.C. 8621 et seq.; 42 U.S.C. 9901 et seq.; 42 U.S.C. 1397 et seq.; 31 U.S.C. 1243 note; unless otherwise noted.

2. Section 96.46 is revised to read as follows:

§ 96.46 Substance abuse prevention and treatment services.

(a) This section applies to direct funding of Indian tribes and tribal organizations under the substance abuse prevention and treatment Block Grant.

(b) For the purpose of determining eligible applicants under section 1933(d) of the Public Health Service Act (42 U.S.C. 300x–33(d)) an Indian tribe or tribal organization (as defined in subsections (b) and (c) of section 4 of the Indian Self-Determination and Education Assistance Act) that received a direct grant under subpart I of part B of title XIX of the PHS Act (as such existed prior to October 1, 1992) in fiscal year 1991 will be considered eligible for a grant under subpart 2 of part B of title XIX of the PHS Act.

(c) For purposes of the substance abuse prevention and treatment Block Grant, an Indian tribe or tribal organization is not required to comply with the following statutory provisions of the Public Health Service Act: 1923 (42 U.S.C. 300x–23), 1925 (42 U.S.C. 300x–25), 1926 (42 U.S.C. 300x–26), 1928 (42 U.S.C. 300x–28), 1929 (42 U.S.C. 300x–29), and 1943(a)(1) (42 U.S.C. 300x–53(a)(1)). An Indian tribe or tribal organization is to comply with all other statutes and regulations applicable to the Substance Abuse Prevention and Treatment Block Grant. In each case in which an Indian Tribe receives a direct grant, the State is also responsible for providing services to Native Americans under the State's Block Grant program.

3. Subpart L is revised to read as follows:

Subpart L—Substance Abuse Prevention and Treatment Block Grant

96.120 Scope.
96.121 Definitions.
96.122 Application content and procedures.
96.123 Assurances.
96.124 Certain allocations.
96.125 Primary prevention.
96.126 Capacity of treatment for intravenous substance abusers.
96.127 Requirements regarding tuberculosis.
96.128 Requirements regarding human immunodeficiency virus.
96.129 Revolving funds for establishment of homes in which recovering substance abusers may reside.
96.131 Treatment services for pregnant women.
96.132 Additional agreements.
96.133 Submission to Secretary of Statewide assessment of needs.
96.134 Maintenance of effort regarding State expenditures.
96.135 Restrictions on expenditure of grant.
96.136 Independent peer review.
96.137 Payment schedule.

Subpart L—Substance Abuse Prevention and Treatment Block Grant

Authority: 42 U.S.C. 300x–21 to 300x–35 and 300x–51 to 300x–64.

§ 96.120 Scope.

This subpart applies to the Substance Abuse Prevention and Treatment Block Grant administered by the Substance Abuse and Mental Health Services Administration. 45 C.F.R. Part 96, subparts A through F, are applicable to this subpart to the extent that those subparts are consistent with subpart L. To the extent subparts A through F are inconsistent with subpart L, the provisions of subpart L are applicable.

§ 96.121 Definitions.

Block Grant means the Substance Abuse Prevention and Treatment Block Grant, 42 U.S.C. 300x–21, *et seq.*

Early Intervention Services Relating to HIV means:

(1) appropriate pretest counseling for HIV and AIDS;

(2) testing individuals with respect to such disease, including tests to confirm the presence of the disease, tests to diagnose the extent of the deficiency in the immune system, and tests to provide information on appropriate therapeutic measures for preventing and treating the deterioration of the immune system and for preventing and treating conditions arising from the disease;

(3) appropriate post-test counseling; and

(4) providing the therapeutic measures described in Paragraph (2) of this definition.

Fiscal Year, unless provided otherwise, means the Federal fiscal year.

Interim Services or Interim Substance Abuse Services means services that are provided until an individual is admitted to a substance abuse treatment program. The purposes of the services are to reduce the adverse health effects of such abuse, promote the health of the individual, and reduce the risk of transmission of disease. At a minimum, interim services include counseling and education about HIV and tuberculosis (TB), about the risks of needle-sharing, the risks of transmission to sexual partners and infants, and about steps that can be taken to ensure that HIV and TB transmission does not occur, as well as referral for HIV or TB treatment services if necessary. For pregnant women, interim services also include counseling on the effects of alcohol and drug use on the fetus, as well as referral for prenatal care.

Primary Prevention Programs are those directed at individuals who have not been determined to require treatment for substance abuse. Such programs are aimed at educating and counseling individuals on such abuse and providing for activities to reduce the risk of such abuse.

Principal Agency is the single State agency responsible for planning, carrying out and evaluating activities to prevent and treat substance abuse and related activities.

Rural Area The definition of a rural area within a State shall be the latest definition of the Bureau of the Census, Department of Commerce.

Secretary is the Secretary of the United States Department of Health and Human Services or the Secretary's designee.

State, unless provided otherwise, includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, America Samoa, the Commonwealth of the Northern Mariana Islands, Palau, Micronesia, and the Marshall Islands.

State Medical Director for Substance Abuse Services is a licensed physician with the knowledge, skill and ability to address the multiple physical and psychological problems associated with substance abuse, and who provides the principle agency with clinical consultation and direction regarding effective substance abuse treatment, effective primary medical care, effective infection control and public health and quality assurance.

Substance Abuse is defined to include the abuse or illicit use of alcohol or other drugs.

Tuberculosis Services means:

(1) Counseling the individual with respect to tuberculosis;

(2) Testing to determine whether the individual has been infected with mycobacteria tuberculosis to determine the appropriate form of treatment for the individual; and

(3) Providing for or referring the individuals infected by mycobacteria tuberculosis for appropriate medical evaluation and treatment.

§ 96.122 Application content and procedures.

(a) For each fiscal year, beginning with fiscal year 1993, the State shall submit an application to such address as the Secretary determines is appropriate.

(b) For fiscal year 1993, applicants must submit an application containing information which conforms to the assurances listed under § 96.123, the report as provided in § 96.122(f), and the State plan as provided in § 96.122(g).

(c) Beginning fiscal year 1994, applicants shall only use standard application forms prescribed by the granting agency with the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. Applicants must follow all applicable instructions that bear OMB clearance numbers. The application will require the State to submit the assurances listed under § 96.123, the report as provided in § 96.122(f), and the State Plan as provided in § 96.122(g).

(d) The application (in substantial compliance with the statutory and regulatory provisions for the Block Grant) shall be submitted for fiscal year 1993 no later than ninety days after publication of these regulations, and, for subsequent years, no later than March 31 of the fiscal year for which the State is applying.

(e) The funding agreements and assurances in the application shall be made through certification by the State's chief executive officer personally, or by an individual authorized to make such certification on behalf of the chief executive officer. When a delegation has occurred, a copy of the current delegation of authority must be submitted with the application.

(f) A report shall be submitted annually with the application and State Plan. Among other things, the report must contain information as determined by the Secretary to be necessary to determine the purposes and the activities of the State, for which the Block Grant was expended. The report shall include (but is not limited to) the following:

(1) For the fiscal year three years prior to the fiscal year for which the State is applying for funds:

(i) A statement of whether the State exercised its discretion under applicable law to transfer Block Grant funds from substance abuse services to mental health services or vice versa, and a description of the transfers which were made;

(ii) A description of the progress made by the State in meeting the prevention and treatment goals, objectives and activities submitted in the application for the relevant year;

(iii) A description of the amounts expended under the Block Grant by the State agency, by activity;

(iv) A description of the amounts expended on primary prevention and early intervention activities (if reporting on fiscal years 1990, 1991, and 1992 only) and for primary prevention activities (if reporting on fiscal years 1993 and subsequent years);

(v) A description of the amounts expended for activities relating to substance abuse such as planning, coordination, needs assessment, quality assurance, training of counselors, program development, research and development and the development of information systems;

(vi) A description of the entities, their location, and the total amount the entity received from Block Grant funds with a description of the activities undertaken by the entity;

(vii) A description of the use of the State's revolving funds for establishment of group homes for recovering substance abusers, as provided by § 96.129, including the amount available in the fund throughout the fiscal year and the number and amount of loans made that fiscal year;

(viii) A detailed description of the State's programs for women and, in particular for pregnant women and women with dependent children, if reporting on fiscal years 1990, 1991, or 1992; and pregnant women or women with dependent children for fiscal year 1993 and subsequent fiscal years;

(ix) A detailed description of the State's programs for intravenous drug users; and

(x) For applications for fiscal year 1996 and subsequent fiscal years, a description of the State's expenditures for tuberculosis services and, if a designated State, early intervention services for HIV.

(2) For the most recent 12 month State expenditure period for which expenditure information is complete:

(i) A description of the amounts expended by the principal agency for substance abuse prevention and treatment activities, by activity and source of funds;

(ii) A description of substance abuse funding by other State agencies and offices, by activity and source of funds when available; and

(iii) A description of the types and amounts of substance abuse services purchased by the principal agency.

(3) For the fiscal year two years prior to the fiscal year for which the State is applying for funds:

(i) A description of the amounts obligated under the Block Grant by the principal agency, by activity;

(ii) A description of the amounts obligated for primary prevention and early intervention (if reporting on fiscal years 1990, 1991, and 1992 activities only) and primary prevention activities (if reporting on fiscal years 1993 and subsequent year activities);

(iii) A description of the entities to which Block Grant funds were obligated;

(iv) A description of the State's policies, procedures and laws regarding substance abuse prevention, especially the use of alcohol and tobacco products by minors;

(v) For applications for fiscal year 1995 and all subsequent fiscal years, a description of the State's procedures and activities undertaken to comply with the requirement to conduct independent peer review as provided by § 96.136;

(vi) For applications for fiscal year 1995 and all subsequent fiscal years, a description of the State's procedures and activities undertaken to comply with the requirement to develop capacity management and waiting list systems, as provided by §§ 96.126 and 96.131, as well as an evaluation summary of these activities; and

(vii) For applications for fiscal year 1955 and subsequent fiscal years, a description of the strategies used for monitoring program compliance with § 96.126(f), § 96.127(b), and § 96.131(f), as well as a description of the problems identified and the corrective actions taken.

(4) The aggregate State expenditures by the principle agency for authorized activities for the two State fiscal years preceding the fiscal year for which the State is applying for a grant, pursuant to § 96.134(d).

(5) For the previous fiscal year:

(i) A description of the State's progress in meeting the goals, objectives and activities included in the previous year's application, and a brief description of the recipients of the Block Grant funds;

(ii) A description of the methods used to calculate the following:

(A) The base for services to pregnant women and women with dependent children as required by § 96.124;

(B) The base for tuberculosis services as required for § 96.127; and

(C) For designated States, the base for HIV early intervention services as required by § 96.128;

(iii) For applications for fiscal years 1994 and 1995 only, a description of the State's progress in the development of protocols for and the implementation of

tuberculosis services, and, if a designated State, early intervention services for HIV; and

(iv) For applications for fiscal year 1994 only, a description of the States progress in the development, implementation, and utilization of capacity management and waiting list systems.

(6) [Reserved]

(7) In addition to the information above, any information that the Secretary may, from time to time, require, consistent with the Paperwork Reduction Act.

(g) For each fiscal year, beginning fiscal year 1993, the State Plan shall be submitted to the Secretary and shall include the following:

(1) For fiscal years 1993 and 1994, a statement on whether the Governor intends to exercise discretion under applicable law to transfer Block Grant funds from the Substance Abuse Prevention and Treatment Block Grant allotment under section 1921 of the PHS Act to the Community Mental Health Services Block Grant allotment under section 1911 of the PHS Act or vice versa and a description of the planned transfer;

(2) A budget of expenditures which provides an estimate of the use and distribution of Block Grant and other funds to be spent by the agency administering the Block Grant during the period covered by the application, by activity and source of funds;

(3) A description of how the State carries out planning, including how the State identifies substate areas with the greatest need, what process the State uses to facilitate public comment on the plan, and what criteria the State uses in deciding how to allocate Block Grant funds;

(4) A detailed description of the State procedures to monitor programs that reach 90% capacity pursuant to § 96.126(a);

(5) A detailed description of the State procedures to implement the 14/120 day requirement provided by § 96.126(b) as well as the interim services to be provided and a description of the strategies to be used in monitoring program compliance in accordance with § 96.126(f);

(6) A full description of the outreach efforts States will require entities which receive funds to provide pursuant to § 96.126(e);

(7) A detailed description of the State procedures implementing TB services pursuant to § 96.127, and a description of the strategies to be used in monitoring program compliance in accordance with § 96.127(b);

(8) A detailed description of the State's procedures implementing HIV services pursuant to § 96.128, if considered a designated State;

(9) A description of estimates of non-Federal dollars to be spent for early intervention services relating to HIV, if a designated State, and tuberculosis services for the fiscal year covered by the application, as well as the amounts actually spent for such services for the two previous fiscal years;

(10) For fiscal year 1993, a detailed description of the State's revolving fund for establishment of group homes for recovering substance abusers pursuant to § 96.129 and, for subsequent years, any revisions to the program;

(11) A detailed description of State procedures implementing § 96.131 relating to treatment services for pregnant women;

(12) Unless waived, a description on how the State will improve the process for referrals for treatment, will ensure that continuing education is provided, and will coordinate various activities and services as provided by § 96.132;

(13) Statewide assessment of needs as provided in § 96.133;

(14) The aggregate State dollar projected expenditures by the principal agency of a State for authorized activities for the fiscal year for which the Block Grant is to be expended, as well as the aggregate obligations or expenditures, when available, for authorized activities for the two years prior to such fiscal year as required by § 96.134;

(15) Unless waived, a description of the services and activities to be provided by the State with Block Grant funds consistent with § 96.124 for allocations to be spent on services to pregnant women and women with dependent children, alcohol and other drug treatment and prevention, including primary prevention, and any other requirement;

(16) A description of the State procedures to implement § 96.132(e) regarding inappropriate disclosure of patient records;

(17) A description of the amounts to be spent for primary prevention in accordance with § 96.125;

(18) A description of the amounts to be spent on activities relating to substance abuse such as planning coordination, needs assessment, quality assurance, training of counselors, program development, research and development and the development of information systems;

(19) A description of the State plans regarding purchasing substance abuse services;

(20) A description of how the State intends to monitor and evaluate the performance of substance abuse service providers in accordance with § 96.136;

(21) A description of the State's overall goals for Block Grant expenditures, specific objectives under each goal, and the activities the State will carry out to achieve these objectives; and

(22) Such other information as the Secretary may, from time to time, require, consistent with the Paperwork Reduction Act.

(h) The Secretary will approve an application which includes the assurances, the State plan and the report that satisfies the requirements of this part and the relevant sections of the PHS Act. As indicated above, the State is required to provide descriptions of the State's procedures to implement the provisions of the Act and the regulations. Unless provided otherwise by these regulations, the Secretary will approve procedures which are provided as examples in the regulations, or the State may submit other procedures which the Secretary determines to reasonably implement the requirements of the Act.

§ 96.123 Assurances.

(a) The application must include assurances that:

(1) the State will expend the Block Grant in accordance with the percentage to be allocated to treatment, prevention, and other activities as prescribed by law and, also, for the purposes prescribed by law;

(2) The activities relating to intravenous drug use pursuant to § 96.126 will be carried out;

(3) The TB services and referral will be carried out pursuant to § 96.127, as well as the early intervention services for HIV provided for in § 96.128, if a designated State;

(4) The revolving funds to establish group homes for recovering substance abusers is in place consistent with the provisions of § 96.129 and the loans will be made and used as provided for by law;

(5) [Reserved]

(6) Pregnant women are provided preference in admission to treatment centers as provided by § 96.131, and are provided interim services as necessary and as required by law;

(7) The State will improve the process in the State for referrals of individuals to the treatment modality that is most appropriate for the individuals, will ensure that continuing education is provided to employees of any funded entity providing prevention activities or treatment services, and will coordinate

prevention activities and treatment services with the provision of other appropriate services as provided by § 96.132;

(8) The State will submit an assessment of need as required by section 96.133;

(9) The State will for such year maintain aggregate State expenditures by the principal agency of a State for authorized activities at a level that is not less than the average level of such expenditures maintained by the State for the 2-year period preceding the fiscal year for which the State is applying for the grant as provided by § 96.134;

(10) The Block Grant will not be used to supplant State funding of alcohol and other drug prevention and treatment programs;

(11) For purposes of maintenance of effort pursuant to §§ 96.127(f), 96.128(f), and 96.134, the State will calculate the base using Generally Accepted Accounting Principles and the composition of the base will be applied consistently from year to year;

(12) The State will for the fiscal year for which the grant is provided comply with the restrictions on the expenditure of Block Grant funds as provided by § 96.135;

(13) The State will make the State Plan public within the State in such manner as to facilitate comment from any person (including any Federal or other public agency) during the development of the State Plan and after the submission of the State Plan (including any revisions) to the Secretary as provided by § 1941 of the PHS Act;

(14) The State will for the fiscal year for which the grant is provided, provide for independent peer review to assess the quality, appropriateness, and efficacy of treatment services provided in the State to individuals under the program involved as required by § 96.136;

(15) The State has in effect a system to protect from inappropriate disclosure patient records maintained by the State in connection with an entity which is receiving amounts from the grant;

(16) The State will comply with chapter 75 of title 31, United States Code, pertaining to audits; and

(17) The State will abide by all applicable Federal laws and regulations, including those relating to lobbying (45 CFR Part 93), drug-free workplace (45 CFR 76.600), discrimination (PHS Act Sec. 1947), false statements or failure to disclose certain events (PHS Act Sec. 1946), and, as to the State of Hawaii, services for Native Hawaiians (PHS Act Sec. 1953).

§ 96.124 Certain allocations.

(a) States are required to expend the Block Grant on various activities in certain proportions. Specifically, as to treatment and prevention, the State shall expend the grant as follows:

(1) not less than 35 percent for prevention and treatment activities regarding alcohol; and

(2) not less than 35 percent for prevention and treatment activities regarding other drugs.

(b) The States are also to expend the Block Grant on primary prevention programs as follows:

(1) Consistent with § 96.125, the State shall expend not less than 20 percent for programs for individuals who do not require treatment for substance abuse, which programs—

(i) educate and counsel the individuals on such abuse; and

(ii) provide for activities to reduce the risk of such abuse by the individuals;

(2) The State shall, in carrying out paragraph (b)(1) of this section—

(i) give priority to programs for populations that are at risk of developing a pattern of such abuse; and

(ii) ensure that programs receiving priority under paragraph (b)(2)(i) of this section develop community-based strategies for prevention of such abuse, including strategies to discourage the use of alcoholic beverages and tobacco products by individuals to whom it is unlawful to sell or distribute such beverages or products.

(c) Subject to paragraph (d) of this section, a State is required to expend the Block Grant on women services as follows:

(1) The State for fiscal year 1993 shall expend not less than five percent of the grant to increase (relative to fiscal year 1992) the availability of treatment services designed for pregnant women and women with dependent children (either by establishing new programs or expanding the capacity of existing programs). The base for fiscal year 1993 shall be an amount equal to the fiscal year 1992 alcohol and drug services Block Grant expenditures and State expenditures for pregnant women and women with dependent children as described in paragraph (e) of this section, and to this base shall be added at least 5 percent of the 1993 Block Grant allotment. The base shall be calculated using Generally Accepted Accounting Principles and the composition of the base shall be applied consistently from year to year. States shall report the methods used to calculate their base for fiscal year 1992 expenditures on treatment for pregnant women and women with dependent children.

(2) For fiscal year 1994, the State shall, consistent with paragraph (c)(1) of this section, expend not less than five percent of the grant to increase (relative to fiscal year 1993) the availability of such services to pregnant women and women with dependent children.

(3) For grants beyond fiscal year 1994, the States shall expend no less than an amount equal to the amount expended by the State for fiscal year 1994.

(d) Upon the request of a State, the Secretary may waive all or part of the requirement in paragraph (c) of this section if the Secretary determines that the State is providing an adequate level of services for this population. In determining whether an adequate level of services is being provided the Secretary will review the extent to which such individuals are receiving services. This determination may be supported by a combination of criminal justice data, the National Drug and Treatment Units Survey, statewide needs assessment data, waiting list data, welfare department data, including medicaid expenditures, or other State statistical data that are systematically collected. The Secretary will also consider the extent to which the State offers the minimum services required under § 96.124(e). The Secretary shall approve or deny a request for a waiver not later than 120 days after the date on which the request is made. Any waiver provided by the Secretary shall be applicable only to the fiscal year involved.

(e) With respect to paragraph (c) of this section, the amount set aside for such services shall be expended on individuals who have no other financial means of obtaining such services as provided in § 96.137. All programs providing such services will treat the family as a unit and therefore will admit both women and their children into treatment services, if appropriate. The State shall ensure that, at a minimum, treatment programs receiving funding for such services also provide or arrange for the provision of the following services to pregnant women and women with dependent children, including women who are attempting to regain custody of their children:

(1) primary medical care for women, including referral for prenatal care and, while the women are receiving such services, child care;

(2) primary pediatric care, including immunization, for their children;

(3) gender specific substance abuse treatment and other therapeutic interventions for women which may address issues of relationships, sexual and physical abuse and parenting, and

child care while the women are receiving these services;

(4) therapeutic interventions for children in custody of women in treatment which may, among other things, address their developmental needs, their issues of sexual and physical abuse, and neglect; and

(5) sufficient case management and transportation to ensure that women and their children have access to services provided by paragraphs (e) (1) through (4) of this section.

(f) Procedures for the implementation of paragraphs (c) and (e) of this section will be developed in consultation with the State Medical Director for Substance Abuse Services.

§ 96.125 Primary prevention.

(a) For purposes of § 96.124, each State/Territory shall develop and implement a comprehensive prevention program which includes a broad array of prevention strategies directed *at individuals not identified to be in need of treatment.* The comprehensive program shall be provided either directly or through one or more public or nonprofit private entities. The comprehensive primary prevention program shall include activities and services provided in a variety of settings for both the general population, as well as targeting sub-groups who are at high risk for substance abuse.

(b) In implementing the prevention program the State shall use a variety of strategies, as appropriate for each target group, including but not limited to the following:

(1) *Information Dissemination:* This strategy provides awareness and knowledge of the nature and extent of alcohol, tobacco and drug use, abuse and addiction and their effects on individuals, families and communities. It also provides knowledge and awareness of available prevention programs and services. Information dissemination is characterized by one-way communication from the source to the audience, with limited contact between the two. Examples of activities conducted and methods used for this strategy include (but are not limited to) the following:

(i) Clearinghouse/information resource center(s);
(ii) Resource directories;
(iii) Media campaigns;
(iv) Brochures;
(v) Radio/TV public service announcements;
(vi) Speaking engagements;
(vii) Health fairs/health promotion; and
(viii) Information lines.

(2) *Education:* This strategy involves two-way communication and is distinguished from the Information Dissemination strategy by the fact that interaction between the educator/facilitator and the participants is the basis of its activities. Activities under this strategy aim to affect critical life and social skills, including decision-making, refusal skills, critical analysis (e.g. of media messages) and systematic judgment abilities. Examples of activities conducted and methods used for this strategy include (but are not limited to) the following:

(i) Classroom and/or small group sessions (all ages);
(ii) Parenting and family management classes;
(iii) Peer leader/helper programs;
(iv) Education programs for youth groups; and
(v) Children of substance abusers groups.

(3) *Alternatives:* This strategy provides for the participation of target populations in activities that exclude alcohol, tobacco and other drug use. The assumption is that constructive and healthy activities offset the attraction to, or otherwise meet the needs usually filled by alcohol, tobacco and other drugs and would, therefore, minimize or obviate resort to the latter. Examples of activities conducted and methods used for this strategy include (but are not limited to) the following:

(i) Drug free dances and parties;
(ii) Youth/adult leadership activities;
(iii) Community drop-in centers; and
(iv) Community service activities.

(4) *Problem Identification and Referral:* This strategy aims at identification of those who have indulged in illegal/age-inappropriate use of tobacco or alcohol and those individuals who have indulged in the first use of illicit drugs in order to assess if their behavior can be reversed through education. It should be noted, however, that this strategy does not include any activity designed to determine if a person is in need of treatment. Examples of activities conducted and methods used for this strategy include (but are not limited to) the following:

(i) Employee assistance programs;
(ii) Student assistance programs; and
(iii) Driving while under the influence/driving while intoxicated education programs.

(5) *Community-Based Process:* This strategy aims to enhance the ability of the community to more effectively provide prevention and treatment services for alcohol, tobacco and drug abuse disorders. Activities in this strategy include organizing, planning, enhancing efficiency and effectiveness of services implementation, inter-agency collaboration, coalition building and networking. Examples of activities conducted and methods used for this strategy include (but are not limited to) the following:

(i) Community and volunteer training, e.g., neighborhood action training, training of key people in the system, staff/officials training;
(ii) Systematic planning;
(iii) Multi-agency coordination and collaboration;
(iv) Accessing services and funding; and
(v) Community team-building.

(6) *Environmental:* This strategy establishes or changes written and unwritten community standards, codes and attitudes, thereby influencing incidence and prevalence of the abuse of alcohol, tobacco and other drugs used in the general population. This strategy is divided into two subcategories to permit distinction between activities which center on legal and regulatory initiatives and those which relate to the service and action-oriented initiatives. Examples of activities conducted and methods used for this strategy shall include (but not be limited to) the following:

(i) promoting the establishment and review of alcohol, tobacco and drug use policies in schools;
(ii) technical assistance to communities to maximize local enforcement procedures governing availability and distribution of alcohol, tobacco and other drug use;
(iii) modifying alcohol and tobacco advertising practices; and
(iv) product pricing strategies.

§ 96.126 Capacity of treatment for intravenous substance abusers.

(a) In order to obtain Block Grant funds, the State must require programs that receive funding under the grant and that treat individuals for intravenous substance abuse to provide to the State, upon reaching 90 percent of its capacity to admit individuals to the program, a notification of that fact within seven days. In carrying out this section, the State shall establish a capacity management program which reasonably implements this section—that is, which enables any such program to readily report to the State when it reaches 90 percent of its capacity—and which ensures the maintenance of a continually updated record of all such reports and which makes excess capacity information available to such programs.

(b) In order to obtain Block Grant funds, the State shall ensure that each individual who requests and is in need

of treatment for intravenous drug abuse is admitted to a program of such treatment not later than—

(1) 14 days after making the request for admission to such a program; or

(2) 120 days after the date of such request, if no such program has the capacity to admit the individual on the date of such request and if interim services, including referral for prenatal care, are made available to the individual not later than 48 hours after such request.

(c) In carrying out subsection (b), the State shall establish a waiting list management program which provides systematic reporting of treatment demand. The State shall require that any program receiving funding from the grant, for the purposes of treating injecting drug abusers, establish a waiting list that includes a unique patient identifier for each injecting drug abuser seeking treatment including those receiving interim services, while awaiting admission to such treatment. For individuals who cannot be placed in comprehensive treatment within 14 days, the State shall ensure that the program provide such individuals interim services as defined in § 96.121 and ensure that the programs develop a mechanism for maintaining contact with the individuals awaiting admission. The States shall also ensure that the programs consult the capacity management system as provided in paragraph (a) of this section so that patients on waiting lists are admitted at the earliest possible time to a program providing such treatment within reasonable geographic area.

(d) In carrying out paragraph (b)(2) of this section the State shall ensure that all individuals who request treatment and who can not be placed in comprehensive treatment within 14 days, are enrolled in interim services and those who remain active on a waiting list in accordance with paragraph (c) of this section, are admitted to a treatment program within 120 days. If a person cannot be located for admission into treatment or, if a person refuses treatment, such persons may be taken off the waiting list and need not be provided treatment within 120 days. For example, if such persons request treatment later, and space is not available, they are to be provided interim services, placed on a waiting list and admitted to a treatment program within 120 days from the latter request.

(e) The State shall require that any entity that receives funding for treatment services for intravenous drug abuse carry out activities to encourage individuals in need of such treatment to undergo such treatment. The States shall require such entities to use outreach models that are scientifically sound, or if no such models are available which are applicable to the local situation, to use an approach which reasonably can be expected to be an effective outreach method. The model shall require that outreach efforts include the following:

(1) Selecting, training and supervising outreach workers;

(2) Contacting, communicating and following-up with high risk substance abusers, their associates, and neighborhood residents, within the constraints of Federal and State confidentiality requirements, including 42 C.F.R. Part 2;

(3) Promoting awareness among injecting drug abusers about the relationship between injecting drug abuse and communicable diseases such as HIV;

(4) Recommend steps that can be taken to ensure that HIV transmission does not occur; and

(5) Encouraging entry into treatment.

(f) The State shall develop effective strategies for monitoring programs compliance with this section. States shall report under the requirements of § 96.122(g) on the specific strategies to be used to identify compliance problems and corrective actions to be taken to address those problems.

§ 96.127 Requirements regarding tuberculosis.

(a) States shall require any entity receiving amounts from the grant for operating a program of treatment for substance abuse to follow procedures developed by the principal agency of a State for substance abuse, in consultation with the State Medical Director for Substance Abuse Services, and in cooperation with the State Department of Health/Tuberculosis Control Officer, which address how the program—

(1) Will, directly or through arrangements with other public or nonprofit private entities, routinely make available tuberculosis services as defined in § 96.121 to each individual receiving treatment for such abuse;

(2) In the case of an individual in need of such treatment who is denied admission to the program on the basis of the lack of the capacity of the program to admit the individual, will refer the individual to another provider of tuberculosis services; and

(3) Will implement infection control procedures established by the principal agency of a State for substance abuse, in cooperation with the State Department of Health/Tuberculosis Control Officer, which are designed to prevent the transmission of tuberculosis, including the following:

(i) Screening of patients;

(ii) Identification of those individuals who are at high risk of becoming infected; and

(iii) Meeting all State reporting requirements while adhering to Federal and State confidentiality requirements, including 42 CFR part 2; and

(4) will conduct case management activities to ensure that individuals receive such services.

(b) The State shall develop effective strategies for monitoring programs compliance with this section. States shall report under the requirements of § 96.122(g) on the specific strategies to be used to identify compliance problems and corrective actions to be taken to address those problems. The principal agency, in cooperation with the State Department of Health/Tuberculosis Control Officer, shall also establish linkages with other health care providers to ensure that tuberculosis services are routinely made available. All individuals identified with active tuberculosis shall be reported to the appropriate State official as required by law and consistent with paragraph (a)(3)(iii) of this section.

(c) With respect to services provided for by a State for purposes of compliance with this section, the State shall maintain Statewide expenditures of non-Federal amounts for such services at a level that is not less than an average level of such expenditures maintained by the State for the 2-year period preceding the first fiscal year for which the State receives such a grant. In making this determination, States shall establish a reasonable funding base for fiscal year 1993. The base shall be calculated using Generally Accepted Accounting Principles and the composition of the base shall be applied consistently from year to year.

§ 96.128 Requirements regarding human immunodeficiency virus.

(a) In the case of a designated State as described in paragraph (b) of this section, the State shall do the following—

(1) with respect to individuals undergoing treatment for substance abuse, the State shall, subject to paragraph (c) of this section, carry out one or more projects to make available to the individuals early intervention services for HIV disease as defined in § 96.121 at the sites at which the individuals are undergoing such treatment;

(2) for the purpose of providing such early intervention services through such

projects, the State shall make available from the grant the amounts prescribed by section 1924 of the PHS Act;

(3) the State shall, subject to paragraph (d) of this section, carry out such projects only in geographic areas of the State that have the greatest need for the projects;

(4) the State shall require programs participating in the project to establish linkages with a comprehensive community resource network of related health and social services organizations to ensure a wide-based knowledge of the availability of these services; and

(5) the State shall require any entity receiving amounts from the Block Grant for operating a substance abuse treatment program to follow procedures developed by the principal agency of a State for substance abuse, in consultation with the State Medical Director for Substance Abuse Services, and in cooperation with the State Department of Health/Communicable Disease Officer.

(b) For purposes of this section, a "designated State" is any State whose rate of cases of acquired immune deficiency syndrome is 10 or more such cases per 100,000 individuals (as indicated by the number of such cases reported to and confirmed by the Director of the Centers for Disease Control for the most recent calendar year for which the data are available).

(c) With respect to programs that provide treatment services for substance abuse, the State shall ensure that each such program participating in a project under paragraph (a) of this section will be a program that began operation prior to the fiscal year for which the State is applying to receive the grant. A program that so began operation may participate in a project under paragraph (a) of this section without regard to whether the program has been providing early intervention services for HIV disease.

(d) If the State plans to carry out 2 or more projects under paragraph (a) of this section, the State shall carry out one such project in a rural area of the State, unless the requirement is waived. The Secretary shall waive the requirement if the State certifies to the Secretary that:

(1) The rate of cases of acquired immune deficiency syndrome is less than or equal to two such cases per 100,000 individuals in any rural area of the State, or there are so few infected persons that establishing a project in the area is not reasonable; or

(2) There are no rural areas in the State as defined in § 96.121.

(e) With respect to the provision of early intervention services for HIV disease to an individual, the State shall ensure that the entities comply with § 96.137 regarding payment and § 96.135 regarding restrictions on expenditure of grant. The State shall also ensure that such services will be undertaken voluntarily by, and with the informed consent of, the individual, and undergoing such services will not be required as a condition of receiving treatment services for substance abuse or any other services.

(f) With respect to services provided for a State for purposes of compliance with this section, the State shall maintain Statewide expenditures of non-Federal amounts for such services at a level that is not less than the average level of such expenditures maintained by the State for 2-year period preceding the first fiscal year for which the State receives such a grant. In making this determination, States shall establish a reasonable base for fiscal year 1993. The base shall be calculated using Generally Accepted Accounting Principles and the composition of the base shall be applied consistently from year to year.

§ 96.129 Revolving funds for establishment of homes in which recovering substance abusers may reside.

(a) The State shall establish and provide for the ongoing operation of a revolving fund as follows:

(1) The purpose of the fund is to make loans for the costs of establishing programs for the provision of housing in which individuals recovering from alcohol and drug abuse may reside in groups of not less than six individuals;

(2) Not less than $100,000 will be available for the revolving fund;

(3) Loans made from the revolving fund do not exceed $4,000 and that each such loan is repaid to the revolving fund not later than 2 years after the date on which the loan is made;

(4) Each such loan is repaid by such residents through monthly installments by the date specified in the loan agreement involved;

(5) Such loans are made only to nonprofit private entities agreeing that, in the operation of the program established pursuant to the loan—

(i) The use of alcohol or any illegal drug in the housing provided by the program will be prohibited;

(ii) Any resident of the housing who violates such prohibition will be expelled from the housing;

(iii) The costs of the housing, including fees for rent and utilities, will be paid by the residents of the housing; and

(iv) The residents of the housing will, through a majority vote of the residents, otherwise establish policies governing residence in the housing, including the manner in which applications for residence in the housing are approved;

(6) States shall identify and clearly define legitimate purposes for which the funds will be spent, such as first month's rent, necessary furniture (e.g., beds), facility modifications (e.g., conversion of basement into a game room or extra bedrooms), and purchase of amenities which foster healthy group living (e.g., dishwasher);

(7) In managing the revolving fund, the State and the financial entity managing the fund for the State shall abide by all Federal, State and local laws and regulations;

(8) If the State decides to indirectly manage the fund using a private nonprofit entity as the fund management group, the State shall establish reasonable criteria for selecting the group, such as qualifications, expertise, experience, and capabilities of the group, and the State shall require that these entities abide by all Federal, State and local laws and regulations;

(9) The State may seek assistance to approve or deny applications from entities that meet State-established criteria;

(10) The State shall set reasonable criteria in determining the eligibility of prospective borrowers such as qualifications, expertise, capabilities, the acceptability of a proposed plan to use the funds and operate the house, and an assessment of the potential borrower's ability to pay back the funds;

(11) The State shall establish a procedure and process for applying for a loan under the program which may include completion of the application, personal interviews and submission of evidence to support eligibility requirements, as well as establish a written procedure for repayment which will set forth reasonable penalties for late or missed payments and liability and recourse for default;

(12) The State shall provide clearly defined written instructions to applicants which lays out timeliness, milestones, required documentation, notification of reasonable penalties for late or missed payments and recourse for default, notification on legitimate purposes for which the loan may be spent, and other procedures required by the State; and

(13) The State shall keep a written record of the number of loans and amount of loans provided, the identities of borrowers and the repayment history of each borrower and retain it for three years.

(b) The requirements established in paragraph (a) of this section shall not apply to any territory of the United

States other than the Commonwealth of Puerto Rico.

§ 96.131 Treatment services for pregnant women.

(a) The State is required to, in accordance with this section, ensure that each pregnant woman in the State who seeks or is referred for and would benefit from such services is given preference in admissions to treatment facilities receiving funds pursuant to the grant. In carrying out this section, the State shall require all entities that serve women and who receive such funds to provide preference to pregnant women. Programs which serve an injecting drug abuse population and who receive Block Grant funds shall give preference to treatment as follows:

(1) Pregnant injecting drug users;

(2) Pregnant substance abusers;

(3) Injecting drug users; and

(4) All others.

(b) The State will, in carrying out this provision publicize the availability to such women of services from the facilities and the fact that pregnant women receive such preference. This may be done by means of street outreach programs, ongoing public service announcements (radio/television), regular advertisements in local/regional print media, posters placed in targeted areas, and frequent notification of availability of such treatment distributed to the network of community based organizations, health care providers, and social service agencies.

(c) The State shall in carrying out paragraph (a) of this section require that, in the event that a treatment facility has insufficient capacity to provide treatment services to any such pregnant woman who seeks the services from the facility, the facility refer the woman to the State. This may be accomplished by establishing a capacity management program, utilizing a toll-free number, an automated reporting system and/or other mechanisms to ensure that pregnant women in need of such services are referred as appropriate. The State shall maintain a continually updated system to identify treatment capacity for any such pregnant women and will establish a mechanism for matching the women in need of such services with a treatment facility that has the capacity to treat the woman.

(d) The State, in the case of each pregnant woman for whom a referral under paragraph (a) of this section is made to the State—

(1) will refer the woman to a treatment facility that has the capacity to provide treatment services to the woman; or

(2) will, if no treatment facility has the capacity to admit the woman, make available interim services, including a referral for prenatal care, available to the woman not later than 48 hours after the woman seeks the treatment services.

(e) Procedures for the implementation of this section shall be developed in consultation with the State Medical Director for Substance Abuse Services.

(f) The State shall develop effective strategies for monitoring programs compliance with this section. States shall report under the requirements of § 96.122(g) on the specific strategies to be used to identify compliance problems and corrective actions to be taken to address those problems.

§ 96.132 Additional agreements.

(a) With respect to individuals seeking treatment services, the State is required to improve (relative to fiscal year 1992) the process in the State for referring the individuals to treatment facilities that can provide to the individuals the treatment modality that is most appropriate for the individuals. Examples of how this may be accomplished include the development and implementation of a capacity management/waiting list management system; the utilization of a toll-free number for programs to report available capacity and waiting list data; and the utilization of standardized assessment procedures that facilitate the referral process.

(b) With respect to any facility for treatment services or prevention activities that is receiving amounts from a Block Grant, continuing education in such services or activities (or both, as the case may be) shall be made available to employees of the facility who provide the services or activities. The States will ensure that such programs include a provision for continuing education for employees of the facility in its funding agreement.

(c) The State shall coordinate prevention and treatment activities with the provision of other appropriate services (including health, social, correctional and criminal justice, educational, vocational rehabilitation, and employment services). In evaluating compliance with this section, the Secretary will consider such factors as the existence of memoranda of understanding between various service providers/agencies and evidence that the State has included prevention and treatment services coordination in its grants and contracts.

(d) Upon the request of a State, the Secretary may provide to a State a waiver of any or all of the requirements established in paragraphs (a), (b) and (c) of this section, if the Secretary determines that, with respect to services for the prevention and treatment of substance abuse, the requirement involved is unnecessary for maintaining quality in the provision of such services in the State. In evaluating whether to grant or deny a waiver, the Secretary will rely on information drawn from the independent peer review/quality assurance activities conducted by the State. For example, a State may be eligible for a waiver of the requirement of paragraph (a) of this section if a State already has a well developed process for referring individuals to treatment facilities that can provide to the individuals the treatment modality that is most appropriate for the individuals. The Secretary will approve or deny a request for a waiver not later than 120 days after the date on which the request is made. Any waiver provided by the Secretary for paragraphs (a), (b) and (c) of this section, will be applicable only to the fiscal year involved.

(e) The State is also required to have in effect a system to protect from inappropriate disclosure patient records maintained by the State in connection with an activity funded under the program involved or by any entity which is receiving amounts from the grant and such system shall be in compliance with all applicable State and Federal laws and regulations, including 42 CFR part 2. This system shall include provisions for employee education on the confidentiality requirements and the fact that disciplinary action may occur upon inappropriate disclosures. This requirement cannot be waived.

§ 96.133 Submission to Secretary of Statewide assessment of needs.

(a) The State is required to submit to the Secretary an assessment of the need in the State for authorized activities, both by locality and by the State in general. The State is to provide a broad range of information which includes the following:

(1) The State is to submit data which shows the incidence and prevalence in the State of drug abuse and the incidence and prevalence in the State of alcohol abuse and alcoholism. For fiscal years 1993 through 1996, the State shall submit its best available data on the incidence and prevalence of drug and alcohol abuse and alcoholism. The State shall also provide a summary describing the weakness and bias in the data and a description on how the State plans to strengthen the data in the future.

(2) The State shall provide a description on current substance abuse prevention and treatment activities:

(i) For fiscal year 1993, the State shall provide its best available data on current prevention and treatment activities in the State in such detail as it finds reasonably practicable given its own data collection activities and records.

(ii) For fiscal year 1994 and subsequent years, the State shall provide a detailed description on current prevention and treatment activities in the State. This report shall include a detailed description of the intended use of the funds relating to prevention and treatment, as well as a description of treatment capacity. As to primary prevention activities, the activities must be broken down by strategies used, such as those provided in section 96.125, including the specific activities conducted. The State shall provide the following data if available: the specific risk factors being addressed by activity; the age, race/ethnicity and gender of the population being targeted by the prevention activity; and the community size and type where the activity is carried out. As to all treatment and prevention activities, including primary prevention, the State shall provide the identities of the entities that provide the services and describe the services provided. The State shall submit information on treatment utilization to describe the type of care and the utilization according to primary diagnosis of alcohol or drug abuse, or a dual diagnosis of drug and alcohol abuse.

(3) The State may describe the need for technical assistance to carry out Block Grant activities, including activities relating to the collection of incidence and prevalence data identified in paragraph (a)(1) of this section.

(4) The State shall establish goals and objectives for improving substance abuse treatment and prevention activities and shall report activities taken in support of these goals and objectives in its application.

(5) The State shall submit a detailed description on the extent to which the availability of prevention and treatment activities is insufficient to meet the need for the activities, the interim services to be made available under sections 96.126 and 96.131, and the manner in which such services are to be so available. Special attention should be provided to the following groups:

(i) Pregnant addicts;

(ii) Women who are addicted and who have dependent children;

(iii) Injecting drug addicts; and

(iv) Substance abusers infected with HIV or who have tuberculosis.

(6) Documentation describing the results of the State's management information system pertaining to capacity and waiting lists shall also be submitted, as well as a summary of such information for admissions and, when available, discharges. As to prevention activities, the report shall include a description of the populations at risk of becoming substance abusers.

§ 96.134 Maintenance of effort regarding State expenditures.

(a) With respect to the principal agency of a State for carrying out authorized activities, the agency shall for each fiscal year maintain aggregate State expenditures by the principal agency for authorized activities at a level that is not less than the average level of such expenditures maintained by the State for the two year period preceding the fiscal year for which the State is applying for the grant. The Block Grant shall not be used to supplant State funding of alcohol and other drug prevention and treatment programs.

(b) Upon the request of a State, the Secretary may waive all or part of the requirement established in paragraph (a) of this section if the Secretary determines that extraordinary economic conditions in the State justify the waiver. The State involved must submit information sufficient for the Secretary to make the determination, including the nature of the extraordinary economic circumstances, documented evidence and appropriate data to support the claim, and documentation on the year for which the State seeks the waiver. The Secretary will approve or deny a request for a waiver not later than 120 days after the date on which the request is made. Any waiver provided by the Secretary shall be applicable only to the fiscal year involved. "Extraordinary economic conditions" mean a financial crisis in which the total tax revenue declines at least one and one-half percent, and either unemployment increases by at least one percentage point, or employment declines by at least one and one-half percent.

(c) In making a Block Grant to a State for a fiscal year, the Secretary shall make a determination of whether, for the previous fiscal year or years, the State maintained material compliance with any agreement made under paragraph (a) of this section. If the Secretary determines that a State has failed to maintain such compliance, the Secretary shall reduce the amount of the allotment for the State for the fiscal year for which the grant is being made by an amount equal to the amount constituting such failure for the previous fiscal year.

(d) The Secretary may make a Block Grant for a fiscal year only if the State involved submits to the Secretary information sufficient for the Secretary to make the determination required in paragraph (a) of this section, which includes the dollar amount reflecting the aggregate State expenditures by the principal agency for authorized activities for the two State fiscal years preceding the fiscal year for which the State is applying for the grant. The base shall be calculated using Generally Accepted Accounting Principles and the composition of the base shall be applied consistently from year to year.

§ 96.135 Restrictions on expenditure of grant.

(a) The State shall not expend the Block Grant on the following activities:

(1) To provide inpatient hospital services, except as provided in paragraph (c) of this section;

(2) To make cash payments to intended recipients of health services;

(3) To purchase or improve land, purchase, construct, or permanently improve (other than minor remodeling) any building or other facility, or purchase major medical equipment;

(4) To satisfy any requirement for the expenditure of non-Federal funds as a condition for the receipt of Federal funds;

(5) To provide financial assistance to any entity other than a public or nonprofit private entity; or

(6) To provide individuals with hypodermic needles or syringes so that such individuals may use illegal drugs, unless the Surgeon General of the Public Health Service determines that a demonstration needle exchange program would be effective in reducing drug abuse and the risk that the public will become infected with the etiologic agent for AIDS.

(b) The State shall limit expenditures on the following:

(1) The State involved will not expend more than 5 percent of the grant to pay the costs of administering the grant; and

(2) The State will not, in expending the grant for the purpose of providing treatment services in penal or correctional institutions of the State, expend more than an amount prescribed by section 1931(a)(3) of the PHS Act.

(c) Exception regarding inpatient hospital services.

(1) With respect to compliance with the agreement made under paragraph (a) of this section, a State (acting through the Director of the principal agency) may expend a grant for inpatient

hospital-based substance abuse programs subject to the limitations of paragraph (c)(2) of this section only when it has been determined by a physician that:

(i) The primary diagnosis of the individual is substance abuse, and the physician certifies this fact;

(ii) The individual cannot be safely treated in a community-based, nonhospital, residential treatment program;

(iii) The Service can reasonably be expected to improve an individual's condition or level of functioning;

(iv) The hospital-based substance abuse program follows national standards of substance abuse professional practice; and

(2) In the case of an individual for whom a grant is expended to provide inpatient hospital services described above, the allowable expenditure shall conform to the following:

(i) The daily rate of payment provided to the hospital for providing the services to the individual will not exceed the comparable daily rate provided for community-based, nonhospital, residential programs of treatment for substance abuse; and

(ii) The grant may be expended for such services only to the extent that it is medically necessary, i.e., only for those days that the patient cannot be safely treated in a residential, community-based program.

(d) The Secretary may approve a waiver for construction under paragraph (a)(3) of this section within 120 days after the date of a request only if:

(1) The State demonstrates to the Secretary that adequate treatment cannot be provided through the use of existing facilities and that alternative facilities in existing suitable buildings are not available;

(2) The State has carefully designed a plan that minimizes the costs of renovation or construction;

(3) The State agrees, with respect to the costs to be incurred by the State in carrying out the purpose of the waiver, to make available non-Federal contributions in cash toward such costs in an amount equal to not less than $1 for each $1 of Federal funds provided under the Block Grant; and

(4) The State submits the following to support paragraphs (b)(1), (2) and (3), of this section:

(i) Documentation to support paragraph (d)(1) of this section, such as local needs assessments, waiting lists, survey data and other related information;

(ii) A brief description of the project to be funded, including the type(s) of services to be provided and the projected number of residential and/or outpatient clients to be served;

(iii) The specific amount of Block Grant funds to be used for this project;

(iv) The number of outpatient treatment slots planned or the number of residential beds planned, if applicable;

(v) The estimate of the total cost of the construction or rehabilitation (and a description of how these estimates were determined), based on an independent estimate of said cost, using standardized measures as determined by an appropriate State construction certifying authority;

(vi) An assurance by the State that all applicable National (e.g., National Fire Protection Association, Building Officials and Codes Administrators International), Federal (National Environmental Policy Act), State, and local standards for construction or rehabilitation of health care facilities will be complied with;

(vii) Documentation of the State's commitment to obligate these funds by the end of the first year in which the funds are available, and that such funds must be expended by the end of the second year (section 1914(a)(2) of the PHS Act);

(viii) A certification that there is public support for a waiver, as well as a description of the procedure used (and the results therein) to ensure adequate comment from the general public and the appropriate State and local health planning organizations, local governmental entities and public and private-sector service providers that may be impacted by the waiver request;

(ix) Evidence that a State is committed to using the proposed new or rehabilitated substance abuse facility for the purposes stated in the request for at least 20 years for new construction and at least 10 years for rehabilitated facilities;

(x) An assurance that, if the facility ceases to be used for such services, or if the facility is sold or transferred for a purpose inconsistent with the State's waiver request, monies will be returned to the Federal Government in an amount proportionate to the Federal assistance provided, as it relates to the value of the facility at the time services cease or the facility sold or transferred;

(xi) A description of the methods used to minimize the costs of the construction or rehabilitation, including documentation of the costs of the residential facilities in the local area or other appropriate equivalent sites in the State;

(xii) An assurance that the State shall comply with the matching requirements of paragraph (d)(3) of this section; and

(xiii) Any other information the Secretary may determine to be appropriate.

§ 96.136 Independent peer review.

(a) The State shall for the fiscal year for which the grant is provided, provide for independent peer review to assess the quality, appropriateness, and efficacy of treatment services provided in the State to individuals under the program involved, and ensure that at least 5 percent of the entities providing services in the State under such program are reviewed. The programs reviewed shall be representative of the total population of such entities.

(b) The purpose of independent peer review is to review the quality and appropriateness of treatment services. The review will focus on treatment programs and the substance abuse service system rather than on the individual practitioners. The intent of the independent peer review process is to continuously improve the treatment services to alcohol and drug abusers within the State system. "Quality," for purposes of this section, is the provision of treatment services which, within the constraints of technology, resources, and patient/client circumstances, will meet accepted standards and practices which will improve patient/client health and safety status in the context of recovery. "Appropriateness," for purposes of this section, means the provision of treatment services consistent with the individual's identified clinical needs and level of functioning.

(c) The independent peer reviewers shall be individuals with expertise in the field of alcohol and drug abuse treatment. Because treatment services may be provided by multiple disciplines, States will make every effort to ensure that individual peer reviewers are representative of the various disciplines utilized by the program under review. Individual peer reviewers must also be knowledgeable about the modality being reviewed and its underlying theoretical approach to addictions treatment, and must be sensitive to the cultural and environmental issues that may influence the quality of the services provided.

(d) As part of the independent peer review, the reviewers shall review a representative sample of patient/client records to determine quality and appropriateness of treatment services, while adhering to all Federal and State confidentiality requirements, including 42 CFR Part 2. The reviewers shall examine the following:

(1) Admission criteria/intake process;

(2) Assessments;

(3) Treatment planning, including appropriate referral, e.g., prenatal care and tuberculosis and HIV services;

(4) Documentation of implementation of treatment services;

(5) Discharge and continuing care planning; and

(6) Indications of treatment outcomes.

(e) The State shall ensure that the independent peer review will not involve practitioners/providers reviewing their own programs, or programs in which they have administrative oversight, and that there be a separation of peer review personnel from funding decisionmakers. In addition, the State shall ensure that independent peer review is not conducted as part of the licensing/certification process.

(f) The States shall develop procedures for the implementation of this section and such procedures shall be developed in consultation with the State Medical Director for Substance Abuse Services.

§ 96.137 Payment schedule.

(a) The Block Grant money that may be spent for §§ 96.124(c) and (e), 96.127 and 96.128 is governed by this section which ensures that the grant will be the "payment of last resort." The entities that receive funding under the Block Grant and provides services required by the above-referenced sections shall make every reasonable effort, including the establishment of systems for eligibility determination, billing, and collection, to:

(1) Collect reimbursement for the costs of providing such services to persons who are entitled to insurance benefits under the Social Security Act, including programs under title XVIII and title XIX, any State compensation program, any other public assistance program for medical expenses, any grant program, any private health insurance, or any other benefit program; and

(2) Secure from patients or clients payments for services in accordance with their ability to pay.

[FR Doc. 93-7513 Filed 3-30-93; 9:34 am]

BILLING CODE 4160-20-M

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H.R. 750/P.L. 103–10

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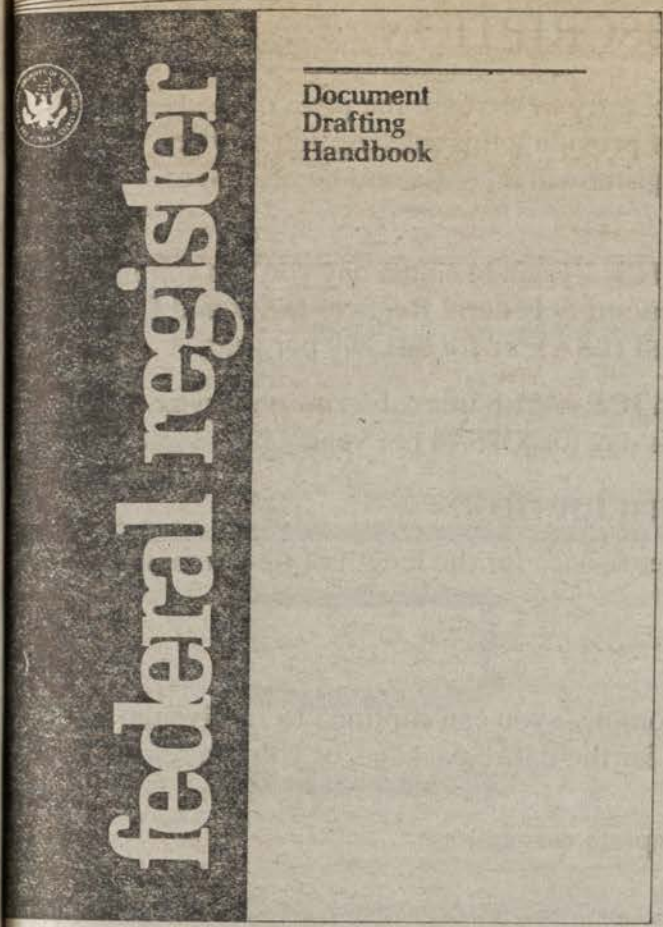

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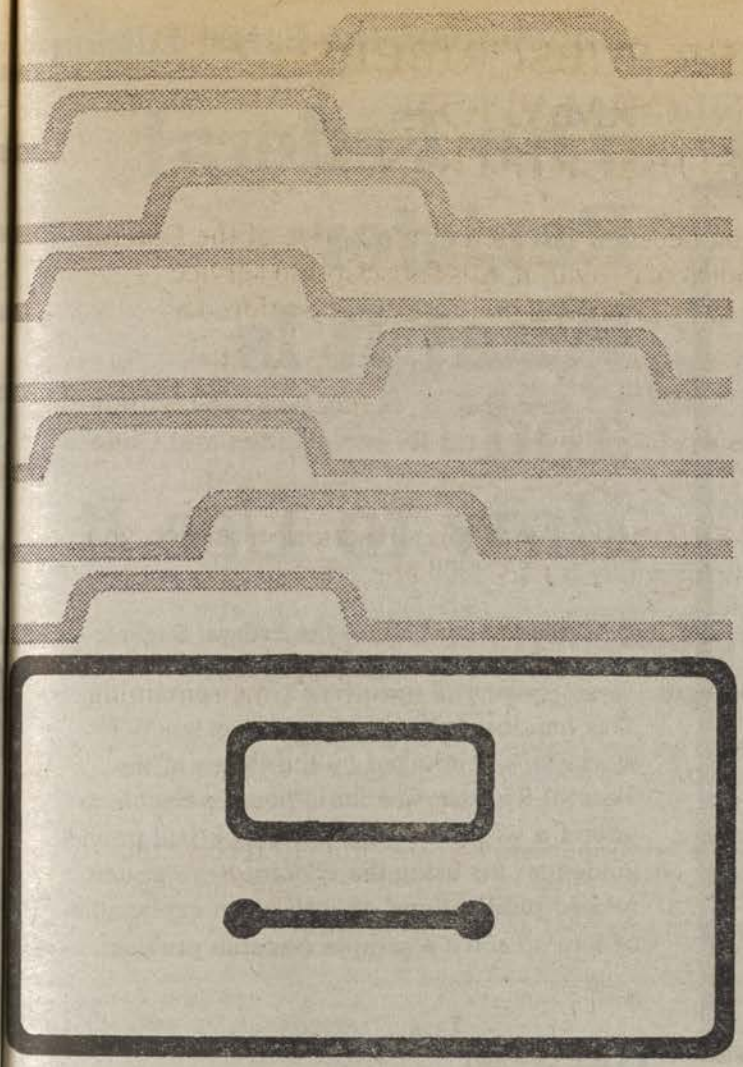

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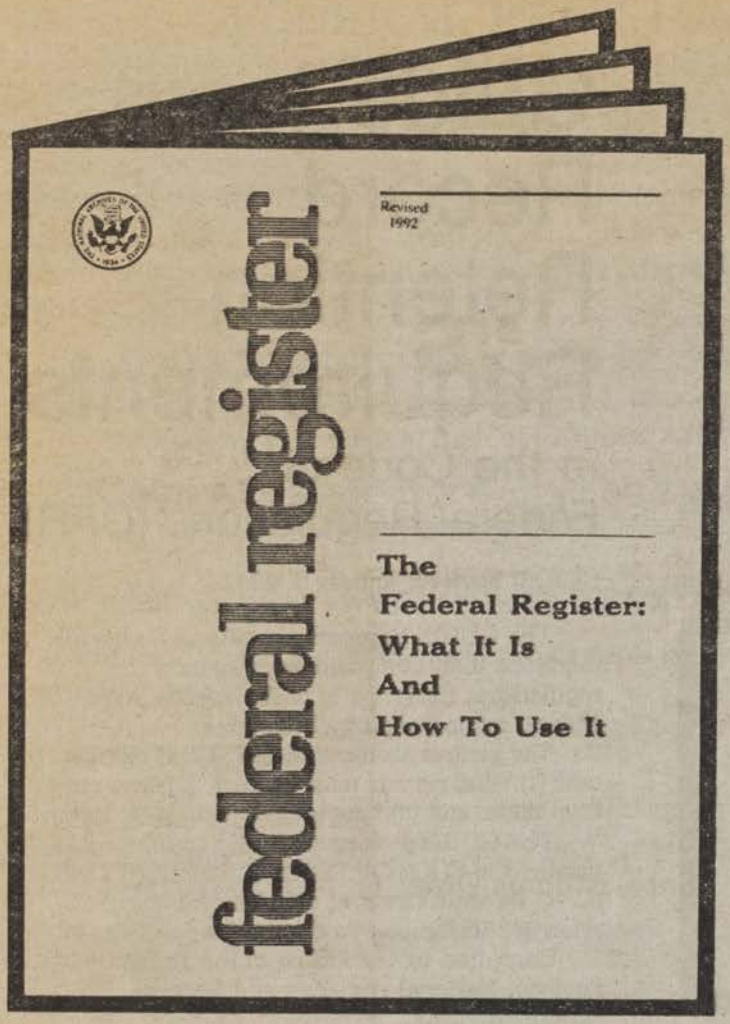

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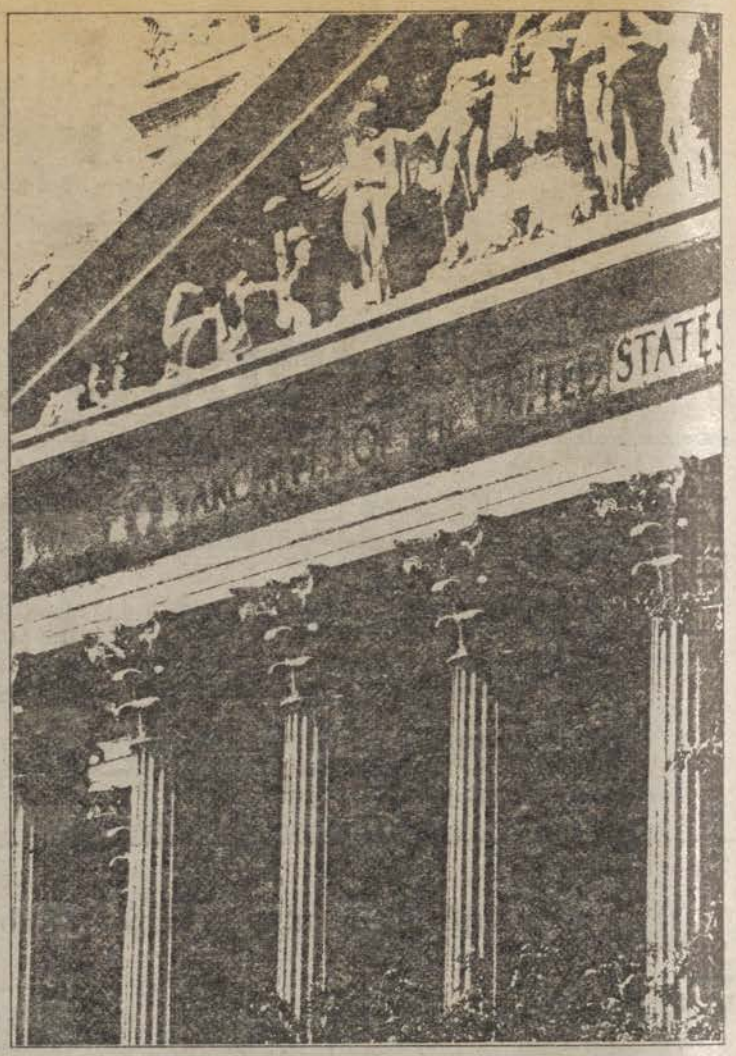

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