AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

1–6–94
Vol. 59 No. 4

federal register

Thursday
January 6, 1994

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)

1-6-94
Vol. 59 No. 4
Pages 653-946

federal register

Thursday
January 6, 1994

Briefings on How To Use the Federal Register
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FEDERAL REGISTER Published daily, Monday through Friday, (not published on Saturdays, Sundays, or on official holidays), by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

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WHO: The Office of the Federal Register.

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(TWO BRIEFINGS)

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Presidential Documents

Title 3—

The President

Memorandum of January 1, 1994

Determination Under the Bus Regulatory Reform Act of 1982

Memorandum for the Secretary of Transportation

Section 6 of the Bus Regulatory Reform Act of 1982 imposed a moratorium on the issuance of certificates or permits to motor carriers domiciled in, or owned or controlled by, persons of a contiguous foreign country. The Act authorized the President to remove the moratorium in whole or in part for any country or political subdivision thereof upon determining that such action is in the national interest. Sixty days' advance notice to the Congress is required whenever the removal or modification applies to a foreign contiguous country or political subdivision thereof that substantially prohibits the granting of motor carrier authority to persons from the United States.

As set forth in the Statement of Administrative Action regarding the North American Free Trade Agreement (NAFTA) that I submitted to the Congress on November 3, 1993, the moratorium with respect to Mexico will be lifted in phases to coincide with the schedule of liberalization in the relevant provisions of the NAFTA. The NAFTA specifically states that the moratorium will not apply to the provision of cross-border charter or tour bus services as of the date of entry into force of the Agreement.

This is to give public notice that, pursuant to section 6 of the Bus Regulatory Reform Act of 1982, 49 U.S.C. section 10922(*l*)(2)(A), on November 3, 1993, I gave the Congress notice of my intention to make a limited modification to the moratorium imposed by that section and all actions taken by my predecessors under that section on the issuance of certificates or permits to motor carriers domiciled in, or owned or controlled by, persons of Mexico. This modification will take effect on January 1, 1994, the 60th day after my notice to the Congress.

The moratorium is modified only to authorize the Interstate Commerce Commission to grant Mexican motor carriers authority to transport passengers in charter or tour bus operations, in foreign commerce, in round-trip or one-way service between Mexico and the United States.

This action applies only to international charter or tour bus operations, does not allow for point-to-point bus service within the United States, and does not authorize companies to conduct cross-border regular route bus service.

Effective January 1, 1994, the Interstate Commerce Commission will begin to accept and process expeditiously all applications for operating authority from Mexican owned, controlled, or domiciled charter and tour bus firms.

This determination shall be published in the **Federal Register**.

William J. Clinton

THE WHITE HOUSE,
Washington, January 1, 1994.

[FR Doc. 94–423
Filed 1–4–94; 4:46 pm]
Billing code 4910–62–M

Rules and Regulations

Federal Register
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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.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 201

[Docket No. 93–164–1]

Federal Seed Act Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Federal Seed Act regulations to remove the origin staining requirements for seed of alfalfa and red clover grown in Mexico and imported into the United States. The removal of the requirements is necessary to make the regulations conform to the amendment of the Federal Seed Act by the North American Free Trade Agreement Implementation Act. The effect of this action is to relieve a restriction on importation of alfalfa and red clover seed from Mexico.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Ms. Polly Lehtonen, Botanist, Biological Assessment and Taxonomic Support, Operational Support, Plant Protection and Quarantine, APHIS, USDA, room 626, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–8896.

SUPPLEMENTARY INFORMATION:

Background

We are amending the Federal Seed Act Regulations in 7 CFR part 201 (referred to below as the regulations) by removing the requirement that 10 percent of each container of alfalfa or red clover grown in Mexico be stained red.

On December 8, 1993, President Clinton signed the North American Free Trade Agreement (NAFTA), to become effective January 1, 1994. To implement this agreement, Congress passed the North American Free Trade Agreement Implementation Act (the Act) (Pub. L. 103–182). The statutory amendments included in the Act become effective coincident with NAFTA.

The amendment in this final rule is mandated by section 361(a) of the Act, which amended section 302(e)(1) of the Federal Seed Act (7 U.S.C. 1582(e)(1)) by providing that the provisions requiring certain seeds to be stained red shall not apply to alfalfa or red clover seed originating in Mexico. (See Pub. L. 103–182).

This final rule is being taken to conform the regulations with the amendments to the Act, by amending § 201.104 of the regulations to remove the origin staining requirements for seed of alfalfa and red clover grown in Mexico and imported into the United States.

Emergency Action

The Administrator of the Animal and Plant Health Inspection Service has determined that good cause exists to publish this final rule without prior notice and opportunity for public comment.

Certain regulatory actions must be taken as a result of the statutory amendments discussed in the "**Background,**" and must become effective with NAFTA to avoid inconsistency between the regulations and their statutory authority. Removal of the origin staining requirement for alfalfa and red clover seed imported from Mexico is one of the regulatory changes that must become effective at the same time as NAFTA and the Act to avoid this conflict.

This action relieves a restriction on the importation of alfalfa and red clover seed from Mexico. Since prior notice and other public procedures with respect to this final rule are impracticable, unnecessary, and contrary to the public interest, and since this regulatory change is mandated by Congress, there is good cause under 5 U.S.C. 553 for making this final rule effective as of January 1, 1994.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been reviewed under Executive Order 12866.

The Act, as amended, removes the requirement that alfalfa and red clover seed that is imported from Mexico be stained red. This final rule conforms the regulations to the Act. We have no record of any alfalfa or red clover having been imported from Mexico in the past 5 years, and we anticipate no importations in the foreseeable future.

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

Executive Order 12278

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 201

Advertising, Agricultural commodities, Imports, Labeling, Reporting and recordkeeping requirements, Seeds, Vegetables.

Accordingly, 7 CFR part 201 is amended as follows:

PART 201—FEDERAL SEED ACT REGULATIONS

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

Authority: 7 U.S.C. 1582.

2. In § 201.104, paragraph (a) is revised to read as follows:

§ 201.104 Staining of imported seed.

(a) 10 percent of the seed in each container of the seed of alfalfa or red clover grown in any foreign country other than the countries of South America, Canada, and Mexico shall be stained red.

* * * * *

Done in Washington, DC, this 30th day of December 1993.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 94–201 Filed 1–5–94; 8:45 am]

BILLING CODE 3410–34–P

7 CFR Part 322

[Docket No. 93-163-1]

Honeybees and Honeybee Semen

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending a footnote in the honeybee and honeybee semen regulations that quotes the Honeybee Act, in order to conform the footnote to the Honeybee Act, as amended by the North American Free Trade Agreement Implementation Act.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Dr. Matthew H. Royer, Chief Operations Officer, Biological Assessment and Taxonomic Support, Operational Support, Plant Protection and Quarantine, APHIS, USDA, room 626, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-8896.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR part 322 (referred to below as the regulations) govern the importation into the United States of honeybees and honeybee semen. These regulations were established pursuant to the Honeybee Act (7 U.S.C. 281 et seq.) The Honeybee Act was designed to prevent the movement into the § United States of diseases and parasites harmful to honeybees. In addition, the Honeybee Act was designed to prevent the movement into the United States of undesirable species or subspecies of honeybees.

Section 322.1 of the regulations contains a footnote that includes the criteria set forth in the Honeybee Act for determining which countries may be listed in the regulations as countries from which honeybees or honeybee semen may be imported into the United States. In this rule, we are amending that footnote to reflect amendments to the Honeybee Act made by section 361(d)(2) of the North American Free Trade Agreement Implementation Act.

On December 8, 1993, President Clinton signed the North American Free Trade Agreement (NAFTA), to become effective January 1, 1994. To implement this agreement, Congress passed the North American Free Trade Agreement Implementation Act (the Act) (Pub. L. 103-182). The statutory amendments included in the Act become effective coincident with NAFTA.

Section 361(d)(2) of the Act amended subsections (a) and (b) of the Honeybee Act by providing the following: (1) That honeybees may be imported from Canada or Mexico, subject to such terms as the Secretary of Agriculture determines appropriate, if the Secretary determines that the region of Canada or Mexico from which the honeybees originated is, and is likely to remain, free of diseases or parasites harmful to honeybees, and undesirable species or subspecies of honeybees; and (2) that honeybee semen may be imported from Canada or Mexico, if the Secretary of Agriculture determines that the region of Canada or Mexico from which the imports originate is, and is likely to remain, free of undesirable species or subspecies of honeybees. (See Pub. L. 103-182; 107 Stat. 2057).

This rule is being published to conform a footnote in the regulations with the Act, as amended.

Emergency Action

The Administrator of the Animal and Plant Health Inspection Service has determined that good cause exists to publish this final rule without prior notice and opportunity for public comment.

Since prior notice and other public procedures with respect to this final rule are impracticable, unnecessary, and contrary to the public interest, and since this regulatory change is mandated by Congress, there is good cause under 5 U.S.C. 553 for making this final rule effective as of January 1, 1994.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been reviewed under Executive Order 12866.

This rule amends a footnote in the regulations that quotes the Act, in order to conform the footnote to the Act, as amended by the North American Free Trade Agreement Implementation Act.

The amendments to the regulations will have no practical impact on importations of honeybees and honeybee semen from Canada or Mexico since it merely quotes the Act. Furthermore, such importations are already allowed from any part of Canada. Currently, the only regular movement of honeybees from Canada to the United States is a relatively insignificant movement from the Maritime Provinces of Canada to northern New England. We anticipate that the amendments will have little practical impact with regard to importations from Mexico. Sufficient numbers of honeybees are already available in the United States to make it unnecessary to import honeybees or honeybee semen from Mexico.

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

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 322

Bees, Honey, Imports, Quarantine, Transportation.

Accordingly 7 CFR part 322 is amended as follows:

PART 322—HONEYBEES AND HONEYBEE SEMEN

1. The authority citation for part 322 is revised to read as follows:

Authority: 7 U.S.C. 281; 7 CFR 2.17, 2.51, and 371.2(c).

2. In § 322.1, footnote 1 is revised to read as follows:

§ 322.1 Importation of honeybees and honeybee semen.[1]

* * * * *

[1] The criteria for determining which countries may be listed in this part as countries from which honeybees or honeybee semen may be imported into the United States are set forth in 7 U.S.C. 282. In this regard, 7 U.S.C. provides in relevant part, that:

(a) In order to prevent the introduction and spread of diseases and parasites harmful to honeybees, and the introduction of genetically undesirable germ plasm of honeybees, the importation into the United States of all honeybees is prohibited, except that honeybees may be imported into the United States—

(1) By the United States Department of Agriculture for experimental or scientific purposes;

(2) From countries determined by the Secretary of Agriculture—

(A) To be free of diseases or parasites harmful to honeybees, and undesirable species or subspecies of honeybees; and

(B) To have in operation precautions adequate to prevent the importation of honeybees from other countries where harmful diseases or parasites, or undesirable species or subspecies, of honeybees exist; or

(3) From Canada or Mexico, subject to such terms and conditions as the Secretary of Agriculture determines appropriate, if the Secretary determines that the region of Canada or Mexico from which the honeybees originated is, and is likely to remain, free of diseases or parasites harmful to honeybees, and undesirable species or subspecies of honeybees.

Done in Washington, DC, this 30th day of December, 1993.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 94–200 Filed 1–5–94; 8:45 am]

BILLING CODE 3410–34–P

Rural Electrification Administration

7 CFR Part 1773

RIN 0572–AA93

Policy on Audits of REA Borrowers

AGENCY: Rural Electrification Administration, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises and clarifies a provision of the current regulation which requires a certified public accountant (CPA) to state whether an electric borrower has complied with certain provisions of its loan and security instruments. This final rule also incorporates the illustrative management letter issued by the American Institute of Certified Public Accountants in a Technical Practice Aid dated November 11, 1992.

DATES: This rule is effective February 7, 1994. This rule applies to audits prepared as of December 31, 1993, and thereafter.

FOR FURTHER INFORMATION CONTACT: Ms. Roberta E. Detwiler, Chief, Technical Accounting and Auditing Staff, Borrower Accounting Division, Rural Electrification Administration, room 2222, South Building, U.S. Department of Agriculture, Washington, DC 20250, telephone number (202) 720–5227.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final rule is issued in conformance with Executive Order 12866.

Regulatory Flexibility Act Certification

The Administrator, REA, has determined that the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) does not apply to this final rule.

Information Collection and Recordkeeping Requirements

In compliance with the Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implements the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and section 3504 of that Act, the information collection and recordkeeping requirements have been approved by the Office of Management and Budget (OMB) under control number 0572–0095. Comments regarding these requirements may be sent to the United States Department of Agriculture, Clearance Office, OIRM, room 404–W, Washington, DC 20250 or to the Office of Management and Budget, Office of Information and Regulatory Affairs, room 3201, Washington, DC 20503.

National Environmental Policy Act Certification

The Administrator, REA, has determined that this final rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Catalog of Federal Domestic Assistance

The program described by this final rule is listed in the Catalog of Federal Domestic Assistance Programs under number 10.850—Rural Electrification Loans and Loan Guarantees. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402.

Executive Order 12372

This final rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation. A Notice of Final Rule entitled Department Programs and Activities Excluded from Executive Order 12372 (50 FR 47034) exempts REA and Rural Telephone Bank (RTB) loans and loan guarantees, and RTB bank loans, to governmental and nongovernmental entities from coverage under this Order.

Executive Order 12778

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This final rule:

(1) Will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule;

(2) Will not have any retroactive effect; and

(3) Will not require administrative proceeding before parties may file suit challenging the provisions of this rule.

Background

On December 3, 1991, REA published a final rule on part 1773, at 56 FR 63354, concerning audits of REA borrowers. Part 1773 implements the standard REA security instrument provision requiring REA borrowers to prepare and furnish to REA, at least once during each 12-month period, a full and complete report of its financial condition, operations, and cash flows, in form and substance satisfactory to REA, audited and certified by an independent CPA, satisfactory to REA, and accompanied by a report of such audit, in form and substance satisfactory to REA. A report of the audit was defined in § 1773.1 to include the auditor's report, report on compliance, report on internal controls and management letter.

The management letter is prepared by the CPA and addresses specific internal control, compliance, and other program issues not typically addressed in the standard auditor's report, report on internal controls, or report on compliance. The requirements for preparing a management letter are set forth in § 1773.34, Management Letter. This final rule revises and clarifies § 1773.34(e). Section 1773.34 (e)(1)(i) for electric borrowers and § 1773.34 (e)(2)(i) for telephone borrowers requires CPAs to test compliance with the loan and security instrument provision requiring borrowers to maintain insurance. REA is currently reviewing its insurance requirements to determine if these requirements are representative of current industry standards. Therefore, until such time as REA's review is completed and revisions, if any, to current policies are finalized, CPAs will not be required to test for compliance with the mortgage provision relating to insurance.

Section 1773.34(e)(1)(ii) for electric borrowers and § 1773.34(e)(2)(iii) for telephone borrowers requires CPAs to test for compliance with the loan and security instrument provision requiring funds to be deposited in banks or other depositories designated in the loan documents or approved by REA. Because of the many and varied investing activities available in today's economy, CPAs have questioned the definition of funds and what, if any, investments are affected. This final rule provides a definition of funds for purposes of applying this part 1773.

Section 1773.34(e)(1)(iv) for electric borrowers and § 1773.34(e)(2)(iv) for telephone borrowers requires CPAs to

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(b) Honeybee semen may be imported into the United States only from:

(1) Countries determines by the Secretary of Agriculture to be free of undesirable species or subspecies of honeybees, and which have in operation precautions adequate to prevent the importation of such undesirable honeybees and their semen; or

(2) Canada or Mexico, if the Secretary of Agriculture determines that the region of Canada or Mexico from which the imports originate is, and is likely to remain, free of undesirable species or subspecies of honeybees.

review the financial and statistical report and state whether the information presented is in agreement with the borrower's records. CPAs have questioned whether they are required to review a certified copy of the report obtained directly from REA or whether they may review a copy represented by the borrower as having been submitted to REA. This final rule clarifies REA's requirement for CPAs to review a copy of the financial and statistical report represented by the borrower as having been submitted to REA.

Section 1773.34(e)(1)(iii) for electric borrowers and § 1773.34(e)(2)(ii) for telephone borrowers requires the CPA to state whether an REA borrower has complied with the provision of its loan and security instrument that requires a borrower to obtain written approval of mortgagees to enter into any contract for the operation or maintenance of all or any part of its property, or for the use of its property by others. This requirement clearly goes beyond the scope of government auditing standards because it requires all contracts, even those that have little or no impact on financial statement amounts, to be reviewed by the CPA for REA approval. This testing has, during the effective period of part 1773, translated into increased audit fees. To minimize the cost impact to REA borrowers yet provide REA the assurance it requires, this final rule details the contracts that must be reviewed by CPAs.

This final rule also incorporates the illustrative management letter, as amended by these part 1773 revisions, issued by the American Institute of Certified Public Accountants in a Technical Practice Aid dated November 11, 1992. The illustrative letter properly addresses the management letter requirements set forth in 7 CFR 1773.34 and includes specific language to ensure compliance with the promulgated auditing literature. As such, REA believes it is more informative than the sample management letter previously provided in appendix C to part 1773.

Due to a procedural change within REA that will more efficiently process and review audit reports submitted by REA borrowers, this final rule also amends § 1773.3, § 1773.20, and § 1773.21 to require borrowers to submit to REA an additional copy of the audit, report on compliance, report on internal controls, and management letter and revises § 1773.21 to require the submission of an additional copy of borrowers' plans for corrective action.

Comments

A proposed rule entitled Policy on Audits of REA Borrowers, published September 23, 1993, at 58 FR 49442, invited interested parties to submit comments on or before November 22, 1993. Comments were received from the National Rural Electric Cooperative Association (NRECA) and two certified public accounting firms. The comments submitted by NRECA were based upon an analysis performed by the Accounting & Depreciation Committee, a subcommittee of the Generation and Transmission Managers Association Technical Advisory Committee, and were considered and concurred in by the NRECA Accounting and Tax Committee.

One accounting firm agreed with the proposed revisions in all respects. The other commenters agreed with the proposed revisions; however, proffered additional revisions. The following paragraphs address the additional revisions proposed by the commenters.

Comment. Sections 1773.40 and 1773.45 state that the certified public accountant's (CPA) workpapers must document whether all regulatory assets and liabilities comply with the requirements of Statement of Financial Accounting Standards No. 71, Accounting for the Effects of Certain Types of Regulation, and have received REA approval. REA telephone borrowers that comply with generally accepted accounting principles as required by part 32 of the Federal Communications Commission's Rules and Regulations, Uniform System of Accounts for Telecommunications Companies, are not required to obtain specific REA approval of regulatory assets and liabilities. Only REA electric borrowers must seek such approval. Sections 1773.40 and 1773.45 should be amended to specify that REA approval of regulatory assets and liabilities must only be documented for REA electric borrowers.

Response. REA agrees with the comment and has revised § 1773.40 and § 1773.45 accordingly.

Comment. Section 1773.9(c) states that pursuant to the terms of its audit agreement with the borrower, the CPA must immediately report, in writing, all irregularities and all indications or instances of illegal acts, whether material or not to: (1) The president of the borrower's board of directors; (2) the Director, Borrowers Accounting Division; and (3) the Office of Inspector General. This requirement goes beyond that of generally accepted government auditing standards (GAGAS) which limits reporting requirements for irregularities to material instances and instances that cumulatively could have a material effect on the financial statements. GAGAS further limits the reporting of illegal acts to only the top official of the entity arranging for the audit. REA should modify the requirements set forth in § 1773.9(c) to correspond with the GAGAS requirements.

Response. REA recognizes that certain procedures set forth in part 1773 exceed the requirements of a GAGAS audit and REA has acknowledged that fact in the rule. The Office of Inspector General, in Departmental Regulation No. 1700–1, Basic OIG Investigation/Audit Organization and Procedures, sets forth certain requirements that all Federal agencies within USDA must impose upon nonFederal auditors. One of these requirements is that all irregularities or illegal acts, regardless of materiality, discovered by nonFederal auditors be reported to the Federal agency requiring the audit and to OIG for appropriate action. For this reason, no revisions were made in the final rule.

Comment. Section 1773.6(a)(2) states that "The borrower and CPA acknowledge that REA regulations provide that if the borrower fails to have an audit performed and documented in compliance with GAGAS and this part, the borrower is in violation of its security instrument with REA". This language exceeds the applicable mortgage covenant and the following language should be substituted: "The borrower and CPA acknowledge that REA will consider the borrower to be in violation of its security instrument with REA if the borrower fails to have an audit performed and documented in compliance with GAGAS and 7 CFR part 1773. This acknowledgement shall not be considered a contractual admission against interest by either the borrower or the CPA."

Response. REA's proposed rule published on September 23, 1993, did not include revisions to § 1773.6(a)(2). Therefore, comments on this section went beyond the scope of the proposal. REA is planning a separate rulemaking procedures that will include changes in § 1773.6(a)(2) and REA will be soliciting comments at that time.

Comment. Certain disclosure and reporting requirements contained in § 1773.34 should include some consideration of materiality. The concept of materiality is inherent in all audits. Strict compliance with the existing policy has, however, resulted in reporting of immaterial items of non-compliance.

Response. As previously discussed, REA recognizes that certain procedures set forth in part 1773 exceed the requirements of a GAGAS audit and REA has acknowledged that fact in the rule. Section 1773.34 sets forth REA's

requirement that the CPA must prepare a management letter and establishes the testing and reporting requirements for the management letter.

Section 1773.34(e) sets forth certain provisions of REA's security instrument that REA has determined are essential to the security of its loans. CPAs auditing REA borrowers are, therefore, required to test for compliance with the security instrument provisions set forth in § 1773.34. Because of the degree of reliance that REA places on the CPAs' testing in these areas, REA has determined that materiality should not be a factor upon which testing is based. REA has, however, through the publication of this final rule, revised and eliminated many of the unclear or burdensome requirements set forth in part 1773. For this reason, no additional revisions were made to § 1773.34.

List of Subjects in 7 CFR Part 1773

Accounting, Electric power, Loan programs—communications, Loan programs—energy, Reporting and recordkeeping requirements, Rural areas, Telephone.

For the reasons set forth in the preamble, REA hereby amends 7 CFR chapter XVII as follows:

PART 1773—POLICY ON AUDITS OF REA BORROWERS

1. The authority citation for part 1773 is revised to read as follows:

Authority: 7 U.S.C. 901 *et seq.*, 1921 *et seq.*)

2. In § 1773.3, paragraph (c) is revised to read as follows:

§ 1773.3 Annual audit.

* * * * *

(c) Until all loans made or guaranteed by REA have been repaid, the borrower must furnish three copies of the auditor's report, report on compliance, report on internal controls, and management letter to REA within 120 days of the as of audit date.

* * * * *

3. In § 1773.20, paragraph (a) is revised to read as follows:

§ 1773.20 CPA's submission of the auditor's report, report on compliance, report on internal controls, and management letter.

(a) *Time limit.* As soon as possible after completion of the audit, but within 90 days of the as of audit date, the CPA should deliver the auditor's report, report on compliance, report on internal controls, and management letter to the president of the borrower's board of directors. As a minimum, copies should be provided for each member of the board of directors and the manager. Further, three copies must be provided to the borrower for transmittal to REA.

* * * * *

4. In § 1773.21, paragraphs (b) and (c) are revised to read as follows:

§ 1773.21 Borrower's review and submission of the auditor's report, report on compliance, report on internal controls, and management letter.

* * * * *

(b) The borrower must furnish REA with three copies of the auditor's report, report on compliance, report on internal controls, and management letter within 120 days of the as of audit date. Any provision in REA's security instrument that requires such documents to be furnished to REA in a shorter period of time may be disregarded.

(c) The borrower must furnish REA with three copies of its plan for corrective action, if any, within 180 days of the as of audit date.

* * * * *

5. Section 1773.34 is amended by removing paragraph (e)(1)(i), redesignating paragraphs (e)(1)(ii) through (e)(1)(iv) as paragraphs (e)(1)(i) through (e)(1)(iii) respectively and revising the newly designated paragraphs, removing paragraph (e)(2)(i), redesignating paragraphs (e)(2)(ii) through (e)(2)(iv) as paragraphs (e)(2)(i) through (e)(2)(iii) respectively and revising the newly redesignated paragraphs to read as follows:

§ 1773.34 Management letter.

* * * * *

(e) * * *

(1) * * *

(i) The requirement for funds to be deposited in banks or other depositories designated in the loan documents or approved by REA. For purposes of this part 1773, funds shall be defined as cash on deposit in demand and time accounts, and certificates of deposit;

(ii) The requirement for a borrower to obtain written approval of mortgagees to enter into any contract for the operation or maintenance of all or any substantial part of its property, or for the use by others of its property. For purposes of this part 1773, the following contracts shall be deemed as requiring REA approval:

(A) Management contracts in which the borrower has contracted to have another borrower or other entity manage its affairs;

(B) Management contracts in which the borrower has contracted to manage another borrower or other utility system;

(C) Operations and maintenance contracts in which the borrower has contracted to have another borrower or other entity operate and/or maintain all or a substantial part (45% or more) of the physical plant facilities of the borrower;

(D) Operations and maintenance contracts in which the borrower has contracted to operate and maintain the physical plant facilities of another borrower or other utility system; and

(E) Contracts between the borrower and its manager; and

(iii) The requirement for a borrower to prepare and furnish mortgagees annual financial and statistical reports on the borrower's financial condition and operations. The CPA must state whether the information represented by the borrower as having been submitted to REA in its most recent December 31 REA Form 7 or Form 12 is in agreement with the borrower's records, and must comment on any exceptions noted. If the borrower represents that an amended report has been filed as of December 31, the comments must relate to the amended report.

(2) * * *

(i) The requirement for a borrower to obtain written approval of the mortgagees to enter into any contract for the operation or maintenance of property and for the use of mortgaged property by others, or for services pertaining to toll traffic, operator assistance, or switching. For purposes of this part 1773, the following contracts shall be deemed as requiring REA approval:

(A) Any contract, agreement or lease between the borrower and an affiliate other than as allowed under 7 CFR part 1744, subpart E;

(B) Any lease of a building or land; and

(C) Any other contract as defined in § 1773.34 (e)(2)(i) except:

(*1*) Industry standard traffic settlement agreements involving interexchange and long distance carriers which, in form and substance, conform with contracts in general use in the telecommunications industry;

(*2*) Billing and collecting agreements;

(*3*) Toll pooling arrangements involving National Exchange Carrier Association and state associations;

(*4*) Directory services agreements; and

(*5*) Joint use agreements;

(ii) The requirement for funds to be deposited in banks or other depositories designated in the loan documents or approved by REA. For purposes of this part 1773, funds shall be defined as cash on deposit in demand and time accounts, and certificates of deposit; and

(iii) The requirement for a borrower to prepare and furnish mortgagees annual financial and statistical reports on the

borrower's financial condition and operations. The CPA must state whether the information represented by the borrower as having been submitted to REA in its most recent December 31 REA Form 479 is in agreement with the borrower's records, and must comment on any exceptions noted. If the borrower represents that an amended report has been filed as of December 31, the comments must relate to the amended report.

* * * * *

6. Section 1773.40 is revised to read as follows:

§ 1773.40 Regulatory assets.

The CPA's workpapers must document whether all regulatory assets comply with the requirements of SFAS No. 71. For electric borrowers only, the CPA's workpapers must document whether all regulatory assets have received REA approval.

7. Section 1773.45 is revised to read as follows:

§ 1773.45 Regulatory liabilities.

The CPA's workpapers must document whether all regulatory liabilities comply with the requirements of SFAS No. 71. For electric borrowers only, the CPA's workpapers must document whether all regulatory liabilities have received REA approval.

8. Appendix C to Part 1773 is revised to read as follows:

Appendix C to Part 1773—Illustrative Independent Auditors' Management Letter

REA requires that CPAs auditing REA borrowers provide a management letter in accordance with § 1773.34. REA requires that this letter bear the same date as the auditor's report and be addressed to the borrower's board of directors. The CPA is required to sign the auditor's report, report on compliance, report on internal controls, and management letter.

Illustrative Independent Auditors' Management Letter

March 15, 19x6

Board of Directors
[*Name of Borrower*]
[*City, State*]

We have audited the financial statements of [*Name of Borrower*] for the year ended December 31, 19x5, and have issued our report thereon dated March 15, 19x6. We conducted our audit in accordance with generally accepted auditing standards, Government Auditing Standards issued by the Comptroller General of the United States, and 7 CFR part 1773, Policy on Audits of Rural Electrification Administration (REA) Borrowers. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement.

In planning and performing our audit of the financial statements of [*Name of Borrower*] for the year ended December 31, 19x5, we considered its internal control structure in order to determine our auditing procedures for the purpose of expressing an opinion on the financial statements and not to provide assurance on the internal control structure.

A description of the responsibility of management for establishing and maintaining the internal control structure and the objectives of and inherent limitations in such a structure is set forth in our independent auditors' report on the internal control structure dated March 15, 19x6, and should be read in conjunction with this report.

Our consideration of the internal control structure would not necessarily disclose all matters in the internal control structure that might be material weaknesses under standards established by the American Institute of Certified Public Accountants.

A material weakness is a condition in which the design or operation of the specific internal control structure elements does not reduce to a relatively low level the risk that errors or irregularities in amounts that would be material in relation to the financial statements being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions. However, we noted no matters involving the internal control structure and its operation that we consider to be a material weakness as defined above. [*If a material weakness was noted, refer the reader to the independent auditors' report on internal control structure.*]

7 CFR 1773.34 requires comments on specific aspects of the internal control structure, compliance with specific REA loan and security instrument provisions, and other additional matters. We have grouped our comments accordingly. In addition to obtaining reasonable assurance about whether the financial statements are free from material misstatements, at your request, we performed tests of specific aspects of the internal control structure, of compliance with specific REA loan and security instrument provisions, and of additional matters. The specific aspects of the internal control structure, compliance with specific REA loan and security instrument provisions, and additional matters tested include, among other things, the accounting procedures and records, materials control, compliance with specific REA loan and security instrument provisions set forth in 7 CFR 1773.34 (e)(1), [*for telephone borrowers, 7 CFR 1773.34 (e)(2)*], related party transactions, and depreciation rates. [*For electric borrowers:*] The additional matters tested also include a schedule of deferred debits and credits, upon which we express an opinion. In addition, our audit of the financial statements also included the procedures specified in 7 CFR 1773.38–.45. Our objective was not to provide an opinion on these specific aspects of the internal control structure, compliance with specific REA loan and security instrument provisions, or additional matters, and accordingly, we express no opinion thereon.

No reports (other than our independent auditors' report, our independent auditors' compliance report, and our independent auditors' report on the internal control structure, all dated March 15, 19x6) or summary of recommendations related to our audit have been furnished to management.

Our comments on specific aspects of the internal control structure, compliance with specific REA loan and security instrument provisions, and other additional matters as required by 7 CFR 1773.34 are presented below.

Comments on Certain Specific Aspects of the Internal Control Structure

We noted no matters regarding [*Name of Borrower*]'s internal control structure and its operation that we consider to be a material weakness as previously defined with respect to:

—The accounting procedures and records [*list other comments*];
—The process for accumulating and recording labor, material, and overhead costs, and the distribution of these costs to construction, retirement, and maintenance or other expense accounts [*list other comments*]; and,
—The materials control [*list other comments*].

Comments on Compliance With Specific REA Loan and Security Instrument Provisions

Management's responsibility for compliance with laws, regulations, contracts, and grants is set forth in our independent auditors' report on compliance dated March 15, 19x6, and should be read in conjunction with this report. At your request, we have performed the procedures enumerated below with respect to compliance with certain provisions of laws, regulations, and contracts. The procedures we performed are summarized as follows:

—Procedure performed with respect to the requirement to maintain all funds in institutions whose accounts are insured by an Agency of the Federal Government:

1. Obtained information from financial institutions with which [*Name of Borrower*] maintains funds that indicated that the institutions are insured by an Agency of the Federal Government.

—Procedures performed with respect to the requirement for a borrower to obtain written approval of the mortgagee to enter into any contract for the operation or maintenance of property, or for the use of mortgaged property by others [*see § 1773.34(e)(2)(i) for additional telephone borrower requirements in accordance with 7 CFR 1773.34(e)*] for the year ended December 31, 19x5 of [*Name of Borrower*]:

1. Obtained and read a borrower prepared schedule of new written contracts entered into during the year for the operation or maintenance of its property, or for the use of its property by others as defined in § 1773.34(e)(1)(ii) [*§ 1773.34(e)(2)(i) for telephone borrowers*].

2. Reviewed Board of Director minutes to ascertain whether board-approved written contracts are included in the borrower-prepared schedule.

3. Noted the existence of written REA [*and other mortgagee*] approval of each contract listed by the borrower.

—Procedure performed with respect to the requirement to submit REA Form 7 or Form 12 [*Form 479 for telephone borrowers*] to the REA:

1. Agreed amounts reported in Form 7 or Form 12 [*Form 479 for telephone borrowers*] to [*Name of Borrower*]'s records.

The results of our tests indicate that, with respect to the items tested, [*Name of Borrower*] complied, except as noted below, in all material respects, with the specific REA loan and security instrument provisions referred to below. With respect to items not tested, nothing came to our attention that caused us to believe that [*Name of Borrower*] had not complied, in all material respects, with those provisions. The specific provisions tested, as well as any exceptions noted, include the requirements that:

—The borrower maintains all funds in institutions whose accounts are insured by an Agency of the Federal Government [*list all exceptions*];

—The borrower has obtained written approval of the REA [*and other mortgagees*] to enter into any contract for the operation or maintenance of property, or for the use of mortgaged property by others as defined in § 1773.34(e)(1)(ii) [*§ 1773.34(e)(2)(i) for telephone borrowers*] [*list all exceptions*]; and

—The borrower has submitted its Form 7 or Form 12 [*Form 479 for telephone borrowers*] to the REA and the Form 7 or Form 12 [*Form 479 for telephone borrowers*], Financial and Statistical Report, as of December 31 19x5, represented by the borrower as having been submitted to REA is in agreement with the [*Name of Borrower*]'s records in all material respects [*list all exceptions*].

Comments on Other Additional Matters

In connection with our audit of the financial statements of [*Name of Borrower*], nothing came to our attention that caused us to believe that [*Name of Borrower*] failed to comply with respect to:

—The reconciliation of subsidiary plant records to the controlling general ledger plant accounts addressed at 7 CFR 1773.34(c)(1) [*list all exceptions*];

—The clearing of the construction accounts and the accrual of depreciation on completed construction addressed at 7 CFR 1773.34(c)(2) [*list all exceptions*];

—The retirement of plant addressed at 7 CFR 1773.34(c) (3) and (4) [*list all exceptions*];

—Sales of plant material, or scrap addressed at 7 CFR 1773.34(c)(5) [*list all exceptions*];

—The disclosure of material related party transactions, in accordance with Statement of Financial Accounting Standards No. 57, Related Party Transactions, for the year ended December 31, 19x5, in the financial statements referenced in the first paragraph of this report addressed at 7 CFR 1773.34(f) [*list all exceptions*]; and

—*For electric borrowers only*: depreciation rates addressed at 7 CFR 1773.34(g) [*list all exceptions*].

Detailed Schedule of Inventory Differences

A detailed schedule of differences between physical inventory, perpetual inventory records, and the general ledger (identifying gross overages and gross shortages) is provided below. This schedule is not a required part of the basic financial statements but is supplementary information required by 7 CFR 1773.34(d). We have applied certain limited procedures, which consisted principally of inquiries of management regarding the method of measurement and presentation of the supplementary information. However, we did not audit the information and express no opinion on it. [Disclose the disposition of inventory differences.]

[The detailed schedule of inventory differences would be included here. The word "unaudited" should appear in the title of the schedule.]

For Electric Borrowers Only: Detailed Schedule of Deferred Debits and Deferred Credits

Our audit was made for the purpose of forming an opinion on the basic financial statements taken as a whole. The detailed schedule of deferred debits and deferred credits required by 7 CFR 1773.34(h) and provided below is presented for purposes of additional analysis and is not a required part of the basic financial statements. This information has been subjected to the auditing procedures applied in our audit of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

[The detailed schedule of deferred debits and deferred credits would be included here. The total amount of deferred debits and deferred credits as reported in the schedule must agree with the totals reported on the Balance Sheet under the specific captions of "Deferred Debits" and "Deferred Credits". Those items that have been approved, in writing, by REA should be clearly indicated.]

This report is intended solely for the information and use of the board of directors, management, and the REA and supplemental lenders. However, this report is a matter of public record and its distribution is not limited.

Name of Firm

Michael V. Dunn,

Acting Under Secretary, Small Community and Rural Development.

[FR Doc. 94–196 Filed 1–5–94; 8:45 am]

BILLING CODE 3410–15–M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

RIN 3150–AE93

Fingerprint Cards: Change in User Fee

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to reflect an administrative change in the procedure for notifying licensees of changes in the user fee charged by the Federal Bureau of Investigation (FBI) for processing fingerprint cards as part of the criminal history checks that nuclear power reactor licensees are required to perform for those individuals granted unescorted access to an operating nuclear power facility or access to Safeguards Information. This notice also informs licensees of the new user fee adopted by the FBI effective January 3, 1994.

EFFECTIVE DATE: February 7, 1994.

FOR FURTHER INFORMATION CONTACT: C.H. Hendren, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone (301) 504–3209.

SUPPLEMENTARY INFORMATION:

Background

The provisions of 10 CFR 73.57 requires licensees to process fingerprint cards through the NRC to the FBI Criminal Justice Information Services Division which then does a criminal history check. A user fee for processing fingerprint cards was required by Congress (Pub. L. 99–399), is established by the FBI, and is periodically increased as the FBI's processing costs change.

Discussion

On December 3, 1993, the FBI's Division of Criminal Justice Information Services (CJIS) notified the Nuclear Regulatory Commission that the "user fee" charged by the FBI for processing fingerprint cards had been increased from $23.00 to $24.00 effective January 3, 1994. The FBI user fee includes a $2.00 handling cost for the agency doing the initial screening of the fingerprint cards, and provides that the agency doing the initial screening retains that handling cost. In the case of nuclear reactor licensees, the NRC performs this initial screening. The user fee is periodically changed by the FBI, as their processing costs change.

Because this amendment pertains only to a user-fee change imposed by the FBI, the Commission for good cause finds that the notice and public procedure provisions of the Administrative Procedure Act are impractical and unnecessary. Comment will not serve to alter the FBI fee, which is outside the control of the NRC. Further, rather than engaging in an unnecessary rulemaking procedure to amend the rule every time the FBI changes the fee, this amendment removes the fee amount from the rule.

The Commission will advise licensees directly when the FBI fee changes. A notice of the FBI fee change pertaining to NRC licensees will also be published in the **Federal Register.**

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described as a categorical exclusion in 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget under approval number 3150–0002.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to the action taken in this final rulemaking and, therefore, that a backfit analysis is not required for this final rule because this amendment does not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 73

Criminal penalties, Export, Hazardous materials transportation, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

For the reasons stated in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendment to 10 CFR part 73.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

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

Authority: Secs. 53, 161, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245 (42 U.S.C. 5841, 5844).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241, (42 U.S.C. 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99–399, 100 Stat. 876 (42 U.S.C. 2169).

2. In § 73.57, paragraph (d)(3) is revised to read as follows:

§ 73.57 Requirements for criminal history checks of individuals granted unescorted access to a nuclear power facility or access to Safeguards Information by power reactor licensees.

* * * * *

(d) * * *

(3) Fees for the processing of fingerprint checks are due upon application. Licensees shall submit payment with the application for the processing of fingerprints through corporate check, certified check, cashier's check, or money order made payable to "U.S. NRC." The amount of the fee is the user fee for processing fingerprint cards submitted by the Nuclear Regulatory Commission on behalf of nuclear power plants charged by the FBI for each card. Combined payment for multiple applications is acceptable. The Commission will publish the user fee charged by the FBI in the **Federal Register** whenever the fee changes. The Commission will directly notify licensees who are subject to this regulation of any fee changes.

* * * * *

Dated at Rockville, Maryland this 22nd day of December, 1993.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 94–250 Filed 1–5–94; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 93–AWP–17]

Establishment of Class D Airspace, Barking Sands, Kauai, HI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This document contains corrections to the final rule published on December 10, 1993. This final rule established Class D airspace at Barking Sands Pacific Missile Range Facility (PMRF), Kekaha, Kauai, Hawaii, effective January 10, 1994. This correction to the final rule will establish the Class D airspace at Barking Sands PMRF effective on March 3, 1994.

EFFECTIVE DATE: Effective January 6, 1994, the effective date of the final rule at 58 FR 64880 is corrected to be 0901 U.T.C., March 3, 1994.

FOR FURTHER INFORMATION CONTACT: Gene Enstad, Airspace Specialist, System Management Branch, AWP–530, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California 90261: telephone (310) 297–0010.

SUPPLEMENTARY INFORMATION: On December 10, 1993, the Federal Aviation Administration (FAA) published a final rule that established Class D airspace at Barking Sands Pacific Missile Range Facility, Kekaha, Kauai, Hawaii (58 FR 64880). The effective date was established as 0901 U.T.C., January 10, 1994. That date was incorrect. The new effective date is now 0901 U.T.C., March 3, 1994.

Correction of Final Rule Effective Date

Accordingly, pursuant to the authority delegated to me, the publication on December 10, 1993 (58 FR 64880) is corrected as follows:

On page 64880, in the second column, in **EFFECTIVE DATE**, by removing "0901 U.T.C., January 10, 1994" and inserting in its place "0901 U.T.C., March 3, 1994".

Issued in Lawndale on December 21, 1993.

Harvey R. Riebel,

Manager, System Management Branch, AWP–530.

[FR Doc. 94–133 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 93–ASO–17 and 93–ASO–18]

Amendment to Class D Airspace Areas, Multiple Locations in Kentucky, Mississippi, North Carolina, South Carolina and Puerto Rico; Amendment to Class E Airspace Areas, Multiple Locations in Alabama, Georgia, Kentucky, Mississippi, North Carolina and Tennessee; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; corrections.

SUMMARY: This action corrects errors in the airspace designation of the Columbus Golden Triangle, MS Class E airspace area published in final rules on October 25, 1993 (58 FR 54953), Airspace Docket No. 93–ASO–17 and (58 FR 54954), Airspace Docket No. 93–ASO–18.

EFFECTIVE DATE: 0900 UTC, January 6, 1994.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Patterson, Airspace Section, System Management Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636,

Atlanta, GA 30320; telephone (404) 305–5590.

SUPPLEMENTARY INFORMATION:

History

Airspace Docket 93–ASO–17, published on October 25, 1993 (58 FR 54953), changed the effective hours of certain Class D Airspace areas from full time to part time. The Columbus Golden Triangle Airport was inadvertently included in the list of Class D Airspace areas in error. The Columbus Golden Triangle Airport is Class E2 airspace, an airspace area designated as a surface area for an airport. Airspace Docket No. 93–ASO–18, published on October 25, 1993 (58 FR 54954), changed the effective hours of certain Class E airspace areas from full time to part time. The Columbus Golden Triangle Airport was inadvertently omitted from the list of Class E airspace areas. This action corrects the errors by changing the designation of the Columbus Golden Triangle, MS Airspace area from Class D to Class E.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the corrections to the airspace designation for the Columbus Golden Triangle, Mississippi, Airspace area, as published in the **Federal Register** on October 25, 1993 (58 FR 54953) (**Federal Register** Document No. 93–26168, page 54954, column 2) and omitted from the **Federal Register** on October 25, 1993 (58 FR 54954) (**Federal Register** Document No. 93–26169, page 54955, column 1) is corrected in the amendment to the incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9A, Airspace Designations and Reporting Points, dated June 17, 1993, and effective September 16, 1993, as follows:

The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§71.1 [Amended]

Para. 5000 General is amended by removing "ASO MS D Columbus Golden Triangle, MS".

Para. 6002 Class E airspace areas designated as a surface area for an airport is amended by adding "ASO MS E2 Columbus Golden Triangle, MS".

Issued in College Park, Georgia, on December 17, 1993.

Michael J. Powderly,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 94–246 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

Technology Administration

15 CFR Part 295

[Docket No. 930242–3313]

RIN 0693–AA83

Advanced Technology Program

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Final rule.

SUMMARY: The National Institute of Standards and Technology (NIST) is today issuing a final rule which amends the implementing regulations for the Advanced Technology Program (ATP). A number of the revisions are required by the American Technology Preeminence Act of 1992, including provisions on: participation by foreign companies in ATP; the establishment of a patent policy different from the government-wide policy set out by the Bayh-Dole Act; and a new requirement that "joint research and development ventures" be industry-led. Further, requirements for royalty-sharing by ATP recipients with the Federal government for inventions funded under ATP have been repealed by the Act, and are thus removed from the regulations. Similarly, ATP authority to provide direct funding to independent research organizations has been repealed. Also, changes not required by the Act are made, including changes to simplify and clarify the selection criteria, and to streamline the internal operations of ATP, including the selection process.

EFFECTIVE DATE: This rule is effective on January 6, 1994.

FOR FURTHER INFORMATION CONTACT: George A. Uriano or Brian C. Belanger, Advanced Technology Program, National Institute of Standards and Technology (NIST), telephone number (301) 975–5187.

SUPPLEMENTARY INFORMATION: The National Institute of Standards and Technology is today issuing a final rule which amends regulations found at part 295 of title 15 of the Code of Federal Regulations, which implement the Advanced Technology Program (ATP). The Advanced Technology Program assists United States businesses to carry out high-risk research and development that will, if successful, improve the competitive position of the United States and its businesses by accelerating the development of technologies that have significant potential to stimulate economic growth, and raise productivity. ATP enters into cooperative agreements with United States joint research and development ventures and United States businesses, especially small businesses. Where appropriate, Federal laboratories may be involved in ATP projects consistent with other authority, such as cooperative research and development agreements under section 12 of the Stevenson-Wydler Technology Innovation Act of 1980.

Description of the Changes

Changes to part 295 include revisions on the following topics (please see the analysis of comments below for additional details):

- The eligibility of foreign firms to participate in ATP is addressed in a new section 295.3 of the regulations, and a related definition of "United States owned company" is added in section 295.2(r). These revisions follow the requirements of section 201(c)(6) of the American Technology Preeminence Act of 1991 (15 U.S.C. 278n(d)(9)).
- The establishment of a patent policy different from the government-wide policy set out by the Bayh-Dole Act (Pub. L. 96–517, as amended) is set out at section 295.8(a). These revisions follow the requirements of section 201(c)(6) of the American Technology Preeminence Act of 1991 (15 U.S.C. 278n(d)(11)). That statute requires that title to inventions made in whole or part with Program funds reside with for-profit companies that have been incorporated in the United States. Entities that are not for-profit organizations incorporated in this country are not eligible to obtain title to inventions made under the Program.
- A new requirement that "joint research and development ventures" be industry-led, set out at §§ 295.2(i) and 295.21, and the repeal of ATP authority to provide direct funding to independent research organizations, set out at § 295.30. These revisions follow the requirements of section 201(c)(2) and section 201(c)(4), respectively, of the American Technology Preeminence Act of 1991 (15 U.S.C. 278n(b)(1) and (b)(2)).
- Requirements for royalty-sharing by ATP recipients with the Federal government for inventions funded under ATP have been repealed, and are thus removed from existing § 295.7(c) of the regulations. This revision follows

the requirements of section 201(c)(6) of the American Technology Preeminence Act of 1991.

• Finally, changes not required by the Act are made to the selection criteria, and to the internal operations of ATP, including the selection process. These changes particularly include revisions to the remaining definitions in § 295.2, changes to the selection process described in §§ 295.4 and 295.5, changes to the selection criteria as set out in § 295.6, and changes to program administration found in §§ 295.7 and 295.14.

Summary of Comments

On August 2, 1993, the Technology Administration published a notice of proposed rulemaking in the **Federal Register** (55 FR 41069). In response to this notice forty-four letters were received; twenty-nine from universities, ten from other not-for-profit research organizations and industry associations, one from a state agency, one from a U.S.-owned for-profit company, one from a U.S. subsidiary of a foreign-owned corporation, one from a member of the U.S. House of Representatives, and one from a member of the NIST staff.

All but four of the forty-four respondents, including all twenty-nine from universities and all ten from other not-for-profit organizations, commented on the proposed revision to the treatment of patent rights found in § 295.8. An additional two dozen comments were received concerning proposed changes to the proposed definitions set out in § 295.2. The remaining comments were scattered among several sections, including: five concerning new § 295.14, which deals with special financial reporting requirements; three on the revisions to the selection criteria found in § 295.5; two on the use of abbreviated proposals proposed in § 295.5; and one each on the provisions on the eligibility and qualification of applicants found in §§ 295.3 and 295.31. No comments were received in response to proposed changes to the following: § 295.1, pertaining to the purpose of the regulation; § 295.4, the selection process; § 295.7, pertaining to notices of availability of funds; § 295.21, on qualification of applicants; § 295.22, dealing with limitations on assistance; § 295.24, concerning registration under the antitrust laws; and § 295.30, which describes the types of assistance available.

The following is a section-by-section description of the comments received by NIST, and NIST's response to those comments.

Section 295.2 Definitions—Comment Summary (24 Comments)

Twenty-three respondents, all universities or other nonprofit organizations, questioned whether the definition of "United States-owned company" found in § 295.2(r) of the proposed rule reflected the actual intent of Congress as stated in the American Technology Preeminence Act of 1991. The definition of United States-owned company set out in § 295.2(r) is used in section 295.8 to determine eligibility to obtain title to inventions arising from assistance under ATP. A consolidated analysis of the issues raised by § 295.2(r) and 295.8 is presented in the discussion of § 295.8 later in this notice, and the reader is asked to refer to that discussion.

In addition to the issue described above, one respondent questioned the exclusion (by omission) of independent research and development (IR&D) costs in the definition of matching funds found in § 295.2(1). IR&D funds are generally generated through contracts funded by the federal government. The financial assistance regulations which are applicable to ATP awards, and particularly Attachment E to OMB Circular A–110, prohibit the use of federal funds as cost share or match unless specifically authorized by federal law. The rule follows closely the wording of the 1988 legislation and hence cannot be changed without congressional action. The purpose of the limitations on qualified matching funds is to obtain a meaningful and significant commitment of company resources towards ATP objectives, including support to additional R&D beyond that which would have occurred without the ATP award.

Section 295.3 Eligibility of United States and foreign-owned businesses—(1 Comment)

One U.S. subsidiary of a foreign-owned company requested that both eligibility requirements and cancellation requirements for foreign-owned applicants be made clearer and that they be consistent with present law and with H.R. 820. In response, NIST notes that H.R. 820 is not law, but rather is pending legislation in the Congress. NIST cannot base changes in rules upon proposed legislation that has not been enacted.

Section 295.5 Use of Abbreviated Proposals in the Selection Process—(2 Comments)

Two respondents endorsed the use of abbreviated proposals. One respondent further proposed that abbreviated proposals address, and thus be evaluated on, scientific and technical criteria only. NIST has determined that business and economic factors are important factors in assessing the potential for success of a proposed project, and therefore must be considered in addition to the scientific and technical merit of the proposal.

Section 295.6 Criteria for Selection—(3 Comments)

Two respondents endorsed the increased emphasis on "scientific and technical merit", one of whom suggested increasing its weight further to 40 percent. Another respondent took issue with the reduced weight for two proposers "level of commitment" and suggested increasing the weight for the "commitment" criteria to 30 percent by eliminating "experience and qualifications" as a separate criteria.

In response to these comments, § 295.5 has been modified to increase the weight of the "level of commitment" to 20 percent, the level that exists in the regulation as it was promulgated in 1990. The weight given "experience and qualifications" has been reduced from 20 percent to 10 percent.

Section 295.8(a) Patent Rights—(40 Comments)

Forty comments were received concerning the proposed revision to § 295.8(a)(1), thirty-nine from universities and other nonprofit organizations opposed to the proposal, and one from a business supporting the proposal. Also, twenty-three of the thirty-nine commentors described above objected to the definition of "United States-owned company" found in § 295.2(r) of the proposed rule.

The term "United States-owned company" defined in § 295.2(r) is used in § 295.8(a)(1) to determine who is eligible to obtain title inventions arising from assistance under ATP. The definition states that an entity must be organized for profit-making purposes to be deemed a United States-owned company, and § 295.8(a)(1) states that only United States-owned companies may take title to inventions arising under the ATP. Taken together, the two sections prevent universities and other nonprofit organizations from obtaining title to inventions arising under the ATP.

The thirty-nine universities and nonprofit commentors are strongly opposed to this outcome. The following objection is typical: "The ATP legislation enables universities to participate in research funded through the program, and (we have) taken advantage of the opportunity to do so.

However, the problem is that NIST has interpreted the ATP legislation to exclude universities from ownership of intellectual property resulting from ATP funded research."

In the view of NIST, the decision to prevent universities and other nonprofit organizations from taking title to inventions is embedded in statute, and NIST has no alternative but to follow the law as it presently is written. As a result of comments received from both for-profit and nonprofit organizations, NIST recognizes that one ingredient for the successful implementation of joint ventures under ATP is a flexible patent policy. The participants in ATP joint ventures need the flexibility to determine for themselves the best means of commercializing the technology they develop. This, in turn, requires the flexibility to allocate intellectual property rights as the joint ventures best see fit. Accordingly, NIST is working with the Congress in an attempt to enact a patent policy for ATP that leaves the decisions on patent ownership to joint venture members. Should a change in the law be enacted, NIST would immediately implement it. In that case, NIST would rely on the ATP proposal evaluation criteria to assess the probability of subsequent commercialization based on the proposed intellectual property rights arrangement.

Section 201(c)(6) of the American Technology Preeminence Act of 1991 (15 U.S.C. 278n(d)(11)) states that intellectual property rights developed under ATP "shall vest in a company or companies incorporated in the United States." In reaching the conclusion that the term "company or companies" refers to profit-making entities, NIST has been guided by the broader context of changes made to the ATP by the American Technology Preeminence Act. NIST believes that it was the intent of Congress to provide title to inventions directly to U.S. companies as the most effective means of assuring that research results enter the marketplace rapidly, and in the way most beneficial to United States businesses. In this context, NIST notes that the Act contains a new requirement that "joint research and development ventures" funded by ATP must be industry-led. NIST also notes the repeal of ATP authority to provide direct funding to nonprofit independent research organizations. (See sections 201(c)(2) and section 201(c)(4), respectively, of the American Technology Preeminence Act of 1991 (15 U.S.C. 278n(b)(1) and (b)(2)).

Thus, NIST believes that the only reasonable reading of section 201(c)(6) is to interpret the term "United States-owned company" as referring to businesses, and specifically, to for-profit entities.

Section 295.8 (b) and (c) Copyright and Publication—(24 Comments)

A number of universities have expressed fear that the new ATP rules will prevent universities or their employees from copyrighting their works. The fear is also raised that the ATP rule will require universities to get the permission of their for-profit collaborators before publishing their research findings. In response, NIST notes that the parts of the ATP rule dealing with the questions raised by these comments on copyright and publication were not proposed to be substantively changed in the **Federal Register** notice of August 2, 1993. In the old rule, the provision on copyright was found in § 295.5(b), and the treatment of publication of research results was found at § 295.8(d). In the new rule, the provision on copyright is found in § 295.8(b), and the treatment of publication of research results is at § 295.8(c).

Except for renumbering, the only change that NIST proposed for the old § 295.5(b) concerned the governmental use license that each ATP funding recipient is required to provide to NIST for any copyrighted data first produced in the performance of the ATP award. The scope of the governmental use license has been truncated by deleting the authority of the government to distribute computer programs first produced in the performance of the ATP award to users in the United States. The ability of funding recipients to copyright the works of their employees remains unchanged. Both the old and new versions of the ATP regulation state that "funding recipients" can copyright works made under ATP. Universities that receive funds under ATP are "funding recipients". They are funding recipients if they are members of joint ventures. They are funding recipients if they are subcontractors. Universities get copyright. Accordingly, no change is made to § 295.8(c) of the regulation based upon the comments described above.

Except for renumbering, the only change that NIST proposed for the old § 295.5(d) was to delete the first part of the first sentence. That sentence originally read: "Although the program will encourage the timely publication of research results by funding recipients, the decision on whether to publish or not will be made by the funding recipient(s)." In the proposed revision, the sentence was revised to read simply "The decision on whether to publish or not will be made by the funding recipient(s)." NIST believes that the regulation is very clear that the decision to publish shall be made by negotiated agreement of the funding recipients and that the for-profit members of a joint venture will not be able to dictate to universities on this matter. This provision has been part of every ATP award made since 1990, and no difficulties have arisen under it. Accordingly, no change is made to section 295.8(c) of the proposed regulation based upon the comments described above.

Section 295.14 Special Financial Reporting—(5 Comments)

Two universities and three other not-for-profit organizations commented on proposed section 295.14, which would increase the flexibility of financial reporting requirements and encourage award recipients to retain independent CPA firms to perform audit services, while reserving the right of the Department of Commerce's Office of the Inspector General to determine the timing and nature of these services, and to conduct its own audit. The comments suggested a need for greater specificity as to the applicable OMB regulations which might apply and the conditions under which the Departmental Inspector General would exercise his authority in setting the time frame and scope of audit services.

In response, the regulations have been amended to state that the audit principles to be applied to ATP awards are the Generally Accepted Accounting Principles (GAAP) according to the General Accounting Office's "Government Auditing Standards" subtitled "Standards for Auditing Government Organization, Program, Activities and Functions". Clarifying changes have also been made to the definitions of "direct costs" found at § 295.2(c) and "indirect costs" found at § 295.2(h).

Section 295.31 Qualification of Applicants—(1 Comment)

One respondent urged that state and local governments and U.S. universities and non-profit research institutes working independently should be eligible to receive individual ATP awards outside of joint ventures. No change has been made to the regulation based upon this comment because eligibility for individual awards is expressly limited to United States companies by section 278n(b)(2) of title 15 of the United States Code.

Effective Date of the Final Rule

This final rule relating to grants, benefits, and contracts is exempt from the delayed effective date requirement, and accordingly, under section 553(a)(2) of the Administrative Procedure Act (5 U.S.C. 553), is therefore being made effective immediately without a 30 day delay in effective date.

Classification

This document was not reviewed by the Office of Management and Budget under Executive Order 12866. The General Counsel certified to the Chief Counsel for Advocacy, Small Business Administration, at the time this rule was proposed that, if it were adopted as proposed it would not have a significant economic effect on a substantial number of small entities requiring a flexibility analysis under the Regulatory Flexibility Act. This is because there are only a small number of awardees and thus only a small number of awards will be given to small businesses. The program is entirely voluntary for the participants that seek funding. It is not a major federal action requiring an environmental assessment under the National Environment Policy Act. This rule contains collection of information requirements subject to the Paperwork Reduction Act approved by OMB under control number 0693–0009. The Advanced Technology Program does not involve the mandatory payment of any matching funds from a state or local government, and does not affect directly any state or local government. Accordingly, the Technology Administration has determined that Executive Order 12372 is not applicable to this program. This notice does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

List of Subjects in 15 CFR Part 295

Inventions and patents, Laboratories, Research, Science and technology, Scientists.

Dated: December 27, 1993.

Arati Prabhakar,

Director.

For reasons set forth in the preamble, title 15, part 295 of the Code of Federal Regulations is amended as follows:

PART 295—ADVANCED TECHNOLOGY PROGRAM

1. The authority citation for part 295 is revised to read as follows:

Authority: 15 U.S.C. 278n.

2. Section 295.1 is revised to read as follows:

§ 295.1 Purpose.

(a) The purpose of the Advanced Technology Program (ATP) is to assist United States businesses to carry out research and development on pre-competitive generic technologies. These technologies are: (1) Enabling, because they offer wide breadth of potential application and form an important technical basis for future commercial applications; and (2) high value, because when applied, they offer significant benefits to the U.S. economy. Precompetitive technology is defined in § 295.2(n) and generic technology is defined in § 295.2(e).

(b) In the case of joint research and development ventures involving potential competitors, the willingness of firms to commit significant amounts of corporate resources to the venture is evidence that the proposed research and development is precompetitive. For joint ventures that involve firms and their customers or suppliers or for single firms not proposing cooperative research and development, a quantified description of the expected broad applicability of the technology and adequate assurances that the technology being developed will be utilized widely can provide evidence that the proposed research and development is pre-competitive.

(c) These rules prescribe policies and procedures for the award of cooperative agreements under the advanced Technology Program in order to ensure the fair treatment of all proposals. While the Advanced Technology Program is authorized to enter into grants, competitive agreements, and contracts to carry out its mission, these rules address only the award of cooperative agreements. The Program employs cooperative agreements rather than grants because such agreements allow ATP to exercise appropriate management oversight of projects and also to link ATP-funded projects to ongoing R&D at the National Institute of Standards and Technology wherever such linkage would increase the likelihood of success of the project.

3. Section 295.2 is amended by revising paragraph (a), redesignating paragraphs (d) through (i) as paragraphs (k) through (p), redesignating paragraph (b) as paragraph (e), redesignating paragraph (c) as paragraph (h), and adding new paragraphs (b), (c), (d), (f), (g), (i), and (j) to read as follows:

§ 295.2 Definitions.

(a) For the purposes of the ATP, the term *award* means Federal financial assistance made under a grant or cooperative agreement.

* * * * *

(b) The term *cooperative agreement* refers to a Federal assistance instrument used whenever the principal purpose of the relationship between the Federal Government and the recipient is the transfer of money, property, or services, or anything of value to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the recipient during performance of the contemplated activity.

(c) The term *direct costs* means costs that can be identified readily with activities carried out in support of a particular final objective. Because of the diverse characteristics and accounting practices of different organizations, it is not possible to specify the types of costs which may be classified as direct costs in all situations. However, typical direct costs could include salaries of personnel assigned to the ATP project and associated normal fringe benefits such as medical insurance. Direct costs might also include supplies and materials, special equipment required specifically for the ATP project, and travel associated with the ATP project. ATP shall interpret direct costs in accordance with 48 CFR part 31 or OMB Circular A–122, attachment B.

(d) The term *foreign-owned company* means a company other than a United States-owned company as defined in § 295.2(r).

* * * * *

(f) The term *grant* means a Federal assistance instrument used whenever the principal purpose of the relationship between the Federal Government and the recipient is the transfer of money, property, services, or anything of value to the recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the recipient during performance of the contemplated activity.

(g) The term *independent research organization* (IRO) means a nonprofit research and development corporation or association organized under the laws of any state for the purpose of carrying

out research and development on behalf of other organizations.

* * * * *

(i) The term *industry-led joint research and development venture* means a joint research and development venture that consists of at least two separately-owned businesses that contribute matching funds to the project, perform research and development in the project, and control the venture's membership, research directions and funding priorities. The venture may include additional companies, independent research organizations, universities, and/or government laboratories which may or may not contribute funds to the project and perform research and development. An independent research organization may perform administrative tasks on behalf of an industry-led joint research and development venture, such as handling receipts and disbursements of funds and making antitrust filings.

(j) The term *intellectual property* means an invention patentable under title 35, United States Code, or any patent on such an invention.

* * * * *

4. The newly designated § 295.2(h) is revised to read as follows:

§ 295.2 Definitions.

* * * * *

(h) The term *indirect costs* means those costs incurred for common or joint objectives that cannot be readily identified with activities carried out in support of a particular final objective. A cost may not be allocated to an award as an indirect cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as a direct cost. Because of diverse characteristics and accounting practices it is not possible to specify the types of costs which may be classified as indirect costs in all situations. However, typical examples of indirect costs include general administration and general expenses, such as the salaries and expenses of executive officers, personnel administration, maintenance, library expenses, and accounting. ATP shall interpret indirect costs in accordance with 48 CFR part 31 or OMB Circular A–122, Attachment C.

5. The newly designated § 295.2(k)(1)(v) is revised and (k)(1)(vi) is added, to read as follows:

§ 295.2 Definitions.

* * * * *

(k)(1) * * *

* * * * *

(v) The production of any product, process, or service; or

(vi) any combination of the purposes specified in paragraphs (k)(1), (i), (ii), (iii), (iv) and (v) of this section, and may include the establishment and operation of facilities for the conducting of research, the conducting of such venture on a protected and proprietary basis, and the prosecuting of applications for patents and the granting of licenses for the results of such venture, but does not include any activity specified in paragraph (k)(2) of this definition.

* * * * *

6. The newly designated § 295.2(l) is revised to read as follows:

§ 295.2 Definitions.

* * * * *

(l) The term *matching funds* includes the following: (1) Dollar contributions from state, county, city, company, or other non-federal sources; (2) in-kind contributions of full-time personnel (i.e., persons employed full time by the joint venture or one of the joint venture members); (3) in-kind contributions of a pro-rata share of part-time personnel that the Program deems essential to carrying out the proposed experimental work program and who devote at least 50% of their time to the program; and (4) in-kind value of equipment that the Program deems essential to carrying out the proposed experimental work program, which may include either the purchase cost of new equipment or the depreciated value of previously purchased equipment. The depreciation method to be used for the matching fund determination shall be the internal depreciation accounting method used by the applicant for that equipment prior to the award. The value of equipment will be further pro-rated according to the share of total use dedicated to carrying out the proposed ATP work program. The total value of equipment expenditures allowable under the match may be applied in the award year expended or pro-rated over the duration of award years. The total in-kind value of equipment expenditures can not exceed 30% of the applicant's total annual share of matching funds. The total in-kind value of part-time personnel can not exceed 20% of the applicant's total annual share of matching funds.

* * * * *

7. The newly designated § 295.2(p) is revised to read as follows:

§ 295.2 Definitions.

* * * * *

(p) The term *Secretary* means the Secretary of Commerce or the Secretary's designee.

8. Section 295.2 is amended by adding paragraphs (q) through (r) to read as follows:

§ 295.2 Definitions.

* * * * *

(q) The term *small business* means a business that is independently owned and operated, is organized for profit, and is not dominant in the field of operation in which it is proposing, and meets the other requirements found in 13 CFR part 121.

(r) The term *United States-owned company* means a for-profit organization, including sole proprietors, partnerships, or corporations, that has a majority ownership or control by individuals who are citizens of the United States.

§§ 295.3–295.10 [Redesignated as §§ 295.6–295.13]

9. Sections 295.3 through 295.10 are redesignated as §§ 295.6 through 295.13, and newly designated §§ 295.3 through 295.5 are added to read as follows:

§ 295.3 Eligibility of United States- and foreign-owned businesses.

(a) A company shall be eligible to receive an award from the Program only if:

(1) The Program finds that the company's participation in the Program would be in the economic interest of the United States, as evidenced by investments in the United States in research, development, and manufacturing (including, for example, the manufacture of major components or subassemblies in the United States); significant contributions to employment in the United States; and agreement with respect to any technology arising from assistance provided by the Program to promote the manufacture within the United States of products resulting from that technology (taking into account the goals of promoting the competitiveness of United States industry), and to procure parts and materials from competitive suppliers, and

(2) Either the company is a United States-owned company, or the Program finds that the company is incorporated in the United States and has a parent company which is incorporated in a country which affords to United States-owned companies opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized under the Program; affords the United States-owned companies local investment opportunities comparable to those afforded to any other company; and affords adequate and effective

protection for the intellectual property rights of United States-owned companies.

(b) The Program may, within 30 days after notice to Congress, suspend a company or joint venture from continued assistance under the Program if the Program determines that the company, the country of incorporation of the company or a parent company, or the joint venture has failed to satisfy any of the criteria contained in paragraph (a) of this section, and that it is in the national interest of the United States to do so.

§ 295.4 The selection process.

(a) The selection process for awards is a multi-step process based on the criteria listed in § 295.6. In the first step, called "preliminary screening," proposals are eliminated that do not meet the requirements of this rule or the program announcement. Typical but not exclusive of the reasons for eliminating a proposal at this stage is that the proposal: is deemed to have serious deficiencies in either the technical or business plan; or does not meet the definition of precompetitive, generic technology; or, is not industry-led; or is significantly overpriced or underpriced given the scope of the work; or does not meet the requirements set out in the Notice of Availability of Funds issued pursuant to § 295.7; or in the case of joint ventures, requests more than a minority share of funding. NIST will also examine proposals that have been submitted to a previous competition to determine whether substantive revisions have been made to the earlier proposal, and if not, may reject the proposal or forward it to a later stage in the review process based upon the earlier review.

(b) In the second step, referred to as the "technical and business review," proposals are evaluated under the criteria found in § 295.6. Proposals are rated as "not recommended" or "recommended." Proposals must have high scientific and technical merit to be recommended. Only those proposals rated as "recommended" are considered further. These applicants are referred to as "semifinalists."

(c) In the third step, referred to as "selection of finalists," the Program prepares a final scoring and ranking of semifinalist proposals. During this step, the semifinalist proposers may be asked to make oral presentations on their proposals at NIST, and in some cases site visits may be required. Subject to the provisions of § 295.6, a list of ranked finalists is submitted to the selecting official.

(d) In the final step, referred to as "selection of awardees," the Selecting Official selects funding recipients from among the finalists, based upon (1) the rank order of the applications on the basis of all selection criteria (§ 295.6); (2) assuring an appropriate distribution of funds among technologies and activities, and (3) the availability of funds. The Program reserves the right to withhold awards in any case where a search of Federal records discloses information that raises a reasonable doubt as to the responsibility of the applicant. The decision of the Selecting Official is final.

(e) If a joint venture is ranked as a finalist, but the Program determines that the joint venture contains weaknesses in its structure or cohesiveness that may substantially lessen the probability of the proposed program being completed successfully, the Program may inform the applicant of the deficiencies and enter into negotiations with the applicant in an effort to remedy the deficiencies. If appropriate, funding up to 10 percent of the amount originally requested by the applicant may be awarded by the Program to the applicant to assist in overcoming the organizational deficiencies. If the Program determines within six months of this award that the organizational deficiencies have been corrected, the Program may award the remaining funds requested by the applicant to that applicant.

(f) NIST reserves the right to negotiate with applicants selected to receive awards the cost and scope of the proposed work, e.g., to add or delete a task to improve the probability of success.

§ 295.5 Use of abbreviated proposals in the selection process.

To reduce proposal preparation costs incurred by applicants and to make the selection process more efficient, NIST may use a preliminary qualification process based on abbreviated proposals. Announcements requesting abbreviated proposals will be published as indicated in § 295.7, seeking proposals that address all of the selection criteria, but in considerably less detail than full proposals. The Program will review the abbreviated proposals and select those that best meet the selection criteria. Submitters of abbreviated proposals will be notified in writing whether their proposals are recommended for full proposal, or, not recommended for full proposal. Those whose proposals are recommended for full proposal submission will be invited to prepare and submit full proposals. Those not invited to submit proposals may nonetheless elect to do so, and will have an equal opportunity for selection. When the full proposals are received, the review and selection process will continue as described in § 295.4.

10. Section 295.6 is revised to read as follows:

§ 295.6 Criteria for selection.

The evaluation criteria to be used in selecting any proposal for funding under this program, and their respective weights, are listed in this section. No proposal will be funded unless the Program determines via the technical review that it has high scientific and technical merit, no matter how meritorious the proposal might be with respect to the other selection criteria.

(a) Scientific and Technical Merit of the Proposal (30 Percent)

(1) Quality, innovativeness, and cost-effectiveness of the proposed technical program, i.e. uniqueness with respect to current industry practice. Applicants shall compare and contrast their approaches with those taken by other domestic and foreign companies working in the same field.

(2) Appropriateness of the technical risk and feasibility of the project; that is, is there a sufficient knowledge base to justify the level of technical risk involved, and is the risk commensurate with the potential payoff. Projects should press the state of the art while still demonstrating feasibility.

(3) Coherency of technical plan and clarity of vision of technical objectives, and the degree the technical plan meets Program goals.

(4) Adequacy of systems-integration and multi-disciplinary planning including integration of appropriate downstream or upstream production, manufacturing, quality assurance, and customer service requirements.

(5) Potential broad impact on U.S. technology and knowledge base.

(b) Potential Broad-based Economic Benefits of the Proposal (20 Percent)

(1) Potential to improve U.S. economic growth.

(2) Timeliness of proposal; that is, the potential project results will not occur too late or too early to be competitively useful.

(3) Degree to which ATP support is essential for the achievement of the broad-based benefits from the proposed R&D and appropriateness of proposed R&D for ATP support. This factor takes into consideration the likelihood of the results being achieved in the same general time frame by the applicant or by other U.S. researchers without ATP support, and whether other Federal agencies or other sponsors are already funding very similar kinds of work.

(4) Cost-effectiveness of proposal.

(c) Adequacy of Plans for Eventual Commercialization (20 Percent)

(1) Evidence that if the project is successful, the applicants will pursue further development of the technology toward commercial application, either through their own organization(s) or through others.

(2) Degree to which proposal identifies potential applications of the technology and provides evidence that the applicant has credible plans to assure prompt and widespread use of the technology if the R&D is successful and to ensure adequate protection of the intellectual property by the participant(s) and, as appropriate, by other U.S. businesses.

(d) Proposer's Level of Commitment and Organizational Structure (20 Percent)

(1) Level of commitment of proposer as demonstrated by contribution of personnel, equipment, facilities, and cost-sharing. Extent to which the proposer assigns the company's best people to the project. Priority given to this work vis-a-vis other projects.

(2) For joint ventures, the extent to which the joint venture has been structured (vertical integration, horizontal integration, or both) so as to include sufficient participants possessing all of the skills required to complete successfully the proposed work.

(3) For joint ventures, appropriate participation by small businesses. "Small business" is defined in § 295.2(q).

(4) Appropriateness of subcontractor/supplier/collaborator participation and relationships (where applicable).

(5) Clarity and appropriateness of management plan. Extent to which the proposers have clarified who is responsible for each task, and the chain of command. Extent to which those responsible for the work have adequate authority and access to higher level management.

(e) Experience and Qualifications of the Proposing Organization (10 Percent)

(1) Adequacy of proposer's facilities, equipment, and other technical, financial, and administrative resources to accomplish the proposed program objectives. This factor includes consideration of resources possessed by subcontractors to the applicant or other collaborators.

(2) Quality and appropriateness of the technical staff to carry out the proposed work program and to identify and overcome barriers to meeting project objectives.

(3) Past performance of the company or joint venture members in carrying out similar kinds of efforts successfully, including technology application. Consideration of this factor in the case of a start-up company or new joint venture, will take into account the past performance of the key people in carrying out similar kinds of efforts.

11. Newly designated § 295.7 is revised to read as follows:

§ 295.7 Notice of availability of funds.

(a) The Program shall publish at least annually a **Federal Register** notice inviting interested parties to submit proposals, and may more frequently publish invitations for proposals in the Commerce Business Daily, based upon the annual notice. Potential applicants must request a proposal preparation kit from the Program. Applications will only be considered for funding when submitted in response to an invitation published in the **Federal Register**, or a related announcement in the Commerce Business Daily.

(b) All notices published in accord with § 295.7(a) shall include the amount of funds available, the approximate number of awards, types of awards, closing dates, the name, address and telephone number of the contact person, a requirement that proposals be submitted with a NIST Form 1262 (for single applicants), or NIST Form 1263 (for joint ventures), and any other appropriate guidance.

(c) Notices issued under § 295.7(a) shall also state that awards under the Program shall be subject to all Federal laws and Federal and Departmental regulations, policies and procedures applicable to financial assistance awards, and shall require that funds awarded by the Program under subpart C (single applicants) shall be used only for direct costs and not for indirect costs, profits, or management fees of the funding recipients. Notices shall also include the notification that section 319 of Public Law 101–121 prohibits recipients of Federal contracts, grants, and loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan.

12. Newly designated § 295.8 is revised to read as follows:

§ 295.8 Intellectual property rights; Publication of research results.

(a)(1) *Patent rights:* Title to inventions arising from assistance provided by the Program must vest in a company or companies incorporated in the United States. The United States may reserve a non-exclusive, nontransferable, irrevocable paid-up license to practice or have practiced for or on behalf of the United Sates any such intellectual property, but shall not, in the exercise of such license, publicly disclose proprietary information related to the license. Title to any such intellectual property shall not be transferred or passed, except to a company incorporated in the United States, until the expiration of the first patent obtained in connection with such intellectual property. Nothing in this paragraph shall be construed to prohibit the licensing to any company of intellectual property rights arising from assistance provided under this section.

(2) *Patent procedures:* Each award by the Program will contain procedures regarding reporting of inventions by the funding recipient to the Program; determinations by the Program as to whether it will retain a governmental use license; march-in rights, and other matters.

(b) *Copyrights:* Except as otherwise specifically provided for in an Award, funding recipients under the Program may establish claim to copyright subsisting in any data first produced in the performance of the award. When claim is made to copyright, the funding recipient shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship to the data when and if the data are delivered to the Government, are published, or are deposited for registration as a published work in the U.S. Copyright Office. The funding recipient shall grant to the Government, and others acting on its behalf, a paid up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, perform publicly and display publicly, and for data other than computer software to distribute to the public by or on behalf of the Government.

(c) *Publication of research results:* The decision on whether or not to publish research results will be made by the funding recipient(s). Unpublished intellectual property owned and developed by any business or joint research and development venture receiving funding or by any member of such a joint venture may not be disclosed by any officer or employee of the Federal Government except in accordance with a written agreement between the owner or developer and the Program. The licenses granted to the Government under § 295.8(b) shall not be considered a waiver of this requirement.

13. Section 295.14 is added to read as follows:

§ 295.14 Special financial reporting requirements.

Each award by the Program shall contain procedures regarding financial reporting to ensure that awards are being used in accordance with Office of Management and Budget Circular A-122—"Cost Principles for Non-Profit Organizations", Federal Acquisition Regulation (FAR) part 31—"Contract Cost Principles and Procedures", or other sound accounting practices to be specified in the Cooperative Agreement. The audit principles to be applied to ATP awards are the Generally Accepted Accounting Principles (GAAP) according to the General Accounting Office's "Government Auditing Standards" subtitled "Standards for Auditing Government Organization, Program, Activities and Functions". Each award will be subject to an Attestation Engagement (i.e., providing assurance on representations of compliance with statutory, regulatory, and contractual requirements) or an audit in conjunction with the recipient's annual audit at least every two years. In the interest of efficiency, the recipients are encouraged to retain their own independent CPA firm to perform these services. The Department of Commerce's Office of Inspector General (OIG) reserves the right to determine the time frame and/or level of service of financial audit reports that are to be delivered and to determine how the close-out audit is to be conducted. The use of an independent CPA firm does not preclude the OIG's right to conduct its own audit.

14. The heading for subpart B is revised to read as follows:

Subpart B—Assistance to United States Industry-Led Joint Research and Development Ventures

15. Section 295.21 is revised to read as follows:

§ 295.21 Qualification of applicants.

(a) Assistance under this subpart is available to industry-led joint research and development ventures only, subject to the limitations set out in § 295.3 of these regulations. These ventures may include universities, independent research organizations, and governmental entities; however, the Program will not provide funding directly to any university or governmental organization.

(b) Applications for funding under this subpart may be submitted on behalf of an industry-led joint research and development venture by one or more businesses or independent research organizations that are members of the venture. Applications must, however, include letters of commitment from all proposed members of the venture, verifying the availability of matching funds, and authorizing the party or parties submitting the proposal to act on behalf of the venture with the Program on all matters pertaining to the proposal.

16. Section 295.22 is revised to read as follows:

§ 295.22 Limitations on assistance.

An award will be made under this subpart only if the award will facilitate the formation of a joint venture or the initiation of a new research and development project by an existing joint venture.

17. Section 295.24 is revised to read as follows:

§ 295.24 Registration.

Joint research and development ventures selected for funding must notify the Department of Justice or the Federal Trade Commission under the National Cooperative Research Act of 1984. No funds will be released prior to receipt by the Program of copies of such notification.

18. The heading for subpart C is revised to read as follows:

Subpart C—Assistance to Single-Applicant U.S. Businesses

19. Section 295.30 is revised to read as follows:

§ 295.30 Types of assistance available.

This subpart describes the types of assistance that may be provided under the authority of 15 U.S.C. 278n(b)(2). Such assistance includes but is not limited to entering into cooperative agreements with United States businesses, especially small businesses.

20. Section 295.31 is revised to read as follows:

§ 295.31 Qualification of applicants.

Awards under this subpart will be available to all businesses, subject to the limitations set out in § 295.3 of these regulations. The Program will not directly provide funding under this subpart to any governmental entity, academic institution or independent research organization.

[FR Doc. 94-69 Filed 1-5-94; 8:45 am]

BILLING CODE 3510-13-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

[Regulations No. 4]

RIN 0960—None Assigned

Federal Old-Age, Survivors and Disability Insurance; Determining Disability and Blindness; Extension of Expiration Date for Cardiovascular System Listing

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: We are extending the date on which parts A and B of the cardiovascular system listings, found in appendix 1 of part 404, subpart P, will no longer be effective from January 6, 1994, to February 15, 1994. We have made no revisions in the medical criteria in the cardiovascular system listings; they remain the same as they now appear in the Code of Federal Regulations. We are presently considering comments we received on a Notice of Proposed Rulemaking (NPRM) to update the medical criteria contained in part A and part B of the cardiovascular system listings. When we have completed our review, any revised criteria will be published as final regulations.

EFFECTIVE DATE: This final rule will be effective January 6, 1994.

FOR FURTHER INFORMATION CONTACT: Irving Darrow, Esq., Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 966-0512.

SUPPLEMENTARY INFORMATION: On December 6, 1985, a revised Listing of Impairments in appendix 1 to subpart P of part 404 was published in the **Federal Register** (50 FR 50068). The Listing of Impairments describes, for each of 13 major body systems, impairments that are considered severe enough to preclude a person from engaging in any gainful activity (part A), or in the case of a child under the age of 18, impairments that are considered severe enough to prevent the child from functioning independently, appropriately, and effectively in an age-appropriate manner (part B). The Listing of Impairments is used for evaluating disability and blindness at the third step of the sequential evaluation process for adults and children under the Social Security disability program and the supplemental security income program.

When the revised Listing of Impairments was published in 1985, we indicated that medical advances in disability evaluation and treatment and program experience would require that the listings be periodically reviewed and updated. Accordingly, we established termination dates ranging from 4 to 8 years for each of the listings for specific body systems. A date of December 6, 1989, was established for the cardiovascular system listings in part A to no longer be effective. A date of December 6, 1993, was established for part B of the cardiovascular system listings to no longer be effective.

The potential program impact of the changes to update the cardiovascular system listings required careful analysis and consideration within the Agency. As our analysis continued, it became evident that we would be unable to publish a proposed and then a final regulation containing revised criteria for part A of the cardiovascular system listings by December 6, 1989. We published in the **Federal Register** of December 5, 1989 (54 FR 50233), a final regulation extending the current part A cardiovascular system listings for a period of 18 months through June 5, 1991. The part A cardiovascular system listings were again extended an additional 12 months through June 5, 1992, by final regulation published in the **Federal Register** on June 6, 1991 (56 FR 26030), and were extended to January 5, 1993, by final regulation published in the **Federal Register** on June 5, 1992 (57 FR 23945), and to July 6, 1993, by final regulation published in the **Federal Register** on December 29, 1992 (57 FR 61795). The part A and part B cardiovascular system listings were extended to January 6, 1994, by final regulation published in the **Federal Register** on July 6, 1993 (58 FR 36133).

On July 9, 1991, we published an NPRM proposing revisions to the medical criteria contained in parts A and B of the cardiovascular system listings (56 FR 31266), with provisions for a 60-day comment period. The complex issues raised by the numerous comments we received have required extensive analysis and careful consideration. In order to ensure sufficient time for this review, we are extending the date on which the current cardiovascular system listings in parts A and B will no longer be effective from January 6, 1994, to February 15, 1994.

Regulatory Procedures

The Department, even when not required by statute, as a matter of policy, generally follows the Administrative Procedure Act notice of proposed rulemaking and public comment procedures specified in 5 U.S.C. 553 in the development of its regulations. The Administrative Procedure Act provides exceptions to its notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(B), good cause exists for waiver of notice of proposed rulemaking and public comment procedures on this rule because it only extends the dates on which parts A and B of the cardiovascular system listings will no longer be effective and makes no substantive changes to these listings. The current regulations expressly provide that the listings may be extended by the Secretary, as well as revised and promulgated again. Because we are not making any revisions to the current listings, we have determined that use of public comment procedures is unnecessary under the Administrative Procedure Act.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

This regulation imposes no reporting or recordkeeping requirements necessitating clearance by the Office of Management and Budget.

(Catalog of Federal Domestic Assistance Program No. 93.802, Social Security-Disability Insurance; No. 93.807, Supplemental Security Income)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-age, Survivors and disability insurance, Reporting and recordkeeping requirements.

Dated: December 21, 1993.

Shirley Chater,

Commissioner of Social Security.

Approved: December 29, 1993.

Donna E. Shalala,

Secretary of Health and Human Services.

For the reasons set forth in the preamble, part 404, title 20 of the Code of Federal Regulations is amended as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

1. The authority citation for subpart P of part 404 is revised to read as follows:

Authority: Secs. 202, 205 (a), (b), and (d) through (h), 216(i), 221 (a) and (i), 222(c), 223, 225, and 1102 of the Social Security Act; 42 U.S.C. 402, 405 (a), (b), and (d) through (h), 416(i), 421 (a) and (i), 422(c), 423, 425, and 1302.

2. Appendix 1 to subpart P is amended by revising item 5 of the introductory text before part A to read as follows:

Appendix 1 to Subpart P—Listing of Impairments

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5. Cardiovascular System (4.00 and 104.00): February 15, 1994.

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[FR Doc. 94–222 Filed 1–5–94; 8:45 am]

BILLING CODE 4190–29–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

Schedules of Controlled Substances Temporary Placement of 4-Bromo-2,5-dimethoxyphenethylamine into Schedule I

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Final rule.

SUMMARY: The Acting Administrator of the Drug Enforcement Administration (DEA) is issuing this final rule to temporarily place 4-bromo-2,5-dimethoxyphenethylamine into Schedule I of the Controlled Substances Act (CSA) pursuant to the emergency scheduling provisions of the CSA. This action is based on the finding by the Acting Administrator of the DEA that the placement of 4-bromo-2,5-dimethoxyphenethylamine in Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety. As a result of this rule, the criminal sanctions and regulatory controls of Schedule I substances under the CSA will be applicable to the manufacture, distribution, and possession of 4-bromo-2,5-dimethoxyphenethylamine.

EFFECTIVE DATE: January 6, 1994.

FOR FURTHER INFORMATION CONTACT: Howard McClain, Jr., Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: The Comprehensive Crime Control Act of 1984 (Pub. L. 98–473) amended section 201 of the Controlled Substances Act (CSA) (21 U.S.C. 811) to give the Attorney General the authority to temporarily place a substance into Schedule I of the CSA if it is found that such action is necessary to avoid an imminent hazard to the public safety. A substance may be temporarily scheduled under the emergency provision of the CSA if that substance is not listed in any other schedule under Section 202 of the CSA (21 U.S.C. 812) of if there is no approval or exemption in effect under 21 U.S.C. 355 of the Food, Drug, and Cosmetic Act for the substance. The Attorney General has delegated his authority under 21 U.S.C. 811 to the Administrator of the DEA (28 CFR 0.100).

A notice of intent to temporarily place 4-bromo-2,5-dimethoxyphenethylamine into Schedule I of the CSA was published in the **Federal Register** on November 4, 1993, (58 FR 58819). The Administrator transmitted notice of his intention to temporarily place 4-bromo-2,5-dimethoxyphenethylamine into Schedule I of the CSA to the Assistant Secretary for Health of the Department of Health and Human Services (HHS). In response to this notification, the Food and Drug Administration has advised DEA that there are no exemptions or approvals in effect under 21 U.S.C. 355 of the Food, Drug, and Cosmetic Act for 4-bromo-2,5-dimethoxyphenethylamine and HHS has no objection to DEA's intention to temporarily place 4-bromo-2,5-dimethoxyphenethylamine into Schedule I of the CSA. No other comments were received regarding this matter.

In accordance with 21 U.S.C. 811(h)(3), the Acting Administrator has considered the following factors regarding 4-bromo-2,5-dimethoxyphenethylamine: (1) Its history and current pattern of abuse; (2) scope, duration and significance of abuse; and (3) what, if any, risk there is to the public health.

4-Bromo-2,5-dimethoxyphenethylamine is structurally similar to the Schedule I phenylisopropylamine hallucinogens, 4-methyl-2,5-dimethoxyamphetamine (STP or DOM) and 4-bromo-2,5-dimethoxyphenethylamine (DOB). Like DOM and DOB, 4-bromo-2,5-dimethoxyphenethylamine displays high affinity for central serotonin receptors and is capable of substituting for either DOM or DOB in drug discrimination studies conducted in rats. These data suggest that 4-bromo-2,5-dimethoxyphenethylamine is a psychoactive substance capable of producing effects similar, though not identical, to DOM and DOB. Data from human studies indicate that 4-bromo-2,5-dimethoxyphenethylamine is orally active at 0.1–0.2 mg/kg producing an intoxication with considerable euphoria and sensory enhancement which lasts for 6 to 8 hours. Higher doses have been reported to produce intense and frightening hallucinations.

DEA first encountered 4-bromo-2,5-dimethoxyphenethylamine in Texas in 1979. Since that time, several other exhibits of 4-bromo-2,5-dimethoxyphenethylamine have been analyzed by DEA and state forensic laboratories in California, Arizona, Louisiana, Pennsylvania, Iowa, Oregon, Georgia, Tennessee and Florida. Clandestine laboratories producing 4-bromo-2,5-dimethoxyphenethylamine were seized in California in 1986 and in Arizona in 1992. It has been represented as 3,4-methylenedioxy-methamphetamine (MDMA) and has been sold in sugar cubes as LSD. More recently, it has been promoted as an aphrodisiac and distributed under the product name of NEXUS whose purported active ingredient is brominated cathinine. DEA has recently seized several thousand dosage units of this product.

The continued clandestine production, illicit importation, distribution and abuse of 4-bromo-2,5-dimethoxyphenethylamine poses an imminent hazard to public safety. DEA is not aware of any commercial use for this substance in the United States.

In accordance with the provisions of section 201(h) of the CSA (21 U.S.C. 811(h)) and 28 CFR 0.100 and based on a consideration of the requisite factors and other relevant information, the Acting Administrator finds that placement of 4-bromo-2,5-dimethoxyphenethylamine into Schedule I of the CSA on a temporary basis is necessary to avoid an imminent hazard to the public safety.

The following regulations are effective with respect to 4-bromo-2,5-dimethoxyphenethylamine on January 6, 1994, except for those individuals registered with DEA in accordance with part 1301 or part 1311 of title 21 of the Code of Federal Regulations, who currently possess 4-bromo-2,5-dimethoxyphenethylamine may continue to do so pending DEA's receipt of an application for amended registration no later than February 7, 1994:

1. Registration. Any person who manufactures, distributes, delivers, imports or exports 4-bromo-2,5-dimethoxyphenethylamine or who engages in research or conducts instructional activities with respect to 4-bromo-2,5-dimethoxyphenethylamine or who proposes to engage in such activities must be registered to conduct such activities in accordance with parts 1301 and 1311 of title 21 of the Code of Federal Regulations.

2. Security. 4-Bromo-2,5-dimethoxyphenethylamine must be manufactured, distributed and stored in accordance with §§ 1301.71 through 1301.76 of title 21 of the Code of Federal Regulations.

3. Labeling and Packaging. All labels and labeling for commercial containers of 4-bromo-2,5-dimethoxyphenethylamine must comply with requirements of §§ 1302.03 through 1302.05, 1302.7 and 1302.08 of title 21 of the Code of Federal Regulations.

4. Quotas. All persons required to obtain quotas for 4-bromo-2,5-dimethoxyphenethylamine must submit applications pursuant to §§ 1303.12 and 1303.22 of title 21 of the Code of Federal Regulations.

5. Inventory. Every registrant required to keep records and who possesses any quantity of 4-bromo-2,5-dimethoxyphenethylamine is required to take an inventory of all stocks of this substance on hand pursuant to §§ 1304.11 through 1304.19 of title 21 of the Code of Federal Regulations.

6. Records. All registrants required to keep records pursuant to §§ 1304.21 through 1304.27 of title 21 of the Code of Federal Regulations must do so regarding 4-bromo-2,5-dimethoxyphenethylamine.

7. Reports. All registrants required to submit reports in accordance with §§ 1304.34 through 1304.37 of title 21 of the Code of Federal Regulations shall do so regarding 4-bromo-2,5-dimethoxyphenethylamine.

8. Order Forms. All registrants involved in the distribution of 4-bromo-2,5-dimethoxyphenethylamine must comply with the order form requirements of §§ 1305.01 through 1305.16 of title 21 of the Code of Federal Regulations.

9. Importation and Exportation. All importation and exportation of 4-bromo-2,5-dimethoxyphenethylamine must be in compliance with part 1312 of title 21 of the Code of Federal Regulations.

10. Criminal Liability. Any activity with 4-bromo-2,5-dimethoxyphenethylamine not authorized by, or in violation of, the CSA or the Controlled Substances Import and Export Act occurring on or after January 6, 1994, is unlawful.

The Acting Administrator of the DEA hereby certifies that the temporary

placement of 4-bromo-2,5-dimethoxyphenethylamine into Schedule I of the CSA will have no significant impact upon entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This action involves the temporary control of a substance with no currently approved medical use in the United States.

The temporary scheduling of 4-bromo-2,5-dimethoxyphenethylamine is not a significant regulatory action for the purposes of Executive Order (E.O.) 12866 of September 30, 1993. Drug scheduling matters are not subject to review by the Office of Management and Budget (OMB) pursuant to the provisions of E.O. 12866, section 3(d)(1). Accordingly, this proposed emergency scheduling action is not subject to provisions of E.O. 12778 which are contingent upon review by OMB. This regulation both responds to an emergency situation posing an imminent hazard to the public safety, and is essential to a criminal law enforcement function of the United States.

This action has been analyzed in accordance with the principles and criteria in E.O. 12612, and it has been determined that the temporary placement of 4-bromo-2,5-dimethoxyphenethylamine into Schedule I of the CSA does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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 section 201(h) of the CSA (21 U.S.C. 811(h)), and delegated to the Administrator of the DEA by the Department of Justice regulations (28 CFR 0.100), the Acting Administrator hereby amends 21 CFR part 1308 as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

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

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

2. Section 1308.11 is amended by adding paragraph (g)(5) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(g) * * *

(5) 4-bromo-2,5-dimethoxyphenethylamine, its optical isomers, salts and salts of isomers—7392. Some other names: 2-(4-bromo-2,5-dimethoxyphenyl)-1-aminoethane; alpha-desmethyl DOB; 2C–B.

Dated: December 27, 1993.

Stephen H. Greene,

Acting Administrator of Drug Enforcement.

[FR Doc. 94–234 Filed 1–5–94; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD02 93–035]

RIN 2115–AE46

Special Local Regulations; Operation Anzio Reenactment (Ohio River Between Mile 630.0–636.5)

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: A special local regulation is being adopted for the Operation Anzio Reenactment training exercise which the U.S. Army will hold on the Ohio River near Fort Knox, Kentucky on January 20–22, 1994. This regulation is needed to control vessel traffic in the immediate vicinity of the event. The regulation will restrict general navigation in the regulated area for the safety of spectators, participants and through traffic.

EFFECTIVE DATES: This regulation becomes effective daily at 12 p.m. to 3 p.m. local time on January 20–22, 1994.

FOR FURTHER INFORMATION CONTACT: LTJG D.R. Dean, Chief, Boating Affairs Branch, Second Coast Guard District, 1222 Spruce Street, St. Louis, Missouri 63103–2832. The telephone number is (314) 539–3971, fax (314) 539–2685.

SUPPLEMENTARY INFORMATION:

Drafting Information

The drafters of these regulations are LTJG D.R. Dean, Project Officer, Second Coast Guard District, Boating Safety Division and LCDR A.O. Denny, Project Attorney, Second Coast Guard District Legal Office.

Regulatory History

In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published for these regulations and good cause exists for making them effective in less than 30 days from the date of publication. Following normal rulemaking procedures would have been impracticable. Specifically, the sponsor's late submission of the regatta application left insufficient time to publish a notice of proposed rulemaking in advance of the scheduled event. However, the Coast Guard deems it to be in the public's best interest to issue a regulation now as the benefits of holding the training during the winter, as scheduled, rather than later in the spring will mean less impact on the boating public.

Background and Purposes

Operation Anzio Reenactment consists of river crossing training for the 19th Engineer Battalion, Fort Knox, Kentucky. The Training will take place over three days, January 20–22, 1994. Each day's training will begin at 12 p.m., and will end at 3 p.m. local time. In order to provide for the safety of spectators and participants, and for the safe passage of through traffic, the Coast Guard will restrict vessel movement in the regatta area. The river will be closed during part or all of the effective period to all vessel traffic except participants, official regatta vessels, and patrol craft. These regulations are issued pursuant to 33 U.S.C. 1233 and 33 CFR 100.35.

Regulatory Evaluation

This regulation is not considered a significant regulatory action under Executive Order 12866 and is not significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979), it will not have a significant economic impact on a substantial number of small entities, and it contains no collection of information requirements. A full regulatory analysis is unnecessary because the Coast Guard expects the impact of this regulation to be minimal due to its short duration.

Federalism Assessment

Under the principles and criteria of Executive Order 12612, this regulation does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

Under section 2.B.2.c of Commandant Instruction M16475.1B, this regulation is categorically excluded from further environmental documentation.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Records and recordkeeping requirements, Waterways.

Temporary Regulations

In consideration of the foregoing, part 100 of title 33, Code of Federal Regulations, is amended as follows:

PART 100—[AMENDED]

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35.

2. A temporary § 100.35–T02–035 is added, to read as follows:

§ 100.35–T02–035 Ohio River, Fort Knox, Kentucky.

(a) *Regulated area.* Ohio River from mile 630.0 to 636.5.

(b) *Special local regulations.* (1) Except for participants in the Operation Anzio Reenactment no person or vessel may enter or remain in the regulated area without permission of the Patrol Commander.

(2) The Coast Guard Patrol Commander will be a commissioned or petty officer designated by the Commanding Officer, Marine Safety Office Louisville, Kentucky and may be contacted, during the event, on channel 16 (156.8 MHZ) by the call sign "Coast Guard Patrol Commander." The Patrol Commander may:

(i) Direct the anchoring, mooring, or movement of any vessel within the regulated area,

(ii) Restrict vessel operation within the regulated area to vessels having particular operating characteristics,

(iii) Terminate the marine event or the operation of any vessel when necessary for the protection of life and property, and

(iv) Allow vessels to transit the regulated area whenever an event is not being conducted and the transit can be completed before another event begins.

(3) Coast Guard commissioned or petty officers will patrol the event on board patrol vessels which display the Coast Guard Ensign. If radio or other voice communications are not available to communicate with a vessel, they will use a series of sharp, short blasts by whistle or horn to signal the operator of any vessel in the vicinity of the regulated area to stop. When signaled, the operator of any vessel in the immediate vicinity of the regulated area shall stop the vessel immediately and shall proceed as directed.

(4) Vessels desiring to transit the regulated area may do so only with the prior approval and direction of the Patrol Commander.

(5) The Patrol Commander will terminate enforcement of the regulations at the conclusion of the marine event if earlier than the announced termination time.

(c) *Effective dates.* This regulation becomes effective daily from 12 p.m. to 3 p.m. local time on January 20–22, 1994.

Dated: January 3, 1994.

Paul M. Blayney,

Rear Admiral, U.S. Coast Guard, Commander, Second Coast Guard District.

[FR Doc. 94–268 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 147

[CGD08–93–026]

RIN 2115–AA97

Safety Zone; Chevron #1 Well on Destin Dome #97

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: This rulemaking establishes a 500 meter safety zone around the structure at the Chevron #1 Well on Destin Dome #97. The overall impact of these regulations will be to promote the safety of lives and property on the structure, its appurtenances and attending vessels, and on vessels in adjacent waters.

DATES: This regulation becomes effective on November 3, 1993, and terminates on September 1, 1994, unless sooner terminated by Commander, Eighth Coast Guard District. Comments on this regulation must be received on or before February 22, 1994.

ADDRESSES: Comments should be mailed to Commander (mps), Eighth Coast Guard District, Hale Boggs Federal Building, 501 Magazine Street, New Orleans, LA 70130–3396. The comments will be available for inspection and copying at the Marine Safety Division, Eighth Coast Guard District, room 1319, Hale Boggs Federal Building, 501 Magazine Street, New Orleans, LA. Normal office hours are between 7:30 a.m. and 4 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: Lieutenant Verne Gifford, Marine Safety Division, Eighth Coast Guard District, Hale Boggs Federal Building, 501 Magazine Street, New Orleans, LA 70130–3396. Phone number: (504) 589–6271.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a Notice of Proposed Rulemaking was not published for this regulation and good cause exists for making it effective in less than 30 days from the date of publication. Following normal rulemaking procedures would have been contrary to the public interest. Immediate action is needed to prevent possible loss of life and damage to vessels in the area and to the structure itself. Although this regulation is published as a final rule without prior notice, an opportunity for public comment is nevertheless desirable to ensure that the regulation is both reasonable and workable. Accordingly, persons wishing to comment may do so by submitting written comments to the office listed under ADDRESSES in this preamble. Commenters should include their names and addresses, identify the docket number for the regulations, and give reasons for their comments. Based upon comments received, the regulations may be changed.

Drafting Information

The drafters of this notice are Lieutenant Verne Gifford, project officer, and Commander D.G. Dickman, project attorney, Eighth Coast Guard District Legal Office.

Discussion of Regulation

The circumstances creating the need for this regulation is information received by Chevron and by the Coast Guard that vessels intend to protest and possibly interfere with drilling operations at this site. This is the first site at which drilling will begin in this particular area, which has been a subject of controversy. Precautionary measures for safety at a drilling site require that the structure and waters around it be maintained free of interference and traffic in order to allow for immediate evacuation of personnel aboard the structure and by attending vessels in case of emergency. The establishment of a safety zone will prevent non-attending vessels from remaining in close proximity to the offshore structure and hindering any necessary evacuation of the area.

The final rule amends part 147 to add a temporary safety zone around the Chevron Well #1, Destin Dome #97, which is about 27 miles south of Pensacola, Florida. The regulation contains a description of the area of the safety zone, including the location of the center of the structure and information pertinent to the safety zone. The regulations restrict the entry of vessels into the safety zone, except for attending vessels and those vessels authorized by the Commander, Eighth Coast Guard District.

Economic Assessment and Certification

This regulation is not considered a significant regulatory action under Executive Order 12866 and is nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact has been found to be so minimal that a full

regulatory evaluation is unnecessary. The Coast Guard certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

Federalism Assessment

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

Environmental Assessment

The Coast Guard has considered the environmental impact of this regulation and concluded that under section 2.B.2.c of Commandant Instruction M16475.1B, it will have no significant environmental impact and it is categorically excluded from further environmental documentation. A Categorical Exclusion Determination is available in the docket for examination or a copy may be obtained by contracting the person identified under "FOR FURTHER INFORMATION CONTACT."

Paperwork Reduction Act

The rule contains no information collection or recordkeeping requirements.

List of Subjects in 33 CFR Part 147

Continental shelf, Marine safety, Navigation (water).

Final Regulation

In consideration of the foregoing, part 147 of title 33, Code of Federal Regulations, is amended as follows:

PART 147—[AMENDED]

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

Authority: 43 U.S.C. 1333 as amended; 49 CFR 1.46.

2. A new § 147.T801 is added to read as follows:

§ 147.T801 Safety Zone: Chevron #1 Well at Destin Dome #97.

(a) *Description.* The area within a line 500 meters from each point on the structure's outer edge. The position of the center of the structure is 29°51'57.91" N, 87°20'07.74" W.

(b) *Effective date.* This regulation becomes effective November 3, 1993. It terminates on September 1, 1994, unless sooner terminated by Commander, Eighth Coast Guard District.

(c) *Regulation.* No vessel may enter or remain in this safety zone except the following:

(1) An attending vessel or

(2) A vessel authorized by the Commander, Eighth Coast Guard District.

Dated: November 3, 1993.

J.C. Card,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 94–264 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 165

[COTP St. Louis Regulation 93–037]

RIN 2115–AA97

Safey Zone; Upper Mississippi River

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the Upper Mississippi River. This regulation is needed to control vessel traffic in the regulated area to provide safe working conditions and navigation within the affected area. The regulation will prohibit navigation in the regulated area for the safety of vessel traffic and the protection of life and property associated with bridge and span removal.

EFFECTIVE DATES: This regulation is effective December 21, 1993 and will terminate on January 21, 1994 unless sooner terminated by the Captain of the Port.

FOR FURTHER INFORMATION CONTACT: LT Timothy Deal, Operations Officer, Captain of the Port, St. Louis, Missouri at (314) 539–3823.

SUPPLEMENTARY INFORMATION:

Drafting Information

The drafters of this regulation are MK1 Christopher C. Schulz, Project Officer, Marine Safety Office, St. Louis, Missouri and LCDR A. O. Denny, Project Attorney, Second Coast Guard District Legal Office.

Regulatory History

In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published for this regulation and good cause exists for making it effective in less than 30 days from the date of publication. Following normal rulemaking procedures would have been impracticable. Specifically, the nature of repairs to the Burlington Highway Bridge at mile 404.2 Upper Mississippi River leaves insufficient time to publish a notice of proposed rule making. The Coast Guard deems it to be in the public's best interest to issue a regulation without waiting for a comment period since the conditions present an immediate hazard.

Background and Purpose

Extensive renovation of the bridge is required and removal of the center is to be accomplished from a vessel located in the navigation channel and this action will impede normal traffic flow. As a result of these conditions this regulation is necessary to provide safe working conditions and navigation within the affected area.

Regulatory Evaluation

This regulation is not considered a significant regulatory action under Executive Order 12866 and not significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979), it will not have a significant economic impact on a substantial number of small entities, and it contains no collection of information requirements.

The Coast Guard expects the impact of this regulation to be so minimal that a Regulatory Evaluation is unnecessary. The imposed restrictions are anticipated to be of short duration. To avoid any unnecessary adverse economic impact on businesses which use the river for commercial purposes, Captain of the Port, St. Louis, Missouri will monitor the situation and will authorized entry into the closed area as conditions warrant. Changes will be announced by Marine Safety Information Radio Broadcast on VHF Marine Band Radio, Channel 22 (157.1 MHZ). Mariners may also call the Port Operations Officer, Captain of the Port, St. Louis, Missouri at (314) 539–3823 for current information.

Federalism Assessment

Under the principles and criteria of Executive Order 12612, this regulation does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

The Coast Guard considered the environmental impact of this proposal and concluded that, under section 2.B.2.g.[5] of Commandant Instruction M16475.1B, this proposal is categorically excluded from further environmental documentation as an action to protect public safety.

List of Subject in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Records and recordkeeping, Security measures, Waterways.

Temporary Regulation

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

PART 165—[AMENDED]

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; CFR 1.46 and 33 CFR 1.05–1(g), 6.01–1, 6.04–6, and 160.5.

2. A temporary § 165.T02–077 is added, to read as follows:

§ 165.T02–077 Safety zone: Upper Mississippi River.

(a) *Location.* The Upper Mississippi River between mile 403.2 and 405.2 is established as a safety zone.

(b) *Effective dates.* This regulation becomes effective on December 21, 1993 and will terminate on January 21, 1994.

(c) *Regulations.* The general regulations under § 165.23 of this part which prohibit entry into the described zones without authority of the Captain of the Port apply. The Captain of the Port, St Louis, Missouri will notify the maritime community of river conditions affecting the areas covered by this safety zone by Marine Safety Information Radio Broadcast on VHF Marine Band Radio, Channel 22 (157.1 MHZ).

Dated: December 17, 1993.

S.P. Cooper,

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

[FR Doc. 94–269 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 165

[COTP Pittsburgh Regulation 93–010]

RIN 2115–AA97

Safety Zone Regulations; Youghiogheny River

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the Youghiogheny River from mile 0.8 to mile 1.8. This regulation is needed to control vessel traffic in the regulated area during demolition of the main span of a bridge at mile 1.3. This regulation will restrict general navigation in the regulated area during demolition and subsequent debris clearing operations for the safety of vessels transitting the area.

EFFECTIVE DATE: This regulation is effective from 9 a.m. on January 8, 1994 and will terminate at 10 a.m. on January 10, 1994.

FOR FURTHER INFORMATION CONTACT: LT John Meehan, Port Operations Officer, Captain of the Port, Pittsburgh, Pennsylvania at (412) 644–5808.

SUPPLEMENTARY INFORMATION:

Drafting Information

The drafters of this regulation are LT John Meehan, Project Officer, Marine Safety Office, Pittsburgh, Pennsylvania and LCDR A.O. Denny, Project Attorney, Second Coast Guard District Legal Office.

Regulatory History

In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published for this regulation and good cause exists for making it effective in less than 30 days from the date of publication. Following normal rulemaking procedures would have been impracticable. Specifically, a bridge is being removed from a navigable waterway. Bridge removal operations pose inherent risks to the waterway because the structure is progressively weakened as the operation proceeds. Once commenced, such operations should be completed as quickly as possible. Removal operations involving structural supports for this bridge have proceeded ahead of schedule, leaving insufficient time to publish a notice of proposed rulemaking. The Coast Guard deems it to be in the public's best interest to issue a regulation without waiting for a comment period, as immediate implementation of navigation restrictions is needed to ensure the safety of vessels transitting the area and to minimize the time a bridge in a weakened condition remains over the waterway.

Background and Purpose

The Port Vue Bridge located at mile 1.3 on the Youghiogheny River is not longer an active highway bridge and must be removed. The bridge consists of several small spans that are located over land and one 310-foot main span that crosses over the navigable waterway. As part of the overall bridge removal operation, this main span will be demolished with five simultaneously detonated explosive charges. This explosion, which will create an obvious hazard to vessels transitting the area, will occur at approximately 10 a.m. on January 8, 1994. After the explosives on this span are detonated, the steel and other debris from the bridge will fall into the navigable waters of the Youghiogheny River, creating an unsafe condition of vessels. The contractor will immediately commence clearing operations, but it will require 48 hours to restore the navigability of this section of the Youghiogheny River. Accordingly, during that period, no traffic will be permitted in the safety zone, as it would be unsafe for vessels attempting to transit and such transit attempts would interfere with the debris clearing operations.

Regulatory Evaluation

This regulation is not considered a significant regulatory action under Executive Order 12866 and not significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979), it will not have a significant economic impact on a substantial number of small entities, and it contains no collection of information requirements. A full regulatory analysis is unnecessary because the Coast Guard expects the impact of this regulation to be minimal due to the relatively short duration of vessel traffic restrictions, the relatively small size of the area regulated, and the absence of any commercial vessel transits along this section of the Youghiogheny River, due to insufficient bridge clearances and water depth downriver.

Federalism Assessment

Under the principles and criteria of Executive Order 12612, this regulation does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

The Coast Guard considered the environmental impact of this proposal and concluded that, under section 2.B.2.c. of Commandant Instruction M16475.1B, this proposal is categorically excluded from further environmental documentation as an action required to protect public safety.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Records and recordkeeping, Security measures, Waterways.

Temporary Regulation

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

PART 165—[AMENDED]

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

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

2. A temporary § 165.T02–079 is added, to read as follows:

§ 165.T02–079 Safety zone: Youghiogheny River.

(a) *Location.* The Youghiogheny River between mile 0.8 and mile 1.8 is established as a safety zone.

(b) *Effective dates.* This regulation becomes effective from 9 a.m. on January 8, 1994 and will terminate at 10 a.m. on January 10, 1994.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port.

Dated: December 30, 1993.

M.W. Brown,

Commander, U.S. Coast Guard, Captain of the Port, Pittsburgh, Pennsylvania.

[FR Doc. 94–270 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

Diseases of the Ear and Systemic Conditions; Correction

AGENCY: Department of Veterans Affairs.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to the regulations of the Department of Veterans Affairs (VA) that govern the evaluation of diseases of the ear and systemic conditions. These corrections are required in order to amend editorial errors in those regulations. No substantive change to the content of 38 CFR part 4 is being made by this correcting amendment.

EFFECTIVE DATE: This correcting amendment is effective January 6, 1994.

FOR FURTHER INFORMATION CONTACT: John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233–3005.

SUPPLEMENTARY INFORMATION: The regulations that appear at 38 CFR 4.87a, diagnostic code 6210, establish the criteria for evaluating disease of the auditory canal. Due to VA error, that criteria contains the word "serious" instead of the word "serous." This document corrects that error.

The regulations that appear at 38 CFR 4.88a, diagnostic code 6311, establish the criteria for evaluating military tuberculosis. Due to VA error, that type of tuberculosis is identified as "military" instead of "miliary" tuberculosis. This document corrects that error.

List of Subjects in 38 CFR Part 4

Handicapped, Pensions, Veterans.

For the reasons set out in the preamble, 38 CFR part 4, subpart B, is amended as set forth below:

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

1. The authority citation for part 4, subpart B, continues to read as follows:

Authority: 72 Stat. 1125; 38 U.S.C. 1155, unless otherwise noted.

§ 4.87a [Corrected]

2. In § 4.87a, diagnostic code 6210, remove the word "serious", and insert, in its place, the word "serous".

§ 4.88a [Corrected]

3. In § 4.88a, diagnostic code 6311, remove the word "military", and insert, in its place, the word "miliary".

Approved: December 28, 1993.

Marjorie M. Leandri,

Chief, Records, Reports, and Regulations.

[FR Doc. 94–232 Filed 1–5–94; 8:45 am]

BILLING CODE 8320–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 600

[AMS-FRL 4823–1]

Revisions to Corporate Average Fuel Economy (CAFE) Calculations Pursuant to the North American Free Trade Agreement Implementation Act of 1993

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action changes the Corporate Average Fuel Economy (CAFE) calculation regulations to conform to changes required by section 371 of the North American Free Trade Agreement Implementation Act of 1993, which specifies that costs to motor vehicle manufacturers attributable to value added in Mexico be included with the costs attributable to value added in the United States and Canada for the purpose of separating foreign and domestic fleets.

EFFECTIVE DATE: This action is effective January 1, 1994.

ADDRESSES: Interested parties may submit written comments (in duplicate, if possible) to Public Docket No. A–93–52 at: Air Docket Section, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Materials relevant to this final rule have been placed in Docket No. A–93–52. The docket is located at the above address in room M–1500, Waterside Mall, and may be inspected weekdays between 8:30 a.m. and noon, and between 1:30 p.m. and 3:30 p.m.

FOR FURTHER INFORMATION CONTACT: Cliff Tyree, Certification Division, U.S. Environmental Protection Agency, National Vehicle and Fuel Emissions Laboratory, 2565 Plymouth Road, Ann Arbor, MI 48105. Telephone (313) 668–4310.

SUPPLEMENTARY INFORMATION:

I. Background

EPA is today promulgating changes to its fuel economy calculation regulations to conform to changes in the Motor Vehicle Information & Cost Savings Act (MVICSA), 15 U.S.C. 2003(b)(2), made by section 371 of the North American Free Trade Agreement Implementation Act of 1993 (NAFTA Implementation Act), Public Law 103–182 (December 8, 1993). Section 104(a)(2) of the NAFTA Implementation Act specifically provides that "appropriate officers of the United States Government may issue such regulations * * * as may be necessary to ensure that any * * * amendment made by this Act, that takes effect on the date the Agreement enters into force is appropriately implemented on such date."

The MVICSA, 15 U.S.C. 2003(b)(1), specifies that the EPA Administrator is to separate passenger automobiles manufactured by a manufacturer into foreign and domestic fleets, and to calculate the average fuel economy of each category separately. Prior to the NAFTA Implementation Act, 15 U.S.C. 2003(b)(2) specified that an automobile is to be considered domestically manufactured in any model year if at least 75% of the cost to the manufacturer is attributable to value added in the United States or Canada, unless the assembly is completed in Canada and the automobile is not imported into the United States prior to the expiration of 30 days following the end of the model year.

Section 371 of the NAFTA Implementation Act simply adds a new subparagraph (G) to 15 U.S.C. 2003(b)(2) extending domestic treatment to costs to the manufacturer attributable to value added in Mexico, according to an explicit phase-in schedule. The statutory change does not alter the current treatment of costs to the

manufacturer attributable to value added in the United States or Canada. Pursuant to clause (iii) in new subparagraph (G), the Secretary of Transportation is to prescribe reasonable procedures for manufacturers to make elections for the phase-in schedules described in today's regulations, and the EPA Administrator may prescribe rules for carrying out subparagraph (G). Today, EPA is amending its regulations governing the determination of domestic production to include the provisions of new subparagraph (G) in 15 U.S.C. 2003(b)(2).

II. Environmental Effects and Economic Impacts

Because the NAFTA Implementation Act does not give EPA discretion as to the content of these regulations and because Congress required the regulations to become effective less than a month after enactment of this Act, the Agency has not conducted detailed analyses of the environmental and economic impacts separate from the analyses that were done on the North American Free Trade Agreement.

III. Public Participation and Effective Date

Pursuant to section 553(b)(3)(B) of the Administrative Procedure Act, the Agency is not using notice and comment rulemaking procedures to promulgate this rule because the Agency has found that notice is unnecessary and impracticable. Comment is unnecessary because the rule issued today merely conforms pre-existing regulations as required by the NAFTA Implementation Act and does not involve an exercise of discretion by the Administrator. Furthermore, comment is impracticable because the NAFTA Implementation Act allowed the Administrator less than one month between the date of enactment and the date by which the regulations must be effective. It is impracticable to have notice-and-comment rulemaking completed in such a short time. This short time period is consistent with EPA's view that it is performing a ministerial act that is not subject to notice and comment rulemaking.

The rule is being made effective sooner than 30 days after publication or service. This is permitted by section 553(d) of the Administrative Procedure Act when the Agency finds good cause and publishes it with the rule. The Agency finds that there is good cause. The regulation needs to be effective on January 1, 1994, to avoid having the statute (which goes into effect on January 1, 1994) differ from the implementing regulations. In addition, the statutory provision itself will go into effect less than 30 days after it was enacted, which precludes EPA from providing 30 days between publication or service and the effective date.

The Agency does not believe that notice-and-comment rulemaking is required and does not expect this change to be controversial, as it directly incorporates the explicit provisions of the statutory amendment into the current regulations. Nonetheless, EPA will accept comments on these regulatory changes and will consider making changes if justified by the comments.

IV. Statutory Authority

Authority for the actions promulgated in this final rule is granted to EPA by section 371 of the North American Free Trade Agreement Implementation Act of 1993, Public Law 103–182.

V. Administrative Designation

Under Executive Order 12866, the Agency must determine whether the regulatory action is "significant" and, therefore, subject to OMB review and the requirements of the Executive Order. The order defines a "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1990, which requires federal agencies to identify potentially adverse impacts of federal regulations upon small entities, does not apply to this rulemaking. Section 604 of the Regulatory Flexibility Act requires analyses only for final rules for which a general notice of proposed rulemaking is required. As discussed in section III, a general notice of rulemaking would be unnecessary and impracticable and, thus, is not required for this rule.

VII. Reporting and Recordkeeping Requirements

Under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, EPA must obtain Office of Management and Budget clearance for any activity that will involve collecting substantially the same information from ten or more non-Federal respondents. This regulation does not impose any new information requirements or contain any new information collection requirements and will result in no change in the reporting burden.

List of Subjects in 40 CFR Part 600

Environmental protection, Administrative practice and procedure, Energy conservation, Fuel economy, Gasoline, Imports, Labeling, Motor vehicles, Reporting and recordkeeping requirements.

Dated: December 30, 1993.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, part 600 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 600 is revised to read as follows:

Authority: Title III of the Energy Policy and Conservation Act of 1975, Public Law 94–163, 89 Stat. 871, Title IV of the National Energy Conservation Policy Act of 1978, Public Law 95–619, 92 Stat. 3206, Section 371 of the North American Free Trade Agreement Implementation Act of 1993, Public Law 103–182, 107 Stat. 2057.

2. Section 600.502–81 is amended by revising paragraph (a)(1) to read as follows:

§ 600.502–81 Definitions.

(a) * * *

(1) "Declared value" of imported components shall be:

(i) The value at which components are declared by the importer to the U.S. Customs Service at the date of entry into the customs territory of the United States, or

(ii) With respect to imports into Canada, the declared value of such components as if they were declared as imports into the United States at the date of entry into Canada, or

(iii) With respect to imports into Mexico (when paragraph (b)(3) of this section applies), the declared value of such components as if they were declared as imports into the United States at the date of entry into Mexico.

* * * * *

3. Section 600.511–80 is amended by revising paragraphs (a) introductory text, (a)(1), and (b)(2) introductory text, and adding new paragraphs (b)(3), (b)(4) and (b)(5) to read as follows:

§ 600.511–80 Determination of domestic production.

(a) An automobile shall be considered domestically produced in any model year if it is included within a domestically produced car line (car line includes station wagons for purposes of this paragraph), unless the assembly of such automobile is completed in Canada or Mexico and such automobile is not imported into the United States prior to the expiration of 30 days following the end of the model year. For purposes of this paragraph a car line will be considered domestically produced if the following ratio is less than 0.25:

(1) The sum of the declared value, as defined in § 600.502, of all of the imported components installed or included on automobiles produced within such a car line within a given model year plus the cost of transportation and insuring such components to the United States port of entry, the Mexican port of entry (when § 600.511–80(b)(3) applies), or the Canadian port of entry but exclusive of any customs duty, divided by

* * * * *

(b) * * *

(2) For automobiles for which paragraph (b)(3) of this section does not apply pursuant to the schedule in paragraph (b)(4), components shall be considered imported unless they are either:

* * * * *

(3) For automobiles for which this paragraph applies pursuant to the schedule in paragraph (b)(4) of this section, components shall be considered imported unless they are either:

(i) Wholly the growth, product, or manufacture of the United States and/or Canada and/or Mexico, or

(ii) Substantially transformed in the United States and/or Canada and/or Mexico into a new and different article of commerce.

(4) Paragraphs (b)(4) (i) through (v) of this section set forth the schedule according to which paragraph (b)(3) of this section applies for all automobiles manufactured by a manufacturer and sold in the United States, wherever assembled.

(i) With respect to a manufacturer that initiated the assembly of automobiles in Mexico before model year 1992, the manufacturer may elect, at any time between January 1, 1997, and January 1, 2004, to have paragraph (b)(3) of this section apply to all automobiles it manufactures, beginning with the model year commencing after the date of such election.

(ii) With respect to a manufacturer initiating the assembly of automobiles in Mexico after model year 1991, paragraph (b)(3) of this section shall apply to all automobiles it manufactures, beginning with the model year commencing after January 1, 1994, or the model year commencing after the date that the manufacturer initiates the assembly of automobiles in Mexico, whichever is later.

(iii) With respect to a manufacturer not described by paragraph (b)(4) (i) or (ii) of this section assembling automobiles in the United States or Canada but not in Mexico, the manufacturer may elect, at any time between January 1, 1997, and January 1, 2004, to have paragraph (b)(3) of this section apply to all automobiles it manufactures, beginning with the model year commencing after the date of such election, except that if such manufacturer initiates the assembly of automobiles in Mexico before making such election, this paragraph shall not apply, and the manufacturer shall be subject to paragraph (b)(4)(ii) of this section.

(iv) With respect to a manufacturer not assembling automobiles in the United States, Canada, or Mexico, paragraph (b)(3) of this section shall apply to all automobiles it manufactures, beginning with the model year commencing after January 1, 1994.

(v) With respect to a manufacturer authorized to make an election under paragraph (b)(4) (i) or (iii) of this section which has not made that election within the specified period, paragraph (b)(3) of this section shall apply to all automobiles it manufactures, beginning with the model year commencing after January 1, 2004.

(5) All elections under paragraph (b)(4) of this section shall be made in accordance with the procedures established by the Secretary of Transportation pursuant to 15 U.S.C. 2003(b)(2)(G)(iii).

* * * * *

[FR Doc. 94–181 Filed 1–5–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 421

[BPO–083–F]

RIN 0938–AF84

Medicare Program; Revisions to Criteria and Standards for Evaluating Intermediaries and Carriers

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This rule issues technical amendments to Medicare regulations intended to simplify and improve our system for evaluating the performance of fiscal intermediaries and carriers in the administration of the Medicare program. Currently, we evaluate intermediaries using performance criteria and standards announced in an annual notice in the **Federal Register**. We are clarifying the methodology for establishing these criteria and standards. For consistency, we establish comparable regulation requirements for the evaluation of carrier performance.

These revisions are published in accordance with sections 1816(f) and 1842(b)(2) of the Social Security Act which require us to develop standards, criteria, and procedures to evaluate an intermediary's or carrier's overall performance.

EFFECTIVE DATE: This final rule is effective February 7, 1994.

FOR FURTHER INFORMATION CONTACT: Larry Pratt, (410) 966–7403.

SUPPLEMENTARY INFORMATION:

I. Background

Under section 1816(a) of the Social Security Act (the Act), public or private organizations and agencies participate in the administration of Part A (Hospital Insurance) of the Medicare program under agreements with the Secretary of Health and Human Services (HHS). These agencies or organizations are known as fiscal intermediaries, and they perform bill processing and benefit payment functions for the Medicare program. Under section 1842(a) of the Act, the Secretary is authorized to enter into contracts with carriers to fulfill various functions in the administration of Part B (Supplementary Medical Insurance) of the Medicare program. Beneficiaries, physicians and suppliers of the services submit claims to these carriers that, in turn, make appropriate payments.

Beginning in 1980 for intermediaries and in 1981 for carriers, we have been evaluating the effectiveness and efficiency of contractor operations through a system of criteria and standards called the Contractor Performance Evaluation Program (CPEP).

We refer to the performance requirements we use to evaluate the performance of intermediaries and carriers in meeting their contractual obligations to HCFA in our regulations and program instructions as criteria and standards. When we developed our regulations, criteria were expected to be distinguished from standards; we intended to measure broad categorizations of performance using criteria (42 CFR 421.120) and to measure statistical and performance data using standards (§ 421.122). As planned, a contractor had to be evaluated by and pass the requirements of the criteria before we evaluated contractor performance using statistical standards. However, in practice, the standards have been used to measure a contractor's compliance with the requirements of the criteria. The separate reliance on statistical standards diminished and we have developed a CPEP under which standards are used to measure the performance of specific activities in a defined criteria instead of "statistical" standards.

II. Summary of the Proposed Rule

On December 3, 1992, we published in the **Federal Register** (57 FR 57125) a proposed rule describing technical revisions we proposed to make to Medicare regulations in order to simplify and improve our system for evaluating the performances of fiscal intermediaries and carriers in the administration of the Medicare program. These technical revisions are necessary to bring our regulations up to date with our actual use of criteria and standards in performance evaluations.

In the preamble to the proposed rule we described how the reliance on statistical standards diminished and that current "standards" are used to measure the performance of specific activities in a defined criterion. That is, measurement and evaluation using criteria and standards have evolved into a one-step process. In addition, we noted that certain functions that were included in the original planned evaluation structure have been transferred to more appropriate review activities. We, therefore, proposed to amend §§ 421.3, 421.112(b), 421.118(b) and 421.122 to delete reference to statistical standards and to replace the general standards for the areas evaluated formerly by statistical standards with a general explanation of the areas evaluated by performance standards.

We also mentioned in the proposed rule that our regulations do not contain requirements relating to measurement of carrier performance that are parallel to those for intermediaries. For consistency, we proposed to establish a new § 421.201, "Performance Criteria and Standards," that would measure and evaluate carrier performance of functional responsibilities, such as, accurate and timely processing of claims, responsiveness to beneficiaries', physicians' and suppliers' concerns, and proper management of administrative funds.

We proposed to base performance criteria and standards on the experience of carriers nationwide, changes in carrier operations due to fiscal constraints, and our objectives in achieving better performance. Before the beginning of each CPEP evaluation period, we would publish the performance criteria and standards as a notice in the **Federal Register**.

We also announced that we would add a new § 421.203, "Carrier's failure to perform efficiently and effectively," to explain the adverse action that may be taken by the Secretary if the carrier fails to meet criteria and standards specified at § 421.201. The content is parallel to § 421.124, which applies to intermediaries. This new § 421.203 does not add or change carrier obligations. It merely codifies in regulations a provision specific to carriers that has been in effect since Public Law 98–369.

III. Analysis of and Response to Public Comments

We received 10 timely items of correspondence in response to the December 3, 1992 proposed rule. The comments were from intermediaries, carriers, contractor advocacy groups, and provider advocacy groups. A summary of the comments and the Department's responses follow:

Comment: Several commenters suggested that a process be developed by HCFA for receiving comments, complaints, or problems with carrier performance by physicians or professional organizations and that the information generated by this process be included in the overall performance evaluation of a carrier.

Response: Beginning in Fiscal Year 1994, HCFA will review both intermediaries' and carriers' efforts to enhance customer satisfaction through the use of customer satisfaction surveys, including the National Physician Survey. Results of the surveys will be used to establish performance data on customer satisfaction and to identify areas in need of improvement. The results will be summarized for publication in the report of contractor performance.

Comment: A number of the commenters believe that certain of our proposed changes at §§ 421.124 and 421.203 are unnecessary. Those changes would allow the Secretary to take adverse action if an intermediary or carrier exceeds the amount the Secretary finds to be reasonable and adequate to meet the costs which must be incurred by an efficiently and economically operated intermediary or carrier, notwithstanding whether the intermediary or carrier meets the published criteria and standards. Both the intermediary and carrier contracts currently have a provision to allow the Secretary to request a committee of the contractors to assist in efforts to effect improvements in the high cost contractor's performance. In addition, the current Contractor Performance Evaluation Program (CPEP) contains measures on contractor costs. If a contractor fails to meet the applicable criteria, its CPEP score is reduced accordingly.

Response: We do not agree that the proposed changes are unnecessary. This section of the regulation would authorize us to take adverse action for deficient performance of a function not specifically evaluated by CPEP. Currently, CPEP only measures contractor performance in meeting the approved budget and the contractor's relative standing among similar contractors. Moreover, beginning in FY 1993, CPEP eliminated the concept of passing/failing the overall evaluation. Passing/failing now is determined on a standard by standard basis. For example, if a contractor fails to meet the approved budget, it will fail one standard in CPEP, not the entire CPEP. Thus, despite CPEP, the authority to take adverse contract action against high cost intermediaries and carriers is necessary. As the commenters note, current contracts allow the Secretary to request a committee of the contractors to assist in efforts to effect improvements in the high cost contractor's performance. The proposed regulatory change allows us to take the next logical step in the event efforts to effect improvement have failed. We will have authority to take adverse action based on continued high cost performance.

Comment: Several commenters stressed that the proposed § 421.124 and § 421.203 were vague. They asked that HCFA further define "reasonable" amount, and how and when high cost would be calculated.

Response: We believe that the provisions at § 421.124 and § 421.203 are clear and straightforward. It is our responsibility to consider the funding levels that are reasonable and adequate to meet the costs incurred by an efficiently and economically operated contractor. To address this responsibility, we develop unit cost targets for each contractor prior to the start of every fiscal year. These unit cost targets are forwarded to the HCFA regional offices as part of the Budget and Performance Requirements (BPRs) package and represent the benchmark for the negotiations between the regional offices and the contractors.

We believe that the composition of a contractor's workload (for example, number of hospital inpatient bills versus number of outpatient bills or laboratory bills, etc.) is an important factor in the amount of costs it incurs since some claims are inherently more problematic and difficult to resolve. In order to give full consideration of each contractor's unique situation, we currently apply a "complexity index" to develop the BPRs' unit cost targets. This methodology allows us to correlate the contractor's costs with its individual workload composition. The use of the complexity index allows us to identify the contractors whose unit costs appear to be out of proportion to the type and medium (electronic versus hardcopy) of workload they must process.

Use of the complexity index methodology allows us to evaluate each contractor's costs with full consideration of its unique workload mix and within the national forum of its peers. In this way, we identify our high cost contractors. However, since the use of the complexity index methodology is an administrative tool to identify contractors with aberrant costs and can be changed or modified as required, we do not believe it necessary to outline this methodology in the regulation.

Comment: Several commenters stated that the proposed §§ 421.124(a) and 421.203(a) on high cost contractors do not specify the types of adverse action we may take on the grounds of excessive cost. Contractors are uncertain about how we would go about the process of applying sanctions and what these sanctions might be.

Response: Adverse contract actions are listed in §§ 421.124(a) and 421.203(a) of the proposed regulation, but we are not limited to those. Adverse contract actions are further defined in the intermediary and carrier manual issuances released within the HCFA Program Manual Issuances System, which contain the details of the CPEP. Adverse actions range in severity commensurate with relative performance and include, but are not limited to, such actions as, Regional Office Letter of Admonition; Central Office Letter of Admonition; deletion of the automatic renewal clause from the contract without performance goals established; deletion of the automatic renewal clause from the contract with performance goals established; limited contract automatic-renewal clause and provision for termination upon 90 days notice; reduction in territory or "carve-out"; non-renewal; and termination.

Comment: A commenter was unsure whether, if HCFA does not publish the CPEP standards during a fiscal year, there would be no performance evaluation for that year or whether the previous year's CPEP would apply.

Response: In general, the evaluation period which the criteria and standards measure is the Federal fiscal year. We make every effort to publish the criteria and standards prior to the beginning of the Federal fiscal year, that is, October 1st. If we do not publish a Federal Register notice before the new fiscal year begins, readers may presume that, until and unless notified otherwise, the criteria and standards which were previously in effect remain in effect. When a new CPEP is published, it usually applies to a prospective period, as stated in the Federal Register notice.

Comment: One commenter states that contractors participate in pilot projects which may involve additional funding from HCFA. They assume this "additional funding" would not be considered as "excessively high costs".

Response: We encourage contractors to participate in pilot projects which may result in improved quality, service or efficiency in the administration of the Medicare program. Where a contractor's participation in a pilot study or program adversely affects its performance evaluation, appropriate adjustments are made to mitigate the impact of the pilot study or program.

Comment: One commenter recommends that HCFA not base criteria and standards on the sliding scale of available funding but on true expectations of performance and therefore delete "changes in fiscal operations due to fiscal constraints" as a basis for developing criteria and standards.

Response: Each year the specific standards are revised and developed in concert with the specific budget and performance requirements, because that is the fiscally responsible approach to develop uniform and fair performance standards for the Medicare contractor community. We will continue to develop standards in conjunction with budget and performance requirements.

Comment: One commenter notes that §§ 421.124 and 421.203 do not include the contract's provision for an extension of the contract, subject to cost limitations. This would deprive high cost contractors of the formal opportunity to choose between accepting limits on their reimbursable costs and losing their Medicare contracts.

Response: The contract allows us to offer a high cost contractor the option of submitting a lower budget or losing its Medicare contract. Sections 421.124 and 421.203 would give us the authority to determine the amount which is reasonable and adequate to efficiently and economically operate as an intermediary and carrier. If we determine that we cannot afford to contract with high cost intermediaries or carriers, we may consider appropriate adverse contract action.

IV. Provisions of the Final Rule

Based on our review of the comments submitted, we are making no substantive changes to the proposed revisions to the rules affecting criteria and standards for evaluating intermediaries and carriers as published on December 3, 1992, (57 FR 233). Only minor editorial and technical revisions have been made to the proposed rules.

List of Subjects in 42 CFR Part 421

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR part 421 is amended as set forth below:

PART 421—INTERMEDIARIES AND CARRIERS

1. The authority citation for part 421 continues to read as follows:

Authority: Secs. 1102, 1815, 1816, 1833, 1834(a) and (h), 1842, 1861(u), 1871, 1874, and 1875 of the Social Security Act (42 U.S.C. 1302, 1395g, 1395h, 1395l, 1395m(a) and (h), 1395u, 1395x(u), 1395hh, 1395kk, and 1395ll), and 42 U.S.C. 1395b-1.

2. Section 421.3 is revised to read as follows:

§ 421.3 Definitions.

Intermediary means an entity that has a contract with HCFA to determine and make Medicare payments for Part A or Part B benefits payable on a cost basis (or under the Prospective Payment System for hospitals) and to perform other related functions. For purposes of designating regional or alternative regional intermediaries for home health

agencies and of designating intermediaries for hospices under § 421.117 as well as for applying the performance criteria in § 421.120 and the performance standards in § 421.122 and any adverse action resulting from such application, the term intermediary also means a Blue Cross Plan which has entered into a subcontract approved by HCFA with the Blue Cross and Blue Shield Association to perform intermediary functions.

§ 421.112 [Amended]

3. In § 421.112(b), "statistical standards" is revised to read "performance standards".

§ 421.118 [Amended]

4. In § 421.118(b) "statistical standards" is revised to read "performance standards".

5. Section 421.122 is revised to read as follows:

§ 421.122 Performance standards.

(a) *Development of standards.* In addition to the performance criteria (§ 421.120), HCFA develops detailed performance standards for use in evaluating intermediary performance which may be based on historical performance, application of acceptable statistical measures of variation to nationwide intermediary experience during a base period, or changing program emphases or requirements. These standards are also developed considering intermediary experience and evaluate the specific requirements of each functional responsibility or criterion.

(b) *Factors beyond intermediary's control.* To identify measurable factors that significantly affect an intermediary's performance, but that are not within the intermediary's control, HCFA will—

(1) Study the performance of intermediaries during the base period, and

(2) Consider the noncontrollable factors in developing performance standards.

(c) *Publication of standards.* The development and revision of standards for evaluating intermediary performance is a continuing process. Therefore, before the beginning of each evaluation period, which usually coincides with the Federal fiscal year period of October 1–September 30, HCFA publishes the performance standards as part of the **Federal Register** notice describing the performance criteria issued under § 421.120(c). HCFA may not necessarily publish the criteria and standards every year. HCFA interprets the statutory phrase "before the beginning of each evaluation period" as allowing publication of the criteria and standards after the Federal fiscal year begins, as long as the evaluation period of the intermediaries for the new criteria and standards begins after the publication of the notice.

6. Section 421.124 is revised to read as follows:

§ 421.124 Intermediary's failure to perform efficiently and effectively.

(a) Failure by an intermediary to meet, or to demonstrate the capacity to meet, the criteria or standards specified in §§ 421.120 and 421.122 may be grounds for adverse action by the Secretary or by HCFA, such as reassignment of providers, offer of a short-term agreement, termination of a contract, or non-renewal of a contract. If an intermediary meets all criteria and standards in its overall performance, but does not meet them with respect to a specific provider or class of providers, HCFA may reassign that provider or class of providers to another intermediary in accordance with § 421.114.

(b) In addition, notwithstanding whether an intermediary meets the criteria and standards, if the cost incurred by the intermediary to meet its contractual requirements exceeds the amount which HCFA finds to be reasonable and adequate to meet the cost which must be incurred by an efficiently and economically operated intermediary, those high costs may also be grounds for adverse action.

7. In subpart C a new § 421.201 is added to read as follows:

§ 421.201 Performance criteria and standards.

(a) *Application of performance criteria and standards.* As part of the carrier evaluations mandated by section 1842(b)(2) of the Act, HCFA periodically assesses the performance of carriers in their Medicare operations using performance criteria and standards.

(1) The criteria measure and evaluate carrier performance of functional responsibilities such as—

(i) Accurate and timely payment determinations;

(ii) Responsiveness to beneficiary, physician, and supplier concerns; and

(iii) Proper management of administrative funds.

(2) The standards evaluate the specific requirements of each functional responsibility or criterion.

(b) *Basis for criteria and standards.* HCFA bases the performance criteria and standards on—

(1) Nationwide carrier experience;

(2) Changes in carrier operations due to fiscal constraints; and

(3) HCFA's objectives in achieving better performance.

(c) *Publication of criteria and standards.* Before the beginning of each evaluation period, which usually coincides with the Federal fiscal year period of October 1–September 30, HCFA publishes the performance criteria and standards as a notice in the **Federal Register**. HCFA may not necessarily publish the criteria and standards every year. HCFA interprets the statutory phrase "before the beginning of each evaluation period" as allowing publication of the criteria and standards after the Federal fiscal year begins, as long as the evaluation period of the carriers for the new criteria and standards begins after the publication of the notice.

8. A new § 421.203 is added to read as follows:

§ 421.203 Carrier's failure to perform efficiently and effectively.

(a) Failure by a carrier to meet, or demonstrate the capacity to meet, the criteria and standards specified in § 421.201 may be grounds for adverse action by the Secretary, such as contract termination or non-renewal.

(b) Notwithstanding whether or not a carrier meets the criteria and standards specified in § 421.201, if the cost incurred by the carrier to meet its contractual requirements exceeds the amount that HCFA finds to be reasonable and adequate to meet the cost which must be incurred by an efficiently and economically operated carrier, those high costs may also be grounds for adverse action.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: October 20, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: December 2, 1993.

Donna E. Shalala,

Secretary.

[FR Doc. 94–63 Filed 1–5–94; 8:45 am]

BILLING CODE 4120–01–P

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42 CFR Part 493

[HSQ–210–FC]

Medicare, Medicaid and CLIA Programs; Personnel Requirements for Cytotechnologists

AGENCY: Health Care Financing Administration (HCFA), and Public Health Service (PHS), HHS.

ACTION: Final Rule with Comment Period.

SUMMARY: This rule amends certain personnel requirements for cytotechnologists that perform testing in laboratories subject to the requirements of the Clinical Laboratory Improvement Amendments of 1988 (CLIA). We are providing an adequate period of time for individuals to gain the necessary 2 years experience performing cytology testing which is currently included in two of the provisions for qualifying as a cytotechnologist. Also, we are extending the time for individuals to either meet the educational qualifications by virtue of completing training in an approved cytotechnology training program or be certified by an approved organization. We are making these changes to prevent the loss of qualified personnel in the field of cytotechnology.

DATES: These regulations are effective on January 6, 1994. Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on March 7, 1994.

ADDRESSES: Mail an original and 3 copies of comments to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: HSQ–210–FC, P.O. Box 26676, Baltimore, MD 21207.

If you prefer, you may deliver your written comments to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, MD 21207.

Due to staffing and resource limitations, we cannot accept facsimile (FAX) transmissions. In commenting, please refer to file code HSQ–210–FC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

FOR FURTHER INFORMATION CONTACT: Cheryl Wiseman, (410) 597–5906.

SUPPLEMENTARY INFORMATION:

I. Background

On February 28, 1992, we published in the **Federal Register** at 57 FR 7002, rules that set forth the test performance requirements for laboratories that are subject to the Clinical Laboratory Improvement Amendments of 1988 (CLIA). We subsequently published in the **Federal Register** a related rule (January 19, 1993 (58 FR 5215)) that made technical corrections and addressed immediate concerns raised by some of the approximately 16,000 comments on the publication of the February 28 regulations. This rule responds to concerns raised by some of the commenters and pertains to limited aspects of the CLIA requirements: The period of time during which an individual who needs 2 years experience as a cytotechnologist is allowed to earn that experience, and the period of time that a person may either obtain appropriate training in a school approved by the Commission on Allied Health Education and Accreditation (CAHEA) or be certified by an organization approved by HHS.

The February 28, 1992 CLIA regulations represented establishment of uniform personnel standards for cytotechnologists for all laboratories offering cytology, regardless of location. Prior to these regulations, individuals working in hospital cytology laboratories that were not licensed under the Clinical Laboratory Improvement Act of 1967 to test specimens in interstate commerce were not subject to Federal personnel qualification requirements for cytotechnologists. In addition, individuals employed in cytology laboratories that were not approved to participate in the Medicare or Medicaid program were not subject to Federal requirements, including personnel requirements.

In the preamble to the February 28, 1992 regulations, we stated that in developing the personnel standards for cytotechnologists, it was not our intention to put out of work individuals currently employed as cytotechnologists. Our aim was to provide qualification standards that would ensure quality of service and be in the best interest of the public health. Recognizing the existing shortage of laboratory personnel, particularly cytotechnologists, we stated that we were expanding the qualification requirements to allow individuals additional methods of qualifying. We stated, "In our opinion, many individuals currently working in laboratories, as a function of their employment, have gained valuable experience in testing operations. In most instances in this rule, we are acknowledging the value of this experience, by allowing those individuals, who do not meet the qualification requirements in these regulations, to continue their laboratory employment while acquiring the education or training necessary to meet the requirements. The net effect of the personnel standards will be to permit a preponderance of personnel presently working in laboratories to continue their employment while they are updating their credentials to meet the national standards for laboratory personnel specified in this rule." (57 FR 7083)

To § 493.1483, Standard: Cytotechnologist Qualifications, we added several alternative qualification standards for cytotechnologists with education or experience requirements that had to be met by the effective date of the regulations (September 1, 1992) or by a specified later date. To the previous Federal requirements, we added at § 493.1483(b)(4) a current work experience requirement that had to be met by September 1, 1992, which was applicable to those individuals who received their cytotechnology training and acquired their work experience prior to January 1, 1969. At § 493.1483(b)(5), we added a new provision requiring current work experience by September 1, 1993, in addition to requiring on or before September 1, 1994, that individuals either complete their cytotechnology training in an approved school or be certified in cytotechnology by an organization approved by HHS.

II. Revisions to the Rules

We have now determined that we did not provide sufficient time for cytotechnologists to meet current standards. Without prior notification, the February 28, 1992 rule required individuals, who obtained their education and training prior to January 1, 1969, 6 months to acquire 2 years of current work experience. Also, individuals, who trained outside of the United States, were given 1 year and 6 months to fulfill the requirement of 2 years for current work experience in the United States. Therefore, we are revising the dates originally published in the February 28, 1992 rule at § 493.1483(b)(4) and (5) concerning personnel requirements for cytotechnologists who qualified under Federal regulations and for individuals who trained outside of the United States. Based on public concern and our analysis of anticipated availability of qualified individuals, we are revising our regulations to allow all individuals 2 full years from September 1, 1992, the effective date of our personnel requirements, to gain the necessary experience to qualify under the regulations.

Accordingly, in § 493.1483(b)(4), we are revising the date from September 1,

1992 to September 1, 1994, to enable a previously qualified cytotechnologist to continue working without interruption and obtain the necessary work experience. In § 493.1483(b)(5)(i), we are similarly revising the date from September 1, 1993 to September 1, 1994 to allow an individual trained outside the United States and an individual who does not meet the other qualification standards an opportunity to obtain the 2 years of slide examination experience within the United States.

As a technical revision to our rules, we note that § 493.1483(b)(5)(ii) provides that an individual qualifying as a cytotechnologist must, on or before September 1, 1994, have either graduated from a school of cytotechnology approved by the CAHEA or be certified by an organization approved by the Department. It is possible that the CAHEA may cease to function as an accrediting organization before the Department has recognized any alternative certifying organization. In order to prevent the possibility that individuals will not have 2 full years to be certified by an approved certifying organization, we are extending the date from September 1, 1994 to September 1, 1995. This will allow time for the Department to recognize organizations that certify cytology personnel and minimize the loss of currently employed individuals at a time when there is an existing shortage of qualified cytology personnel.

We are also making a conforming change to § 493.1483(b)(1) to provide that a school of cytotechnology must be accredited by CAHEA "or other organization approved by HHS."

III. Waiver of Proposed Rulemaking and Delay of Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on proposed requirements. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

We believe that these revisions are essential to the effective implementation of the CLIA program, and to delay the effective date would potentially disrupt public access to laboratory services, unnecessarily expose laboratories to greater costs than are needed to help assure quality testing, and create unnecessary confusion among laboratories in understanding the standards they must meet. Without immediate revision of the regulations, we believe there may be shortages of cytotechnologists in some areas resulting in limited access to cytology services. Therefore, we believe it is contrary to the public interest to go through a notice-and-comment procedure, and we find good cause to waive the notice of proposed rulemaking and to issue this final rule on an interim basis. For these same reasons, we find there is good cause to dispense with a delayed effective date of these regulations. Although the regulations are final and effective on the date of publication, we are providing a 60-day period for public comment.

IV. Regulatory Impact Statement

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, all laboratories are considered to be small entities. Individuals and States are not included in the definition of a small entity.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a final rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

This final rule with comment period revises personnel requirements for cytotechnologists by extending the dates by which they must meet the qualification requirements. We are unable to quantify the number of individuals, laboratories, or rural hospitals affected by this rule. In the laboratory industry generally, recent surveys indicate that 80 percent of U.S. laboratories have experienced a shortage of technical personnel. A shortage of cytotechnologists throughout the United States has been demonstrated through anecdotal studies of wages and vacancy rates. According to the American Hospital Association's 1991 Survey of Human Resources, there was a full-time equivalent vacancy rate of 12.2 percent for cytotechnologists in hospital laboratories. The survey also reported that more than 60 days were required to fill almost two-thirds of the full-time vacancies. The average length of time required to fill approximately half of the full-time vacancies was over 90 days. This scarcity level existed prior to the imposition of Federal personnel standards that might lead to lesser numbers of qualified cytotechnologists.

In the absence of a registry that indicates the actual number of cytotechnologists, their employment and age distribution, the amount and type of work they do, and the specific number of individuals that meet all the qualifications except the two years' experience, we cannot determine the cause of this shortage or predict when the shortage will end. Based on data projections from the Census Bureau and the National Health Interview Survey, the demand for Pap smears in women 18 and older was nearly 79 million in 1992 and is expected to increase. If there is an existing shortage of personnel and we anticipate the increased demand for cytology services, the impact of this regulation would be beneficial to laboratories because it will allow larger numbers of cytotechnologists to meet Federal personnel requirements. Although we cannot determine whether this final rule's provisions to allow a longer period of time for certain individuals to accumulate required experience will have a significant impact on a substantial number of small entities or small rural hospitals, because of the lack of data, we have determined that its impact is beneficial.

As stated previously, one of the new methods of qualifying as a cytotechnologist includes graduation, by September 1, 1994, from a CAHEA-approved school. In the event that CAHEA should cease to function as an accrediting agency prior to September 1, 1994, individuals may not be able to avail themselves of this method of qualifying as a cytotechnologist. To accommodate individuals seeking to qualify under this provision, we are extending the date of graduation to September 1, 1995. This should provide sufficient time for us to formally recognize another accrediting organization, if that becomes necessary.

Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 42 CFR Part 493

Grant programs—health, Health facilities, Laboratories, Medicaid, Medicare, Reporting and recordkeeping requirements.

PART 493—LABORATORY REQUIREMENTS

Part 493 is amended as follows:

1. The authority citation for part 493 continues to read as follows:

Authority: Sec. 353 of the Public Health Service Act, secs. 1102, 1861(e), the sentence following sections 1861(s)(14), 1861(s)(15), and 1861(s)(16) of the Social Security Act (42 U.S.C. 1302, 1395x(e), the sentence following 1395x(s)(14), 1395x(s)(15), and 1395x(s)(16)).

§ 493.1483 [Amended]

2. Section § 493.1483 is amended as set forth below:

a. In § 493.1483(b)(1), "Accreditation; or" is revised to read "Accreditation or other organization approved by HHS; or";

b. In § 493.1483(b)(4) introductory text, "September 1, 1992," is revised to read "September 1, 1994,";

c. In § 493.1483(b)(5)(i), "September 1, 1993," is revised to read "September 1, 1994,"; and

d. In § 493.1483(b)(5)(ii), "September 1, 1994," is revised to read "September 1, 1995,".

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program; Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: October 14, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: November 12, 1993.

Philip R. Lee.

Assistant Secretary for Health.

Dated: December 20, 1993.

Donna E. Shalala,

Secretary.

[FR Doc. 94–58 Filed 1–5–94; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 663

[Docket No. 931249–3349; ID. # 121693B]

Foreign Fishing; Pacific Coast Groundfish Fishery

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

ACTION: 1994 groundfish fishery specifications and management measures; request for comments.

SUMMARY: NMFS announces the 1994 fishery specifications and management measures for groundfish taken in the U.S. exclusive economic zone and state waters off the coasts of Washington, Oregon, and California as authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP). The specifications include the level of the acceptable biological catch (ABC) and harvest guidelines including the distribution between domestic and foreign fishing operations. The management measures for 1994 are designed to keep landings within the harvest guidelines, for those species for which there are harvest guidelines and to achieve the goals and objectives of the FMP and its implementing regulations. The intended effect of these actions is to establish allowable harvest levels of Pacific coast groundfish and to implement management measures designed to achieve but not exceed those harvest levels while extending fishing and processing opportunities as long as possible during the year.

DATES: Effective January 1, 1994, until modified, superseded, or rescinded. Comments will be accepted until February 7, 1994.

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

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

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

These final fishery specifications and management measures have been recommended by the Council and approved by the Secretary of Commerce (Secretary) for implementation on January 1, 1994. The ABCs and harvest guidelines announced herein are the basis for the management measures recommended for 1994, and may be modified during the year as provided in the FMP. Unless otherwise specified, all of the management measures announced in this notice are considered "routine," and have been so designated at 50 CFR 663.23. The exception is trip limits in the open-access fisheries for groundfish caught incidentally in nongroundfish gear (such as trawl gear used to fish for pink shrimp, spot or ridgeback prawns, California halibut, or sea cucumbers). These trip limits will be designated "routine" in a separate **Federal Register** notice so that they may be adjusted as necessary.

The FMP provides for announcement of the final fishery specifications in the **Federal Register** after consideration at two Council meetings. The process for adopting ABCs and harvest guidelines for 1994 was initiated early in 1993 so that preliminary specifications could be adopted by the Council at its September 1993 meeting. New stock assessments, the basis for changes to the 1993 ABCs, were distributed to the public prior to the September Council meeting. The Council's scientific and industry advisory committees and the public reviewed and commented on the documents. After receiving comments, the Council adopted preliminary ABCs and harvest guidelines at its September meeting, which were subsequently made available to the public. Comments were requested before and at the November Council meeting. The final recommendations of harvest specifications and management measures designed to achieve those specifications, adopted at the November Council meeting, were forwarded to the Secretary for implementation by January 1, 1994.

I. Final Specifications: ABCs and Harvest Guidelines, or; Apportionments to Foreign and Joint Venture Fisheries; Open-Access and Limited-Entry Allocations

The fishery specifications include ABCs, the designation of harvest guidelines or quotas for species that need individual management, the apportionment of the harvest guidelines or quotas between domestic and foreign fisheries, and subsequent allocation between the open-access and limited-entry segments of the fishery.

The final 1994 specifications (except for DAP, DAH, JVP, and TALFF) are listed in Table 1, followed by a discussion of each specification that differs from 1993 levels. As in the past, these specifications include fish caught in state ocean waters (0–3 nautical miles offshore) as well as fish caught in the exclusive economic zone (EEZ) (3–200 nautical miles offshore).

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Table 1. 1994 Specifications of Acceptable Biological Catch (ABC), Harvest Guidelines (HG), and Limited Entry and Open Access Allocations, by International North Pacific Fisheries Commission (INPFC) subareas

Species	ACCEPTABLE BIOLOGICAL CATCH (ABC)a/ (x 1,000 mt)						Harvest Guideline (x 1,000 mt)	Allocations (x 1,000 mt)			
								Open Access		Limited Entry	
	Vancou-ver b/	Colum-bia	Eureka	Monte-rey	Concep-tion	Total ABC		%	mt	%	mt
Roundfish:											
Lingcod	1.0	4.0	0.5	1.1	0.4	7.0	4.0	13.6	0.54	86.4	3.46
Pacific cod	--	--	c/	c/	c/	3.2	--	--	--	--	--
Pacific whiting	--	--	--	--	--	325.0 d/	260.0 d/	--	--	--	--
Sablefish e/	7.0				.425	7.425	7.0 f/	9.4 g/	0.63	90.6 g/	6.07
Jack mackerel h/	--	--	--	--	--	52.6 h/	52.6 h/	--	--	--	--
Rockfish:							i/	--	--	--	--
POP	0.0	0.0	c/	c/	c/	0.0	1.3 j/	--	--	--	--
Shortbelly	--	--	--	--	--	23.5	23.5	--	--	--	--
Widow	--	--	--	--	--	6.5	6.5	3.7	0.24	96.3	6.26
Thornyheads: e/							6.44 k/	--	--	--	--
Shortspine	--	1.9			--	1.9	--	--	--	--	--
Longspine		10.1			--	10.1	--	--	--	--	--

Sebastes complex:							13.24 N 1/ 13.44 S m/	6.5 33.6	0.86 4.52	93.5 66.4	12.38 8.92
Bocaccio	c/	c/	1.54			1.54	1.54 n/	33.6 o/	0.45	66.4 o/	0.89
Canary	0.8	1.5	0.6	c/	c/	2.9	--	--	--	--	--
Chilipepper	c/	c/	4.0			4.0	--	--	--	--	--
Yellowtail	1.19	2.97 p/	2.58 n/	c/	c/	6.74	4.16 N 2.58 S p/	6.5 6.5	0.27 0.17	93.5 93.5	3.89 2.40
Remaining rockfish	0.8	3.7	7.0			11.5	--	--	--	--	--
Flatfish:								--	--	--	--
Dover sole e/	2.4	4.0	3.5	5.0	1.0	15.9	5.0 Col 16.9 tot q/	--	--	--	--
English sole	2.0		1.1			3.1	--	--	--	--	--
Petrale sole	1.2		0.5	0.8	0.2	2.7	--	--	--	--	--
Arrowtooth flr.	--	--	--	--	--	5.8	--	--	--	--	--
Other flatfish	0.7	3.0	1.7	1.8	0.5	7.7	--	--	--	--	--
Other fish r/	2.5	7.0	1.2	2.0	2.0	14.7	--	--	--	--	--

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Footnotes Are for Table 1

[a] The acceptable biological catch (ABC) for sablefish, widow rockfish, and bocaccio is calculated after regulation-induced discard has been deducted, and therefor applies to landed catch (including observed incidental catch in the whiting fishery).

[b] U.S. portion.

[c] These species are not common nor important in the areas footnoted. Accordingly, for convenience, Pacific cod is included in the "other fish" category for the areas footnoted, and rockfish species are included in the "remaining rockfish" category for the areas footnoted only.

[d] Coastwide ABC including Canadian waters. The U.S. harvest guideline is 80 percent of the U.S./Canada ABC.

[e] Dover sole, thornyheads, and trawl-caught sablefish are managed together as the "DTS complex" (formerly called the deepwater complex). There is no harvest guideline for the DTS complex.

[f] All subareas except Conception, which does not have a harvest guideline. The sablefish trawl and nontrawl allocations also are harvest guidelines. (See the section on trawl and nontrawl sablefish management for 1994).

[g] Open access and limited entry allocation percentages for sablefish north of the Conception subarea are applied to only to the nontreaty fishery which is 6,700 mt in 1994. (7,000 mt harvest guideline minus 300 mt for the treaty Indian fishery).

[h] Only jack mackerel caught north of 39°00′ N. latitude are governed by the FMP. The ABC and harvest guideline also include area beyond 200 nm.

[i] Harvest guidelines for commercial harvests of all species of rockfish by members of the Makah, Quileute, Hoh, and Quinault Indian tribes are established as follows: 51,000 pounds (23.1 mt) for the area between the U.S.-Canada border and Cape Alava (48°09′30″ N. latitude); and 10,000 pounds (4.5 mt) for the area between Destruction Island (47°40′00″ N. latitude) and Leadbetter Point (46°38′10 N. latitude).

[j] The POP harvest guideline applies to the Vancouver/Columbia subareas combined. A discard factor of 16 percent was deducted from the 1993 harvest guideline to determine the 1994 harvest guideline.

[k] The thornyhead harvest guideline includes both species in the Monterey, Eureka, and Columbia subareas. The 1994 harvest guideline is derived by subtracting a discard factor (8 percent) from the 1993 harvest guideline.

[l] The Sebastes-North harvest guideline applies to the Vancouver and Columbia subareas and equals the sum of the ABCs in those areas: canary (2,300 mt), yellowtail rockfish (6,740 mt minus 300 mt), and remaining rockfish (7,000 mt). The Vancouver/Columbia portion for yellowtail rockfish is derived by subtracting a 300 mt estimate for the Eureka subarea ABC from the total ABC for the Vancouver/Columbia/Eureka areas.

[m] The Sebastes-South harvest guideline is the sum of the ABCs for the species in the Eureka/Monterey/Conception subareas: bocaccio (1,540 mt), canary (600 mt), chilipepper (4,000 mt), yellowtail rockfish (300 mt), and remaining rockfish (7,000 mt).

[n] The bocaccio harvest guideline applies to the Eureka, Monterey, and Conception subareas.

[o] The open access and limited entry allocation percentages for bocaccio are applied only to the commercial portion of the harvest guideline, which is 1,340 mt in 1994. (The 1,540 mt harvest guideline minus 200 mt estimated harvest by the recreational fishery).

[p] The yellowtail rockfish assessment addresses three separate areas: Vancouver, Columbia north of Cape Lookout, and Columbia south of Cape Lookout plus Eureka. For this table, the Columbia ABC means north Columbia only, and the Eureka ABC means Eureka plus south Columbia. The total ABC for yellowtail rockfish is divided into two harvest guidelines: 4,160 mt for the northern area (Vancouver plus Columbia north of Cape Lookout) and 2,580 mt for the southern area (Eureka plus Columbia area south of Cape Lookout). (Separate harvest guidelines are established for the Sebastes complex north and south of the Eureka-Columbia border. Therefore, 300 mt of the yellowtail rockfish southern harvest guideline is included in the southern Sebastes complex harvest guideline, and the remainder of the yellowtail rockfish southern harvest guideline is included in the northern Sebastes complex harvest guideline.) A 16 percent discard factor will be added to certain landings of yellowtail rockfish inseason. This will affect inseason landings estimates for the Sebastes complex also.

[q] The 16,900 mt harvest guideline applies coastwide, and includes a 5,000 mt harvest guideline for the Columbia subarea. The Columbia subarea harvest guideline is higher than its ABC, and is intended to be reduced to ABC (4,000 mt) in 1995.

[r] Includes sharks, skates, rays, ratfish, morids, grenadiers and other groundfish species noted above in footnote c.

Changes to the ABCs and Harvest Guidelines

The 1994 final ABCs are changed from the 1993 levels for the following species: Pacific whiting, shortbelly rockfish, widow rockfish, chilipepper, yellowtail rockfish, remaining rockfish, English sole, and petrale sole. These changes are based on the best available scientific information. Information considered in determining the ABCs is available from the Council (See **ADDRESSES**) and was distributed to the public in the Council's stock assessment and fishery evaluation (SAFE) document. The SAFE document, required under the guidelines for Fishery Management Plans at 50 CFR part 602, summarizes the best available scientific information concerning the past, present, and possible future condition of the stocks and fisheries being managed under Federal regulation.

Those species or species groups with harvest guidelines in 1993 will continue to be managed with harvest guidelines in 1994. As in 1993, no quotas are established. The harvest guidelines are changed from those for 1993 for Pacific whiting, jack mackerel, Pacific ocean perch (POP), shortbelly rockfish, widow rockfish, thornyheads, yellowtail rockfish, the *Sebastes* complex in the Vancouver/Columbia subareas, Dover sole in the Columbia subarea and coastwide, and new harvest guidelines are established for lingcod coastwide and the *Sebastes* complex in the Eureka, Monterey, and Conception subareas.

The changes to the ABCs and harvest guidelines are described below. All other ABC and annual harvest guideline specifications announced in Tables 1 and 2 for 1993 (58 FR 2990, January 7, 1993) will apply again in 1994 and are included in Table 1.

Lingcod. The ABC for lingcod remains at 7,000 mt, but a new harvest guideline is established at 4,000 mt in 1994, approximating peak landings during the past 10 years. Landings ranged between 3,000 and 3,500 mt in 1989–1991. The ABC is based on historical landings rather than a scientific stock assessment, and has not been updated since 1986. A stock assessment for lingcod is planned for the near future. The Council was concerned that the new open-access fishery would expand its lingcod harvest. In order to discourage expansion pending completion of the new stock assessment, a harvest guideline was designated. Based on the harvest guideline, open-access and limited-entry allocations are being specified. If effort shifts into this fishery, trip limits may be imposed to keep landings within the allocations and/or harvest guidelines.

Pacific whiting. The ABC for Pacific whiting in 1994 (325,000 mt for the United States (U.S.) and Canada combined) is substantially higher than in 1993 (177,000 mt) for several reasons. The 1992 hydroacoustic survey utilized new, more sensitive equipment, and extended further offshore and further north to better encompass the range of pacific whiting. As a result, the biomass estimate was more than double the previous estimate. In recent years, the Council has adopted a hybrid fishing strategy that combines the features of a constant fishing mortality (F) strategy at higher levels of biomass, and, at lower levels of biomass, a variable F strategy where fishing mortality for a particular year in proportional to the level of female spawning biomass. If this moderate harvest policy is applied to the new projected numbers in 1994, the potential yield would be 450,000 mt. However, the Council recommended a more conservative harvest rate for 1994, which provides a yield of 325,000 mt, to provide for cautious exploitation until further information can be obtained; the large increase in projected yield is due to a single survey estimate that will not be replicated until 1995. In addition, the Council felt it prudent to acknowledge the possibility of a combined U.S. and Canadian harvest in excess of the U.S.-Canada ABC as occurred in 1992 and 1993.

These overages (15 percent in 1993) have not caused a biological problem, particularly given the large increase in the ABC in 1994. The Council recommended that the U.S. share in

1994 continue at 80 percent of the U.S.-Canada ABC, as was the case in 1993, providing a U.S. harvest guideline of 260,000 mt. If Canada continues to calculate its share in the same manner as in 1992 and 1993, the U.S. and Canadian total harvest would be 14 percent above the coastwide ABC in 1994. However, the total harvest would be lower than the overfishing level, and lower than the amount that would have been taken if the Council had chosen to use the moderate harvest rate level, as in 1993, in determining the ABC. If recruitment remains near the median level, a decline in annual yield is expected over the next few years, and will be slightly more severe if the catch exceeds the harvest guideline. Bilateral negotiations with Canada are expected to continue to resolve this issue.

Jack mackerel. The ABC is maintained at 52,600 mt, the same level as in 1993, and the harvest guideline is adjusted upward to equal the ABC. In 1992, the harvest guideline has been set at 46,500 mt, lower than the ABC, to deduct the amount of jack mackerel that was expected to be taken beyond 200 nautical miles (nm). However, the fishery did not materialize and the Council recommended setting the harvest guideline equal to ABC in 1993. This change inadvertently was not announced with the 1993 specifications in the **Federal Register**, so the correction is made for 1994.

Chilipepper rockfish. In 1993, the coastwide ABC was set at 3,600 mt with nearly all the catch coming from the Eureka, Monterey, and Conception subareas. The catch in 1992 was about 2,895 mt; 1993 landings data are not yet available for this species. A new assessment indicates that the ABC could be higher, up to 5,000 mt, due to a very strong 1984 year class, and that the stock is at a level above that expected under the recommended level of exploitation. However, the Council recommended a lower ABC of 4,000 mt for 1994, higher than the expected 1993 catch, but less than the maximum amount suggested by the assessment and close to the long-term average yield. Although a higher ABC appears supportable from the assessment, it is not recommended because bocaccio, which is at a low stock level and has an ABC of 1,540 mt and 1993 landings near that level, are unavoidably caught with chilipepper. There is no harvest guideline at this time for chilipepper rockfish.

Pacific ocean perch (POP). Based on the 1992 stock assessment, the ABC for POP remains at zero. A rebuilding program was established for POP in 1981, following depletion of this stock during the 1960's and early 1970's. Significant rebuilding has not been detected. The stock abundance is estimated to be about 50 percent of its target level and recent harvests of about 1,000 mt are near the level of overfishing. If the stock recovers to its target level, then annual yields of about 1,400 mt may be possible. Strong year classes which are necessary to rebuild the stock occur infrequently, so the lack of rebuilding is not unexpected. The harvest guideline continues to be set at the level that accommodates the incidental catch of POP caught while fishing for other species. The reduction of the harvest guideline from 1,550 mt in 1993 to 1,300 mt in 1994 results from converting the harvest guideline from an estimate of total catch (retention plus discards) to an estimate of landed catch (retention only). The harvest guideline of 1,550 mt in 1993 applied to the total catch, 1,300 mt for landed catch and a 250-mt (16 percent) estimate of trip-limit induced discards. In 1994, the harvest guideline represents only the landed catch, and therefore is lowered to 1,300 mt.

For the last several years, the harvest guideline, in conjunction with a very small trip limit, was necessary to accommodate only incidental catches of POP which otherwise would have been discarded. The trip limit will not be relaxed to achieve the harvest guideline, but may be changed to reflect revised estimates of bycatch levels. The catch in 1993 is projected to be about 1,447 mt, 93 percent of the harvest guideline. The 1994 harvest guideline is consistent with the Council's policy to allow for incidental catches during the 20-year rebuilding schedule for POP.

Shortbelly rockfish. Shortbelly rockfish remains an unexploited stock and thus is difficult to assess quantitatively. In recent years, the ABC has been maintained at 13,000 mt until further data can be collected. However, the midpoint of the range of recently revised yield estimates is 23,500 mt. The Council agreed that this represents the best available scientific information and recommended that the harvest guideline be set equal to the ABC. To date, a fishery for this species has not developed. Less than 10 mt were taken in 1992 and similar landings have occurred in 1993.

Widow rockfish. A new assessment was conducted for widow rockfish which explored the consequences of near-term landings between 5,000–7,000 mt. If recent recruitment remains near the average, then stock abundance is expected to remain nearly constant with annual landings of 7,000 mt (which would, including discards, indicate a total harvest of 8,150 mt) in 1994–1996. With annual harvest at 6,500 mt, stock abundance would be expected to increase slightly towards its target level. However, the assessment also provides a plausible alternative, based on lower stock abundance and recent recruitment at a lower, median level, which would support landings of only 5,000 mt during 1994–1996. Given this uncertainty, the ABC and HG are both set at 6,500 mt for 1994.

Thornyheads. The ABCs for shortspine and longspine thornyheads are the same as in 1993. The two species of thornyhead cannot be practically separated in the landings, so, as in 1993, the 1994 harvest guideline is set for the combined species. However, like POP, the harvest guideline is adjusted so that it applies only to landed catch in 1994. Under the assumption that equal amounts of each species will be in the catch, the harvest guideline is set at 6,440 mt for both species combined (the 1993 harvest guideline of 7,000 mt, which represented the total catch, minus 8 percent for trip limit induced discards). This would result in a shortspine thornyhead catch equal to its overfishing level of 3,500 mt and a longspine catch that is less than its ABC of 10,100 mt. However, the percentage of shortspine thornyheads in 1991 and 1992 has been lower than 50 percent, and therefore the catches in these years have been below the overfishing level. During the first half of 1993, shortspine contributed only 35 percent of the thornyhead landings. If the percentage shortspine in 1994 remains at this reduced level as expected, the 1994 catch would be 2,450 mt, well below the overfishing level.

Yellowtail rockfish. A new stock assessment was conducted which indicates that 1983 and 1984 were stronger year classes than previously thought. The ABCs which were applied to the Vancouver, Columbia, and Eureka subareas separately in the past, are applied to different subareas in 1994, coinciding with the subareas used in the new stock assessment. These areas are: The Eureka subarea combined with the Columbia subarea south of Cape Falcon (40°30′ to 45°46′ N. latitude); the Columbia subarea north of Cape Falcon (45°46′ to 47°30′ N. latitude); and the Vancouver subarea between 47°30′ and 49°00′ N. latitude which includes Canadian waters.

In the north Columbia subarea, the assessment indicates a stock that is slowly declining, and further declines are expected as the 1983–1984 year class moves through the stock. The 1994 4,160 mt ABC in this area is higher than the 1992 catch and similar to average

catches between 1986–1989. In the Vancouver subarea, which extends into Canadian waters, there are contrary indicators of stock condition. Trawl survey data indicate a stable healthy stock from 1980–1992, whereas age composition data do not indicate a particularly strong 1983–1984 year class and implies a steeply declining stock. Therefore the ABC for the Vancouver subarea is more conservative, based on the lower end of the optimistic scenario in the stock assessment, and the U.S. portion is estimated at 60 percent, or 1,190 mt. In the southern subareas (Eureka/south Columbia), the stock is believed to have recently increased because of the strong 1983–1984 year classes, but will experience a declining trend as the strong year classes are exploited. In 1993, 300 mt of the ABC was set aside for the Eureka subarea, and a harvest guideline, equal to the sum of the ABCs, was set only for the U.S. Vancouver/Columbia subareas combined. In 1994, however, two harvest guidelines are set for yellowtail rockfish, dividing the U.S. Vancouver, Columbia, and Eureka subareas at Cape Falcon, Oregon. The 4,160 mt harvest guideline in the northern subareas (U.S. Vancouver/north Columbia) is the sum of the ABCs. In the southern area (south Columbia/Eureka), the harvest guideline is set equal to the ABC of 2,580 mt.

Remaining rockfish. Remaining rockfish in the Eureka, Monterey, and Conception subareas includes all rockfish except POP, widow rockfish, shortbelly rockfish, bocaccio and chilipepper rockfish. The ABCs for remaining rockfish have been unchanged since 1983. The ABCs in the Eureka, Monterey, and Conception subareas were set at 1.2 times the 1977 catch, for a total of 9,500 mt. During 1983–1992, the catch of remaining rockfish in this area has ranged from 5,100 mt to 7,200 mt with an average of 6,600 mt. Although annual catches never have achieved the 9,500 mt ABC, an examination of declines in average length for several rockfish species suggests that the fishery is having a noticeable impact. Although there is insufficient information to conduct a quantitative stock assessment for the remaining rockfish in this southern area, an increase in effort in this area should not be encouraged, and therefore the ABC is reduced to 7,000 mt, the upper range of harvest in recent years.

Remaining rockfish in the Vancouver and Columbia subareas are defined as all rockfish except POP, yellowtail rockfish, canary rockfish, widow rockfish, and shortbelly rockfish. The ABC is not changed in 1994.

Remaining rockfish are included in both the northern and southern harvest guidelines for the *Sebastes* complex.

Sebastes complex. The *Sebastes* complex includes all rockfish except widow, shortbelly, Pacific ocean perch, and thornyheads.

North: The harvest guideline for the *Sebastes* complex in the Vancouver-Columbia area has been, and continues to be, the sum of the ABCs of the species in that area, and therefore is 13,240 mt in 1994. It is calculated by adding the ABCs for canary and remaining rockfish in the Vancouver and Columbia subareas, and for yellowtail rockfish in the Vancouver, Columbia and Eureka subareas and then subtracting 300 mt, an estimate of the yellowtail ABC in the Eureka subarea.

South: A harvest guideline of 13,440 mt is established for the first time for the *Sebastes* complex in the Eureka, Monterey, and Conception subareas, based on the sum of the ABCs of the species in those subareas (bocaccio, chilipepper, yellowtail rockfish, and remaining rockfish). The decline in average size of some the *Sebastes* species in this southern area, particularly dark-blotched rockfish, indicated a need to keep effort from expanding. Uncertainty generated by the new limited-entry management regime in 1994 prompted the Council to recommend a harvest guideline to better respond to effort shifts during the season.

Dover sole. There is no change to any of the subarea or coastwide ABCs for Dover sole. At its November 1992 meeting, to mitigate the economic impact of abrupt reductions in ABC, the Council adopted a policy to reduce the harvest (and therefore the harvest guideline) in the Columbia subarea by 1,000 mt annually until the 4,000 mt ABC for that subarea is reached in 1995. This is the second year of the step-down, and therefore the harvest guideline in the Columbia subarea is reduced from 6,000 mt in 1993 to 5,000 mt in 1994, 1,000 mt above the 1994 ABC. Consequently, the coastwide harvest guideline, which is the sum of the subarea harvest guidelines, is 16,900 mt, 1,000 mt higher than the sum of the ABCs. As stated at 58 FR 2994 (January 7, 1993), the risk of overfishing Dover sole in the Columbia subarea is not appreciably increased by setting the harvest guideline greater than the ABC in 1993 and 1994. The Columbia subarea catch has declined from an average of 7,970 mt in 1988–1991 to 5,665 mt in 1992, and landings are expected to be about 5,800 mt in 1993.

English sole. The coastwide ABC of 1,900 mt in 1993 is changed to two area ABCs in 1994: 2,000 mt for the Vancouver-Columbia area and 1,100 mt for the Eureka-Monterey-Conception area. A new stock assessment was conducted only for the Vancouver-Columbia area. It indicated high recruitment during 1977–1992. The large biomass, combined with the early age at maturity which allows a high exploitation rate, suggest that a ten-fold increase in short-term yield may be possible in the Vancouver-Columbia area. However, catches have averaged only about 2,100 mt between 1983–1991. The 1994 ABC is set conservatively, at 2,000 mt in this area, approximately double the coastwide average catch during 1983–1991. The southern area ABC is set near the recent average catch because trawl surveys indicate little trend in abundance. There is no harvest guideline for English sole.

Petrale sole. A new stock assessment for the Vancouver and Columbia subareas was conducted which resulted in the ABC for the two subareas being combined and lowered from 1,700 mt in 1993 to 1,200 mt in 1994. The assessment indicates that the stock in this area is essentially at the expected long-term average level of abundance, and recent yields are slightly below the potential. In addition, the ABC is lowered to exclude the portion that applied to Canadian waters that mistakenly was included in the previous ABC. There is no harvest guideline for petrale sole.

Setting Harvest Guidelines Greater Than ABC

In most cases, harvest guidelines equal the ABCs, or prorated ABCs, for specific areas. However, for 1994 as in 1993, the Council recommended harvest guidelines that exceed the ABCs for three species, POP, Dover sole in the Columbia subarea, and shortspine thornyheads. The FMP requires that the Council consider certain factors when setting a harvest guideline above an ABC. These factors were analyzed by the Council's Groundfish Management Team (GMT) and considered at the Council's November 1993 meeting before recommending the 1994 harvest guidelines. These factors also were considered in establishing the 20-year rebuilding schedule for POP in the 1981 FMP, and in the most recent stock assessments for POP and Dover sole in the Council's August 1992 SAFE document, which provided the basis for the 1993 and 1994 ABCs. A synopsis of these issues appears in the above discussion of these species.

Overfishing. The FMP defines "overfishing" as a fishing mortality rate that would, in the long-term, reduce the

spawning biomass per recruit below 20 percent of what it would have been if the stock had never been exploited (unless the species is above the level that would produce the maximum sustainable yield (MSY)). The rate is defined in terms of the percentage of the stock removed per year. Therefore, a large amount of catch can cause overfishing at any stock abundance level. Conversely, overfishing does not necessarily occur for stocks at low abundance levels if the catch can be kept to a sufficiently small fraction of that stock level. The target rate of exploitation for west coast groundfish typically is the rate that would reduce spawning biomass per recruit to 35 percent of its unfished level. This desired rate of fishing will always be less than the overfishing rate, so there is a buffer between the management target and the level that could harm the stock's long-term potential productivity. If the overfishing level is reached, the Guidelines for Fishery Management Plans at 50 CFR part 602 require the Council to identify actions to be undertaken to alleviate overfishing. POP is the only species believed to be near its overfishing level in 1993, and no others are expected to be overfished in 1994.

POP was depleted off Washington and Oregon mainly by foreign fishing during the 1960's and early 1970's. In 1981, a rebuilding program was established for POP in the Vancouver and Columbia subareas. (POP are neither common nor important in the more southern areas). A review in 1992 of fishery and survey data does not indicate any significant rebuilding. The stock is estimated to be about 50 percent of its MSY level and recent harvests are near the level of overfishing (1,100 mt). The review also indicates that strong year classes, which are necessary to rebuild the stock, occur infrequently so the lack of rebuilding is not expected. The Council's GMT recognized that, as long as trawling occurs in these areas, incidental catches of POP will result. The GMT recommended that trip limits continue to be set to discourage targeting on POP while allowing landings of incidental catches.

It is not anticipated that lowering the level of the trip limit (or the harvest guideline) will reduce the fishing mortality of POP. The level of catch will vary with effort in the Vancouver-Columbia area, and it is possible that the overfishing level will be reached, but not substantially exceeded, in 1994. Under the same harvest guideline and trip limit (3,000 pounds (1,361 kg) or 20 percent of all groundfish per trip, whichever is less), the total landings were 1,378 mt in 1991, 1,023 mt in 1992, and are projected at 1,214 mt in 1993.

Discards. Stock assessments and inseason catch monitoring are designed to account for all fishing mortality, including that resulting from fish discarded at sea. Discards of rockfish and sablefish in the fishery for whiting processed at sea are well-monitored and are accounted for inseason as they occur. In the other fisheries, discards caused by trip limits are not monitored, so discard factors have been developed to reasonably account for this extra catch. These discard factors are applied in several ways.

In some cases (trawl sablefish, widow rockfish, bocaccio, Dover sole), the discard factor was used in the stock assessment and in the setting of the ABC. Therefore the ABC and harvest guideline are defined in terms of landed catch. No additional discard factor is applied to inseason catch projections.

In other cases (yellowtail rockfish, POP, thornyheads), a discard factor was not anticipated in the stock assessment leading to the setting of the ABC because the assessment was conducted before the trip limits became low enough to induce discards. For POP and thornyheads, an estimate of discards caused by trip limits has been subtracted from the ABC so that the harvest guideline represents only the landed catch. For yellowtail rockfish, a variety of gears with different discard levels contribute to the catch, so the harvest guideline is set equal to ABC and landings are adjusted by a discard factor during the season to estimate total removals.

The level of trip limit discard is not monitored. A level previously measured for widow rockfish (16 percent) in a scientific study is assumed to be appropriate for the commercial fisheries for widow rockfish, yellowtail rockfish and POP. A lower level of 8 percent is used for the deepwater thornyhead fishery.

Discarded bycatch in the Pacific whiting fishery always is counted towards the harvest guideline inseason because this source of discard is measured accurately by observers and is variable from year to year.

Foreign and domestic fisheries. For those species needing individual management that will not be fully utilized by domestic processors or harvesters, and that can be caught without severely impacting species that are fully utilized by domestic processors or harvesters, the harvest guidelines or quotas may be apportioned to domestic annual harvest (DAH, which includes domestic annual processing (DAP) and joint venture processing (JVP)) and the total allowable level of foreign fishing (TALFF). In 1994, there are no surplus groundfish available for joint venture or foreign fishing operations. Consequently, all the harvest guidelines in 1994 are designated entirely for DAP (which also equals DAH), and JVP and TALFF are set at zero.

In the unlikely event that a foreign or joint venture fishery should occur, the incidental catch levels would be the same as announced at Table 2, footnote 1 of 58 FR 2990 (January 7, 1993).

The Limited-Entry Program—Effective January 1, 1994

Amendment 6 to the FMP establishes a limited-entry program which divides the groundfish fishery into two components, the limited-entry fishery and the open-access fishery, each of which has its own allocations and management measures. The limited-entry and open-access allocations are calculated according to a formula specified in the FMP and implementing regulations, and are announced annually with the ABC and harvest guideline specifications. At its November 1993 meeting, the Council recommended the species and areas subject to open-access and limited-entry allocations in 1994, and the Regional Director calculated the amounts of the allocations which are presented in Table 1. Unless otherwise specified, the limited-entry and open-access allocations are treated as harvest guidelines in 1994.

Open-access allocations. The open-access fishery means the fishery composed of vessels using (i) exempt gear, or (ii) longline or pot (trap) gear used pursuant to the harvest guidelines, quotas, and other management measures governing the open-access fishery. Exempt gear means all types of fishing gear except groundfish trawl, longline, and pots. (Exempt gear includes trawls used to harvest pink shrimp or spot or ridgeback prawns (shrimp trawls), and, south of Point Arena, California, California halibut, or sea cucumbers.) Simply put, open-access gear is all types of fishing gear except longline, pot, or groundfish trawl gear fished by a vessel that has a limited-entry permit affixed with a gear endorsement for that gear.

The open-access allocation is derived by applying the open-access allocation percentage to the annual harvest guideline or quota after subtracting any set asides for recreational fishing or treaty Indians under sections II.E. (b) and (c) of the Appendix to part 663. For those species in which the open-access share would have been less than one percent, no open-access allocation is

specified for 1994 because significant open-access effort is not anticipated. At the time the calculations were made, the status of some vessels (whether or not they would receive a limited-entry permit) was not certain. The catch by these vessels was divided equally between the limited-entry and open-access allocations. The highest "undecided" amount is 4.7 percent for the catch of species used to represent bocaccio during the window period. Therefore the greatest potential error in any of the open-access or limited-entry allocations is less than 2.5 percent of the harvest guideline. This level of error would not result in a change in any of the trip limits for the limited-entry or open-access fisheries.

Limited-entry allocations. The limited-entry fishery means the fishery composed of vessels using limited-entry gear fished pursuant to the harvest guidelines, quotas, and other management measures governing the limited-entry fishery. Limited-entry gear means longline, pot, or groundfish trawl gear used under the authority of a valid limited-entry permit, issued under 50 CFR part 663, affixed with an endorsement for that gear. (Groundfish trawl gear excludes shrimp trawls used to harvest pink shrimp, spot prawns, or ridgeback prawns, and other trawls used to fish for California halibut or sea cucumbers south of Pt. Arena, California.)

The limited-entry allocation is the allowable catch (harvest guideline or quota) reduced by: (1) Set asides, if any, for treaty Indian fisheries or recreational fisheries, and (2) the open-access allocation.

II. 1994 Management Measures—Commercial Fishery

Most of the 1994 management measures announced in this notice have been designated as "routine" under the procedures contained in Amendment 4 to the FMP (56 FR 736, January 8, 1991). The "routine" designation means that a measure is likely to need adjustment on an annual or more frequent basis, and that it may be implemented and adjusted for a specified species or species group and gear type after consideration at a single Council meeting. However, the effects of the particularly measure must have been analyzed previously, the purpose of the measure must be the same as when it was designated as routine, and the measure must be announced in the **Federal Register**.

Those management measures not yet designated as routine apply to the harvest of groundfish taken incidentally in non-groundfish fisheries (in the open-access fishery) for pink shrimp, spot and ridgeback prawns, California halibut, and sea cucumbers. These fisheries must be managed under "routine" trip limits to assure that open-access allocations are not exceeded. The trip limits for pink shrimp, and spot and ridgeback prawns previously were codified at 50 CFR 663.24; those for California halibut and sea cucumbers are announced herein for the first time. In the future, the Council also may recommend designating trip limits for lingcod as routine, so that they may be adjusted in season to achieve its harvest guideline which was specified for the first time in 1994.

Limited-entry fishery. The following management measures apply to vessels operating in the limited-entry fishery after January 1, 1994, and are designed to keep landings within the harvest guidelines or limited-entry allocations.

The Sebastes complex (including yellowtail rockfish and Bocaccio). Beginning January 1, 1993, the cumulative trip limit for the *Sebastes* complex coastwide was 50,000 pounds (22,680 kg) in a 2-week period, of which no more than 10,000 pounds (4,536 kg) could be bocaccio taken south of Cape Mendocino, or 8,000 pounds (3,629 kg) could be yellowtail rockfish caught north of Coos Bay, Oregon. The *Sebastes* complex trip limit remained the same all year, but the trip limit for yellowtail rockfish was lowered to 6,000 pounds (2,722 kg) in late April, and the bacaccio trip limit was increased to 15,000 pounds (6,804 kg) in early October. By the end of 1993, landings of bocaccio are yellowtail rockfish and the *Sebastes* complex catches are expected to exceed their harvest guideline in the Vancouver/Columbia subareas by as much as 27 percent and 18 percent, respectively. The Council did not recommend further reductions in the trip limit for yellowtail rockfish in 1993 because the ABC and harvest guideline for this species were expected to increase substantially in 1994, and the overage in 1993 is not expected to reduce future productivity. The *Sebastes* complex harvest guideline was exceeded entirely due to the overage in the yellowtail rockfish landings, so the trip limit for the complex was not reduced for the same reasons as for yellowtail rockfish.

In 1994, the cumulative trip limit period for the *Sebastes* complex (including yellowtail rockfish and bocaccio) is extended from 2 weeks to a calendar month, consistent with the period for widow rockfish and the Dover sole/thornyhead/sablefish complex. However, the trip limit is not simply doubled because experience has shown that the opportunity for landings, and thus catch rates, increase as the trip limit period is lengthened. Consequently, the coastwide trip limit for the *Sebastes* complex is increased to only 80,000 pounds (36,290 kg) per calendar month in 1994. Analysis of 1993 Washington and Oregon landings accumulated by 4-week periods indicated that this trip limit will not be severely constraining because few cumulative *Sebastes* trips exceeded 80,000 pounds (36,290 kg) in 1993.

In addition, the management line for yellowtail rockfish is moved north to Cape Lookout, Oregon (45°20′15″ N. latitude), to better define the areas where this species is concentrated. The cumulative trip limit for yellowtail rockfish north of Cape Lookout is set at 14,000 pounds (6,350 kg) per month, intermediate to the 1993 levels (6,000 pounds (2,722 kg) and 8,000 pounds (3,629 kg) per 2-week periods), because landings in 1993 are believed to have been similar to the 1994 harvest guideline for the same area. To keep landings from accelerating south of the line, as occurred in 1992, a trip limit of 30,000 pounds (13,608 kg) per month is established for yellowtail rockfish caught south of Cape Lookout.

Because landings of bocaccio did not reach the 1993 harvest guideline, the trip limit is almost doubled to 30,000 pounds (13,608 kg) per month.

The 1993 restrictions limited a vessel to the northern, more restrictive trip limit for yellowtail rockfish if operating on both sides of the line at Coos Bay. This was a problem for vessels that took the yellowtail rockfish limit south of Coos Bay at the beginning of the month, and then fished north of the line for the DTS complex because yellowtail rockfish is commonly taken as bycatch. The yellowtail rockfish would either need to be discarded or the vessel would be in violation of the more restrictive northern limit. The same problem would exist north and south of Cape Lookout in 1994. Consequently, the Council endorsed a declaration procedure by the States of Oregon and Washington that would allow a fisherman to operate both north and south of Cape Lookout during a month and retain up to the southern limit of yellowtail rockfish, if the State is notified in advance where the vessel will be operating on each trip that crosses the line during that month. These declarations, which are binding for the trip, are similar, but not identical, to those used in the past. The State where the fish will be landed (Oregon or Washington) should be contacted for more complete information on these procedures, which

may differ between the two States. The phone numbers of the State agencies appear in Section III.C.

Widow rockfish. The 1993 cumulative trip limit for widow rockfish initially was set at 30,000 pounds (13,608 kg) per 4-week period, but was reduced to 3,000 pounds (1,361 kg) per trip on December 1, 1993. Landings of widow rockfish are projected to exceed the harvest guideline by as much as 12 percent in 1993. For 1994, the trip limit is again initially set at 30,000 pounds (13,608 kg), but the period is slightly extended from 4-weeks to a calendar month. Reducing the number of trip limit periods from 13 4-week periods (of 28 days) to 12 calendar months (of 30–31 days) is intended to reduce landings from 1993 levels and avoid the need for further trip limit reductions before the fall of 1994.

POP. The 1994 trip limit for POP is the same as in 1991–1993: 3,000 pounds (1,361 kg) or 20 percent of all fish on board, whichever is less, in landings of POP above 1,000 pounds (454 kg). This is not a cumulative limit because it is intended to accommodate only incidental catches. It therefore applies to each fishing trip. Because the trip limit for POP is intended to accommodate only unavoidable incidental catches, it will not be increased if landings are lower than the harvest guideline.

DTS complex (Dover sole, thornyheads, and trawl-caught sablefish). In January 1993, the cumulative trip limit for the DTS complex was 45,000 pounds (20,412 kg) per 2-week period, of which no more than 20,000 pounds (9,072 kg) could be thornyheads and no more than 1,000 pounds (454 kg), or 25 percent of the DTS complex, whichever was greater, could be sablefish. In April, the trip limits were reduced and applied on a 4-week cumulative basis: 60,000 pounds (27,216 kg) of the DTS complex, of which no more than 35,000 pounds (15,876 kg) could be thornyheads. The sablefish trip limit remained the same (but was expected to result in lower landings due to the reduction in the trip limit for the complex) until September when a ceiling of 3,000 pounds (1,361 kg) per trip was added. Nonetheless, landings continued at high levels and, at the Council's November 1993 meeting, were projected to exceed the harvest guidelines for trawl-caught sablefish by 18 percent and for thornyheads by 17 percent. Dover sole landings were projected to be 17 percent below its coastwide harvest guideline, but only 3 percent below the harvest guideline in the Columbia subarea (which is 1,000 mt lower in 1994). Further reductions were implemented in December 1993 (58 FR 64169, December 6, 1993) but were not expected to substantially reduce these overages. Throughout the year, no more than 5,000 pound (2,268 kg) of sablefish per trip could be smaller than 22 inches (56 cm) (total length).

In 1994, the cumulative trip limit for the DTS complex is 50,000 pounds (22,680 kg) per month, including no more than 30,000 pounds (13,608 kg) of thornyheads and 12,000 pounds (5,443 kg) of trawl-caught sablefish. The cumulative period is lengthened from 4-weeks to calendar month. The sablefish trip limit of 1,000 pounds (454 kg) or 25 percent of the DTS complex, whichever is greater, that applies to each trip, remains in effect. The 5,000-pound (2,268 kg) trip limit on sablefish smaller than 22 inches (56 cm) also continues. Even though the sablefish harvest guideline applies only to the Vancouver, Columbia, Eureka, and Monterey areas, these trip limits are applied coastwide to avoid effort shifts into the Conception area.

Nontrawl trip limits for sablefish. In 1993, a coastwide 250-pound (113 kg) daily trip limit was applied until May 9, the beginning of the 72-hour closure before the start of the regular season on May 12. The 250-pound (113 kg) daily trip limit was reimposed on June 5 following a 72-hour closure beginning June 2. Landings are projected to be within one percent of the harvest guideline in 1993. The harvest guideline applies coastwide except for the Conception subarea.

Daily trip limits are established again in 1994, until 72 hours before, and 72 hours after, the regular season which is scheduled to start on May 15, 1994. However, the 250-pound (113 kg) daily trip limit will apply only to the Vancouver, Columbia, Eureka, and Monterey subareas, the same areas covered by the harvest guideline. In the Conception area, where there is no harvest guideline and landings have been below the 425 mt ABC, the daily trip limit is increased to 350 pounds (159 kg). This limit will accommodate most current landings without encouraging excessive effort shifts into that area.

The trip limit for sablefish smaller than 22 inches (56 cm) (1,500 pounds (680 kg) or 3 percent of all legal sablefish on board, whichever is greater) remains in effect.

Pacific whiting. The Council recommended continuation of the 10,000-pound (4,536 kg) trip limit for Pacific whiting taken before and after the regular season. In 1994, the regular season begins on March 1 between 42°00′—40°30′ N. latitude, and on April 15 north of 42°00′ N. latitude and south of 40°30′ N. latitude.

Open-access fishery. At its November meeting, the Council recommended open-access fishery trip limits for certain gear types, areas, and species or species groups. For all open-access gear except trawls, the Council recommended: (1) A 10,000 pound (4,536 kg) trip limit for all rockfish, not to exceed 40,000 pounds (18,144 kg) cumulative in a month; and (2) a sablefish trip limit of the same amounts and areas as for the limited-entry nontrawl fishery at the beginning of the year (250 pounds (113 kg) per day north of 36°00′ N. latitude; 350 pounds (159 kg) per day south of 36°00′ N. latitude). For shrimp trawls, the trip limit for spot and ridgeback prawns remains the same at 1,000 pounds (454 kg) of groundfish per trip, and the trip limit in the pink shrimp fishery (1,500 pounds (680 kg) of groundfish per day times the number of days in the fishing trip) is the same except the exclusion of whiting, shortbelly rockfish, and arrowtooth flounder is removed. The trip limits all are designed to keep landings within the open-access allocation for as long as possible during the year. In addition, any more restrictive limits imposed on the limited-entry vessels also apply to the open-access vessels. In particular, the cumulative monthly limits for bocaccio and for yellowtail rockfish are more restrictive than the 40,000 pounds (18,144 kg) cumulative limit on all rockfish in the open-access fishery.

Public comment resulting from the discussion of trip limits at the September 1993 Council meeting revealed two minor trawl fisheries for non-groundfish species (California halibut and sea cucumbers south of Point Arena, California) that incidentally take small amounts of groundfish. If these vessels had landed the 500-pound (227 kg) minimum landing requirement during the window period, they would have qualified for a limited-entry permit, but they did not. These vessels are considered to be using exempt gears, and therefore may participate in the open-access fishery. The Council agreed that the total take of groundfish in these fisheries was insignificant, if measurable, and that there was no need to force these fishers to discard incidentally-caught groundfish. Therefore, a 500-pound (227 kg) trip limit for all groundfish species was recommended for these fisheries.

Vessels using open-access gear are subject to the management measures for the open-access fishery, whether or not the vessel has a valid limited-entry permit endorsed for any other gear. In addition, a vessel operating in the open-

access fishery must not exceed any trip limit, frequency limit, and/or size limit for the same gear and/or subarea in the limited-entry fishery (as announced in this **Federal Register** notice in paragraphs titled "limited-entry"). A vessel that operates in both the open-access and limited-entry fisheries is not entitled to two separate trip limits for the same species. Fish caught with open-access gear will also be counted toward the limited-entry trip limit. For example; In one month, a trawl vessel catches 12,000 pounds (5,443 kg) of yellowtail rockfish in the limited-entry fishery, and in the same month catches 4,000 pounds (1,814 kg) of yellowtail rockfish using hook-and-line (open-access) gear. Because the open-access landings are counted toward the limited-entry limit, the vessel would have exceeded its monthly 14,000 pound (6,350 kg) limited-entry limit for yellowtail rockfish by 2,000 pounds (907 kg).

III. 1994 Management Measures—Recreational Fishery

The recreational size and bag limits in 1994 are the same as in 1993 except for the bag limit for black rockfish off Oregon. The State of Oregon is concerned that numbers of black rockfish on the north Oregon coast are declining and has reduced the State bag limit from 15 rockfish of any species, to 15 rockfish of which no more than 10 may be black rockfish. The Council recommended that the same change be made to the bag limit in Federal waters to conserve the species and maintain consistency with Oregon regulations. The commercial fishery is not restricted at this time because the commercial catch of black rockfish is low, and commercial vessels have voluntarily agreed to avoid the nearshore areas where black rockfish are found.

IV. Secretarial Actions

For the reasons stated above, the Secretary concurs with the Council's recommendations and announces the following management actions for 1994, including those that have not been changed since 1993.

A. General Definitions and Provisions

The following definitions and provisions apply to the 1994 management measures, unless otherwise specified in a subsequent notice:

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

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

(3) *A cumulative trip limit* is the maximum amount that may be taken and retained, possessed or landed per vessel in a specified period of time, without a limit on the number of landings or trips. Cumulative trip limits for 1994 initially apply to calendar months.

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

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

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

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

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

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

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

(11) It is unlawful for any person to take and retain, possess, or land groundfish in excess of the landing limit for the open-access fishery without having a valid limited-entry permit for the vessel affixed with a gear endorsement for the gear used to catch the fish. (50 CFR 663.7(t))

(12) The following provisions that are not covered under the headings "limited-entry" or "open-access" apply to all vessels that take and retain groundfish unless otherwise stated.

B. Widow Rockfish

(1) *Limited-entry Fishery.* No more than 30,000 pounds (13,608 kg) cumulative of widow rockfish may be taken and retained, possessed, or landed per vessel per month. (Widow rockfish are also called brownies.)

(2) *Open-access Fishery.* See section G. Of the 40,000 pound (18,144 kg) monthly cumulative trip limit for rockfish taken in the open-access fishery, no more than 30,000 pounds (13,608 kg) may be widow rockfish.

C. Sebastes Complex (Including Yellowtail and Bocaccio Rockfish)

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

(b) Cape Lookout means 45°20'15" N. latitude.

(c) Cape Mendocino means 40°30'00" N. latitude.

(2) *Limited-entry fishery.* (a) *Cumulative trip limits.* Coastwide, no more than 80,000 pounds (36,287 kg) cumulative of the *Sebastes* complex may be taken and retained, possessed or landed per vessel per month. Within this 80,000 pounds (36,287 kg), no more then 14,000 pounds (6,350 kg) cumulative may be yellowtail rockfish taken and retained north of Cape Lookout; no more than 30,000 pounds (13,608 kg) cumulative may be yellowtail rockfish taken and retained south of Cape Lookout; and no more than 30,000 pounds (13,608 kg) cumulative may be bocaccio taken and retained south of Cape Mendocino.

(b) The provisions of this paragraph (b) apply unless declarations are made according to paragraph (c) below. If any vessel transits through or fishes in the area north of Cape Lookout during a

month, then that vessel is subject to the trip limit for yellowtail rockfish taken and retained north of Cape Lookout, no matter where the fish are possessed or landed. Similarly, if a vessel takes and retains yellowtail rockfish south of Cape Lookout and possesses or lands yellowtail rockfish north of Cape Lookout during a month, that vessel is subject to the northern trip limit.

(c) *State declarations.* The States of Oregon and Washington are implementing declaration procedures that enable a vessel that fishes or transits both north and south of Cape Lookout during a month to retain the 30,000 pound (13,608 kg) cumulative limit for yellowtail rockfish south of Cape Lookout. For any vessel that takes and retains or lands yellowtail rockfish during the month, a declaration must be filed for each fishing trip that crosses the line at Cape Lookout during that month, must be made before leaving port on the fishing trip, and may not be changed once the vessel has left port. Declarations must be made, according to State law, to the state where the fish will be landed. To make a declaration or for further information, contact: Washington Department of Fisheries, Montesano, WA, at 206–249–4628; or Oregon Department of Fish and Wildlife, Newport, OR, at 503–867–4741.

(i) A vessel under a northern trip declaration may not exceed the northern limit during a single trip, nor may the cumulative catch of all northern declared trips exceed the northern cumulative limit. The total cumulative catch for the month may not exceed the southern limit, no matter where the fish are caught.

(ii) A vessel under a southern trip declaration may not fish for any groundfish north of Cape Lookout during the fishing trip for which the declaration is made; otherwise, the northern trip limit would apply. A vessel under a southern trip declaration may not exceed the southern trip limit during a single trip, nor may the cumulative catch of all southern declared trips exceed the southern cumulative limit. The total cumulative catch for the month may not exceed the southern limit, no matter where the fish are caught.

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

(3) *Open-access Fishery.* See section G. Of the 40,000 pound (18,144 kg) monthly cumulative trip limit for rockfish taken in the open-access fishery, no more than 14,000 pounds (6,350 kg) cumulative may be yellowtail rockfish caught north of Cape Lookout, no more than 30,000 pounds (13,608 kg) cumulative may be yellowtail rockfish caught south of Cape Lookout, and no more than 30,000 pounds (13,608 kg) cumulative may be bocaccio caught south of Cape Mendocino. The State declaration procedures apply to all vessels, whether in the limited-entry or open-access fishery.

D. Pacific Ocean Perch (POP)

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

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

(2) *Open-access Fishery.* See section G. Within the 10,000 pound (4,536 kg) trip limit for rockfish taken in the open-access fishery, no more than 3,000 pounds (1,361 kg) or 20 percent of all legal fish on board, whichever is less, may be POP. If less than 1,000 pounds (454 kg) of Pacific ocean perch are landed, the 20 percent limit does not apply.

E. Sablefish and the DTS Complex (Dover Sole, Thornyheads, and Trawl-Caught Sablefish

(1) *1994 Management Goal.* The sablefish fishery will be managed to achieve the 7,000 mt harvest guideline in 1994.

(2) *Washington Coastal Tribal Fisheries.* An estimate will be made of the catch to the end of 1994 for the Washington coastal treaty tribes. It is anticipated that these tribes will regulate their fisheries so as not to exceed their estimated catch. There will be no Federally imposed tribal allocation or quota. In 1994, the estimated tribal catch is 300 mt, the same as in 1991, 1992, and 1993.

(3) *Limited-entry Fishery.* (a) *Gear Allocations.* After subtracting the tribal-imposed catch limit and the open-access allocation from the harvest guideline, the remainder will be allocated 58 percent to the trawl fishery and 42 percent to the nontrawl fishery.

[**Note:** The 1994 harvest guideline for sablefish is 7,000 mt. The 300-mt tribal-imposed catch limit is subtracted, and the limited-entry and open-access allocations are based on the remaining 6,700 mt. The limited-entry allocation for 1994 of 6,070 mt is allocated 3,520 mt (58 percent) to the trawl fishery and 2,550 mt (42 percent) to the nontrawl fishery. The trawl and nontrawl gear allocations are harvest guidelines in 1994, which means the fishery will be managed so that the harvest guidelines are not exceeded, but will not necessarily be closed if they are reached.]

(b) *Trip and Size Limits for the DTS Complex (Thornyheads, Dover Sole, and Trawl-caught Sablefish).* These provisions apply to thornyheads and Dover sole caught with any limited-entry gear and sablefish caught with limited-entry trawl gear.

(i) "DTS complex" (formerly called the "deepwater complex") means Dover sole (*Microstomus pacificus*), thornyheads (*Sebastolobus* spp.), and trawl-caught sablefish (*Anoplopoma fimbria*). Sablefish also are called blackcod. Thornyheads also are called idiots, channel rockfish, or hardheads.

(ii) *Trip limits.* Coastwide, no more than 50,000 pounds (22,680 kg) cumulative of the DTS complex may be taken and retained, possessed, or landed per vessel per month. Within this 50,000 pounds (22,680 kg), no more than 30,000 pounds (13,608 kg) cumulative may be thornyheads, and no more than 12,000 pounds (5,443 kg) cumulative may be trawl-caught sablefish. In any landing of the DTS complex, the trip limit for trawl-caught sablefish is the greater of 1,000 pounds (454 kg), or 25 percent of the DTS complex. In any landing, no more than 5,000 pounds (2,268 kg) of sablefish may be smaller than 22 inches (56 cm) (total length).

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

(c) *Nontrawl trip and size limits.* (i) The daily trip limit for sablefish in the Vancouver, Columbia, Eureka and Monterey subareas (the U.S.-Canada border to 36°00′00″ N. latitude) is 250 pounds (113 kg), and in the Conception subarea (36°00′00″ N. latitude to the U.S.-Mexico border) is 350 pounds (159 kg). These daily trip limits, which apply to sablefish of any size, remain in effect until the regular season begins, as specified at 50 CFR 663.23(b)(2).

[**Note:** In 1994, the daily trip limits will be in effect from 0001 hours January 1 through 2400 hours May 11; the first 72-hour closure will occur from 0001 hours May 12 through 2400 hours May 14; and the regular season will start at 0001 hours May 15.]

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

(See paragraph (d) regarding length measurement.)

(iii) Following the regular season, on a date to be announced in the **Federal Register**, the daily trip limits will be reimposed for sablefish (of any size) caught with nontrawl gear.

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

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

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

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

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

(4) *Open-access Fishery.* The daily trip limit for sablefish in the Vancouver, Columbia, Eureka and Monterey subareas (the U.S.-Canada border to 36°00′00″ N. latitude) is 250 pounds (113 kg), and in the Conception subarea (36°00′00″ N. latitude to the U.S.-Mexico border) is 350 pounds (159 kg).

F. *Pacific Whiting.* (1) *Limited-entry Fishery.* (a) No more than 10,000 pounds (4,536 kg) of pacific whiting may be taken and retained, possessed, or landed, per vessel per fishing trip until the regular season for whiting begins, as specified at 50 CFR 663.23(b)(3).

(b) No more than 10,000 pounds (4,536 kg) of Pacific whiting may be taken and retained, possessed, or landed by a vessel that, at any time during a fishing trip, fished in the fishery management area shoreward of the 100-fathom contour (as shown on NOAA Charts 18580, 18600, and 18620) in the Eureka subarea (from 43°00′00″ N. latitude to 40°30′00″ N. latitude).

Additional regulations that apply to the whiting fishery are found in the Pacific Coast Groundfish regulations at 50 CFR 663.7 and 663.23 (58 FR 21261 and 58 FR 21265, both April 20, 1992).

G. Vessel Limits In The Open-Access Fishery

(1) *Set net, hook-and-line, pot, and other exempt gear except exempted trawl gear:*

(a) *Rockfish.* No more than 10,000 pounds (4,536 kg) of rockfish may be taken and retained, possessed, or landed per vessel per fishing trip. No more than 40,000 pounds (18,144 kg) cumulative of rockfish may be taken and retained, possessed or landed per vessel per month. Rockfish means the *Sebastes* complex, shortbelly rockfish, widow rockfish, Pacific ocean perch, and thornyheads, as listed at 50 CFR 663.2. Within these limits, a vessel may not take and retain, possess or land more widow rockfish, Pacific ocean perch, thornyheads, DTS complex, *Sebastes* complex, yellowtail rockfish, or bocaccio than authorized for the limited-entry fishery. (See paragraphs B.(1), C.(2), D.(1), and E.(3).)

(b) *Sablefish.* The daily trip limit for sablefish in the Vancouver, Columbia, Eureka and Monterey subareas (the U.S.-Canada border to 36°00′00″ N. latitude) is 250 pounds (113 kg), and in the Conception subarea (36°00′00″ N. latitude to the U.S.-Mexico border) is 350 pounds (159 kg).

Note: The "regular" season and 72-hour closures specified at 50 CFR 663.23(b)(2) do not apply to the open-access fishery.

(2) *Shrimp trawl* (used to catch pink shrimp or spot or ridgeback prawns):

(a) *Pink shrimp.* The trip limit for a vessel engaged in fishing for pink shrimp is 1,500 pounds (680 kg) (multiplied by the number of days of the fishing trip) of groundfish species listed at 50 CFR 663.2.

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

(c) Within these limits, a vessel may not take and retain, possess or land more widow rockfish, Pacific ocean perch, thornyheads, DTS complex, *Sebastes* complex, yellowtail rockfish, bocaccio, Dover sole, or Pacific whiting than authorized in the limited-entry fishery. (See paragraphs B.(1), C.(2), D.(1), E.(3), and F.(1).)

(3) *California halibut or sea cucumber trawl.* No more than 500 pounds (227 kg) of groundfish may be taken and retained, possessed, or landed per trip by a vessel participating in the California halibut fishery or in the sea cucumber fishery south or Point Arena, California (38°57′30″ N. latitude).

(i) A trawl vessel will be considered participating in the California halibut fishery if (i) it is not fishing under a valid limited-entry permit issued under 50 CFR part 663 for trawl gear, and (ii) all fishing on the trip takes place south of Point Arena and the landing includes California halibut of a size required at California Fish and Game Code Section 8392(a) which states:

> No California halibut may be taken, possessed or sold which measures less than 22 inches in total length, unless it weighs four pounds or more in the round, three and one-half pounds or more dressed with the head on, or three pounds or more dressed with the head off. Total length means the shortest distance between the tip of the jaw or snout, whichever extends farthest while the mouth is closed, and the tip of the longest lobe of the tail, measured while the halibut is lying flat in natural repose, without resort to any force other than the swinging or fanning of the tail.

(ii) A trawl vessel will be considered participating in the sea cucumber fishery if (i) it is not fishing under a valid limited-entry permit issued under 50 CFR part 663 for trawl gear, and (ii) all fishing on the trip takes place South of Point Arena and the landing includes sea cucumbers taken in accordance with California Fish and Game Code Section 8396, which requires a permit issued by the State of California.

(iii) Currently, no trawl trip limit in the limited-entry fishery is less than 500 pounds (227 kg). However, if a limited-entry trip limit were lower than 500 pounds (227 kg), no groundfish landing by California halibut or sea cucumber trawl may be in excess of the limited-entry trip limit for trawl gear.

(4) *Operating in both limited-entry and open-access fisheries.* The open-access trip limit applies to any fishing conducted with open-access gear, even if the vessel has a valid limited-entry permit with an endorsement for another type of gear. A vessel operating in the open-access fishery must not exceed any trip limit, frequency limit, and/or size limit for the same gear and/or subarea in the limited-entry fishery (as announced in this **Federal Register** notice in paragraphs titled "limited-entry"). A vessel that operates in both the open-access and limited-entry fisheries is not entitled to two separate trip limits for the same species. Fish caught with open-access gear will also be counted toward the limited-entry trip limit.

(5) *Sorting.* 50 CFR 663.7(l) makes it unlawful for any person to "fail to sort, prior to the first weighing after offloading, those groundfish, species or species groups for which there is a trip limit, if the weight of the total delivery exceeds 3,000 pounds (1,361 kg) (round weight or round weight equivalent)." This provision applies to both the limited-entry and open-access fisheries.

IV. Recreational Fishing

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

(2) *Oregon.* The bag limit for each person engaged in recreational fishing seaward of the State of Oregon is 3 lingcod per day and 15 rockfish per day, of which no more than 10 may be black rockfish (*Sebastes melanops*).

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

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

V. Inseason Adjustments

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

VI. Experimental Fisheries

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

Classification

The final specifications and management measures for 1994 are issued under the authority of and in accordance with the regulations implementing the FMP at 50 CFR parts 611 and 663.

Much of the data necessary for these specifications and management measures comes from the current fishing season. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the fishing year, there is good cause to waive the publication of proposed specifications in the **Federal Register** and 30-day comment period on the proposed specifications. Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations, and set up a system by which the interested public was notified, through **Federal Register** notice and Council mailings of meetings, and of the development of these measures, and was provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, Scientific and Statistical Committee, and Council meetings in August, September, October, and November 1993 that resulted in these recommendations from the Council. Additional public comments will be accepted for 30 days after publication of this notice in the **Federal Register**. The Assistant Administrator for Fisheries, NOAA will consider all comments made during the public comment period and may propose modifications as appropriate.

Because the rule is being issued without prior notice and opportunity for public comment, preparation of a Regulatory Flexibility Analysis is not required and none has been prepared.

The Administrative Procedure Act requires that publication of an action be made not less than 30 days before its effective date unless the Secretary finds and publishes with the rule good cause for an earlier effective date. Good cause for waiving the delay in effectiveness is found if the delay is impracticable, unnecessary, or contrary to the public interest. These specifications announce the harvest goals and the management measures designed to achieve those harvest goals in 1994. A delay in implementation could compromise the management strategies that are based on the projected landings from these trip limits. Therefore, a delay in effectiveness is contrary to the public interest and these actions are effective on January 1, 1994.

List of Subjects

50 CFR Part 611

Fisheries, Foreign relations, Reporting and recordkeeping requirements.

50 CFR Part 663

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

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

Dated: December 30, 1993.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 93–32118 Filed 12–30–93; 5 pm]

BILLING CODE 3510–22–M

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50 CFR Part 663

[Docket No. 931248–3348; ID. 100693A]

Pacific Coast Groundfish Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule amends the regulations governing the Pacific coast groundfish limited-entry fishery to: (1) Clarify distinctions between holders, owners, and lessees of limited-entry permits in the Pacific coast groundfish fishery by adding definitions of these terms and making minor corrections consistent with the new definitions; (2) clarify that shrimp (including spot and ridgeback prawn) trawls, California halibut trawls, and California sea cucumber trawls are "exempted gear"; (3) delete trip limits for groundfish taken in the pink shrimp and spot and ridgeback prawn trawl fisheries; (4) designate trip limits in the pink shrimp and spot and ridgeback prawn fisheries as "routine" management measures; (5) modify the method of calculating allocations for the "open-access" fishery; and (6) clarify that the sablefish "regular" season for nontrawl gear only applies to the limited-entry groundfish fishery. These actions are necessary to make the regulations implementing the Fishery Management Plan for the Pacific Coast Groundfish Fishery (FMP) consistent with Amendment 6 (limited entry) to the FMP, and to improve recordkeeping and enforcement of regulations in the Pacific coast groundfish fishery.

DATES: Effective on December 30, 1993. Comments will be accepted through January 31, 1994.

ADDRESSES: Effective January 1, 1994. Comments should be sent to Mr. J. Gary Smith, Acting Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE., BIN C15700, Seattle, WA 98115–0070.

FOR FURTHER INFORMATION CONTACT: William L. Robinson at 206–526–6140.

SUPPLEMENTARY INFORMATION: On November 16, 1992, NOAA promulgated regulations (57 FR 54001) that establish a license limitation limited-entry program for the Pacific coast commercial groundfish fishery based on the issuance of gear-specific Federal permits (the "limited-entry program"). Under the program, permits are initially issued to owners of qualifying vessels. Permits with type "A" gear endorsements are transferrable, and may be leased by one vessel owner to another. The implementing regulations, codified at 50 CFR part 663, subpart C, use the terms "permit holder" and "permit owner" interchangeably, and do not clearly define the relationship between permit owners and permit lessees. This lack of definition creates potential recordkeeping and enforcement problems. These problems stem from a person being able to "own" a permit, but lease it to someone else. Maintenance of records identifying the permit owner, even if the permit is currently registered to a lessee, is essential for recording and enforcement purposes. The NMFS records system is the only place available to officially record permit ownership, and give notice to creditors, purchasers, encumbrancers, and other interested parties. NMFS itself needs to know who owns the permit in the event it becomes necessary to take an enforcement action such as sanctioning the permit or collecting a delinquent penalty.

Accordingly, the first clarification made by this interim final rule is to add the following definitions for "permit owner," "permit lessee," and "permit holder." A "permit owner" is defined as the person owning the permit; a "permit lessee" is defined as a person who does not own the permit, but has the right to possess and use it for a designated period, with reversion to the permit owner; and "permit holder" is an umbrella term which includes both "permit owners" and "permit lessees." This rule amends the regulations in multiple paragraphs to use the term "permit owner" rather than "permit holder" when appropriate, and to amend the definition of "owner" to "owner of a vessel" or "vessel owner" to distinguish a vessel owner from a "permit owner." These revisions clarify that only permit owners may transfer a limited-entry permit to a different person, thus not allowing a lessee to transfer the permit to someone other than the permit owner.

With respect to administration of the limited-entry program, the terms "permit holder," "permit owner," and "permit lessee" are used for ease of understanding only, and do not signify traditional property rights. As stated in Amendment 6,

> Groundfish limited entry permits and endorsements confer a right to participate in the Pacific coast groundfish fishery with a limited entry gear in accordance with the limited entry system established under the Pacific Coast Groundfish FMP as modified by this chapter of the FMP (created under Amendment 6) or any future amendment which may modify or even abolish the limited entry system. The permits and endorsement are also subject to sanctions, including revocation, as provided by the Magnuson Fishery Conservation and Management Act, 16 U.S.C. at 1858(g) and 15 CFR part 904, subpart D.

The second clarification revises the definition of "exempted gear" in the implementing regulations. Section 4.2.1 of the FMP states that exempted gear includes all gears other than groundfish trawl, longline, and fishpot (which are limited-entry gears). The FMP points out that shrimp trawl gear, a non-groundfish trawl gear, is an exempt gear. Shrimp trawl gear is not defined in terms of physical attributes, but includes trawl gear used to take pink shrimp, or spot or ridgeback prawns. Two other trawl fisheries, California halibut and California sea cucumber, also have been identified as non-groundfish trawl fisheries, which have traditionally landed small quantities of groundfish as a bycatch. However, the implementing regulations at 50 CFR 663.31 define "exempted" gear as all types of fishing gear except trawl, longline, and trap (or pot) gear, thus inadvertently excluding shrimp, California halibut, and California sea cucumber trawl gear from participation in the open-access fishery. This action clarifies that "exempted" gear includes all gear other than longline, trap, and groundfish trawl gear. Trawl gear used to take pink shrimp, spot prawns, ridgeback prawns, California halibut, or California sea cucumbers is specifically defined as "exempted gear." "Limited-entry gear" is redefined to include "groundfish trawl gear" rather than "all trawl gear." A new definition of "groundfish trawl gear" is added to include only trawl gear used under the authority of a valid Pacific Coast Groundfish limited-entry permit affixed with an endorsement for trawl gear.

The third and fourth clarifications address how trip limits are established for groundfish taken in trawl fisheries for pink shrimp and spot and ridgeback prawn fisheries. Trip limits for groundfish in these fisheries have been fixed in the regulations at 50 CFR 663.24(a) and (b). The trip limits were codified because the Council did not foresee any future need to revise them under the management regime that existed prior to limited entry. Under Amendment 6, however, groundfish bycatch in the shrimp and prawn trawl fisheries is managed as a component of the "open-access" fishery because it is taken with "exempted gear." Amendment 6 provides for the establishment of trip limits for bycatch of groundfish with exempted gear in the open-access fishery to make sure that the total catch of each species and species group does not exceed the historical catch proportions during the limited-entry qualifying period, and that the open-access allocations are not exceeded during the fishing year. Because the amount of effort in the open-access fishery may change over time, Amendment 6 contemplated that trip limits may need frequent revision.

The Pacific coast groundfish regulations at 50 CFR 663.23(c) establish a category of management measures called "routine." Routine measures include the types of management measures, primarily trip limits but also including trip frequency limits and bag limits in the recreational fishery, that need to be adjusted frequently in order to manage the fishery consistent with the FMP's goals and objectives. Once a particular management measure has been established by regulation as "routine," the Pacific Fishery Management Council (Council) may recommend that the Secretary adjust that measure at any time, following consideration at a single Council meeting and publication of the adjustment in the **Federal Register**, provided that the purpose for the adjustment is consistent with the rationale for needing frequent adjustments that was articulated at the time the management measure was determined to be "routine."

Implementing regulations for Amendment 6 inadvertently omitted a "routine" designation for trip limits for groundfish in the shrimp and prawn trawl fisheries. The routine designation is necessary in order to limit the open-access catch of groundfish to its historical catch proportions and to ensure that the annual open-access allocation is not exceeded. Thus, this rule deletes the trip limits in the pink shrimp and spot and ridgeback prawn

fisheries at 50 CFR 663.24(a) and (b) while simultaneously designating them as "routine" under 50 CFR 663.23(c)(2) so that the Council may recommend adjustments as necessary without undertaking the time-consuming regulatory amendment process.

In accordance with the procedures for routine designation, the Council considered the routine designation for trip limits for pink shrimp and prawns at the September 1993 meeting and recommended the designation at its November 1993 meeting. Rockfish and sablefish trip landing and trip frequency limits for all gear are already designated as routine. This action clarifies the regulations to include trip landing and frequency limits for rockfish and sablefish in the open-access as well as the limited-entry portion of the Pacific coast groundfish fishery.

The fifth clarification addresses an inconsistency between how catches in the "limited-entry" and "open-access" fisheries are accounted for, and how the allocations are calculated for each fishery. 50 CFR 663.32(c) provides that any groundfish caught by a vessel with a limited-entry permit will be counted against the limited-entry allocation while the limited-entry fishery for that vessel's limited-entry gear type is open. Thus, for example, while the limited-entry fishery for groundfish is open, any groundfish taken by a vessel with a limited-entry permit, even if it is fishing with exempted gear such as shrimp trawl gear, will be counted against the limited-entry allocation. In sections II.E.(d)(3) and (d)(4)(A)(1) and (2) of the appendix to part 663, the "open-access" allocation is derived by applying the open-access allocation percentage to the annual harvest guideline or quota after subtracting any set asides for recreational fishing or treaty Indians. The "open-access allocation percentage" is calculated by computing the total catch during the limited-entry qualifying (window) period by longlines and traps (or pots) not initially receiving a limited-entry endorsement for that gear, and by exempted gear, and dividing that amount by the total catch during the window period by all gear. Thus, the groundfish catch taken during the window period with exempted gear by a vessel that initially receives a limited-entry permit will be included in the open-access allocation even though the catch with that same exempted gear in 1994 and beyond will count against the limited-entry allocation as long as the limited-entry fishery is open. To rectify this inconsistency, this rule amends the regulations to provide that the window period catch by vessels not initially receiving limited-entry permits will count toward the "open-access" allocation; conversely, the window period catch with exempted gear by vessels initially receiving a limited-entry permit will count toward the "limited-entry" allocation.

Finally, this rule clarifies that the "regular" season with longline and fish trap (or pot) gear (nontrawl gear) for sablefish refers only to the "limited-entry" fishery. Vessels participating in the "open-access" fishery are not affected by the regular season because they are regulated under open-access trip landing limits which extend throughout the year.

Classification

This interim final rule is issued under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* This rule makes minor changes designed to clarify and facilitate implementation of Amendment 6. NMFS became aware of the need for these changes while implementing the Pacific coast groundfish limited-entry program, a new and complex regulatory system. These changes need to be in place when the fishery itself begins to operate under the limited-entry system on January 1, 1994. Most of the changes effected by this rule are necessary to conform the implementing regulations to the letter and intent of Amendment 6 to the FMP. As such, these provisions were discussed and were subject to public comment and scrutiny during the years the Council developed Amendment 6. Furthermore, the revisions and clarifications are necessary to uniformly administer the program and to ensure accurate recordkeeping. These provisions will not result in any significant changes in the day-to-day operating practices of the fishery. Accordingly, the Assistant Administrator for Fisheries, NOAA, has determined under 5 U.S.C. 553(b) and (d), that it would be unnecessary and contrary to the public interest to delay the effectiveness of these provisions pending advance notice and comment and a 30-day delay in effectiveness.

The revision of 50 CFR 663.22(d)(1) is the only change that was not necessarily contemplated by Amendment 6; however, it would be impracticable and contrary to the public interest to provide advance notice and comment before the fishery converts to limited-entry because, without it, permit owners and potential purchasers would be susceptible to substantial losses if permits could be freely transferred by permit lessees.

List of Subjects in 50 CFR Part 663

Fisheries, Fishing, Reporting and recordkeeping requirements.

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

Dated: December 30, 1993.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 663 is amended as follows:

PART 663—PACIFIC COAST GROUNDFISH FISHERY

1. The authority citation for part 663 continues to read as follows:

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

§ 663.7 [Amended]

2. In § 663.7, in paragraph (q), the word "groundfish" is added before the words "trawl gear" the first two times they appear.

3. In § 663.23, paragraph (b)(2) is amended by revising the paragraph heading and adding introductory text, the title of paragraph (c)(1) is revised, paragraph (c)(2) is redesignated as (c)(3), and a new paragraph (c)(2) is added to read as follows:

§ 663.23 Catch restrictions.

* * * * *

(b) * * *

(2) *Nontrawl sablefish—Limited entry Fishery.* This paragraph (b)(2) applies to vessels using nontrawl gear in the limited entry fishery, but not to vessels in the open access fishery as described in Subpart C—Limited entry and Open Access Fisheries. * * *

* * * * *

(c) * * *

(1) *Commercial—Limited entry and Open Access Fisheries.* * * *

* * * * *

(2) *Commercial—Open Access Fishery.*

(i) All groundfish—Shrimp trawls used to harvest pink shrimp, spot prawn, or ridgeback prawn—trip landing and frequency limits.

(ii) *Reasons for "routine" management measures.* All routine management measures on the open access fisheries are intended to keep landings within the harvest levels announced by the Secretary, maintain landings at historical (1984–1988) proportions, and extend the fishing season to minimize disruption of traditional fishing and marketing patterns.

(3) *Recreational.* * * *

* * * * *

§ 663.24 [Removed and Reserved]

4. Section 663.24 is removed and reserved.

5. Section 663.31 is amended by revising the definitions of "exempted gear," "limited entry gear", removing the definition of "owner" and adding definitions for "groundfish trawl gear", "owner of a vessel", "permit holder", "permit lessee", and "permit owner" in alphabetical order as follows:

§ 663.31 Definitions.

* * * * *

Exempted gear means all types of fishing gear except longline, trap (or pot), and groundfish trawl gear. Exempted gear includes trawl gear used to take pink shrimp, spot and ridgeback prawns, California halibut south of Pt. Arena, California, and sea cucumber, south of Pt. Arena, California, under the authority of a State of California limited entry permit for the sea cucumber fishery.

* * * * *

Groundfish trawl gear means trawl gear that is used under the authority of a valid limited entry permit issued under this part endorsed for trawl gear. It does not include any type of trawl gear listed as "exempted gear."

* * * * *

Limited entry gear means longline, trap (or pot) or groundfish trawl gear used under the authority of a valid limited entry permit affixed with an endorsement for that gear.

* * * * *

Owner of a vessel or *vessel owner*, as used in this subpart, means a person who is identified as the current owner in the Certificate of Documentation (CG–1270) issued by the U.S. Coast Guard for a documented vessel, or in a registration certificate issued by a state or the U.S. Coast Guard for an undocumented vessel.

* * * * *

Permit holder means a permit owner or a permit lessee.

Permit lessee means a person who has the right to possess and use a limited entry permit for a designated period of time, with reversion to the permit owner.

Permit owner means a person who owns a limited entry permit.

* * * * *

§ 663.33 [Amended]

6. In § 663.33, in paragraph (d)(1), the words "Permit holder" are revised to read "Permit owner", and the words "person, or" are revised to read "person. The permit holder may".

§ 663.35 [Amended]

7. In § 663.35, in paragraph (b)(1), the word "holder" is revised to read "permit owner".

8. In § 663.35, in paragraph (b)(2)(i), the words "permit holder" are revised to read "permit owner".

9. In § 663.35, in paragraph (b)(2)(ii), the word "transferee" is revised to read "new permit owner".

§ 663.36 [Amended]

10. In § 663.36, in paragraph (b)(1), the word "holder" is revised to read "permit owner".

§ 663.37 [Amended]

11. In § 663.37, in paragraph (b)(1), the word "holder" is revised to read "permit recipient".

§ 663.41 [Amended]

12. In § 663.41, in paragraph (c)(2), the twice occurrence of the words "permit holder" are revised to read "permit owner".

13. In § 663.41, in paragraph (c)(3), the words "permit holder" are revised to read "permit owner".

14. In Section II.E.(d)(4)(i) of the appendix to part 663, paragraph (A) is revised to read as follows:

Appendix to Part 663—Groundfish Management Procedures

* * * * *

II. * * *
E. * * *
(d) * * *
(4) * * *
(i) * * *

(A) Computing the total catch for that species during the window period by any vessel that does not initially receive a limited entry permit; and

* * * * *

[FR Doc. 93–32117 Filed 12–30–93; 5:12 pm]
BILLING CODE 3510–22–M

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50 CFR Part 676

[Docket No. 921114–3183; I.D. 123093A]

Limited Access Management of Fisheries off Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of application period.

SUMMARY: NMFS announces an application period for individuals and other persons to apply for Quota Share (QS) under the Individual Fishing Quota (IFQ) program for Pacific halibut and sablefish fisheries off Alaska. The IFQ program was developed under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act) and the Northern Pacific Halibut Act (Halibut Act). This action is necessary to provide potential applicants with notice of an opportunity to apply for QS under the IFQ program. Individuals and other persons thought to be eligible to apply have been so informed by NMFS; all others are hereby notified that they must submit a Request for Application prior to being sent an individualized application form by NMFS. The intended effect of this action is to formally announce the application period for QS under the IFQ program for Pacific Halibut and sablefish fisheries off Alaska.

DATES: Applications must be received during the application period beginning January 17, 1994, and ending at close of business on July 15, 1994.

ADDRESSES: Applications must be sent to NMFS, Restricted Access Management, P.O. Box 21668, Juneau, AK 99802–1668 or 709 W. 9th, room 413, Juneau, AK 99801. Applications and copies of the regulations that implement the IFQ program for Pacific halibut and sablefish fisheries off Alaska may be obtained from NMFS at the above address.

FOR FURTHER INFORMATION CONTACT: Phillip J. Smith, Chief, Restricted Access Management Division, Alaska Region, NMFS, at 907–586–7344.

SUPPLEMENTARY INFORMATION: The IFQ program is a regulatory regime intended by the North Pacific Fishery Management Council to promote the conservation and management of halibut and sablefish resources and to further the objectives of the Magnuson Act and the Halibut Act. The regulations implementing the IFQ program were approved by the Secretary of Commerce (Secretary) and became effective on December 9, 1993 (58 FR 59375, November 9, 1993).

Under 50 CFR 676.20(d), the Director, Alaska Region, NMFS (Regional Director), must provide to any person, on request, an application form for an initial allocation of QS. The application form sent to the person requesting a QS allocation will include all data on that person's vessel ownership and catch history of halibut and sablefish that can be released to the applicant under current state and Federal confidentiality rules, and that are available to the Regional Director at the time of the request. The Regional Director must also provide for an application period, of no less than 180 days, for the submission of applications for initial allocation of QS. The Regional Director is directed to provide notice of the application period

in the **Federal Register** and other information sources that the Regional Director deems appropriate.

This notification is intended to comply with the requirements of 50 CFR 676.20(d). Persons thought to be eligible to apply for QS have been so informed by NMFS by mail. All others are hereby notified that they must submit a Request for Application prior to being sent an individualized application form by NMFS. The application period to submit applications for initial allocation of QS begins on January 17, 1994, and extends for 180 days, ending at the close of business on July 15, 1994. Incomplete applications will be returned to the applicant with specific kinds of information identified that are necessary to make it complete. Applications for initial allocation of QS received after the close of business on July 15, 1994, will not be considered.

Classification

This action is taken under 50 CFR 676.20.

List of Subjects in 50 CFR Part 676

Fisheries, Reporting and recordkeeping requirements.

Authority: 16 U.S.C. 773 *et seq.* and 16 U.S.C. 1801 *et seq.*

Dated: December 30, 1993.

David S. Crestin,

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

[FR Doc. 94–204 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–22–M

Proposed Rules

Federal Register
Vol. 59, No. 4
Thursday, January 6, 1994

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 33

[Docket No. 93–ANE–66; Notice No. 33–ANE–05]

Special Conditions; Pratt & Whitney Model(s) PW4073 and PW4084 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This notice proposes special conditions for the Pratt & Whitney (PW) Model(s) PW4073 and PW4048 turbofan engines. The applicable regulations do not contain adequate or appropriate safety standards for the protection of these systems from medium and large bird ingestion. This notice proposes the additional safety standards which the Administrator considers necessary to establish a level of safety equivalent to that established by the airworthiness standards for aircraft engines of the Federal Aviation Regulations (FAR).

DATES: Comments must be submitted on or before February 22, 1994.

ADDRESSES: Comments on this proposal may be submitted in triplicate to: Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attn: Rules Docket No. 93–ANE–66, 12 New England Executive Park, Burlington, Massachusetts 01803–5299. Comments must be marked: Docket No. 93–ANE–66. Comments may be inspected at this location between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John Golinski, Engine and Propeller Standards Staff, ANE–110, Engine and Propeller Directorate, Aircraft Certificate Service, FAA, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803–5229; telephone (617) 238–7119; fax (617) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed special conditions by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under "ADDRESSES." All communications received on or before the closing date for comments, specified under "DATES," will be considered by the Administrator before taking action on the proposal. The proposal contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 93–ANE–66." The postcard will be date stamped and returned to the commenter.

Background

On December 10, 1990, Pratt & Whitney applied for type certification of PW Model(s) PW4073 and PW4084 turbofan engines. The FAA has determined that the current foreign object ingestion requirements of § 33.77(a) for four pound birds; and § 33.77(b) for one and one-half pound flocking birds, do not adequately represent the bird threat encountered in service. A study of in-service bird ingestion events has indicated a need to modify the bird ingestion requirements of this section to ensure design integrity and demonstrate an adequate level of safety.

The FAA has concluded that additional safety standards must be applied to Pratt & Whitney Model(s) PW4073 and PW4048 turbofan engines to demonstrate that they are capable of acceptable operation after medium and large bird ingestion. The applicable airworthiness requirements do not contain adequate or appropriate safety standards for type certification with respect to the new design criteria. This new design criteria assumes the actual bird threat encountered in service.

Type of Certification Basis

Under the provisions of § 21.101 of the FAR, Pratt & Whitney must show that the PW Model(s) PW4073 and PW4084 turbofan engines meet the requirements of the applicable regulations in effect on the date of the application. Those Federal Aviation Regulations are § 21.21 and part 33, effective February 1, 1965, as amended through August 10, 1990, Amendment 33–14.

The Administrator finds that the applicable airworthiness regulations in part 33, as amended, do not contain adequate or appropriate safety standards for the PW Model(s) PW4073 and PW4084 turbofan engines because of its unique design criteria. Therefore, the Administrator proposes these special conditions under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice and opportunity for comment, as required by §§ 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.101(b)(2).

Conclusion

This action affects only PW Model(s) PW4073 and PW4048 turbofan engines. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these new design criteria on the engine.

List of Subjects in 14 CFR Part 33

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for these special conditions continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421, 1423; 49 U.S.C. 106(g); 14 CFR 21.16, and 14 CFR 11.28.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Pratt & Whitney Model(s) PW4073 and PW4084 turbofan engines.

In lieu of the requirements of FAR § 33.77(a) and (b), the following tests and analyses must be conducted, unless compliance can be shown by alternate methods acceptable to the Administrator:

(a) It must be shown that the ingestion of a single large bird, under the conditions prescribed in Appendix A, will not cause the engine to:

(1) catch fire;

(2) release hazardous fragments through the engine casing;

(3) generate loads greater than those ultimate loads specified under § 33.23(a);

(4) lose the ability to be shut down; or

(5) generate other conditions hazardous to the aircraft.

(b) Alternatively, if compliance with the bird ingestion requirements of paragraph (a) of this special condition is not established, the applicant must demonstrate that compliance with the containment requirements of § 33.94(a) constitutes a more severe demonstration than the requirements of paragraph (a) of this special condition. The engine type certification documentation will then be endorsed to reflect this alternative compliance method.

(c) It must be shown that the ingestion of medium birds, under the conditions prescribed in Appendix B, will not cause the engine to:

(1) Sustain more than a 25 percent thrust loss;

(2) Be shut down during the required run-on demonstration prescribed in Appendix B;

(3) Exceed any engine operating limitations to the extent that the engine cannot comply with this section; or

(4) Generate other conditions hazardous to the aircraft.

(d) It must be shown that engine spinner impact by one large bird and by the single largest medium bird, under the respective conditions prescribed in Appendices A and B, will not affect the engine to the extent that it cannot comply with the requirements of paragraphs (a) and (b of this special condition.

Appendix A—Large Bird Ingestion Test Procedures

(a) The test shall be conducted with the engine stabilized at rated takeoff thrust for the test day ambient conditions prior to the ingestion.

(b) The test shall be conducted using one eight-pound bird targeted at the the most critical location and ingested at a bird speed of 200 knots.

(c) Power lever movement is not permitted within 15 seconds following the ingestion event.

Appendix B—Medium Bird Ingestion Test Procedures

(a) The ingestion test shall be conducted with the engine stabilized at rated takeoff thrust for the test day ambient conditions prior to the ingestion.

(b) The test shall be conducted to simulate a flock encounter, with all birds ingested within approximately one second, and using the more severe of the following bird weight/quantity combinations:

(1) Six 1.5-pound and one 2.5-pound birds.

(2) Four 2.5-pound birds.

(c) Bird targeting shall be one 2.5-pound bird at the core primary flow path, and the remaining birds targeted at critical fan rotor locations.

(d) Bird ingestion velocity shall be the most critical velocity between V1 minimum through 250 knots.

(e) Power lever movements between stages must occur in 10 seconds or less. The following test schedule will be used as the post-ingestion run-on demonstration:

(1) Two minutes with no power lever movement.

(2) Three minutes at 75 percent of takeoff thrust.

(3) Six minutes at 75 percent of maximum continuous thrust.

(4) Six minutes at 50 percent of maximum continuous thrust.

(5) One minute at approach idle.

(6) Two minutes at 75 percent of takeoff thrust.

(7) Retard throttle to idle.

(8) Shut down the engine.

(f) An analysis or component/engine test(s) acceptable to the Administrator shall be conducted to determine the critical ingestion parameters for medium bird ingestion that relates to airspeeds from V1 minimum through 250 knots. The analysis or test(s) must also show satisfactory engine operation for medium bird ingestion at the most severe ambient operating condition approved for the engine that may be experienced in service.

Issued in Burlington, Massachusetts, on December 21, 1993.

Jay J. Pardee,

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

[FR Doc. 94-136 Filed 1-5-94; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 33

[Docket No. 93-ANE-67; Notice No. 33-ANE-06]

Special Conditions; Rolls-Royce Model(s) RB211-Trent-875-17/-877-17/-884-17 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This notice proposes special conditions for the Rolls-Royce Aircraft Engines Model(s) RB211-Trent-875-17/-877-17/-884-17 Turbofan Engines. The applicable regulations do not contain adequate or appropriate safety standards for the protection of these systems from water and hail ingestion. This notice proposes the additional safety standards which the Administrator considers necessary to establish a level of safety equivalent to that established by the airworthiness standards of part 33 of the Federal Aviation Regulations (FAR).

DATES: Comments must be submitted on or before February 22, 1994.

ADDRESSES: Comments on this proposal may be submitted in triplicate to: Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attn: Rules Docket No. 93-ANE-67, 12 New England Executive Park, Burlington, Massachusetts 01803-5299. Comments must be marked: Docket No. 93-ANE-67. Comments may be inspected at this location between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Thomas Boudreau, Engine and Propeller Standards Staff, ANE-110, Engine and Propeller Directorate, Aircraft Certification Service, FAA, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803-5229; telephone (617) 238-7117; fax (617) 238-7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed special conditions by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under **ADDRESSES.** All communications received on or before the closing date for comments, specified under **DATES,** will be considered by the Administrator before taking action on the proposal. The proposal contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed special conditions. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after

the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this proposal will be filed in the docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 93–ANE–67." The postcard will be date stamped and returned to the commenter.

Background

On August 4, 1992, Rolls-Royce applied for type certification of Model(s) RB211–Trent–870–17/–877–17/–884–17 turbofan engines. The application for type certification of the Model RB211–Trent–870–17 turbofan engine was withdrawn and a new application for type certification of the Model RB211–Trent–875–17 was made on April 6, 1993. The FAA has determined that the current water and hail ingestion requirements of § 33.77(c) of the FAR do not represent the inclement weather threat encountered in service.

A study of in-service inclement weather events has indicated a need to modify the water and hail ingestion requirements of this section to ensure design integrity and demonstrate an adequate level of safety. This study indicated that a potential flight safety threat existed for engines when operating in severe weather environments. Although current requirements provide adequate validation of the engine's resistance to mechanical damage due to hail impact and case contractions from water ingestion, the study showed that the current standards did not adequately address engine power loss anomalies, such as rollback and flameout at lower than take off rated power settings.

The FAA has concluded that additional safety standards must be applied to Rolls-Royce Model(s) RB211–Trent–875–17/–877–17/–884–17 turbofan engines to demonstrate that they are capable of acceptable operation in severe weather environments.

Type Certification Basis

Under the provisions of § 21.101 of the FAR, Rolls-Royce must show that Model(s) RB211–Trent–875–17/–877–17/–884–17 turbofan engines meet the requirements of the applicable regulations in effect on the date of the application. Those Federal Aviation Regulations are § 21.21 and Part 33, effective February 1, 1965, as amended through August 10, 1990, Amendment 33–14.

The Administrator finds that the applicable airworthiness regulations in part 33, as amended, do not contain adequate or appropriate safety standards for Rolls-Royce Model(s) RB211–Trent–875–17/–877–17/–884–17 turbofan engines because of unique design criteria. Therefore, the Administrator proposes these special conditions under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice and opportunity for comment, as required by § § 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.101(b)(2).

Conclusion

This action affects only Rolls-Royce Model(s) RB211–Trent–875–17/–877–17/–884–17 turbofan engines. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these new design criteria on the engine.

List of Subjects in 14 CFR Part 33

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for these special conditions continues to read as follows:

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

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Rolls-Royce Model(s) RB211–Trent–875–17/–877–17/–884–17 turbofan engines.

In addition to the requirements of FAR § 33.77, the following tests and analyses must be conducted, unless compliance can be shown by alternate methods acceptable to the Administrator.

(a) The most critical operating point(s) for water and hail ingestion must be determined by test, analysis, or other acceptable methods, and must be based on the threat levels defined in Table 1 and Table 2 of this proposal. The critical point(s) determination must address the entire operating envelope of the engine. The critical operating point(s) is defined as those operating conditions within the engine flight envelope at which an engine operability margin is reduced to a minimum level.

TABLE 1.—RAIN THREAT

Altitude (feet)	Liqud water content (LWC) (grams water per cubic water air)
0	20.0
20,000	20.0
26,300	15.2
32,700	10.8
39,300	7.7
46,000	5.2

Note: LWC and HWC values at other altitudes may be determined by linear interpolation.

TABLE 2.—HAIL THREAT

Altitude (feet)	Hail Water Content (HWC) (grams water per cubic meter air)
0	8.9
7,300	8.9
8,500	9.4
10,000	9.8
11,000	9.9
12,000	10.0
15,000	10.0
16,000	8.9
17,700	7.8
19,300	6.6
21,500	5.6
24,300	4.4
29,000	3.3
46,000	3.3

Note: LWC and HWC values at other altitudes may be determined by linear interpolation.

(b) The engine will be shown to operate at an acceptable level for a minimum of three minutes when subjected to the critical point conditions for water ingestion. The percentage of water to airflow by weight, at the critical point, is to be reproduced during the engine test. The test method should adequately model the inflight water concentration effect at the primary flow (core) inlet. Water droplet size and velocity distributions must be representative of the critical water ingestion point. All variable systems, whose position could effect engine operation during water ingestion, must be scheduled for the most critical positions.

(c) The engine will be shown to operate at an acceptable level for a minimum of 30 seconds when subjected to the critical point conditions for hail ingestion. The percentage of hail to airflow by weight, at the critical point,

is to be reproduced during the engine test. The test should adequately model the inflight hail concentration effect at the primary flow (core) inlet. Hailstone size and velocity distributions must be representative of the critical hail ingestion point. All variable systems whose position could effect engine operation during hail ingestion, must be scheduled for the most critical positions.

(d) Acceptable engine operation, as noted in paragraphs (b) and (c) of this special condition, must preclude rundown, flameout, surge, loss of acceleration capability, limit exceedance, or any other engine anomaly which would negatively affect the operability of the engine.

(e) The engine, as operated under the conditions defined in paragraphs (b) and (c) of this special condition, must show that it will operate acceptably if exposed to other probable factors associated with normal operations. These other probable factors include, but are not limited to, performance losses, installation effects, inlet distortion, and throttle transients.

Issued in Burlington, Massachusetts, on December 29, 1993.

Jay J. Pardee,

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

[FR Doc. 94-249 Filed 1-5-94; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 93-AGL-26]

Proposed Establishment of Class E Airspace; Oconto, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish Class E airspace (Class E airspace areas extending upward from 700 feet or more above the surface of the earth) at Oconto Municipal Airport, Oconto, WI, to accommodate Nondirectional Beacon (NDB) Runway 29 Standard Instrument Approach Procedure (SIAP). Controlled airspace extending upward from 700 to 1200 feet above ground level (AGL) is needed to contain aircraft executing the approach. The intended effect of this proposal is to provide segregation of aircraft using instrument approach procedures in instrument conditions from other aircraft operating in visual weather conditions.

DATES: Comments must be received on or before February 8, 1994.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, AGL-7, Rules Docket No. 93-AGL-26, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Assistant Chief Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois. An informal docket may also be examined during normal business hours at the Air Traffic Division, System Management Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Robert Frink, Air Traffic Division, System Management Branch, AGL-530, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (708) 294-7568.

SUPPLEMENTARY INFORMATION

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed below. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 93-AGL-26." The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of the Assistant Chief Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of the Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-220, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3485. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Counsel No. 11-2A, which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace to Oconto Municipal Airport, Oconto, WI, to accommodate NDB Runway 29 SIAP. Controlled airspace extending from 700 to 1200 feet AGL is needed to contain aircraft executing the approach. The intended effect of this action is to provide segregation of aircraft using instrument approach procedures in instrument conditions from other aircraft operating in visual weather conditions. Aeronautical maps and charts would reflect the defined area which would enable pilots to circumnavigate the area in order to comply with applicable visual flight rules requirements.

The coordinates for this airspace docket are based on North American Datum 83. Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9A dated June 17, 1993, and effective September 16, 1993, which is incorporated by reference in 14 CFR 71.1 (58 FR 36298; July 6, 1993). The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule,

when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9A, Airspace Designations and Reporting Points, dated June 17, 1993, and effective September 16, 1993, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL WI E5 Oconto, WI [New]

Oconto Municipal Airport, WI
(lat. 44°52′24.897″N, long. 87°54′32.589″W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Oconto Municipal Airport and within 2.475 miles each side of the 118-degree bearing from the NDB extending from the 6.3-mile radius to 7 miles southeast of the airport.

* * * * *

Issued in Des Plaines, Illinois, on December 20, 1993.

John P. Cuprisin,

Manager, Air Traffic Division.

[FR Doc. 94–245 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–13–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[TX–22–1–5738; FRL–4821–9]

Approval and Promulgation of Implementation Plan Texas State II Program

AGENCY: United States Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking.

SUMMARY: The EPA is taking action to approve the Texas Natural Resource Conservation Commission State II State Implementation Plan (SIP), which includes a SIP Supplement dated September 30, 1992, and Regulation V (31 TAC Section 115 Subchapter C: Volatile Organic Compound Marketing Operations), as a revision to the Texas SIP for ozone. On November 13, 1992, Texas submitted a SIP revision request to the EPA to satisfy the Clean Air Act, as amended (1990). This SIP revision requires owners and operators of gasoline dispensing facilities to install and operate Stage II vapor recovery equipment in the four Texas ozone nonattainment areas classified as moderate or worse. This revision applies to the Texas counties of Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller.

DATES: Comments must be received by February 7, 1994.

ADDRESSES: Comments should be sent to James F. Davis at U.S. EPA Region 6, (6T–AP), 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The State submittal and the technical support document (TSD) are available for public review at the above address and at the Texas Natural Resource Conservation Commission, Stage II Program, 12124 Park 35 Circle, Austin, Texas 78753. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

FOR FURTHER INFORMATION CONTACT: James F. Davis at (214) 655–7584.

SUPPLEMENTARY INFORMATION:

Under section 182(b)(3) of the Clean Air Act (CAA), the EPA was required to issue guidance as to the effectiveness of Stage II systems. The EPA issued technical guidance in November 1991, and enforcement guidance in December 1991, to meet this requirement.[1] In addition, on April 16, 1992, the EPA published the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (General Preamble) (57 FR 13498). The guidance documents and the General Preamble interpret the Stage II statutory requirement and indicate what the EPA believes a State submittal needs to include to meet that requirement.

The EPA has designated four areas as ozone nonattainment in the State of Texas. The Houston/Galveston/Brazoria ozone nonattainment area is classified as severe and contains the following eight counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. The Beaumont/Port Arthur ozone nonattainment area is classified as serious and contains the following three counties: Hardin, Jefferson, and Orange. The El Paso ozone nonattainment area is classified as serious and contains the county of El Paso. The Dallas/Fort Worth ozone nonattainment area is classified as moderate and contains the following four counties: Collin, Dallas, Denton, and Tarrant. The designations for ozone were published in the **Federal Register** (FR) on November 6, 1991, and November 30, 1992, and have been codified in the Code of Federal Regulations (CFR). See 56 FR 56694 (November 6, 1991) and 57 FR 56762 (November 30, 1992), codified at 40 CFR sections 81.300–81.437. Under section 182(b)(3) of the amended CAA, Texas was required to submit Stage II vapor recovery rules for these areas by November 15, 1992. On November 13, 1992, Governor Ann W. Richards submitted to the EPA Stage II vapor recovery rules and a SIP Supplement dated September 30, 1992, which were adopted by the State on October 16, 1992. By today's action, the EPA is proposing to approve this submittal. The EPA has reviewed the State submittal against the statutory requirements and for consistency with the EPA guidance. A summary of the EPA's analysis is provided below. In addition, a more detailed analysis of the State submittal is contained in a TSD, dated June 25, 1993, which is available from the Region 6 Office, listed above.

I. Applicability

Under section 182(b)(3) of the CAA, States were required by November 15, 1992, to adopt regulations requiring owners or operators of gasoline dispensing systems to install and operate vapor recovery equipment at their facilities. The amended CAA specifies that these State rules must apply to any facility that dispenses more than 10,000 gallons of gasoline per month or, in the case of an independent small business marketer, any facility that dispenses more than 50,000 gallons of gasoline per month. Section 324 of the CAA defines an independent small business marketer. The State has adopted a general applicability requirement of 10,000 gallons per

[1] These two documents are entitled "Technical Guidance—Stage II Vapor Recovery Systems for Control of Vehicle Refueling Emissions at Gasoline Dispensing Facilities" (EPA–450/3–91–022) and "Enforcement Guidance for Stage II Vehicle Refueling Control Programs."

month and has not included a lower applicability for independent small business marketers. However, independent small business marketer which dispense less than 50,000 gallons have a provision for an extended compliance deadline.

As more fully discussed in the EPA's Enforcement Guidance and the General Preamble (57 FR at 13514), the State has provided that the gallons of gasoline dispensed per month will be based on the gasoline throughput for each calendar month beginning January 1, 1991. The State is interpreting this requirement to mean that if a facility exceeds the throughput limits for any one month, the facility will be required to install Stage II. While the State is not calculating the average volume of gasoline dispensed per month for the two year period preceding the adoption date, the EPA believes that the State's method will require more gasoline dispensing facilities to comply with Stage II requirements. In addition, the State has specified that the State II requirements apply to all gasoline dispensing facilities, including retail outlets and fleet fueling facilities, with throughput rates as defined above. However, the State has exempted gasoline dispensing equipment used exclusively for the fueling of aircraft, marine vessels, or implements of agriculture. The EPA has determined that these limited exemptions are acceptable in the Texas Stage II program for the following reasons. Historically, the Stage II program was intended to reduce refueling emissions for "on-road" motor vehicles. These limited exemptions would not be considered to be on-road motor vehicles. Also, refueling systems of gasoline powered vehicles such as aircraft, marine vessels, and implements of agriculture are normally designed with nonstandardized equipment for which Stage II systems designed for on-road vehicle refueling facilities may not be compatible. The acceptability of these limited exemptions does not preclude the State from requiring refueling vapor recovery systems at such facilities at a later date.

Section 324 establishes a statutory definition of an independent small business marketer, which is fully set forth in the TSD. The State has adopted the statutory definition of independent small business marketer in its regulations.

The EPA finds the applicability requirements in the Texas Stage II rule to be acceptable.

II. Implementation of Stage II

The CAA specifies the time by which certain facilities must comply with the State regulation. For facilities that are not owned or operated by an independent small business marketer, these times, calculated from the time of State adoption of the regulation, are: (1) Six months for facilities for which construction began after November 15, 1990, (2) one year for facilities that dispense greater than 100,000 gallons of gasoline per month, and (3) two years for all other facilities. The Texas Stage II rule time schedule sets compliance dates of May 15, 1993, November 15, 1993, and November 15, 1994, respectively for the above three deadlines. Although Texas adopted its Stage II regulations on October 16, 1992, the EPA believes it is appropriate to accept the adoption date to be November 15, 1992.

The EPA is proposing to approve the submitted time table for the following reasons. First, the CAA states that the adoption date must be used to calculate the compliance schedule for Stage II implementation at facilities. In this case, the EPA defines the adoption date to be the date when the regulation and the rest of the SIP was required to be submitted to the EPA on November 15, 1992. The compliance deadlines triggered by this date begin within the time schedule specified by the CAA. Secondly, remedying this deficiency by amending the compliance schedule would cause further delay in the implementation of Stage II in Texas. Lastly, the Texas rule otherwise fulfills the Stage II requirements and the EPA believes it will provide substantial air quality benefits to the regulated areas. Therefore, the EPA believes it is in the public interest to approve and make enforceable this requirement at the earliest time feasible.

In the Texas program, independent small business marketers of gasoline, for which the monthly gasoline throughput is less than 50,000 gallons per month, may petition, no later than November 15, 1993, the State's Executive Director for an extension of the compliance deadline to December 22, 1998, or until on or more of the facility's gasoline storage tanks are replaced and/or equipped with corrosive protection, which is required by the Texas Natural Resource Conservation Commission. This extension provision for independent small business marketers of gasoline, for which the monthly gasoline throughput is less than 50,000 gallons per month, is acceptable because the CAA does not require Stage II systems to be installed on such facilities.

III. Additional Program Requirements

Consistent with the EPA's guidance, the State requires that Stage II systems be tested and certified to meet a 95 percent emission reduction efficiency. The EPA has indicated three acceptable methods of demonstrating a 95 percent emission reduction efficiency: (1) A method tested and approved by the California Air Resources Board (CARB); (2) a testing program that is equivalent to the CARB program, that will be conducted by the Program Oversight Agency or by a third party recognized by the Program Oversight Agency, and submitted and approved by the EPA for incorporation into the SIP; or (3) a system approved by CARB. The State has chosen to use option three, a system approved by CARB. The State requires sources to verify proper installation and function of Stage II equipment through use of a liquid blockage test and a leak test prior to system operation and at least every five years or upon major modification of a facility (i.e., 75 percent or more equipment change).

With respect to recordkeeping, the State has adopted those items recommended in the EPA's guidance and specifies that sources subject to Stage II must make these documents available upon request: (1) A copy of the California Air Resources Board (CARB) Executive Order for the specific Stage II vapor recovery system installed at the facility, (2) results of verification tests, (3) equipment maintenance and compliance file logs indicating compliance with manufacturer's specifications and requirements, (4) training certification files, and (5) inspection and compliance records. In addition, the State has committed in their SIP supplement to maintain a general compliance file, including information such as facility name, address, phone number, owner/operator names, a State assigned reference number, date of initial compliance with the regulations, number of pumps and monthly gasoline throughput. The State has also established an inspection function consistent with that described in the EPA's guidance. The State commits to conducting inspections of facilities including a visual inspection of the Stage II equipment and of the required records and a functional test of the Stage II equipment. According to the Supplement, the State shall inspect each facility at least one time per year with follow-up inspections at noncomplying facilities. Finally, the State has established procedures for enforcing violations of the Stage II requirements,

and has committed to establish a penalty schedule in the SIP. A detailed draft penalty schedule has already been developed by the State. Administrative penalties may be assessed of up to $10,000 per day per violation and civil penalties of up to $25,000 per day per violation. The EPA finds the State's program for implementation and enforcement of the Stage II program to be consistent with the EPA guidelines.

Rulemaking Action

Since the EPA finds that the State has adopted a Stage II SIP in accordance with section 182(b)(3) of the CAA, as interpreted in EPA's guidance, the EPA is proposing to approve the submittal as meeting the requirements of section 182(b)(3).

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to a SIP shall be considered in light of specific technical, economical, and environmental factors and in relation to relevant statutory and regulatory requirements.

Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. section 600 et. seq., the EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. sections 603 and 604). Alternatively, the 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.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids the EPA to base its actions concerning SIPs on such grounds (*Union Electric Co.* v. *U.S.E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. section 7410(a)(2).

This action has been classified as a Table Two action by the Regional Administrator under the procedures published in the FR on January 19, 1989 (54 FR 2214–2225). On January 6, 1989, the Office of Management and Budget (OMB) waived Table Two and Table Three SIP revisions from the requirements of section three of Executive Order 12291 for a period of two years (54 FR 2222). The EPA has submitted a request for a permanent waiver for Table Two and Table Three SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on the EPA's request. This request is still applicable under Executive Order 12866.

List of Subjects

40 CFR Part 52

Air pollution control; Hydrocarbons; Environmental protection; Incorporation by reference; Intergovernmental relations; Ozone; Reporting and recordkeeping requirements; Volatile organic compounds.

40 CFR Part 81

Air, pollution, control.

Authority: 42 U.S.C. 7401–7671q.

Dated: November 24, 1993.

W.B. Hathaway,

Acting Regional Administrator.

[FR Doc. 94–186 Filed 1–5–94; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 261

[FRL–4822–9]

Availability of Report to Congress on Cement Kiln Dust; Request for Comments and Announcement of Public Hearing

AGENCY: Environmental Protection Agency.

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of the Agency's *Report to Congress on Cement Kiln Dust*, that is required by section 8002(o) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6982(o). The Report to Congress contains a detailed study of cement kiln dust (CKD), which is within the scope of the exemption from hazardous waste regulations provided by section 3001(b)(3)(A)(iii) of RCRA as codified at 40 CFR 261.4(b)(8); this exemption is often referred to as the Bevill Exemption. The report also presents the Agency's decision making rationale and a series of options being considered regarding regulatory options for cement kiln dust waste. Information submitted in public comments and at a public hearing will be used in conjunction with the Report to Congress to make a final determination on the regulatory status of these wastes.

DATES: EPA will accept public comments on the Report to Congress on Cement Kiln Dust until February 22, 1994. The Agency will hold a public hearing on the Report to Congress on February 15, 1994.

ADDRESSES: Requests to speak at the public hearing should be submitted in writing to the Public Hearing Officer—Cement Kiln Dust, Office of Solid Waste, Special Waste Branch, U.S. Environmental Protection Agency, 401 M Street (5302W), SW., Washington, DC 20460. The February 15, 1994 public hearing will be held at the Renaissance Hotel in Washington, DC, located at 999 9th Street, NW. The hearing will begin at 9 a.m. with registration beginning at 8:30 a.m. The hearing will end at 5 p.m. unless concluded earlier. Oral and written statements may be submitted at the public hearing. Persons who wish to make oral presentations must restrict them to 15 minutes, and are requested to provide written comments for inclusion in the record.

Copies of the full report are available for inspection and copying at the EPA Headquarters library, at the RCRA Docket in Washington, DC, and at all EPA Regional Office libraries. Copies of the full report can be purchased from the National Technical Information Service (call (703) 487–4660 or (800) 553–NTIS). Copies of the Executive Summary (Volume I) can be obtained by calling the RCRA/Superfund Hotline at (800) 424–9346 or (703) 412–9810.

Those wishing to submit public comments for the record must send an original and two copies of their comments to the following address: RCRA Docket Information Center (5305), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460. Please place the docket number F–93–RCKA–FFFFF on your comments.

The RCRA docket is located in room M2616 at EPA Headquarters in Washington, DC. The docket is open from 9 to 4 p.m., Monday through Friday, except Federal holidays. In order to view the docket, please call (202) 260–9327 to make an appointment. Copies are free up to 100 pages and thereafter cost $0.15/page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/Superfund Hotline at (800) 424–9346 or (703) 412–9810; for technical information contact Bill Schoenborn, U.S. Environmental Protection Agency (5302W), 401 M Street, SW., Washington, DC 20460, at (703) 308–8483.

SUPPLEMENTAL INFORMATION:

A. Background Information

RCRA section 3001(b)(3) (hereafter referred to as the Bevill Exemption) exempts, among other things, cement kiln dust waste from regulation under RCRA subtitle C, pending completion of a Report to Congress and a subsequent determination of whether such regulation is warranted. In RCRA section 8002(o), Congress directed EPA to conduct a detailed and comprehensive study based on eight study factors (discussed below) and submit a Report to Congress on "the adverse effects on human health and the environment, if any, of the disposal and utilization of cement kiln dust waste". RCRA section 3001(b)(3)(C) then requires that EPA determine, within six months of the date of submission of the Report to Congress, either to promulgate regulations for CKD under subtitle C or determine that subtitle C regulation is unwarranted.

The Bevill Exemption was added to RCRA on October 12, 1980, as part of the 1980 Solid Waste Disposal Act Amendment. In response to the 1980 RCRA amendments, EPA published an interim final amendment to its hazardous waste regulations to reflect the provisions of the Bevill Exemption (40 CFR 261.4(b)(8)). Since that time, cement kiln dust has remained exempt from subtitle C of RCRA, meaning that this material has never been subject to hazardous waste regulations under Federal law.

On March 8, 1989, the Environmental Defense Fund (EDF) filed suit against EPA for failing to complete the RTC as required by RCRA. On June 19, 1991, EPA entered into a proposed consent decree with EDF. In the proposed consent decree, EPA agreed to complete the Report to Congress on Cement Kiln Dust by April 30, 1993. The proposed consent decree was later modified to extend the deadline for issuance of the Report to Congress to December 31, 1993.

B. Report to Congress

EPA has completed its study of CKD waste and prepared the Report to Congress on Cement Kiln Dust. In keeping with the statutory requirements, the report addresses the following factors (hereafter "study factors") required under section 8002(o) of RCRA:

(1) The source and volumes of such materials generated per year;

(2) Present disposal practices;

(3) Potential danger, if any, to human health and the environment from the disposal of such materials;

(4) Documented cases in which danger to human health or the environment has been proved;

(5) Alternatives to current disposal methods;

(6) The costs of such alternatives;

(7) The impact of those alternatives on the use of natural resources; and

(8) The current and potential utilization of such materials.

In addition, section 8002(o) directs the Agency review other Federal and state studies and actions (e.g., regulations) to avoid duplication of effort.

The Agency's approach in preparing the Report to Congress was to combine certain study factors for purposes of analysis and to evaluate these study factors in a step-wise fashion. This evaluation process, hereafter referred to as EPA's decision rationale, is a three-step methodology that was used in making the regulatory determinations for Mineral Processing Special Wastes (56 FR 27305, June 13, 1991) and the four large-volume Wastes from the Combustion of Coal by Electric Utilities (58 FR 42466, August 9, 1993). The decision rationale contributed to the development of the proposed options for managing CKD waste. EPA is soliciting comment on how the decision rationale can be used in the Agency's decision-making process.

The resulting review and discussion of EPA's analysis is organized into ten chapters in Volume II of the Report to Congress: Methods and Findings. (Volume I is an Executive Summary.) The first chapter of Volume II briefly summarizes the purpose and scope of the report, general methods and information sources used, and EPA's decision making methodology. The second chapter provides a brief overview of the cement industry, including a description of CKD waste, the industry structure and characteristics, the cement manufacturing process, the types of production processes used, and significant process inputs (RCRA Study Factor 1). The third chapter discusses the generation and chemical and physical characteristics of CKD (Study Factors 1 and 3). The fourth chapter outlines the range of CKD management methods employed at domestic cement plants (Study Factor 2). The fifth chapter identifies and summarizes cases of potential and documented damages to human health and the environment (Study Factor 4). The sixth chapter includes a discussion of EPA's risk assessment in which the Agency examined inherent hazards posed by CKD, evaluated site-specific risk factors, and performed quantitative transport, fate and exposure modeling (Study Factor 3). The seventh chapter summarizes applicable federal and state regulatory controls. The eighth chapter investigates alternative waste management practices and potential utilization of the wastes (Study Factors 5, 6, and 7). The ninth chapter discusses costs and impacts under each of several regulatory and operational scenarios (Study Factor 8). The tenth and final chapter of Volume II of the Report to Congress summarizes and analyzes the findings of EPA's evaluation of the above study factors and presents a series of options the Agency is considering, based on these findings, concerning the management of cement kiln dust.

C. Decision Rationale

After studying cement kiln dust, the Agency used the decision rationale to evaluate the findings of the study factors, and to formulate a series of options being considered regarding the level of control needed for CKD. In Step 1 of the decision rationale, the Agency first determined whether the management of CKD poses human health/environmental problems and the potential for current practices to cause problems in the future. In Step 2, the Agency looked at waste management practices and existing regulations to examine the potential for releases and exposure under current practices. In Step 3, the Agency evaluated the costs and impacts associated with regulating this waste under Subtitle C and, possibly, other regulatory scenarios.

The rationale for the order of questions is that cement kiln dust should first be considered to present risk to human health or the environment or a potential risk under plausible mismanagement scenarios before the Agency considers it for regulation under RCRA subtitle C. Second, before it considers regulating the waste under subtitle C, the Agency should determine that current management practices and existing state and Federal regulatory controls are inadequate to limit the risks posed by a waste. Then it should consider whether subtitle C regulation would be effective and appropriate. Finally, the special statutory status of the waste requires that the Agency consider the impacts to the industry that regulation under subtitle C would create in making a decision to regulate the waste as hazardous. Therefore, the decision rationale allows EPA to systematically narrow its focus as to whether the waste may present significant risk of harm and whether additional regulatory controls are necessary and desirable.

The tentative answers to the questions posed in its three-step decision rationale are discussed below:

Step 1: Does management of CKD pose human health and environmental problems? Might current practices cause problems in the future?

After reviewing evidence of damage to human health and the environment, performing a risk assessment, and reviewing the results of laboratory analyses of waste samples, EPA has concluded that risks associated with CKD management are generally low, however, there is a potential under certain circumstances for CKD to pose a danger to human health and environment, and may do so in the future.

Data collected from state files and EPA site visits identify common CKD waste management practices, including management in exposed, unlined piles, abandoned quarries, and landfills, that have caused, and may continue to cause, contamination of air and nearby surface water and ground water. Management practices such as disposal in a water-filled quarry and management in piles adjacent to grazing and agricultural fields or surface water bodies also pose a potential danger to human health and the environment. In addition, risk modeling results supports the conclusion that CKD can potentially pose risks to human health and the environment under certain hypothetical, yet plausible scenarios.

Step 2: Is more stringent regulation necessary or desirable?

EPA has reached no conclusions with respect to the need for more stringent regulation. EPA's preliminary analysis of the effectiveness of State and Federal regulations and controls suggests that additional controls should be evaluated; for example, controls for CKD management scenarios which potentially present high risks, if those scenarios exist. While CKD is regulated under State and local laws, the specific requirements for CKD vary from state to state. In many instances, minimal controls are applied to these wastes. Also, recycling technologies could be used as a means to improve waste management practices.

Step 3: What would be the operational and economic consequences of a decision to regulate CKD under subtitle C?

Operational costs of CKD regulation are largely dependent on the management alternative selected. If CKD is managed as a hazardous waste under RCRA subtitle C, facilities that manage their CKD through on-site land disposal are estimated to incur significant compliance costs. However, the financial burden of compliance, even for waste dust generated in kilns that burn RCRA hazardous waste, may be reduced, if facilities are able to adopt pollution prevention technologies which recycle CKD.

The possible economic outcomes of a decision to regulate CKD under RCRA subtitle C cover a broad spectrum. An economic analysis of innovative pollution prevention technologies (including alkali leaching, flue gas desulfurization, and fluid-bed dust recovery), suggests that the potentially high compliance costs of CKD land disposal may drive the industry toward more recycling of their CKD. However, at this early stage of their development, it is uncertain that these recycling technologies can be widely adopted by the industry. Moreover, even if CKD is recycled, some facilities may incur substantial disposal costs.

D. Regulatory Options

This section presents a series of options the Agency is considering concerning the management of cement kiln dust waste based on the findings of this Report. In accordance with RCRA section 3001(b)(3)(C), EPA will make a regulatory determination for cement kiln dust waste after submitting this Report to Congress, and after holding a public hearing, and accepting and reviewing public comments.

As stated previously, cement kiln dust waste generally presents a low inherent toxicity, is only rarely characteristically hazardous, and, in most cases based on risk modeling, does not present a risk to human health and the environment. However, cement kiln dust waste may pose a potential threat to human health and the environment considering plausible worst case conditions under certain hypothetical management scenarios (see Chapters 5 and 6). Major factors increasing the potential for human health and environmental damages include proximity to potential exposure points such as agricultural fields and surface water bodies, as well as the concentrations of key constituents of concern.

Based on the findings, and an initial evaluation of regulatory options, the Agency has not decided whether to retain or remove the CKD exemption. The Agency considered a number of options which represent a wide range of scenarios that would subject CKD to different management requirements and enforcement oversight. From these, the Agency has chosen to highlight five, including three in which CKD would be managed under subtitle C, with the intent to focus public comment from environmental groups, industry, and other interested parties regarding the most appropriate approach to manage CKD.

EPA notes that regulations for the management of CKD waste under subtitle C may not be warranted or appropriate if other Agency-administered programs are better suited to address the concerns identified in this Report. Among the statutes that may have authority to address the indirect foodchain risks associated with CKD are the Clean Water Act (stormwater management regulations), the Clean Air Act (the program defining the National Emissions Standards for Hazardous Air Pollutants), and the Toxic Substances Control Act (which gives the Agency authority to issue appropriate regulations to address the risks from hazardous chemical substances or mixtures). These alternative authorities are being explored and a decision to pursue regulation of CKD under one or more of these statutes may form the basis for a decision that subtitle C regulation of CKD may be limited or even unwarranted.

Whether or not the Agency lifts the exemption, dust suppression and storm water management at facilities that burn hazardous waste, as well as on-site CKD management practices at all other facilities would be subject to current and potential future regulation under the Federal Clean Air and Clean Water Acts, and where such provisions exist, all applicable state laws and regulations. Damages at existing CKD disposal sites also could be addressed by RCRA section 7003 and CERCLA section 104 and 106, if the site posed an imminent and substantial danger to human health and the environment.

Option 1: Retain the CKD Exemption.

Since CKD exhibits low inherent toxicity and poses minimal risk when evaluating the various exposure pathways using average or best case conditions, it may be appropriate to retain the exemption for cement kiln dust waste, that is, maintain the status quo. Under this option, CKD management would continue to be regulated by the States, if at all.

Option 2: Retain the CKD Exemption, but enter into discussions with the industry, in which they voluntarily implement dust recycling technologies, reduce waste, and monitor and control certain off-site uses.

Since certain management scenarios may present risks when assuming plausible worst case conditions and pollution prevention alternatives may be promising in certain instances, the Agency could enter into discussions with the cement manufacturing industry

to urge it to implement selected waste minimization/pollution prevention technologies or implement, more environmentally protective management practices, including controlling certain off-site uses.

For example, some of the potential higher risk situations that have been identified in the hypothetical scenarios relate to on-site CKD management and derive from CKD releases from waste piles or other points via wind-blown dust or storm water runoff or a combination of the two. These contaminant release situations may be controllable (and at some facilities are currently being controlled) at relatively low cost by careful location of the waste pile and active use of conventional dust suppression and storm water management practices. The Agency would hold discussions with the industry to encourage them to voluntarily agree to implement these practices.

An exception to the above conclusion would appear to be the 15 percent or so of cement plants where CKD waste is managed in areas of karst topography or other areas characterized by flow in fractured or cavernous bedrock, where leachate may directly percolate to groundwater with little or no attenuation. For some of these facilities, the groundwater pathway may become of increased concern, depending on other site specific considerations. Again, EPA would discuss with the industry opportunities to either use appropriate liners or relocate the CKD management unit.

About 20 percent of current net CKD generation is used off-site for a wide variety of purposes, most of which according to the Agency's risk assessment do not pose human health or other risks. However, the use of raw CKD containing higher measured levels of certain metals and/or dioxins as a direct substitute for lime on agricultural fields and gardens can concentrate toxic constituents in crops and animal products at levels of concern for human health. This use of CKD, though not widely practiced at present, is otherwise not currently controlled, and may warrant further consideration by the Agency.

The Agency, under this option, could also develop guidance for States regarding site management, off-site uses, and pollution prevention and waste minimization technologies. This guidance would assist States in reducing the potential risks posed by mismanagement of CKD and recommend implementation of technologies that would promote recycling of CKD.

Under this option, CKD management would not be controlled by the provisions of RCRA subtitle C. However, since the exemption for CKD remains in place, CKD generated in kilns that burn hazardous waste would still be subject to the two-part test for residuals under 40 CFR 266.112. If CKD does not pass the two-part test, it would be treated to standards for land disposal (40 CFR 268.43) and disposed in a subtitle C facility. Damages at existing CKD disposal sites would still be addressed by RCRA section 7003 and CERCLA sections 104 and 106, if the site posed an imminent and substantial danger to human health and the environment.

Option 3: Remove the CKD Exemption but delay implementation for some period of time (e.g., two years), that would allow industry time to employ pollution prevention options.

While CKD may not present risks when evaluating the various exposure pathways using average or best case conditions, CKD may pose a potential danger to human health and the environment if managed in certain ways under a limited set of exposure pathways assuming plausible worst case conditions. Also, damages to the environment resulting from poor CKD management practices have been recorded and are continuing to occur at some facilities. For these reasons, removing the Bevill exemption (codified at 40 CFR 261.4(b)(8)) may be appropriate. Accordingly, provisions of the Boiler and Industrial Furnace rule (40 CFR 266.112) would no longer apply to hazardous waste-derived CKD.

Under this option, on-site CKD management practices at those facilities with dust that exhibited any of the RCRA hazardous waste characteristics, or CKD derived from the burning of listed hazardous wastes (see 40 CFR 261.3(c)(2)(i)) would be affected by the provisions of RCRA subtitle C. CKD disposal piles which are inactive on or before the effective date of the Final Rule would be unaffected by the provisions of subtitle C, unless subsequently managed.

By delaying lifting the exemption for some period of time (e.g., two years after the Regulatory Determination), industry would be provided an opportunity to implement pollution prevention alternatives and thus, manage the hazardous waste management costs they would incur. During this interim period between submittal of the Report to Congress and the effective date of the Final Rule, the CKD exemption would still be in effect. The Agency believes that many of the affected facilities would utilize the time to adopt pollution prevention technologies which would reduce, if not eliminate the amount of hazardous CKD they generate or stop burning hazardous waste.

Once the exemption is removed, CKD generated from cement manufacturing facilities that burn RCRA hazardous wastes would be RCRA hazardous waste under the derived-from rule (40 CFR 261.3(c)(2)(i)). The goal of avoiding subtitle C compliance costs would provide an incentive for each facility to look for pollution prevention alternatives to recycle their CKD and reduce the amount of hazardous waste generated. The Agency is requesting additional information on the viability of the CKD recycling options discussed in the RTC and any other available pollution prevention or recycling option not considered in the Report.

Those facilities that do not burn hazardous waste would not generally be affected by removing the exemption unless they generated characteristic RCRA hazardous waste. The Agency expects the number of non-hazardous waste burning facilities affected by this option would be small, since CKD rarely exhibits a characteristic of hazardous waste. These facilities would have an incentive to control their cement manufacturing process to avoid generating characteristic CKD.

Option 4: Remove the CKD Exemption, and rely on existing hazardous waste rules to control cement kiln dust.

This option is similar to Option 3, except the exemption would be removed in accordance with RCRA section 3010(b). (Under subtitle C of RCRA, wastes brought under regulatory control have up to six months from the Regulatory Determination before they become subject to hazardous waste control.) Thus, CKD that is hazardous waste-derived or exhibits a RCRA hazardous characteristic would be made subject to the provisions of RCRA subtitle C. Otherwise, this option is the same as Option 3.

Option 5: Promulgate Regulatory Standards for the Management of CKD Waste.

As previously stated, the Agency's analysis of the risks associated with cement kiln dust suggest that by merely lifting the exemption at 40 CFR 264.1(b)(8), certain pathways of potential concern under the hypothetical scenarios may not be adequately addressed under Options 3 and 4, should EPA decide that subtitle C regulation is warranted for CKD in the first instance. Specifically, EPA's risk assessment indicates indirect foodchain risks are of potential concern from releases of CKD from disposal piles to

nearby surface waters and crop lands and from the direct application of CKD to croplands as a soil amendment assuming reasonable worst-case conditions. The Agency acknowledges, as discussed in detail in Chapter 6, that these modelled risks, while plausible, are of probably minimal incidence.

As described above, the likely regulatory result under Options 3 and 4 would be to make CKD generated by a kiln that burns listed hazardous wastes itself a hazardous waste under the derived-from rule (40 CFR 261.3(c)(2)(i)). The indirect foodchain risks potentially identified in this Report, however, are not associated only with CKD generated by hazardous waste burning kilns. As a result, EPA is also considering regulatory mechanisms that would specifically address these risks, including promulgating regulatory standards under subtitle C for the management of CKD waste that would provide adequate protection against these risks.

RCRA section 3001(b)(3)(C) provides that EPA shall within six months of the RTC "determine to promulgate regulations under this subchapter * * * or determine that such regulations are unwarranted." The statute does not describe the type of regulation that EPA should consider promulgating (if any), other than that such regulation be under subtitle C of RCRA. For example, RCRA does not expressly direct EPA to determine whether to list CKD as hazardous, as required for other wastes under the mandates in RCRA section 3001(c). Furthermore, RCRA section 2002(a) gives the Administrator the broad authority to "prescribe * * * such regulations as are necessary to carry out his functions under this chapter." The Agency believes it has the authority where appropriate to promulgate Federally-enforceable regulatory standards under subtitle C for the management of CKD. EPA could explore mechanisms for imposing regulatory standards for CKD, e.g., under grant of rulemaking authority under section 3001(b)(3)(C). Alternatively, EPA could consider conditioning the CKD exemption from the definition of hazardous waste (40 CFR 261.4(b)(8)) on compliance with appropriate management standards.

EPA could promulgate minimally burdensome management standards for cement kiln dust that would adequately control the indirect foodchain risks, such as: (1) Requiring that dust piles be kept covered to control fugitive emissions and institute surface water runoff and erosion controls; (2) maintaining groundwater protection, perhaps by requiring that CKD piles be maintained on a non-earthen base or by requiring a liner; and (3) establishing risk-based concentration thresholds for all constituents of concern (including 2,3,7,8–TCDD, arsenic, cadmium, and lead) for CKD used as a direct soil amendment. Additional or alternative standards may be appropriate, and EPA welcomes comments and suggestions on this aspect of its options.

Of the five options being considered by the Agency, Options 3, 4 and 5 would provide more control through implementation of the provisions of subtitle C. The principal difference between Options 3 and 4 is the timing of the implementation of the regulatory controls. Option 3 provides industry additional time to implement waste minimization/pollution prevention options and more protective CKD management standards. Option 4 would bring CKD under subtitle C regulatory control more quickly. Removing the exemption also would impose regulatory equity between CKD generated from kilns that burn RCRA hazardous waste and residues from other incinerators that burn RCRA hazardous waste that do not have such an exemption. Option 5 would provide management standards to control all CKD, and would be targeted to specifically address only those risks of potential concern.

The Agency did not evaluate the risk from the land application of agricultural lime, so it cannot determine whether there is an increase in incremental risk when CKD is substituted. In any event, CKD-sewage sludge derived fertilizers and soil amendments are considered safe for such uses as fertilizer and pose minimal risk because these final products are required to be tested to assure they comply with all provisions of 40 CFR part 503, which are fully protective of human health and the environment. It should be noted that if the exemption is removed, fertilizer that is derived from CKD generated from a kiln that burns listed hazardous waste is itself a hazardous waste under the derived-from rule (40 CFR 261.3(c)(2)(i)); the extent of regulation, however, is limited (see 40 CFR 266.20(b)).

In addition, it should also be noted that under current rules, if CKD is recycled, the resulting clinker is not automatically subject to the provisions of subtitle C. By removing the exemption, however, clinker may be affected by the derived-from rule (40 CFR 261.3(c)(2)(i)) if the kiln burns listed hazardous waste, thereby becoming a hazardous waste. The Agency has not yet fully analyzed available data on trace constituents in clinker. Based on our understanding of current data, however, the Agency does not believe that clinker produced from kilns that burn listed hazardous waste generally poses a hazard to human health and the environment. The Agency is, therefore, considering crafting appropriate regulatory language for clinker. The Agency, however, is interested in receiving comment on this issue.

E. Public Comment

The Agency encourages all interested parties to obtain a copy of the Report to Congress and provide comments or further information that might be necessary to the Agency on the data, analysis, and findings contained in the Report to Congress, and on the types of specific requirements that might be necessary under RCRA subtitle C or D for this waste. In addition to receiving input from the various stakeholders regarding the appropriateness of each of the five regulatory options presented for the management of CKD, the Agency is interested in receiving additional information and/or comment on the following:

- CKD sampling data (analytical results, including conditions of sampling, fuels burned at time of sampling, types of samples collected and analytical methods used).
- Documented cases of damage to human health and the environment traceable to CKD disposal, including notices of violation, administrative orders, and scientific studies.
- How the burning of RCRA hazardous wastes, non-hazardous wastes (such as tires and non-hazardous used oils), and fossil fuels affect the quantity and chemistry of generated CKD, as well as the partitioning of toxic metals, chlorides, and alkalis between stack gases, CKD, and clinker.
- The Agency's consideration of drafting appropriate regulatory language for clinker acknowledging that, based on the Agency's preliminary assessment, clinker produced from kilns that burn hazardous waste generally poses no hazard to human health or the environment.
- The extent to which activities such as farming (including the recreational gardening of vegetables) and fishing occur around these facilities.
- Any concerns related to the location of cement manufacturing facilities with respect to environmental justice matters (i.e., the fair treatment of people of all cultures, incomes, and educational levels with respect to protection from environmental hazards).
- The viability of implementing the CKD recycling options discussed in the

RTC and any other available pollution prevention or recycling option not considered in the Report.

• How pollution prevention technologies, including flue gas desulfurization, fluid-bed dust recovery, and alkali leaching affect the quantity and chemistry of air emissions, as well as the partitioning of toxic metals, chlorides, and alkalis between CKD and clinker.

• Additional or alternative management standards from those presented in the Report (e.g., covers for dust piles, runoff controls, groundwater protection, and the establishment of risk-based thresholds for all constituents of concern), that might be appropriate for control of indirect foodchain risks.

Public comments and other documents related to the Report to Congress will be available for inspection at the docket, together with information obtained at the public hearing.

Following publication of this report, the Agency will consider public comments received during a 45-day public comment period in accordance with RCRA section 3001(b)(3)(c). After evaluating and responding to public comments, the Agency will make a regulatory determination on the status of this waste.

Dated: December 30, 1993.

Carol Browner,

Administrator.

[FR Doc. 94–182 Filed 1–5–94; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 300

[FRL–4822–5]

National Oil and Hazardous Substances Pollution Contingency Plan (NCP)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Reopening of comment period on proposed rule; notice of public meeting.

SUMMARY: On October 22, 1993 (58 FR 54702), EPA published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) that would revise the National Contingency Plan (NCP) consistent with the Oil Pollution Act of 1990 (OPA). The public comment period for the NPRM ended December 20, 1993. EPA received several letters requesting a comment period extension. To accommodate these requests and obtain additional input concerning the NPRM, EPA will hold a public meeting at which interested parties may present their concerns for EPA's consideration in finalizing the NCP. EPA is today reopening the comment period until the day of that meeting.

DATES: EPA must receive all comments on or before January 14, 1994. The public meeting will be held on January 14, 1994, from 9 a.m. until 4 p.m.

ADDRESSES: Comments should be submitted in triplicate to Emergency Response Division, Attn: Superfund Docket Clerk, Docket Number NCP–R2/A, Superfund Docket, room M2427, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

The meeting will be held in EPA's Region 10 office, located at 1200 Sixth Avenue, Seattle, WA 98101.

FOR FURTHER INFORMATION CONTACT: Richard Morris, Emergency Response Division (5202G), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (703) 603–9053.

SUPPLEMENTARY INFORMATION:

Public Meeting

Meeting attendees should send a letter by telephone facsimile by Monday, January 10, 1994, stating attendees' names, addresses, affiliation, and telephone numbers, to Richard Norris, EPA Emergency Response Division, at (703) 603–9116. Those who do not have a facsimile machine may telephone (703) 603–9074 and leave a message containing the information requested above.

Attendees should submit in writing any additional comments they wish to add to the public record in the event that time does not allow for all comments to be presented orally. Additional written comments may also be submitted to the EPA docket, if commenters do not wish to attend the public meeting. Written comments should be submitted in triplicate either at the public meeting or to: Emergency Response Division, Attn: Superfund Docket Clerk, Docket Number NCP–R2/A, Superfund Docket, room M2427, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Summary of Proposed Rule

The proposed revisions (58 FR 54702) include the creation of Area Committees and Area Contingency Plans; a National Response Unit to assist in coordinating spill removal resources, personnel, and equipment; and U.S. Coast Guard District Response Groups to assist On-Scene Coordinators and maintain Coast Guard response equipment. In addition, the NPRM includes criteria and procedures for responding to discharges that result in substantial threats to public health or welfare; procedures and standards for preventing, mitigating, and removing worst case discharges; and a new provision addressing spills of national significance. EPA also proposed to revise subpart J of the NCP, which provides for a Product Schedule that lists dispersants, bioremediation agents, and other miscellaneous oil spill control substances. The subpart J revisions would reflect new dispersant effectiveness testing and acceptability criteria.

Dated: December 29, 1993.

Elliott P. Laws,

Assistant Administrator.

[FR Doc. 94–184 Filed 1–5–94; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 406

[BPD–738–P]

RIN: 0938–AG19

Medicare Program; Revisions to the Definition of End-Stage Renal Disease and Resumption of Entitlement

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: We propose to revise the definition of end-stage renal disease to reflect that more than one dialysis treatment is required for there to be a "regular course of dialysis" and to require that generally accepted diagnostic criteria and laboratory findings must form the basis of the physician's certification of end-stage renal disease. The purpose of this proposed revision is to eliminate any misinterpretation of the definition of end-stage renal disease. We propose to do so by clarifying that only those individuals whose kidneys have failed and for whom the disease is expected to be a lifelong affliction are eligible for Medicare end-stage renal disease benefits.

We also propose to amend the regulations to specify that Medicare entitlement is resumed for individuals who again begin a regular course of renal dialysis treatments after a previous course is terminated (with or without a transplant), and to add the same considerations for those who have a second transplant. Therefore, the purpose of these proposed revisions is to conform the regulations more closely to the intent of sections 226A (c)(2) and (c)(3) of the Social Security Act

regarding resumption of entitlement to Medicare.

DATES: Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on March 7, 1994.

ADDRESSES: Mail comments to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: BPD–738–P, P.O. Box 26676, Baltimore, MD 21207.

If you prefer, you may deliver your written comments to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC. 20201, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207.

Due to staffing and resource limitations, we cannot accept facsimile (FAX) copies of comments. In commenting, please refer to file code BPD–738–P. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

FOR FURTHER INFORMATION CONTACT: Denis Garrison, (410) 966–5643.

SUPPLEMENTARY INFORMATION:

I. Background

End-stage renal disease (ESRD) is a disease which occurs from the destruction of normal kidney tissues over a long period of time. The individual often does not experience any symptoms until the kidney has lost more than half of its function. The loss of kidney function in ESRD is usually irreversible and permanent.

A. Related Law and Regulations for Medicare Coverage of ESRD and the Definition of ESRD

Section 226A(a)(2) of the Social Security Act (the Act) provides for Medicare coverage for certain individuals who are medically determined to have end-stage renal disease. Once an individual is medically determined to have ESRD, section 226A(b) of the Act specifies that one of two conditions must be met before entitlement begins. That is, a regular course of dialysis must begin or a kidney transplant must be performed. Section 226A(b)(1)(A) of the Act provides that entitlement begins with the third month after the month in which a regular course of renal dialysis is initiated.

The statute does not give a definition of ESRD; however, the Medicare regulations in title 42 of the Code of Federal Regulations do define the term. The definition of ESRD is given in two sections of the regulations. For purposes of Medicare eligibility and entitlement, ESRD is currently defined in § 406.13(b) as that stage of kidney impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life. A parallel definition of ESRD also appears in § 405.2102 which defines ESRD as it relates to the conditions for coverage that must be met by suppliers furnishing ESRD care to Medicare beneficiaries.

B. Potential Misinterpretation of the Current ESRD Definition

In calendar year 1989, 21,200 individuals were certified by their physicians as having an irreversible, permanent kidney impairment and obtained Medicare entitlement solely because of this certification. That is, they could not qualify for Medicare on any other basis, such as age or disability status. In calendar year 1990, the number of similar new beneficiaries was 22,800. Soon after obtaining Medicare eligibility, nearly 1 percent of these individuals terminated their course of dialysis with a return of kidney function. We are concerned that the diagnosis and certification of ESRD for these individuals was incorrect. The regulations in §§ 405.2102 and 406.13(b) define ESRD as a condition that appears irreversible and permanent; Medicare entitlement on the basis of the patient's need for dialysis is usually terminated only if the individual dies or receives a kidney transplant.

Any severe kidney condition (particularly acute kidney failure) may appear to be irreversible and permanent if the diagnosis is based on only limited tests and criteria. We believe that certifications for the patients who terminated dialysis may have arisen from a misunderstanding of the extent of the kidney failure which constitutes ESRD for which the law grants Medicare entitlement. We believe that specifying that the diagnosis must be based on generally accepted diagnostic criteria and laboratory findings may result in not enrolling in Medicare those patients whose renal disease is not "end-stage". However, we do not wish to eliminate the word, "appears," from the regulation since the law recognizes that dialysis treatments may end in some ESRD cases.

C. Related Laws and Regulations for Termination of Medicare Entitlement and Resumption of Entitlement to ESRD Benefits

Section 226A(b)(2) of the Act specifies that Medicare entitlement for individuals on the basis of ESRD terminates with the end of the 36th month after the month of transplant or with the end of the 12th month after the last month of renal dialysis treatments. Section 226A(c)(2) and (c)(3) of the Act specifically provides for beginning a new period of entitlement when a kidney transplant fails or a course of renal dialysis begins again, whether during or after the 36 or 12 months, as applicable. Current regulations in § 406.13(f) address these situations by specifying that entitlement does not end as scheduled if the treatment begins again during the applicable periods. The regulations in § 406.13(g) deal with resumption of entitlement after termination of entitlement has occurred and require the submission of a new application.

In addition, the provisions in section 226A(c)(2) and (c)(3) of the Act ensure that resumption of entitlement to Medicare will begin without the 3-month waiting period that usually applies in cases when Medicare entitlement is sought on the basis of dialysis (except for certain cases involving self-care training).

II. Provisions of the Proposed Regulations

A. Proposed Revision to ESRD Definition

We analyzed the payment records of patients who terminated dialysis shortly after becoming eligible for Medicare based on a diagnosis of ESRD. Our records indicate an annual mean cost per patient of approximately $8,000, which is significantly below the average annual cost of $40,000 for a patient who remains on dialysis. Because these individuals were able to discontinue dialysis shortly after beginning a course of treatment and incurred only limited medical costs, we believe that many of these patients may have been incorrectly certified as having ESRD as a result of physicians misinterpreting the ESRD definition as it appears in § 406.13(b). We also find the current ESRD definition (§ 406.13(b)) inadequate for Medicare Part A (hospital insurance) eligibility and entitlement purposes because entitlement to Medicare based on ESRD depends on the existence of ESRD, not on the sole fact that dialysis treatments are being given. Therefore, in order to eliminate any possible misinterpretation, we

propose to revise the definition of ESRD in § 406.13(b). After the phrase "* * * a regular course of dialysis", we propose to add the word "treatments". This revision would clarify that more than one dialysis treatment is required for there to be a regular course of dialysis.

We also propose to add to the end of the definition of ESRD, the phrase "as evidenced by generally accepted diagnostic criteria and laboratory findings". We believe that requiring generally accepted diagnostic criteria and laboratory findings as the basis for diagnosis of ESRD serves as a reminder to physicians that they must have medical evidence to substantiate their certification of ESRD. We do not believe this addition to the definition would have a substantial effect on most physicians since they already depend on such medical information.

We do not believe it is necessary to add the word "treatments" or the phrase "as evidenced by generally accepted diagnostic criteria and laboratory findings" to the definition of ESRD in § 405.2102, which defines ESRD as it relates to the conditions for coverage of suppliers of ESRD services. This is because that section does not establish who is eligible or entitled to Medicare ESRD benefits, which is the purpose of this proposed rule.

B. Proposed Revisions to the Termination of Entitlement and to the Resumption of Entitlement

Section 226A(c)(2) and (c)(3) of the Act specifies the conditions for beginning a new period of entitlement when a kidney transplant fails or a regular course of dialysis begins again. However, this section refers to those instances when entitlement has not yet ended and specifies that Part A entitlement "begins" (although it may not yet have ended) with the month when regular dialysis treatments begin again. The importance of "beginning" Part A entitlement is that it offers the opportunity for those who do not have Part B (Supplementary Medical Insurance) entitlement to enroll in Part B without waiting for the annual general enrollment period (January through March). Supplementary Medical Insurance is a voluntary program available to most individuals age 65 or over and to disabled individuals who are under age 65 and entitled to Medicare Part A. In addition, since Part A entitlement has not ended, we believe that the intention is to re-enroll the individual in Part A with that month, without a new application.

Therefore, we propose to treat the situation where dialysis or transplant recurs during the 12-month or 36-month periods as a resumption of entitlement. Accordingly, we delete from § 406.13(f) the reference to continuation of entitlement, and instead revise § 406.13(g), which specifies the conditions for resumption of entitlement, to include this situation where coverage resumes despite a previous course of treatment.

We propose to revise § 406.13(g) to state that entitlement would be resumed under any one of three conditions. Using the language we propose to remove from paragraph (f), a new period of entitlement would begin if an individual initiates a regular course of renal dialysis during the 12-month period after the previous course of dialysis ended, and he or she would be entitled to resume Part A benefits and eligible to enroll in Part B benefits effective with the month the regular course of dialysis is resumed.

The statute does not mention the beginning of a new period of entitlement when a second kidney transplant occurs during the 36-month period following the initial transplant, since there is never a waiting period for entitlement based on a transplant. However, we believe that, by analogy, the provisions for beginning a new period of entitlement in cases where a regular course of dialysis begins or recurs during the 36 months indicate that we should construe the law as requiring resumption of entitlement and a new period of Part B enrollment in cases of re-transplantation that occur without the beneficiary's resuming (or initiating) dialysis treatments. We, therefore, propose to revise § 406.13(g) to state that entitlement would begin when an individual initiates a new, regular course of renal dialysis, or has a kidney transplant, during the 36-month period after an earlier kidney transplant, and that he or she would be entitled to resume Part A benefits and eligible to enroll in Part B benefits effective with the month the regular course of dialysis begins or with the month the subsequent kidney transplant occurs.

We also propose to make technical revisions to § 406.13(g) to clarify the other condition for resumption of entitlement. That is, entitlement is resumed if an individual initiates a regular course of renal dialysis more than 12 months after the previous regular course of dialysis ended or more than 36 months after the month of a kidney transplant, and the individual is eligible to enroll in Part A and Part B benefits effective with the month in which the regular course of dialysis treatment is resumed. If he or she is otherwise entitled to Part A benefits under the conditions specified in § 406.13(c), and files an application, entitlement would begin with the month in which dialysis treatments are initiated or resumed, without a waiting period, subject to the basic limitations of entitlement in § 406.13(e)(1).

C. Proposed Revisions' Effect on Medicare Part B

The revised definition of ESRD in § 406.13(b) and revisions to resumption of entitlement in § 406.13(g) would also be used as the basis for eligibility for Medicare Part B. This is because, in accordance with § 407.10(a)(1), an individual who qualifies for Medicare Part A on the basis of ESRD is also eligible for Medicare Part B.

D. Manuals Affected

When we publish these proposed requirements as a final rule, the Social Security Program Operations Manual System, Part 6, "HI"; the Medicare Part A Intermediary Manual, Part 3, "Claims Processing"; the Medicare Part B Carriers Manual, Part 3, "Claims Processing"; and the Medicare Renal Dialysis Facilities Manual, would be revised to reflect the changes made to the definition of ESRD and the resumption of entitlement.

III. Collection of Information Requirements

This rule contains no information collection requirements. Consequently, this rule need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

IV. Response to Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, we will consider all comments that we receive by the date and time specified in the "Dates" section of this preamble, and if we proceed with the final rule, we will respond to the comments in the preamble to the final rule.

V. Regulatory Impact Statement

In calendar year 1989, over 21,200 individuals were certified by their physicians as having an irreversible, permanent kidney impairment, and obtained Medicare entitlement solely on the basis of this certification. In 1990, that number was 22,800. As reported in the National Institute of Diabetes and Digestive and Kidney Disease's U.S. Renal Data System Annual Data Report, approximately 1 percent of individuals

receiving dialysis treatments during these years were able to terminate their course of dialysis treatment because kidney function returned. This figure is consistent with data that we maintain on the number of individuals whose Medicare eligibility terminated.

We analyzed the Medicare payment records of beneficiaries whose sole reason for Medicare entitlement was ESRD, and who discontinued dialysis (and thus, Medicare eligibility) within 2 years after enrollment. Our records indicate that 70 percent of the individuals incurred annual costs of less than $10,000, with an annual mean cost per beneficiary to the Medicare program of approximately $8,000. This is significantly below the average annual cost to the Medicare program of $40,000 for a patient receiving regular dialysis treatments. Because these beneficiaries were able to discontinue dialysis after incurring only limited medical costs, we believe that most of these patients may have been incorrectly certified as having ESRD, which requires long-term maintenance dialysis or a kidney transplant. Although the number of individuals who may have been incorrectly certified was less than 250 per year, they accounted for nearly $2 million in annual Medicare program expenditures. These expenditures were unintended because the disease did not reach "end-stage" in these individuals. As a result of this proposed revision, we estimate the projected savings to the Medicare program for the next 5 calendar years to be as follows:

[Millions of Dollars]

1994	1995	1996	1997	1998
2.8	3.1	3.4	3.8	4.2

With regard to the portion of this proposed rule concerning resumption or continuation of entitlement after a terminating event, we have no reason to believe, based on 13 years' experience, that more than one or two people would have had their entitlement resumed earlier under the proposed revised regulation relating to that issue.

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a proposed rule would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we consider all physicians and dialysis facilities to be small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a proposed rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

No additional time burden or monetary requirements would be placed on physicians or dialysis facilities in order to comply with the provisions of this proposed rule since physicians should already have appropriate laboratory findings and generally accepted diagnostic criteria to confirm a diagnosis of ESRD.

In addition, changes in the resumption of entitlement regulations would have no effect on physicians or on dialysis facilities.

For the reasons stated above, we have determined, and the Secretary certifies, that this proposed rule would not result in a significant economic impact on a substantial number of small entities or on the operations of a substantial number of small rural hospitals. We are, therefore, not preparing analyses for either the RFA or section 1102(b) of the Act.

List of Subjects in 42 CFR Part 406

Health facilities, Kidney diseases, Medicare.

42 CFR chapter IV, part 406 is amended as follows:

PART 406—HOSPITAL INSURANCE ELIGIBILITY AND ENTITLEMENT

1. The authority citation for part 406 continues to read as follows:

Authority: Secs. 202(t), 202(u), 226, 226A, 1102, 1818, and 1871 of the Social Security Act (42 U.S.C. 402(t), 402(u), 426, 426–1, 1302, 1395i–2, and 1395hh), and 3103 of Public Law 89–97 (42 U.S.C. 426a) unless otherwise noted.

2. In § 406.13, the heading and introductory language in paragraph (b) is republished, the definition of "End-stage renal disease" in paragraph (b) is revised, and paragraphs (f) and (g) are revised to read as follows:

§ 406.13 Individual who has end-stage renal disease.

* * * * *

(b) *Definitions.* As used in this section:

End-stage renal disease (ESRD) means that stage of kidney impairment that appears irreversible and permanent and requires a regular course of dialysis treatments or kidney transplantation to maintain life, as evidenced by generally accepted diagnostic criteria and laboratory findings.

* * * * *

(f) *End of entitlement.* Entitlement ends with—

(1) The end of the 12th month after the month in which a regular course of dialysis ends; or

(2) The end of the 36th month after the month in which the individual has received a kidney transplant.

(g) *Resumption of entitlement.* Entitlement is resumed under the following conditions:

(1) An individual who initiates a regular course of renal dialysis during the 12-month period after the previous course of dialysis ended is entitled to Part A benefits and eligible to enroll in Part B with the month the regular course of dialysis is resumed.

(2) An individual who initiates a regular course of renal dialysis, or has a kidney transplant, during the 36-month period after an earlier kidney transplant is entitled to Part A benefits and eligible to enroll in Part B with the month the regular course of dialysis begins or with the month the subsequent kidney transplant occurs.

(3) An individual who initiates a regular course of renal dialysis more than 12 months after the previous course of regular dialysis ended or more than 36 months after the month of a kidney transplant is eligible to enroll in Part A and Part B with the month in which the regular course of dialysis is resumed. If he or she is otherwise entitled under the conditions specified in paragraph (c) of this section, including the filing of an application, entitlement begins with the month in which dialysis is initiated or resumed, without a waiting period, subject to the limitations of paragraph (e)(1) of this section.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: June 4, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Approved: October 4, 1993.

Donna E. Shalala,

Secretary.

[FR Doc. 94–65 Filed 1–5–94; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3160

[WO-610-4111-02-24 1A]

RIN 1004-AB22

Onshore Oil and Gas Operations, Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order No. 5, Measurement of Gas

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise Onshore Oil and Gas Order No. 5 under 43 CFR 3164.1, originally issued February 24, 1989 (54 FR 8100), and made effective March 27, 1989, for new facilities, August 23, 1989, for existing facilities measuring 200 thousand cubic feet (Mcf) or more per day of gas, and February 26, 1990, for existing facilities producing less than 200 Mcf per day of gas. This proposed revision would reorganize the Order to make it more logical in sequence, remove unnecessary provisions, resolve internal inconsistencies discovered in the Order, and clarify certain provisions. These changes are based on several years of experience implementing the Order, and on suggestions from the public.

DATES: Comments should be submitted by March 7, 1994. Comments received or postmarked after the above date may not be considered in the decisionmaking process on the final rule.

ADDRESSES: Comments should be sent to: Director (140), Bureau of Land Management, Room 5555, Main Interior Building, 1849 C Street, N.W., Washington, D.C. 20240. Comments will be available for public review at the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Lonny R. Bagley, (406) 255-2847.

SUPPLEMENTARY INFORMATION: Order No. 5, Measurement of Gas, implements and supplements requirements found in 43 CFR Part 3160 relating to the measurement of gas produced under the terms of Federal and Indian (except Osage) oil and gas leases, as well as gas produced from State or privately owned lands when Federal and/or Indian leases receive a share of such production under the terms of an approved agreement. The Order addresses gas measurement by orifice meter and gas measurement by other methods acceptable to the authorized officer of the Bureau of Land Management (BLM). Gas measurement by electronic flow computers, utilizing an orifice, which calculate volume using the equations specified by the American Gas Association (AGA) Committee Report No. 3, may be implemented without prior approval if the minimum standards outlined in the Order are adhered to.

Several years of experience implementing the Order have revealed some areas where the organization of the Order can be improved, and certain provisions that require amendment or clarification or both.

The statement of the purpose of the Order in section I.B. is proposed to be amended to remove the reference to the assessments and penalties imposed as a result of noncompliance or the failure to correct noncompliance, because the Order does not set forth such assessments and penalties. The purpose statement also is proposed to be amended to include the purpose that measurements be accurate.

There are no amendments proposed in the definitions included in the existing Order. However, one new definition (meter uncertainty) would be added in this proposed rule.

Section III.A. on Required Recordkeeping is proposed to be amended by adding requirements for the retention of data generated by electronic flow computers. The revised Order would set forth specifically the kinds of data required to be retained, without prescribing an exhaustive list.

Article III. would be reorganized in the proposed Order. Two new sections would be added to cover minimum standards specific to the secondary element of the orifice meter and to allow the use of other types of secondary elements, and to cover other requirements not specific to orifice meters or the secondary element. Requirements included in section C. on orifice meters are proposed to be moved, and in some cases amended, as part of the new section D. on secondary elements or section E. on other requirements, and several new requirements have been added as part of section C. and new section D. These changes are stated in table form below.

Existing order citations	Proposed order citations
III.C. Gas Measurement by Orifice Meter.	III.C Primary Element—Orifice Meters.
C.1	C.1.
C.2	C.2.
C.3	C.3.
C.4	D.10.a.
C.5	D.10.b.
C.6	C.4.
C.7	D.1.
C.8	C.5.
	C.6. (new).
C.9	C.7.
C.10	C.8.
C.11	C.9.
C.12	C.10.
C.13	(removed).
	D. Secondary Element (new).
	D.2. (new).
C.14	D.10.c.
C.15	D.3.
	D.4. (new).
	D5. (new).
C.16	D.10.d.
C.17	D.6.
C.18	D.7.
C.19	D.8.
	D.11.a., b., and c. (new).
	E. Other Requirements (new).
C.20	E.1.
C.21	C.11.
C.22	Removed.
C.23	E.2.
C.24	D.9.
C.25	E.3.
C.26	E.4.
D. Gas Measurmeent by Other Methods.	F. Gas Measurement by Other Methods.
D.1	F.1.
D.2	F.2.

The automatic exemption from some requirements for meters measuring 100 Mcf per day or less on a monthly basis would be expanded to include 3 additional standards. These added exemptions would include the existing requirement that the static element be sized to make the pen that records the static pressure operate in the outer ⅔ of the chart range for the majority of the flowing period, the new requirement that electronic flow computers be installed, operated, and maintained to achieve an overall meter uncertainty of plus or minus 3 percent, and the new requirement for inspecting meter tubes every 5 years. Language has been added to the Order identifying the applicable standards for the exemption.

The following requirements proposed to be amended in revised Order No. 5 are discussed below in the order they appear in this proposed rule.

III.C.5. (formerly C.8.) is proposed to be amended purely for clarification. It is the difference between the internal diameters of the meter tube pipe and the orifice fittings that is to be within AGA tolerance limits, not the diameters themselves, as the existing Order seems to provide.

III.C.6. (new) is added to ensure that the meter tubes conform with AGA

Committee Report No. 3. Proper meter tube condition is essential for accurate measurement. It is intended that all meter tube inspections would be conducted within the first 5 years after the effective date of the final rule, and every 5 years thereafter. Meters measuring 100 Mcf per day or less on a monthly basis would be exempt from this new requirement.

III.C.8. (formerly C.10.) is proposed to be amended for precision in stating the requirement. As stated in this rule, orifice plates would be required to be inspected during calibration of the secondary element.

III.C.10. (formerly C.12.) is proposed to be amended by removing the requirement that, when leaks are detected, the meter setting shall be determined and recorded "as found," and "as left" after the meter is calibrated. This part of the existing requirement is duplicated by the linearity test in requirement III.D.3. of the proposed Order.

III.C.13. in the existing Order would be removed in the proposed Order because it is duplicated by the linearity test in requirement III.D.3. of the proposed Order.

III.C.11. (formerly C.21.) would be amended by revising the corrective action to provide for the submittal of a report to BLM. The form called for in existing requirement C.21. is now submitted to the Minerals Management Service, not to the BLM. Under the proposed rule, the operator would be required to submit a report to the BLM showing what corrections were made.

III.D.1. (formerly C.7.) would be amended by removing the provision allowing consideration of a variance for sales or allocation meters measuring between 200 and 500 Mcf per day. This provision duplicates the general provision for a variance under Article IV. of the Order. The requirement for the use of an indicating thermometer would be removed because when using an indicating thermometer the temperature is not a true average flowing temperature. All meters measuring more than 100 Mcf per day are required to have a temperature recorder. Meters measuring 100 Mcf per day or less are required to use either a temperature recorder or an average flowing temperature.

III.D.2. (new) would ensure that the accuracy of the temperature recording device is maintained.

III.D.3. (formerly C.15.) would be amended for clarification and to require the recording of readings before and after adjustments are made. The words "of the element range" would be added to make it clear what the 0 and 100 percent refer to.

III.D.4. (new) would be added to require calibration equipment to be more accurate than the equipment being calibrated. If the testing equipment is not more accurate than the equipment being calibrated, the inherent uncertainty in the metering equipment increases.

III.D.5. (new) would be added to require documentation of the certification or recertification of calibration equipment to be available to the authorized officer at the time of calibration.

III.D.6. (formerly C.17.) would be amended to allow meters that measure 100 Mcf or less per day to be inspected and calibrated semiannually rather than quarterly. Experience has shown that quarterly inspections and calibrations of meters measuring such low volumes are neither cost effective nor necessary to assure an acceptable degree of accuracy.

III.D.7. (formerly C.18.) would be amended to require operators to notify the authorized officer of the BLM well in advance of calibrations to enable the planning of inspections.

III.D.8. (formerly C.19.) would be amended by changing the reference to "measuring equipment" to "recording device" to conform with changes in other requirements. The current Order requires that an adjustment be made whenever a volume error of 2 percent or greater occurs. It is proposed to change this standard to "more than 1 percent" because volume errors of less than 2 percent on higher volume wells are very significant. However, in most instances, it will be the policy of the BLM not to pursue volume errors of less than 200 Mcf per month, because the cost of doing so would exceed the value of any additional royalty that might result. The requirement that the meter be adjusted to zero error would be removed because this is part of the linearity test requirement in Section III.D.3. For the sake of simplicity, the abatement period would be stated as 60 days only rather than also stating the alternative "prior to completion of calibration."

III.D.10. would be added combining several requirements from the existing Order, as explained below.

III.D.10.a. (formerly C.4.) would be revised to clarify what is meant by the outer ⅔ of the chart range. Also, the reference to sizing the orifice would be removed because doing so is not the only alternative available to the operator to maintain the differential pen in the outer ⅔ of the chart.

III.D.10.b. (formerly C.5.) would be revised to clarify what is meant by the outer ⅔ of the chart range.

III.D.10.c. (formerly C.14.) would be amended by revising the corrective action. It would no longer require recordation of the "as found" and "as left" readings, which are meaningless.

III.D.11.a., b., and c. (new) would be added as requirements for Electronic Flow Computers (EFCs). The requirements for EFCs would be no more stringent than those for chart recorders. The current static pressure, differential pressure, and temperature would have to be displayed on a continuous basis, and the EFC would be required to have a back-up power source capable of retaining data collected for a minimum of 35 days.

III.E.3. and 4. (formerly C.25. and 26.) would be amended to make them read as requirements rather than as descriptions or definitions, as they appear to do in the existing Order.

Other editorial changes have been proposed to correct errors in the existing Order and cross-references that must be changed as a result of the proposed reorganization of the Order.

The principal authors of this proposed rule are Lonny R. Bagley, Inspection and Enforcement Specialist, Montana State Office, Richard Estabrook, Petroleum Engineer, Ukiah District Office, California, Michael Kolling, Petroleum Engineering Technician, Dickinson District Office, North Dakota, Will Lambert, Petroleum Engineer, Grand Junction District Office, Colorado, and Larry Bray, Petroleum Engineering Technician, Roswell Resource Area Office, New Mexico, assisted by the staff of the Division of Legislation and Regulatory Management, all of the BLM.

It is hereby determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment, and that no detailed statement pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is required. The Bureau of Land Management has determined that this proposed rule is categorically excluded from further environmental review pursuant to 516 Departmental Manual (DM), Chapter 2, Appendix 1, Item 1.10, and that the proposal would not significantly affect the 10 criteria for exceptions listed in 516 DM 2, Appendix 2. Pursuant to the Council on Environmental Quality regulations (40 CFR 1508.4) and environmental policies and procedures of the Department of the Interior, "categorical exclusions" means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found

to have no such effect in procedures adopted by a Federal agency and for which neither an environmental assessment nor an environmental impact statement is required.

This rule has been reviewed under Executive Order 12866.

The Department has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that it will not have a significant economic impact on a substantial number of small entities for the same reasons. The rule codifies industry standards that apply to all entities in the industry, regardless of size. The Order would not require a substantial amount of additional information or monitoring. Some additional equipment may be required in certain cases, but the total cost of these changes would not approach the threshold specified in the Executive Order. Costs to the public should not increase at all as a result of the Order.

The Department certifies that this proposed rule does not represent a governmental action capable of interference with constitutionally protected property rights. There would be no taking of private property without due process. Failure to abate violations could result in assessments under the Mineral Leasing Act and/or penalties under the Federal Oil and Gas Royalty Management Act, and possibly lease cancellation if the failure continues, but not without due process. Therefore, as required by Executive Order 12630, the Department of the Interior has determined that the proposed rule would not cause a taking of private property.

The Department has certified to the Office of Management and Budget that this proposed rule meets the applicable standards provided in section 1(a) and 2(b)(2) of Executive Order 12788.

The information collection requirement(s) contained in Part 3160 that relate to this Order have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1004–0134.

List of Subjects in 43 CFR Part 3160

Government contracts; Mineral royalties; Oil and gas exploration; Oil and gas production; Public lands—Mineral resources; Indian lands—Mineral resources; Reporting requirements.

For the reasons stated above, under the authority of the Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 *et seq.*), the Department proposes to amend part 3160, Group 3100, subchapter C, chapter II of title 43 of the Code of Federal Regulations as set forth below:

PART 3160—ONSHORE OIL AND GAS OPERATIONS

1. The authority citation for part 3160 continues to read as follows:

Authority: 43 U.S.C. 1733; 30 U.S.C. 181 *et seq.*; 30 U.S.C. 351–359; 30 U.S.C. 301–306; 25 U.S.C. 396; 25 U.S.C. 396a–396q, 397, 398, 398a–398e, 399; 43 U.S.C. 1457; see also 40 Op.Atty.Gen. 41; 40 U.S.C. 471 *et seq.*; 42 U.S.C. 4321 *et seq.*; 43 U.S.C. 6508; 30 U.S.C. 1701 *et seq.*; and 25 U.S.C. 2101 *et seq.*

Subpart 3164—Special Provisions

2. Section 3164.1(b) is amended by revising the fifth entry of the table to read as follows:

§ 3164.1 Onshore Oil and Gas Orders.

* * * * *

(b) * * *

Order No. & Subject	Effective date	Federal Register reference	Supersedes
* *	* *	* *	*
5. Measurement of Gas	[30 days after date of publication of final rule].	[FR reference for final rule]	None.
* *	* *	* *	*

Dated: September 27, 1993.

Bob Armstrong,

Assistant Secretary of the Interior.

Appendix—Text of Oil and Gas Order No. 5

Note.—This appendix will not appear in the Code of Federal Regulations.

Onshore Oil and Gas Order No. 5

Measurement of Gas

I. Introduction
A. Authority
B. Purpose
C. Scope
II. Definitions
III. Requirements
A. Required Recordkeeping
B. General
C. Primary Element—Orifice Meters
D. Secondary Element
E. Other Requirements
F. Gas Measurement by Other Methods or at Other Locations Acceptable to the Authorized Officer
IV. Variances from Minimum Standards

Attachment

I. Sections from 43 CFR Subparts 3163 and 3165

Onshore Oil and Gas Order No. 5

Measurement of Gas on Federal and Indian Oil and Gas Leases

I. Introduction

A. Authority

This Order is established pursuant to the authority granted to the Secretary of the Interior under various Federal and Indian mineral leasing statutes and the Federal Oil and Gas Royalty Management Act of 1982. This authority has been delegated to the Bureau of Land Management and is implemented by the onshore oil and gas operating regulations contained in 43 CFR part 3160. Section 3164.1 thereof specifically authorizes the Director to issue Onshore Oil and Gas Orders when necessary to implement or supplement the operating regulations and provides that all such Orders shall be binding on the lessees and operators of Federal and restricted Indian oil and gas leases which have been, or may hereafter, be issued.

Specific authority for the provisions contained in this Order is found at: section 3162.4–1, Well records and reports; section 3162.4–2, Samples, tests, and surveys; section 3162.7–1, Disposition of production; section 3162.7–3, Measurement of gas; and subpart 3163, Noncompliance, Assessments, and Penalties.

B. Purpose

One purpose of this Order is to establish requirements and minimum standards for the accurate measurement of gas by the methods authorized in 43 CFR 3162.7–3, i.e., measurement by orifice meter or other methods acceptable to the authorized officer. Accurate gas measurement ensures that the Federal Government, the general public, State Governments that share in the proceeds, and Indian mineral owners receive the royalties due, as

specified in the governing oil and gas leases.

Another purpose of this Order is to establish abatement periods for corrective action when noncompliance with the minimum standards is detected.

This Order also serves as notice to any party cited for noncompliance that it may request from the authorized officer an extension of the abatement period for any violation, provided that the request for extension is applied for and granted prior to the expiration of the abatement period previously allowed.

C. Scope

This Order is applicable to all Federal and Indian (except Osage) oil and gas leases. In addition, this Order is also applicable to all wells and facilities on State or privately owned mineral lands committed to a unit or communitization agreement that affects Federal or Indian interests, notwithstanding any provision of a unit or communitization agreement to the contrary.

II. Definitions

A. "Authorized officer" means any employee of the Bureau of Land Management authorized to perform the duties described in 43 CFR Groups 3000 and 3100 (see 43 CFR 3000.0–5).

B. "Business day" means any day Monday through Friday excluding Federal holidays.

C. "Gas" means any fluid, either combustible or noncombustible, that is produced in a natural state from the earth and that maintains a gaseous or rarefied state at standard temperature and pressure conditions (see 43 CFR 3000.0–5(a)).

D. "INC" means incident of noncompliance, which serves as a Notice of Violation under CFR subpart 3163.

E. "Lessee" means a person or entity holding record title in a lease issued by the United States (see 43 CFR 3160.0–5).

F. "Major violation" means noncompliance that causes or threatens immediate, substantial, and adverse impacts on public health and safety, the environment, production accountability, or royalty income (see 43 CFR 3160.0–5).

G. "Meter uncertainty" means the overall inaccuracy of a flow meter caused by the inherent errors of the flow measurement equipment.

H. "Minor violation" means noncompliance that does not rise to the level of a major violation (see 43 CFR 3160.0–5).

I. "Operating rights owner" means a person or entity holding operating rights in a lease issued by the United States. A lessee also may be an operating rights owner if the operating rights in a lease or portion thereof have not been severed from record title.

J. "Operator" means any person or entity, including but not limited to the lessee or operating rights owner, who has stated in writing to the authorized officer that it is responsible under the terms and conditions of the lease for the operations conducted on the leased lands or portion thereof.

K. "Production unit" means, for purposes of reporting gas production, a measurement unit of 1000 standard cubic feet (Mcf).

L. "Standard cubic foot" means the volume of gas contained in one cubic foot at a base pressure of 14.73 pounds per square inch absolute, and at a base temperature of 60° F or 519.67° Rankine (see 43 CFR 3162.7–3).

III. Requirements

A. Required Recordkeeping

The operator shall keep all test data, meter reports, charts/recordings, or other similar records for 6 years from the date they were generated, unless the operator is notified that an audit or investigation involving such records has been initiated. If the operator is notified that an audit or investigation involving the records has been initiated, the operator shall maintain the records until released in writing from the obligation to maintain them. The authorized officer may request, and the operator shall produce, such records any time within this period. For electronic flow computers (EFCs), this includes but is not limited to:

1. Field edits or volume adjustments.

2. Hourly average static and differential pressures, hourly flow temperatures, hourly sums of extensions calculated at each data point, hourly volumes, and the method used to obtain the summation of extensions, averages, and volumes. For the purposes of this Order, extensions are the square root of the product of the differential pressure and static pressure.

3. Subsequent edits or adjustments. If several changes are made, only the original and the final readings shall be retained.

Along with any records submitted at the request of the authorized officer, the operator shall provide all additional information used to compute volumes so that computations may be verified.

B. General

All gas production shall be measured in accordance with an authorized method of measurement. As set out in 43 CFR 3162.7–3, gas measurement authorized for gas produced from leases, unit areas, and communitization agreements subject to the jurisdiction of the Bureau of Land Management, as such jurisdiction is defined in 43 CFR 3161.1, may be by orifice meter or other methods acceptable to the authorized officer. The requirements and minimum standards for gas measurement are set out below. If these requirements for the primary element and chart recorder are met, a meter accuracy of plus or minus 3 percent will be attained. However, given the complex components and sophistication of electronic flow computers (EFCs), no "cook book" method can be established. Therefore, an uncertainty standard of plus or minus 3 percent would be included for EFCs.

The requirements of this Order are based on the standards and specifications published by the American Gas Association (AGA) and officially designated as ANSI/API 2530 and AGA Committee Report No. 3, second edition, 1985, hereafter referred to as AGA Committee Report No. 3. The AGA-published standards and specifications are considered to be appropriate for proper gas measurement by both the Department of the Interior and the oil and gas industry. The requirements set minimum standards necessary to promote conservation of natural resources and to ensure proper measurement of gas production for sales and allocation purposes, so that the Federal Government and Indian mineral owners will receive the royalties due under governing oil and gas leases.

All future sales and allocation facilities and sales or allocation facilities in existence on the effective date of this Order, unless covered by a valid variance, shall meet the minimum standards prescribed in this Order; provided, however, that all gas produced from or allocated to Federal and Indian (except Osage) oil and gas leases wherein the gas is measured through sales or allocation meters handling 100 thousand cubic feet (Mcf) per day or less on a monthly basis are exempt from the standards in section III. C.1., C.2., D.10.a., D.10.b., and D.11.c. of this Order. The authorized officer may, where appropriate and necessary for proper measurement, work with the operators in designating consolidated gas sales and/or allocation meter stations.

Meter installations constructed in accordance with the AGA Committee Report No. 3 standards in effect at that time shall not automatically be required to retrofit if the standards are revised. The Bureau will review any revised

Meter installations constructed in accordance with the AGA Committee Report No. 3 standards in effect at that time shall not automatically be required to retrofit if the standards are revised. The Bureau will review any revised standards and, when necessary, will amend the Order through the rulemaking process.

The intent of these minimum standards is to ensure that when equipment malfunctions occur that could result in inaccurate measurement, proper corrective actions are taken, the authorized officer is notified, and a report is submitted.

Failure to comply with these minimum standards will be considered noncompliance and an incident of noncompliance (INC) will be issued. Operators who discover noncompliance with these minimum standards and take immediate corrective action will not be issued an INC. If the authorized officer or his representative is present when an operator discovers a malfunction or uses incorrect procedures as specified in this Order, an INC will be issued unless immediate corrective action is taken. Failure of equipment will not be considered a violation. However, the incidents of noncompliance which may result from equipment failure are considered violations. A partial list of such incidents follows:

Failure to install equipment properly.

Failure to repair or correct equipment malfunction properly or in a timely manner.

Failure to submit report of alternate method of sales.

Failure to submit required reports in a timely manner.

Failure to adhere to the minimum standard procedures specified in this Order.

The use of improper equipment, when discovered, will be considered a violation and a formal INC will be issued.

The use of improper procedures will be considered a violation and when witnessed by the authorized officer or his representative, immediate corrective action will be required. In the event that proper procedures are then used as required by this Order, and prior to completing the operation, calibration, or proving, the violation will be considered as properly corrected. In this case, although the violation will be documented in the agency files, no INC will be issued.

The failure to take timely corrective action as required to meet any standard in this article will be considered either a major or minor violation in accordance with the classification set out below for each standard, unless an applicable variance has been granted or the standards have been otherwise modified in accordance with Article IV.

A major violation, as defined in this Order, will generally require an immediate shut-in of the metering device. However, where the non-recoupable loss is not significant or where damage to the resource is likely to occur if a shut-in is required, an abatement period of 24 hours may be granted by the authorized officer or his representative.

Where abatement is required "prior to sales or removal," action is required to be taken so that no gas can be removed beyond the measurement point until properly measured.

C. Primary Element—Orifice Meters

The following are minimum standards for the measurement of natural gas using orifice meters.

1. For meters measuring more than 100 Mcf per day on a monthly basis, the orifice to pipe diameter ratio (d/D), or the beta ratio, with meters using "flange taps," shall be between 0.15 and 0.70.

Violation: Major.

Corrective Action: Install an orifice of such size that subsequent measurements will be within the appropriate beta ratio range. If changing the orifice causes the differential pressure to be recorded in the lower one-third of the chart, then either the meter tube or the differential element shall be changed, sizing the straight pipe sections in a manner that will provide subsequent measurement within the appropriate beta ratio range.

Abatement Period: Prior to sales or removal.

2. For meters measuring more than 100 Mcf per day on a monthly basis, the orifice to pipe diameter ratio (d/D), or the beta ratio, with meters using "pipe taps," shall be between 0.20 and 0.67.

Violation: Major.

Corrective Action: Same as C.1. above.

Abatement Period: Prior to sales or removal.

3. To obtain flow conditions as near optimum as possible and minimize the effects of turbulence in gas flow, the minimum length of straight pipe preceding and following an orifice, and the use of straightening vanes, shall conform to the specifications shown in Figures 4 through 9 of AGA Committee Report No. 3.

Violation: Major.

Corrective Action: Install proper length of pipe where appropriate or install straightening vanes in accordance with appropriate AGA Committee Report No. 3 specifications.

Abatement Period: Prior to sales or removal.

4. There shall be no pipe connections between the orifice and the nearest pipe fitting other than the pressure taps and/or thermometer wells as specified in AGA Committee Report No. 3.

Violation: Major.

Corrective Action: Replace entire length of pipe ahead of the orifice meter with pipe of appropriate length and inside smoothness in accordance with AGA Committee Report No. 3.

Abatement Period: Prior to sales or removal.

5. The difference between the internal diameters of the meter tube pipe and the orifice fittings shall be within the tolerance limits set by AGA.

Violation: Major.

Corrective Action: Install properly sized meter tube.

Abatement Period: Prior to sales or removal.

6. For meters measuring more than 100 Mcf per day on a monthly basis, meter tubes shall be inspected at least every 5 years to ensure continuing conformance with the meter tube specifications in AGA Committee Report No. 3. Record results of inspections and take any necessary corrective actions to bring the meter tube into conformance with AGA Committee Report No. 3.

Violation: Minor.

Corrective Action: Inspect meter tube for conformance with AGA Committee Report No. 3, record results of inspection, and take necessary corrective actions.

Abatement Period: 60 days.

7. Meter tubes using flange taps or pipe taps shall have the pressure tap holes located as specified in AGA Committee Report No. 3.

Violation: Major.

Corrective Action: Install pressure tap as specified.

Abatement Period: Prior to sales or removal.

8. Orifice plates shall be removed from the flange or plate holder, and visually inspected for conformance with AGA standards and specifications, at least semi-annually, during calibration of the secondary element.

Violation: Minor.

Corrective Action: Remove and visually inspect orifice plate for conformance with AGA standards and specifications.

Abatement Period: No later than the next meter calibration.

9. Any plate or orifice that is determined not to be in conformance with AGA standards shall be replaced with one that is in conformance.

Violation: Major.

Corrective Action: Replace orifice plate.

Abatement Period: Prior to sales or removal.

10. All connections and fittings of the secondary element (including meter pots and meter manifolds) shall be leak tested prior to conducting tests of the meter's accuracy.

Violation: Minor.

Corrective Action: Stop meter calibration and conduct leak test.

Abatement Period: Prior to completion of calibration.

11. Volumes of gas delivered shall be determined according to the flow equations specified in AGA Committee Report No. 3.

Violation: Minor.

Corrective Action: Recalculate all gas volumes not determined in accordance with flow equations specified in AGA Committee Report No. 3. Submit a report adjusting the volume of gas measured, and showing or discussing all calculations made in correcting the volumes.

Abatement Period: 60 days.

D. Secondary Element

The following are minimum standards for the secondary element of the orifice meter.

1. Continuous temperature recorders to measure the flowing gas temperature are required on all sales and allocation meters measuring more than 100 Mcf per day on a monthly basis. Meters measuring 100 Mcf or less per day on a monthly basis shall determine the flowing temperature of the gas by one of the following:

a. Continuous temperature recorder, or

b. Average flowing temperature, as determined by a method approved by the authorized officer.

Violation: Major.

Corrective Action: Install temperature measuring device as required.

Abatement Period: Prior to sales or removal.

2. The temperature recording device shall be tested for accuracy utilizing one of the following:

a. "Test well" in the meter run; or

b. Water bath.

Record "as found" readings, make any necessary adjustments, and record "as left" readings.

Violation: Minor.

Corrective Action: Test temperature recording device as specified, record "as found" readings, make necessary adjustments, and record "as left" readings.

Abatement Period: Prior to completion of calibration.

3. Differential and static pen accuracy shall be tested for linearity at zero, at 100 percent of the element range, and at 1 point within the normal operating range of the differential and static recordings. Record "as found" readings, make any necessary adjustments, and record "as left" readings.

Violation: Minor.

Corrective Action: Test linearity at the required points, record "as found" readings, make necessary adjustments, and record "as left" readings.

Abatement Period: Prior to completion of calibration.

4. All calibrating equipment shall be more accurate than the required accuracy of the equipment being calibrated, as shown in the documentation required in paragraph 5. Calibration equipment shall be recertified at least annually.

Violation: Minor.

Corrective Action: Stop calibration, substitute proper calibrating equipment, and restart calibration.

Abatement Period: Prior to completion of calibration.

5. Documentation of the certification/recertification of the calibrating equipment shall be available to the authorized officer at the time of calibration.

Violation: Minor.

Corrective Action: Provide documentation.

Abatement Period: 20 days.

6. The accuracy of the recording device(s) shall be tested following initial meter installation and following repairs. Meters measuring more than 100 Mcf per day on a monthly basis shall be tested at least quarterly. Meters measuring 100 Mcf per day or less on a monthly basis shall be tested at least semi-annually.

Violation: Minor.

Corrective Action: Test meter for accuracy.

Abatement Period: a. 24 hours for initial meter installation or following repairs.

b. 30 days to conduct the quarterly or semi-annual meter test, as applicable.

7. The authorized officer shall be notified in writing of all meter calibrations. Calibration schedules covering monthly, quarterly, semiannual, or annual periods shall be submitted at least 10 days prior to the date of the first calibration on the schedule.

Violation: Minor.

Corrective Action: Submit the calibration schedule, as required.

Abatement Period: Prior to next calibration.

8. If the inaccuracy in the recording device(s) results in a volume calculation more than 1 percent in error, the volume measured since the last calibration shall be corrected. However, if the magnitude of the volume error is less than 200 Mcf per month, it will not be pursued unless it occurs on a continuing basis. In that case, the meter shall be adjusted in accordance with Sections III.D.2. and III.D.3. Also, the operator shall submit a report adjusting the volumes of gas measured, and showing or discussing all calculations made in correcting the volumes. The volumes shall be corrected back to the time the inaccuracy occurred, if known. If this time is unknown, volumes shall be corrected for the last half of the period elapsed since the date of last calibration.

Violation: Minor.

Corrective Action: Submit report with adjusted volumes.

Abatement Period: 60 days.

9. All meter calibration report forms shall include the following information, if applicable, and shall be submitted to the authorized officer upon request.

a. Name of producer or seller;

b. Name of purchaser;

c. Federal or Indian lease number, communitization agreement number, or unit name or number and participating area identification;

d. Station or meter number;

e. Meter data (make, differential, and static and temperature range, recording period);

f. Type of connections (flange or pipe, upstream or downstream static connections);

g. Orifice data (plate size and ID of meter tube);

h. Time and date of test;

i. Instrument error(s) found and certification of corrections, and "as found" and "as left" data for all instruments;

j. Signature and affiliation of tester and witness;

k. Remarks.

Violation: Minor.

Corrective Action: Submit amended meter calibration report(s) to authorized officer, including all required information.

Abatement Period: 15 days.

10. Chart Recorder: The following are minimum standards that only apply to chart recorders.

a. For meters measuring more than 100 Mcf per day on a monthly basis, the pen that records differential pressure shall operate in the outer ⅔ of the chart range (the physical distance on the chart measured from zero) for the majority of the flowing period.

Violation: Minor.

Corrective Action: Size the metering equipment so that the differential pen will record in the outer ⅔ of the chart range.

Abatement Period: 20 days.

b. For meters measuring more than 100 Mcf per day on a monthly basis, the static element shall be sized to make the

pen that records the static pressure operate in the outer ⅔ of the chart range (the physical distance on the chart measured from zero) for the majority of the flowing period.

Violation: Minor.

Corrective Action: Size static element so as to cause static pen to record in the outer ⅔ of the chart range.

Abatement Period: 20 days.

c. The meter's differential pen arc, the ability of the differential pen to duplicate the test chart's time arc over the full range of the test chart, shall be checked during each testing of the meter's accuracy and adjustments made if necessary.

Violation: Minor.

Corrective Action: Stop meter calibration, check differential pen arc, make necessary adjustments, and restart calibration.

Abatement Period: Prior to completion of calibration.

d. During testing of the meter accuracy, the static pen time lag shall be adjusted to ensure independent movement of the static pen in relation to the differential pen.

Violation: Minor.

Corrective Action: Make appropriate adjustments.

Abatement Period: Prior to completion of calibration.

11. Electronic Flow Computers: The following are minimum standards that only apply to electronic flow computers (EFCs).

a. The current static pressure, differential pressure, and temperature shall be displayed on a continuous basis.

Violation: Minor.

Corrective Action: Display required data.

Abatement Period: 30 days.

b. The EFC shall be equipped with a back-up power source capable of retaining data collected for a minimum of 35 days.

Violation: Minor.

Corrective Action: Install back-up power source capable of retaining data collected for a minimum of 35 days.

Abatement Period: 30 days.

c. For meters measuring more than 100 Mcf per day on a monthly basis, the EFC shall be installed, operated, and maintained to achieve an overall meter uncertainty of within ±3 percent.

Violation: Minor.

Corrective Action: Make any necessary changes to bring the overall meter uncertainty within ±3 percent.

Abatement Period: 20 days.

E. Other Requirements

The following are minimum standards that apply to all sales and sales allocation meter installations.

1. If, for any reason, the measuring equipment is out of service or malfunctioning so that the quantity of gas delivered is not known, the volume delivered during this period shall be estimated using one of the following methods, in this order of priority:

a. Record data on check metering equipment if used in lieu of main meter recordings. If check meters are not installed or are found to be recording inaccurately, then

b. Base corrections on the percentage error found during the instrument test. If that is not feasible, then

c. Estimate the quantity of gas run, based on deliveries made under similar conditions when the metering equipment was registering accurately.

Violation: Minor.

Corrective Action: Estimate volumes delivered during those periods cited using one or more of the approved methods identified in the order of priority and, where necessary, submit a report showing corrected volumes.

Abatement Period: 60 days.

2. The Btu content shall be determined at least annually, unless otherwise required by the authorized officer, by means of (1) a recording calorimeter, (2) calculations based on a complete compositional analysis of the gas and the heating value of each constituent, in accordance with AGA Committee Report No. 3, or (3) any other method acceptable to the authorized officer. The authorized officer shall be apprised of the method used for each determination and be furnished with all needed analytical data or other documentation upon request. The Btu content most recently determined and used for royalty purposes shall be reported.

Violation: Minor.

Corrective Action: Determine Btu content and submit a report.

Abatement Period: 30 days.

3. For purposes of measurement and meter calibration, atmospheric pressure shall be established through an actual measurement or assumed to be a constant value based on the elevation at the metering station.

Violation: Minor.

Corrective Action: Recalibrate gas meter and submit a report indicating corrected volumes using the adjusted absolute zero or properly calculated pressure extensions.

Abatement Period: 30 days.

4. The method and frequency of determining specific gravity shall be determined by use of one of the following methods:

a. Continuous recording gravitometer;

b. Complete compositional analysis of a spot or cumulative gas sample determined at least annually.

Violation: Minor.

Corrective Action: Determine specific gravity of gas by approved method and submit a report with corrected volume.

Abatement Period: 30 days.

F. Gas Measurement by Other Methods or at Other Locations Acceptable to the Authorized Officer

Using any method of gas measurement other than by orifice meter at a location on the lease, unit, unit participating area, or communitized area, requires prior approval from the authorized officer pursuant to 43 CFR 3162.7–3. Other measurement methods include, but are not limited to:

Turbine metering systems
Positive displacement meter
Pitot tube
Orifice well tester
Critical flow prover
Gas-oil ratio

The requirements and minimum standards for gas measurement on the lease, unit, unit participating area, or communitized area by an alternate method of measurement, or at a location off the lease, unit, unit participating area, or communitized area by either an authorized or an alternate method of measurement, are as follows:

1. Measurement on the Lease, Unit, Unit Participating Area, or Communitized Area

A written application for approval of an alternate gas measurement method shall be submitted to the authorized officer and written approval obtained before any such alternate gas measurement method is installed or operated. Any operator requesting approval of any alternate gas sales measurement system shall submit performance data, actual field test results, or any other supporting data or evidence acceptable to the authorized officer, that will demonstrate that the proposed alternate gas sales measurement system will meet or exceed the objectives of the applicable minimum standards or will not adversely affect royalty income or production accountability.

Violation: Major.

Corrective Action: Submit application and obtain approval.

Abatement Period: Prior to sales or removal.

2. Measurement at a Location Off the Lease, Unit, Unit Participating Area, or Communitized Area

a. A written application for off-lease measurement shall be submitted to the authorized officer and written approval obtained before any such off-lease gas measurement facilities are installed or

operated. The application for approval of off-lease measurement shall justify the location of the measurement facilities at the desired off-lease location before approval will be granted, but no additional approval as to the gas sales measurement method is required, provided measurement is to be accomplished by orifice meter pursuant to the requirements and minimum standards of this Order.

Violation: Minor.

Corrective Action: Submit application and obtain approval.

Abatement Period: 20 days.

b. If gas measurement is to be accomplished at a location off the lease, unit, unit participating area, or communitized area by any alternate measurement method (any method other than measurement by orifice meter), then the application, in addition to justifying the location of the measurement facilities, shall also demonstrate the acceptability of the alternate measurement method pursuant to Section III.F.1. of this Order.

Violation: Major.

Corrective Action: Submit application and obtain approval.

Abatement Period: Prior to sales.

IV. Variances From Minimum Standards

An operator may request that the authorized officer approve a variance from any of the minimum standards prescribed in Article III. All such requests shall be submitted in writing to the appropriate authorized officer and shall provide information as to the circumstances warranting approval of the variance(s) requested and the proposed alternative means by which the related minimum standard(s) will be satisfied. The authorized officer, after considering all relevant factors, shall approve the requested variance(s) if it is determined that the proposed alternative(s) meets or exceeds the objectives of the applicable minimum standard(s), or does not adversely affect royalty income or production accountability.

In addition, approval may be given orally by the authorized officer before the operator initiates actions which require a variance from minimum standards. The oral request, if granted, shall be followed by a written request not later than the fifth business day following oral approval, and written approval will then be appropriate.

The authorized officer may also issue NTLs that establish modified standards and requirements for specific geographic areas of operations.

After notice to the operator, the authorized officer may also require compliance with standards that exceed those contained in this Order whenever such additional requirements are necessary to achieve protection of royalty income or production accountability. The rationale for any such additional requirements shall be documented in writing to the operator.

[FR Doc. 94–149 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 67

[CGD 93–063]

Vessel Rebuild Standards

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: The Coast Guard is considering whether to undertake rulemaking to develop standards for vessel rebuild determinations. In order to help it determine whether rulemaking is needed and the scope of the issues involved, the Coast Guard conducted a public meeting on November 16, 1993. At the meeting, attendees discussed problems encountered under existing procedures and possible solutions, and whether use of a negotiated rulemaking would be appropriate. The meeting attendees requested that the Coast Guard conduct a second meeting to further discuss the issues. This notice announces the date, time, and place of the second meeting.

DATES: 1. The meeting will be held on February 15, 1994, beginning at 9 a.m. and concluding at 3 p.m. or earlier if discussion is concluded.

2. All comments should be received by the Coast Guard on or before January 31, 1994.

ADDRESSES: 1. The meeting will be held in room 4400, DOT Headquarters (Nassif Building), 400 Seventh Street, SW., Washington, DC 20590.

2. All written material should be submitted to the Coast Guard at: Vessel Documentation and Tonnage Survey Branch, room 1312, 2100 Second Street, SW., Washington, DC 20593–0001.

FOR FURTHER INFORMATION CONTACT: Ms. Laura Burley, Vessel Documentation and Tonnage Survey Branch at (202) 267–1492.

SUPPLEMENTARY INFORMATION: Under section 27 of the Merchant Marine Act, 1920 (46 U.S.C. app. 883), a vessel entitled to engage in the coastwise trade by virtue of having been built in the United States which is later rebuilt outside the United States, loses its eligibility to engage in the coastwise trade. Under 46 U.S.C. 12106, a vessel not eligible for the coastwise trade cannot receive a Great Lakes endorsement on its Certificate of Documentation. In addition, under 46 U.S.C. 12108, a fishing vessel which has been rebuilt outside the United States and which does not qualify for the rebuild savings provision of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, is not eligible for a fishery endorsement on its Certificate of Documentation.

Effective January 1, 1994, the Coast Guard's regulatory standard for rebuild determinations will be found in 46 CFR § 67.177. (See final rule published in the **Federal Register** issue of Monday, November 15, 1993, page 60256.) In accordance with that standard, a vessel is rebuilt when "any considerable part of its hull or superstructure is built upon or is substantially altered." A determination that a vessel has been rebuilt, if the rebuilding was done outside the U.S., results in a permanent loss of the eligibility of the vessel to engage in the restricted trades, with a commensurate loss in value. At the present time none of the problematic terms contained in the regulatory standard are defined. As a result, the Coast Guard frequently receives requests for advisory opinions that certain work to be performed on a vessel does not constitute a rebuilding. In support of a request for a rebuild determination, the submitter will generally enclose extensive documentation addressing the character and scope of the work to be performed including plans, drawings, contracts, work orders, and materials lists. Then the submitter will attempt to show that the work will not build upon or "substantially" alter "any considerable part" of the vessel's hull or superstructure. Often, the submitter will make comparisons between the before and after area of the hull and superstructure; the weight and area of steel plate to be replaced or added; or the comparative cost of the planned work to the value of the vessel. Unfortunately, the vessel representative sometimes does not submit any documentation until after the work is performed only to have the Coast Guard determine that the vessel has been rebuilt, with the disastrous consequence of loss of trading entitlements. In other cases, the work actually done on the vessel differs from or exceeds the planned work, with possible adverse effects on the final determination.

The Coast Guard is considering initiating rulemaking to develop standards for determining when work

on a vessel constitutes a rebuilding and to define the terms involved in rebuild determinations. However, to assist it to determine the scope of the issues involved in the project and to receive suggested definitions and standards for consideration, the Coast Guard conducted a public meeting before proceeding with the rulemaking process. At the meeting held on November 16, 1993, the attendees requested time to consider the information and ideas shared at the meeting and the opportunity to submit written materials to the Coast Guard. In addition, the attendees requested that the Coast Guard schedule a second meeting to further discuss the issues involved, including whether the use of negotiated rulemaking would be appropriate. The Coast Guard agreed.

In order to have sufficient time to review written submissions prior to the meeting, all materials should be received by the Coast Guard on or before January 31, 1994. Attendees are encouraged to share written submissions with other attendees. An attendance list with addresses for this purpose may be obtained by contacting the person identified in **FOR FURTHER INFORMATION CONTACT** in this notice.

The meeting is open to the public and will begin at 9 a.m. on February 15, 1994, at: DOT Headquarters (Nassif Building), room 4400, 400 Seventh Street, SW., Washington, DC 20590.

Dated: December 29, 1993.

R.C. North,

Captain, U.S. Coast Guard, Acting Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 94–265 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–14–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 93–254, DA 93–1576]

Radio Broadcast Services; Limitations on Commercial Time on Television Broadcast Stations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of reply comment period.

SUMMARY: This action, in response to a request indicating good cause to extend the reply comment period filed by the Center for the Study of Commercialism, the Center for Media Education, the Consumer Federation of America, and the Office of Communication of the United Church for Christ, extends the deadline for filing reply comments in the Notice of Inquiry in the above-cited docket. The Notice solicited comments on whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. The Commission adopted the *Notice* on its own motion. Comments were due by December 20, 1993. The deadline for reply comments was originally January 5, 1994, and is extended until February 4, 1994.

DATES: Reply comments are now due by February 4, 1994.

ADDRESSES: Federal Communications Commission, 1919 M Street NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Paul R. Gordon, Mass Media Bureau, Video Services Division, (202) 632–6357.

SUPPLEMENTARY INFORMATION:

Order

Adopted: December 29, 1993
Released: December 29, 1993
Reply Comment Date: February 4, 1994
By the Chief, Mass Media Bureau

1. This action extends the deadline for filing reply comments in response to the Notice of Inquiry in MM Docket No. 93–254, 8 FCC Rcd 7277 (1993), in which the Commission seeks comment on whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. The Commission adopted the Notice on its own motion. Comments were due by December 20, 1993, and the deadline for reply comments was January 5, 1994.[1]

2. The Center for the Study of Commercialism, the Center for Media Education, the Consumer Federation of America, and the Office of Communication of the United Church for Christ (the parties) request a 30-day extension of the reply comment period in order to address adequately the matters asserted in the comments. The parties state that the reply comment period extends over the seasonal holidays, providing insufficient time in which to prepare an adequate reply. In addition, they state that their co-counsel, a clinical legal education program at a local law school, lacks the staff to prepare reply comments during the school holiday.[2]

3. In light of the foregoing, the Bureau finds that good cause exists for an extension. Grant of the request will provide the Commission a more substantial record upon which to base its findings. Therefore, pursuant to 47 CFR 0.283, the deadline for filing reply comments is extended until February 4, 1994.

Federal Communications Commission.

Roy J. Stewart,

Chief, Mass Media Bureau.

[FR Doc. 94–211 Filed 1–5–94; 8:45 am]

BILLING CODE 6712–01–M

[1] The Bureau altered these comments dates from the original dates set forth in the Notice of Inquiry. Order in MM Docket No. 93–254, DA No. 93–1425 (released November 22, 1993).

[2] The parties also state that an extension will allow the Commission to supplement the Notice. Specifically, they request that two pending petitions for rulemaking, both of which concern the Commission's rules on commercial sponsorship identification, be incorporated into this proceeding. However, we believe that the issues raised in the petitions for rulemaking are best addressed separately by the Commission. Accordingly, we decline to extend the range of issues addressed in this proceeding.

Notices

Federal Register
Vol. 59, No. 4
Thursday, January 6, 1994

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

Forms Under Review by Office of Management and Budget

December 30, 1993.

The Department of Agriculture has submitted to OBM for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection;

(2) Title of the information collection;

(3) Form number(s), if applicable;

(4) How often the information is requested

(5) Who will be required or asked to report;

(6) An estimate of the number of responses;

(7) An estimate of the total number of hours needed to provide the information;

(8) Name and telephone number of the agency contact person.

Questions about the time in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, room 404–W Admin. Bldg., Washington, DC 20250, (202) 690–2118.

New Collection

• Food Safety and Inspection Service, Processing Procedures and Quality Control Systems, FSIS Forms 8820–2 & 6000–17, Recordkeeping; on occasion, Businesses or other for-profit; 15,213 responses; 5,849 hours, Lee Puricelli, (202) 720–7163.

Larry K. Roberson,
Deputy Department Clearance Officer.

[FR Doc. 94–202 Filed 1–5–94; 8:45 am]

BILLING CODE 3410–01–M

Office of the Secretary

Meat Import Limitations; First Quarterly Estimate

Public Law 88–482, enacted August 22, 1964, as amended (19 U.S.C. 2253 note (the "Act"), provided for limiting the quantity of fresh, chilled, or frozen meat of bovine, sheep except lamb, and goats; and processed meat of beef or veal (Harmonized Tariff Schedule of the United States subheadings 0201.10.00, 0201.20.20, 0201.10.40, 0201.20.60, 0201.30.20, 0201.30.40, 0201.30.60, 0202.10.00, 0202.20.20, 0202.20.40, 0202.20.60, 0202.30.20, 0202.30.40, 0202.30.60, 0204.21.00, 0204.22.40, 0204.23.40, 0204.41.00, 0204.42.40, 0204.43.40, and 0204.50.00), other than Canada and Mexico, which may be imported into the United States in any Calendar year. Such limitations are to be imposed when the Secretary of Agriculture estimates that imports of articles, other than products of Canada and Mexico, provided for in Harmonized Tariff Schedule of the United States subheadings 0201.10.00, 0201.20.40, 0201.20.60, 0201.30.40, 0201.30.60, 0202.10.00, 0202.20.40, 0202.20.60, 0202.30.40, 0202.30.60, 0204.21.00, 0204.22.40, 0204.23.40, 0204.41.00, 0204.42.40, 0204.43.40, and 0204.50.00 (hereinafter referred to as "meat articles"), in the absence of limitations under the Act during such calendar year, would equal or exceed 110 percent of the estimated aggregate quantity of meat articles prescribed for calendar year 1994 by subsection 2(c) as adjusted under subsection 2(d) of the Act.

In accordance with the requirements of the Act, I have made the following estimates:

1. The estimated aggregate quantity of meat articles prescribed by subsection 2(c) as adjusted by subsection 2(d) of the Act for calendar year 1994 is 1,108.1 million pounds.

2. The first quarterly estimate of the aggregate quantity of meat articles which would, in the absence of limitations under the Act, be imported during calendar year 1994 is 1,218.8 million pounds.

Done at Washington, DC this 30th day of December, 1993.

Mike Espy,
Secretary.

[FR Doc. 94–192 Filed 1–5–94; 8:45 am]

BILLING CODE 3410–10–M

Forest Service

Environmental Impact Statement for the Mad River Water Withdrawal and Sugarbush South Snowmaking and Trail Improvement Project; Green Mountain National Forest; Towns of Warren and Fayston; Washington County, VT

AGENCY: Forest Service, USDA.

The Forest Service is the lead agency for preparing the Environmental Impact Statement. The U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, and U.S. Department of Interior—Fish and Wildlife Service are cooperating agencies.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The U.S. Department of Agriculture, Forest Service will prepare a Draft and Final Environmental Impact Statement to determine whether to authorize additional snowmaking capability and trail improvements at the Sugarbush South Ski Area as proposed by Snowridge, Inc. Authorization of the trail improvements and snowmaking would implement a portion of the Master Development Plan for the Sugarbush Valley Winter Sports Area, approved on July 14, 1983. The proposed use and activities are consistent with the Land and Resource Management Plan for the Green Mountain National Forest and the current Special Use Permit for operation of the Sugarbush Ski Resort. Authorization would require an amendment to the Master Development Plan for the Sugarbush Valley Winter Sports Area so that the Master Development Plan identifies the water source for snowmaking and the schedule for water withdrawal. The Master Development Plan would also be amended to accurately show the approved trail configuration and anticipated development schedule.

Sugarbush is a winter sports complex operated by Snowridge, Inc. and located on both private lands and National Forest System lands. There are about

2,100 acres at Sugarbush South, the area where this project is proposed. Of that 2,100 acres, about 1825 acres are National Forest System lands.

The purpose of the actions proposed by Snowridge, Inc. is to improve the quality of winter sports recreation opportunities at Sugarbush South by installing snowmaking equipment and facilities that would provide coverage over at least 70% of the ski trails, and by constructing widening, and grading the trail system so that there is improved skier traffic flow and safety. Improved trail design would also offer a better mix of opportunities for novice, intermediate, advanced, and expert skiers.

Additional snowmaking is needed because Sugarbush South currently has snowmaking coverage on only 38% of the ski trails. Natural snowfall is inconsistent and often inadequate during a typical Vermont winter. Predictable snow coverage is needed if Sugarbush is to consistently provide quality winter sports recreation opportunities, be attractive to skiers, and remain competitive with other major ski areas in New England. Increased snowmaking will also relieve skier traffic congestion problems and improve skier safety by providing more opportunities for skiers to disperse over many trails.

Trail widening is needed so that snow grooming equipment can be used and to relieve "bottle-necks" where skiers merge. Trail construction is needed to improve inter-connections among trails, improve skier traffic flow, and increase the number of intermediate and advanced trails so that the variety of skier experiences available is better geared to families and groups made up of skiers with different ability levels.

The proposed action is to: (1) Construct and operate a water withdrawal facility on the Mad River including a removable weir, a permanent Parshall flume and two intake structures; (2) Withdraw for snowmaking use an estimated 300–420 million gallons of water per year (the estimated average is 380 Million gallons per year) from the Mad River under a schedule which will prohibit withdrawals that would reduce flows to less than the February median flow rate (0.79 csm); (3) Construct and operate a 13-acre water storage pond located adjacent to the Mad River and having a capacity of approximately 55 to 60 million gallons; (4) Construct and operate pumping facilities adjacent to the water storage pond; (5) Construct a 15 foot wide, 1,800 foot long gravel access road from Highway 100 to the pond site; (6) Construct and operate about 3.3 miles of buried 16-inch pipeline to transport water from the storage pond to the snowmaking facilities at Sugarbush South; (7) Construct and operate a new snowmaking facility located in the vicinity of the existing vehicle maintenance shop. This is a building housing the pumps, compressors, and control system used for snowmaking; (8) Install approximately 90,000 feet of buried pipelines and hydrants along 24 trails at Sugarbush South and operate for snowmaking; (9) Use water from the Mad River source and the existing source on Clay Brook for snowmaking on an additional 157 acres of ski trails; and (10) Widen 24 trails, widen 2 lift lines, construct 6 new trails, and grade several existing trails. Total widening and trail construction will add 100 acres of skiable terrain.

Both the Forest Service and the U.S. Army Corps of Engineers have decisions to make with respect to the proposal. The Forest Service must decide whether to authorize the project under the Special Use Permit and whether to approve amendments to the Master Development Plan for the Sugarbush Valley Winter Sports Area. The U.S. Army Corps of Engineers must make a decision as to whether to issue a permit under Section 404 of the Clean Water Act to authorize the Mad River water withdrawal structures, holding pond, access road and fill.

The purpose of the Environmental Impact Statement is to determine the environmental effects of the proposed action and of any reasonable alternatives actions that would also achieve the purpose and need while addressing significant issues raised through public comment and agency review.

The alternatives may include any combination of feasible water withdrawal sources; water storage sites; and water withdrawal schedules on source rivers or brooks as long as those alternatives would achieve the purpose and need for this proposal while addressing significant issues that are identified during the analysis. Alternatives may include different trail configurations if significant concerns are raised about the trail improvements being proposed. The analysis will include a discussion of cumulative effects of all water withdrawals in the area affected by this proposal, including the current withdrawal at Clay Brook, the proposed withdrawal on Mad River, and any alternative water withdrawals that are identified.

This Environmental Impact Statement and analysis will not reconsider the overall development plans for the Sugarbush Valley Winter Sports Areas as described in the Master Development Plan approved on July 14, 1983. Forest Supervisor Terry Hoffman completed a review of that Master Development Plan on September 30, 1993. The Forest Supervisor determined that there is no need to change the overall development plan or supplement the 1983 Environmental Impact Statement that was prepared in support of that Plan, except for specific amendments to the Master Development Plan associated with the proposal from Snowridge Inc. to use the Mad River as a water source for snowmaking, increase the volume of water used for snowmaking, and revise the trail map (or the alternative to this proposal as selected by the Forest Service). Those specific amendments are the focus and scope of the Environmental Impact Statement that will be prepared.

The purpose of this Notice is to inform you that the Forest Service, with assistance from the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and U.S. Army Corp of Engineers is soliciting your comments and concerns about this proposed action.

The environmental analysis and decision-making process will include opportunities for public participation and comment so that people interested in this proposal may contribute to the final decision.

The Forest Service will host an open house to be held at the Waitsfield Elementary School, Waitsfield, Vermont, from 6:00 PM to 8:00 PM on Monday January 24, 1994. The purpose of this open house is to discuss and answer questions about the project proposal, the analysis process that will be conducted by the Forest Service and cooperating agencies, and the ways that people can best participate in the analysis and decision-making process.

Public participation will be welcome throughout the analysis, but is especially important at two points. The first point is during the scoping process (40 CFR 1501.7). The agency is now seeking written comments and suggestions on the scope of the analysis. Comments relevant to scoping include: (1) identifying potential issues, (2) identifying those issues to be analyzed in depth, (3) eliminating insignificant issues or those which have been covered by a previous environmental analysis, (4) identifying additional alternatives to the proposed action that should be considered, (5) identifying potential environmental effects of the proposed action and alternatives, and (6) determining task assignments among the lead and cooperating agencies. General

notice to the public concerning the scope of the analysis will be provided by mailings, news releases and/or public meetings. The second point when public participation is most important is during the public comment period on the Draft Environmental Impact Statement.

DATES: Comments related to the scope of the analysis should be received by February 18, 1994 to ensure timely consideration.

ADDRESSES: Submit written comments and suggestions related to the scope of analysis to Terry Hoffman, Forest Supervisor, Green Mountain National Forest, 231 N. Main Street, Rutland, VT 05701.

FOR FURTHER INFORMATION CONTACT: Direct questions about the proposed action and EIS to Sam Emmons, Green Mountain National Forest, 231 N. Main Street, Rutland, VT 05701, (phone 802–747–6757).

SUPPLEMENTARY INFORMATION: Sugarbush is a winter sports area which has operated by Special Use Permit since 1958 on National Forest System lands administered by the Green Mountain National Forest. Most of the base lodge facilities are on provide lands, but some of the base facilities and many of the lifts and trails are located on National Forest System lands. Sugarbush encompasses about 6,000 acres, of which a little over 1,825 acres are on National Forest System lands at Sugarbush South (about 30%).

Sugarbush operates in accordance with the Master Development Plan for the Sugarbush Valley Winter Sports Area, which was approved by the Forest Service on July 14, 1983. Specific operations on National Forest System lands are authorized under a Special Use Permit issued by the Forest Service on December 9, 1988.

The proposed action is consistent with the long-range goals for this area as defined in the Land and Resource Management Plan for the Green Mountain National Forest. That Forest Plan was approved on January 15, 1987. Under that Forest Plan, the area encompassed by the Suguarbush Ski Area is assigned to management under prescription 7.1A. This management prescription emphasizes highly developed areas, including downhill ski areas. The purpose of prescription 7.1A is to provide opportunities for recreation requiring highly developed structures and facilities, maintain a visually appealing landscape, and manage for other resources and uses in a compatible way. The Forest Service does not anticipate the need for any amendments to the Land and Resource Management Plan as a result of this snowmaking proposal.

On September 30, 1993, the Forest Service completed a review of an Environmental Impact Statement completed in 1983 and the Master Development Plan which was approved based on that Environmental Impact Statement. Based on that review, the Forest Supervisor determined that there was no need to supplement the 1983 Environmental Impact Statement or revise the Master Development Plan except for amendments to the Master Development Plan that may result from the analysis of the Mad River water withdrawal proposal.

Four amendments to the Master Development Plan would likely be required if the project proposal is approved: (1) Identify the Mad River as a source of water for snowmaking; (2) Identify the anticipated schedules and volumes for water withdrawal and any restrictions or requirements related to snowmaking water withdrawal; (3) Revise the Master Development Plan trails map so that it accurately displays the approved trail configuration for Sugarbush South; and (4) Update the Development Schedule (Appendix C in the Master Development Plan) so that it shows current estimates of completion dates for each phase of the previously approved development at Sugarbush.

The proposed snowmaking facilities, trail widening, construction, and improvement, and the actual snowmaking itself, would be located on National Forest System land operated under special use permit. Approval of these actions which would occur on National Forest System lands requires Forest Service authorization under the Special Use Permit.

The Department of the Army permit program is authorized by section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection Research and Sanctuaries Act. These laws require permits authorizing activities in or affecting navigable waters of the United States, the discharge of dredged or fill materials into waters of the United States, and the transportation of dredged material for the purpose of dumping it into ocean waters. The Corps must make a decision as to whether to issue a section 404 permit for activities associated with the Mad River water withdrawal. These activities include water withdrawal structures, holding pond, access road, and fill. The proposed water withdrawal site, storage pond, access road and most of the pipeline to the snowmaking facility would be located on private lands.

Several permits, certificates, or authorizations through the review processes established for the State of Vermont are also required to implement the proposed action. The District Environmental Commission must issue permits under the State of Vermont's Act 250 for various phases of the project. A 401 Certificate must be issued by the State Division of Water Quality. A Dam Permit must be issued by the State Agency of Natural Resources. At this time, all permits or authorizations required by the State of Vermont have been granted, except for one Act 250 permit to approve the trial improvements.

Until a Record of Decision based on this EIS is issued, the Sugarbush Ski Area will continue to bé managed according to the terms and conditions of the Land and Resource Management Plan for the Green Mountain National Forest, the Master Development Plan for the Sugarbush Valley Winter Sports Area, and the Special Use Permit.

A range of reasonable alternatives to the proposed action will be considered in the analysis. Reasonable alternatives are those which fulfill the purpose and need for the proposals and address significant issues that are identified during the scoping process. The analysis may include an evaluation of feasible alternative water sources or storage sites which could be used either separately or in combination to meet snowmaking objectives while reducing or avoiding impacts to the aquatic environment. Only one specific alternative to the proposed action has been identified at this time. That is the "no action" alternative. If the "no action" alternative were selected, the proposed project would not take place at this time. Other alternatives will be developed based on the results of scoping.

The analysis will address major issues and concerns about the proposed action and alternatives and will disclose the direct and indirect impacts related to those issues. The following tentative issues have been identified: (1) Impacts to wetlands and floodplains; (2) Impacts to waterways; (3) Impacts to cultural resource; (4) Impacts to streams from increased snowpack and runoff; (5) Impacts to fisheries; (6) Effect on the suitability of the Mad River for inclusion in the national system of Wild and Scenic Rivers; (7) Effect on recreation opportunities, specifically skiing and winter sports at Sugarbush South; (8) Effects on visual quality, and (9) Impacts to the local economy.

The Draft Environmental Impact Statement is expected to be filed with the Environmental Protection Agency and to be available for public review in

the summer of 1994. At that time, the Environmental Protection Agency will publish a Notice of Availability in the **Federal Register**.

The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the Notice of Availability in the **Federal Register**.

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

After the comment period ends on the Draft Environmental Impact Statement, the comments will be analyzed and considered by the agency in preparing the Final Environmental Impact Statement.

The Final Environmental Impact Statement is scheduled to be completed and available to the public approximately 5 months following the close of the review period for the Draft Environmental Impact Statement. The responsible Forest Service official will document the decision and the reasons supporting it in a Record of Decision. That decision will be subject to appeal pursuant to 36 CFR part 215.

A separate decision will be made by the U.S. Army Corps of Engineers concerning the issuance of permits under section 404 of the Clean Water Act.

The Forest Service official responsible for approving the proposed action is Terry Hoffman, Forest Supervisor, Green Mountain National Forest, 231 North Main Street, Rutland, VT 05701.

Dated: December 21, 1993.

Terry W. Hoffman,

Forest Supervisor.

[FR Doc. 94–407 Filed 1–5–94; 8:45 am]

BILLING CODE 3410–11–M

Rural Electrification Administration

Rural Telephone Bank

Amendment to the Rural Electrification Act's "Buy American" Provision

AGENCY: Rural Electrification Administration and Rural Telephone Bank, USDA.

ACTION: Notice of Amendment to the Rural Electrification Act's "Buy American" Provision.

SUMMARY: The recently passed North America Free Trade Agreement Implementation Act has amended the Rural Electrification Act's "Buy American" provision. Previously, the provision required borrowers, when using loan funds, to purchase only equipment that was manufactured in the United States and that was made mostly from materials and supplies originating in the United States. The amended provision permits borrowers to also purchase equipment, under similar conditions, from Canadian or Mexican manufacturers.

FOR FURTHER INFORMATION CONTACT: For telephone program matters: George Bagnall, Chief, Engineering Standards Branch, Telecommunications Standards Division, Rural Electrification Administration, Room 2846, South Building, U.S. Department of Agriculture, Washington DC 20250–1500, telephone number (202) 720–0698.

For electric program matters: Harvey L. Bowles, Chairman, Technical Standards Committee "A" (Electric), Electric Staff Division, Rural Electrification Administration, Room 1246, South Building, U.S. Department of Agriculture, Washington, DC 20250–1500, telephone number (202) 720–0980.

SUPPLEMENTARY INFORMATION: The North American Free Trade Agreement Implementation Act, Public Law 103–182, (NAFTA Implementation Act) was signed into law on December 8, 1993. Section 381 (d) of Subtitle G of Title III of the NAFTA Implementation Act amends the REA "Buy American" provision established by Section 401 of the Rural Electrification Act of 1938, 52 Stat. 313, 318, 7 U.S.C. 901 et. seq., (1938 RE Act). The REA "Buy American" provision was revised by adding ", Mexico, or Canada" after every reference therein to the "United States."

Prior to its amendment by the NAFTA Implementation Act, the 1938 RE Act generally required borrowers, when using loan funds, to purchase equipment that was manufactured in the United States that was made mostly from materials and supplies originating in the United States. The NAFTA Implementation Act amendment of the 1938 RE Act takes effect on January 1, 1994. Generally speaking, after December 31, 1993, borrowers using funds from loans which have been made or guaranteed by REA or the Rural Telephone Bank will be able to satisfy REA's "Buy American" provision by purchasing equipment that has been manufactured in North America and made mostly of materials and supplies originating in North America, i.e., in the United States, Mexico, or Canada.

The REA "Buy American" provision as revised by the NAFTA Implementation Act reads as follows:

> In making loans pursuant to this title and pursuant to the Rural Electrification Act of 1936, the Administrator of Rural Electrification Administration shall require that, to the extent practicable and the cost of which is not unreasonable, the borrower agree to use in connection with the expenditure of such funds only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, Mexico, or Canada, and only such manufactured articles, materials, and supplies as have been manufactured in the United States, Mexico, or Canada substantially all from articles, materials or supplies, mined, produced, or manufactured, as the case may be, in the United States, Mexico, or Canada.

The amended provision applies to all procurements within REA's jurisdiction that commence after December 31, 1993, which involve any REA, Rural Telephone Bank or guaranteed loan funds. REA is notifying borrowers, as well as Canadian and Mexican manufacturers with current REA technically-accepted products, of this

change in the REA "Buy American" provision.

REA is also making technical revisions to its existing forms of loan contracts and loan contract amendments to conform them to the 1938 RE Act as amended by NAFTA. REA will begin using these revised forms for all transactions entered into after December 31, 1993. In addition, REA is making similar technical revisions to its recommended forms of contracts providing for the purchase of materials and supplies. These changes will have no effect on any contract which is fully in effect prior to January 1, 1994.

Michael V. Dunn,

Acting Under Secretary, Small Community and Rural Development.

[FR Doc 94–233 Filed 1–5–94; 8:45 am]

BILLING CODE 3410–15–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: Quarterly Survey of the Finances of Public–Employee Retirement Systems.

Form Number(s): F–10.

Agency Approval Number: 0607–0143.

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: 416 hours.

Number of Respondents: 104.

Avg Hours Per Response: 1 hour.

Needs and Uses: This survey provides, on a quarterly basis, nationwide data on the receipts, expenditures, and cash and security holdings of the 104 largest public–employee retirement systems. These 104 systems control billions of asset dollars and represent 90 percent of the total assets of all public employee retirement systems. Census conducts this survey at the request of the Council of Economic Advisors and the Federal Reserve Board. Economists from these agencies, the Department of Treasury, the Bureau of Economic Analysis, and others use these data to monitor and analyze investment trends and to formulate governmental economic policies and investment decisions.

Affected Public: State or local governments.

Frequency: Quarterly.

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: January 3, 1994.

Edward Michals,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 94–283 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–07–F

Foreign-Trade Zones Board

[Docket 64-93]

Foreign-Trade Zone 24—Pittston (Wilkes-Barre/Scranton), PA; Application for Subzone, Merck & Co. Pharmaceutical Plant, Riverside, PA

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Eastern Distribution Center, Inc., grantee of FTZ 24, requesting special-purpose subzone status for the pharmaceutical manufacturing facility of Merck & Co., Inc., (Merck) in Riverside, Pennsylvania. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on December 28, 1993.

Merck is one of the world's largest pharmaceutical manufacturers with nearly $9 billion in total sales in 1991. Its primary product lines include: Patented prescription and over-the-counter pharmaceutical products, veterinary pharmaceuticals, and agricultural and specialty chemicals. This proposal is part of an overall company cost reduction effort (subzone status is being requested for seven other Merck facilities).

Merck's Riverside plant (364 acres, 650,000 sq. ft., 68 bldgs.) is located at First Street and Avenue C in Riverside (Northumberland County), Pennsylvania, some 60 miles southwest of Scranton. The facility (560 employees) is used to produce bulk pharmaceutical chemicals and intermediates used at other Merck plants in the manufacture of human and animal health products, agricultural chemicals (including "Avermectin" and "Ethopabate"), and industrial chemicals. At the outset, zone procedures would be used primarily in the production of "Primaxin", a broad spectrum antibiotic produced for the company's Human Health Division. Currently, foreign-sourced materials account for 33 to 43 percent of finished product value and include the following specific ingredients: Acetoxy azetidinone, HP–20 resin dianon, SP–207 (brominated polystyrine resin), bromochloropentane, and D-carboxamide. The company also may purchase from abroad items in the following general product categories: Gums, starches, waxes, vegetable extracts, mineral oils, phosphoric acid, hydroxides, hydrazine and hydroxylamine, chlorides, phosphates, carbonates, hydrocarbons, alcohols, phenols, ethers, epoxides, acetals, aldehydes, ketone function compounds, mono- and polycarboxylic acids, phosphoric esters, amine-, carboxymide, nitrile- and oxygen-function compounds, heterocyclic compounds, sulfonamides, vitamins, hormones, sugars, antibiotics, gelatins, enzymes, color lakes, soaps and detergents, medicaments, and pharmaceutical products. The company may also source from abroad insecticides, rodenticides, fungicides, and herbicides for use in its agricultural/veterinary products. Currently, exports account for some 40 percent of production.

Zone procedures would exempt Merck from Customs duty payments on foreign materials used in production for export. On domestic sales, the company would be able to choose the duty rates that apply to the finished products ("Primaxin"—3.7%; others—duty-free to 23.5%). The duty rates on foreign-sourced items range from duty-free to 23.5 percent, with most falling in the 3.7%–7.9% range. The application indicates that the savings from zone procedures will help improve the plant's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 7, 1994. Rebuttal comments in response to material submitted during the foregoing period

may be submitted during the subsequent 15-day period (to March 22, 1994).

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations:

Port Director, U.S. Customs Service, Northeast Region, Bldg. 135, 2nd Floor, Middletown, PA 17057.

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, room 3716, 14th & Pennsylvania Avenue, NW., Washington, DC 20230.

Dated: December 28, 1993.

Dennis Puccinelli,

Acting Executive Secretary.

[FR Doc. 94-282 Filed 1-5-94; 8:45 am]

BILLING CODE: 3510-DS-P

International Trade Administration

[A-351-820]

Final Determination of Sales at Less Than Fair Value: Ferrosilicon From Brazil

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: January 6, 1994.

FOR FURTHER INFORMATION CONTACT: Kimberly Hardin, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-0371.

FINAL DETERMINATION: We determine that ferrosilicon (FeSi) from Brazil is being, or is likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (the Act), and that critical circumstances exist for Italmagnesio S.A. Industria e Comercio (Italmagnesio), but not for Companhia Ferroligas Minas Gerais (Minasligas) or Companhia Brasileira Carbureto de Calcio (CBCC). The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Scope of Investigation

The merchandise subject to this investigation is ferrosilicon, a ferroalloy generally containing, by weight, not less than four percent iron, more than eight percent but not more than 96 percent silicon, not more than 10 percent chromium, not more than 30 percent manganese, not more than three percent phosphorous, less than 2.75 percent magnesium, and not more than 10 percent calcium or any other element.

FeSi is a ferroalloy produced by combining silicon and iron through smelting in a submerged-arc furnace. FeSi is used primarily as an alloying agent in the production of steel and cast iron. It is also used in the steel industry as a deoxidizer and a reducing agent, and by cast iron producers as an inoculant.

FeSi is differentiated by size and by grade. The sizes express the maximum and minimum dimensions of the lumps of FeSi found in a given shipment. FeSi grades are defined by the percentages by weight of contained silicon and other minor elements. FeSi is most commonly sold to the iron and steel industries in standard grades of 75 percent and 50 percent FeSi.

Calcium silicon, ferrocalcium silicon, and magnesium ferrosilicon are specifically excluded from the scope of this investigation. Calcium silicon is an alloy containing, by weight, not more than five percent iron, 60 to 65 percent silicon, and 28 to 32 percent calcium. Ferrocalcium silicon is a ferroalloy containing, by weight, not less than four percent iron, 60 to 65 percent silicon, and more than 10 percent calcium. Magnesium ferrosilicon is a ferroalloy containing, by weight, not less than four percent iron, not more than 55 percent silicon, and not less than 2.75 percent magnesium.

FeSi is currently classifiable under the following subheadings of the Harmonized Tariff Schedule of the United States (HTSUS): 7202.21.1000, 7202.21.5000, 7202.21.7500, 7202.21.9000, 7202.29.0010, and 7202.29.0050. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

FeSi in the form of slag is included within the scope of this investigation if it meets, generally, the chemical content definition stated above and is capable of being used as FeSi. FeSi is used primarily as an alloying agent in the production of steel and cast iron. It is also used in the steel industry as a deoxidizer and a reducing agent, and by cast iron producers as an inoculant. Parties that believe their importations of slag do not meet these definitions should contact the Department and request a scope determination.

Period of Investigation

The period of investigation (POI) is July 1, 1992, through December 31, 1992.

Case History

Since the publication of the notice of preliminary determination on August 16, 1993 (58 FR 43323), the following events have occurred.

On August 20, 1993, respondent Italmagnesio notified the Department that it had decided to withdraw from participation in this investigation and requested the return of all documents that it submitted during the course of the investigation.

On August 25, 1993, we returned the proprietary versions of all documents submitted by Italmagnesio during the investigation.

On August 23, 24, and 25, 1993, CBCC, petitioners, and Minasligas, respectively, requested a public hearing.

The Department conducted verification of the cost and sales responses of Minasligas and CBCC in Brazil from August 25 through September 14, 1993.

Petitioners, CBCC, and Minasligas submitted case briefs on October 27, 1993, and rebuttal briefs on November 1, 1993.

On November 3, 1993, a public hearing was held.

Best Information Available

As stated in the "Case History" section of this notice, Italmagnesio withdrew its responses prior to verification and stated that it would not participate further in the investigation. Therefore, Italmagnesio must be considered a non-cooperating party. As a non-cooperating party, based on our past practice (*see e.g.*, 58 FR 37215, *Final Determination of Sales At Less Than Value, Certain Cut-to-Length Carbon Steel Plate from the United Kingdom*, July 9, 1993), Italmagnesio will be assigned the higher of the margins alleged in the petition or a calculated margin for another company as best information available (BIA). (See Comment 15)

Such or Similar Comparisons

We have determined that all the products covered by this investigation constitute a single category of such or similar merchandise. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared similar merchandise based on the following criteria: (1) The percentage range, by weight, of silicon content; (2) grade; and (3) sieve size. (See Comment 2 with regard to sieve size.)

Fair Value Comparisons

To determine whether sales of FeSi from Brazil to the United States were made at less than fair value, we compared the United States price (USP) to the foreign market value (FMV), as specified below.

United States Price

A. CBCC

We based USP on purchase price, in accordance with section 772(b) of the Act, because the subject merchandise was sold to unrelated purchasers in the United States prior to importation and exporter's sales price was not indicated by other circumstances.

We calculated purchase price based on packed FOB port of embarkation prices to unrelated customers. Because CBCC did not report packing for bulk sales, we used information from the public version of Minasligas' response for bulk packing. We made deductions where appropriate for foreign inland freight (which also included foreign inland insurance), foreign brokerage and handling, and warehousing.

We made an adjustment to USP for the taxes paid on the comparison sales in Brazil. On October 7, 1993, the Court of International Trade (CIT), in *Federal-Mogul Corp. and The Torrington Co.* v. *United States*, Slip Op. 93–194 (CIT, October 7, 1993), rejected the Department's methodology for calculating an addition to USP under section 772(d)(1)(C) of the Act to account for taxes that the exporting country would have assessed on the merchandise had it been sold in the home market. The CIT held that the addition to USP under section 772(d)(1)(C) of the Act should be the result of applying the foreign market tax rate to the price of the United States merchandise at the same point in the chain of commerce that the foreign market tax was applied to foreign market sales. *Federal-Mogul*, Slip Op. 93–194 at 12.

The Department has changed its methodology in accordance with the *Federal-Mogul* decision, and has applied this new methodology in making the final determination in this investigation. From now on, the Department will add to USP the result of multiplying the foreign market tax rate by the price of the United States merchandise at the same point in the chain of commerce that the foreign market tax was applied to foreign market sales. The Department will also adjust the USP tax adjustment and the amount of tax included in FMV. These adjustments will deduct the portions of the foreign market tax and the USP tax adjustment that are the result of expenses that are included in the foreign market price used to calculate foreign market tax and are included in the United States merchandise price used to calculate the USP tax adjustment and that are later deducted to calculate FMV and USP. These adjustments to the amount of the foreign market tax and the USP tax adjustment are necessary to prevent the new methodology for calculating the USP tax adjustment from creating antidumping duty margins where no margins would exist if no taxes were levied upon foreign market sales.

This margin creation effect is due to the fact that the bases for calculating both the amount of tax included in the price of the foreign market merchandise and the amount of the USP tax adjustment include many expenses that are later deducted when calculating USP and FMV. After these deductions are made, the amount of tax included in FMV and the USP tax adjustment still reflects the amounts of these expenses. Thus, a margin may be created that is not dependent upon a difference between USP and FMV, but is the result of the price of the United States merchandise containing more expenses than the price of the foreign market merchandise. The Department's policy to avoid the margin creation effect is in accordance with the United States Court of Appeals' holding that the application of the USP tax adjustment under section 772(d)(1)(C) of the Act should not create an antidumping duty margin if pre-tax FMV does not exceed USP. *Zenith Electronics Corp.* v. *United States*, 988 F.2d 1573, 1581 (Fed. Cir. 1993). In addition, the CIT has specifically held that an adjustment should be made to mitigate the impact of expenses that are deducted from FMV and USP upon the USP tax adjustment and the amount of tax included in FMV. *Daewoo Electronics Co., Ltd.* v. *United States*, 760 F. Supp. 200, 208 (CIT, 1991). However, the mechanics of the Department's adjustments to the USP tax adjustment and the foreign market tax amount as described above are not identical to those suggested in *Daewoo*.

In this investigation, there are four different taxes levied on sales of the subject merchandise in the home market. The ICMS tax is a regional tax, which varies depending upon the state in which the purchase originates. The IPI tax is a fixed percentage rate tax of four percent. Finally, the PIS and FINSOCIAL taxes are a fixed percentage rate tax equalling 2.65 percent combined. CBCC used both a unit and a gross basis to calculate the combined PIS and FINSOCIAL taxes within various months of the POI. We recalculated these taxes on a unit basis, where appropriate, which is the way CBCC calculated them. Because these taxes are calculated on the same base price, we find them not to be cascading. Thus, for each sale, we made only one tax adjustment which equals the sum of the actual tax rates.

B. Minasligas

We based USP on purchase price, in accordance with section 772(b) of the Act, because the subject merchandise was sold to unrelated purchasers in the United States prior to importation and exporter's sales price was not indicated by other circumstances.

We calculated purchase price based on packed FOB port of embarkation prices to unrelated customers. We made deductions where appropriate for foreign inland freight (which also included foreign inland insurance) and foreign brokerage and handling.

We made an adjustment to USP for the taxes paid on the comparison sale in Brazil. (See above description under "A. *CBCC*" for an explanation of our new tax methodology as well as a description of the specific taxes in this investigation.)

Foreign Market Value

In order to determine whether there were sufficient sales of FeSi in the home market to serve as a viable basis for calculating FMV, we compared the volume of home market sales of FeSi to the aggregate volume of third country sales in accordance with section 773(a)(1)(B) of the Act. For both CBCC and Minasligas, the volume of home market sales was greater than five percent of the aggregate volume of third country sales. Therefore, for both CBCC and Minasligas, we determined that home market sales of FeSi constituted a viable basis for calculating FMV, in accordance with 19 CFR 353.48(a).

In the petition and in subsequent filings, petitioners alleged that home market sales were made at less than the cost of production (COP) and that constructed value (CV) should be used to compute FMV. Based on petitioners' allegations, which provided a reasonable basis to "believe or suspect" below cost sales (see section 773(b) of the ACT), we initiated COP investigations. We examined respondents' cost data at verification and analyzed this information for purposes of this final determination.

We determine Brazil's economy to be hyperinflationary. Therefore, in order to eliminate the distortive effects of inflation, consistent with past practice (see, *e.g.*, *Final Determination of Sales at Less Than Fair Value and Amended Antidumping Duty Order, Tubeless Steel Disc Wheels from Brazil*, 53 FR 34566, September 7, 1988), we calculated separate weighted-average FMVs, COPs, and CVs for each month.

A. CBCC

In order to determine whether home market sales were above the COP, we calculated the monthly COPs on the basis of CBCC's cost of materials, fabrication, general expenses, and packing. We relied on the COP data submitted by CBCC except in the following instances where the costs were not appropriately quantified or valued. Specifically, we:

1. Revised general and administrative (G&A) expenses by calculating them as a percentage of cost of goods sold as reported on CBCC's 1992 financial statements (see Comment 4);
2. Added an amount for the G&A expenses of CBCC's parent company (see Comment 4);
3. Revised the interest expense computation using the financial statements of CBCC's parent, Solvay do Brasil (see Comment 3);
4. Included IPI and ICMS taxes as part of reported material costs in COP (see Comment 5);
5. Recalculated the cost of CBCC's own production of charcoal based upon BIA (see Comment 6);
6. Recalculated depreciation costs for Furnace 8 based upon a 10 year useful life (see Comment 7);
7. Corrected an error in the October 1992 calculation of electricity cost (see Comment 9);
8. Added packing expenses in COP for the home market and United States, respectively.

We compared individual home market prices with the monthly COPs. We tested the home market prices on a sieve-size-specific basis and found, for all sieve sizes, that between 10 and 90 percent of sales in the home market were made at prices above the COP. Therefore, we disregarded the below-cost sales, if those sales were made over an extended period of time. CBCC did not provide any information in its responses to indicate that its below cost sales were made at prices which would permit recovery of all costs within a reasonable period of time in the normal course of trade. In order to determine whether below-cost sales were made over an extended period of time, we performed the following analysis on a product-specific basis: (1) If respondent sold a product in only one month of the POI and there were sales in that month below the COP, or (2) if respondent sold a product during two months or more of the POI and there were sales below the COP during two or more of those months, then below-cost sales were considered to have been made over an extended period of time. All of CBCC's sales were made over an extended period of time.

For CBCC, we based FMV on home market prices. However, for one U.S. sale, although there were comparable home market sales in the same month, we were unable to make a difference-in-merchandise (DIFMER) adjustment. This is because the U.S. product was produced in a month different than the home market products and in hyperinflationary economies, we limit such adjustments to products produced and sold in the same month. In that instance, we used CV as FMV.

We calculated CV in accordance with section 773(e)(1) of the Act. The monthly CV includes materials, fabrication, general expenses, profit and packing. We made all adjustments described in the COP section (except for the inclusion of ICMS and IPI taxes in material costs) in calculating the CV. We used the following as the basis for calculating CV:

(1) CBCC's actual general expenses because they exceed the statutory ten percent minimum of materials and fabrication, in accordance with section 773(e)(1)(B)(i) of the Act;

(2) the statutory minimum profit of eight percent, in accordance with section 773(e)(1)(B)(ii) of the Act, as CBCC's profit was less than eight percent of the sum of general expenses and the cost of manufacture; and

(3) we calculated an offset to interest expense to avoid double counting the portion of such expense attributable to the imputed credit and inventory carrying costs which were already included in the selling, general and administrative expenses.

We made circumstance-of-sale adjustments for differences in credit expenses, in accordance with 19 CFR 353.56(a). Finally, we added U.S. packing expenses to CV.

For price-to-price comparisons, we based FMV on ex-factory prices, inclusive of packing, to unrelated customers. We deducted foreign inland freight from FMV. We made circumstance-of-sale adjustments, where appropriate, for differences in credit expenses, in accordance with 19 CFR 353.56(a). Because the home market credit figure reported by CBCC is actually interest revenue, we imputed credit expense and then applied the interest revenue as an offset against the imputed expense. We also used the actual paydates found at verification in our credit expense calculation. For those sales which we did not examine at verification, we added the average difference between the paydate reported and the actual paydate from the verified sales.

For FeSi sales packed in bags, we deducted home market packing costs and added U.S. packing costs. Because CBCC did not report packing for bulk sales, we used information on bulk packing costs from the public version of Minasligas' response for these sales.

We included in the FMV the amount of taxes collected in the home market. We also calculated the amount of the tax that was due solely to the inclusion of price deductions in the original tax base (i.e., the sum of any amounts that were deducted from the tax base). This amount was deducted from the FMV after all other additions and deductions had been made. By making the additional tax adjustments, we avoid a distortion that would create a dumping margin even when pre-tax dumping is zero.

B. Minasligas

In order to determine whether home market sales were above the COP, we calculated the monthly COPs on the basis of Minasligas' cost of materials, fabrication, general expenses, and packing. We relied on the COP data submitted by Minasligas except in the following instances where the costs were not appropriately quantified or valued. Specifically, we:

1. Revised G&A expenses by calculating them on an annual basis as a percentage of cost of goods sold as reported in Minasligas' 1992 financial statements (see Comment 4);
2. Revised interest expenses to include finance expenses of Delp (Minasligas' parent company), and disallowed a portion of the claimed interest income offset (see Comment 3);
3. Included IPI and ICMS taxes as part of reported material costs in COP (see Comment 5);
4. Revised the labor and overhead allocation methodology to reflect production quantity (see Comment 14);
5. Adjusted the inventory holding gains and losses to account for revisions in the reported costs (see Comment 10);
6. Disallowed the claimed differences in cost between high purity and standard grade FeSi and used the "all kinds" reported costs;
7. Added packing expenses in COP for the home market and United States, respectively.

We compared individual home market prices with the monthly COPs. We tested the home market prices on a sieve-size-specific basis and found, for certain sieve sizes, that between 10 and 90 percent of sales of each in the home market were made at prices above the COP. Therefore, we disregarded the below-cost sales for those sieve sizes, if those sales were made over an extended period of time. Minasligas did not provide any information in its responses

to indicate that its below cost sales were made at prices which would permit recovery of all costs within a reasonable period of time in the normal course of trade. In order to determine whether below-cost sales were made over an extended period of time, we performed the following analysis on a product-specific basis: (1) If respondent sold a product in only one month of the POI and there were sales in that month below the COP, or (2) if respondent sold a product during two months or more of the POI and there were sales below the COP during two or more of those months, then below-cost sales were considered to have been made over an extended period of time. All of Minasligas' below cost sales were made over an extended period of time.

For Minasligas, we based FMV on home market prices. We calculated FMV based on ex-factory prices, inclusive of packing, to unrelated customers. We deducted foreign inland freight from FMV. We made circumstance-of-sale adjustments, where appropriate, for differences in credit expenses, in accordance with 19 CFR 353.56(a). Because the home market credit figure reported by Minasligas is actually interest revenue, we imputed credit expense and then used the interest revenue as an offset against the imputed expense. We imputed U.S. credit because Minasligas did not report this expense. We used the "First Payment" date reported by Minasligas and the monthly interest rates based on the "Taxa Referential" which is the Brazilian Government's referential index for short-term borrowings. We also made circumstance-of-sale adjustments, where appropriate, for direct selling expenses (finance charges), warehousing, and quality control expenses. We reallocated a portion of direct selling expenses to foreign brokerage and handling based on findings at verification. Finally, we deducted home market packing costs and added U.S. packing costs.

We included in FMV the amount of taxes collected in the home market. We also calculated the amount of the tax that was due solely to the inclusion of price deductions in the original tax base (i.e., the sum of any adjustments that were deducted from the tax base). This amount was deducted from the FMV after all other additions and deductions had been made. By making the additional tax adjustments, we avoid a distortion that would create a dumping margin even when pre-tax dumping is zero.

Critical Circumstances

Petitioners alleged that critical circumstances exist with respect to imports of FeSi from Brazil. Section 735(a)(3) of the Act provides that critical circumstances exist if we determine that:

(A) (i) There is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or

(ii) The person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and,

(B) There have been massive imports of the class or kind of merchandise which is the subject of the investigation over a relatively short period.

Regarding (A)(i) above, we normally consider whether there has been an antidumping order in the United States or elsewhere on the subject merchandise in determining whether there is a history of dumping. Regarding (A)(ii) above, we normally consider margins of 25 percent or more for purchase price comparisons and 15 percent or more for exporter's sales price comparisons as sufficient to impute knowledge of dumping.

Pursuant to section 735(a)(3)(B), we generally consider the following factors in determining whether imports have been massive over a short period of time: (1) The volume and value of the imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by imports. If imports during the period immediately following the filing of a petition increase by at least 15 percent over imports during a comparable period immediately preceding the filing of a petition, we normally consider them massive.

Since the calculated dumping margins for CBCC and Minasligas are not in excess of 25 percent, we cannot impute knowledge under section 735(a)(3)(A)(ii) of the Act. (See, *e.g., Final Determination of Sales At Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Italy*, 52 FR 24198, June 29, 1987.) Petitioners provided information regarding respondent's history of dumping in a third country. Therefore, we examined whether imports have been massive. Based on our analysis of verified company specific import data, we determined that imports have not been massive over a relatively short period of time for CBCC and Minasligas. Accordingly, we determine that critical circumstances do not exist for CBCC and Minasligas. However, for Italmagnesio, a non-cooperative respondent, based on BIA we determine that critical circumstances exist. In the case of Italmagnesio, the margin in excess of 25 percent is high enough to impute knowledge of dumping and, as BIA, we concluded that imports have been massive over a relatively short period of time.

Because we found that critical circumstances do not exist with respect to all cooperative respondents, we also find that critical circumstances do not exist with respect to all other exporters and producers of the subject merchandise from Brazil, except for Italmagnesio.

Verification

As provided in section 776(b) of the Act, we conducted verification of the information provided by CBCC and Minasligas by using standard verification procedures, including the examination of relevant sales and financial records, and selection of original source documentation containing relevant information.

Currency Conversion

No certified rates of exchange, as furnished by the Federal Reserve Bank of New York, were available for the POI. In place of the official certified rates, we used the daily official exchange rates for the Brazilian currency published by the Central Bank of Brazil. In the instances when a post-POI exchange rate was required, we used a monthly average exchange rate from International Monetary Fund's International Financial Statistics.

In hyperinflationary economies, the Department normally converts movement charges for the U.S. sales on the date these charges become payable. Where we did not have the exact payment date for a charge, we converted charges for U.S. sales on the date of shipment, the closest approximation to the date the charges became payable. For two of CBCC's U.S. sales, it was necessary to convert the bulk packing charges on the date of sale as we did not have a bulk packing rate in the month of shipment for those U.S. sales. Thus, for these two sales we converted the packing charges in the same month in which the U.S. sales occurred.

Interested Party Comments

Comment 1: Petitioners argue that, based on the facts now available to the Department, the dumping margins established in the preliminary determination are inadequate to offset the actual dumping margin of Brazilian FeSi producers. In addition, petitioners

believe that at verification the Department confirmed the existence of major, continuing deficiencies in respondents' information. Accordingly, petitioners contend that the Department should assign the highest, most adverse margin based on noncooperative BIA to both CBCC and Minasligas.

DOC Position: We disagree with petitioners. CBCC and Minasligas' mistakes, found during the course of this investigation, when taken as a whole, do not represent a verification failure and do not support a claim of respondents' noncooperation. The minor errors in calculation or discrepancies with regard to adoption of certain methodological premises do not merit the use of BIA. Therefore, we have followed our practice of correcting errors found at verification as long as those errors are minor and do not exhibit a pattern of systemic misstatement of fact. Thus, we are able to use the data submitted by CBCC and Minasligas, corrected for errors noted at verification, in our calculations.

Comment 2: Petitioners argue that the Department should use the highest, most adverse noncooperative BIA rate for CBCC and Minasligas since they both repeatedly failed to provide the Department with the accurate sieve size and silicon content of the FeSi they sold. Petitioners maintain that CBCC's August 17, 1993, letter contained information about silicon content and sieve size known to be inaccurate. Petitioners contend that accurate information was clearly available to CBCC and the fact that it was not provided prevented the Department from making such or similar comparisons in the final determination, as required by the Act. Similarly, petitioners note that Minasligas, in its August 25, 1993, revised product concordance, failed to provide the exact silicon content and sieve size of its home market sales.

CBCC believes that the Department incorrectly based its preliminary determination on BIA because of the alleged failure by CBCC to provide a proper product concordance. CBCC states that it cannot fabricate a product concordance to the level of sieve size, which was requested by the Department, because there is no difference in product between sieve sizes. CBCC argues that the Department verified that sieve size is irrelevant in terms of the cost and the price and, thus, any DIFMER would be zero. CBCC maintains that based on the information submitted and the production processes observed at verification, the Department should use CBCC's information as the basis for the final determination.

Similarly, Minasligas maintains that sieve size does not impact cost or price of FeSi and should not be considered a factor for product comparison purposes. With respect to providing information on exact silicon content, Minasligas contends that the ASTM standard specifications for FeSi 75 percent under grade C provide for a product containing between 74 percent and 79 percent of silicon. Minasligas argues that since all of its FeSi sales are of FeSi 75 percent the exact silicon content of the product within this range is irrelevant.

DOC Position: We agree with respondents. We determine that Minasligas provided a unique code for each sieve size for each sale during the POI, in accordance with directions in Appendix V. We used Minasligas' product matching method for purposes of margin calculation; however, we rematched in a few instances where we disagreed with their selection. We based matching on home market sales with sieve size ranges which were closest to the sieve size range of the U.S. product.

We also determine that CBCC reported sieve sizes in accordance with Appendix V. The sieve size ranges reported by CBCC were broader than those reported by Minasligas and were broader than the ranges observed on CBCC's individual home market sales. Nevertheless, these ranges do allow us to match within the closest sieve size range, as specified in Appendix V. Moreover, these broad ranges are consistent with CBCC's selling practices. CBCC stated on the record that it fills customer orders with the broadest range of possible sieve sizes. Therefore, we accepted CBCC's revised coding system, and matched home market sales with all possible sieve sizes, including those that may extend beyond the sieve size range of the U.S. product because this corresponds to CBCC's selling practices. We excluded from FMV only those home market sales where the sieve size ranges are entirely outside the sieve size range of the U.S. sale in question. (See Concurrence Memorandum dated December 29, 1993.)

In addition, we also agree with respondents that reported silicon content ranges, within acceptable ASTM specifications, are adequate.

Comment 3: Petitioners claim that both CBCC and Minasligas failed to report their respective interest expenses on a consolidated basis for the purposes of calculating COP in accordance with Department practice. Petitioners argue that CBCC's refusal to provide this information prevented the Department from verifying these expenses. Accordingly, petitioners state that the Department should use adverse, "noncooperative BIA" in calculating interest expense for CBCC. However, in the event that the Department does not use "noncooperative BIA," petitioners suggest that the Department use Solvay do Brasil's audited financial statements to calculate interest expense for the purposes of calculating CBCC's COP and CV. Similarly, petitioners contend that the Department should allocate interest expense to Minasligas' COP based on Delp's (Minasligas' parent company) 1992 audited financial statements as a percentage of cost of goods sold, without allowance for a short-term interest income offset.

CBCC argues that the Department should use its non-consolidated income statement, rather than the corporate consolidated figure, to compute net interest expense. CBCC claims that the advances of funds from subsidiary to parent were the reverse of those normally seen by the Department and were not "interest free". CBCC further argues that without CBCC, Solvay do Brasil would have had to borrow funds in the commercial market. Thus, CBCC suggests that the Department should increase CBCC's financial receipts by an imputed interest on the interest free loans that CBCC made to its parent. With regard to petitioners' allegation that CBCC refused to provide the Department with Solvay do Brasil's financial statement, CBCC explains that the Department requested an additional copy of the translated financial statement, previously submitted to the Department on June 10, 1993, which the company was unable to provide at verification.

Minasligas contends that its financial statements are not consolidated with Delp's statements. Minasligas maintains that there is no borrowing relationship between Delp and Minasligas, and further, there is no evidence of control by Delp over borrowings by Minasligas. Minasligas, therefore, believes it is inappropriate to substitute Delp's interest expenses for that of Minasligas. Minasligas asserts that it correctly reduced its submitted unconsolidated interest expenses by various forms of short-term financial income, including capital gains, exchange rate gains, discounts, and monetary correction.

DOC Position: We agree with petitioners that CBCC and Minasligas should report interest expense on a consolidated basis. The Department's position is that the cost of capital is fungible, therefore, calculating interest expense based on consolidated statements is the most appropriate methodology.

As discussed in the cost verification report of CBCC, we noted that CBCC and Solvay do Brasil rely on intercompany interest-free borrowing to meet their working capital requirements. In addition, in order to extinguish its outstanding debt, CBCC issued new shares of capital stock to its parent company. After establishing at verification that CBCC and Solvay do Brasil have significant financial transactions with each other, we requested information documenting financial expense at the Solvay do Brasil level. Company officials refused to provide any data. Therefore, we have based financial expense for CBCC using BIA. As BIA, we used information from Solvay do Brasil's financial statements (exhibit B; June 10, 1993, questionnaire response). This percentage was then applied to each month's COM.

In the case of Minasligas, Delp does not consolidate its accounts with Minasligas. In addition, because there are no significant intercompany transactions between the two companies, we combined the financial expenses of the two companies, effectively creating consolidated accounts. Regarding the offset claimed by Minasligas, the Department only allows income generated from investments of working capital which the company documents as short-term in nature. Minasligas was able to substantiate only a portion of the investments to be short-term; consequently, we have allowed only the documented portion of interest income as an offset. We did not allow an offset to Minasligas' parent, Delp, for interest expense because the information required to substantiate such an adjustment is not contained in the record of this investigation.

For both companies, in order to avoid overstating financing charges, we applied the interest expense ratio to each month's COM calculated on a historical basis rather than amounts computed under the replacement cost basis.

Comment 4: Petitioners maintain that CBCC and Minasligas failed to follow the Department's established practice for allocating G&A expenses. Petitioners make the same allegation with regard to CBCC's selling expenses. Petitioners claim that G&A expenses are period costs that should be allocated based on the ratio of total annual G&A expenses over total annual costs of goods sold. Selling expenses should be allocated similarly. However, petitioners state that CBCC allocated G&A and selling expenses to individual products, using the ratio of each separate product's cost of goods sold. Minasligas allocated POI G&A expenses on a monthly basis. For purposes of the final determination, petitioners believe that the Department should reallocate these expenses following its established practice.

CBCC argues that the Department should not use the ratio of expenses to cost of goods sold as an estimate of G&A expenses. CBCC believes that the monthly expenses accurately reflect, on a replacement cost basis, the expenses for the company in that month and are the most appropriate figures to use. CBCC claims that the petitioners are urging the Department to use a methodology that the Court of International Trade specifically invalidated as susceptible to overstating the effects of inflation.

Minasligas agrees that G&A expenses are period costs, but maintains that an annual calculation based on cost of sales is problematic because the annual G&A expense and the annual cost of sales are conglomerations of monthly expenses which have not been adjusted for inflation. Minasligas believes the Department should calculate G&A rates based on monthly averages or a simple average G&A rate.

DOC Position: We agree with petitioners in part. G&A expenses are period expenses which are normally measured over a fiscal year. As such, the Department calculates G&A on an annual basis. To calculate G&A for a lesser period may exclude certain expenses, which is distortive. Therefore, we recalculated G&A expenses on an annual historical basis for both companies and, in order to avoid overstating G&A expenses and neutralize hyperinflationary effects, we applied the G&A ratio to each month's COM calculated on a historical basis. We also revised CBCC's reported G&A to include a portion of Solvay do Brasil's G&A, which CBCC had failed to include in its reported costs. Moreover, we calculated CBCC's selling expense portion of SG&A based on sales of the same class or kind of merchandise according to our normal practice.

Comment 5: Petitioners contend that the Department should include ICMS and IPI taxes in CBCC's and Minasligas' reported materials costs in applying the Department's sales-below-cost test. Petitioners state that Department practice is to perform the sales-below-cost test on a tax-inclusive basis, with the COP and home market prices containing the same absolute amount of taxes. With regard to CV, petitioners contend that the Department has previously determined that ICMS and other domestic taxes are not remitted or refunded upon exportation and consequently have to be included in CV.

CBCC submits that the Department should not include the ICMS and IPI taxes in its COP and CV calculations. CBCC states that the Department reviewed CBCC's records at verification showing that CBCC's payments of ICMS offset any amount owed by virtue of its receipts of ICMS. Thus, CBCC claims that the "cost of materials" does not include any ICMS or IPI value, because CBCC always receives a tax credit for these payments.

Minasligas argues that in determining whether home market sales are above the cost of production, the Department must either include ICMS and IPI in the cost of production and in the sales price to the domestic market or exclude them from both sides to avoid double counting. Minasligas further argues that these taxes should not be included in calculations of CV because they are offset against the amounts collected from the domestic market sales.

DOC Position: We agree with petitioners in part. For our test of home market sales below cost we have included the same amount of domestic taxes in the COP and the domestic sales prices. However, when using CV as a surrogate for home market prices we must determine if in fact the entity under investigation is able to recover all of the taxes paid on inputs (raw materials) from its domestic sales of subject merchandise. If domestic sales of subject merchandise fully recover all of the domestic taxes paid on inputs, then these taxes would appropriately be excluded from the margin analysis. However, if the producer is not able to recover all input taxes from its sales of subject merchandise, then these actual costs must be reflected in the CV. (See *Camargo Correa Metais, S.A.*, v. *United States*, Slip Op. 93–163, p. 19 (August 13, 1993).

We have determined that CBCC's domestic sales of subject merchandise fully recover all input taxes incurred to produce the subject merchandise sold in both the domestic and export markets. We have excluded the domestic tax amounts from CV because the taxes paid are offset against the amounts which are collected on domestic sales which are rebated to the government.

Comment 6: Petitioners claim that CBCC did not accurately report its charcoal replacement costs. They further argue that CBCC did not provide the Department with the additional documentation requested regarding the estimated harvest of wood and other assumptions used in the calculation of the amortization costs for charcoal production. Petitioners argue that by not providing this information, CBCC prevented the Department from

verifying the accuracy of the cost data and CBCC did not comply with Department practice in reporting replacement costs for company-produced charcoal. Therefore, petitioners state that the Department should assign a noncooperative BIA rate to CBCC. Alternatively, petitioners suggest that the Department adjust CBCC's reported cost for company-produced charcoal upward to the level of CBCC's cost for purchasing charcoal from unrelated suppliers.

CBCC argues that since charcoal accounts for less than three percent of the cost of production of FeSi, use of BIA because of the difficulty encountered with verifying the accuracy of this factor of production would be totally inappropriate. CBCC maintains that should the Department make any adjustments to the charcoal costs it should only adjust the figures with the information gathered at verification rather than disregard the entire response.

DOC Position: We agree with petitioners that we should adjust CBCC's charcoal replacement costs; however, we disagree that CBCC was noncooperative and should receive a margin based solely upon BIA. We discovered errors made by CBCC in calculating its cost of producing charcoal, a primary raw material, used in the production of FeSi. CBCC substantially understated its cost of producing charcoal by inaccurately recording the costs associated with their wood forests which provide the raw material needed to produce charcoal. Therefore, we have recalculated the cost of CBCC's production of charcoal. As suggested by petitioners, we relied upon the actual weighted-average monthly cost CBCC was charged by unrelated vendors.

Comment 7: Petitioners claim that CBCC incorrectly accelerated the depreciation on a particular furnace by five years. The result was a disproportionate allocation of costs to products manufactured during the first five years the furnace was put into service, as opposed to the second five years, when no depreciation was reported. Petitioners contend that the accelerated depreciation for this furnace was an abnormal event since CBCC returned to its normal ten-year useful life for furnace depreciation following the period of accelerated depreciation. Petitioners further argue that the Department has explicitly rejected the accelerated depreciation of assets where such accelerated depreciation was not based on the useful life of the assets. Accordingly, petitioners believe that the depreciation charges for this furnace should be recalculated to reflect the company's normal ten-year useful life for furnace depreciation.

DOC Position: We agree with petitioners. We have recalculated depreciation expense for this furnace to reflect the amounts which would have been recorded based upon CBCC's normal ten year amortization period since it is CBCC's normal practice to employ a ten year useful life in calculating furnace depreciation charges.

Comment 8: Petitioners state that CBCC failed to accurately allocate furnace depreciation to FeSi based on the percentage of total furnace capacity devoted to FeSi production. Accordingly, for purposes of the final determination, petitioners contend that the Department should increase depreciation allocated to FeSi production for each month of the POI.

CBCC contends that it would be improper for the Department to allocate all of CBCC's depreciation expenses on all furnaces to FeSi production. Although theoretically, any one furnace could be used to produce any of the products that CBCC sells, this does not make the furnaces fungible. The Department's determination should not be based on what could theoretically be produced in a furnace, but rather what was actually produced in each furnace. Regardless, if the Department considers the furnaces fungible, this would result in a lowering of CBCC's depreciation expense as furnaces one through six are fully depreciated.

DOC Position: We agree with CBCC. Its methodology of matching furnace depreciation with the product actually produced in each furnace is an acceptable methodology. Accordingly, no adjustment has been made for the final determination.

Comment 9: Petitioners claim that at verification CBCC's reported consumption and cost of electricity attributed to FeSi were understated for October 1992. Therefore, petitioners believe that the Department should increase these costs for each month of the POI.

CBCC maintains that the Department verified that only the month of October contained an error of 5.7 percent with respect to the electricity consumption and cost; such error was incurred in transferring expenses from one cost report to another. Thus, CBCC concedes only that the Department should adjust its October, 1992, electricity consumption and cost by 5.7 percent, rather than making monthly adjustments.

DOC Position: We agree with CBCC. At verification we established that this was an isolated error and not a methodological problem. Accordingly, we have corrected the reported electrical consumption and cost for October 1992, only.

Comment 10: Petitioners state that CBCC failed to properly calculate inventory holding gains/losses. Petitioners argue that CBCC reported its input and finished product inventories on a first in first out (FIFO) basis, which is contrary to Department practice. Furthermore, petitioners claim that CBCC provided no inventory holding gain/loss calculations for iron ore. Accordingly, petitioners believe that the reported values cannot be relied on for purposes of the final determination and the Department should apply BIA.

CBCC maintains that it provided inventory gain/loss information according to the Department's methodology used in the *Final Determination Of Sales At Less Than Fair Value, Silicon Metal from Brazil*, 56 FR 26977, June 12, 1991, where the Department rejected CBCC's cost accounting method used in the normal course of business, stating that it did not properly reflect the effects of inflation and used a FIFO basis to make the calculation.

With respect to the inventory holding gain/loss calculation for iron ore, the Department verified that CBCC maintains no more than its immediate requirements in inventory. Thus, CBCC submitted no inventory holding gain/loss information on this raw material because there is none. CBCC's monthly purchase of iron ore is consumed during that month.

DOC Position: We agree with respondent. In reporting on a FIFO basis, CBCC followed prescribed Department practice. The Department verified that CBCC had no gain or loss on the iron ore because it completely consumed its purchases in the same month as production.

Comment 11: Petitioners argue that Minasligas' U.S. sales of slag during the POI are within the scope of this investigation. Petitioners base their argument on the petition's scope language, which they claim does not specifically exclude slag of the chemical composition that Minasligas sold to the United States during the POI. Petitioners further argue that even if the slag were not covered by the product description in the petition, it is within the scope under the criteria outlined in *Diversified Products Corporation* v. *U.S.*, 572 F. Supp. 883 (CIT 1983) ("*Diversified Products*") criteria.

Conversely, Minasligas states that its U.S. sales of slag are not covered by the scope of this investigation. Minasligas

bases its argument on chemical analysis certificates provided at verification, which list chemical compositions which Minasligas claims are sufficient to exclude the slag sales from the scope of the investigation. Specifically, Minasligas argues that, according to the petition, the high levels of oxygen and calcium oxide present in these slag sales places them outside the scope of the investigation.

DOC Position: We agree that ferrosilicon in the form of slag can be included within the scope of investigation if it generally meets the chemical content definition contained in the scope of this investigation and if it is capable of being used as FeSi. (See *Scope of Investigation.*)

With regard to the two U.S. sales of FeSi slag made by Minasligas, we determine that these sales are within the scope of the investigation based on information on the record indicating that the slag in question can be used as FeSi. Since we do not have actual price or cost data for these two sales, we will assign an average of all margins calculated for Minasligas' sales for which we have price and cost data.

Comment 12: Petitioners argue that Minasligas failed to provide complete cost information requested by the Department in conjunction with a previously unreported sale. Thus, petitioners argue that the Department should assign a "noncooperative" BIA margin for that U.S. sale.

Minasligas maintains that it provided all necessary information relating to this sale.

DOC Position: Since we used a price-to-price comparison for this sale, petitioners' points are moot.

Comment 13: Minasligas contends that the sale dates for certain U.S. sales falls outside the POI. Thus, Minasligas claims these sales should be excluded from this investigation.

DOC Position: We agree with respondent. Based on the sale dates reported and verified, these sales are outside the POI and are not included in our margin calculation.

Comment 14: Petitioners claim that Minasligas inappropriately allocated its labor and overhead costs between subject and non-subject merchandise based on number of furnaces, rather than actual production during the POI. Therefore, petitioners request that the Department adjust Minasligas' submitted costs accordingly.

DOC Position: We agree with petitioners that number of furnaces is not an adequate basis for allocating labor or other fabrication costs. Number of furnaces is an arbitrary measure, which does not necessarily reflect the actual level of labor and overhead expended in the production of the subject merchandise. In the instant case, output tons is a more accurate allocation basis. Therefore, we have revised the submitted costs to reflect an allocation based on actual production units.

Comment 15: Petitioners argue that Italmagnesio failed to cooperate with the Department by withdrawing from the investigation and should receive the highest, most adverse BIA rate on the record. Petitioners further argue that BIA includes the rates alleged in the petition, as corrected for clerical errors, and the rates alleged in petitioners' amended allegation of sales below cost for Italmagnesio. Petitioners disagree with the Department's decision in the preliminary determination which rejected the revised margin calculations in petitioners' amended sales-below-cost allegation as a source of BIA; the Department rejected the revisions on the grounds that petitioners based the revisions on information submitted by Italmagnesio. Petitioners state that their amended allegation relied not on financial statements submitted by Italmagnesio but on identical financial statements that petitioners had obtained independently prior to the date of Italmagnesio's submission of the information. In addition, petitioners assert that Italmagnesio withdrew from the investigation after the Department indicated in the preliminary determination that it would not use the higher rates in petitioners' amended allegation as BIA. Therefore, petitioners maintain that not using the amended allegation as BIA would allow Italmagnesio to control the outcome of the investigation.

DOC Position: For this final determination, we assigned Italmagnesio a margin in accordance with the two-tiered BIA methodology under which the Department imposes the most adverse rate upon those respondents who refuse to cooperate or otherwise significantly impede the proceeding. In our BIA margin analysis, we utilized information contained in petitioners' amended COP allegation for Italmagnesio. Although Department policy does not allow petitioners to use questionnaire responses in a piece-meal manner in order to increase margins in the petition that may later be used as BIA, our analysis revealed that petitioners had access to Italmagnesio's financial statements prior to the submission of this information on the record by Italmagnesio.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(4)(A) of the Act, we are directing the U.S. Customs Service to continue to retroactively suspend liquidation of all entries of FeSi from Italmagnesio. Retroactive suspension applies to entries of FeSi, that are entered, or withdrawn from warehouse, for consumption on or after May 18, 1993, which is the date 90 days prior to the date of the publication of our preliminary determination in the **Federal Register**. We are also directing the Customs Service to terminate the retroactive suspension of liquidation with regard to CBCC, and "All Other Exporters" entered, or withdrawn from warehouse, for consumption between May 18, 1993, and August 16, 1993, which is the date of our preliminary determination, and to release any bond or other security, and refund any cash deposit with respect to these entries during that period in accordance with section 735(c)(3). For CBCC and "All Other Exporters", we are directing the Customs Service to suspend liquidation of all entries of FeSi from Brazil, that are entered, or withdrawn from warehouse, for consumption on or after August 16, 1993. Finally, since the Department finds that no final dumping margin exists with respect to Minasligas, we are directing the Customs Service to terminate the suspension of liquidation for entries of FeSi from Minasligas, and to release any bond or other security, and refund any cash deposit with respect to these entries from Minasligas in accordance with section 735(c)(2) of the statute. However, if the Department has reasonable cause to believe or suspect at any time during the existence of the antidumping duty order that Minasligas has sold or is likely to sell the subject merchandise to the United States at less than its foreign market value, then the Department may institute an administrative review of Minasligas under section 751 of the Tariff Act of 1930, as amended.

The Customs Service shall require a cash deposit or posting of a bond equal to the estimated margin amount by which the FMV of the subject merchandise exceeds the USP as shown below.

Manufacturer/producer/exporter	Margin percent	Critical circumstances
Italmagnesio S.A. Industria e Comercio.	88.86	Yes.

Manufacturer/producer/exporter	Margin percent	Critical circumstances
Companhia Brasileira Carbureto de Calcio.	2.23	No.
Companhia Ferroligas Minas Gerais.	0.00	No.
All others	45.55	No.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination.

Notification to Interested Parties

This notice also serves as the only reminder to parties subject to administrative protective order (APO) in this investigation of their responsibility covering the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 735(d) of the Act (19 U.S.C. 1673d(d)) and 19 CFR 353.20(b)(2).

Dated: December 29, 1993.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 94–281 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–DS–P

[A–588–702]

Certain Stainless Steel Butt-Weld Pipe and Tube Fittings From Japan, Preliminary Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration/ Department of Commerce.

ACTION: Notice of Preliminary Results of Antidumping Duty Administrative Review.

SUMMARY: In response to a request from the petitioner, Flowline Division of Markovitz Enterprises, Inc. (Flowline), the Department of Commerce (the Department) has conducted an administrative review of the antidumping duty order on certain stainless steel butt-weld pipe and tube fittings (SSPFs) from Japan. The review covers one manufacturer/exporter, Benkan Corporation (Benkan), and exports of the subject merchandise to the United States during the period from March 1, 1992, through February 28, 1993. The review indicates the existence of dumping margins for the period.

As a result of the review, the Department has preliminarily determined to assess antidumping duties equal to the difference between the United States price (USP) and foreign market value (FMV). Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: January 6, 1994.

FOR FURTHER INFORMATION CONTACT: David Genovese or Michael Heaney, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 482–5254.

SUPPLEMENTARY INFORMATION:

Background

On March 12, 1993, the Department published a notice of "Opportunity to Request an Administrative Review" (58 FR 13503) of the antidumping duty order on SSPFs from Japan (53 FR 9787). On March 29, 1993, Flowline requested an administrative review. The Department initiated the review on May 6, 1993 (58 FR 26960), covering the period March 1, 1992, through February 28, 1993. The Department has now conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Review

The products covered by this review include certain stainless steel butt-weld pipe and tube fittings. These fittings are used in piping systems for chemical plants, pharmaceutical plants, food processing facilities, waste treatment facilities, semiconductor equipment applications, nuclear power plants, and other areas.

This merchandise is currently classifiable under the Harmonized Tariff Schedules (HTS) item number 7307.23.0000. The HTS item number is provided for convenience and Customs purposes. The written product description remains dispositive.

This review covers sales and entries by Benkan of the subject merchandise during the period March 1, 1992, through February 28, 1993.

Such or Similar Comparisons

For Benkan, pursuant to section 771(16) of the Act, the Department established the following criteria for matching sales in the home and U.S. markets: Type of fitting, seam condition, steel material grade, unit product weight within 10 percent, nominal pipe size, and wall thickness. An identical pipe is one that matches all of these criteria. A similar pipe is one that has one or more differences in these discrete criteria from the U.S. fitting other than the type of fitting, seam condition, and unit product weight within 10 percent. The 10 percent variance in unit product weight reflects our prior practice in this case which was based upon allowable deviations between Japanese and U.S. industry standards. The Department established this hierarchy of criteria after soliciting comments from Flowline and Benkan at the beginning of the 1992–1993 review period. Both Flowline and Benkan agreed on the criteria and their hierarchy.

United States Price

In calculating USP, the Department used purchase price, as defined in section 772(b) of the Act, because the merchandise was sold to an unrelated purchaser in the United States prior to its importation and exporter's sales price was not indicated by other circumstances. The Department based USP on the packed, delivered price to those unrelated purchasers.

The Department has determined that the date of sale for this merchandise is the invoice date because the invoice always sets forth agreed prices and quantities and represents the first transactional document which systematically records agreed prices. The Department made deductions, where appropriate, for foreign inland freight, U.S. inland freight, U.S. duties, U.S. brokerage fees, ocean freight, marine insurance, foreign brokerage fees, and discounts.

On October 7, 1993, the United States Court of International Trade (CIT), in *Federal-Mogul Corporation and The Torrington Company* v. *United States*, Slip Op. 93–194 (CIT, October 7, 1993), rejected the Department's methodology for calculating an addition to USP under section 772(d)(1)(C) of the Act to account for taxes that the exporting country would have assessed on the merchandise had it been sold in the home market. The CIT held that the addition to USP under section 772(d)(1)(C) of the Act should be the result of applying the foreign market tax rate to the price of the United States merchandise at the same point in the chain of commerce that the foreign market tax was applied to the foreign market sales. *Federal-Mogul*, Slip Op. 93–194 at 12.

The Department has changed its methodology in accordance with the *Federal-Mogul* decision. The Department will add to USP the result of multiplying the foreign market tax rate by the price of the merchandise sold in the United States at the same point in the chain of commerce that the foreign market tax was applied to

foreign market sales. The Department will also adjust the USP tax adjustments and the amount of tax included in FMV. These adjustments will deduct the portions of the foreign market tax and the USP tax adjustment that are the result of expenses that are included in the foreign market price used to calculate foreign market tax and are included in the United States merchandise price used to calculate the USP tax adjustment and that are later deducted to calculate FMV and USP. These adjustments to the amount of the foreign market tax and the USP tax adjustment are necessary to prevent our new methodology for calculating the USP tax adjustment from creating antidumping duty margins where no margins would exist if no taxes were levied upon foreign market sales.

This margin creation effect is due to the fact that the bases for calculating both the amount of tax included in the price of the foreign market merchandise and the amount of the USP tax adjustment include many expenses that are later deducted when calculating USP and FMV. After these deductions are made, the amount of tax included in FMV and the USP tax adjustment still reflects the amounts of these expenses. Thus, a margin may be created that is not dependent upon a difference between USP and FMV, but is the result of the price of the United States merchandise containing more expenses than the price of the foreign market merchandise. The Department's policy to avoid the margin creation effect is in accordance with the United States Court of Appeals' holding that the application of the USP tax adjustment under section 772(d)(1)(C) of the Act should not create an antidumping duty margin if pre-tax FMV does not exceed USP. *Zenith Electronics Corp.* v. *United States*, 988 F.2d 1573, 1581 (Fed. Cir. 1993). In addition, the CIT has specifically held that an adjustment should be made to mitigate the impact of expenses that are deducted from FMV and USP upon the USP tax adjustment and the amount of tax included in FMV. *Daewoo Electronics Co., Ltd.* v. *United States*, 760 F. Supp. 200, 208 (CIT, 1991). However, the mechanics of the Department's adjustments to the USP tax adjustment and the foreign market tax amount as described above are not identical to those suggested in *Daewoo*.

Foreign Market Value

In calculating FMV, we used home market price, as defined in section 773(a) of the Act. Home market price was based on a packed, delivered price to unrelated purchasers in the home market. In accordance with section 353.45 of the Department's regulations, the Department has excluded sales to related parties because the respondent has failed to provide sufficient evidence to support its claim that sales to related parties were at arm's-length. The Department made adjustments, where applicable, for inland freight, discounts, rebates, and for differences in packing material, packing labor, and credit.

The Department also made an adjustment to FMV for imputed consumption taxes in accordance with the aforementioned *Federal-Mogul* decision.

Additionally, where similar home market sales were used due to the absence of an identical sale, we made a difference-in-merchandise adjustment. The Department based the difference-in-merchandise adjustment on differences in steel pipe materials cost between U.S. and home market merchandise (see the Department's preliminary analysis memo dated December 29, 1993). When there were no contemporaneous such or similar sales, we based FMV on constructed value. Constructed value data for specific models was provided by Benkan at the request of the Department. Benkan did not provide constructed value information for two models as requested by the Department. For these preliminary results the Department has applied to applicable sales of these two models an antidumping duty margin of 8.05967 percent which is the weighted average margin for sales of SSPFs by Benkan for this review. The Department will request for the final results of this review that Benkan provide constructed value data for these two models.

Preliminary Results of Review

As a result of our comparison of USP to FMV, the Department preliminarily determines that a margin of 8.06 percent exists for Benkan for the period March 1, 1992, through February 28, 1993.

Interested parties may request disclosure within 5 days of the date of publication of this notice and may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication of this notice, or the first workday thereafter. Case briefs and/or written comments from interested parties may be submitted not later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to the issues raised in the case briefs and comments, may be filed not later than 37 days after the date of publication. The Department will publish the final results of this administrative review, including the results of its analysis of any such written comments or hearing.

The Department shall determine, and U.S. Customs shall assess, antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary from the percentage stated above. The Department will issue appraisement instructions directly to Customs.

Furthermore, the following deposit requirements will be effective for all shipments of the subject merchandise, entered or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed company will be that rate established in the final results of this administrative review; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in a previous review or the original less-than-fair-value (LTFV) investigation, the cash deposit rate will continue to be the rate published in the most recent final results or determination for which the manufacturer or exporter received a company-specific rate; (3) if the exporter is not a firm covered in this review, earlier reviews, or the original investigation, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise in these final results of review, earlier reviews, or the original investigation, whichever is the most recent; and (4) the "all others" rate will be 49.31 percent, as explained below.

On May 25, 1993, the CIT, in *Floral Trade Council* v. *United States*, Slip Op. 93–79, and *Federal-Mogul Corporation* v. *United States*, Slip Op. 93–83, decided that once an "all others" rate is established for a company it can only be changed through an administrative review. The Department has determined that in order to implement these decisions, it is appropriate to reinstate the original "all others" rate from the LTFV investigation (or that rate as amended for correction of clerical errors or as a result of litigation) in proceedings governed by antidumping duty orders. Accordingly, the cash deposit rate for any future entries from all other manufacturers or exporters, who are not covered in this or prior administrative reviews and who are unrelated to the reviewed firms or any previously reviewed firm, will be the "all others" rate established in the original LTFV investigation which is 49.31 percent.

These deposit requirements, when imposed, shall remain in effect until

publication of the final results of the next administrative review.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: December 29, 1993.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 94–280 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–DS–P

United States-Canada Free-Trade Agreement, Article 1904 Binational Panel Reviews: Stay of Panel Reviews

AGENCY: United States-Canada Free-Trade Agreement, Binational Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of stay of panel reviews of the final determination made by the International Trade Administration respecting certain cold-rolled carbon steel flat products from Canada (USA–93–1904–01) and certain hot-rolled carbon steel flat products from Canada (USA–93–1904–02).

SUMMARY: This notice is effective December 23, 1993.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, United States Secretary, Binational Secretariat, suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

Background

The panel issued an order and memorandum on December 23, 1993, as follows: "These are appeals from two affirmative final dumping determinations issued by the International Trade Administration of the Department of Commerce (ITA) involving, respectively, cold-and-hot rolled carbon steel flat products imported into the United States from Canada. The International Trade Commission (ITC) rendered final negative determinations in both cases on the issue of material injury; these negative injury determinations have been appealed to the Court of International Trade (CIT).

The ITA has moved in each case to stay the proceedings before this panel pending final resolution of the injury question now before the CIT. The ITA argues that until such final judicial action an unconstitutional exercise of power for this panel to proceed. Four complaining parties in each case (respondents below) support the issuance of the requested stay. The complaining U.S. domestic interests (who also appeal here, claiming that the dumping margins found by ITA are too low) have taken no position on the ITA motion. The Government of Canada takes no position on the ITA motion in No. 01 and consent to issuance of a stay in No. 02 but does not endorse the ITA's constitutional argument in either case.

In the cold-rolled case (No. 01), a fifth complaining respondent, Sidbec-Dosco, Inc. (SDI), opposes the ITA motion and itself moves for a stay, which it would seek to have lifted in the event the CIT remands the injury issue to the ITC for further proceedings. SDI regards the Panel as having power to go forward with this proceeding, whether or not there has been a final resolution of the injury question elsewhere.

At the present juncture, no party contends either that we cannot or should not grant a stay. It is evident that if the ITC's negative determination is affirmed by the courts any effort expended here will have been wasted. We agree with all the parties who have addressed the point that, in these circumstances, considerations of economy and efficiency should predominate. We do not regard the procedural timetable laid down in the Free Trade Agreement and the implementing measures as a jurisdictional limitation. Accordingly, we grant a stay in each case, subject to further consideration on motion by any party or by the Panel if and when circumstances warrant, and terminating in each case at the latest upon the conclusion of the proceedings for review of the corresponding injury determination. In staying these proceedings, we express no opinion as to the merits of the constitutional argument advanced by ITA. Leave is granted to any party to move later to lift the stay if and when they regard the circumstances as propitious.

Dated: December 30, 1993.

James R. Holbein,

United States Secretary, FTA Binational Secretariat.

[FR Doc. 94–284 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–GT–M

National Oceanic and Atmospheric Administration

Site Selection Process for Proposed East Coast Florida National Estuarine Research Reserve; Meeting

AGENCY: Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, DOC.

ACTION: Notice of public meeting.

SUMMARY: The Office of Ocean and Coastal Resource Management announces a public meeting on the proposed East Coast Florida National Estuarine Research Reserve.

This meeting will be conducted pursuant to section 315 of the Coastal Zone Management Act of 1972, (CZMA) as amended. The CZMA requires the conduct of at least one public meeting by the State during the site selection process. This meeting must be held in the vicinity of the proposed site. The State of Florida, Department of Environmental Protection has selected the Guana, Tolomato and Matanzas River area in St. Johns and Flagler Counties for consideration for nomination as a National Estuarine Research Reserve. The Public Meeting will be held on Thursday, January 20, 1994, at the St. Johns County Auditorium, 4020 Lewis Speedway, St. Augustine, Florida beginning at 7 p.m. A copy of the agenda may be obtained by contacting Mr. Danny Riley or Mr. Larry Nall at (404) 488–3456.

FOR FURTHER INFORMATION CONTACT: June Cradick, Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 12th floor, Silver Spring, Maryland 20910, (301) 713–3133.

(Federal Domestic Assistance Catalog 11.429 Coastal Zone Management Program Administration)

Dated: December 23, 1993.

W. Stanley Wilson,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 94–260 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–08–M

[I.D. 123093I]

New England Fishery Management Council; Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a public meeting on January 12–13, 1994, at the King's Grant Inn, Route 128 at Trask Lane, Danvers, MA; telephone: (508) 774–6800.

The meeting will begin at 1:30 p.m. on January 12 with introductions and announcements. The Lobster Oversight Committee Chair will provide an update on events that have taken place subsequent to the submission of Amendment No. 5 to the American Lobster Fishery Management Plan (FMP) to the Secretary of Commerce. NMFS will present details of their new fisheries data collection program, and participate in a question-and-answer session with both the Council and public. If time allows, the Council Chairman, Council Executive Director, NMFS Regional Director, Northeast Fisheries Center liaison, Mid-Atlantic Fishery Management Council liaison, and representatives from the Coast Guard, Fish and Wildlife Service, and the Atlantic States Marine Fisheries Commission will provide reports.

On January 13, the meeting will begin at 8:30 a.m. with a discussion of haddock management. A representative of the Canadian Department of Fisheries and Oceans will report to the Council on Canada's actions to manage groundfish, and haddock in particular. The Groundfish Plan Development Team will report on its meeting held in early January. During the afternoon session, the Marine Mammal Committee will report on the use of time/area closures to reduce the bycatch of harbor porpoise in the Gulf of Maine. This will be followed by a status report on Atlantic Sea Scallops and the implementation of Amendment No. 4 to the FMP for Atlantic Sea Scallops. Any other outstanding business, including reports from the previous day, will be addressed before the meeting adjourns on Thursday.

FOR FURTHER INFORMATION CONTACT: Douglas G. Marshall, Executive Director, New England Fishery Management Council, 5 Broadway, Saugus, MA 01906; telephone: (617) 231–0422.

Dated: January 3, 1994.

David S. Crestin,

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

[FR Doc. 94–261 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–22–P

Endangered Species; Permits

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

ACTION: Notice of receipt of application for an incidental take permit (P503L).

Notice is hereby given that the Idaho Department of Fish and Game (IDFG) has applied in due form for a permit to take listed species as authorized by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) and the NMFS regulations governing listed fish and wildlife permits (50 CFR parts 217–227).

The applicant requests authorization to continue its anadromous fish mitigation program funded by Idaho Power Company. The program includes four hatcheries, the operation of which was authorized in 1993 through Permit 832. The activities included in this application are: (1) Release of hatchery steelhead smolts in the Snake and Salmon Rivers; (2) adult hatchery steelhead broodstock collection in the Snake and upper Salmon Rivers; (3) release of hatchery spring chinook smolts in the Snake and lower Salmon Rivers; (4) adult hatchery spring chinook broodstock collection in the Snake and lower Salmon Rivers, and (5) adult natural summer chinook trap and transport in the lower Salmon River. IDFG is requesting authorization for a period of five years, through 1998.

The proposed activities may incidentally affect endangered Snake River sockeye salmon (*Oncorhynchus nerka*), threatened Snake River spring/summer chinook salmon (*O. tshawytscha*), and threatened Snake River fall chinook salmon (*O. tshawytscha*) through broodstock collection, predation, competition, behavior modification, transmission of disease, straying, and the operation of the hatchery facilities.

Written data or views, or requests for a public hearing on this application should be submitted to the Director, Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Hwy., Silver Spring, MD 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries. All statements and opinions contained in this application summary are those of the Applicant and do not necessarily reflect the views of NMFS.

Documents submitted in connection with the above application are available for review by interested persons in the following offices by appointment:

Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Hwy., Silver Spring, MD 20910 (301–713–2322); and

Environmental and Technical Services Division, National Marine Fisheries Service, 911 North East 11th Ave., room 620, Portland, OR 97232 (503–230–5400).

Dated: December 22, 1993.

Herbert W. Kaufman,

Deputy Director, Office of Protected Resources.

[FR Doc. 94–293 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–22–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Brazil

December 29, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs reducing limits.

EFFECTIVE DATE: January 10, 1994.

FOR FURTHER INFORMATION CONTACT: Nicole Bivens Collinson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for Categories 218 and 350 are being reduced for carryforward used.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Also see 58 FR 14381, published on March 17, 1993.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist

only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 29, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on March 12, 1993, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products, produced or manufactured in Brazil and exported during the twelve-month period which began on April 1, 1993 and extends through March 31, 1994.

Effective on January 10, 1994, you are directed to amend the directive dated March 12, 1993 to reduce the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and the Federative Republic of Brazil:

Category	Adjusted twelve-month limit [1]
Sublevels in the aggregate	
218	4,261,627 square meters.
350	127,310 dozen.

[1] The limits have not been adjusted to account for any imports exported after March 31, 1993.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 94–198 Filed 1–5–94; 8:45 am]

BILLING CODE 3510–DR–F

COMPETITIVENESS POLICY COUNCIL

Meeting

ACTION: Notice of forthcoming meetings.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the Competitiveness Policy Council announces several forthcoming meetings.

DATES: January 13, 1994; 9:30 a.m. to 4:00 p.m.

ADDRESSES: Third Floor, 1726 M Street, NW., suite 300, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Howard Rosen, Executive Director, Competitiveness Policy Council, suite 300, 1726 M Street, NW., Washington, DC 20036, (202) 632–1307.

SUPPLEMENTARY INFORMATION: The Competitiveness Policy Council (CPC) was established by the Competitiveness Policy Council Act, as contained in the Trade and Competitiveness Act of 1988, Public Law 100–418, sections 5201–5210, as amended by the Customs and Trade Act of 1990, Public Law 101–382, section 133. The CPC is composed of 12 members and is to advise the President and Congress on matters concerning competitiveness of the US economy. The Council's chairman, Dr. C. Fred Bergsten, will chair each meeting.

The meeting will be open to the public subject to the seating capacity of the room. Visitors will be requested to sign a visitor's register.

Type of Meeting: Open.

Agenda: The Council will discuss the Administration's Workforce Investment Strategy, the impact of regulation on US competitiveness, and a mechanism to finance public infrastructure expenditures. The Council will also consider additional business as suggested by its members.

Dated: December 30, 1993.

Dr. C. Fred Bergsten,

Chairman, Competitiveness Policy Council.

[FR Doc. 94–193 Filed 1–5–94; 8:45 am]

BILLING CODE 4739–54–M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Information Resources Management Service, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before February 7, 1994.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok: Deck Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Cary Green, Department of Education, 400 Maryland Avenue, SW., room 4682, Regional Office Building 3, Washington, DC 20202–4651.

FOR FURTHER INFORMATION CONTACT: Cary Green, (202) 401–3200. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director of the Information Resources Management Service, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Cary Green at the address specified above.

Dated: January 3, 1994.

Cary Green,

Director, Information Resources Management Service.

Office of Postsecondary Education

Type of Review: Revision.

Title: Federal Pell Grant Program—State Report on Postsecondary Educational Assistance Provided To Incarcerated Students.

Frequency: Annually.

Affected Public: State or local governments.

Reporting Burden:

Responses: 57.

Burden Hours: 1,140.

Recordkeeping Burden:

Recordkeepers: 57.

Burden Hours: 57.

Abstract: Federal Grants, Federal Student Financial Aid Programs section 401(b)(8) of the Higher Education Act of 1965, as amended, requires that incarcerated students

shall only be awarded a Federal Pell Grant in a state if the grants are used to supplement and not supplant the level of postsecondary educational assistance provided by that state to incarcerated individuals. The Annual State Report on Postsecondary Educational Assistance Provided To Incarcerated Students will be used to collect this information.

Office of Educational Research and Improvement

Type of Review: New.

Title: Third International Mathematics and Science Study.

Frequency: One time.

Affected Public: Individuals or households; State or local governments; non-profit institutions.

Reporting Burden:

Responses: 7,600.

Burden Hours: 17,591.

Recordkeeping Burden:

Recordkeepers: 0.

Burden Hours: 0.

Abstract: The Third International Mathematics and Science Study will assess student achievement in math and science, at the fourth, eighth, and twelfth grade levels, in 50 countries. In the U.S., the data will be used to measure U.S. progress toward the fourth National Education Goal—that the U.S. will be first in the world in math and science education by the year 2000. The study will also help educators understand differences in performance by providing data on opportunity-to-learn factors.

[FR Doc. 94–272 Filed 1–5–94; 8:45 am]

BILLING CODE 4000–01–M

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board, Education.

ACTION: Amendment to notice of a closed meeting of the Nominations Committee.

SUMMARY: This amends the notice of a closed meeting of the Nominations Committee of the National Assessment Governing Board published on December 12, 1993 in Vol. 58, No. 247, page 68639. The place of the meeting is changed from Washington, DC to Denver, Colorado. The Committee will meet at the offices of the Education Commission of the States, 707–17th Street, Denver, Colorado. The meeting time and agenda are unchanged.

Dated: January 3, 1994.

Roy Truby,

Executive Director, National Assessment Governing Board.

[FR Doc. 94–256 Filed 1–5–94; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2275–001]

Public Service Company of Colorado; Intent To Prepare a Joint Environmental Assessment and Conduct Public Scoping Meetings and Site Visit

December 30, 1993.

The Federal Energy Regulatory Commission (FERC) has received an application for relicense of the existing Salida Hydroelectric Project, FERC No. 2275–001. The project is located on the South Arkansas River and on Fooses Creek in Chaffee County, Colorado, and occupies lands within the San Isabel National Forest.

The FERC staff, in cooperation with the U.S. Forest Service, intends to prepare an Environmental Assessment (EA) on this hydroelectric project in accordance with the National Environmental Policy Act.

The EA will objectively consider both site-specific and cumulative environmental impacts of the project and reasonable alternatives, and will include an economic, financial and engineering analysis.

A draft EA will be issued and circulated for review by all interested parties. All comments filed on the draft EA will be analyzed by the staff and considered in a final EA. The staff's conclusions and recommendations will then be presented for the consideration of the Commission in reaching its final licensing decision.

Scoping Meetings

Two scoping meetings will be conducted on January 27, 1994. A scoping meeting oriented towards the agencies will be conducted at 10 a.m. at the Salida Ranger District office, 325 West Rainbow Boulevard, Salida, Colorado. A scoping meeting oriented towards the public will be conducted at 7 p.m. at the Chaffee County Courthouse, Commissioners Meeting Room, 142 Crestone Street, Salida, Colorado.

Interested individuals, organizations, and agencies are invited to attend either or both meetings and assist the staff in identifying the scope of environmental issues that should be analyzed in the EA.

To help focus discussions at the meetings, a scoping document outlining subject areas to be addressed in the EA will be mailed to agencies and interested individuals on the FERC mailing list. Copies of the scoping document will also be available at the scoping meetings.

Objectives

At the scoping meetings the FERC staff will: (1) Identify preliminary environmental issues related to the proposed project; (2) identify preliminary resource issues that are not important and do not require detailed analysis; (3) identify reasonable alternatives to be addressed in the EA; (4) solicit from the meeting participants all available information, especially quantified data, on the resource issues; and (5) encourage statements from experts and the public on issues that should be analyzed in the EA, including points of view in opposition to, or in support of, the staff's preliminary views.

Procedures

The meetings will be recorded by a court reporter and all statements (oral and written) thereby become a part of the formal record of the Commission proceedings on the Salida Hydroelectric Project. Individuals presenting statements at the meetings will be asked to clearly identify themselves for the record.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meetings and assist the staff in defining and clarifying and issues to be addressed in the EA.

Persons choosing not to speak at the meetings, but who have views on the issues or information relevant to the issues, may submit written statements for inclusion in the public record at the meetings. In addition, written scoping comments may be filed with Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, until February 28, 1994.

All written correspondence should clearly show the following caption on the first page: Salida Hydroelectric Project, FERC Project No. 2275–001.

Intervenors—those on the Commission's service list for this proceeding (parties)—are reminded of the Commission's Rules of Practice and Procedure, requiring parties filing documents with the Commission, to serve a copy of the document on each person whose name appears on the official service list. Further, if a party or

interceder files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Site Visit

A site visit to the Salida Project is planned for January 26, 1994. Those who wish to attend should plan to meet at the Salida No. 2 powerhouse at 9 a.m. or contact Charlie Medina, District Ranger, at (719) 539–3591 for details.

Any questions regarding this notice may be directed to Vince Yearick, at (202) 219–3073.

Lois D. Cashell,

Secretary.

[FR Doc. 94–194 Filed 1–5–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. EG94–11–000]

Adirondack Hydro Development Corporation; Application for Commission Determination of Exempt Wholesale Generator Status

December 30, 1993.

Adirondack Hydro Development Corporation ("Adirondack") filed with the Federal Energy Regulatory Commission an application on December 30, 1993 for determination of exempt wholesale generator status pursuant to part 365 of the Commission's Regulations.

Adirondack is a Delaware Subchapter S corporation which will provide operation and maintenance services to a hydroelectric generating facility located on the Hudson River in Saratoga and Washington Counties, New York.

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 sections 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 must be filed on or before January 10, 1994 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. 94–231 Filed 1–5–94 8:45 am]

BILLING CODE 6717–01–M

[Docket No. EG94–12–000]

Northern Electric Power Co., L.P.; Application for Commission Determination of Exempt Wholesale Generator Status

December 30, 1993.

Northern Electric Power Co., L.P. ("Northern Electric") filed with the Federal Energy Regulatory Commission an application on December 30, 1993 for determination of exempt wholesale generator status pursuant to part 365 of the Commission's Regulations.

Northern Electric is a New York limited partnership formed to own a hydroelectric generating facility located on the Hudson River in Saratoga and Washington Counties, New York.

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 sections 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 must be filed on or before January 10, 1994 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. 94–230 Filed 1–5–94; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–4822–6]

Acid Rain Program: Notice of Public Comment Period and Proposed Retired Unit Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed retired unit exemptions.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is issuing for comment draft, five-year retired unit exemptions to 11 utility units under the Acid Rain Program regulations (40 CFR part 72).

DATES: Comments on retired unit exemptions must be received no later than February 7, 1994.

ADDRESSES: *Administrative Records.* The administrative record for each exemption, except information protected as confidential, may be viewed at the addresses listed in **"SUPPLEMENTARY INFORMATION."**

Comments. Send comments, requests for public hearings, and requests to receive notice of future actions concerning a retired unit exemption to David Kee, Director, Air and Radiation Division, EPA Region 5 (A–18J), Ralph H. Metcalfe Federal Bldg., 77 West Jackson Blvd., Chicago, IL 60604.

Submit all comments in duplicate and identify the unit to which the comments apply, the commenter's name, address, and telephone number, and the commenter's interest in the matter and affiliation, if any, to the owners and operators of the unit covered by the exemption. All timely comments will be considered, except those pertaining to standard provisions under 40 CFR 72.9 and issues not relevant to the exemption.

Hearings. To request a public hearing, state the issues proposed to be raised in the hearing. EPA may schedule a hearing if EPA finds that it will contribute to the decision-making process by clarifying significant issues affecting the exemption.

FOR FURTHER INFORMATION CONTACT: Regarding the Acme and Avon Lake plants: Franklin Echevarria at (312) 886–9653. Regarding the Poston plant: Allan Batka at (312) 353–7316. Air and Radiation Division, EPA Region 5 (A–18J), Ralph H. Metcalfe Federal Bldg., 77 West Jackson Blvd., Chicago, IL 60604.

SUPPLEMENTARY INFORMATION:

Retired Unit Exemptions

EPA proposes to issue exemptions from the Acid Rain permit and continuous emission monitoring requirements for the following units in Ohio: Acme units 9, 11, 13, 14, 15, 91, and 92; Avon Lake unit 11; and Poston units 1, 2, and 3. The designated representative for Acme and Avon Lake is Fred J. Lange Jr. and the designated representative for Poston is John McManus.

Addresses

The administrative records for each plant may be viewed during normal

business hours at EPA Region 5, 17th floor, Ralph H. Metcalfe Federal Bldg., 77 West Jackson Blvd., Chicago, IL 60604.

Dated: December 23, 1993.

Doris Price,

Acting Director, Acid Rain Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 94–185 Filed 1–5–94; 8:45 am]

BILLING CODE 6560–50–P

[FRL–4822–2]

Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as Amended, by the Superfund Amendments and Reauthorization Act

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act ("CERCLA"), notice is hereby given that a proposed administrative cost recovery settlement concerning the Martin Marietta site in Waterton, Colorado was signed by the EPA Regional Administrator, Region VIII, and issued by the Agency on July 2, 1993. The settlement resolves an EPA claim under section 107 of CERCLA against the Martin Marietta Corporation ("MMC"). By the terms of the proposed Agreement, MMC will pay $875,592.92 to EPA to settle its liability for remaining Past Response Costs. In return, the United States will provide MMC with a covenant not to sue limited to claims for civil liability to the United States arising out of section 107(a) of CERCLA, 42 U.S.C. 9607(a), for reimbursement of the United States' Past Response Costs. "Past Response Costs" are defined in the Agreement as any and all response costs, including oversight costs, incurred by the United States in responding to the release or threat of release of hazardous substances from the Site pursuant to CERCLA prior to and including the effective date of the Agreement, and any and all response costs, including oversight, incurred pursuant to Administrative Order on Consent, In the Matter of: Martin Marietta Corporation, Docket Nos. CERCLA 106 VIII–86–2 and RCRA (3008) VIII–86–01. The $875,592.92 figure represents approximately 91 percent of the total amount of Past Response Costs incurred by the United States.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency's response to any comments received will be available for public inspection at the Superfund Records Center, 5th floor, Denver Place, 999 18th Street, Denver, Colorado, 80202.

DATES: Comments must be submitted on or before February 7, 1994.

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available at the Superfund Records Center, 5th floor, Denver Place, 999 18th Street, Denver, Colorado, 80202. A copy of the proposed settlement may be obtained from Kelcey Land (8HWM–SR), 999 18th Street, suite 500, Denver, Colorado, 80202, telephone (303) 294–7639. Comments should reference the Martin Marietta site, Waterton, Colorado, and EPA Docket No. CERCLA VIII 93–03 and should be addressed to Kelcey Land (8HWM–SR), Cost Recovery Program Manager, 999 18th Street, suite 500, Denver, Colorado, 80202.

FOR FURTHER INFORMATION CONTACT: Jessie Goldfarb, Office of Regional Counsel, 999 18th Street, suite 500, Denver, Colorado, 80202, telephone (303) 294–7592.

Dated: August 2, 1993.

Jack W. McGraw,

Acting Regional Administrator.

[FR Doc. 94–183 Filed 1–5–94; 8:45 am]

BILLING CODE 6560–50–M

[OPPTS–44604; FRL–4748–3]

TSCA Consent Order; Receipt of Test Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the receipt of test data on refractory ceramic fibers (RCFs) (CAS No. 142844–00–6), submitted pursuant to a Testing Consent Order entered into under the authority of the Toxic Substances Control Act (TSCA). Publication of this notice is required under section 4(d) of TSCA.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–543B, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: Section 4(d) of TSCA requires EPA to publish a notice in the **Federal Register** reporting the receipt of test data submitted pursuant to test rules promulgated under section 4(a) of TSCA within 15 days after the test data are received. Under 40 CFR 790.60, all results of testing conducted pursuant to a consent order must be announced to the public in accordance with the procedures specified in section 4(d) of TSCA.

I. Test Data Submissions

Test data for refractory ceramic fibers (RCFs) were submitted by three member companies of the Refractory Ceramic Fiber Coalition (Carborundum Company, Premier Refractories and Chemicals, Inc., and Thermal Ceramics, Inc.) pursuant to a Testing Consent Order at 40 CFR 799.5000. The test data were received by EPA on December 21, 1993. The submission describes workplace exposure monitoring data to RCFs from RCFC company facilities, and their customers' facilities.

RCFs are used as insulation for industrial applications such as high temperature furnaces, heaters, and kilns. RCFs are also used in automotive applications, aerospace uses, and in certain commercial appliances such as self-cleaning ovens.

EPA has initiated its review and evaluation process for these data submissions. At this time, the Agency has not determined whether the submissions are complete.

II. Public Record

EPA has established a public record for this TSCA section 4(d) receipt of data notice (docket number OPPTS–42166A). This record includes copies of all data reported in this notice. The record is available for inspection from 12 noon to 4 p.m., Monday through Friday, except legal holidays, in the TSCA NCIC, Rm. E–G102, 401 M St., SW., Washington, DC 20460.

Authority: 15 U.S.C. 2603.

Lists of Subjects

Environmental protection, Test data.

Dated: December 27, 1993.

James B. Willis,

Acting Director, Office of Pollution Prevention and Toxics.

[FR Doc. 94–374 Filed 1–5–94; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirements Submitted to Office of Management and Budget for Review

December 30, 1993.

The Federal Communications Commission has submitted the following information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of these submissions 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 these submissions contact Judy Boley, Federal Communications Commission, (202) 632–0276. Persons wishing to comment on these information collections should contact Timothy Fain, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, (202) 395–3561.

OMB Number: 3060–0176.

Title: Section 73.1510, Experimental Authorizations.

Action: Extension of a currently approved collection.

Respondents: Businesses or other for-profit (including small businesses).

Frequency of Response: On occasion reporting requirement.

Estimated Annual Burden: 25 responses; 2.96 hours average burden per response; 74 hours total annual burden.

Needs and Uses: Section 73.1510 requires that a licensee of an AM, FM and TV broadcast station file an informal application with the FCC to request an experimental authorization to conduct technical experimentation directed toward improvement of the technical phases of operation and service. This request shall describe the nature and purpose of experimentation to be conducted, the nature of the experimental signal to be transmitted, and the proposed schedule of hours and duration of the experimentation. The data is used by FCC staff to maintain complete technical information about a broadcast station and to ensure that such experimentation will not cause interference to other stations.

OMB Number: 3060–0181.

Title: Section 73.1615, Operation During Modification of Facilities.

Action: Extension of a currently approved collection.

Respondents: Businesses or other for-profit (including small businesses).

Frequency of Response: On occasion reporting requirement.

Estimated Annual Burden: 160 responses; 0.69 hour average burden per response; 110 hours total annual burden.

Needs and Uses: Section 73.1615 requires notification to the FCC by a licensee of an AM, FM or TV station when it is in the process of modifying existing facilities as authorized by a construction permit and it becomes necessary to either discontinue operation or to operate with temporary facilities. If such licensee needs to discontinue operations or operate with temporary facilities for more than 30 days, then an informal letter request must be sent to the FCC prior to the 30th day. The data is used by FCC staff to maintain complete technical records and to ensure that interference will not be caused to other licensed broadcast facilities.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 94–212 Filed 1–5–94; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL MARITIME COMMISSION

[Petition No. P108–93]

Petition for Permanent Filing Exemption; Petition of Totem Ocean Trailer Express, Inc.; Filing of Petition

Notice is hereby given of the filing of a petition by Totem Ocean Trailer Express, Inc. pursuant to 46 CFR 514.8(a), for permanent exemption of its Local Freight Tariff No. 3–C, FMC–F No. 4, ICC TOTE 201, from the electronic tariff filing requirements of the Commission's ATFI System, on the grounds that the tariff is jointly filed with the Interstate Commerce Commission and the Federal Maritime Commission, and is therefore not compatible with the ATFI filing requirements. Alternatively, petitioner seeks complete exemption from filing the tariff in paper or electronic form.

To facilitate through consideration of the petition, interested persons are requested to reply to the petition no later than January 18, 1994. Replies shall be directed to the Secretary, Federal Maritime Commission, Washington, DC 20573–0001, shall consist of an original and 15 copies, and shall be served on Counsel for petitioner, Mr. Michael D. Duppenthaler, Registered Practitioner, Interstate Commerce Commission, 1100 Olive Way, suite 1150, Seattle, Washington 98101–1839.

Copies of the petition are available for examination at the Washington, DC office of the Secretary of the Commission, 800 N. Capitol Street. NW., room 1046.

Joseph C. Polking,

Secretary.

[FR Doc. 94–111 Filed 1–5–94; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Carnegie Bancorp, et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have 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)).

Each 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 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.

Unless otherwise noted, comments regarding each of these applications must be received not later than January 31, 1994.

A. Federal Reserve Bank of Philadelphia (Thomas K. Desch, Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105:

1. Carnegie Bancorp, Princeton, New Jersey; to become a bank holding company by acquiring 100 percent of the voting shares of Carnegie Bank, N.A., Princeton, New Jersey.

B. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. American Bancshares Corp., Livingston, Tennessee; to become a bank holding company by acquiring American Savings Bank, Livingston, Tennessee, a *de novo* bank.

C. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230

South LaSalle Street, Chicago, Illinois 60690:

1. *Independent Bank Corporation*, Ionia, Michigan; to acquire 100 percent of the voting shares of KSB Financial, Inc., Kingston, Michigan, and thereby indirectly acquire Kingston State Bank, Kingston, Michigan.

D. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Union Planters Corporation*, Memphis, Tennessee; to acquire 100 percent of the voting shares of Tennessee Bancorp, Inc., Columbia, Tennessee, and thereby indirectly acquire Tennessee National Bank, Columbia, Tennessee.

In connection with this application, Union Planters National Bank, Memphis, Tennessee, has applied to become a bank holding company by acquiring 100 percent of the voting shares of Tennessee Bancorp, Inc., Columbia, Tennessee, and thereby indirectly acquire Tennessee National Bank, Columbia, Tennessee. Immediately at consummation of the proposed acquisition, Tennessee Bancorp, Inc. will be dissolved and its subsidiary bank, Tennesee National Bank, will be merged with and into Union Planters National Ban. Union Planters National Bank will be the surviving entity. Both Tennessee Bancorp, Inc. and Tennessee National Bank will cease to exist on a pro forma basis.

E. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Leader First Bancorp, Inc.*, Marlow, Oklahoma; to become a bank holding company by acquiring 100 percent of the voting shares of The First National Bank of Marlow, Marlow, Oklahoma.

F. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. *Mission-Heights Management Company, Ltd.*, Houston, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of Ibid, Inc., Wilmington, Delaware; Independent Bancorp, Inc., Channelview, Texas, and thereby indirectly acquire Channelview Bank, Channelview, Texas.

Board of Governors of the Federal Reserve System, December 30, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 94–213 Filed 1–5–94; 8:45 am]

BILLING CODE 6210–01–F

FF Bancorp, Inc., et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities

The organizations listed in this notice have applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) 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 that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each 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.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than January 20, 1994.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. *FF Bancorp, Inc.*, New Smyrna Beach, Florida; to become a bank holding company by acquiring Key Bancshares, Inc., Tampa, Florida, and thereby indirectly acquire The Key Bank of Florida, Tampa, Florida.

Applicants proposes to retain its thrift subsidiaries, First Federal Savings Bank of New Smyrna, New Smyrna Beach, Florida, and First Federal Savings Bank of Citrus County, Inverness, Florida, and thereby engage in operating a thrift subsidiary pursuant to § 225.25(b)(9) of the Board's Regulation Y. Applicant also proposes to retain Smyrna Thrift's subsidiary, Florida Agency, and Inverness Thrift's subsidiary, Home Assets, and thereby engage in discount brokerage activities pursuant to § 225.25(b)(15) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 30, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 94–214 Filed 1–5–94; 8:45 am]

BILLING CODE 6210–01–F

First Security Corporation; Application to Engage de novo in Permissible Nonbanking Activities

This notice corrects a notice (FR Doc. 93-31063) published on page 67412 of the issue for Tuesday, December 21, 1993.

In the third column, under the Federal Reserve Bank of San Francisco heading, the entry for First Security Corporation is revised to read as follows:

1. *First Security Corporation*, Salt Lake City, Utah; to engage *de novo* through its subsidiary, First Security Investor Services, Inc., Salt Lake City, Utah, in the purchase and sale, on the order of investors as a "riskless principal", of obligations of the United States, general obligations of states and their political subdivisions and other obligations that state member banks of the Federal Reserve System may be authorized to underwrite and deal in under 12 U.S.C. 24 and 335, including bankers' acceptances and certificates of deposit, under the same limitations as would be applicable if the activity were performed by Applicant's subsidiary state member banks or its subsidiary nonmember banks as if they were member banks, pursuant to § 225.25(b)(16) of the Board's Regulation Y.

Comments on this applicatio must be received by January 10, 1994.

Board of Governors of the Federal Reserve System, December 30, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 94–215 Filed 1–5–94; 8:45 am]

BILLING CODE 6210–01–F

Norwest Corporation; 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 January 31, 1994.

A. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Norwest Corporation, Minneapolis, Minnesota, and Norwest Investment Services, Inc., Minneapolis, Minnesota; to acquire FN Investment Center, Phoenix, Arizona, and thereby engage in securities brokerage activities pursuant to § 225.25(b)(15) of the Board's Regulation Y, including private placement, limited underwriting, precious metal brokerage, riskless pincipal and leasing activities pursuant to *Norwest Corp.*, 76 Federal Reserve Bulletin 79 (1990).

Board of Governors of the Federal Reserve System, December 30, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 94-216 Filed 1-5-94; 8:45 am]

BILLING CODE 6210-01-F

The Sumitomo Bank, Limited; Application To Engage in Certain Nonbanking Activities

The Sumitomo Bank, Limited, Osaka, Japan (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 section 225.23 of the Board's Regulation Y (12 CFR 225.23), for approval to engage through its wholly owned subsidiary, Sumitomo Bank Securities, Inc., New York, New York (Company), in underwriting and dealing in, to a limited extent, certain municipal revenue bonds, 1-4 family mortgage-related securities, consumer receivable-related securities, and commercial paper. Applicant proposes to conduct the activities on a world-wide basis.

Closely Related to Banking Standard

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with Board approval, engage in any activity "that 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". In determining whether a proposed activity is closely related to banking for purposes of the BHC Act, the Board considers, *inter alia*, the matters set forth in National Courier Association v. Board of Governors of the Federal Reserve System, 516 F.2d 1229 (D.C. Cir. 1975). These considerations are:

(1) Whether banks generally have in fact provided the proposed services,

(2) Whether banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed services; and

(3) Whether banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form. *See* 516 F.2d at 1237. 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 maintains that the Board previously has determined by order that the proposed activities, when conducted within the limitations established by the Board, are closely related to banking and consistent with section 20 of the Glass-Steagall Act (12 U.S.C. 377). *See, e.g., Citicorp*, 73 Federal Reserve Bulletin 473 (1987), *aff'd sub nom. Securities Industry Ass'n v. Board of Governors of the Federal Reserve System*, 839 F.2d 47 (2d Cir. 1988), *cert. denied*, 486 U.S. 1059 (1988); *Order Approving Modifications to the Section 20 Orders*, 75 Federal Reserve Bulletin 751 (1989); *The Sanwa Bank, Limited*, 76 Federal Reserve Bulletin 568 (1990); *Order Approving Modifications to the Section 20 Orders*, 79 Federal Reserve Bulletin 226 (1993); and *Supplement to Order Approving Modifications to Section 20 Orders*, 79 Federal Reserve Bulletin 360 (1993).

Proper Incident to Banking Standard

In order to approve the proposal, the Board must determine that the proposed activities to be conducted 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 interests, or unsound banking practices." 12 U.S.C. 1843(c)(8).

Applicant believes that the proposal will produce public benefits that outweigh any potential adverse effects. In particular, Applicant maintains that the proposal will enhance competition and result in greater convenience to Applicant's customers. In addition, Applicant states that the proposed activities will not result in adverse effects such as an undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices, and that Company will conduct the proposed activities in accordance with prudential limitations designed to safeguard against such potential adverse effects that have been relied upon by the Board in similar previous cases. *See, e.g., Citicorp, supra; The Sanwa Bank, Limited, supra.* In this regard, Applicant has requested that one of the prudential limitations be modified to permit one officer or one director of one of its United States banking affiliates to serve as a director of Company, a modification which Applicant maintains is consistent with prior Board actions. *See, e.g., Synovus Financial Corp., et al.*, 77 Federal Reserve Bulletin 954 (1991).

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, D.C. 20551, not later than January 26, 1994. Any request for a hearing on this application must, as required by section 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 San Francisco.

Board of Governors of the Federal Reserve System, December 30, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 94–217 Filed 1–5–94; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL TRADE COMMISSION

Revised Jurisdictional Thresholds for Section 8 of the Clayton Act

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission announces the revised thresholds for interlocking directorates required by the 1990 amendment of section 8 of the Clayton Act. Section 8 prohibits, with certain exceptions, one person from serving as a director or officer of two competing corporations if two thresholds are met. Competitor corporations are covered by section 8 if each one has capital, surplus, and undivided profits aggregating more than $10,000,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than $1,000,000. Section 8(a)(5) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product. The new thresholds, which take effect immediately, are $12,092,000 for section 8(a)(1), and $1,209,200 for section 8(a)(2)(A).

EFFECTIVE DATE: January 6, 1994.

FOR FURTHER INFORMATION CONTACT: James Mongoven, Bureau of Competition, Office of Policy and Evaluation, (202) 326–2879.

(Authority: 15 U.S.C. 19(a)(5)).

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 94–273 Filed 1–5–94; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 92N–0416]

David J. Brancato; Denial of Hearing and Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Deputy Commissioner for Operations of the Food and Drug Administration (FDA) is denying a request for a hearing and issuing a final order under section 306(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 335a(a)) permanently debarring Mr. David J. Brancato, 13010 Atlantic Ave., Rockville, MD 20851, from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Mr. Brancato was convicted of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval of a drug product; and relating to the regulation of a drug product under the act.

EFFECTIVE DATE: January 6, 1994.

ADDRESSES: Application for termination of debarment to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Diane M. Sullivan, Center for Drug Evaluation and Research (HFD–366), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–2041.

SUPPLEMENTARY INFORMATION:

I. Background

David J. Brancato, a former review chemist with FDA's Division of Generic Drugs, pled guilty and was sentenced on January 5, 1990, for receiving unlawful gratuities, a felony offense under 18 U.S.C. 201(c)(1)(B). This conviction was based on Mr. Brancato's acceptance of payment of approximately $4,300 from senior officials of generic drug manufacturers, Par Pharmaceutical, Inc. (Par), and its subsidiary, Quad Pharmaceuticals, Inc. (Quad), while Mr. Brancato was involved in the regulation of Par's and Quad's drug products and while he was specifically responsible for reviewing Par's and Quad's applications to determine whether those applications met certain statutory standards for approval.

On December 12, 1992, Mr. Brancato received a certified letter from the Deputy Commissioner for Operations offering Mr. Brancato an opportunity for a hearing on the agency's proposal to issue an order under section 306(a) of the act debarring him from providing services in any capacity to a person that has an approved or pending drug product application. FDA based the proposal to debar Mr. Brancato on its finding that he was convicted of a felony under Federal law for conduct relating to the development, approval, and regulation of Par's and Quad's drug products.

The certified letter further informed Mr. Brancato that his request for a hearing could not rest upon mere allegations or denials but must present specific facts showing that there was a genuine and substantial issue of fact requiring a hearing. The letter also notified Mr. Brancato that if it conclusively appeared from the face of the information and factual analyses in his request for a hearing that there was no genuine and substantial issue of fact which precluded the order of debarment, FDA would enter summary judgment against him and deny his request for a hearing.

In a letter dated December 21, 1992, Mr. Brancato requested a hearing and submitted arguments and information in support of his hearing request. In his request for a hearing, Mr. Brancato acknowledges that he was convicted of a felony under Federal law as alleged by FDA; however, he argues that FDA's findings are incorrect and that the agency's proposal to debar him is unconstitutional.

The Deputy Commissioner for Operations has considered Mr. Brancato's arguments and concludes that they are unpersuasive and fail to raise a genuine and substantial issue of fact requiring a hearing. The legal arguments that Mr. Brancato offers do not create a basis for a hearing because hearings are not granted on matters of policy or law, but only on genuine and substantial issues of fact (see 21 CFR 12.24(b)(1)). Additionally, the material submitted in support of Mr. Brancato's hearing request does not justify a hearing because hearings will not be granted on the basis of mere allegations, denials, or general descriptions of positions and contentions (see 21 CFR 12.24(b)(2)). Moreover, all of Mr.

Brancato's arguments are unconvincing for the reasons discussed below.

II. Conclusions of the Deputy Commissioner Concerning Mr. Brancato's Arguments in Support of a Hearing

A. Mandatory Debarment of Individuals Applies Retroactively to Convictions Occurring Within the Past 5 Years

Mr. Brancato first alleges that the debarment provisions do not apply to conduct which occurred prior to the effective date of the act. Mr. Brancato does not support this claim with further argument.

The provision of the act applicable to Mr. Brancato is section 306(a)(2) of the act. Initiation of debarment proceedings under that section is not limited by when the conduct underlying the conviction occurred, but rather, by when the conviction occurred. Under section 306(a)(2) of the act, debarment proceedings must be initiated within 5 years of the conviction (see section 306(l)(2) of the act). Debarment of Mr. Brancato is appropriately based upon his January 5, 1990, conviction, occurring less than 4 years ago. Because the 5-year statute of limitations has not expired, Mr. Brancato's argument fails to raise a genuine and substantial issue of fact.

It is unclear from Mr. Brancato's first argument whether he intended to further allege that the debarment provisions do not apply retroactively to convictions occurring prior to the effective date of the act. Nevertheless, this issue is addressed below.

Congress intended section 306(a)(2) of the act to be retroactive as evidenced by comparing section 306(a)(2) of the act, applicable to mandatory debarment of individuals, to section 306(a)(1) of the act, applicable to mandatory debarment of corporations. The act treats corporations differently from individuals with respect to retroactivity. Mandatory debarment of corporations under section 306(a)(1) of the act is not retroactive because debarment of corporations is explicitly limited to convictions occurring "after the date of enactment." Conversely, section 306(a)(2) of the act, pertaining to mandatory debarment of individuals, does not contain any such limiting language. The exclusion of language barring retroactivity for section 306(a)(2) implies that section 306(a)(2) of the act was intended by Congress to be implemented retroactively.

In addition, section 306(l)(2) of the act shows that section 306(a)(2), pertaining to mandatory debarment of individuals, was intended to be retroactive. Section 306(l)(2) of the act sets out the effective dates for each provision of the act. As noted above, the effective dates pertaining to section 306(a)(2) of the act state that any relevant conviction may be used as the basis for mandatory debarment of individuals, so long as the conviction occurred no more than 5 years prior to the initiation of debarment proceedings. Section 306(l) of the act states that certain other debarment provisions shall not be retroactive by limiting application of those provisions to actions occurring on or after June 1, 1992. Thus, where Congress intended a section not to be retroactive, it provided an effective date in section 306(l) of the act. The omission of an effective date for section 306(a) of the act and the inclusion of an effective date for other sections reveals Congress' intent that this section be retroactive.

Thus, as intended by Congress, and as supported by the explicit language of the act, mandatory debarment applies retrospectively and, thus, mandatory debarment applies to Mr. Brancato's conviction, which occurred within 5 years prior to the effective date of the act. Accordingly, Mr. Brancato's claim fails to raise a genuine and substantial issue of fact.

B. The Decision To Debar Mr. Brancato Was Based Upon the Relevant Considerations and Was Made by an Authorized Designee of the Secretary

Mr. Brancato next argues that notice to him of his proposed debarment does not reflect consideration by the Secretary of Health and Human Services or his designee. Mr. Brancato does not support this claim with facts or further argument.

Sections 201 through 903 of the act (21 U.S.C. 321 through 394) contain numerous grants of authority to the Secretary of the Department of Health and Human Services (the Secretary). The Secretary has, in general, delegated this authority to the Commissioner of Food and Drugs with authority to redelegate to the Deputy Commissioner for Operations and other officers of FDA (see 21 CFR 5.10 and 5.20). The authority conferred in section 306 of the act is delegated to the Commissioner, even though the legislation formally names the Secretary. The Commissioner has redelegated that authority to the Deputy Commissioner for Operations (21 CFR 5.20(b) and 5.20(g)(1)).

The notice of proposed debarment and opportunity for a hearing letter received by Mr. Brancato on December 12, 1992, was issued legally under authority delegated to FDA's Deputy Commissioner for Operations.

The decision to propose debarment of Mr. Brancato was appropriately based upon the following relevant considerations: (1) The nature of the conviction (a felony under Federal law) and (2) the conduct underlying the conviction (conduct relating to the development, approval, and regulation of Par's and Quad's drug products) (see section I. of this document). Because the Deputy Commissioner for Operations, an authorized designee of the Secretary, considered the relevant factors in making the determination to propose debarment, Mr. Brancato's claim that the notice of his proposed debarment does not reflect consideration by the Secretary or his designee fails to raise any issue as to the validity of this proceeding and fails to raise a genuine and substantial issue of fact.

C. Mr. Brancato's Conviction Subjects Him to the Mandatory Debarment Provisions Not to the Permissive Debarment Provisions

Mr. Brancato further contends that the conduct for which he was convicted is more appropriately conduct subject to permissive debarment under 21 U.S.C. 306(b)(2)(B) of the act rather than to mandatory debarment. Mr. Brancato fails to support this statement with an explanation or further argument.

Section 306(a)(2)(A) and (a)(2)(B) of the act mandates that FDA debar an individual if the Secretary finds that the individual has been convicted of a felony under Federal law for conduct: (1) Relating to the development or approval, including the process for development or approval, of any drug product; and (2) otherwise relating to the regulation of any drug product under the act.

As discussed above, Mr. Brancato's conviction for receiving unlawful gratuities triggers the section 306 (a)(2)(A) and (a)(2)(B) of the act mandatory debarment provisions. An individual convicted of this crime will not be considered a candidate for permissive debarment unless FDA finds that the conduct underlying the conviction did not relate to the development or approval, or the regulation of any drug product (see section 306(b)(2)(B)(ii) of the act). Absent such a finding, mandatory debarment based upon such a conviction must follow. Because FDA finds that the conduct which served the basis for Mr. Brancato's conviction did relate to the development and approval and the regulation of Par's and Quad's drug products, the mandatory provisions, rather than the permissive provisions, are applicable in this case. Mr. Brancato acknowledges that he was convicted of a felony under Federal law.

Furthermore, he does not dispute FDA's finding that the conduct underlying his conviction relates to the development and approval and the regulation of Par's and Quad's drug products. Therefore, Mr. Brancato's claim fails to raise a genuine and substantial issue of fact.

D. The Statutory Criteria Pertaining to Permissive Debarment Are Not Relevant to Mr. Brancato's Mandatory Debarment Action

Mr. Brancato states the following: (1) There is no evidence that the Secretary considered the statutory criteria for determining appropriateness and period of debarment for nonmandatory (permissive) debarment, (2) Mr. Brancato took voluntary steps to mitigate the impact of his offense on the public, and (3) Mr. Brancato has no prior convictions. Mr. Brancato fails to support these three statements with further argument.

As discussed, the mandatory debarment provisions, not the permissive debarment provisions, apply in this case. The criteria pertaining to permissive debarment, which include evidence of mitigation and prior convictions, may not be considered in making the decision to initiate mandatory debarment proceedings. Because Mr. Brancato argues for the consideration of irrelevant permissive debarment criteria, not applicable to Mr. Brancato's mandatory debarment action, his claim fails to raise a genuine and substantial issue of fact.

E. Mr. Brancato's Plea Agreement With the Government Does Not Preclude His Debarment

In his next argument, Mr. Brancato states that his guilty plea and cooperation with the government were predicated on the assumption that no civil penalties would flow from his cooperation and that debarment would render his guilty plea subject to collateral attack and jeopardizes the integrity of the judicial process. He does not support this claim with evidence or citations.

Mr. Brancato's claim is completely unsubstantiated. The April 13, 1989, plea agreement represents the complete and final embodiment of Mr. Brancato's and the government's intention; the agreement explicitly states that "[t]here are no other agreements, promises, undertakings or understandings between Mr. Brancato and this Office." Contrary to Mr. Brancato's "assumption," the terms of the plea agreement do not preclude subsequent civil or administrative actions, including debarment. The terms bar only subsequent criminal action. Because the plea agreement is the complete and final expression of the compromise between Mr. Brancato and the government, and because the agreement does not preclude debarment, Mr. Brancato's claim fails to raise a genuine and substantial issue of fact.

F. Debarment of Mr. Brancato Is Not Prohibited by the Ex Post Facto Clause

In his final argument, Mr. Brancato states, "individuals who cooperate with the government should not be subject to sanctions of this kind *ex post facto*." Mr. Brancato fails to support this statement with an explanation or case citation.

Although it is unclear from this statement what point Mr. Brancato is attempting to make, two separate arguments may be implied: That his cooperation exempts him from the debarment provisions, and that his debarment violates the ex post facto clause of the United States Constitution. Both arguments are discussed individually below.

As discussed above, the mandatory debarment provisions, not the permissive debarment provisions, apply in this case. Cooperation with the government may not be considered in the decision to initiate mandatory debarment proceedings. (Cooperation may, however, be considered in determining whether to grant special early termination of debarment, under section 306(d)(4)(C) of the act, to individuals and as evidence of mitigation, in determining appropriateness and period of permissive debarment.) Because Mr. Brancato's cooperation is immaterial here, his claim fails to raise a genuine and substantial issue of fact.

Mr. Brancato further suggests that the ex post facto clause of the U.S. Constitution prohibits application of section 306(a)(2) of the act to him because this section was not in effect at the time of Mr. Brancato's criminal conduct. Section 306(a)(2) of the act was enacted on May 13, 1992. The conduct underlying Mr. Brancato's conviction occurred in 1987, and his conviction occurred in 1990.

An ex post facto law is one which punishes acts occurring prior to enactment of the law, or which adds a new punishment to one that was in effect when the crime was committed. (*Ex Parte Garland*, 4 Wall. 333, 377, 18 L. Ed. 366 (1866). *Collins* v. *Youngblood*, 110 S.Ct. 2715 (1990).) Retroactive application of a law to serve a remedial purpose does not violate the ex post facto clause.

Because debarment is intended as a remedy, rather than a punishment, retroactive application of the mandatory debarment provisions of the act is not prohibited by the ex post facto clause.

Debarment was clearly intended to be remedial. Congress created the Generic Drug Enforcement Act of 1992 (GDEA) in response to findings of fraud and corruption in the generic drug industry. Both the language of the GDEA itself and its legislative history reveal that the purpose of the debarment provisions is remedial: "to restore and ensure the integrity of the ANDA approval process and to protect the public health" (see section 1, Pub. L. 102–282, (GDEA)). A statement by Senator Hatch supports the remedial character of debarment as follows: "* * * [t]he legislation * * * provides a much-needed *remedy* for the blatant fraud and corruption uncovered in the generic drug industry * * * during the last 3 years." (Emphasis added.) (See Congressional Record, April 10, 1992, at S 5616.)

It is well established by the Supreme Court that statutes which deny future privileges to convicted offenders because of their previous criminal activities in order to ensure against corruption in specified areas do not impose penalties for past conduct and, therefore, do not violate the ex post facto prohibitions (see, e.g., *Hawker* v. *New York*, 170 U.S. 189, 190 (1898) (physician barred from practicing medicine for a prior felony conviction); *DeVeau* v. *Braisted*, 373 U.S. 154 (1960)).

In *DeVeau*, the Court upheld a law that prohibited a convicted felon from employment as an officer in a waterfront union. The purpose of the law was to remedy the past corruption and to ensure against future corruption in the waterfront unions. The Court in *DeVeau*, 363 U.S. at 160, stated:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession * * *.

As in *DeVeau*, the legislative purpose of the relevant statute is to ensure that fraud and corruption are eliminated from the generic drug industry. The restrictions placed on individuals convicted of a felony under Federal law are not intended as punishment but are "incident to a regulation of a present situation" (*DeVeau*, 363 U.S. at 160) and are necessary in order to remedy the past fraud and corruption in the industry.

The legislative history is replete with statements that the GDEA provides the

reasonable means needed to eliminate the widespread corruption in the generic drug industry and to restore consumer confidence in generic drugs. Because debarment is a remedial action, rather than one intended to punish, debarment does not violate the ex post facto clause and Mr. Brancato's claim fails to raise a genuine and substantial issue of fact.

In conclusion, Mr. Brancato has raised no genuine and substantial issue of fact regarding his conviction. He acknowledges his conviction as alleged by FDA in the agency proposal to debar him. In addition, Mr. Brancato's legal arguments do not create a basis for a hearing and, in any event, are unpersuasive. Accordingly, the Deputy Commissioner for Operations denies Mr. Brancato's request for a hearing.

III. Findings and Order

Therefore, the Deputy Commissioner for Operations, under section 306(a) of the act, and under authority delegated to her (21 CFR 5.20), finds that Mr. Brancato has been convicted of a felony under Federal law for conduct: (1) Relating to the development or approval, including the process for development or approval, of a drug product (21 U.S.C. 335a(a)(2)(A)); and (2) relating to the regulation of a drug product (21 U.S.C. 335a(a)(2)(B)).

As a result of the foregoing findings, Mr. Brancato is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application under sections 505, 507, 512, or 802 of the act (21 U.S.C. 355, 357, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective on January 6, 1994 (21 U.S.C. 335a(c)(1)(B) and (c)(2)(A)(ii) and 21 U.S.C. 321(ee)).

Any person with an approved or pending drug product application who knowingly uses the services of Mr. Brancato in any capacity, during his period of debarment, will be subject to civil money penalties (21 U.S.C. 335b(a)(6)). If Mr. Brancato, during his period of debarment, provides services in any capacity to a person with an approved or pending drug product application, he will be subject to civil money penalties (21 U.S.C. 335b(a)(7)). In addition, FDA will not accept or review any abbreviated new drug application or abbreviated antibiotic drug application submitted by or with Mr. Brancato's assistance during his period of debarment.

Mr. Brancato may file an application to attempt to terminate his debarment, pursuant to section 306(d)(4)(A) of the act. Any such application would be reviewed under the criteria and processes set forth in section 306(d)(4)(C) and (d)(4)(D) of the act. Such an application should be identified with Docket No. 92N–0416 and sent to the Dockets Management Branch (address above). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j). Publicly available submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 5, 1993.

Jane E. Henney,

Deputy Commissioner for Operations.

[FR Doc. 94–210 Filed 1–5–94; 8:45 am]

BILLING CODE 4160–01–P

[Docket No. 93D–0398]

Proposed Guideline Regarding Microbiological Testing for Antimicrobial Food-Animal Drugs; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a proposed guideline entitled "Microbiological Testing of Antimicrobial Drug Residues in Food" prepared by the Center for Veterinary Medicine (CVM) regarding the tests required for food-animal antimicrobial drug products to establish their human-food safety. This proposed guideline provides criteria for determining which antimicrobials will require supplemental testing, and recommends test procedures that are necessary to ensure that antimicrobial residues will not cause intestinal microflora perturbations in the consumer.

DATES: Submit written comments by April 6, 1994.

ADDRESSES: Submit written requests for single copies of the proposed guideline to the Communications and Education Branch (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1755, or the contact person (address below). Send two self-addressed adhesive labels to assist that office in processing your requests. Submit written comments on the proposed guideline to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857. Requests and comments should be identified with the docket number found in brackets in the heading of this document. A copy of the proposed guideline and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Haydee Fernandez, Center for Veterinary Medicine (HFV–154), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1684.

SUPPLEMENTARY INFORMATION: FDA is announcing the availability of a proposed guideline entitled "Microbiological Testing of Antimicrobial Drug Residues in Food" regarding required testing for food-animal antimicrobial drug products. In evaluating new animal drug applications (NADA's) the agency must determine, among other factors, the safety of the intended use of the drug, including the cumulative effect on man or animal required by section 512(d)(2)(B) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360b(d)(2)(B)). The proposed guideline provides criteria that will be used to determine which antimicrobial drugs will require supplemental testing to ensure that antimicrobial residues will not cause intestinal microflora perturbations in the consumer exposed to antimicrobial residues.

It is well known that therapeutic doses of antibiotics can cause adverse effects on the intestinal microflora ecology. In most cases the lowest dose at which these perturbations occur have not been determined; however, CVM believes that the ecology of the human intestinal microflora should not be disturbed by the residues of antimicrobials used in food-animals.

In June 1992, CVM sponsored a symposium on the Microbiological Significance of Drug Residues in Food to evaluate scientific expertise in this area. Information discussed at the symposium reaffirmed CVM's conclusion that the residue antimicrobial activity is a valid endpoint for establishing residue tolerances for antimicrobial animal drugs.

CVM proposes establishing two categories for antimicrobial drugs: (1) "New Animal Antimicrobial Drugs Requiring Additional Human Food Safety Microbiological Testing" and (2) "New Animal Antimicrobial Drugs Exempt from Additional Human Food Safety Microbiological Testing." To qualify for exemption from additional microbiological testing, the antimicrobial drug must have either: (1) "Very low" residue levels, (2) residues

with limited antimicrobial activity, or (3) no adverse effects on intestinal microflora at approved dosages. Antimicrobial drugs will require additional testing in cases where a safe residue concentration retains antimicrobial activity in humans at residue exposure levels greater than 1 part per million in the total diet.

CVM requests comments regarding how the proposed guideline should relate the effects of low doses of antibiotics observed in model systems to potential adverse biological effects in humans. In addition, information is requested on the appropriate endpoints for monitoring the effects of the different classes of antibiotics.

Interested persons may, on or before April 6, 1994, submit to the Dockets Management Branch (address above) written comments on the proposed guideline. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The proposed guideline and received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 28, 1993.

William K. Hubbard,

Acting Deputy Commissioner for Policy.

[FR Doc. 94–114 Filed 1–5–94; 8:45 am]

BILLING CODE 4160–01–F

Health Care Financing Administration

[BPD–778–PN]

RIN 0938–AG28

Medicare Program; Special Payment Limits for Home Blood Glucose Monitors

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed notice.

SUMMARY: This notice would establish special payment limits for standard home blood glucose monitors, identified as code E0607 of the HCFA Common Procedure Coding System (HCPCS). This proposed notice is intended to prevent excessive payment for these items. Currently, payment under the Medicare program for home blood glucose monitors and other items of durable medical equipment (DME) is equal to 80 percent of the lesser of the actual charge for the item or the fee schedule amount for the item. This notice proposes that payment for standard home blood glucose monitors be equal to 80 percent of the lesser of the actual charge or a special payment limit.

DATES: Comments will be considered if we receive them at the appropriate address, as provided below, by 5 p.m. on March 7, 1994.

ADDRESSES: Mail written comments (1 original and 3 copies) to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: BPD–778–PN, P.O. Box 26688, Baltimore, MD 21207

If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, MD 21207.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code BPD–778–PN. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 245–7890).

FOR FURTHER INFORMATION CONTACT: Joel Kaiser, (410) 966–4499.

SUPPLEMENTARY INFORMATION:

I. Background

A. Special Reasonable Charge Limits

Payment for DME furnished under Part B of the Medicare program (Supplementary Medical Insurance) is made through contractors known as carriers. Before January 1, 1989, payment for DME was made on a reasonable charge basis. The methodology used by the carriers to establish reasonable charges is set forth in sections 1833 and 1842(b) of the Social Security Act (the Act) and in 42 CFR part 405, subpart E. Reasonable charge determinations are generally based on customary and prevailing charges derived from historic charge data. The reasonable charge for an item of DME was generally set at the lowest of the following factors:

- The supplier's actual charge for the item.
- The supplier's customary charge.
- The prevailing charge in the locality for the item. (The prevailing charge may not exceed the 75th percentile of the customary charges of suppliers in the locality.)
- The inflation indexed charge (IIC). The IIC is defined in § 405.509(a) as the lowest of the fee screens used to determine reasonable charges for services, supplies, and equipment paid on a reasonable charge basis (excluding physicians' services) that is in effect on December 31 of the previous fee screen year, updated by the inflation adjustment factor.

Section 1842(b)(3) of the Act requires that all payments under Part B of the Medicare program must be reasonable. Paragraphs (8) and (9) of section 1842(b) of the Act provide that we may establish a special reasonable charge limit for a category of service if, after consultation with representatives of affected parties, we determine that the standard rules for calculating reasonable charges result in grossly deficient or excessive charges.

Applicable regulations are located at § 405.502(g). Section 405.502(g) requires that we consider the available information that is relevant to the category of service and establish reasonable charge limits that are realistic and equitable. The limit on the reasonable charge is an upper limit to correct a grossly excessive charge or a lower limit to correct a grossly deficient charge. The limit is either a specific dollar amount or is based on a special method to be used in determining the reasonable charge.

Section 405.502(g)(1) provides the following examples of circumstances that may result in grossly deficient or excessive charges:

- The marketplace is not competitive.
- Medicare and Medicaid are the sole or primary source of payment for a service.
- The charges involve the use of new technology for which an extensive charge history does not exist.
- The charges do not reflect changing technology, increased facility with that technology, or changes in acquisition, production, or supplier costs.
- The prevailing charges for a service in a particular locality are substantially higher or lower than prevailing charges in other comparable localities, taking into account the relative costs of furnishing the services in the different localities.
- Charges are grossly lower than or exceed acquisition or production costs.
- There have been increases in charges for a service that cannot be explained by inflation or technology.
- The prevailing charges for a service are substantially higher or lower than the payments made for the service by other purchasers in the same locality.

Section 405.502(g)(3) specifies that we announce payment limits in the **Federal Register**. Specifically, we publish in the **Federal Register** our intention to propose limits and allow 60 days for receipt of public comments on the proposal. After we have considered all timely comments, we publish in the **Federal Register** a final notice announcing the special payment limits and our analyses and responses to the comments. Section 405.502(g)(3) also provides that the proposed and final notices must set forth the criteria and circumstances, if any, under which a carrier may grant an exception to the limit(s).

B. DME Fee Schedules

Section 4062 of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) (Public Law 100–203), which added section 1834(a) to the Act, provides for a fee schedule payment methodology for DME furnished on or after January 1, 1989. (This fee schedule payment methodology is set forth in 42 CFR part 414, subpart D.) Sections 1834(a)(1) (A) and (B) of the Act provide that Medicare payment for DME is equal to 80 percent of the lesser of the actual charge for the item or the fee schedule amount for the item. Section 1834(a) of the Act classifies DME into the following payment categories:

- Inexpensive or other routinely purchased DME.
- Items requiring frequent and substantial servicing.
- Customized items.
- Oxygen and oxygen equipment.
- Other items of DME (capped rental items).

There is a separate methodology for determining the fee schedule payment amount for each category of DME. The fee schedules are adjusted annually by a covered item update factor. The covered item update factor is generally equal to the change in the Consumer Price Index for all Urban Consumers (CPI–U) for the 12-month period ending June 30 of the preceding year.

Section 1834(a)(10)(B) provides that we may apply the special payment limits authority of paragraphs (8) and (9) of section 1842(b) to covered items of DME and suppliers of these items and payments under section 1834(a) in the same manner as these provisions apply to physician's services and physicians and reasonable charges under section 1842(b).

C. Payment for Home Blood Glucose Monitors (Code E0607)

Standard home blood glucose monitors allow individuals to measure their blood glucose and, then, alter their diets or insulin dosages to ensure that they are maintaining an adequate blood glucose level. Home blood glucose monitors are covered by the Medicare program as DME and are classified under the inexpensive and other routinely purchased DME payment category defined in section 1834(a)(2) of the Act. Section 1834(a)(2) specifies that inexpensive and other routinely purchased DME are those items of DME that have a purchase price that does not exceed $150 or are acquired at least 75 percent of the time by purchase. We determined that home blood glucose monitors belong in this category based on a review of data that show that these monitors are acquired at least 75 percent of the time by purchase.

Section 1834(a)(2) requires that payment for items falling within this category be made on a purchase or rental basis and that local purchase and rental fee schedule amounts be calculated for each item. Section 414.220(c)(1) provides for the calculation of purchase fee schedules for both new and used DME within this category. The fee schedule amounts for purchased new, purchased used, and rental DME within this category are based on the average reasonable charges for purchased new, purchased used, and rental DME, respectively, from the base year period of July 1, 1986 through June 30, 1987.

The current 1993 fee schedule amounts for code E0607 accurately reflect the average reasonable charges for home blood glucose monitors in 1986, adjusted by 1.7 percent (the percentage increase in the CPI–U for the 6-month period ending with December 1987) and by the cumulative covered item update factor. The average 1993 fee schedule amount for purchased new home blood glucose monitors, excluding the fee schedule amounts for the Virgin Islands, Alaska, Hawaii, and Puerto Rico, is $178.73. However, as we explain below, due to manufacturers' widespread practice of issuing consumer rebates, the fee schedule amounts substantially exceed the effective purchase amount (the list purchase amount less any rebate) paid by the general public in all localities.

We have reviewed pricing and rebate information available for the years 1986 through 1993 to become familiar with the home blood glucose monitor market. Our pricing and rebate sources include: mail order catalogs (such as Bruce Medical Supply catalog, St. Louis Medical Supply, and Institutional Products), advertisements listed in newspapers and periodicals (such as Drug Topics and Shopper's Guide), and pharmacy and other retail store fliers. For the purposes of this analysis, we focused on home blood glucose monitor pricing and national rebate programs listed in the Winter 1993 edition of the Bruce Medical Supply catalog (Vol. 15, No. 1), but the pricing and rebate information found in the Bruce catalog is consistent with the pricing and rebate information available in all the other sources we examined.

In addition, in our experience, the Bruce catalog listed the largest number of home blood glucose monitors made by the largest number of home blood glucose monitor manufacturers, and reflected the national rebate programs offered by these manufacturers. Six different brands of home blood glucose monitors, manufactured by five different organizations, can be purchased from the Bruce catalog from any location in the United States, Puerto Rico, and the United States Virgin Islands and are covered under Medicare. The monitors listed are: Accu-Chek III, manufactured by Boehringer Mannheim; Checkmate, manufactured by Cascade Medical; ExacTech Companion and ExacTech Pen, manufactured by MediSence; Glucometer 3, manufactured by Miles, Inc.; One Touch II, manufactured by Lifescan; and Tracer II, manufactured by Boehringer Mannheim. We estimate that the six monitors listed in the Bruce catalog account for approximately 90 percent of the market. This estimate is based on marketing information presented in an article that appeared in the Wall Street Journal on November 12, 1992 (Marketing and Media section, B1).

We are using the Bruce catalog pricing and rebate information because it is a convenient single reference. We believe the catalog is indicative of market pricing for home blood glucose monitors. In addition, the catalog lists the national rebate programs offered by the manufacturers of the monitors. By choosing the Bruce catalog as the source of data for proposing payment limits, we are not recommending that future purchases of home blood glucose monitors by Medicare beneficiaries be made through the Bruce catalog. We are confident that comparable net prices are available in all localities from the various other mail order or retail outlets.

During the fee schedule base year period (July 1, 1986 through June 30, 1987), retail prices for home blood glucose monitors generally exceeded $150. Since then, several lower priced models have appeared on the market while the older, higher priced models have been phased out. The growth in the home blood glucose monitor market and advances in the technology of producing these monitors have caused the market value of the home blood

glucose monitor to decline steadily, so that now this item is readily available at prices below $70. In addition, manufacturers have begun the widespread practice of issuing consumer rebates to promote their products. Mail-in manufacturers' rebates ranging from $20 to $75 have been available over the past several years. The Medicare program does not receive the benefit of many of these rebates because, although suppliers bill for the price of the equipment, the rebates are sent to the beneficiary.

The average list price of the six monitors in the Bruce catalog is $65.44. Manufacturer rebates, ranging from $30 to $50, are available for four of these monitors. A fifth monitor, the Checkmate, is listed at a price of $61.90, but can be obtained through the catalog free of charge with the purchase of two boxes of Checkmate test strips, supplies that are essential for the effective use of the Checkmate monitoring system. New home blood glucose monitors are now available to the general public at a net cost that is well below the fee schedule amounts established for code E0607.

Our findings are supported by the Office of the Inspector General's (OIG) report "Durable Medical Equipment—Review of Medicare Payments for Home Blood Glucose Monitors" (A–09–92–00034)—issued in December of 1992. In this report, the OIG states that excessive Medicare payments have been made for home blood glucose monitors because claims were not adjusted to reflect manufacturers' rebates. The OIG reviewed a sample of 80 Medicare claims for monitors processed by 2 carriers. From this sample, the OIG identified 50 claims for which rebates were available at the time the monitors were purchased. The OIG found that Medicare payment for only 5 of these 50 claims were reduced by the amount of the rebate. The OIG concluded that the fee schedule amounts established for code E0607 based on pre-1987 historic charges are excessive.

D. Supplier Consultation

Sections 1834(a)(10)(B) and 1842(b)(9)(A)(i) of the Act require that we consult with representatives of the suppliers likely to be affected by any change in payment before making a determination that a fee schedule amount(s) is not inherently reasonable by reason of its grossly excessive or deficient amount. On June 15, 1993, we met with representatives of suppliers of home blood glucose monitors (hereinafter referred to as supplier representatives) to discuss issues relating to Medicare payment for these devices. The following is a synopsis of the comments and concerns of the supplier representatives as expressed at this meeting.

The supplier representatives were primarily concerned about the use of manufacturer rebate information in determining appropriate Medicare payment amounts for home blood glucose monitors. They maintained that the rebate programs are purely a marketing tool used by the manufacturers to promote the sale of their monitors, that the rebates do not relate in any way to the "market price" of the monitors, and that the rebate programs are not permanent and, therefore, should not be used as a basis for establishing payment amounts.

Currently, if a manufacturer's rebate is included in the charge listed on a claim submitted for reimbursement to Medicare, that rebate is to be clearly and specifically identified and is to be annotated as not reimbursable under Medicare. Payment is based on the lower of the actual charge for the equipment (the submitted charge less the rebate amount) or the fee schedule amount. However, as noted in the OIG report discussed above, in a majority of cases, the rebates are not reported on the claims submitted to Medicare, resulting in Medicare overpayments.

The Medicare payment amounts for home blood glucose monitors should not exceed the amounts paid by the general public for these devices. The price of a home blood glucose monitor less any available rebate amount represents the actual cost to the consumer for the device and is an appropriate basis for establishing Medicare payment amounts for these devices.

In the case of home blood glucose monitors, manufacturer rebates are widespread and have been available for several years. The OIG reported that manufacturer rebates for home blood glucose monitors generally range from about $30 to $75 and that the duration of the rebate offer is continually extended, often lasting for more than 1 year or until a new model is introduced. Given the facts underlying the pricing of these monitors, the retail prices of home blood glucose monitors less the available rebate amounts are reasonable measures of the market value of these devices.

The supplier representatives maintained that some rebate programs are not available in some areas of the United States. However, the rebates listed in the Bruce Medical Supply catalog are available to all Medicare beneficiaries living in the continental United States, Alaska, Hawaii, Puerto Rico, and the United States Virgin Islands.

The supplier representatives stated that we should consider establishing inherent reasonableness limits for blood glucose test strips, identified as code A4253 of the HCPCS. Medicare payment for these supplies is made on a reasonable charge basis. The Medicare carriers, therefore, have the authority to establish inherent reasonableness limits for code A4253. We are aware of several carriers that have established inherent reasonableness limits for this code.

II. Provisions of This Proposed Notice

Based on our own experience and the work of OIG, and after consulting with representatives of suppliers of home blood glucose monitors, we have determined that the fee schedule amounts for code E0607 are grossly excessive and are not inherently reasonable. In accordance with section 1842(b)(8) of the Act, we are proposing to replace the use of a fee schedule payment with special payment limits for code E0607. These special payment limits would not apply to home blood glucose monitors with special features (HCPCS code E0609).

A. Special Payment Limits for Code E0607

1. New Home Blood Glucose Monitors

For purchased new home blood glucose monitors furnished to Medicare beneficiaries, we propose the following special payment limits:

Initial Year Special Payment Limits	
Continental U.S.	$57
Alaska, Hawaii, Puerto Rico and Virgin Islands	$65

These proposed limits are based on pricing and manufacturers' rebates contained in the Winter 1993 edition of the Bruce Medical Supply catalog. We based the proposed limits for the continental U.S. on the median net cost, rounded to the nearest dollar, of five of the six monitors listed in the catalog. We omitted the Checkmate monitor because this monitor is relatively new to the market and has little market history. We determined the cost for each monitor to be equal to the Bruce Medical Supply list price decreased by the manufacturer's mail-in rebate (if applicable) and increased by appropriate shipping and handling charges effective December 1992. After making the adjustments for rebates and shipping and handling charges, we are proposing a limit of $57 which exceeds the final cost for four of the six monitors listed in the catalog. We permitted an additional shipping charge of $8 for monitors that are purchased in Alaska,

Hawaii, Puerto Rico, and the U.S. Virgin Islands. In addition, our review of current pricing and rebate information shows that several brands of new home blood glucose monitors can be widely purchased at prices below the proposed limits.

The information we used to calculate the proposed limits is presented below.

BRUCE MEDICAL SUPPLY (WINTER 1993)

[Pricing for Home Blood Glucose Monitors]

Monitor	List price	Rebate	Basic cost (1)	Shipping & handling (2)	Final cost (1+2)
Checkmate	$61.90	[1] $61.90	$0.00	$6.95	$6.95
Tracer II	42.95	30.00	12.95	5.95	18.90
Glucometer 3	42.95	30.00	12.95	5.95	18.90
Accu-Chek III	79.95	30.00	49.95	6.95	56.90
ExacTech	54.95	00.00	54.95	5.95	60.90
One Touch II	109.95	50.00	59.95	8.95	68.90
Median of the final cost—$57					

[1] The Checkmate monitor can be obtained free of charge with the purchase of two boxes of Checkmate test strips.

The final median cost of the monitors listed in the Bruce catalog, excluding the Checkmate monitor, including shipping and handling, and rounded to the nearest dollar is $57. We propose that this amount be established as the special payment limit for new home blood glucose monitors furnished within the continental United States. The final median cost for these monitors, if furnished in Alaska, Hawaii, Puerto Rico, or the United States Virgin Islands, including shipping and handling, and rounded to the nearest dollar is $65. We propose that this amount be established as the special payment limit for new home blood glucose monitors furnished outside the continental United States.

We recognize that shipping and handling costs are unique to mail-order outlets and are not generally experienced by retail outlets; however, we have chosen to include these shipping and handling costs, without regard to the type of supplier, as a proxy for similar costs such as transportation and overhead that might be incurred by retail stores. The average shipping and handling cost per monitor in the continental U.S. is approximately $7, an amount that we believe sufficiently reflects expenses incurred by retail stores that supply home blood glucose monitors. The additional shipping allowance of $8 is intended to reflect additional costs of shipping outside the continental U.S.

2. Purchased Used Home Blood Glucose Monitors

Historically, Medicare allowed payment amounts for the purchase of used DME have been set at approximately 75 percent of the corresponding allowed payment amounts for the purchase of new DME. Based on this ongoing policy, for purchased used home blood glucose monitors, the special payment limits would be equal to 75 percent of the special payment limits for purchased new monitors. If the special payment limit for a purchased new home blood glucose monitor is $57, the special payment limit for the purchased used monitor would be $42.75.

3. Rented Home Blood Glucose Monitors

Historically, Medicare-allowed payment amounts for the rental of DME have been set at approximately 10 percent of the corresponding allowed payment amounts for the purchase of new DME. Based on this ongoing policy, for rented home blood glucose monitors, the special payment limits would be equal to 10 percent of the special payment limits for purchased new monitors. If the special payment limit for a purchased new home blood glucose monitor is $57, the special payment limit for a rented monitor would be $5.70 each month. The total payment for a rented monitor would not be allowed to exceed the lower of the actual charge or the fee for the purchase of the monitor.

B. Applicability

The initial special payment limits we propose would apply to standard home blood glucose monitors furnished on or after the effective date of the published final notice and before January 1, 1994. For standard home blood glucose monitors furnished in calendar year 1994, the special payment limits would be equal to the initial special payment limits increased by the 1994 covered item update factor (the factor used to update other items of DME). The covered item update for 1994, and each subsequent year, is defined in section 1834(a)(14)(B) of the Act as the percentage increase in the CPI–U for the 12-month period ending with June of the previous year. For each calendar year after 1994, the special payment limits would be equal to the special payment limits for the preceding calendar year increased by the covered item update for the calendar year to which the limits would apply.

C. Payment for Home Blood Glucose Monitors

We propose that payment for home blood glucose monitors be equal to 80 percent of the lesser of the actual charge for the monitor or the appropriate special payment limit, as described in section A above.

III. Regulatory Impact Statement

A. Executive Order 12291

Executive Order 12291 (E.O. 12291) requires us to prepare and publish a regulatory impact analysis for any notice that meets one of the E.O. 12291 criteria for a "major rule"; that is, that would be likely to result in—

- An annual effect on the economy of $100 million or more;
- A major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This proposed notice would reduce unnecessary Medicare program

expenditures for standard home blood glucose monitors. Currently, payment under the Medicare program for home glucose monitors is equal to 80 percent of the lesser of the actual charge for the item or the fee schedule amount for the item. Under this proposed notice, payment would be equal to 80 percent of the lesser of the actual charge or the appropriate special payment limit proposed by this notice.

We are proposing special payment limits for purchased new home blood glucose monitors for Medicare beneficiaries of $57 if the monitor is furnished within the continental United States and $65 if furnished in Alaska, Hawaii, Puerto Rico, or the Virgin Islands.

We estimate that imposing special payment limits for purchased new home blood glucose monitors would produce savings of $5 million annually, or $25 million from FY 1994 through FY 1998.

This notice would not meet the $100 million criterion nor would it meet the other E.O. 12291 criteria. Therefore, this notice is not a major rule under E.O. 12291, and an initial regulatory impact analysis is not required.

B. Regulatory Flexibility Act

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a notice would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, all suppliers and manufacturers of home blood glucose monitors are considered to be small entities.

In addition, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a notice may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

In determining whether to adjust payment rates for standard home blood glucose monitors, we considered the potential impacts on quality, access, and beneficiary liability of the adjustment, including the likely effects on assignment rates and participation rates of suppliers (as required by section 1842(b)(8)(C) of the Act). These considerations are addressed below in this impact analysis.

This notice would affect suppliers of standard home blood glucose monitors. Their Medicare payments could be reduced by the amount of the estimated savings. Suppliers can choose to accept assignment, which means they agree to accept Medicare's approved amount as payment in full. It is possible that, as a consequence of our reducing payments for code E0607, the number of suppliers accepting assignment of a beneficiary's claim for Medicare payment for this code may decrease if suppliers choose instead to charge beneficiaries the full difference between the amount charged and the lower Medicare payment. Also, the number of suppliers who elect to become "participating suppliers" may decrease as a result of reduced payments for code E0607. Under the Medicare participation program, a supplier that decides to become a "participating supplier" must agree to accept assignment for all covered services furnished to Medicare beneficiaries. Participating suppliers benefit by being listed in the Medicare Participating Physician/Supplier Directories, known as Medpards, which are compiled by the Medicare carriers and furnished to various senior citizen groups. A Medicare beneficiary can obtain the Medpard for his or her State from the Medicare carrier.

Suppliers who do not accept assignment and charge more than the Medicare approved amount can collect the balance, that is, the actual charge minus Medicare payment, from the beneficiary. Therefore, beneficiaries who receive services from suppliers who do not accept assignment are exposed to greater financial liability than those who receive services from a supplier taking assignment. As a result, Medicare beneficiaries may choose to deal with participating suppliers or purchase less expensive home blood glucose monitors in order to reduce their financial liability.

Manufacturers of more expensive home blood glucose monitors may be affected if, as a result of this notice, suppliers choose to provide less expensive monitors or Medicare beneficiaries decide to use less expensive monitors. We expect that this notice would have minimal affects on the quality of monitors furnished to beneficiaries or on beneficiary access to quality monitors. As we demonstrated above, four out of six home blood glucose monitors listed in the Bruce Medical Supply catalog can be purchased from anywhere in the continental United States for less than $57.

Though the estimated decrease in the allowed limit from $178.73 to $57 for monitors purchased in the continental U.S. appears large, the net decrease is not large, given the size and prevalence of the rebates manufacturers have been refunding to beneficiaries. Four of five manufacturers are giving rebates ranging from 37 percent to 70 percent of the purchase price. In addition, the glucose test strips used with the monitors are specifically manufactured to be used with a specific brand of monitor. The test strips frequently cost more than $.50 each and a beneficiary may use 4 or more each day. Therefore, once the beneficiary obtains a home blood glucose monitor, Medicare could pay an additional $60 each month the beneficiary uses the medically necessary monitor. Apparently, the income generated from the ongoing sale of the test strips far exceeds the income generated from the sale of the monitors. A manufacturer has an enormous incentive to promote the sale of its brand of monitors in order to ensure the future sale of its brand of test strips. For these reasons, we believe that manufacturers and suppliers will continue to provide their services to Medicare beneficiaries.

If a manufacturer's rebate is not reported on a Medicare claim for code E0607, and the beneficiary subsequently mails in the rebate form, and receives the rebate, then the beneficiary receives a windfall in the amount of the rebate and the Medicare program is not benefiting from the rebate. The beneficiary is essentially paid for purchasing a certain brand of monitor

This notice would effectively eliminate any windfall that beneficiaries receive from manufacturer rebates that are not reported on Medicare claims for code E0607.

We are not preparing analyses for either the RFA or section 1102(b) of the Act since we have determined, and the Secretary certifies, that this notice would not result in a significant economic impact on a substantial number of small entities and would not have a significant impact on the operations of a substantial number of small rural hospitals.

IV. Paperwork Reduction Act

This notice does not impose any information collection requirements. Consequently, it need not be reviewed by the Executive Office of Management and Budget under the authority of the Paper Reduction Act of 1980 (44 U.S.C. 3501 through 3511).

V. Response to Comments

Because of the large number of items of correspondence we normally receive on FR documents published for comment, we are not able to acknowledge or respond to them

individually. We will consider all comments we receive by the date and time specified in the "DATES" section of this preamble, and, if we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

(Section 1834(a)(10)(B) of the Social Security Act (42 U.S.C. 1395m(a)(10)(B)); 42 CFR 405.502(g))

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: September 3, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: October 4, 1993.

Donna E. Shalala,

Secretary.

[FR Doc. 94–66 Filed 1–5–94; 8:45 am]

BILLING CODE 4120–01–P

[BPD–796–NC]

Medicare Program; Elimination of Additional Payments for Administrative and General Costs of Hospital-Based Home Health Agencies

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final notice with comment period.

SUMMARY: In accordance with section 13564(b)(1) of the Omnibus Budget Reconciliation Act of 1993, this final notice with comment period provides that the payment add-on for the administrative and general costs of hospital-based home health agencies (HHAs) is eliminated. This notice also explains the effects of this provision on the methodology used in calculating the HHA cost limits.

DATES: *Effective date:* The notice is effective for cost reporting periods beginning on or after October 1, 1993.

Comment date: Written comments will be considered if we receive them at the appropriate address, as provided below, and must be received by 5 p.m. on March 7, 1994.

ADDRESSES: Mail comments (an original and three copies) to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: BPD–796–NC, P.O. Box 7517, Baltimore, MD 21207–0517.

If you prefer, you may deliver your comments (an original and three copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Ave. SW., Washington, DC 20201, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, MD 21207.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code BPD–796–NC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in room 309–G of the Department's offices at 200 Independence Avenue SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (Phone: 202–690–7890).

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FOR FURTHER INFORMATION CONTACT: Michael Bussacca (410) 966–4602.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1861(v)(1)(A) of the Social Security Act (the Act) authorizes the Secretary to establish limits on allowable costs incurred by a provider of services that may be paid under the Medicare program. These limits are based on estimates of the costs necessary in the efficient delivery of needed health services. Under this authority, we have maintained limits on HHA per-visit costs since 1979. The limits may be applied to direct or indirect overall costs or to the costs incurred for specific items or services furnished by the provider. This statutory provision is implemented in the regulations at 42 CFR 413.30. Additional statutory provisions governing the limits are contained at section 1861(v)(1)(L) of the Act. Section 1861(v)(1)(L)(i) specifies that for cost reporting periods beginning after July 1, 1987, the cost limits are not to exceed 112 percent of the mean of the labor-related and nonlabor per-visit costs for freestanding HHAs. In addition, section 1861(v)(1)(L)(ii) of the Act has required that an adjustment be made to the cost limits for the administrative and general (A&G) costs of hospital-based agencies. The A&G per-visit add-on for hospital-based HHAs has been applied since 1980.

We published a notice with comment period that appeared in the July 8, 1993 issue of the **Federal Register** (58 FR 36748) that set forth a revised schedule of limits on HHA costs for cost reporting periods beginning on or after July 1, 1993. The limits were computed using actual cost per-visit data from cost reporting periods ending on or after June 30, 1989 and before May 31, 1991, and were adjusted by the latest estimates in the "market basket" index to reflect changes in the price of goods and services furnished by HHAs.

II. Provisions of This Final Notice With Comment Period

A. Elimination of the A&G Add-on

On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Public Law 103–66, was enacted. Section 13564(b) of OBRA '93 amended section 1861(v)(1)(L)(ii) of the Act to require that, effective for cost reporting periods beginning on or after October 1, 1993, we no longer include a payment adjustment for the administrative and general costs of hospital-based HHAs in computing the HHA limits. Under this provision, hospital-based HHAs and freestanding HHAs will be treated identically for payment purposes. Thus, in computing a hospital-based HHA's cost limits for cost reporting periods beginning on or after October 1, 1993, the A&G add-on amounts that were to apply, as set forth in Table II of the July 8, 1993 notice (58 FR 36753), will not be used. Other components of the July 8, 1993 notice, specifically the per-visit limits in Table I, the wage indexes in Tables IIIa and IIIb, and the cost reporting year adjustment factors in Table IV, will continue to be used to compute the limits.

We note that section 13564(a) of OBRA '93 amended section 1861(v)(1)(L)(iii) of the Act to provide that there be no changes in the per-visit cost limits for home health services for cost reporting periods beginning on or after July 1, 1994, and before July 1, 1996. Since the effective date of that provision is different from that of the elimination of the A&G add-on, we intend to publish a separate notice in a future **Federal Register** to explain the effects of the delay in the update. Again,

the only change in the methodology for computing the HHA cost limits that is effective for cost reporting periods beginning on or after October 1, 1993 is the elimination of the A&G add-on for hospital-based HHAs.

B. Computing the Cost Limit for a Hospital-Based HHA

The example below illustrates how an adjusted occupational therapy per-visit cost limit is calculated for a hospital-based HHA in Dallas, Texas, with a 12-month cost reporting period beginning October 1, 1993. Because the A&G add-on has been eliminated, this example is identical to the example contained in our July 8, 1993 notice (58 FR 36752) of the calculation of a limit for a free-standing HHA, with the exception of the application of a different cost reporting period adjustment factor, as set forth in Table IV of that notice. These factors are based on the month and year in which an HHA's cost reporting period begins, and are used to account for inflation in costs that occurs after the effective date of the latest schedule of HHA limits. Thus, in the example below, the adjustment factor from Table IV of the July 8, 1993 notice for an HHA with a cost reporting period beginning October 1, 1993 is applied.

To arrive at the adjusted limit, the HHA's intermediary first determines the adjusted labor-related component by multiplying the labor-related component of the limit by the appropriate wage index value, and then adjusts for budget neutrality. The adjusted limit is the sum of the adjusted labor-related component, plus the nonlabor component, plus other adjustments (if applicable), multiplied by the applicable cost reporting period adjustment factor.

Example: Calculation of an Adjusted Occupational Therapy Limit for a Hospital-Based HHA in Dallas, Texas for a Cost Reporting Period Beginning October 1, 1993 (using the appropriate tables from the July 8, 1993 schedule of limits)

Labor Component (Table I)	$76.27
Wage Index Value (Table III)	×0.9599
Labor Portion	$73.21
Special Labor Adjustment for Budget Neutrality	×1.027
Adjusted Labor Portion	$75.19
Nonlabor Component (Table I)	+16.68
OSHA Adjustment	+0.18
	$92.05
Cost Reporting Period. Adjustment Factor (Table IV)	× 1.0126
Adjusted Occupational Therapy Limit	$93.21

If an HHA uses a cost reporting period that is not 12 months in duration, a special adjustment factor is calculated. This is necessary because inflation projections are computed to the midpoint of the cost reporting period, and the adjustment factors in Table IV are based on 12-month cost reporting periods. For cost reporting periods other than 12 months, the calculation must be made for the midpoint of the specific cost reporting period. In these cases, the intermediary for the HHA obtains this adjustment factor from HCFA.

In the July 8, 1993 notice, we also set forth an example of a cost-limit calculation with A&G add-on for a hospital-based HHA in State College, Pennsylvania (58 FR 36754). That example, as well as any other references in that document to the A&G add-on, are no longer applicable for cost reporting periods beginning on or after October 1, 1993.

III. Impact Statement

Executive Order 12866 (E.O. 12866) requires us to prepare an analysis for any rule that meets one of the E.O. 12866 criteria for a "significant regulatory action"; that is, that may—

- Have an annual effect on the economy of $100 million or more; or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

In addition, for final notices such as this, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that this notice would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, all HHAs are treated as small entities.

This final notice with comment period announces the provisions of section 13564(b) of OBRA '93, which provides for the elimination of the A&G add-on for hospital-based HHAs, effective for cost reporting periods beginning on or after October 1, 1993. None of the provisions of this notice interprets or extends requirements beyond those set forth in OBRA '93.

Section 13564(b) of OBRA '93 will result in significant Federal cost savings. The impact of this provision is discussed further below. This notice explains how the provision affects the methodology for calculating the HHA limits. We do not believe that merely explaining the results of this provision in this notice produces any effect that will meet any of the criteria of E.O. 12866 for a significant regulatory action or will have a significant effect on a substantial number of small entities. Therefore, we have determined and the Secretary certifies that neither an impact statement under E.O. 12866 nor a regulatory flexibility analysis under the RFA are required.

To the extent that a legislative provision being announced by a notice such as this may have a significant effect on beneficiaries or providers or may be viewed as controversial, we believe that we should address any potential concerns. In this instance, we believe it is desirable to inform the public of our estimate of the substantial budgetary effect of this statutory change. We estimate that the elimination of the add-on for hospital-based HHAs will result in the following savings to the Medicare program:

TABLE 1.—IMPACT OF THE ELIMINATION OF HOSPITAL-BASED ADD-ON*

Fiscal year	Savings
1994	$70
1995	120

*All figures are rounded to the nearest $10 million.

We have attempted to examine the overall effects of this provision on hospital-based HHAs. As illustrated in Table 2 below, we estimate that the elimination of the A&G add-on for hospital-based HHAs will result in substantial increases in the number of hospital-based HHAs that meet or exceed the cost limits.

TABLE 2.—HOSPITAL-BASED HHAS AT OR OVER THE COST LIMITS

	HHAs in Model	July 1993	October 1993
Hospital-Based	1599	774	1144
Urban	780	397	596
Rural	819	377	548

The model used for our analysis is based on data from 1,599 hospital-based HHAs. In our July 8, 1993 notice, which used the same model, we estimated that 774 hospital-based HHA in the model would meet or exceed the HHA cost limits. Thus, we believe that the proportion of hospital-based HHAs that will meet or exceed the cost limits is likely to increase from approximately 48 percent (774/1599) to 72 percent (1144/1599) as a result of the elimination of the A&G add-on.

We are unable to identify the effects of this provision on individual hospital-based home health agencies. However, we anticipate that overall FY 1994 Medicare payments for hospital-based HHAs will be approximately 6 percent less than they would have been if the A&G add-on had not been eliminated. The effects of this reduction on the total revenues of individual hospital-based HHAs will depend on the HHA's ability to operate within the cost limits and on the proportion of the HHA's revenues that come from the Medicare program.

Section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a final notice such as this may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 100 beds located outside of a Metropolitan Statistical Area.

We have not prepared a rural impact statement since we have determined and the Secretary certifies that this final notice will not have a significant economic impact on the operations of a substantial number of small rural hospitals.

IV. Other Required Information

A. Waiver of Proposed Notice and 30-Day Delay in the Effective Date

In adopting notices such as this, we ordinarily publish a proposed notice in the **Federal Register** with a 60-day period for public comment as required under section 1871(b)(1) of the Act. We also normally provide a delay of 30 days in the effective date for documents such as this. However, we may waive these procedures if we find good cause that prior notice and comment or a delay in the effective date are impracticable, unnecessary, or contrary to the public interest.

Section 13564(b)(1) of OBRA '93 amended section 1861(v)(1))(L)(ii) of the Act to eliminate, effective for cost reporting periods beginning on or after October 1, 1993, the adjustment to the HHA cost limits to recognize the administrative and general costs of hospital-based HHAs. In conformance with the clear direction of section 13564(b)(1) of OBRA '93, this notice announces the elimination of the adjustment to the HHA cost limits to recognize the administrative and general costs of hospital-based HHAs and explains the effect that this action will have on methodology for calculating the cost limits of hospital-based HHAs. We have made no changes in this methodology beyond those directly required by section 13564(b)(1) of OBRA '93, nor are there any other discretionary aspects to this notice. Moreover, section 13564(b)(2) of OBRA '93 mandates that these provisions are effective beginning with cost reporting periods beginning on or after October 1, 1993. Thus, we have concluded that in this instance, it would be impracticable, unnecessary, and contrary to the public interest to publish a proposed notice or to provide for a 30-day delay in the effective date of this notice. Therefore, we find good cause to waive publication of a proposed notice and the 30-day delay in effective date. However, we are providing a 60-day period for public comment, as indicated at the beginning of this notice.

B. Paperwork Reduction Act

This final notice does not impose information collection requirements. Consequently, it does not need to be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

C. Public Comments

Because of the large number of items of correspondence we normally receive on a notice with comment period, we are not able to acknowledge or respond to them individually. However, we will consider all comments concerning the provisions of this notice that we receive by the date and time specified in the "**DATES**" section of this notice, and, if changes are made in another notice, we will respond to these comments in that notice.

Authority: (Section 1861(v)(1)(L) of the Social Security Act (42 U.S.C. 1395x(v)(1)(L)); section 4207(d) of Pub. L. 101–508 (42 U.S.C. 1395x (note)); section 13564(b) of Pub. L. 103–66 (42 U.S.C. 1395x (note)).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: November 19, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: December 5, 1993.

Donna E. Shalala,

Secretary.

[FR Doc. 94–61 Filed 1–5–94; 8:45 am]

BILLING CODE 4120–01–P

[BPD–795–NC]

RIN: 0938–AG56

Medicare Program; Schedule of Limits for Skilled Nursing Facility Inpatient Routine Service Costs

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final notice with comment period.

SUMMARY: This final notice with comment period provides that there will be no changes in the skilled nursing facility (SNF) cost limits for cost reporting periods beginning during Federal fiscal years 1994 and 1995 and that the add-on for administrative and general costs of hospital-based SNFs is eliminated. This notice announces provisions of the Omnibus Budget Reconciliation Act of 1993 that affect the schedule of limits on SNF routine service costs for which payment may be made under the Medicare program and explains the effects of these provisions on the methodology used in calculating the SNF cost limits.

DATES: *Effective date:* The provisions set forth in this notice are effective for cost reporting periods beginning on or after October 1, 1993.

Comment date: Written comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on [March 7, 1994].

ADDRESSES: Mail written comments (1 original and 3 copies) to the following address:

Health Care Financing Administration Department of Health and Human Services Attention: BPD–795–NC, P.O. Box 7571, Baltimore Maryland 21207–0517.

If you prefer, you may deliver your comments to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Ave. SW., Washington DC 20201, or

Room 132, East High Rise Building 6325 Security Boulevard Baltimore Maryland 21207.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code BPD–795–NC. Comments received timely will be available for public inspection as they are received, beginning approximately three weeks after publication of a document, in room 309–G of the Department's offices at 200 Independence Avenue SW., Washington DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (Phone: 202–690–7890).

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FOR FURTHER INFORMATION CONTACT: Laurence Wilson, (410) 966–4603

SUPPLEMENTARY INFORMATION:

I. Background

Sections 1861(v)(1)(A) and 1888 of the Social Security Act (the Act) authorize the Secretary to set limits on allowable costs incurred by a provider of services for which payment may be made under Medicare. These limits are based on estimates of the costs necessary for the efficient delivery of needed health services. Implementing regulations appear at 42 CFR 413.30. Section 1888 of the Act directs the Secretary to set limits on per diem inpatient routine service costs for hospital-based and freestanding skilled nursing facilities (SNFs) by urban or rural area location. Section 4008(e)(2) of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) amended section 1888(a) of the Act to require the Secretary to update the per diem SNF cost limits for cost reporting periods beginning on or after October 1, 1992, and every 2 years thereafter.

Under the authority of section 1888 of the Act, we published a final notice on October 7, 1992 (57 FR 46177) announcing a schedule of limits for freestanding and hospital-based SNFs effective for cost reporting periods beginning on or after October 1, 1992. The limits were computed using data from cost reporting periods ending on or after June 30, 1989, through May 31, 1990, for freestanding SNFs and from cost reporting periods ending on or after October 31, 1988, through September 30, 1989, for hospital-based SNFs.

The October 7, 1992 final notice contained provisions relating to:

(1) Separate group limits for labor-related and nonlabor-related components of SNF per diem routine service costs;

(2) Adjustments to the cost limits by an area wage index developed from hospital industry wages;

(3) A "market basket" index developed to reflect changes in the price of goods and services purchased by SNFs;

(4) Application of the adjusted hospital wage index to wages, employee benefits, health service costs, costs of business services, and other miscellaneous expenses;

(5) Freestanding SNF cost limits set at 112 percent of the average per diem labor-related and nonlabor-related costs;

(6) Hospital-based SNF cost limits set at the limit for freestanding SNFs, plus 50 percent of the difference between the freestanding limit and 112 percent of the average per diem routine service costs of hospital-based SNFs, and an add-on for administrative and general (A&G) costs;

(7) Cost-of-living adjustments for Alaska, Hawaii, Puerto Rico, and the Virgin Islands;

(8) Exceptions to the cost limits;

(9) A classification system based on whether the SNF is hospital-based or freestanding and whether it is located in an urban or rural area.

In addition to the above provisions, the October 7, 1992 final notice also provided for a per diem add-on to recognize the costs incurred by SNFs in complying with the additional nursing home reform requirements of section 1819 of the Act (including the costs of conducting nurse aide training and competency evaluations). (Section 1861(v)(1)(E) of the Act provides for Medicare payment for costs incurred by SNFs in complying with the requirements of section 1819 of the Act.) The October 7, 1992 notice also included an add-on to the cost limits to recognize the costs that SNFs may incur in meeting the universal precaution requirements of the Occupational Safety and Health Administration (OSHA). These requirements were described in a final rule published by OSHA in the **Federal Register** on December 6, 1991 (54 FR 64004) that set forth a standard under section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655) to eliminate or minimize occupational exposure to bloodborne pathogens.

II. Provisions of This Final Notice With Comment Period

A. No Changes in the Cost Limits

On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Public Law 103–66, was enacted. Section 13503(a)(1) of OBRA '93 requires that there be no changes in the SNF routine cost limits (except as may be necessary to take into account the elimination of the administrative and general add-on for hospital-based SNFs) for cost reporting periods beginning during Federal fiscal years (FY) 1994 and 1995, that is, for cost reporting periods beginning on or after October 1, 1993, and before October 1, 1995. The effect of this provision is that a SNF's latest routine cost limit for a period beginning on or after October 1, 1992 and before October 1, 1993, as calculated under the October 7, 1992 notice, without regard to any subsequent adjustments under section 1888(c) of the Act such as exceptions, will remain in effect until its cost reporting period beginning on or after October 1, 1995. Accordingly, there will be no changes to a SNF's cost limit for cost reporting periods beginning on or after October 1, 1993, and before October 1, 1995, to account for inflation, updates of the data, changes to the wage index or to MSA designations. Thus, in computing a provider's cost limit for cost reporting periods beginning on or after October 1, 1993 and before October

1, 1995, the cost reporting period adjustment factors that were to apply for cost reporting periods beginning on or after October 1, 1993, as set forth in Table IV of the October 7, 1992 notice (57 FR 46188), will not be used. Other components of the October 7, 1992 notice, specifically the SNF Group Limits in Table I, and the wage indexes in Tables II and III will continue to be used to compute the limits, with the exception in Table I of the add-on for administrative and general costs of hospital-based SNFs.

In the example below, a freestanding SNF in Dallas, Texas has a cost reporting period beginning date of January 1, 1993. As calculated under the October 7, 1992 notice, its cost limit for the 12-month period beginning January 1, 1993 is $96.97. Under the provisions of this notice, the cost limit of $96.97 will remain in effect for its 12-month cost reporting periods beginning January 1, 1994 and January 1, 1995. As explained above, the cost reporting period adjustment factors that would have been used under the October 7, 1992 notice for calculating the limits for the SNF's new cost reporting periods beginning January 1, 1994 and January 1, 1995, are not used. Accordingly, the provider in this example will not have any change in its cost limit until its cost reporting period beginning January 1, 1996.

Example—Calculation of Adjusted Limit for a Freestanding SNF Located in Dallas, Texas (using the appropriate tables from the October 7, 1992 schedule of limits):

Labor-Related Component	$79.56	(Table I).
Wage Index	×0.9638	(Table II).
Adjusted Labor Component	$76.68	
Nonlabor-Related Component	+17.08	(Table I).
Nursing Home Reform and OSHA Per Diem Add-On	+1.98.	
Limit Prior To Inflation Adjustment $95.74		
Adjustment Factor	×1.01286	(Table IV).
Inflation Adjusted Limit	$96.97	

As noted above, for cost reporting periods beginning on or after October 1, 1993 but before October 1, 1995, a SNF's cost limit will be its latest routine cost limit for the period beginning on or after October 1, 1992 and before October 1, 1993, as calculated under the October 7, 1992 notice and without regard to any subsequent adjustments, such as an exception to the limit. Thus, if the SNF in the above example received an exception to its cost limit for its cost reporting period beginning January 1, 1993, its cost limit for the cost reporting period beginning January 1, 1994 would not include the exception amount for the previous period. To receive an exception or other adjustment to its cost limit, the SNF would need to submit a request to its fiscal intermediary in accordance with the procedures set forth in § 413.30 of the regulations.

B. Periods Other Than 12 Months

The above methodology applies to providers with cost reporting periods of 12 months in duration. If a facility's cost reporting period is not 12 months in duration, a special adjustment factor is calculated. This is necessary because inflation projections are computed to the midpoint of a cost reporting period, and the adjustment factors in Table IV are based on 12-month reporting periods. For cost reporting periods of other than 12 months, the calculation must be made based on the midpoint of the specific cost reporting period. The SNF's intermediary obtains this adjustment factor from HCFA central office. This methodology results in a different cost limit than if a 12-month adjustment factor were used. However, since the provisions of OBRA '93 require no changes in the cost limit on or after October 1, 1993, the limit calculated with the special adjustment factor will remain in place for subsequent cost reporting periods beginning before October 1, 1995.

C. Providers Entering the Medicare Program

For providers entering the Medicare program on or after October 1, 1993 and before October 1, 1995, the applicable cost limit will be the cost limit for the identical period beginning on or after October 1, 1992 through September 30, 1993. For example, if a provider enters the Medicare program on September 1, 1994, with a 12-month cost reporting period, its cost limit will be determined in the same manner as a cost limit for a period beginning September 1, 1993 and ending August 30, 1994. If the provider's cost reporting period is a short period beginning September 1, 1994 and ending December 31, 1994, the provider's cost limit will be determined in the same manner as a cost limit for a period beginning September 1, 1993 and ending December 31, 1993. In addition, whether the first period is a full 12-month period or a period other than 12 months, the cost limit determined for the first period will remain in effect until the provider's first cost reporting period beginning on or after October 1, 1995.

D. Next Update of Limits

As discussed above, before the enactment of OBRA '93, section 1888(a) of the Act required that the SNF routine cost limits be updated on October 1, 1992 and every 2 years thereafter. Section 13503(a)(1) of OBRA '93 amended this section to delay the next update until October 1, 1995, and every 2 years thereafter. Accordingly, there will be no changes to the routine cost limits published in the October 7, 1992 notice for inflation, changes in the wage index, geographic designation, or for a more recent data base until October 1, 1995.

E. Add-On for Hospital-Based SNFs

Before the enactment of OBRA '93, section 1888(b) of the Act provided for an add-on to recognize the cost differences between hospital-based and freestanding SNFs attributable to excess overhead allocations, that is, an add-on for the administrative and general costs (A&G) of hospital-based SNFs. Section 13503(a)(3) of OBRA '93 amended this section of the Act to repeal the requirement that we recognize cost differences attributable to excess overhead allocations. Therefore, this notice implements that provision by eliminating the A&G add-on for hospital-based SNFs. In addition, while section 13503(a)(1) of OBRA '93 requires that there be no changes in the cost limits, as explained above, it also states that the provision does not apply to the elimination of the A&G add-on for hospital-based SNFs. Therefore, effective for cost reporting periods beginning on or after October 1, 1993, we will no longer apply the administrative and general add-on for hospital-based SNFs as shown in Table

I of the October 7, 1992 schedule of limits. The intermediary will continue to determine the cost limits for hospital-based SNFs using the relevant instructions and Table I SNF Group Limits, as described in the October 7, 1992 notice. However, for cost reporting periods beginning on or after October 1, 1993, these limits will be calculated without using the A&G add-on.

The example below uses information from Table I of the October 7, 1992 schedule of limits to calculate a cost limit for a hospital-based SNF located in Scranton, Pennsylvania. The cost limit is for a cost reporting period beginning October 1, 1993. However, as discussed above, the A&G add-on for hospital-based SNFs is no longer applied, and the cost limit effective October 1, 1992 remains in effect for the cost reporting period beginning on or after October 1, 1993.

Example—Calculation of Adjusted Limit Effective October 1, 1993, for a Hospital-Based SNF Located in Scranton, Pennsylvania:

Labor-Related Component Limit	$112.22	(Table I).
Wage Index	×0.8952	(Table II).
Adjusted Labor Component	$100.46	
Nonlabor-Related Component:		
Limit	23.79	(Table I).
Nursing Home Reform and OSHA Per Diem Add-on	+1.98	
Adjusted Limit	$126.23	

F. Adjustments to the Routine Limits

Section 1888(c) of the Act provides for appropriate adjustments to the SNF routine cost limits. These adjustments are set forth at § 413.30 and include: exemptions from the cost limits for new providers; exceptions to the limits for atypical services and extraordinary circumstances; and other provisions. Section 13503(a)(1) of OBRA '93 mandates that the effect of allowing no changes in the SNF routine cost limits for cost reporting periods beginning during FYs 1994 and 1995 not be considered in making adjustments to the routine cost limits under the exceptions process. Therefore, effective for cost reporting periods beginning on or after October 1, 1993, and before October 1, 1995, a provider may request an exception only for costs incurred above the amount that the limit would have been had the provisions set forth in this notice regarding no changes in the cost limits not been enacted. Accordingly, for the purpose of determining the amount of an exception to the SNF routine cost limits under the regulations at § 413.30(f), the difference between the amount of a provider's cost limit as determined by the provisions set forth in this notice, and the amount that a provider's cost limit would have been under the October 7, 1992 notice had the provisions described herein not been enacted, is not subject to an exception to the routine cost limits. We note that this provision does not apply to the A&G add-on for hospital-based SNFs. That is, for cost reporting periods beginning on or after October 1, 1993, the A&G add-on for hospital-based SNFs will not be used in computing the amount that the hospital-based cost limit would have been had the provisions requiring no changes in the limits not been enacted. In addition, we note that this provision has no effect on new provider exemptions to the SNF cost limits, as set forth under § 413.30(e)(2), since this exemption removes the limitation on a SNF's routine costs.

The example below demonstrates the computation to determine the amount not subject to an exception under the provisions set forth in this notice. The provider's cost limit is computed for the cost reporting period beginning January 1, 1993, in accordance with the provisions set forth in this notice, and this limit remains in effect until the cost reporting period beginning January 1, 1995. The provider has requested an exception to its limit for the period beginning January 1, 1994. Again, we use the information from the October 7, 1992 notice to calculate what the limit would have been had the OBRA '93 provisions requiring no changes in the limits not been enacted. The difference of $5.04 between the actual limit and the amount the limit would have been is the amount not subject to an exception.

Example—Calculation of Amount Not Subject to an Exception to the Limits Freestanding SNF Located in Dallas, Texas:

Labor-Related Component	$79.56	(Table I).
Wage Index	×0.9638	(Table II).
Adjusted Labor Component	$76.68	
Nonlabor-Related Component	+17.08	(Table I).
Nursing Home Reform and OSHA Per Diem Add-On	+1.98	
Limit Prior To Inflation Adjustment	$95.74	
Adjustment Factor (January 1, 1993)	×1.01286	(Table IV).
Inflation Adjusted Limit (Limit in Effect for January 1, 1993, January 1, 1994, January 1, 1995)	$96.97	
Adjustment Factor (January 1, 1994 for Exception Purposes Only)	×1.06553	(Table IV).
Inflation Adjusted Limit (January 1, 1994 for Exception Purposes Only)	$102.01	
Amount Not Subject to Exception ($102.01–$96.97)	$5.04	

III. Impact Statement

Executive Order 12866 (E.O. 12866) requires us to prepare an analysis for any rule that meets one of the E.O. 12866 criteria for a "significant regulatory action"; that is, that may—

- Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

• Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

• Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

• Raise a novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

In addition for final notices such as this, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that this notice will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, all SNFs are treated as small entities.

This final notice with comment period announces the provisions of section 13503(a) of OBRA '93, which provides for a delay in the updates of the limits on payments for routine SNF services through cost reporting periods beginning before October 1, 1995, and provides for the elimination of the A&G add-on for hospital-based SNFs effective for cost reporting periods beginning on or after October 1, 1993. None of the provisions of this notice interprets or extends requirements beyond those set forth in OBRA '93.

Sections 13503(a)(1) and (3) of OBRA '93 will result in significant Federal cost savings. The impact of these provisions is discussed further below. This notice explains the revised methodology for calculating the SNF limits that results from the provisions of OBRA '93. We do not believe that merely reflecting these provisions in this notice produces any effect that will meet any of the criteria of E.O. 12866 for a significant regulatory action or will have a significant effect on a substantial number of small entities. Therefore, we have determined and the Secretary certifies that neither an impact analysis under E.O. 12866 nor a regulatory flexibility analysis under the RFA are required.

To the extent that a legislative provision being announced by a notice such as this may have a significant effect on beneficiaries or providers or may be viewed as controversial, we believe that we should address any potential concerns. In this instance, we believe it is desirable to inform the public of our estimate of the substantial budgetary effect of these statutory changes. We estimate that these statutory provisions will result in the following savings to the Medicare program:

TABLE 1.—IMPACT OF DELAY IN THE UPDATE OF SNF LIMITS AND ELIMINATION OF ADD-ON*

Fiscal year	Update delay	Elimination of add-on
1994	$30	$10
1995	120	10
1996	90	10
1997	.....	10
1998	.....	10

*All figures are rounded to the nearest $10 million.

As illustrated in Table 2 below, the delay in updating the cost limits until October 1, 1995, combined with the elimination of the A&G add-on for hospital-based SNFs, will result in a small increase in the number of SNFs exceeding the SNF limits in all categories, although we cannot isolate the separate impact of these factors. Table 2 below shows the combined impact of these changes.

TABLE 2.

	Total SNFs	Exceeding old limits	Exceeding new limits
Freestanding SNFs	5340	911	1209
Urban	4074	706	930
Rural	1266	205	279
Hospital-based SNFs	908	518	563
Urban	455	298	321
Rural	453	220	242

We are unable to identify the effects of these provisions on individual SNFs. However, we anticipate that overall SNF payments for FY 1994 and FY 1995 will be approximately 1.2 percent and 2.3 percent less, respectively, than they would have been in those years if the OBRA '93 provisions were not in effect. Moreover, since Medicare does not account for a high proportion of SNF utilization or revenue, we estimate that the delay in updating the limits and the elimination of the hospital-based add-on will not result in a significant number of facilities' total revenues being increased or reduced by 3 percent or more from the October 7, 1992 limits, adjusted for inflation. Thus, we have determined that the economic impact on SNFs will not be significant.

Section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a final notice such as this may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 100 beds located outside of a Metropolitan Statistical Area.

We have not prepared a rural impact statement since we have determined and the Secretary certifies that this final notice will not have a significant economic impact on the operations of a substantial number of small rural hospitals.

IV. Other Required Information

A. Paperwork Reduction Act

This final notice with comment period does not impose information collection requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 through 3511).

B. Waiver of Proposed Notice and 30-Day Delay in the Effective Date

In adopting notices such as this, we ordinarily publish a proposed notice in the **Federal Register** with a 60-day period for public comment as required under section 1871(b)(1) of the Act. We also normally provide a delay of 30 days in the effective date for documents such as this. However, we may waive these procedures if we find good cause that prior notice and comment or a delay in the effective date are impracticable, unnecessary, or contrary to the public interest.

As discussed above, before the enactment of OBRA '93, section 1888(a) of the Act required that the SNF routine cost limits be updated for cost reporting periods beginning on or after October 1,

1992 and every 2 years thereafter. However, section 13503(a)(1) of OBRA '93 specifies that there be no changes in the SNF cost limits for cost reporting periods beginning during FYs 1994 and 1995, and section 13503(a)(2) of OBRA '93 amended section 1888 of the Act to delay the next required update of the SNF limits until October 1, 1995. In addition, section 13503(a)(3) of OBRA '93 amended section 1888(b) of the Act to eliminate, effective for cost reporting periods beginning on or after October 1, 1993, the add-on to the SNF cost limits to recognize the higher administrative and general costs of hospital-based SNFs.

In conformance with the clear direction of section 13503(a) of OBRA '93, this notice announces the new SNF provisions and explains the effects of these provisions on the methodology used in calculating the SNF cost limits. We have made no changes in this methodology beyond those directly required by OBRA '93, nor are there any other discretionary aspects to this notice. Moreover, section 13503(a) of OBRA '93 mandates that these provisions are effective beginning with cost reporting periods beginning on or after October 1, 1993. Thus, we have concluded that in this instance, it would be impracticable, unnecessary, and contrary to the public interest to publish a proposed notice or to provide for a 30-day delay in the effective date of this notice. Therefore, we find good cause to waive publication of a proposed notice and the 30-day delay in effective date. However, we are providing a 60-day period for public comment, as indicated at the beginning of this preamble.

C. Public Comments

Because of the large number of items of correspondence we normally receive, we are not able to acknowledge or respond to them individually. However, we will consider all comments that we receive by the date and time specified in the "Date" section of the preamble to this notice. If we make any changes to this notice, we will respond to the comments in the preamble to the notice that incorporates the changes.

Authority: (Sections 1102, 1814(b), 1861(v)(1), 1866(a), 1871, and 1888 of the Social Security Act (42 U.S.C. 1302, 1395f(b), 1395x(v)(1), 1395cc(a), 1395hh, and 1395yy); section 6024 of Pub. L. 101–239 (42 U.S.C. 1395yy(note)); section 13503 of Pub. L. 103–66 (42 U.S.C. 1395yy(note)) and 42 CFR 413.30.)

(Catalog of Federal Domestic Assistance Program No. 93.773 Medicare-Hospital Insurance Program)

Dated: November 23, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: November 28, 1993.

Donna E. Shalala,

Secretary.

[FR Doc. 94–62 Filed 1–5–94; 8:45 am]

BILLING CODE 4120–01–P

Health Resources and Services Administration

Program Announcement, Proposed Minimum Percentages for "High Rate" and "Significant Increase in the Rate" for Implementation of the General Statutory Funding Preference and Proposed Funding Priority for Grants for Establishment of Departments of Family Medicine for Fiscal Year 1994

The Health Resources and Services Administration (HRSA) announces that applications for fiscal year (FY) 1994 Grants for Establishment of Departments of Family Medicine are being accepted under the authority of section 747(b), (previously section 780) of the Public Health Service (PHS) Act, title VII, as amended by the Health Professions Education Extension Amendments of 1992, Public Law 102–408, dated October 13, 1992. Comments are invited on the proposed minimum percentage for "High Rate" and "Significant Increase in the Rate" for Implementation of the General Statutory Funding Preference, and proposed funding priority stated below.

Approximately $9.4 million will be available for the Grants for Establishment of Departments of Family Medicine program in FY 1994. Total continuation support recommended is $5.7 million. It is anticipated that $3.7 million will be available to support approximately 22 competing awards averaging $170,000.

Purpose

Section 747(b) of the PHS Act authorizes support to schools of medicine and osteopathic medicine to meet the costs of projects to establish, maintain, or improve family medicine academic administrative units (which may be departments, divisions, or other units) to provide clinical instruction in family medicine. Funds awarded will be used to: (1) Plan and develop model educational predoctoral, faculty development and graduate medical education programs in family medicine which will meet the requirements of section 747(a), by the end of the project period of section 747(b) support; and (2) support academic and clinical activities relevant to the field of family medicine.

The program may also assist schools to strengthen the administrative base and structure that is responsible for the planning, direction, organization, coordination, and evaluation of all undergraduate and graduate family medicine activities. Funds are to complement rather than duplicate programmatic activities for actual operation of family medicine training programs under section 747(a).

Previous Funding Experience

Previous funding experience information is provided to assist potential applicants to make better informed decisions regarding submission of an application for this program.

In FY 1993, HRSA reviewed 50 competing applications for the Grants for Departments of Family Medicine program. Of those applications 82 percent were approved and 18 percent were disapproved. Twelve projects, or 24 percent of applications received, were funded.

In FY 1992, HRSA reviewed 71 competing applications. Of those applications, 66 percent were approved and 34 percent were disapproved. Thirty-six projects, or about 50 percent of the applications received, were funded.

Eligibility

To be eligible to receive support for this grant program, the applicant must be a public, or nonprofit private, accredited school of medicine or osteopathic medicine.

To receive support, programs must meet the requirements of final regulations as set forth in 42 CFR part 57, subpart R, and section 791(b) of the PHS Act.

The period of Federal support will not exceed 5 years.

National Health Objectives for the Year 2000

The Public Health Service urges applicants to submit work plans that address specific objectives of Healthy People 2000. Potential applicants may obtain a copy of Healthy People 2000 (Full Report; Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (Telephone (202) 783–3238).

Education and Service Linkage

As part of its long-range planning HRSA will be targeting its efforts to

strengthening linkages between U.S. Public Health Service education programs and programs which provide comprehensive primary care services to the underserved.

Review Criteria

The review of applications will take into consideration the following criteria:

1. The degree to which the proposed project adequately provides for the project requirements in section 57.1704;
2. The administrative and management capability of the applicant to carry out the proposed project in a cost effective manner;
3. The qualifications of the proposed staff and faculty of the unit; and
4. The potential of the project to continue on a self-sustaining basis.

Other Considerations

In addition, the following funding factors may be applied in determining funding of approved applications:

1. Funding preference is defined as the funding of a specific category or group of applications ahead of other categories or groups of approved applications such as competing continuation projects ahead of new projects.
2. Funding priority is defined as the favorable adjustment of aggregate review scores when applications meet specified criteria.

It is not required that applicants request consideration for a funding factor. Applications which do not request consideration for funding factors will be reviewed and given full consideration for funding.

General Statutory Funding Preference

As provided in section 791(a) of the PHS Act, preference will be given to any qualified applicant that—

(A) Has a high rate for placing graduates in practice settings having the principal focus of serving residents of medically underserved communities; or

(B) During the 2-year period preceding the fiscal year for which an award is sought, has achieved a significant increase in the rate of placing graduates in such settings. This preference will only be applied to applications that rank above the 20th percentile that have been recommended for approval by the peer review group.

Proposed Minimum Percentages for "High Rate" and "Significant Increase in the Rate"

"High rate" means that 20 percent of all graduates of the medical school in 1989 or 1990, whichever is greater, are spending at least 50 percent of their work time in clinical practice in the specified settings.

"Significant increase in the rate" means that, between academic years 1991–92 and 1992–93, the rate of placing 1989 or 1990 graduates in the specified settings has increased by at least 50 percent and that not less than 15 percent of graduates from the most recent year (1990) are working in these settings.

Additional information concerning the implementation of this preference has been published in the **Federal Register** at 58 FR 40659, dated July 29, 1993.

Establishment and Expansion

Public Law 102–408 has amended section 747(b), (previously section 780) to include the following statutory funding preference for this program.

Section 747(b)(2) provides that preference shall be given to any qualified applicant that agrees to expend the award for one of the following purposes:

(a) Establishing an academic administrative unit (defined as a department, division, or other unit), for programs in family medicine; or

(b) Substantially expanding the programs of such a unit.

A program will meet the definition of "substantial expansion" if it has developed an acceptable plan for a 50 percent increase in a sufficient number of the following areas to qualify for 70 points. The expansion must be completed within 3 years.

	Points
(1) Required 3rd Year Clerkship	30
(2) Required Preceptorship	20
(3) Family Medicine Research	10
(4) Expansion of Faculty	10
(5) Faculty Development Program for Community Based Faculty	10
(6) Family Medicine Faculty Represented on Medical School Standing Committees of Admissions or Curriculum	10
(7) Family Medicine Faculty Represented on Dean's Executive Committee that determines Tenure	10

More detail on each of these areas will be provided in the program application materials.

Established Funding Priority for FY 1994

The following funding priority was established in FY 1993, after public comment at 58 FR 35019, June 30, 1993, and is being continued in FY 1994.

A funding priority will be given to applicants that demonstrate either substantial progress over the last 3 years or a significant experience of 10 or more years in influencing graduates from those minority or low-income populations identified as at-risk of poor health outcomes to enter family medicine residency training.

Proposed Funding Priority for FY 1994

It is proposed that a funding priority be given to applicants based on their level of accomplishment in relation to the outcome *or* process measures cited below:

Outcome measures	Points	Process measures
—25% of students who graduated in 1991, 1992 and 1993 entered family practice residencies.	100	
—20% of students who graduated in 1991, 1992 and 1993 entered family practice residencies.	75	
—15% of students who graduated in 1991, 1992 and 1993 entered family practice residencies.	50	—Required 3rd Year Clerkship* (of at least 4 weeks duration).
—12% of students who graduated in 1991, 1992 and 1993 entered family practice residencies.	35	—Required primary care preceptorship/mentorship program* in preclinical years.

*Curricular elements must be in place at the time of application or the applicant must provide satisfactory evidence (including commitments from institutional officials) that the clerkship or preceptorship will be operational by the beginning of the third year of the grant.

Applicants May Only Receive Priority Points in One of the Above Six Categories

Information Requirements Provision in Statute

Under section 791(b) of the Act, the Secretary may make an award under the Grants for the Establishment of Departments of Family Medicine program only if the applicant for the award submits to the Secretary the following information:

1. A description of rotations or preceptorships for students, or clinical training programs for residents, that have the principal focus of providing health care to medically underserved communities.

2. The number of faculty on admissions committees who have a clinical practice in community-based ambulatory settings in medically underserved communities.

3. With respect to individuals who are from disadvantaged backgrounds, or from medically underserved communities, the number of such individuals who are recruited for academic programs of the applicant, the number of such individuals who are admitted to such programs, and the number of such individuals who graduate from such programs.

4. If applicable, the number of recent graduates who have chosen careers in primary health care.

5. The number of recent graduates whose practices are serving medically underserved communities.

6. A description of whether and to what extent the applicant is able to operate without Federal assistance under this title.

Additional details concerning the implementation of this information requirement have been published in the **Federal Register** at 58 FR 43642, August 17, 1993, and will be provided in the application materials.

Additional Information

Interested persons are invited to comment on the proposed minimum percentages for "high rate" and "significant increase in the rate" for implementation of the general statutory funding preference, and funding priority. All comments received on or before February 7, 1994 will be considered before the final minimum percentages for "high rate" and "significant increase in the rate" for implementation of the general statutory funding preference, and funding priority are established.

Written comments should be addressed to: Marc L. Rivo, M.D., M.P.H. Director, Division of Medicine, Bureau of Health Professions, Health Resources and Services Administration, 5600 Fishers Lane, Parklawn Building, room 4C–25, Rockville, Maryland 20857.

All comments received will be available for public inspection and copying at the Division of Medicine, Bureau of Health Professions, at the above address, weekdays (Federal holidays excepted) between the hours of 8:30 a.m. and 5 p.m.

Application Requests

Requests for application materials and questions regarding grants policy and business management issues should be directed to: Mrs. Judy Bowen, Grants Management Specialist (D–32), Residency and Advanced Grants Section, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, room 8C–26, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–6960, FAX: (301) 443–6343.

Completed applications should be returned to the Grants Management Branch at the above address.

Questions regarding programmatic information should be directed to: Ms. Shelby Biedenkapp, Program Specialist, Resources Development Section, PCMEB, Division of Medicine, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, room 4C–04, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–3614, FAX: (301) 443–8890.

Paperwork Reduction Act

The standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. This approval includes the burden for collection of information for the statutory general preference and for the information requirement provision. (OMB #0915–0060, expiration date 7/31/95)

The deadline date for receipt of applications is February 4, 1994. Applications shall be considered to be "on time" if they are either:

(1) Received on or before the established deadline date, or

(2) Sent on or before the established deadline and received in time for orderly processing. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or the U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late applications not accepted for processing will be returned to the applicant.

This program is listed at 93.984 in the Catalog of Federal Domestic Assistance. It is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100).

This program is not subject to the Public Health System Reporting Requirements.

Dated: November 29, 1993.

William A. Robinson,

Acting Administrator.

[FR Doc. 94–178 Filed 1–5–94; 8:45 am]

BILLING CODE 4160–15–P

Program Announcement and Proposed Minimum Percentages for "High Rate" and "Significant Increase in the Rate" for Implementation of the General Statutory Funding Preference for Grants for Nurse Anesthetist Education Programs for Fiscal Year 1994

The Health Resources and Services Administration (HRSA) announces that applications will be accepted for fiscal year (FY) 1994 Grants for Nurse Anesthetist Education Programs under the authority of section 831(a), title VIII of the Public Health Service Act, as amended by the Nurse Education and Practice Improvement Amendments of 1992, title II of the Health Professions Education Extension Amendments of 1992, Public Law 102–408, dated October 13, 1992. Comments are invited on the proposed minimum percentages for "high rate" and "significant increase in the rate" for implementation of the general statutory funding preference.

Approximately $1,791,000 will be available in FY 1994 for this program. Total continuation support recommended is $1,316,000. It is anticipated that approximately $475,000 will be available to support 5 competing awards averaging $95,000.

Previous Funding Experience

Previous funding experience information is provided to assist potential applicants to make better informed decisions regarding submission of an application for this program. In FY 1993, HRSA reviewed 16 eligible applications for Grants for Nurse Anesthetist Education Programs. Of those applications, 88 percent were approved and 12 percent were disapproved. Eight projects or 57 percent of the competing applications

approved, were funded. In FY 1992, HRSA reviewed 3 applications for Grants for Nurse Anesthetist Education Programs. Of those applications, 67 percent were approved and 33 percent were disapproved. Two projects, or 67 percent of the applications received, were funded.

Purpose

Section 831(a) of the Public Health Service Act authorizes the Secretary to make grants to cover the costs of projects to develop and operate programs for the education of nurse anesthetists. The period of Federal support may not exceed 3 years.

Eligibility

Eligible applicants for Grants for Nurse Anesthetist Education Programs are public or private nonprofit institutions, accredited by an entity or entities designated by the Secretary of Education. Grants may be awarded to develop and operate a new nurse anesthetist program. Grants may also be awarded to maintain or expand an existing program.

National Health Objectives for the Year 2000

The Public Health Service urges applicants to submit work plans that address specific objectives of Healthy People 2000. Potential applicants may obtain a copy of Healthy People 2000 (Full Report; Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402–9325 (Telephone 202–783–3238).

Education and Service Linkage

As part of its long-range planning, HRSA will be targeting its efforts to strengthening linkages between U.S. Public Health Service education programs and programs which provide comprehensive primary care services to the underserved.

Review Criteria

The review of applications will take into consideration the following criteria:

1. The national or special local need which the particular project proposes to serve with special emphasis on meeting shortages in underserved areas;
2. The potential effectiveness and impact of the proposed project including its potential contribution to nursing;
3. The administrative and managerial capability of the applicant to carry out the proposed project;
4. The appropriateness of the plan, including the timetable for carrying out the activities of the proposed project and achieving and measuring the project's stated objectives;
5. The capability of the applicant to carry out the proposed project;
6. The reasonableness of the budget for the proposed project, including the justification of the grant funds requested; and
7. The potential of the nurse anesthetist program to continue on a self-sustaining basis after the period of grant support.

Other Considerations

In addition, the following funding factors may be applied in determining funding of approved applications.

A funding preference is defined as the funding of a specific category or group of approved applications ahead of other categories or groups of approved applications.

A funding priority is defined as the favorable adjustment of aggregate review scores of individual approved applications when applications meet specified criteria.

It is not required that applicants request consideration for a funding factor. Applications which do not request consideration for funding factors will be reviewed and given full consideration for funding.

Statutory Funding Preference

In making awards of grants under this section, preference will be given to any qualified applicant that—(A) has a high rate for placing graduates in practice settings having the principal focus of serving residents of medically underserved communities; or (B) during the 2-year period preceding the fiscal year for which such an award is sought, has achieved a significant increase in the rate of placing graduates in such settings. Preference will be given only for applications ranked above the 20th percentile of applications that have been recommended for approval by the appropriate peer review group.

Proposed Minimum Percentages for "High Rate" and "Significant Increase in the Rate"

"High rate" is defined as a minimum of 20 percent of graduates in academic years 1990–91, 1991–92 or 1992–93 who spend at least 50 percent of their worktime in clinical practice in the specified settings. Graduates who are providing care in a medically underserved community as a part of a fellowship or other educational experience can be counted.

"Significant increase in the rate" means that, between academic years 1991–92 and 1992–93, the rate of placing graduates in the specified settings has increased by a minimum of 50 percent and that not less than 15 percent of graduates from the most recent year are working in these settings.

Additional information concerning the implementation of this preference has been published in the **Federal Register** at 58 FR 40659, July 29, 1993.

Established Funding Priority

The following funding priority was established in FY 1993 following public comment (58 FR 40657, July 29, 1993) and the Administration is extending this funding priority in FY 1994. A funding priority will be given to programs which demonstrate either substantial progress over the last 3 years or a significant experience of 10 or more years in enrolling and graduating students from those minority populations identified as at-risk of poor health outcomes.

Information Requirements Provision

Under section 860(e)(2) of the Act, the Secretary may make an award under the Grants for Nurse Anesthetist Education Programs only if the applicant for the award submits to the Secretary the following information:

1. A description of rotations of preceptorships for students, or clinical training programs for residents, that have the principal focus of providing health care to medically underserved communities.
2. The number of faculty on admissions committees who have a clinical practice in community-based ambulatory settings in medically underserved communities.
3. With respect to individuals who are from disadvantaged backgrounds or from medically underserved communities, the number of such individuals who are recruited for academic programs of the applicant, the number of such individuals who are admitted to such programs, and the number of such individuals who graduate from such programs.
4. If applicable, the number of recent graduates who have chosen careers in primary health care.
5. The number of recent graduates whose practices are serving medically underserved communities.
6. A description of whether and to what extent the applicant is able to operate without Federal assistance under this title.

Additional details concerning the implementation of this information requirement have been published in the **Federal Register** at 58 FR 43642, August 17, 1993 and will be provided in the application materials.

Paperwork Reduction Act

The standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. This approval includes the burden for collection of information for the statutory general preference and for the information requirement provision. (OMB #0915–0060, expiration date July 31, 1995)

Additional Information

Interested persons are invited to comment on the proposed minimum percentages for "high rate" and "significant increase in the rate" for implementation of the general statutory funding preference. The comment period is 30 days. All comments received on or before February 7, 1994 will be considered before the final minimum percentages for "high rate" and "significant increase in the rate" for implementation of the general statutory funding preference are established. Written comments should be addressed to: Marla Salmon, ScD, RN, FAAN, Director, Division of Nursing, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, room 9–35, 5600 Fishers Lane, Rockville, Maryland 20857.

All comments received will be available for public inspection and copying at the Division of Nursing, Bureau of Health Professions, at the above address, weekdays (Federal holidays excepted) between the hours of 8:30 a.m. and 5 p.m.

Application Requests

Requests for application materials and questions regarding grants policy and business management issues should be directed to: Jacquelyn Whitaker (A–22), Grants Management Specialist, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, room 8C–26, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–6857, FAX: (301) 443–6343.

Completed applications should be returned to the Grants Management Branch at the above address.

If additional programmatic information is needed, please contact: Mary S. Hill, R.N., Ph.D., Chief, Nursing Education Practice Resources Branch, Division of Nursing, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, room 9–35, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–6193, FAX: (301) 443–8586.

The deadline date for receipt of applications is March 15, 1994. Applications will be considered to be "on time" if they are either:

(1) Received on or before the established deadline date, or

(2) Sent on or before the established deadline date and received in time for orderly processing. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.

Late applications not accepted for processing will be returned to the applicant.

This program, Grants for Nurse Anesthetist Education Programs, is listed at 93.916 in the Catalog of Federal Domestic Assistance. It is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100). This program is not subject to the Public Health System Reporting Requirements.

Dated: December 6, 1993.

William A. Robinson,

Acting Administrator.

[FR Doc. 94–179 Filed 1–5–94; 8:45 am]

BILLING CODE 4160–15–P

Program Announcement for Grants for Interdisciplinary Training for Health Care for Rural Areas for FY 1994

The Health Resources and Services Administration (HRSA) announces that applications are being accepted for fiscal year (FY) 1994, Grants for Interdisciplinary Training for Health Care for Rural Areas under the authority of section 778, title VII of the Public Health Service (PHS) Act, as amended by the Health Professions Education Extension Amendments of 1992, Public Law 102–408, dated October 13, 1992.

Approximately $4,017,000 will be available in FY 1994 for this program. Total continuation support recommended is approximately $1,600,000. It is anticipated that $2,417,000 will be available to support 12 competing awards averaging approximately $180,000.

Funding for this program is designed to test innovative training approaches that may be replicated in similar settings.

Previous Funding Experience

Previous funding experience is provided to assist potential applicants to make better informed decisions regarding submission of an application for this program. In FY 1993, HRSA reviewed 29 applications for Grants for Interdisciplinary Training for Health Care for Rural Areas. Of those applications, 45 percent were approved and 55 percent were disapproved. Eight projects, or 28 percent of the applications received, were funded. There was no competitive cycle for FY 1992.

Purposes

Section 778 of the Public Health Service Act, as amended, authorizes the Secretary to award grants for interdisciplinary training projects designed to provide or improve access to health care in rural areas. Specifically, projects funded under this authority shall be designed to:

(a) Use new and innovative methods to train health care practitioners to provide services in rural areas;

(b) Demonstrate and evaluate innovative interdisciplinary methods and models designed to provide access to cost-effective comprehensive health care;

(c) Deliver health care services to individuals residing in rural areas;

(d) Enhance the amount of relevant research conducted concerning health care issues in rural areas; and

(e) Increase the recruitment and retention of health care practitioners in rural areas and make rural practice a more attractive career choice for health care practitioners.

A recipient of funds may use various methods in carrying out the projects described above. The legislation cites the following methods as examples:

(a) The distribution of stipends to students of eligible applicants;

(b) The establishment of a postdoctoral fellowship program;

(c) The training of faculty in the economic and logistical problems confronting rural health care delivery systems; or

(d) The purchase or rental of transportation and telecommunication equipment where the need for such equipment due to unique characteristics of the rural area is demonstrated by the recipient.

Eligibility

To be eligible for a Grant for Interdisciplinary Training for Health Care for Rural Areas, each applicant must be located in a State and be:

1. A local health department, or
2. A nonprofit organization, or
3. A public or nonprofit college, university or school of, or program that specializes in nursing, mental health practice, optometry, public health, dentistry, osteopathic medicine, physician assistants, pharmacy,

podiatric medicine, allopathic medicine, chiropractic, or allied health professions.

Applicants eligible to obtain funds under this grant program shall not include for-profit entities, either directly or through a subcontract or subgrant.

Each application must be jointly submitted by at least two eligible applicants. One of the applicants must be an academic institution. Each application must demonstrate the need and demand for health care services, knowledge of available resources and the most significant service and educational gaps within its targeted geographic area. One applicant must be designated the principal organization responsible and accountable for the conduct of the proposed project.

Support may be requested for this grant program for a project period of not more than three years.

Definitions

"Clinical Treatment or Training" means direct, supervised participation in patient care by observation, examination and performance of procedures as are appropriate for the assigned role of the trainee on the rural health care team.

"Community Health Center" means an entity as defined in section 330 (a) and (b) of the Act and in regulations at 42 CFR 51c.102(c).

"Community Mental Health Center" means for purposes of this grant program a multiservice mental health facility which provides essential elements of comprehensive mental health services:

(1) Inpatient services;

(2) Outpatient services;

(3) Partial hospitalization services—must include at least day care service;

(4) Emergency services provided 24 hours per day—must be available within at least one of the first three services listed above; and/or

(5) Consultation and education services available to community agencies and professions personnel.

"Indian Tribe" or "Tribal Organization" means an organization or entity as defined in section 4(e) and 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

"Interdisciplinary Training" means a planned and coordinated program of education or training aimed at preparation of functioning teams of two or more health care practitioners from different health disciplines who will coordinate their activities to provide services to a client or group of clients.

"Long-Term Care Facility" is a facility which offers services designed to provide diagnostic, preventive, therapeutic, rehabilitative, supportive and maintenance services for individuals who have chronic physical or mental impairments. This facility may have a variety of institutional and non-institutional health settings, including the home, and the goal of the service provided is to promote the optimum level of physical, social and psychological functioning.

"Migrant Health Center" means an entity as defined in section 329(a) of the Act and in regulations at 42 CFR 56.102(g)(1).

"Native Hawaiian Health Center" means an entity as defined in the Native Hawaiian Health Care Act of 1988 (Pub. L. 100–579) (42 U.S.C. 11707(4)).

"Nonprofit" as applied to any entity means one, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

"Postdoctoral Fellowship Program" means a program of advanced academic or professional work, after the attainment of a doctoral degree, that is sponsored by a school of/or program that specializes in medicine, osteopathic medicine, nursing, dentistry, mental health practice, optometry, public health, pharmacy, podiatric medicine, physician assistant, chiropractic, or allied health.

"Rural" means geographic areas that are located outside of standard metropolitan statistical areas.

"Rural Health Care Agency" means a hospital, community health center, migrant health center, rural health clinic, community mental health center, long-term care facility, Native Hawaiian health center, or facility operated by the Indian Health Service or an Indian tribe or tribal organization or Indian organization under a contract with the Indian Health Service under the Indian Self-Determination Act.

"Rural Health Clinic" means an entity as defined under section 1861(aa)(2) of the Social Security Act and in regulations at 42 CFR 491.2.

"State" means, in addition to the 50 States, only the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands (the Republic of Palau), the Republic of the Marshall Islands, and the Federated States of Micronesia.

National Health Objectives for the Year 2000

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a PHS led national activity for setting priority areas. This program, Grants for Interdisciplinary Training for Health Care for Rural Areas, is related to the priority area of Educational and Community-Based Programs. Potential applicants may obtain a copy of Healthy People 2000 (Full Report; Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (Telephone 202–783–3238).

Education and Service Linkage

As part of its long-range planning, HRSA will be targeting its efforts to strengthening linkages between U.S. Public Health Service education programs and programs which provide comprehensive primary care services to the underserved.

Statutory Project Requirements

Interdisciplinary training projects funded under section 778 must:

1. Assist individuals in academic institutions in establishing long-term collaborative relationships with health care facilities and providers in rural areas, and;

2. Designate a rural health care agency or agencies for clinical treatment or training, including hospitals, community health centers, migrant health centers, rural health clinics, community mental health centers, long-term care facilities, Native Hawaiian health centers, or facilities operated by the Indian Health Service or an Indian tribe or tribal organization or Indian organization under a contract with the Indian Health Service under the Indian Self-Determination Act.

Not more than 10 percent of the individuals receiving training with section 778 funds shall be trained as doctors of medicine or osteopathic medicine. A grantee may not use more than 10 percent of the grant funds for administrative costs.

Established Nonstatutory Project Requirements

The following project requirements were established in fiscal year 1990 (55 FR 24321, June 15, 1990) and 1991 (56 FR 37713, August 8, 1991), after public comment, and are being extended in FY 1994.

A project supported under this grant program must meet the following requirements:

(1) Carry out the following two project purposes, at a minimum, among those authorized by section 778:

(a) Interdisciplinary training to prepare health care practitioners to provide services in rural areas; and

(b) increase the recruitment and retention of health care practitioners in rural areas.

(2) Collaborate with the resources of an Area Health Education Center (AHEC) or Geriatric Education Center(GEC) if these centers are present in a State or part of a State where the rural interdisciplinary training project is conducted.

(3) Evaluate in a systematic manner, as prescribed by the Secretary, its project activity, including determination of a baseline at the outset of the project and measurement of progress by trainees and faculty.

(4) Provide and clearly define for each level of training (undergraduate, graduate, postgraduate, continuing education and faculty training) the disciplines and numbers of students to receive training as well as the duration of the training. This is to include an outline of basic criteria for the selection of students to participate in the training. These project elements are to be tracked and linked to project outcomes.

(5) Provide specific indicators of the extent and means by which it plans to become self-sufficient.

(6) Implement integrated recruitment and retention strategies.

(7) Establish curriculum elements that address the uniqueness of health conditions and ethnic or cultural characteristics of the populations in the rural areas to be served.

(8) Enroll a significant proportion of individuals from rural areas, particularly rural health professions shortage areas or medically underserved areas.

Review Criteria

The review of applications will take into consideration the following criteria:

(1) The potential effectiveness of the proposed project in carrying out the training purposes of section 778 of the Act;

(2) The extent to which the project explains the need for the project in the rural area to be served;

(3) The degree to which the proposed project adequately provides for the interdisciplinary training of health professionals to practice in the rural area to be addressed by the project;

(4) The degree to which the applicant offers appropriate clinical training experiences in rural health care settings;

(5) The degree to which the applicant demonstrates a commitment to establishing and maintaining long-term collaborative relationships between academic institutions and health care facilities and providers in rural areas;

(6) The effectiveness of the organizational arrangements necessary to carry out the project;

(7) The administrative and management capability of the applicant to carry out the proposed project in a cost-effective manner;

(8) The capability of the proposed staff and faculty to provide the proposed instruction;

(9) The extent to which the trainee recruitment and selection process assures that qualified trainees with significant interest or background in rural health care are involved in the project;

(10) The extent to which the budget justification is reasonable and indicates that institutional and community support to the project are provided to the maximum extent possible; and

(11) The extent to which the financial information provided indicates an effective utilization of grant funds and indicates that the project will continue on a self-sustaining basis.

Other Considerations

In addition, the following funding factors may be applied in determining funding of approved applications.

A funding preference is defined as the funding of a specific category or group of approved applications ahead of other categories or groups of approved applications.

A funding priority is defined as the favorable adjustment of aggregate review scores of individual approved applications when applications meet specified criteria.

It is not required that applicants request consideration for a funding factor. Applications which do not request consideration for funding factors will be reviewed and given full consideration for funding.

Established Funding Preference

The following funding preference was established in FY 1990, after public comment (55 FR 24321, June 15, 1990), and the Administration is extending it in FY 1994.

A funding preference will be given to interdisciplinary training involving three or more disciplines. This funding preference will be given to applicants that propose and implement training for health care practitioners, faculty or students representing three or more disciplines.

Established Funding Priority

The following funding priority was established in FY 1993 after public comment (58 FR 5741, January 22, 1993) and the Administration is extending this funding priority in FY 1994. In determining the order of funding of approved applications a priority will be given to applicant institutions (academic) which demonstrate either substantial progress over the last three years or a significant experience of ten or more years in enrolling and graduating trainees from those minority or low-income populations identified as at risk of poor health outcomes.

Application Requests

Application forms will be sent only upon request. Requests for application materials and questions regarding grants policy and business management issues should be directed to: Ms. Theda Duvall, Grants Management Specialist (D–36), Bureau of Health Professions, HRSA, Parklawn Building, room 8C–26, 5600 Fishers Lane, Rockville, MD 20857, Telephone: 301–443–6002, FAX: 301–443–6343.

Completed applications should be returned to the Grants Management Branch at the above address.

If additional programmatic information is needed, please contact: Dr. Marcia Brand, Program Officer, Division of Associated, Dental and Public Health Professions, Bureau of Health Professions, HRSA, Parklawn Building, room 8C–02, 5600 Fishers Lane, Rockville, MD 20857, Telephone: 301–443–6763, FAX: 301–443–1164.

The standard application for State and local governments is form PHS 5161. For other applicants, the standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office Of Management and Budget under the Paperwork Reduction Act. The OMB clearance number is 0915–0060.

The deadline date for receipt of applications is January 31, 1994. Applications will be considered to be "on time" if they are either:

(1) Received on or before the established deadline date, or

(2) Sent on or before the established deadline date and received in time for orderly processing. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late applications not accepted for processing will be returned to the applicant.

This program, Grants for Interdisciplinary Training for Health care for Rural Areas, is listed at 93.192

in the Catalog of Federal Domestic Assistance. It is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100). This program is not subject to the Public Health System Reporting Requirements.

Dated: November 19, 1993.

William A. Robinson,

Acting Administrator.

[FR Doc. 94–180 Filed 1–5–94; 8:45 am]

BILLING CODE 4160–15–P

Public Health Service

Statement of Organization, Functions and Delegations of Authority; Office of the Assistant Secretary for Health

Part H, Public Health Service (PHS), Chapter HA (Office of the Assistant Secretary for Health), of the Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services (DHHS) (42 FR 61318, December 2, 1977, as amended most recently at 58 FR 58871, November 4, 1993) is amended to reflect changes within the Office of Management, Office of the Assistant Secretary for Health.

Office of the Assistant Secretary for Health Under *Chapter HA, Office of the Assistant Secretary for Health, Section HA–20, Functions, Office of Management,* delete in their entirety the titles and statements for the *Office of Personnel Management (HAU3),* and add the following:

Office of Personnel Management (HAU3). The Director, Office of Personnel Management, serves as the principal advisor to the Assistant Secretary for Health, the Deputy Assistant Secretary for Health Management Operations and the Director, Office of Management, in meeting PHS nationwide human resources management responsibilities; represents the Office of the Assistant Secretary for Health and the PHS agencies in contacts with DHHS, U.S. Office of Personnel Management, other Federal Agencies, and provides leadership and direction in the planning and implementation of comprehensive human resource management systems for PHS.

Division of Employee and Labor Management Relations (HAU32). Plans, monitors, directs, implements, and evaluates a comprehensive employee relations program throughout the PHS including providing guidance, policy direction, and assistance in carrying out USOPM and HHS guidelines in misconduct and performance deficiencies and in the resolution of grievances and appeals, and administering the PHS recognition and awards program. Plans, monitors, directs, implements and evaluates an effective Federal labor management relations program throughout the PHS which establishes a system of cooperative and quality relationships between labor organizations and management; defines the respective rights of each in dealing with the other; and seeks to insure the PHS management is adequately defended and/or represented.

Division of Policy, Evaluation and Compensation (HAU33). Develops, implements, and administers systems for and advises on PHS human resources management planning for all areas of human resource services; formulates PHS personnel policies and delegations of authority; evaluates personnel management practices and programs throughout PHS; creates and implements new/pilot projects, alternative personnel and pay systems, and other continuous-improvement efforts; provides PHS-wide leadership for the functional areas of pay, salary setting, bonuses and allowances, job evaluation and position management.

Division of Staffing and Development (HAU36). Develops and implements PHS policies and programs in the areas of recruitment and staffing, career development and training and performance management. Coordinates special staffing and career development programs to meet work force needs with particular emphasis on the health professions, students, under-represented groups and executive resources management. Provides PHS-wide advice, assistance and leadership in these areas and common needs training for employees in the Parklawn complex.

Division of Personnel Operations (HAU37). Administers the Parklawn Servicing Personnel Office (SPO) providing technical review and oversight to the consolidated personnel activities of the constituent agencies of Parklawn complex; assures close working relationships exist between personnel and programs with a uniformity of operations within the scope of the SPO. Plans and conducts an operating personnel program for the Office of the Assistant Secretary for Health (OASH), including position classification, pay administration, employment, merit promotion, personnel security, employee relations, labor-management relations, awards and special recruitment activities. Provides personnel management advice and assistance on all aspects of personnel administration to managers, supervisors, and employees of OASH.

Division of Human Resources Information Management (HAU38). Provides ADP systems support to the PHS personnel offices and the OPM Divisions. Provides human resources management information to PHS agency management. Manages DHHS automated personnel and pay systems for the PHS agencies in the Parklawn complex. Designs and maintains application systems which provide PHS agencies with access to personnel/payroll information. Supports ADP hardware software, applications and network administration used by OPM.

Dated: December 27, 1993.

Anthony L. Itteilag,

Deputy Assistant Secretary for Health Management Operations.

[FR Doc. 94–223 Filed 1–5–94; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[G–910–64–0002]

Notice of Use Restriction—Seasonal Closure of Access Road to Simon Canyon ACEC

AGENCY: Bureau of Land Management, Farmington District, Interior.

ACTION: Notice of use restriction.

SUMMARY: To protect significant natural resources, a seasonal road closure is in effect each year from March 1–July 31.

SUPPLEMENTARY INFORMATION: The road will be closed seasonally with locked gate in T. 31 N., R. 8 W., Sec. 27; NE¼. Access beyond this point will be limited to permitted users. Authority for the closure is found in 43 CFR part 8364. Any person who fails to comply with a closure issued under 43 CFR part 8364 may be subject to the penalties provided in 43 CFR 8360.0–7: violations are punishable by a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months.

FOR MORE INFORMATION CONTACT: Bill Falvey, BLM Farmington District, 1235 La Plata Highway, Farmington, NM 87401. Phone (505) 599–6329.

Dated: December 23, 1993.

Mike Pool,

District Manager.

[FR Doc. 94–291 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–FB–M

[NM-940-4120-04; OKNM 92221]

Invitation to Participate; Exploration for Coal in Oklahoma

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Members of the public are hereby invited to participate with Farrell-Cooper Mining Company on a pro rata cost sharing basis, in a program for the exploration of coal deposits owned by the United States of America. The lands are located in LeFlore County, Oklahoma, and are described as follows:

Indian Meridian

T 5 N., R. 20 E.,
Sec. 1, lots 3 and 4;
Sec. 2, lots 1 to 4, inclusive;
T. 6 N., R. 20 E.,
Sec. 35, S½SW¼SW¼ and S½SE¼;
Sec. 36, S½.
T. 6 N., R. 21 E.,
Sec. 31, S½S½N½;
Sec. 32, S½S½N½ and S½;
Sec. 33, S½S½N½ and S½.
T 6 N., R. 22 E.,
Sec. 31, N½S½ and N½S½S½;
Sec. 32, S½;
Sec. 33, S½;
Sec. 34, S½;
Sec. 35, S½;
Sec. 36, N½.
T 6 N., R. 23 E.,
Sec. 31, N½S½.
Aggregating 3,723.52 acres, more or less.

Interested parties may obtain a complete description of the lands covered in the license application by contacting Farrell-Cooper Mining Company, P.O. Box 11050, Fort Smith, Arkansas 72917-1050, or the Bureau of Land Management, New Mexico State Office, Mining Unit, P.O. Box 27115, Santa Fe, New Mexico 87502-0115. Any parties electing to participate in this exploration program shall notify in writing, both the State Director, Bureau of Land Management, New Mexico State Office, P.O. Box 27115, Santa Fe, New Mexico 87502-0115, and Farrell-Cooper Mining Company, P.O. Box 11050, Fort Smith, Arkansas 72917-1050. Such written notice must include a justification for wanting to participate and any recommended changes in the exploration plan with specific reasons for such changes. The notice must be received no later than 30-calendar days after the publication of this notice in the **Federal Register**.

This proposed exploration program is for the purpose of determining the quality and quantity of the coal in the area and will be conducted pursuant to an exploration plan to be approved by the Bureau of Land Management. A copy of the exploration plan as submitted by Farrell-Cooper Mining Company may be examined at the Bureau of Land Management, New Mexico State Office, 1474 Rodeo Road, Santa Fe, New Mexico 87502-0115, the Bureau of Land Management, Tulsa District Office, 9522-H E. 47th Place, Tulsa, Oklahoma 74145-7223, or the Bureau of Land Management, Oklahoma Resource Area Office, 221 N. Service Road, Moore, Oklahoma 73160-4946.

Dated: December 23, 1993.

Gilbert J. Lucero,

Acting State Director.

[FR Doc. 94-299 Filed 1-5-94; 8:45 am]

BILLING CODE 4310-FB-M

[NM-940-4120-04; OKNM 92222]

Invitation to Participate; Exploration for Coal in Oklahoma

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Members of the public are hereby invited to participate with Farrell-Cooper Mining Company on a pro rata cost sharing basis, in a program for the exploration of coal deposits owned by the United States of America. The lands are located in Le Flore County, Oklahoma, and are described as follows:

Indian Meridian

T. 8 N., R. 24 E.,
Sec. 1, S½,SW¼ and SE¼;
Sec. 2, SE¼SE¼;
Sec. 11, NE¼NE¼ and S½NE¼.
Sec. 12, N½NW¼.
T. 8 N., R. 25 E.,
Sec. 4, S½SW¼;
Sec. 5, N½S½ and SE¼SE¼;
Sec. 6, N½S½ and SE¼SE½;
Sec. 6, lots 6 and 7, N½NE¼, E½SW¼, and N½SW¼SE¼.
Aggregating 1,017.46 acres, more or less.

Interested parties may obtain a complete description of the lands covered in the license application by contacting Farrell-Cooper Mining Company, P.O. Box 11050, Fort Smith, Arkansas 72917-1050, or the Bureau of Land Management, New Mexico State Office, Mining Unit, P.O. Box 27115, Santa Fe, New Mexico 87502-0115.

Any parties electing to participate in this exploration program shall notify in writing both the State Director, Bureau of Land Management, New Mexico State Office, P.O. Box 27115, Santa Fe, New Mexico 87502-0115, and Farrell-Cooper Mining Company, P.O. Box 11050, Fort Smith, Arkansas 72917-1050. Such written notice must include a justification for wanting to participate and any recommended changes in the exploration plan with specific reasons for such changes. The notice must be received no later than 30 calendar days after the publication of this notice in the **Federal Register**.

This proposed exploration program is for the purpose of determining the quality and quantity of the coal in the area and will be conducted pursuant to an exploration plan to be approved by the Bureau of Land Management. A copy of the exploration plan as submitted by Farrell-Cooper Mining Company may be examined at the Bureau of Land Management, New Mexico State Office, 1474 Rodeo Road, Santa Fe, New Mexico 87502-0115, the Bureau of Land Management, Tulsa District Office, 9522-H E. 47th Place, Tulsa, Oklahoma 74145-7223, or the Bureau of Land Management, Oklahoma Resource Area Office, 221 N. Service Road, Moore, Oklahoma 73160-4946.

Dated: December 23, 1993.

Gilbert J. Lucero,

Acting State Director.

[FR Doc. 94-300 Filed 1-5-94; 8:45 am]

BILLING CODE 4310-FB-Ms

[NM-940-4120-04; OKNM 92223]

Invitation to Paricipate; Exploration for Coal in Oklahoma

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Members of the public are hereby invited to participate with Farrell-Cooper Mining Company on a pro rata cost sharing basis, in a program for the exploration of coal deposits owned by the United States of America. The lands are located in LeFlore County, Oklahoma, and are described as follows:

Indian Meridian

T. 5 N., R. 26 E.,
Sec. 23, SE¼SE¼;
Sec. 24, S½S½ and N½SE¼;
Sec. 25, N½NW¼;
Sec. 26, N½;
Sec. 27, S½N½, N½S½, and SW¼SW¼,
Sec. 28, S½;
Sec. 29, S½SW¼, N½SE¼, N½SW¼SE¼, and SE¼SE¼,
Sec. 32, NW¼NE¼ and N½NW¼.
T. 5 N., R. 27 E.,
Sec. 15, lots 2 and 3;
Sec. 16, SE¼NE¼ and S½;
Sec. 17, SE¼SW¼ and S½SE¼;
Sec. 19, NE¼NE¼, S½N½, N½S½, and SW¼SW¼;
Sec. 20, N½NE¼ and NW¼;
Sec. 21, NW¼NW¼.
Aggregating 2,844.78 acres, more or less.

Interested parties may obtain a complete description of the lands covered in the license application by contacting Farrell-Cooper Mining Company, P.O. Box 11050, Fort Smith, Arkansas 72917–1050, or the Bureau of Land Management, New Mexico State Office, Mining Unit, P.O. Box 27115, Santa Fe, New Mexico 87502–0115.

Any parties electing to participate in this exploration program shall notify in writing, both the State Director, Bureau of Land Management, New Mexico State Office, P.O. Box 27115, Santa Fe, New Mexico 87502–0115, and Farrell-Cooper Mining Company, P.O. Box 11050, Fort Smith, Arkansas 72917–1050. Such written notice must include a justification for wanting to participate and any recommended changes in the exploration plan with specific reasons for such changes. The notice must be received no later than 30-calendar days after the publication of this notice in the **Federal Register**.

This proposed exploration program is for the purpose of determining the quality and quantity of the coal in the area and will be conducted pursuant to an exploration plan to be approved by the Bureau of Land Management. A copy of the exploration plan as submitted by Farrell-Cooper Mining Company may be examined at the Bureau of Land Management, New Mexico State Office, 1474 Rodeo Road, Santa Fe, New Mexico 87502–0115, the Bureau of Land Management, Tulsa District Office, 9522–H E. 47th Place, Tulsa, Oklahoma 74145–7223, or the Bureau of Land Management, 221 N. Service Road, Moore, Oklahoma 73160–4946.

Dated: December 23, 1993.

Gilbert J. Lucero,

Acting State Director.

[FR Doc. 94–301 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–FB–M

[CA–940–4350–01, 4333-01; CACA 30080]

Issuance of Land Exchange Conveyance Document; California

AGENCY: Bureau of Land Management, DOI.

ACTION: Notice.

SUMMARY: The purpose of this exchange is to acquire non-Federal lands in the Three Rivers area with important scenic, riparian, and access values. This exchange will consolidate the Bureau lands and reduce the number of scattered, isolated Bureau tracts that are difficult for the Bureau to manage. The public interest will be well served upon completion of this exchange.

FOR FURTHER INFORMATION CONTACT: Viola Andrade, BLM, California State Office, 2800 Cottage Way, Sacramento, California 95825, 916–978–4820.

The United States issued four exchange conveyance documents to The Trust for Public Land on December 20, 1993, pursuant to section 206 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716), for the following described lands:

Mount Diablo Meridian

T. 27 S. R. 10 E.,
Portions of secs. 13, 24, and 28.
T. 27 S., R. 11 E.,
Portion of sec. 19.
T. 28 S., R. 13 E.
Portions of secs. 28, 32, 33, 34, and 35.
T. 29 S., R. 13 E.,
Portions of secs. 1, 2, 3, 4, and 11.

San Bernardino Meridian

T. 11 N., R. 33 W.
Portions of secs. 8 and 9.

The lands described in the conveyance documents aggregate 2,960.64 acres in San Luis Obispo County. A specific description of these lands is contained in the official case file which is located in the California State Office.

The value of the Federal lands was appraised at $869,187. When appropriate, the non-Federal land involved in this exchange will be acquired in accordance with the procedures set forth in the Cooperative Land Exchange Agreement between the Bureau of Land Management and The Trust for Public Land for the State of California, dated February 15, 1990.

Dated: December 29, 1993.

Nancy J. Alex,

Chief, Lands Section.

[FR Doc. 94–296 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–40–P

[CA–060–4350–06; CACA 28950]

Opening of Land in a Proposed Withdrawal; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The temporary 2-year segregation of a proposed withdrawal of 1,262.45 acres of public land to protect the Santa Margarita Ecological Preserve expires on January 17, 1994, and the land will be opened to mining. It has been and remains open to mineral leasing.

EFFECTIVE DATE: January 18, 1994.

FOR FURTHER INFORMATION CONTACT: John Beck, BLM California State Office, 2800 Cottage Way, rm E–2845, Sacramento, CA 95825, (916) 978–4820.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Withdrawal was published in the **Federal Register**, 57 FR 2110, January 17, 1992, which segregated the land described therein for up to 2 years from location and entry under the mining laws, subject to valid existing rights, but not from mineral leasing. The 2-year segregation expires January 17, 1994. The withdrawal application will continue to be processed unless it is canceled or denied. The land is described as follows:

San Bernardino Meridian

T. 8 S., R. 3 W.,
Sec. 23, SE¼SE¼;
Sec. 24, Lots 1,2,3, S½SW¼;
Sec. 25, W½NE¼, W½, SE¼;
Sec. 26, E½NE¼, NE¼NW¼, NE¼SE¼;
Sec. 33, NW¼NE¼, S½NE¼, S½NW¼, N½SW¼, NE¼SE¼.
T. 9 S., R. 3 W.,
Sec. 3, Lot 4.

The areas described aggregate approximately 1,262.45 acres in Riverside and San Diego counties.

At 10 a.m. on January 18, 1994, the land will be opened to location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, and other segregations of record. Appropriation of any of the land described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (1988), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: December 29, 1993.

Duane A. Marti,

Acting Chief, Lands Section.

[FR Doc. 94–195 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–40–P

[CO–930–4214–10; COC–56149]

Proposed Withdrawal; Opportunity for Public Meeting; Colorado

December 30, 1993.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture, Forest Service, proposes to withdraw approximately 3,333 acres of National Forest System land for 50 years to protect recreational resources and existing and planned facilities of the Aspen Highlands Ski Area. This notice closes this land to location and entry under the mining laws for up to two years. The land remains open to mineral leasing.

DATES: Comments on this proposed withdrawal or requests for public meeting must be received on or before April 6, 1994.

ADDRESSES: Comments and requests for a meeting should be sent to the Colorado State Director, BLM, 2850 Youngfield Street, Lakewood, Colorado 80215–7076.

FOR FURTHER INFORMATION CONTACT: Doris E. Chelius, 303–239–3706.

SUPPLEMENTARY INFORMATION: On December 21, 1993, the Department of Agriculture, Forest Service, filed an application to withdraw the following described National Forest System land from location and entry under the United States mining laws (30 U.S.C. Ch 2): White River National Forest.

Sixth Principal Meridian

T. 10 S., R 85 W.,
- Sec. 15, SE¼SE¼;
- Sec. 22, lots 1, 2, 3, 4, and 5, E½SW¼, and SE¼;
- Sec. 23, lots 1, 2, 3, 6, 7, 8, and 9;
- Sec. 26, lots 3, 4, 5, 10, and 11, SW¼NW¼ and W½SW¼;
- Sec. 27;
- Sec. 28, E½E½;
- Sec. 33, E½ and E½W½;
- Sec. 34;
- Sec. 35, lot 10, W½NW¼, SE¼NW¼, and SW¼.

Sec. T. 11 S., R. 85 W.,
- Sec. 2, N½N½NW¼;
- Sec. 3, N½N½N½;
- Sec. 4, N½N½NE¼ and N½NE¼NW¼.

The area described aggregates approximately 3,333.34 acres of National Forest System land in Pitkin County. (This proposed withdrawal excludes any lands lying within the boundaries of the Maroon Bells—Snowmass Wilderness Area.)

The purpose of this withdrawal is to protect the high recreational resource values and planned recreational development and use associated with the Aspen Highlands Ski Area.

For a period of 90 days from the date of publication of this notice, all parties who wish to submit comments, suggestions, or objections in connection with this proposed withdrawal, or to request a public meeting, may present their views in writing to the Colorado State Director. If the authorized officer determines that a meeting should be held, the meeting will be scheduled and conducted in accordance with 43 CFR 2310.3–1(c)(2).

This application will be processed in accordance with the regulations set forth in 43 CFR part 2310.

For a period of two years from the date of publication in the **Federal Register**, this land will be segregated from the mining laws as specified above unless the application is denied or cancelled or the withdrawal is approved prior to the date. During this period the Forest Service will continue to manage these lands.

Alexa L. Watson,

Acting Chief, Branch of Realty Programs.

[FR Doc. 94–295 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–JB–M

Fish and Wildlife Service

Availability of Draft Recovery Plans for the Key Largo Woodrat, Key Largo Cotton Mouse, Gulf Sturgeon, Two Hernando County Plants, and Four Apalachicola Plants for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of four draft recovery plans for the following species: The Key Largo woodrat (*Neotoma floridana smalli*) and cotton mouse (*Peromyscus gossypinus allapaticola*), Gulf sturgeon (*Acipenser oxyrinchus desotoi*) two Hernando County plants (*Campanula robinsiae, Justicia cooleyi*), and four Apalachicola plants (*Euphorbia telephioides, Macbridea alba, Pinguicula ionantha, Scutellaria floridana*). The Key Largo woodrat and Key Largo cotton mouse are restricted to the north half of Key Largo, Monroe County, Florida. The Gulf sturgeon occurs in most major rivers from the Mississippi River to the Suwannee River, and marine waters of the central and eastern Gulf of Mexico and Florida Bay. The two Hernando County plants occur in the hilly countryside north of Tampa. The four Apalachicola plants occur in the pinelands and wetlands in Liberty, Franklin, Gulf, and Bay Counties in the Florida panhandle. The Service solicits review and comment from the public on these draft plans.

DATES: Comments on the draft recovery plans must be received on or before March 7, 1994, to receive consideration by the Service.

ADDRESSES: Persons wishing to review the draft recovery plans for the Key Largo woodrat and cotton mouse, two Hernando County plants, or the four Apalachicola plants may obtain a copy by contacting David J. Wesley, Field Supervisor, Jacksonville Field Office, U.S. Fish and Wildlife Service, 6620 Southpoint Drive, South, suite 310, Jacksonville, Florida 32216 (Telephone: 904–232–2580, FAX 904–232–2404). Persons wishing to review the draft recovery plan for the Gulf sturgeon may obtain a copy by contacting Ms. Gail A. Carmody, Field Supervisor, U.S. Fish and Wildlife Service, 1612 June Avenue, Panama City, Florida 32244 (Telephone: 904–768–0552, FAX 904–763–2177). Written comments and materials regarding these plans should be addressed to the appropriate above individual. Comments and material received are available upon request for public inspection, by appointment, and during normal business hours at the above addresses.

FOR FURTHER INFORMATION CONTACT: For information on the Key Largo woodrat and cotton mouse recovery plan, contact Linda Finger at the Jacksonville, Florida, address. For information on the two Hernando County Plants and the four Apalachicola plants recovery plan, contact David L. Martin at the Jacksonville, Florida address. For information on the Gulf sturgeon recovery plan, contact Lorna Patrick at the Panama City, Florida address.

SUPPLEMENTARY INFORMATION:

Background

Restoring endangered or threatened animals and plants to the point where they are again secure self-sustaining members of their ecosystems is a primary goal of the Service's endangered species program. To help guide the recovery effort the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions necessary for the conservation of the species, establish criteria for the recovery levels for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*) requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended in 1988, requires that public notice, and an opportunity for public review and comment be provided during recovery

plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised recovery plan. The Service and other Federal agencies will take these comments into account in the course of implementing approved recovery plans.

The Key Largo woodrat and cotton mouse were listed as endangered species on August 31, 1984. Both species require tropical hardwood hammock forests for food and cover. An estimated 6,500 woodrats and 18,000 cotton mice occur on 2,100 acres of forested uplands. Both species originally occurred throughout all of the hardwood hammocks of Key Largo, but are now restricted to only north Key Largo, representing about one-half their original distribution. Primary threats to these species include habitat destruction and fragmentation, road mortality, and vulnerability to catastrophic events such as storms or fires. Current habitat acquisition by both the State and Federal governments will provide nearly complete public ownership for the remaining hardwood hammocks on north Key Largo. Specific recovery actions include additional habitat purchase and protection and the future reestablishment of both species to the southern portion of Key Largo.

The Gulf sturgeon, a subspecies of the Atlantic sturgeon *Acipenser oxyrinchus*, was listed as a threatened species on September 30, 1991. The Gulf sturgeon is an anadromous fish which migrates from salt water into large coastal rivers to spawn and spend the warmer months. The majority of its life is spent in fresh water. The current population levels of Gulf sturgeon in rivers other than the Suwannee and Apalachicola rivers are unknown, but are thought to be reduced from historic levels. Historically, the subspecies occurred in most major rivers from the Mississippi River to the Suwannee River, and marine waters of the central and eastern Gulf of Mexico to Florida Bay. Major factors in the decline of the Gulf sturgeon include barriers (dams) to historical spawning habitats, habitat loss, water quality degradation, and overfishing.

The recovery plan for the Gulf sturgeon was prepared by a Recovery Team containing members from the States of Louisiana, Mississippi, Alabama, and Florida, the Gulf States Marine Fisheries Commission, the National Marine Fisheries Service, the National Biological Survey, university researchers, commercial fishing interests, conservation organizations, and the Service. The draft plan currently available for public comment resulted from a technical review during the summer of 1992. Major recovery actions include identifying and restoring essential habitats of the Gulf sturgeon. Initial restoration efforts will focus on riverine habitats. Another recovery action includes reducing incidental catch of the fish by commercial fishermen. The ultimate recovery goal for the Gulf sturgeon is to establish population levels that would allow delisting of the fish in selected river systems. After delisting, the goal is to establish populations that could support commercial fishing in those selected river systems.

The two Hernando County plants *Campanula robinsiae* (Brooksville bellflower) and *Justicia cooleyi* (Cooley's water-willow) were listed as endangered species on August 28, 1989. Brooksville bellflower inhabits wet "prairies" and lake margins in the hill country of Hernando County. Cooley's water-willow primarily inhabits hardwood forests, but appears to persist or thrive in clearings, pastures, and roadsides. Its distribution appears to be primarily in the hills of Hernando County, but it is also known from Sumter County, near Mascotte. The draft recovery plan emphasizes better information on the life history of the bellflower, an annual that grows in late winter and is often under water. For Cooley's water-willow, immediate efforts are needed to control the spread of alien pest vines, especially air-potato (a tropical yam that produces tubers on its vines) and skunkvine (an Asian vine that can cover the ground in a forest, and whose leaves have a fecal odor when brused). Recovery efforts for these plants will begin on land owned by Federal and State agencies.

Three Apalachicola plants were listed as threatened species on May 8, 1992: *Euphorbia telephioides* (Telephus spurge), *Macbridea alba* (white birds-in-a-nest), and *Scutellaria floridana* (Florida skullcap). The fourth species, *Pinguicula ionantha* (Godfrey's butterwort) was listed as a threatened species on July 12, 1993. These four plants overlap in their distributions and habitats in the low-lying outer Coastal Plain near the Apalachicola River, roughly from the southwestern portion of Apalachicola National Forest west to Panama City. Telephus spurge occupies low sand ridges. White birds-in-a-nest and Florida skullcap occur in grassy pinelands and savannahs; Godfrey's butterwort occurs in savannahs, bogs, and seasonal ponds. Three of the four species occur in Apalachicola National Forest, where ongoing management, especially prescribed burning, is needed to ensure that they are secure. Telephus spurge, which does not occur on public land, and the other species outside of Apalachicola National Forest are threatened by habitat degradation due to lack of prescribed fire and by forestry practices, including planting practices. The recovery plan calls for ensuring that habitat for the three plants is appropriately managed in the National Forest and, to the extent feasible, privately-owned habitat be protected through conservation easements or purchase by public conservation agencies.

Public Comments Solicited

The Service solicits written comments on the four recovery plans described. All comments received by the date specified will be considered prior to the approval of the plans.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: December 22, 1993.

David J. Wesley,

Field Supervisor.

[FR Doc. 94–187 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–55–M

Geological Survey

Federal Geographic Data Committee (FGDC); Open Meeting on Creating a Geospatial Data Framework for the National Spatial Data Infrastructure (NSDI)

AGENCY: Geological Survey, Interior.

ACTION: Notice of meeting.

SUMMARY: The Federal Geographic Data Committee has organized a Framework Working Group to gather information for and create the structure for a national geospatial data framework for the National Spatial Data Infrastructure. The purpose of the meeting is to receive public comments on different perspectives on the framework, and the need for and approaches to providing elevation and cadastral data to the framework.

DATES: January 18, 1994, 9 a.m. to 5:30 p.m. Mountain Standard Time.

ADDRESSES: The meeting will be held in the Fifth Floor Conference Room, State Office Building, 400 North State Street, Salt Lake City, Utah. This is the only meeting that will be held in Salt Lake City.

FOR FURTHER INFORMATION CONTACT: Persons planning to attend or to make a presentation at the meeting should notify Dennis Goreham, Manager, Utah Automated Geographic Reference Center, 5130 State Office Building, Salt

Lake City, Utah 84114, telephone (801) 538–3163; facsimile (801) 538–3622.

SUPPLEMENTARY INFORMATION: Admittance will be limited to the seating available. Persons planning to attend the meeting should contact Mr. Goreham as described above.

As part of this effort the working group will hold open meetings to receive input from any interested parties. The public is invited to prepare a presentation on any of the topics listed in the Summary section of this notice. Presentations should be limited to 15 minutes. (Presentations may be limited to a shorter time if necessary so that all may be heard.) An overhead projector and slide projector will be supplied. The working group will also accept written comments, which should be received by Mr. Goreham before January 18, 1994.

This meeting is part of a series on developing a geospatial data framework for the National Spatial Data Infrastructure. The framework will provide a minimum set of geographic data that is useful to a maximum number of users within any geographic area or nationwide. Framework data will be produced to known standards in the fastest time frame possible and for the most reasonable cost. Creation of such a geospatial data framework will eliminate much of the redundancy in data capture by making available a basic set of geospatial data to which other data can be related. The framework data would be of recognized quality and would be available in "standard" formats. The geospatial data framework also will provide a means to integrate data from numerous collection activities in various agencies and will encourage data sharing among different disciplines. The components of the framework will likely include digital ortho imagery, geographic and cadastral reference systems, elevation, and spatial representations of transportation, hydrography, and administrative and political units. This meeting will address elevation and cadastral data; subsequent meeting will address the other themes.

The Framework Working Group consists of representatives of Federal, State, regional, and local government agencies engaged in the collection, maintenance, and development of geospatial data. The working group will define the components, identify the standards for the initial collection and maintenance, recommend a time frame for production and maintenance, and develop a plan for funding a framework of geospatial data as the foundation for the NSDI.

Dated: December 29, 1993.

Allen H. Watkins,

Chief, National Mapping Division.

[FR Doc. 94–206 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–31–M

National Park Service

Willow Beach Development Concept Plan Amendment; Lake Mead National Recreation Area, Arizona and Nevada; Public Meetings and Extension of Comment Deadline

SUMMARY: The National Park Service is extending the public comment period for the Willow Beach Development Concept Plan Amendment, Lake Mead National Recreation Area, to February 4, 1994. The availability of this document was announced in the November 5, 1993, **Federal Register** (58 FR 59065). Also, public meetings and informational sessions, previously scheduled for November 1993 will now be held in January 1994 at the following locations and on the specified times and dates:

Boulder City, Nevada

January 11—Open house 1–4 p.m. at Park Headquarters, 601 Nevada Highway, Boulder City.

Kingman, Arizona

January 12—Open house 1–4 p.m. and a public meeting 7–10 p.m. at the Holiday Inn, 3100 East Andy Devine (Highway 66), Exit 53 off Interstate 40.

Las Vegas, Nevada

January 13—Open house 1–4 p.m. and a public meeting 7–10 p.m. at Cashman Field, 850 North Las Vegas Blvd., just north of U.S. Highway 93/95.

Ontario, California

January 14—Open house 1–4 p.m. and a public meeting 7–10 p.m. at the Holiday Inn, 1801 East G Street, Vineyard Exit (Ontario Airport) off Interstate 10.

For additional information, please contact the Superintendent, Lake Mead National Recreation Area, 601 Nevada Highway, Boulder City, NV 89005, telephone number (702) 293–8947.

Dated: December 8, 1993.

Lou Albert,

Acting Regional Director, Western Region.

[FR Doc. 94–274 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–70–P

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

Public Administration Assistance Program in Central and Eastern Europe (RFP: OP/A/EE–94–P–003 Due 02/28/94) POC Contact Point: Dana Doo-Soghoian, Contract Specialist, 703/875–1995, Contracting Officer, Diane M. Howard

The following notice appeared in the Commerce Business Daily on Monday, December 20, 1993:

This notice is a reissuance of a notice published on 12/7/93 and is for the same RFP. Any requests for this RFP that have already been submitted in response to the earlier notice will be honored, and a new request is not necessary.

The U.S. Agency for International Development (USAID) is soliciting proposals for up to two contracts to provide public administration services throughout Central and Eastern Europe. Activities under the contract(s) will be focused primarily in Romania, Slovakia, the Czech Republic, Albania, Estonia, Latvia, Lithuania, and possibly the republics of the former Yugoslavia, and secondarily, in Bulgaria, Hungary, and Poland.

Each contract term is expected to be for two years, with the option to extend the contract(s) for 50% of the level of effort in the 2-year base period. The contract(s) will be based on a level-of-effort, and contract resources will be accessed through individual Technical Service Orders (TSOs). In addition, the contract(s) will provide a set amount of funds for equipment and U.S.-based training for which the Contractor will be logistically responsible. Contractor(s) shall furnish qualified personnel to provide technical assistance and training in the field of public administration in, but not limited to, the following categories of activity: public management training, personnel systems, organizational management, budgeting systems, regulatory systems, transparency of process, accountability, decentralization, intergovernmental finance, local self-governments, procurement, and future public administrators.

Given the scope of activities, USAID encourages proposals from consortia or organizations joining together under one proposal. All responsible sources may submit a proposal to be considered by USAID. Proposals will be evaluated in accordance with the selection criteria stated in the RFP, with award(s) based on the proposal(s) that are most

advantageous to the Government, cost and other factors considered. To help identify potential subcontractors, the RFP will contain an attachment listing all organizations who requested the RFP up to the time the RFP goes to print. By providing a list, USAID does not endorse any of the listed organizations as being capable of carrying out the activity, nor does USAID verify the claimed status of the organizations known to USAID prior to the issuance of the RFP. All requestors are encouraged to state in their requests for the RFP whether their organization is a small business or a disadvantaged enterprise. USAID promotes participation of small business concerns and disadvantaged enterprises (firms owned by minorities or women, historically black colleges and universities, college and universities with more than 40 percent Hispanic American students, and private voluntary organizations controlled by minorities or women) as contractors or subcontractors. Accordingly, the prime contractor(s) will make reasonable efforts to identify the use of such groups. All other selection criteria being equal, the participation of such groups may be a determining factor for selection.

Only one request for the RFP per organization will be honored. The RFP will be available approximately 15 days after issuance of this notice. Interested parties may obtain a copy of the RFP by submitting a written request, citing RFP number OP/A/EE-94-P-003, with one self-addressed mailing label to Dana Doo-Soghoian, U.S. Agency for International Development, Office of Procurement, M/OP/A/EE, room 1566, SA-14, Washington, DC 20523-1426. Only written requests will be honored. Parties interested in obtaining a copy of the RFP after its issuance may request a copy in person by presenting a written request with the organization mailing address to the 15th Floor Receptionist, 1100 Wilson Blvd., Arlington, VA 22209. To expedite receipt of the RFP, organization requesting the RFP may provide a self-addressed envelope already prepared for mailing with either their Federal Express or Express Mail account number. If an envelope already prepared for mailing is not provided by the requestor, the RFP will be mailed through the regular U.S. Postal Service. Telephonic requests will not be honored. Requests for the RFP that are received one week or less before the RFP closing date will be filled subject to the availability of copies. (0350)

Dated: December 22, 1993.

Susan Kosinski,

Project Officer, ENI/EUR/DR/DPI.

[FR Doc. 94-292 Filed 1-5-94; 8:45 am]

BILLING CODE 6116-01-M

INTERSTATE COMMERCE COMMISSION

Availability of Environmental Assessments

Pursuant to 42 U.S.C. 4332, the Commission has prepared and made available environmental assessments for the proceedings listed below. Dates environmental assessments are available are listed below for each individual proceeding.

To obtain copies of these environmental assessments contact Ms. Tawanna Glover-Sanders or Ms. Johnnie Davis, Interstate Commerce Commission, Section of Energy and Environment, room 3219, Washington, DC 20423, (202) 927-6212 or (202) 927-6245.

Comments on the following assessment are due 15 days after the date of availability:

AB-167 (Sub-No. 1131X), Consolidated Rail Corp.—Abandonment Exemption—In Mahoning County, OH. EA available 12/10/93.

AB-167 (Sub-No. 1122X), Consolidated Rail Corp.—Abandonment Exemption—In Henry and Madison Counties, IN. EA available 12/23/93.

AB-83 (Sub-No. 12X), Maine Central Railroad Co.—Abandonment Exemption—In Coos and Carroll Counties, NH. EA available 12/21/93.

Comments on the following assessment are due 30 days after the date of availability:

None.

Sidney L. Strickland,

Secretary.

[FR Doc. 94-289 Filed 1-5-94; 8:45 am]

BILLING CODE 7035-01-P

[Finance Docket No. 32423]

Twin Cities & Western Railroad Company—Acquisition of Trackage Rights—Burlington Northern Railroad Co.; Exemption

The Burlington Northern Railroad Company (BN) has agreed to grant overhead trackage rights to Twin Cities & Western Railroad Company (TCW) extending from MP-13.27 at Lyndale Junction to MP-9.5 (East leg of Wye) and MP-10.08 (West leg of Wye) at Minneapolis Junction in Minneapolis, MN, from MP-11.6, the former Shoreham Yard switch in Minneapolis, to MP-429.7 in St. Paul, MN. The trackage rights were to become effective on or after January 1, 1994.

The principal purpose of the trackage rights is to provide TCW with an alternative route to Soo Line Railroad Company's (Soo) St. Paul Yard. This notice is related to a notice filed in Finance Docket No. 32424, *Twin Cities & Western Railroad Company—Acquisition of Trackage Rights—Chicago and North Western Transportation Company*, in which CNW is granting TCW overhead trackage rights from its connection with Soo's Merriam Park line in St. Louis Park to Lyndale Junction.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Charles H. Clay, Head, Hempel, Seifert & Vander Weide, One Financial Plaza, suite 2110, 120 South Sixth Street, Minneapolis, MN 55402.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected under *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Decided: December 28, 1993.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94-286 Filed 1-5-94; 8:45 am]

BILLING CODE 7035-01-P

[Finance Docket No. 32424]

Twin Cities & Western Railroad Co.; Acquisition of Trackage Rights—Chicago and North Western Transportation Co.; Notice of Exemption

The Chicago and North Western Transportation Company (CNW) has agreed to grant overhead trackage rights to Twin Cities & Western Railroad Company (TCW) between the connection with the Soo Line Railroad Company (Soo) at MP-16.2, St. Louis Park and the CNW connection with Burlington Northern Railroad Company (BN) at MP-13.7 in Minneapolis, MN. The trackage rights were to become effective on or after January 1, 1994.

The purpose of the trackage rights is to provide TCW with an alternative route to Soo's St. Paul Yard. This notice is related to a notice filed in Finance Docket No. 32423, *Twin Cities & Western Railroad Company—Acquisition of Trackage Rights—Burlington Northern Railroad Company*, in which BN is granting TCW, overhead trackage rights over its line extending from Lyndale Junction in Minneapolis/St. Paul.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Charles H. Clay, Head, Hempel, Seifert & Vander Weide, One Financial Plaza, suite 2110, 120 South Sixth Street, Minneapolis, MN 55402.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected under *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980)*.

Decided: December 28, 1993.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland,

Secretary.

[FR Doc. 94–288 Filed 1–5–94; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 92–56]

Abel J. Sands, M.D.; Denial of Application

On May 14, 1992, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Abel J. Sands, M.D. (Respondent) of 316 South Midwest Boulevard, Midwest City, Oklahoma 73110. The Order to Show Cause, which proposed to deny Respondent's application for registration pursuant to 21 U.S.C. 823(f), alleged that Respondent's registration would be inconsistent with the public interest. The Order to Show Cause alleged that Respondent issued prescriptions for controlled substances to undercover agents of the Oklahoma State Bureau of Narcotics and Dangerous Drugs (OBN) for other than legitimate medical purposes; that OBN took action against Respondent's state license to handle controlled substances; and that Respondent failed to keep complete and accurate records of this purchasing and dispensing of controlled substances.

Respondent, through counsel, requested a hearing and the matter was placed on the docket of Administrative Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was held in Oklahoma City, Oklahoma, on December 15, 1992. On September 8, 1993, the administrative law judge issued her findings of fact, conclusions of law and recommended ruling. On September 30, 1993, Respondent filed exceptions to the recommended ruling of the administrative law judge. On October 12, 1993, the administrative law judge transmitted the record in this proceeding to the Administrator. Having considered the record in its entirety, and pursuant to 21 CFR 1316.67, the Acting Administrator hereby issues his final order in this matter based upon the findings of fact and conclusions of law set forth below.

It was proven at the hearing that on numerous occasions, Respondent wrote prescriptions to undercover agents in the absence of a legitimate medical purpose. OBN first became aware of Respondent's prescribing practices after Respondent's name arose in the course of an investigation into the street purchase of cocaine, a Schedule II controlled substance, Valium and Xanax, both Schedule IV controlled substances. OBN agents posed as patients and visited Respondent's office in an attempt to obtain prescriptions for controlled substances without legitimate medical reason. The OBN agents conducted a total of seven successful undercover operations at Respondent's office between December 1988 and April 1989. On each occasion, the OBN agents were able to obtain prescriptions for Xanax without legitimate medical purpose. All of these undercover operations were taped and transcribed.

On the first undercover visit on December 14, 1988, the undercover agent told Respondent that a friend from whom he had been purchasing Xanax advised him that he could obtain a prescription for Respondent. The agent told Respondent that the Xanax made him "feel good." After initially refusing to provide the prescription, Respondent informed the agent that he would make a patient chart for him, the charge for which would be $25.00. Respondent proceeded to perform a cursory examination of the agent, which included taking his weight and blood pressure. The agent told Respondent that he needed Xanax to "function" at work after he used cocaine. Respondent ultimately provided the agent with a prescription for 60 Xanax, stating that writing for 100 would get him (Respondent) in "trouble."

OBN agents conducted similar undercover operations on six other occasions and obtained prescriptions for Xanax each time. The lead agent testified, and the transcripts provided corroboration, that he never complained of any medical problem which warranted the use of Xanax. The administrative law judge determined that Respondent did not establish a physician-patient relationship with the OBN agents and concluded that none of the prescriptions at issue was for a legitimate medical purpose.

The administrative law judge further noted that Respondent's taped comments to the OBN agents demonstrated that he was aware of the illegitimacy of the prescriptions and was concerned that his conduct would become known to law enforcement. As a result, the administrative law judge concluded that Respondent's contention that he issued the prescriptions pursuant to a valid physician-patient relationship was disingenuous and did not "bode well for the proposition that [Respondent] is likely in the future to accept and discharge the responsibilities of a DEA registrant."

Also proven at the administrative hearing was the fact that Respondent, after surrendering his DEA Certificate of Registration and after his state controlled substance license had been suspended, was found to be in possession of controlled substances. On January 29, 1990, OBN agents and DEA Diversion Investigators delivered to Respondent an "imminent danger letter" from OBN, which suspended Respondent's state controlled substance registration. The same day, Respondent signed a DEA Form 104, voluntarily surrendering his DEA Certificate of Registration. An investigation by Medical Board investigators revealed that on June 4, 1990, Respondent was in possession of Equagesic and Halcion, both controlled substances.

The Medical Board investigation also revealed that Respondent had failed to keep accurate records of his purchase and dispensing of controlled substances. After a Medical Board hearing was scheduled, but before the hearing date, the Medical Board proposed and Respondent accepted a five year probation period during which Respondent was prohibited from prescribing, administering or dispensing any Schedule II or III controlled

substances. On April 16, 1991, OBN granted Respondent a state controlled substance registration limited to Schedules IV and V for the period of his Medical Board probation.

The Acting Administrator also finds that on November 15, 1989, Respondent was indicted in the United States District Court for the Western District of Oklahoma on seven counts of violating 21 U.S.C. 842(a)(1). This indictment was based on Respondent's writing of prescriptions to the undercover OBN agents. Respondent was acquitted of all charges on February 22, 1990, following a jury trial.

Pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Administrator may revoke a DEA Certificate of Registration or deny an application for registration if he determines that the registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered: (1) The recommendation of the appropriate State licensing board or professional disciplinary authority; (2) the applicant's experience in dispensing, or conducting research with respect to controlled substances; (3) the applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances; (4) compliance with applicable State, Federal or local laws relating to controlled substances; and, (5) such other conduct which may threaten the public health and safety.

The Administrator may rely on any one or any combination of these factors when determining whether an application should be denied or a registration revoked. See Neveille H. Williams, D.D.S., 51 FR 17556 (1986); Anne L. Hendricks, M.D., 51 FR 41030 (1986). The administrative law judge correctly found that all these factors, with the exception of 21 U.S.C. 823(f)(3), were relevant to a determination of whether Respondent's registration would be in the public interest.

Two Oklahoma authorities which exercise control over the licensing of physicians, OBN, which issues controlled substances registrations, and the Oklahoma Medical Board (Medical Board), which issues medical licenses, have taken action against Respondent. With respect to Respondent's experience with dispensing controlled substances, the OBN investigation clearly demonstrates that Respondent cannot be trusted to fulfill his responsibilities as a DEA registrant. This conduct, combined with his recordkeeping violations as discovered by the Medical Board, indicates that Respondent has not complied with Federal and State regulations relating to controlled substances.

Finally, Respondent's cavalier conduct when issuing prescriptions, as evidenced by comments made during the undercover operations, is disturbing. As the Administrative law judge correctly noted, the transcripts clearly indicate that Respondent was aware of the illegality of his actions. Respondent's knowledge of the illicit nature of his conduct demonstrates that Respondent cannot fulfill the significant responsibilities which come with a DEA registration. Additionally, it is further evidence that the public health and safety would be comprised were Respondent given the opportunity to return to his prior conduct. After considering these elements, the administrative law judge concluded that Respondent's registration would not be in the public interest and recommended that Respondent's application be denied.

On September 30, 1993, Respondent filed exceptions to the administrative law judge's recommended decision. In these exceptions, Respondent took issue with the administrative law judge's reliance on the testimony of the OBN agent and the transcripts of the undercover operations. Respondent maintained that the agent's credibility was damaged given the discrepancies between his testimony before the grand jury and his testimony during the criminal trial. The Acting Administrator finds, however, that the administrative law judge carefully considered these issues and concluded that the alleged inconsistencies in testimonies did not affect the administrative hearing. The inconsistencies were adequately explained by the agent at the administrative hearing. Furthermore, as the administrative law judge correctly noted, some of the agent's statements which Respondent insisted were contradictory were not necessarily inconsistent. Finally, and perhaps most importantly, the transcripts of the undercover operations, the accuracy of which was not challenged by Respondent, speak for themselves.

Respondent asserts that the administrative law judge did not base her opinion on all the evidence presented, and instead relied exclusively on the transcripts of the undercover operations. This contention, however, is not supported by the detailed opinion and recommended ruling prepared by the administrative law judge. The Acting Administrator finds that the administrative law judge properly weighed the evidence presented by both the Government and Respondent.

The Acting Administrator agrees with the administrative law judge that, after considering the applicable factors pursuant to 21 U.S.C. 823(f), Respondent's registration would not be in the public interest and adopts her recommended decision in its entirety. Accordingly, the Acting Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), hereby orders that Abel J. Sands' application for registration be, and it hereby is, denied. This order is effective January 6, 1994.

Dated: December 28, 1993.

Stephen H. Greene,

Acting Administrator of Drug Enforcement.

[FR Doc. 94–235 Filed 1–5–94; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Office of the Secretary

Commission on the Future of Worker-Management Relations; Meeting

AGENCY: Office of the Secretary, Labor.

ACTION: Notice of public meeting.

SUMMARY: The Commission on the Future of Worker-Management Relations was established in accordance with the Federal Advisory Committee Act (FACA) Public Law 92–463. Pursuant to section 10(a) of FACA, this is to announce that the Commission will meet at the time and place shown below.

TIME AND PLACE: The meeting will be held on Wednesday, January 19, 1994 from 10 a.m. to 4:30 p.m. in room N–3437 A–D, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC.

AGENDA: The agenda for the meeting is as follows:

The meeting will be devoted to the statutory and legal framework respecting employee participation plans of various forms treating a variety of workplace issues. It will consider what, if any, changes in this framework are required to encourage workplace productivity through labor-management cooperation and employee participation.

The meeting will be organized around two panels, one in the morning and one in the afternoon. The morning panel will be comprised of two representatives of management, one a lawyer and one a human resources executive, and two representatives of labor, one a lawyer and one a union representative.

The afternoon panel will be drawn from legal academics and research

organizations with recent research reports treating workplace worker-management plans.

The members of the panels will each be allotted ten minutes of prepared presentations and then engage in discussion of the issues with each other and with members of the Commission.

PUBLIC PARTICIPATION: The meeting will be open to the public. It will be in session from 10 a.m. until 12:30 p.m. when it will adjourn for lunch and will return at 1:45 p.m. Seating will be available to the public on a first-come, first-served basis. Handicapped individuals wishing to attend should contact the Commission to obtain appropriate accommodations. Individuals or organizations wishing to submit written statements should send 15 copies to Mrs. June M. Robinson, Designated Federal Official, Commission on the Future of Worker-Management Relations, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 219-9148.

Due to the Christmas and New Year's Holiday vacation, we are unable to give the full 15 days of advance notice of this meeting.

Signed at Washington, DC this 29th day of December, 1993.

Robert B. Reich,

Secretary of Labor.

[FR Doc. 94-238 Filed 1-5-94; 8:45 am]

BILLING CODE 4510-23-M

Occupational Safety and Health Administration

[Docket No. NRTL-1-93]

Wyle Laboratories; Application

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Notice of application for recognition as a Nationally Recognized Testing Laboratory, and preliminary finding.

SUMMARY: This notice announces the application of Wyle Laboratories for recognition as a Nationally Recognized Testing Laboratory (NRTL) under 29 CFR 1910.7, and presents the Agency's preliminary finding.

DATES: The last date for interested parties to submit comments is March 7, 1994.

ADDRESSES: Send comments to: NRTL Recognition Program, Office of Variance Determination, Occupational Safety and Health Administration, U.S. Department of Labor, Third Street and Constitution Avenue, NW., Room N3653, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Office of Variance Determination, NRTL Recognition Program, Occupational Safety and Health Administration, U.S. Department of Labor, Third Street and Constitution Avenue, NW., Room N3653, Washington, DC 20210.

SUPPLEMENTARY INFORMATION:

Notice of Application

Notice is hereby given that Wyle Laboratories (WL) has made application pursuant to section 6(b) of the Occupational Safety and Health Act of 1970, (84 Stat. 1593, 29 U.S.C. 655), Secretary of Labor's Order No. 1-90 (55 FR 9033), and 29 CFR 1910.7 for recognition as a Nationally Recognized Testing Laboratory.

The address of the laboratory covered by this application is: Wyle Laboratories, 7800 Governors Drive, P.O. Box 077777, Huntsville, Alabama 35807.

Regarding the merits of the application, the applicant contends that it meets the requirements of 29 CFR 1910.7 for recognition to certify products in the areas of testing which it has specified.

Wyle Laboratories states that its application demonstrates that for each specified item of equipment or material to be certified, it has the capability (including proper testing equipment and facilities, trained staff, written testing procedures, quality control and calibration programs) to perform testing and examination of equipment and materials for workplace safety purposes to determine conformance with appropriate product test standards. In summary, it claims that it has the experience, expertise, personnel, organization, equipment, and facilities suitable for accreditation as an OSHA Nationally Recognized Testing Laboratory.

The Calibration Laboratory maintains, repairs, and calibrates more than 7400 pieces of test equipment. Test equipment is available in the laboratory to perform the testing specified in the standard. If equipment is not available, it may be purchased, rented, or leased only under specified, stringent conditions.

The applicant states that it has pertinent testing and certification experience. The Huntsville facility has been conducting testing related to product safety for over 30 years. Since the commercial product safety market has only recently become available, WL's experience has been in other markets including telecommunications. The applicant states the WL has tested equipment to standards which compare with UL standards for which they are requesting accreditation to test and certify as an NRTL. In addition, Wyle has had experience in the certification of products (although not necessarily related to those required by OSHA), having been a certified Department of Transportation (DOT) Third Party Testing Laboratory since July, 1985. (See Exhibit 2.A.(1), Section 6).

WL's Huntsville facility employs some 350 people and has about 320,000 square feet of engineering and test facilities situated on 126 acres. The floor space of the Product Safety Testing and Certification Laboratory including the storage and office area, is 2,700 square feet. Some twenty key personnel are presently assigned to this Division including Calibration Laboratory and Quality staff. Product safety testing has been allocated 1,500 square feet of floor space. If additional floor space is necessary for product testing, WL can expand into the 320,000 square feet that is available at this facility. (See Exhibits 3.A.(1) and 2.A.(2), Appendices II and III, and IV).

WL has written testing procedures and has supplied examples of typical procedures for five of the test standards for which it has applied for NRTL recognition. (See Exhibit 2.A.(2), Appendix VI).

Wyle Laboratories states that all instrumentation, measuring, and test equipment used in the performance of the testing programs are calibrated in accordance with Wyle Laboratories' Quality Assurance Program. Standards used in performing all calibrations are traceable to the National Institute of Standards and Technology (NIST) by report number and date. Where no national standards exist, the standards are traceable to international standards or the basis for calibration is otherwise documented. (See Exhibit 2.A.(1), Section 10, and Exhibit 2.A.(2), Appendix VIII, Section 12, and Appendix XII).

WL has submitted an unrestricted copy of its Quality Assurance Program Manual (Exhibit 2.A.(2), Appendix VIII) which describes the overall Quality Assurance Program used at WL's Huntsville facility. The Manual includes various control procedures.

Wyle Laboratories states that it will implement control procedures for identifying products which have been certified. It will maintain a controlled and secure file for each product tested. This file will contain the technical and business records of the test program, including the services agreement, test results, correspondence, transmittals, the Factory Inspection Reports, and the

product documentation. (See Exhibit 2.A.(1), Section 7).

The applicant further states that products bearing the Wyle label will be considered evaluated, certified, and listed by Wyle. It will certify that these products are in compliance with the applicable safety standards to which they were tested. Wyle will thereafter have unannounced and unrestricted access to conduct inspections at approximately three-month intervals at manufacturing and other facilities where products certified by them may be fabricated, processed, or stored. Wyle will conduct field inspections to monitor and assure proper use of its certification label after the products are delivered to the end user. (See Exhibit 2.A(1), Sections 5 and 9, and Exhibit 2.A.(2), Appendix XI).

WL states that its Product Safety Certification activities are performed completely independent of its clients. No Wyle clients have ownership positions in Wyle or have any sort of influence on WL's activities. No WL employees are under the influence or control of manufacturers or suppliers. (See Exhibits 2.A; 2.A.(1), Section 3; and Exhibits 2.A.(2), Appendix I).

The applicant appears to maintain effective procedures for producing creditable findings or reports that are objective and without bias. (See Exhibit 2.A.(2), Appendices IV and VIII).

Wyle asserts that its Appeals Procedure (see Exhibit 2.A.(2), Appendix X) includes a system which provides an unbiased review of any controversial matter. The Appeals Procedure is available for any interested party, including users.

All other pertinent aspects of Wyle Laboratories' program are detailed in Exhibited 2.A and 3.A.

Background

The applicant states that Wyle Laboratories was founded in 1949 in El Segundo, California, as an independent test laboratory to support the nation's fledgling aerospace industry. As manned spaceflight became a national priority and support of spaceflight development was required, Wyle expanded to a new location in Norco, California, which was dedicated in 1959. To complement the propellent and vibration testing capabilities of the California locations, Wyle states that it created the Huntsville facility in 1962 to support the National Aeronautics and Space Administration (NASA) and the establishment of the George C. Marshall Space Flight Center (MSFC) in Huntsville, Alabama, with testing, engineering, and research capabilities. Of the three major operations at the Huntsville facility, the one of interest to the NRTL Accreditation program is the Test Operations Division, which includes the Product Safety Department. The Product Safety Testing and Certification Division of the Test Operations Division is responsible for the testing, certification, and factory follow-up inspections of the products.

The applicant states that over its 42 year history, Wyle Laboratories—Scientific & Systems (3S) Group has expended and diversified into various business disciplines. At the same time, the applicant states that the Company has continuously maintained its independent laboratory status as a major provider of conformity assessment services to North America's most quality-conscious industries. Wyle's focus continues to be on the science of evaluation, test and measurement engineering, as well as the business of regulatory compliance.

Wyle Laboratories desires recognition for testing and certification of products when tested for compliance with the following test standards:

ANSI/UL 153—Portable Electric Lamps
ANSI/UL 187—X-Ray Equipment
ANSI/UL 465—Central Cooling Air Conditioners
ANSI/UL 484—Room Air Conditioners
ANSI/UL 489—Molded-Case Circuit Breakers and Circuit-Breaker Enclosures
ANSI/UL 499—Electric Heating Appliances
ANSI/UL 506—Specialty Transformers
ANSI/UL 508—Electric Industrial Control Equipment
UL 544—Electric Medical and Dental Equipment
ANSI/UL 1012—Power Supplies
ANSI/UL 1025—Electric Air Heaters
ANSI/UL 1069—Hospital Signaling and Nursing Call Equipment
ANSI/UL 1087—Molded-Case Switches
ANSI/UL 1236—Electric Battery Chargers
UL 1244—Electrical and Electronic Measuring and Testing Equipment
ANSI/UL 1262—Laboratory Equipment
ANSI/UL 1310—Direct Plug-In Transformer Units
ANSI/UL 1411—Transformers and Motor Transformer for Use in Audio-, Radio-, and Television-Type Appliances
ANSI/UL 1459—Telephone Equipment
ANSI/UL 1570—Fluorescent Lighting Fixtures
ANSI/UL 1571—Incandescent Lighting Fixtures
ANSI/UL 1585—Class 2 and Class 3 Transformers
ANSI/UL 1778—Uninterruptible Power Supply
UL 1863—Communication Circuit Accessories
ANSI/UL 1950—Information Technology Equipment Including Electrical Business Equipment

Preliminary Finding

Wyle Laboratories addressed all of the criteria which must be met for recognition as an NRTL in its initial application and in its further correspondence. For example, the applicant submitted a list of its test equipment and instrumentation; a roster of its personnel including resumes of those in key positions and copies of position descriptions; copies of a typical test report; a factory inspection form and an inspection summary; a summary of its listing, labeling, and follow-up services; a statement of its independence as a testing laboratory; appeals procedure; typical calibration forms; and a copy of its Quality Assurance Manual. This QA Manual includes a description of its document control; identification and control of materials, parts, and components; inspection; test control; control of measuring and test equipment; inspection, test, and operating status; quality assurance records; and audits.

Nine major areas were examined in depth during the on-site laboratory evaluation: Facility; test equipment; calibration program; test and evaluation procedures; test reports; records; quality assurance program; follow-up listing program; and personnel.

The discrepancies noted during the on-site evaluation were adequately responded to [Ex. 3.A.(2)] prior to the preparation of the final on-site evaluation [Ex. 3. A.(1)]. With the preparation of the final report, the survey team was satisfied that the testing facility appeared to meet the necessary criteria required by the standard, and so noted in the On-Site Review Report (Survey). (See Ex. 3.A.)

Following a review of the application file and the on-site survey report of the WL facility, the NRTL Recognition Program staff concluded that the applicant appeared to have met the requirements for recognition as a Nationally Recognized Testing Laboratory and, therefore, recommended to the Assistant Secretary that the application be preliminarily approved.

Based upon a review of the completed application file and the recommendation of the staff, the Assistant Secretary has made a preliminary finding that Wyle Laboratories can meet the requirements for recognition as required by 29 CFR 1910.7.

All interested members of the public are invited to supply detailed reasons and evidence supporting or challenging the sufficiency of the applicant's having met the requirements for recognition as a Nationally Recognized Testing Laboratory, as well as Appendix A, of 29 CFR 1910.7. Submission of pertinent written documents and exhibits shall be made no later than March 7, 1994 and must be addressed to the NRTL Recognition Program, Office of Variance Determination, Room N 3653, Occupational Safety and Health Administration, U.S. Department of Labor, Third Street and Constitution Avenue, NW., Washington, DC 20210. Copies of the WL application, the laboratory survey report, and all submitted comments, as received, (Docket No. NRTL–1–93), are available for inspection and duplication at the Docket Office, room N 2634, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address.

The Assistant Secretary's final decision on whether the applicant satisfies the requirements for recognition as an NRTL will be made on the basis of the entire record including the public submissions and any further proceedings that the Assistant Secretary may consider appropriate in accordance with Appendix A of § 1910.7.

Signed at Washington, DC this 30th day of December, 1993.

Joseph A. Dear,

Assistant Secretary.

[FR Doc. 94–237 Filed 1–5–94; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL SCIENCE FOUNDATION

Office of Polar Programs; Permit Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Thomas F. Forhan, Permit Office, Office of Polar Programs, National Science Foundation, Washington, DC 20550; 703–306–1031.

SUPPLEMENTARY INFORMATION: On December 1, 1993 the National Science Foundation published a notice in the **Federal Register** of permit applications received. Permit for taking, import into USA–Port of Entry Port Hueneme and enter site of special scientific interest was issued to E. Imre Friedmann on December 30, 1993.

Thomas F. Forhan,

Permit Officer, Office of Polar Programs.

[FR Doc. 94–205 Filed 1–5–94; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Elementary, Secondary and Informal Education; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Date and Time: January 21, from 8:30 a.m. to 5 p.m.; January 22, from 8:30 a.m. to 3:30 p.m.

Place: Holiday Inn Arlington, 4610 North Fairfax Drive, Arlington, VA 22230.

Type of Meeting: Closed.

Contact Person: Dr. Margaret B Cozzens, Division Director Division of Materials Development, Research and Informal Science Education, room 885, 4201 Wilson Boulevard, Arlington, VA 22230, telephone: (703) 307–1620.

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate proposals as part of the selection process of awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act.

Dated: January 3, 1994.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 94–218 Filed 1–5–94; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Mechanical and Structural Systems; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following two meetings:

Name: Special Emphasis Panel in Mechanics and Structural Systems.

Date & Time: January 24 & 25 1994; 8:30 a.m. to 5 p.m.

Place: NSF, Rm. 530, 4201 Wilson Blv., Arlington, VA 22230.

Contact: Dr. Oscar W. Dillon/ Dr. William A. Spitzig, Program Directors, (703) 306–1361.

Type of Meeting: Closed.

Purpose of Meeting: To provide advice and recommendations concerning support for research proposals submitted to the NSF for financial support.

Agenda: To review and evaluate proposals as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b.(c) (4) and (6) of the Government in the Sunshine Act.

Dated: January 3, 1994.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 94–219 Filed 1–5–94; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Mechanical and Structural Systems; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announced the following meeting:

Name: Special Emphasis Panel in Mechanical and Structural Systems.

Date and Time: February 3–4, 1994, 8:30 a.m. to 5 p.m.

Place: National Science Foundation, Room 370, Arlington, VA 22230.

Notice of Meeting: Closed.

Contact Person: Dr. Mehmet T. Tumay, Program Director, 4201 Wilson Blvd., Arlington, VA 22230, Telephone: (703) 306–1361.

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: Review and evaluate Mechanical and Structural Systems NSF IIA proposals.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information, financial data, such as salaries, and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b. (c) (4) and (6) of the Government in the Sunshine Act.

Dated: January 3, 1994.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 94–220 Filed 1–5–94; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–441]

Cleveland Electric Illuminating Co., et al., Perry Nuclear Power Plant, Unit 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an extension to the latest construction completion date specified in Construction Permit No. CPPR–149 issued to The Cleveland Electric Illuminating Company, et al., for the Perry Nuclear Power Plant, Unit 2. The facility is located on the applicant's site in Lake County, Ohio, approximately 35 miles northeast of Cleveland, Ohio and approximately 7 miles northeast of Painesville, Ohio.

Environmental Assessment

Identification of Proposed Action

The proposed action would extend the latest construction completion date of Construction Permit No. CPPR–149 to November 30, 2001. The proposed action is in response to the applicant's request of October 28, 1991, as supplemented on February 20, 1992.

The Need for the Proposed Action

The proposed action is needed because the construction of the facility is not yet completed and the licensee wants to maintain the facility as a potential electrical power source.

Environmental Impact of the Proposed Action

Since the proposed action involves extending the construction permit, there are no radiological impacts associated with this action. The impacts that are involved are all non-radiological and are associated with continued construction. The impact of construction was evaluated in the Final Environmental Statement for the Perry Nuclear Power Plant, Units 1 and 2 (NUREG–0844, dated August 1982).

Based on the foregoing, the NRC staff concludes that the proposed extension of the construction permit would have no significant environmental impact.

Alternatives Considered

A possible alternative to the proposed action would be to deny the request. Under this alternative, the applicant would not be able to complete construction of the facility. This would result in denial of the potential benefit of the facility. This option would not eliminate the environmental impacts of construction already incurred. If construction were halted and not completed, site redress activities would restore some small areas to their natural state. This would be a slight environmental benefit, but much outweighed by the economic losses from denial of the use of the facility, if completed. Therefore, this alternative is rejected.

Another alternative is to take no action on the request for extension. The construction permit would not be deemed to have expired until the application has been finally processed (10 CFR 2.109). In effect, the construction permit could be in effect as long as no action was taken on a timely application for an extension. To take no action on the applicant's request would not be responsive; therefore, this alternative is rejected.

Alternative Use of Resources

This action does not involve the use of resources other that those evaluated in the Final Environmental Statement, NUREG–0884, dated August 1982, prepared as part of the NRC staff's review of the construction permit application.

Agencies and Persons Consulted

The NRC staff reviewed the applicant's request and applicable documents referenced therein that support this extension. The NRC did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for this action. Based upon the environmental assessment, we conclude that this action will not have a significant effect on the quality of the human environment.

For details with respect to this action, see the request for extension of October 28, 1991, as supplemented on February 20, 1992, which is available for public inspection in the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC. 20555, and at the Local Public Document Room, located at the Perry Public Library, 3753 Main Street, Perry, Ohio 44081.

Dated at Rockville, Maryland, this 29th day of December 1993.

For the Nuclear Regulatory Commission.

John N. Hannon,

Director, Project Directorate III–3, Division of Reactor Projects III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 94–251 Filed 1–5–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–331]

Iowa Electric Light and Power Co.; Issuance of Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–49, issued to Iowa Electric Light and Power Company (the licensee), for operation of the Duane Arnold Energy Center (DAEC), located in Linn County, Iowa.

Identification of Proposed Action

The amendment would consist of a change to the Operating License that would increase the storage capacity of the spent fuel pool to 3152 fuel assemblies, including a rack which can be used for temporary storage of 323 fuel assemblies.

The amendment to the TS is responsive to the licensee's application dated March 26, 1993, and supplemented by additional correspondence dated September 15 and November 23, 1993. The NRC staff has prepared an Environmental Assessment of the proposed action.

Summary of Environmental Assessment

The "Final Generic Environmental Impact Statement (FGEIS) on Handling and Storage of Spent Light Water Power Reactor Fuel" (NUREG–0575), Volumes 1–3 (1979), concluded that the environmental impact of interim storage of spent fuel was negligible and the cost of the various alternatives reflects the advantage of continued generation of nuclear power with the accompanying spent fuel storage. Because of the differences in design, the FGEIS recommended evaluating spent fuel pool expansions on a case-by-case basis. For DAEC, the expansion of the storage capacity of the spent fuel pool will not create any significant additional radiological effects or nonradiological environmental impacts beyond those assessed in the Commission's Final Environmental Statement (FES) issued in March 1973 related to the operation of DAEC, and in the Safety Evaluation Report issued July 7, 1978, in support of a previous license amendment concerning storage capacity.

The occupational radiation dose for the proposed operation of the expanded spent fuel pool is estimated to be less than 2 percent of the total annual occupational radiation exposure for this facility.

Finding of No Significant Impact

The staff has reviewed the proposed spent fuel pool expansion to the facility relative to the requirements set forth in 10 CFR part 51. Based on this assessment, the staff concludes that there are no significant radiological or nonradiological impacts associated with the proposed action and that the issuance of the proposed amendment to the license will have no significant impact on the quality of the human environment. Therefore, pursuant to 10 CFR 51.31, no environmental impact statement needs to be prepared for this action.

For further details with respect to this action see

(1) The application for amendment dated March 26, 1993, and supplemental correspondence dated September 15 and November 23, 1993,

(2) The FGEIS on Handling and Storage of Spent Light Water Power Reactor Fuel (NUREG–0575),

(3) The FES for DAEC dated March 1973 and

(4) The Environmental Assessment dated December 29, 1993.

These documents are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC 20555 and at the Cedar Rapids Public Library, 500 First Street, SE., Cedar Rapids, Iowa 52401.

Dated at Rockville, Maryland, this 29th day of December 1993.

Robert M. Pulsifer,

Project Manager, Project Directorate III–3, Division of Reactor Projects III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 94–253 Filed 1–5–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–293]

Boston Edison Co., (Pilgrim Nuclear Power Station); Exemption

I

The Boston Edison Company (BECo, the licensee) is the holder of Facility Operating License No. DRP–35, which authorizes the operation of Pilgrim Nuclear Power Station (the facility), at steady state power levels not in excess of 1998 megawatts thermal. This facility is a boiling water reactor located in Plymouth, Massachusetts. The license provides, among other things, that Pilgrim Nuclear Power Station is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

II

BECo is preparing to implement the Final Rule on Standards for Protection Against Radiation, 10 CFR part 20, on January 1, 1994. Section 20.1902(d) of the Final Rule specifies posting requirements for airborne radioactivity areas (ARA) and § 20.1003 defines an ARA based on the derived air concentrations (DAC) values of radionuclides provided in Table 1 of Appendix B to 10 CFR part 20.

III

By letter dated September 13, 1993, the licensee requested an exemption, pursuant to 10 CFR 20.2301, from the DAC values for Kr–89 and Xe–137 in Table 1 of appendix B to 10 CFR part 20 and provided alternative values in order to use more appropriate specific DAC values for these radionuclides. The requested exemption would constitute a permanent change to the Final Rule values for Kr–89 and Xe–137 for the facility.

Based on the NRC staff evaluation, it was calculated that the dose equivalent, in units of rem, that corresponds to an exposure of 2,000 hours at the requested DACs of 10^{-6} uCi/cm for Kr–89 and 10^{-5} uCi/cm for Xe–137 is below the limiting dose values used for determining the radionuclide-specific DAC values in Appendix B to 10 CFR 20.001–20.2402 (and in Federal Guidance Report No. 11). Therefore, the staff finds the specific DAC values acceptable alternatives for use in place of the generic DAC value of 10^{-7} uCi/ml for these radionuclides when determining whether an area is, and requires posting as, an airborne radioactivity area.

IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 20.2301, the requested exemption from the DAC values for Kr–89 and Xe–137 in Table 1 of Appendix A to 10 CFR part 20 and use of the values specified in the licensee's request is authorized by law, and will not result in undue hazard to life or property. The exemption request has been evaluated in a Safety Evaluation dated December 29, 1993.

Therefore, the Commission hereby grants BECo and exemption from the values in the Final Rule for Kr–89 and Xe–137 and approves the use of the proposed values in their request when determining whether an area is, and requires posting as, an airborne radioactivity area. This exemption constitutes a permanent change to the applicability of the Regulations in this regard for the facility.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this Exemption will have no significant impact on the quality of the human environment (58 FR 68672 dated December 28, 1993).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 29th day of December 1993.

For the Nuclear Regulatory Commission.

Jose A. Calvo,

Acting Director, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–254 Filed 1–5–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–003]

Consolidated Edison Co. of New York, Inc., (Indian Point Station, Unit 1); Exemption

I

The Consolidated Edison Company of New York, Inc., (the licensee), is the holder of Provisional Operating License No. DPR–5 which authorizes possession and maintenance of the Indian Point Station, Unit 1 (IP–1). The license provides, among other things, that the plant is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

The plant is a permanently shutdown light water reactor located at the licensee site in Westchester County, New York.

II

IP–1 has been shut down since October 31, 1974. There is presently no fuel in the reactor and, under the terms of an April 14, 1977 amendment to License No. DPR–5 (Appendix A, Technical Specification 3.2.1), no fuel may be loaded into the reactor core or moved into the reactor containment building without prior review and authorization by the Commission. In addition, the Commission revoked authority to operate IP–1 by order dated June 19, 1980. In order to reflect the permanently shutdown and defueled status of the plant, the NRC is granting an exemption from the requirements of 10 CFR 50.120. This rule states the following:

> * * * each nuclear power plant licensee, by November 22, 1993, shall establish, implement, and maintain a training program derived from a systems approach to training as defined in 10 CFR 55.4.

This exemption will relieve the licensee from all training program requirements of 10 CFR 50.120. However, it does not relieve the licensee from previous requirements or commitments to train and qualify facility personnel.

III

The NRC may grant exemptions from the requirements of the regulations which, pursuant to 10 CFR 50.12(a), are (1) authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security; and (2) present special circumstances.

Section 50.12(a)(2)(ii) of 10 CFR part 50 provides that special circumstances exist when application of the regulations in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.

The purpose of 10 CFR 50.120 is to ensure that civilian nuclear power plant operating personnel are trained and qualified to safely operate and maintain the facility commensurate with the safety status of the facility.

The licensee in its letter dated July 31, 1993, addressed the special circumstances related to the NRC requiring the Indian Point training programs to comply with 10 CFR 50.120. The reactor is permanently shut down, defueled, and the fuel moved to the spent fuel pool.

The licensee has stated that the training requirements necessary to assure adequate protection of the public health and safety in a permanently shutdown and defueled facility are significantly less than the training requirements necessary to assure the public health and safety at an operating facility. The current Indian Point training programs for the personnel categories required by 10 CFR 50.120 are as follows:

Non-licensed Operators

At Indian Point, non-licensed operators are known as "Nuclear Plant Operators" and are trained as part of the IP–2 staff. Their training specifically address the IP–1 systems that are required to remain in service and also those that support IP–2 operations.

Shift Supervisor

The Indian Point shift supervisors are known as "Senior Watch Supervisors." Individuals in this category are part of the IP–2 staff and receive ongoing training under the IP–2 program, which includes training on IP–1 activities.

Shift Technical Advisor (STA)

The Indian Point shift technical advisor is known as "Watch Engineer." Individuals in this category are part of the IP–2 staff and receive ongoing training under the Indian Point IP–2 program, which includes training on IP–1 activities.

Instrumentation and Control, Electrical, and Mechanical Maintenance

These individuals are part of the Unit 2 staff and receive training under the IP–2 training program. The IP–2 program contains training in IP–1 activities.

Radiation Protection and Chemistry Technician

These individuals are part of the IP–2 staff and receive training under the IP–2 training program. The IP–2 program contains training in IP–1 activities.

Engineering Support

These individuals are part of the IP–2 staff and receive training under the IP–2 training program. The IP–2 program contains training in IP–1 activities.

The tasks and activities associated with maintaining the fuel are relatively simple compared to the tasks and activities required to maintain an operating nuclear power plant. Therefore, requiring IP–1 to comply with the literal training requirements specified in 10 CFR 50.120 is not necessary to achieve the underlying purpose of the rule.

The licensee contends that the regulation was established for power operation conditions because such conditions could result in the potential for an accident with significant offsite consequences. In an NRC Show Cause Order to Consolidated Edison dated February 11, 1980, the NRC stated that the NRC and the licensee had performed calculations that showed that the spent fuel fission products had decayed such that, in the event of a loss of water from the spent fuel pool, the fuel would adequately cool in air. Since February 11, 1980, the spent fuel radionuclides have decayed an additional 13 years which further reduces the heat load in the event of a loss of water.

The staff has also determined that the tasks that remain to be performed by the IP–1 staff are fewer in number and significantly less complicated than the tasks performed by the staff of an operating nuclear plant. Thus, the NRC staff concludes the licensee justification for exemption is reasonable based on (1) the significantly reduced risk to the public health and safety due to IP–1 being permanently shut down, and (2) the reduced number and complexity of tasks to be performed by the IP–1 site staff.

IV

Based on the analyses presented in Section III above, the staff concludes that sufficient bases exits for approval of this exemption. In addition, the staff finds that the special circumstance present satisfies the requirement of 10 CFR 50.12(a)(2)(ii) in that requiring compliance with 10 CFR 50.120 is not necessary to achieve the underlying purpose of the rule.

V

Based on the above evaluation, the Commission has determined that, pursuant to 10 CFR 50.12(a)(1), this exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security.

Accordingly, the Commission hereby grants Indian Point Station Unit 1 and exemption to 10 CFR 50.120. This exemption does not relieve the licensee of any other training requirements or commitments which they have made to the NRC.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (58 FR 67871, dated December 22, 1993).

This exemption is effective as of its date of issuance.

Dated at Rockville, Maryland this 28th day of December 1993.

For the Nuclear Regulatory Commission.

Brian K. Grimes,

Director, Division of Operating Reactor Support, Office of Nuclear Reactor Regulation.

[FR Doc. 94–255 Filed 1–5–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–498 and 50–499]

Houston Lighting & Power Co. (South Texas Project, Units 1 and 2); Exemption

I

On March 22, 1988, and March 28, 1989, the Commission issued Facility Operating License Nos. NPF–76 and NPF–80 to Houston Lighting & Power Company, et al. (the licensee) for South Texas Project, Unit Nos. 1 and 2, respectively. These licenses provided, among other things, that the facilities are subject to all rules, regulations, and orders of the Commission.

II

Appendix A of part 20 of title 10 of the Code of Federal Regulations, "Protection Factors for Respirators," establishes protection factors of air-purifying respirators for protection against particulates only. Furthermore, footnoted d–2(c) states, "No allowance is to be made for the use of sorbents

against radioactive material in the form of gases or vapors." This restriction was needed since an inadequate data base has existed for evaluating the complex interaction of many factors affecting the service life and removal efficiency of radioactive gases and vapors by sorbent canisters. Also, due to the lack of a data base, a National Institute for Occupational Safety and Health/Mine Safety and Health Administration (NIOSH/MSHA) certification schedule has not been established to ensure that the canisters meet acceptable performance criteria.

Section 20.103(e) of 10 CFR part 20 allows the Commission to authorize the use of respiratory equipment in lieu of an NIOSH/MSHA certification when such an action is justified based on adequate testing of material and performance characteristics.

By letter dated December 19, 1991, as supplemented by letters dated July 1, 1993, and November 3, 1993, HL&P requested an exemption based on 10 CFR 20.501 to allow the use of radioiodine Mine Safety Appliance Company (MSA) GMR-1 canisters with a protection factor of 50 for personnel respiratory protection. In support of the exemption request, HL&P cited test results and a quality assurance plan that satisfies the recommended qualification process of NUREG/CR-3403, "Criteria and Test Methods for Certifying Air-Purifying Respirator Cartridges and Canisters Against Radioiodine."

III

The NRC staff evaluated the information provided by HL&P. The licensee provided reliable test information verifying that the MSA GMR-1 canister is capable of providing a protection factor of 50 over a period of 8 hours of continuous use, provided that the total challenge of radioactive and non-radioactive iodine and other halogenated compounds does not exceed 1 ppm, and temperature does not exceed 110°F provided the dewpoint does not exceed 107° F. The data showed the breakthrough point to be well beyond 8 hours.

Testing has been conducted under acceptable conditions of cyclic flow and under worst-case conditions for those environmental factors affecting service life (i.e., temperature, relative humidity, and challenge concentration of CH_3I (methyliodide/methyl radioiodide), the most penetrating of the challenge forms). The data showed that the MSA GMR-I canisters performed adequately under acceptable test conditions. These conditions, including criteria and test methods, are consistent with those derived by the NRC staff from NUREG/CR-3403, "Criteria and Test Methods for Certifying Air-Purifying Respirator Cartridges and Canisters Against Radioiodine."

HL&P, through acceptance of MSA QA controls, has provided commitments that the MSA GMR-1 canisters will meet standards for quality assurance and quality control that are recognized by NIOSH and are compatible with NRC staff positions. This includes a commitment to establish a 1 percent AQL (acceptable quality limit) in a 5 to 10 ppm challenge concentration of CH_3I, 90 percent relative humidity, 110°F, 64 liters per minute cyclic flow, for a service life of 8 hours or more at a penetration equal to 1 percent of the challenge concentration. Test data referenced by HL&P demonstrate that performance (i.e., service life) of canisters at 100 percent relative humidity is acceptable.

IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 20.501, this exemption is authorized by law and will not result in undue hazard to life or property.

Accordingly, the Commission hereby grants an exemption as described in Section III above from 10 CFR part 20, appendix A, footnote d-2(c) to authorize the use of the MSA GMR-1 canister at South Texas Project, Units 1 and 2. For additional details regarding the basis of this exemption, including usage limitations and restrictions, see the staff's safety evaluation dated December 30, 1993 available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the Wharton County Junior College, J.M. Hodges Learning Center, 911 Boling Highway, Wharton, Texas 77488.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of the Exemption will have no significant impact on the environment (58 FR 42112).

This Exemption is effective upon issuance.

Dated at Rockville, Maryland this 30th day of December 1993.

For The Nuclear Regulatory Commission.

Elinor G. Adensam,

Acting Director, Division of Reactor Projects III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 94-252 Filed 1-5-94; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF MANAGEMENT AND BUDGET

Rescission of OMB Circular A-120, Guidelines for the Use of Advisory and Assistance Services; Correction

AGENCY: Office of Management and Budget (OMB), Executive Office of the President.

ACTION: Correction.

SUMMARY: This document contains a correction to the notice of rescission of OMB Circular No. A-120, Guidelines for the Use of Advisory and Assistance Services, which was published Thursday, December 2, 1993 (58 FR 63593). The Transmittal Memorandum No. 1 was inadvertently left out of the document submitted for publication. The test of Transmittal Memorandum No. 1 follows.

FOR FURTHER INFORMATION CONTACT: Linda G. Williams, Deputy Associate Administrator, (202) 395-3502. To obtain a copy of Transmittal Memorandum No. 1, please call the Executive Office of the President's Publications Office at (202) 395-7332.

Dated: December 28, 1993.

John B. Arthur,

Assistant Director for Administration.

November 19, 1993.

Circular No. A-120

Transmittal Memorandum No. 1

To the Heads of Executive Departments and Establishments

Subject: Guidelines for the Use of Advisory and Assistance Services

Office of Management and Budget (OMB) Circular No. A-120, "Guidelines for the Use of Advisory and Assistance Services," dated January 4, 1988, is hereby rescinded. Executive departments and agencies are no longer required to comply with the management controls and reporting requirements of the Circular.

Guidance contained in the Circular has been revised and incorporated into other policy documents, as appropriate. Those documents include: (1) Office of Federal Procurement Policy (OFPP) Policy Letter 93-1 on "Management Oversight of Service Contracting," (2) OFPP Policy Letter 92-1 on "Inherently Governmental Functions," (3) OFPP Policy Letter 91-2 on "Service Contracting," (4) OFPP Policy Letter 89-1 on "Conflicts of Interest Applicable to Consultants," (5) OMB Circular A-76 on "Performance of Commercial Activities," and (6) OFPP's Guidance on Contract Administration. To obtain a copy of these documents, please call the Executive Office of the President's Publication Office at (202) 395-7332.

Leon E. Panetta,

Director.

[FR Doc. 94-110 Filed 1-5-94; 8:45 am]

BILLING CODE 3110-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee; Initiation of a Review To Consider Designation of Belarus as a Beneficiary Developing Country Under the Generalized System of Preferences; Solicitation of Public Comments Relating to the Designation Criteria

AGENCY: Office of the United States Trade Representative.

ACTION: Solicitation of public comment with respect to the eligibility of Belarus for the Generalized System of Preferences (GSP) program.

SUMMARY: The purposes of this notice is to announce the initiation of a review to consider whether Belarus satisfies criteria for designation as a beneficiary developing country under the GSP program, and to solicit public comment relating to the designation criteria.

FOR FURTHER INFORMATION CONTACT: GSP Subcommittee, Office of the United States Trade Representative, 600 17th Street, NW., room 517, Washington, DC 20506. The telephone number is (202) 395–6971. Public versions of all documents related to this review will be available for review by appointment with the USTR Public Reading Room shortly following the filing deadline. Appointments may be made from 10 a.m. to noon and 1 p.m. to 4 p.m. by calling (202) 395–6186.

SUPPLEMENTARY INFORMATION: The Trade Policy Staff Committee (TPSC) has initiated a review to determine if Belarus meets the designation criteria of the GSP law and should be designated as a beneficiary. The GSP is provided for in the Trade Act of 1974, as amended (19 U.S.C. 2461–2465). The designation criteria are listed in 19 U.S.C. 2462(a), 2462(b) and 2462(c). Interested parties are invited to submit comments regarding the eligibility of Belarus for designation as a GSP beneficiary. The designation criteria mandate determinations related to participation in commodity cartels, preferential treatment provided by beneficiaries to other developed countries, expropriation without compensation, enforcement of arbitral awards, international terrorism, and internationally recognized worker rights. Other practices taken into account include market access for goods and services, investment practices and intellectual property rights.

An original and fourteen (14) copies of comments regarding Belarus' eligibility may be submitted, in English, to the Chairman of the GSP Subcommittee, Trade Policy Staff Committee, 600 17th Street, NW., room 517, Washington, DC 20506. Comments must be received no later than 5 p.m. on January 12, 1994.

Information and comments submitted regarding this notice will be subject to public inspection by appointment with the staff of the USTR Public Reading Room, except for information granted "business confidential" status pursuant to 15 CFR 2003.6. If the document contains business confidential information, an original and fourteen (14) copies of a nonconfidential version of the submission along with an original and (14) copies of the confidential version must be submitted. In addition, the document containing confidential information should be clearly marked "confidential" at the top and bottom of each and every page of the document. The version which does not contain business confidential information (the public version) should also be clearly marked at the top and bottom of each and every page (either "public version" or "non-confidential").

Frederick L. Montgomery,

Chairman, Trade Policy Staff Committee.

[FR Doc. 94–323 Filed 1–5–94; 8:45 am]

BILLING CODE 3190–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–33405; File No. SR–Phlx–93–57]

Self-Regulatory Organizations; Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating To Extending the AUTOM Pilot Program

December 30, 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 December 1, 1993, the Philadelphia Stock Exchange ("Phlx" 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 Phlx is requesting Commission approval to extend the Exchange's Automated Options Market ("AUTOM") system, a pilot program, until December 31, 1994. AUTOM is an electronic delivery system of small options orders to the Phlx trading floor, with an automatic execution feature.[1]

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 states concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

On March 31, 1988, the Commission approved the establishment of AUTOM as a pilot program.[2] The Exchange currently is proposing to extend the AUTOM pilot program until December 31, 1994. The Exchange represents that, from the date of the last Commission order extending the AUTOM pilot program, AUTOM has operated efficiently and without any material

[1] The original proposal included a request for permanent approval of AUTOM. Because the Phlx is in the process of modifying and upgrading the computer system on which the AUTOM system operates, the Phlx submitted a letter, dated December 17, 1993, withdrawing that request from the proposal ("Amendment No. 1"). The Phlx states that it will resubmit its request for permanent approval after the Phlx and the Commission have had the opportunity to evaluate the operation of the system in light of the current modifications and upgrades. See letter from J. Keith Kessel, Staff Counsel, Phlx, to Richard L. Zack, Branch Chief, Division of Market Regulation, Commission, dated December 17, 1993.

[2] The Commission approved AUTOM on a pilot basis for market orders of up to five contracts for all exercise prices in the near month covering twelve Phlx equity options. *See* Securities Exchange Act Release No. 25540 (March 31, 1988), 53 FR 11390 (April 6, 1988). Since then, the order routing feature of AUTOM has been expanded to include all orders in all exercise prices and months in all Phlx equity options. In addition, day orders, good until cancelled orders, and cabinet orders (accommodation transactions) have become eligible for delivery through the system, and the eligible order size for the order routing feature of AUTOM has been increased from five to one hundred contracts. See Securities Exchange Act Release No. 28643 (November 26, 1990), 55 FR 49960 (December 3, 1990) at notes 2–6 for citations to Commission orders approving these expansions of the AUTOM pilot. See *also* Securities Exchange Act Release No. 28978 (March 15, 1991), 56 FR 12050 (March 21, 1991).

problems being reported by Phlx members or AUTOM users.

The AUTOM system is an online system that allows electronic delivery of options orders from member firms directly to the appropriate specialist on the Phlx options trading floor, with electronic confirmation of order executions. Specifically, once AUTOM orders are entered into the system and routed to the specialists' post, they are executed manually by the specialist who, upon execution of the order, enters the relevant trade information into the system. An execution report is then automatically transmitted to the firm that placed the order.

The AUTOM system also has an automatic execution feature called "Auto-X." Currently, Auto-X is available to public customer market and marketable limit orders of up to 20 contracts. Orders eligible for automatic execution through AUTOM are: (1) Printed in hard copy form at the floor representative booth of the delivering member organization; (2) displayed on the trading crowd screen with buy/sell information omitted; and (3) printed in hard copy form at the specialist post. The order is priced and executed automatically at the best displayed bid or offer, and the execution is reported automatically to the Options Price Reporting Authority ("OPRA"). A report of the execution also is electronically sent to the delivering member organization. Under Auto-X, the specialist is the contra-side of all trades. However, the specialist is required to ensure participation of bids and offers on the limit order book and in the trading crowd that are entitled to execution pursuant to the Phlx's rules of priority, parity, and precedence.

The Phlx represents that, as a general matter, the AUTOM system has functioned well, servicing member firms options orders. The Phlx states that two major groups of figures best reflect the performance of AUTOM: (1) The capacity figures; and (2) the order flow figures.[3] First, the Phlx believes that information regarding AUTOM's system capacity shows that AUTOM continues to have the ability to service the volume of incoming orders. Specifically, the Phlx represented, in February 1993, that it would make enhancements to systems capacity (*i.e.*, the ability of the system's hardware to properly route orders and service potential order volume) if order volume during peak time exceeded 80% of CPU capacity. The Exchange represents that since making these representations with respect to AUTOM's capacity, this 80% level has not been attained.

Second, the Phlx also believes that an analysis of current customer order flow demonstrates that the system capacity is adequate to handle the current and potential number of orders transmitted through the system. Specifically, the Phlx represents that only about two-thirds of all orders placed on AUTOM are executed because the other one-third of the orders are too far away from the market to receive execution. The orders routed through AUTOM that receive execution are either automatically executed through Auto-X or are manually executed by the receiving Phlx specialist.

Accordingly, the Phlx believes that AUTOM continues to facilitate smooth and liquid markets on the equity options floor, and otherwise represents a favorable development for all concerned parties. The Phlx further believes that AUTOM has performed well, servicing member firms' options orders.

The Phlx, therefore, believes that it is consistent with the Act and the rules and regulations promulgated thereunder for the Commission to permanently approve the AUTOM system. Specifically, the Phlx believes that the current proposal is consistent with section 6(b)(5) of the Act because it is 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 Phlx 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

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has requested that the proposed rule change be given accelerated effectiveness pursuant to section 19(b)(2) of the Act.

The Commission finds that the proposed rule change, including Amendment No. 1 to 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, the requirements of Sections 6 and 11A.[4] Specifically, the Commission continues to believe that the development and implementation of the AUTOM system provides for more efficient handling and reporting of orders in Phlx equity options through the use of new data processing and communications techniques, thereby improving order processing and turnaround time. The Commission also believes that the extension of the pilot program until December 31, 1994, will provide the Exchange with a better opportunity to study its operation and effectiveness prior to permanent approval of the program.[5]

The Commission further notes that the Exchange has represented that from January 1, 1993 until present, AUTOM has not suffered any operational failures and the Phlx has not received any formal complaints with respect to the system's operation.[6] Finally, since the pilot program is being extended without expansion of the scope of the pilot, the Commission does not believe that the capacity of the Exchange's automated systems will be adversely effected by this extension.[7]

The Commission finds good cause for approving the proposed rule change, including Amendment No. 1 to the proposed rule change, prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register** in order to permit the Phlx to continue the AUTOM pilot program on an uninterrupted basis. Specifically, the Commission believes that the Phlx's proposal to extend the AUTOM pilot program does not raise

[3] See letter from J. Keith Kessel, Staff Counsel, Phlx, to Monica C. Michelizzi, Staff Attorney, Division of Market Regulation, Commission, dated November 19, 1993.

[4] 15 U.S.C. 78f and 78k–1 (1988).

[5] The Commission notes that the Phlx is in the process of modifying and upgrading the computer system on which AUTOM operates. Before granting permanent approval or any further extension of the pilot, the Commission expects the Phlx to submit a full report, by November 1, 1994, describing the effect these modifications have had on the operation of AUTOM and updating the information, submitted to the Commission on November 24, 1993, which set forth the benefits provided by AUTOM, the degree of AUTOM usage, including the number and size of the orders routed through AUTOM and the number and size of the orders automatically executed through the Auto-X system, and the system capacity of AUTOM and Auto-X and any problems that have been encountered with the routing and execution features. The Commission also requests that the Phlx submit its request for an extension of the pilot or permanent approval by November 1, 1994.

[6] See letter dated December 17, 1993, supra note 3.

[7] The Commission recognizes that additional options classes added onto the system can have an effect on the systems operations. In this context, the Commission expects that the Phlx will notify the Commission if the expansion of options multiple trading, pursuant to Rule 19c–5 under the Act, has any material effect on the capacity of the Phlx's automated systems.

any new issues since it merely extends the pilot program as it is currently operating. Further, the Commission believes that the pilot is beneficial in maintaining the quality and efficiency of the Phlx's market.

The Commission also notes that there have been no adverse comments concerning the pilot program since its implementation. Accordingly, the Commission believes that granting accelerated approval of the proposed rule change is appropriate and consistent with Sections 6 and 11A of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the proposed rule change, including Amendment No. 1 to the proposed rule change. 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 January 27, 1994.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act,[8] that the proposed rule change (File No. SR-Phlx-93-57) is approved through December 31, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-239 Filed 1-5-94; 8:45 am]

BILLING CODE 8010-01-M

[8] 15 U.S.C. 78s(b)(2) (1988).

[9] 17 CFR 200.30-3(a)(12) (1993).

TENNESSEE VALLEY AUTHORITY

Information Collection Under Review by the Office of Management and Budget

AGENCY: Tennessee Valley Authority.

ACTION: Information collections under review by the Office of Management and Budget (OMB).

SUMMARY: The Tennessee Valley Authority (TVA) has sent to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), as amended by Public Law 99-591.

Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer whose name, address, and telephone number appear below. Questions or comments should be made within 30 days directly to the Agency Clearance Officer and also to the Desk Officer for the Tennessee Valley Authority, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; Telephone: (202) 395-3084.

Agency Clearance Officer: Mark R. Winter, Tennessee Valley Authority, 1101 Market Street (BR 6B), Chattanooga, TN 37402-2801; (615) 751-2523.

Type of Request: Regular submission.

Title of Information Collection: Comparison of Factors Influencing Minority and Nonminority Representation in State and Federal Natural Resource Professions.

Frequency of Use: On occasion.

Type of Affected Public: Individuals or households, state or local governments, Federal agencies or employees.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 452.

Estimated Number of Annual Responses. 2,000.

Estimated Total Annual Burden Hours: 500.

Estimated Average Burden Hours Per Response: .25.

Need For and Use of Information: TVA is cooperating with 22 other Federal and state agencies to investigate selected factors which may influence minority and nonminority representation in state and Federal agency natural resource professions. A survey of natural resource professions in the Southeastern United States will be conducted to determine (1) the diversity in the workforce and job responsibilities, (2) factors that promote or preclude job satisfaction, (3) educational backgrounds attained and needed by inservice professionals, and (4) conceptual framework for career selection by and retention of minorities in natural resource professions. Results of the study may provide strategies for state and Federal agencies to refine minority recruitment and retention programs, personnel planning, and career counseling.

William S. Moore,

Manager, Information Support Services.

[FR Doc. 94-297 Filed 1-5-94; 8:45 am]

BILLING CODE 8120-08-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD 93-092]

Passenger Vessel Safety Act of 1993

AGENCY: Coast Guard, DOT.

ACTION: Notice of eligibility.

SUMMARY: The Passenger Vessel Safety Act of 1993 (the Act) clarifies the criteria which determine when vessels are required to be certificated by the Coast Guard for passenger carriage. To accomplish this, the Act, among other things, redefines the terms "passenger," "passenger vessel," "small passenger vessel," and "uninspected passenger vessel." The Act also provides definitions for the terms "passenger for hire" and "consideration." The Act establishes an extension period for its applicability to charter vessels that will operate as charters with no crew provided. The extension period is only available to those vessels whose owners make application to the Coast Guard by June 21, 1994. The Act further calls for the possible modification of existing requirements for certain charter vessels of over 100 gross tons, and the establishment of new requirements for uninspected passenger vessels of at least 100 gross tons carrying not more than 12 passengers.

FOR FURTHER INFORMATION CONTACT: LT. Brian Poskaitis, Project Manager, Merchant Vessel Inspection and Documentation Division (G-MVI-1), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001, telephone (202) 267-1464.

SUPPLEMENTARY INFORMATION:

Applicability

Although most of the Act is effective immediately, it does not apply to passenger and small passenger vessels chartered without a crew until six

months after enactment. An additional 30 months extension of inapplicability is also available for these vessels only. To receive this extension the vessel owner must:

(a) Make application for inspection with the local Coast Guard Officer in Charge, Marine Inspection (OCMI) by June 21, 1994;

(b) Make the vessel available for examination by the Coast Guard prior to the carriage of passengers;

(c) Correct especially any hazardous conditions involving the vessel's structure, electrical system, and machinery installation such as: (i) Grossly inadequate, missing, unsound, or severely deteriorated frames or major structural members; (ii) wiring systems or electrical appliances without proper grounding or overcurrent protection; and (iii) significant fuel or exhaust system leaks;

(d) Equip the vessel with lifesaving and firefighting equipment, or the portable equivalent, required for the route and number of persons carried;

(e) Verify through stability tests, calculations, or other practical means (which may include a history of safe operations) that the vessel's stability is satisfactory for the size, route and number of passengers; and

(f) Develop a work plan approved by the Coast Guard to complete in a good faith effort all requirements necessary for issuance of a Certificate of Inspection as soon as practicable. If a vessel qualifies for an extension, the Coast Guard will issue a letter to the owner which establishes the conditions of operation for the vessel during the extension period. The letter will specifically indicate the conditions of route, service, number of passengers, manning, and equipment.

Depending on the condition and outfitting of these vessels, the process to receive a Coast Guard extension letter may take several weeks or months. Therefore, vessel owners desiring extensions are encouraged to apply early. Under the Act, vessels chartered without a crew that carry more than 12 passengers, as defined by the Act, must have an extension letter from the Coast Guard or have obtained a Certificate of Inspection to continue operations after June 21, 1994.

Possible Modified Regulations for Certain Existing Passenger Vessels

The Act also permits the establishment of different structural fire protection, manning, operating and equipment requirements for certain existing charter vessels if they are not necessary for safe operation. Such requirements would apply to existing charter vessels carrying not more than 150 passengers on domestic voyages that are:

(a) At least 100 gross tons but less than 300 gross tons, and;

(b) Former public vessels of at least 100 gross tons but less than 500 gross tons.

These modified requirements will seek to ensure an equivalent degree of safety is achieved for those existing vessels that cannot come into full compliance with the current passenger vessel regulations because of their construction. To be eligible for these modified requirements, the owner of the vessel must:

(1) Make application for inspection with the local Coast Guard OCMI before June 21, 1994; and

(2) Provide satisfactory documentation that the vessel was chartered at least once within the period December 20, 1992 to December 20, 1993.

New Regulations for Uninspected Passenger Vessels

The new definition of the term "uninspected passenger vessel" will now include vessels of at least 100 gross tons, that are: carrying not more than 12 passengers, including at least one passenger for hire; or, that is chartered with the crew provided or specified by the owner or the owner's representative and is carrying not more than 12 passengers. New regulations will be developed for these vessels within 24 months.

Dated: December 30, 1993.

R.C. North,

Captain, U.S. Coast Guard, Acting Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 94–262 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–14–M

Federal Aviation Administration

Approval of Noise Compatibility Program; Stockton Metropolitan Airport, Stockton, CA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the Noise Compatibility Program submitted by the county of San Joaquin, Stockton, California, under the provisions of title I of the Aviation Safety and Noise Abatement Act of 1979 (Public Law 96–193) and 14 CFR part 150. These findings are made in recognition of the description of Federal and nonfederal responsibilities in Senate Report No. 96–52 (1980). On May 10, 1991, the FAA determined that the Noise Exposure Maps submitted by under part 150 were in compliance with applicable requirements. On November 22, 1993, the Acting Assistant Administrator for Airports approved the Noise Compatibility Program for Metropolitan Oakland International Airport. Twenty-eight (28) of the proposed measures were approved, and two (2) measures were disapproved.

EFFECTIVE DATE: The effective date of FAA's approval of the Stockton Metropolitan Airport Noise Compatibility Program is November 22, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Pfeifer, Manager, Airports District Office, SFO–600, Federal Aviation Administration, San Francisco Airports District Office, 831 Mitten Road, Burlingame, California 94010–1303, Telephone: (415) 876–2805. Documents reflecting this FAA action may be reviewed at this same location.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the Noise Compatibility Program for Stockton Metropolitan Airport, effective November 22, 1993.

Under section 104(a) of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator who has previously submitted a Noise Exposure Map, may submit to the FAA a Noise Compatibility Program which sets forth the measures taken or proposed by the airport operator for the reduction of existing noncompatible land uses and prevention of additional noncompatible land uses within the area covered by the Noise Exposure Maps. The Act requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport Noise Compatibility Program developed in accordance with Federal Aviation Regulations (FAR) part 150 is a local program, not a Federal program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of FAR part 150 program recommendations is measured according to the standards expressed in Part 150 and the Act and is limited to the following determinations:

a. The Noise Compatibility Program was developed in accordance with the

b. Program measures are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and preventing the introduction of additional noncompatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to the FAA's approval of an airport Noise Compatibility Program are delineated in FAR part 150, § 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA. Where federal funding is sought, requests for project grants must be submitted to the FAA Airports District Office in Burlingame, California.

The county of San Joaquin submitted to the FAA on February 28, 1992, the Noise Exposure Maps, descriptions, and other documentation produced during the Noise Compatibility Planning study conducted from May 1988, through October 1990. The Stockton Metropolitan Airport Noise Exposure Maps were determined by the FAA to be in compliance with applicable requirements on May 10, 1991. Notice of this determination was published in the **Federal Register** on May 28, 1991.

The Stockton Metropolitan Airport study contains a proposed Noise Compatibility Program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from the date of study completion to, or beyond, the year 2000. It was requested that the FAA evaluate and approve this material as a Noise Compatibility Program as described in section 104(b) of the Act. The FAA began its review of the program on May 26, 1993 and was required by a provision of the Act to approve or disapprove the program within 180 days (other than the use of new flight procedures for noise control). Failure to approve or disapprove such program within the 180-day period shall be deemed to be an approval of such program.

The submitted program contained thirty (30) proposed actions for noise mitigation on and off the airport. The FAA completed its review and determined that the procedural and substantive requirements of the Act and FAR part 150 have been satisfied. The overall program, therefore, was approved by the Acting Assistant Administrator for Airports effective November 22, 1993.

Outright approval was granted for twenty-eight (28) of the specific program elements. Two (2) elements were disapproved. The approved elements included existing preferential runway usage, existing flight procedures, existing aircraft category procedures, existing pattern procedures, practice circling maneuvers, education of airport users, amend county development title, residential/nonresidential noise sensitive land use exclusion area, sound attenuation in new construction, acoustical studies, real estate disclosure, residential soundproofing program, noise abatement departures, informational signs, noise abatement advisories, noise abatement hotlines, interagency coordination procedures, review committee, amend airport land use plan, and Weston Ranch easement area.

These determinations are set forth in detail in a Record of Approval endorsed by the Acting Assistant Administrator for Airports on November 22, 1993. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above and at the administrative offices of the Santa Clara County.

Issued in Hawthorne, California, on December 15, 1993.

Herman C. Bliss,

Manager, Airports Division, Western-Pacific Region.

[FR Doc. 94–247 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–13–M

RTCA, Inc.; Two New Documents Available

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. Appendix I), notice is hereby given for the availability of the following two new documents:

- RTCA/DO–219, Minimum Operational Performance Standards for ATC Two-Way Data Link Communications. Prepared by Special Committee 169 and approved by the Technical Management Committee (TMC) on August 27, 1993.
- RTCA/DO–220, Minimum Operational Performance Standards for Airborne Weather Radar with forward-looking windshear capability. Prepared by Special Committee 173 and approved by the Technical Management Committee (TMC) on September 21, 1993.

Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., suite 1020, Washington, DC 20036; (202) 833–9339. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 28, 1993.

Joyce J. Gillen,

Designated Officer.

[FR Doc. 94–241 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–13–M

RTCA, Inc.; Aeronautical Data Link Applications; RTCA Special Committee 169, Tenth Meeting

Pursuant to section 19(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix I), notice is hereby given for RTCA Special Committee 169 meeting to be held January 11–12, 1994, starting at 9:30 a.m. The meeting will be held at the RTCA Conference Room, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036.

The agenda for this meeting is as follows: (1) Chairman's introductory remarks; (2) Review of meeting agenda; (3) Approval of the Summary of the ninth meeting held July 22–23, 1993; (4) Report of Air Traffic Services Data Link Communications Working Group (WG–1) activities and approval of MOPS for Aircraft Contest Management (CM) Equipment; (5) Report on Working Group 3, Flight Information Services Communications, activities; (6) Discuss Working Group 4 status; (7) Task Force 2 update on issues applicable to SC–169; (8) Other Business: (a) Discussion of implementation issues (b) FANS–1

status; (9) Date and place of next meeting.

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 statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036; (202) 833–9339. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 28, 1993.

Joyce J. Gillen,

Designated Officer.

[FR Doc. 94–242 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–13–M

RTCA, Inc.; RTCA Technical Management Committee Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix I), notice is hereby given for RTCA Technical Management meeting to be held January 12, 1994, starting at 9 a.m. The meeting will be held at the Airports Council International-NA, 1220 10th Street, NW., Suite 200, Washington, DC 20036.

The agenda for this meeting is as follows: (1) Chairman's introductory remarks; (2) Approve summary of the September 21, 1993 meeting; (3) Consider/approve: (a) Action on a recent request from the Federal Aviation Administration to revise the guidance provided to Special Committees 159 and 135. The problems identified in the request will impact RTCA DO–208 and DO–160C (b) Action on a recent request from Airports Council International—North America to develop characteristics/specifications for form/fit/function and software and communications standards for security/access control systems (c) Action on a recent request from ARINC to develop a MOPS for a generic computer. This equipment, referred to as an avionics computer resource, could be used as a Flight Management Computer or a Communications Management Unit and would be used to implement the ICAO CNS/ATM concept; (4) Other business; (5) Date and place of next meeting.

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 statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036; (202) 833–9339. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 28, 1993.

Joyce J. Gillen,

Designated Officer.

[FR Doc. 94–243 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–13–M

RTCA, Inc., Special Committee 168, Eleventh Meeting; Lithium Batteries

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. appendix I), notice is hereby given for Special Committee 168 meeting to be held January 27–28, 1994, starting at 9:30 a.m. The meeting will be held at the RTCA conference room, 1140 Connecticut Avenue, NW., suite 1020, Washington, DC 20036.

The agenda for this meeting is as follows: (1) Chairman's remarks; (2) Approval of the summary from the tenth meeting; (3) Review EUROCAE WG–39 Activity; (4) Review material from task assignments; (5) Review/approve the proposed final MOPS draft; (6) Assignment of tasks; (7) Other business; (8) Date and place of next meeting (if required).

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 statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., suite 1020, Washington, DC 20036; (202) 833–9339. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 28, 1993.

Joyce J. Gillen,

Designated Officer.

[FR Doc. 94–244 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–13–M

National Highway Traffic Safety Administration

[Docket No. 93–34; Notice 2]

American Honda Motor Co., Inc. Denial of Petition for Determination of Inconsequential Noncompliance

American Honda Motor Co., Inc. (Honda) of Torrance, California determined that certain passenger cars failed to comply with 49 CFR 571.208, Federal Motor Vehicle Safety Standard No. 208, "Occupant Crash Protection," and filed an appropriate report pursuant to 49 CFR part 573. Honda also petitioned to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) on the basis that the noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of the petition was published on May 21, 1993 (58 FR 29689). This notice denies that petition.

Paragraph S4.1.4.2 of Standard No. 208 requires that motor vehicles be equipped with seat belt assemblies that comply with Standard No. 209, "Seat Belt Assemblies." Paragraph S4.3(j)(3) of Standard No. 209 requires that

> An emergency locking retractor of a Type 1 or Type 2 seat belt assembly * * * shall not lock, if the retractor is sensitive to vehicle acceleration, when the retractor is rotated in any direction to any angle of 15 degrees or less from its orientation in the vehicle * * *

Honda determined that the seat belt assemblies for the rear outside seating positions of approximately 1.2 million model year 1990, 1991, 1992, and early 1993 two-door and four-door Accords do not comply with S4.3(j)(3), the emergency locking retractor requirements of Standard No. 209. When the vehicle in which the noncomplying belt is installed is in certain parking positions such as on a steep uphill grade, the rear seat occupants are sometimes unable to pull the belt out of the retractor, and thus cannot fasten their belts. The vehicle must be moved to a more level position for the rear seat occupant to be able to put on the seat belt.

Honda supported its petition for inconsequential noncompliance with the following arguments:

In the petitioner's opinion, the noncompliance does not affect the occupant protection performance of the subject seat belt assemblies. To verify this, Honda tested the belts to determine whether they meet the locking requirements of Standard No. 209. All the belts complied with these requirements. Further, Honda performed dynamic sled test comparisons of the noncompliant belts to complaint belts at a test speed of 30 miles per hour. Honda found that the performance of the noncompliant belts was almost the same as that of the compliant belts.

Honda stated that the primary effect of the noncompliant seat belts is inconvenience due to the rear seat occupant's inability to pull the belt out from the retractor under certain parking conditions, as when the vehicle is in a significant uphill parking position in excess of 11 degrees, or when the

vehicle has been parked such that one side of the vehicle is substantially higher than the other (at least nine degrees). Honda argued that the opportunities for parking an affected vehicle in this type of situation are very uncommon and would present a high level of discomfort to rear seat occupants from sitting at this angle. Honda has found that when the vehicle is parked on ground at lesser angles than previously noted, the noncompliant belts work completely normally.

Honda reviewed its consumer records for complaints relating to the noncompliance. It found that consumers had registered a total of 173 complaints regarding the 4-door sedan and 34 complaints regarding the 2-door coupe. These complaints are known to be related to the subject noncompliance, as the problem is clearly described in the complaint. In addition, Honda received 168 complaints regarding the 4-door sedan and 46 complaints regarding the 2-door coupe which were not clearly defined and may not be related to the subject noncompliance. The consumer complaint ratios, taking into account only the known related complaints, are 0.026 percent for the 4-door sedan and 0.014 percent for the 2-door coupe.

Since Honda offers a lifetime warranty for seat belts, it will replace, free of charge, any unit that has a functional problem at any time during the life of the vehicle. In this instance, Honda will notify owners of the subject vehicles that it will replace the sensor in the noncompliant seat belt retractors if the customer experiences the locking problem.

Honda concluded by stating that, although the noncomplying retractors may, in certain situations, result in the belt not being able to be pulled out of the retractor, this is a temporary condition which is remedied if the vehicle is moved from an uphill position of greater than 11 degrees or a lateral angle of greater than nine degrees. There is no risk to safety once the belt has been successfully fastened, since the performance of the belts is equal to those which are in total compliance with Standard No. 209. Because the seat belts have a lifetime warranty, any complaint concerning the ability to activate the belts will result in Honda replacing the belt with no cost to the consumer.

No comments were received on the petition.

Occupant protection has been a primary safety goal of the agency since its inception. Therefore, noncompliances with occupant protection requirements are treated with particular concern. The noncompliance described in the petition is one that occurs only under specific circumstances of vehicle attitude. That these circumstances are not isolated and occur with a degree of frequency is borne out by the number of complaints that Honda has received. Generally, a petitioner for a determination of inconsequentiality supports its arguments with the statement that no complaints have been received. In this instance, there have been sufficiently numerous expressions of concern to cause Honda to formulate a "Product Improvement Campaign". Honda has submitted to NHTSA a draft of its proposed letter to owners. The letter does not address the safety issue to NHTSA's satisfaction. The agency is concerned that the average recipient will not understand the safety-relatedness of the problem described in the letter. As a result, the recipient would be less likely to respond to it than to a letter meeting the requirements of Part 577.

NHTSA has concluded that the noncompliance is one that will have the immediate effect of creating frustration when the rear seat passenger is unable to pull the belt out of its retractor. This can deter the passenger from further efforts to wear the belt until the vehicle is once more at an attitude at which the belt may be fastened, or even create the impression that the belt is broken and that further attempts to dislodge it will be useless. Another possibility is that a parent may be unable initially to secure a child safety seat, then neglect to get out of the car to secure it when the vehicle is moved.

Alternatively, the parent may respond by moving the child seat from the rear seat position to the front. This would be contrary to the agency's policy of encouraging parents to install child safety seats in the rear in view of the greater safety of that location. In NHTSA's view, any noncompliance that has the potential to decrease the chances of use of a seat belt is not one that is inconsequential. Therefore, both the notification letter and the remedy must be in accordance with Federal requirements.

In consideration of the foregoing, it is hereby found that the petitioner has not met its burden of persuasion that the noncompliance herein described is inconsequential as it relates to motor vehicle safety, and its petition is denied.

(15 U.S.C. 1417; delegations of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on: January 3, 1994.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 94–240 Filed 1–5–94; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. T84–01; Notice 31]

Theft Data; Motor Vehicle Theft Prevention Standard

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

ACTION: Publication of final theft data.

SUMMARY: This document publishes the final data on passenger motor vehicle thefts that occurred in calendar years 1990–1991. As provided in the Anti Car Theft Act of 1992, these data were used to determine the theft rates for existing passenger motor vehicle lines manufactured in model years 1990 and 1991 and to determine the median theft rate for all those lines. Vehicle lines with theft rates exceeding the median theft rate of 3.5866 per thousand vehicles produced, are subject to selection for coverage under the Theft Prevention Standard.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara A. Gray, Office of Market Incentives, NHTSA, 400 Seventh Street, SW., Washington, DC 20590. Ms. Gray's telephone number is (202) 366–1740.

SUPPLEMENTARY INFORMATION:

Original Base Median Theft Rate (1983–1984 Median Theft Rate)

The Motor Vehicle Theft Law Enforcement Act of 1984 (Theft Act), added title VI to the Motor Vehicle Information and Cost Savings Act (Cost Savings Act). Pursuant to title VI, NHTSA promulgated 49 CFR part 541, Federal Motor Vehicle Theft Prevention Standard. Part 541 establishes performance requirements for inscribing or affixing vehicle identification numbers (VINs) onto certain major original equipment and replacement parts of high theft lines of passenger motor vehicles.

Section 603 of the Cost Savings Act, as originally enacted, specified three categories of car lines that were high theft lines within the meaning of title VI. These three types were:

Existing lines that had a theft rate exceeding the median theft rate for calendar years (CYs) 1983–1984 (section 603(a)(1)(A));

New lines that were likely to have a theft rate exceeding that median theft rate (section 603(a)(1)(B)); and

Lines with theft rates below the median theft rate, but which had a

majority of major parts interchangeable with lines whose theft rate exceeded or was likely to exceed the median theft rate (section 603(a)(1)(C)).

Section 603(b) of the Cost Savings Act provided that the median theft rate was the combined rate determined for CYs 1983–1984. Section 603(b) also set forth the equation NHTSA must use to determine the theft rates for each of the vehicle lines. After applying this equation to each existing line, NHTSA was directed by section 603(b) to rank the lines by theft rates to calculate the median theft rate.

In a **Federal Register** document of November 12, 1985 (50 FR 46666), NHTSA published the final theft data reflecting passenger motor vehicle thefts in CYs 1983–1984. In that document, NHTSA also explained how it decided on the data source to be used and how it calculated the final theft rates. Based on its calculations, NHTSA determined that the median theft rate for CYs 1983 and 1984 was 3.2712 thefts per thousand vehicles.

Request for Comments Concerning New Median Theft Rate (1990–1991 Median Theft Rate)

1. The Anti Car Theft Act of 1992

The Anti Car Theft Act of 1992 (ACTA), which became law on October 25, 1992, amended title VI, Theft Prevention, of the Cost Savings Act. Title VI was amended to require the agency to calculate theft rates for passenger motor vehicle lines for the CY 1990–1991 period and then to establish a new median theft rate, based on that same period.

Title VI was also amended to redefine "passenger motor vehicle" to include "any multipurpose passenger vehicle and light-duty truck that is rated at 6,000 pounds gross vehicle weight or less." See Section 601(1) of title VI. Before title VI was amended, "passenger motor vehicle" was defined for title VI purposes to include passenger cars only. Given the new definition of "passenger motor vehicle," NHTSA must calculate the CY 1990 and 1991 theft rates not only for passenger cars, but also for multipurpose passenger vehicle (MPV) and light-duty truck (LDT) lines that are rated at 6,000 pounds gross vehicle weight rating or less. Depending on their theft rates, certain MPV and LDT lines may be determined to be likely high theft lines, and thus may be subject to the parts marking requirements of the Theft Prevention Standard.

2. Preliminary Theft Rates of Vehicle Lines and Median Theft Rate

On August 5, 1993, NHTSA published in the **Federal Register** (58 FR 41834), for review and comment, a document setting forth data on passenger motor vehicle thefts that occurred in CYs 1990–91, including preliminary theft rates of vehicle lines and the preliminary median theft rate for all lines. In calculating the preliminary CY 1990–1991 theft rates, NHTSA followed the same procedures it used in calculating the 1983–1984 theft rates, with minor exceptions. The calculation procedure, based on National Crime Information Center data and the Vehicle Identification Number (VIN) of each stolen vehicle, was described in the August 1993 document.

Out of a total of 226 vehicle lines, NHTSA preliminarily determined that the median theft rate for CYs 1990–1991 was 3.6436 thefts per thousand vehicles produced. Of those vehicle lines with a theft rate higher than 3.6436, 90 were passenger car lines, 17 were MPV lines, and 6 were LDT lines.

In Table I of the August 1993 document, NHTSA tentatively ranked each of the 226 vehicle lines in descending order of theft rate. Public comment was sought on the accuracy of the data, especially production volumes of individual vehicle lines. Public comment was also sought on the methodology used by NHTSA in determining the ranking of the existing passenger motor vehicle lines.

Based on the preliminary data, NHTSA also published a Table III that listed the previously designated high theft lines with theft rates that fell below the preliminary median theft rate of 3.6436. The agency noted that lines that are presently listed in appendix A of 49 CFR part 541 as subject to the requirements of the Theft Prevention Standard will continue to be so listed regardless of whether they fall below the median theft rate. This is because section 603(d) of the Cost Savings Act provides that, except for exemptions from parts marking due to NHTSA-approved antitheft devices, the agency may not "render the standard inapplicable to any line which at any time has been subject to the standard."

NHTSA explained that in selecting high theft lines based on the 1990/91 median theft rate, it will follow the procedures it established in 49 CFR part 542, Procedures for Selecting Lines to be Covered by the Theft Prevention Standard. The agency indicated that it contemplated that newly designated high theft passenger cars would be required to begin to comply with parts marking requirements in MY 1995, but that compliance for high theft MPV's and LDTs might be delayed to a later model year since determination of "major parts" for these vehicles has not yet been made.

Public Comments and Agency Response

In response to the August 1993 **Federal Register** document, NHTSA received nine written comments, all from vehicle manufacturers. The commenters addressed four subjects: NHTSA's methodology in calculating the 1990/91 theft rates, the specific preliminary theft data regarding the respective commenter's vehicles, the agency's intention to require that newly designated high theft care lines be marked beginning in model year 1995, and the effect of the 1990/91 theft rates on lines previously determined high theft.

1. NHTSA's Methodology in Calculating Rates

NHTSA received on comment on its methodology in calculating the new theft rates. Volkswagen of America, Inc. (Volkswagen) stated its belief that ACTA sought to alleviate chop-shop related vehicle thefts. It therefore recommended that only thefts relating to chop-shop activities be counted in determining theft rates.

While chop-shop-related thefts may have been Congress' primary concern in enacting the Theft Act, the relevant language in that Act (which remained unaltered in the ACTA) directs NHTSA to calculate the theft rate of a passenger motor vehicle line using a fraction with " the number of new passenger motor vehicle thefts for that line * * *", as the numerator. (See section 603(b)(1).) The statute does not direct the agency to make theft motive distinctions such as those suggested by Volkswagen.

Therefore, NHTSA does not believe it appropriate to only use chop-shop related theft data in calculating theft rates for a particular line, or the median theft rates for a particular line, or the median theft rate of all lines. The final data published in this document calculates theft rates for each particular line, using all reported new passenger motor vehicle thefts for that line, in CY 1990 and 1991.

2. NHTSA's Calculated Theft Rates of Individual Lines

NHTSA received comments from the following seven manufacturers concerning the listing of certain vehicle lines and preliminary data presented in the August 1993 document: Chrysler Corporation (Chrysler), Fiat Auto R&D U.S.A. (Fiat), Ford Motor Company

(Ford), Mazda (North America), Inc., Nissan Research and Development, Inc. (Nissan), American Suzuki Motor Corporation (Suzuki), and Volkswagen.

Chrylsler requested that the Chrysler LeBaron line be separated into three lines, to differentiate among the LeBaron Landau 4-door sedan, the LeBaron 2-door coupe and the LeBaron convertible. NHTSA agrees that the LeBaron line should be separated, but only into two lines. Since the 2-door coupe and the convertible are built on the same platform, the agency considers the vehicles to be in the same line, the LeBaron Coupe/Convertible. The LeBaron 4-door sedan is in a separate line, the LeBaron Sedan.

Chrysler also stated that the Chrysler New Yorker is more accurately listed as the "New Yorker 5th Avenue/Imperial." Listing the 1990/91 New Yorker line as the New Yorker 5th Avenue/Imperial makes that line distinct from the LH series New Yorker, that Chrysler introduced in model year 1994. NHTSA concurs with this comment.

Ford commented that only 16 percent of its model year 1990 and 1991 E150 light duty truck line had a gross vehicle weight rating (GVWR) of 6,000 lbs. or less, and that model year 1996, each vehicle in its E150 line will be over 6,000 lbs. GVWR. Thus, by model year 1996, that company's E150 light duty trucks will not meet the ACTA's definition of "passenger motor vehicle," since they will have a GVWR exceeding 6,000 pounds. Ford stated that it assumes that the effective date of the parts marking standard for MPV's and LDT's will be no earlier than the 1996 model year and that, therefore, it has concluded that no E150 vans will be subject to parts making. As discussed below, NHTSA has decided that manufacturers of liens designated as high theft pursuant to the 1990/91 median theft rate must begin marking their vehicles in model year 1996. The agency agrees that if the Ford E150 line does not fall within the statutory definition of "passenger motor vehicle," the vehicles are not subject to the theft prevention standard.

Mazda noted two errors concerning the listing of Mazda lines in Table III of the August 1993 **Federal Register** document. As discussed above, Table III listed the previously designated high theft lines with theft rates that fell below the preliminary median theft rate. The Mazda 323/Protege line was erroneously listed as a high theft line, and the Mazda 929 was not listed. NHTSA has corrected the table for this document by removing the 323/Protege and including the 929.

Volkswagen noted that Table III listed the "Quattro," which that company assumed refers to the Audi V8 Quattro Sedan. Since the line was determined by NHTSA to be likely low theft, Volkswagen asked that the line be removed from Table III. NHTSA concurs that listing the "Quattro" in Table III was an error, and has removed it from the final data.

Commenters also identified several typographical errors in the theft data presented in the August 1993 document. In light of those comments, the agency has corrected the theft rate for the Ford Tempo and Nissan NX Coupe, and the 1990 production number for the Suzuki Sidekick. NHTSA has also corrected production data for the Jetta line for model year 1991, based on Volkswagen's comment. Based on comments from Rolls-Royce, NHTSA added three Rolls-Royce lines. Two Maserati lines were also added. No thefts were reported for any of the Rolls-Royce or Maserati lines in 1990 or 1991.

Suzuki provided model year 1990 production numbers for the Chevrolet Sprint, Firefly and GEO Metro (including production numbers for both the hardtop and convertible models) lines. The Sprint is sold in Puerto Rico as the Firefly. General Motors (GM) has already provided NHTSA with production figures for the Chevrolet Sprint (including the Firefly). Since GM certifies compliance with the theft prevention standard for the Sprint line, NHTSA will base the final theft rates for these lines using GM's production numbers.

GM also certifies theft standard compliance for the GEO Metro. GM's data, however, did not include production numbers for the convertible GEO Metros. Therefore, the final theft rates for the GEO Metro reflect the additional information provided by Suzuki.

In addition to the above changes, NHTSA is making the following corrections to the list of high theft lines with theft rates below the median theft rate. Two lines that were inadvertently omitted, the Saturn SC and Lotus Elan, are added. One line that was inadvertently included, the Mercedes-Benz 129 line, is removed.

Fiat noted that the production figures shown in the agency's August 1993 document correspond to the figures in the 1990 and 1991 model year CAFE reports, and expressed the belief that NHTSA's theft regulation requires theft marking subjection to be based on actual calendar year production. As indicated above, the equation that NHTSA must use in determining the theft rates for each vehicle line is set forth in section 603(b) of the Coast Savings Act. That section provides that the agency is to use "the sum of the respective production volumes of all passenger motor vehicles of [a] line (as reported to the Environmental Protection Agency under title V of this Act) which are of [two specified] *model years*." (Emphasis added.) Therefore, it is correct to use model year production figures rather than the calendar year production figures suggested by Fiat.

3. Implementation Date

Four commenters discussed whether, for the new vehicle lines determined to be high theft based on the CY 1990–1991 theft data, parts marking should begin in MY 1995. Each of the four commenters, Honda, Nissan, Toyata, and Volkswagen, asked that the required marking begin with MY 1996. Essentially, each manufacturer stated it needed more leadtime to be able to comply, and it would be a hardship to begin marking in MY 1995. Some commenters cited start up difficulties since they would be parts marking for the first time. Volkswagen noted that for some manufacturers, requiring parts marking in model year 1995 may not provide enough leadtime for the manufacturers to be able to submit timely petitions for exemption from parts marking, pursuant to part 543, Exemption from Vehicle Theft Prevention Standard.

Based on these comments, NHTSA has decided that requiring parts marking in MY 1995 for the new vehicle lines determined to be high theft based on the CY 1990–1991 theft data would impose an undue burden on manufacturers. The agency also agrees with Volkswagen that requiring newly designated high theft lines to be marked beginning with model year 1995 may not permit some manufacturers to submit timely petitions for exemption from parts marking for its vehicle lines, pursuant to part 543. Section 543.5(b)(4) requires a manufacturer to submit a petition "at least 8 months before the commencement of production of the line(s)." For a manufacturer which plans to introduce its model year 1995 lines in the summer of 1994, Part 543 petitions may already be due at NHTSA. Delaying parts marking to model year 1996 would permit all manufacturers to submit timely petitions for exemption from parts marking.

For these reasons, NHTSA plans to apply the parts marking requirement for newly designated high theft lines, including cars and MPV's/LDT's, pursuant to the 1990/91 median theft rates, beginning with model year 1996. This expectation will be reflected in a

future rulemaking to amend the Theft Prevention Standard.

4. Effect of 1990/91 Median Theft Rate on Lines Previously Determined To Be High Theft

Nissan made several observations regarding the effect of the 1990/91 median theft rate on Nissan vehicle lines previously determined to be high theft. NHTSA confirms Nissan's understanding that the Infiniti Q45, although ranked no. 177 in the final theft rates, continues to be a high theft line subject to the theft prevention standard. Section 603(a)(5) of the ACTA provides that any line subject to parts marking when the original Motor Vehicle Theft Act was enacted continues to be so subject, and that the only exemptions are for vehicles with NHTSA-approved antitheft devices. See also section 603(d). In model year 1990, the Infiniti Q45 was granted an exemption from parts marking, based on a standard antitheft device on all vehicles in the line. (See 53 FR 45181; November 8, 1988.) Thus, Nissan may continue to place the antitheft device on all vehicles in the Q45 line, in lieu of parts marking.

NHTSA also confirms that the publication of this final theft data has no effect on the Nissan Infiniti J30, which was not yet introduced in 1990 or 1991. The Infiniti J30, a high theft line introduced in model year 1993, was also granted an exemption from parts marking, beginning with model year 1993. (See 56 FR 47983; September 23, 1991.)

Final Theft Data and Final Median Rate

In Table I of this document, the agency lists each of the 231 vehicle lines manufactured in model years 1990 and 1991 in descending order according to theft rate. Based on the data set forth in Table I, NHTSA has determined the final median theft rate for 1990 and 1991 to be 3.5866 thefts per 1000 vehicles produced. The final median is the theft rate ranked 116th (3.5866 thefts per thousand) in the table, according to the instructions in section 603(b)(2) of the Cost Savings Act.

If NHTSA has not previously determined the line to be high theft, each line shown in positions 1 through 115, inclusive, in Table I, will be subject to selection as a high theft line. In selecting high theft lines based on the 1990/91 median theft rate, NHTSA will follow the procedures it established in 49 CFR part 542 Procedures for Selecting Lines to be Covered by the Theft Prevention Standard, and provide affected manufacturers an opportunity to comment on NHTSA's preliminary determination that a line is high theft. Final selection by NHTSA will mean that the vehicles in these lines and their major replacement parts will have to be marked as specified in 49 CFR part 541, the vehicle theft prevention standard, beginning with model year 1996.

In addition, Table II of this document lists previously designated high theft lines with theft rates below the median theft rate of 3.5866, and Table III lists lines that have theft rates above the median theft rate and have major parts interchangeable with those of lines that have theft rates below the median theft rate.

Authority: 19 U.S.C. 2021 and 2023; delegation of authority at 49 CFR 1.50.

Issued on: December 30, 1993.

Howard M. Smolkin,

Executive Director.

TABLE I.—MODEL YEARS 1990/1991 THEFT RATES FOR MOTOR VEHICLES PRODUCED IN CALENDAR YEARS 1990/1991

Manufacturer	Make/model (line)	Thefts 1990	Thefts 1991	Production (mfgr's) 1990	Production (mfgr's) 1991	Theft rate (1990/91 thefts per 1,000 cars produced)
1. Ford Motor Co	Ford Mustang	1,545	2,085	115,821	91,479	17.5109
2. General Motors	GMC Jimmy S–15	276	1,048	18,257	61,794	16.5395
3. Honda	Prelude	379	555	29,708	29,785	15.6993
4. General Motors	Chevrolet Blazer S–10	946	2,825	56,080	192,680	15.1592
5. Nissan	Pathfinder	357	579	29,525	38,215	13.8175
6. Hyundai	Sonata	336	281	25,021	24,542	12.4488
7. Toyota	Supra	65	61	6,287	4,055	12.1833
8. General Motors	Oldsmobile Bravada	0	134	0	11,139	12.0298
9. Nissan	300ZX	449	229	38,882	18,502	11.8151
10. Volkswagen	Cabriolet	116	35	8,673	4,138	11.7867
11. Chrysler Corp	Jeep Cherokee	1,837	924	135,416	105,463	11.4622
12. Mazda	RX–7	107	77	10,560	7,800	10.0218
13. Alfa Romeo	164	0	19	0	1,947	9.7586
14. General Motors	Cadillac Brougham	295	257	32,052	25,731	9.5530
15. Mitsubishi	Mirage	448	364	60,150	30,019	9.0053
16. Chrysler Corp	Dodge Monaco	23	153	7,154	12,433	8.9856
17. Volkswagen	Golf/GTI	76	186	13,696	15,965	8.8331
18. General Motors	Cadillac Seville	305	206	32,346	25,916	8.7707
19. Chrysler Corp	Jeep Wrangler	397	392	46,874	44,891	8.5980
20. Porsche	911	31	48	4,609	4,818	8.3802
21. General Motors	Pontiac Grand AM	1,596	1,381	189,150	171,582	8.2527
22. Chrysler Corp	Lebaron Coupe/Convertible	469	341	58,837	39,749	8.2162
23. General Motors	Chevrolet Camaro	288	759	33,200	97,290	8.0236
24 Mitsubishi	Montero	144	108	16,403	15,959	7.7869
25. Ford Motor Co	Ford Probe	755	654	110,201	73,522	7.6692
26. Chrysler Corp	Town & Country MPV	32	10	3,238	2,244	7.6614
27. General Motors	Chevrolet Corvette	168	139	22,034	18,510	7.5720
28. Toyota	4-Runner	521	340	72,138	46,263	7.2179
29. General Motors	Pontiac Bonneville	494	345	75,655	42,919	7.0758
30. Volkswagen	Jetta	337	329	47,731	48,091	6.9504
31. Volvo	780	7	2	945	363	6.8807
32. Suzuki	Sidekick	59	80	7,162	13,052	6.8764
33. General Motors	Pontiac Firebird	154	288	19,157	45,234	6.8643
34. Chrysler Corp	Dodge Shadow	537	500	71,088	81,211	6.8090

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Manufacturer	Make/model (line)	Thefts 1990	Thefts 1991	Production (mfgr's) 1990	Production (mfgr's) 1991	Theft rate (1990/91 thefts per 1,000 cars produced)
35. Mitsubishi	Pickup Truck	194	132	24,976	23,928	6.6661
36. Ford Motor Co	Lincoln Continental	396	368	62,657	52,103	6.6574
37. Suzuki	Samurai	42	31	5,782	5,417	6.5184
38. General Motors	Pontiac 6000	293	223	52,352	27,940	6.4265
39. General Motors	GEO Tracker	232	195	34,948	31,498	6.4263
40. Porsche	928	4	1	414	369	6.3857
41. Ford Motor Co	Lincoln Mark VII	120	71	21,658	8,898	6.2508
42. General Motors	Buick Skylark	509	482	83,666	75,811	6.2141
43. Chrysler Corp	Dodge Dynasty	500	768	94,510	112,320	6.1306
44. General Motors	Chevrolet C–1500	1,639	1,015	267,411	168,497	6.0884
45. Mitsubishi	Galant/Sigma	301	212	45,397	39,562	6.0382
46. Toyota	MR2	0	129	0	22,080	5.8424
47. BMW	3	143	138	21,556	26,839	5.8064
48. Chrysler Corp	Plymouth Acclaim	538	671	95,142	114,510	5.7667
49. General Motors	Buick Reatta	55	2	8,431	1,491	5.7448
50. Chrysler Corp	Dodge Spirit	415	584	79,054	94,895	5.7431
51. General Motors	GMC Sierra C–1500	531	273	89,021	52,079	5.6981
52. Chrysler Corp	Plymouth Sundance	432	236	60,517	56,820	5.6930
53. General Motors	GEO Prizm	1,021	489	170,272	95,000	5.6923
54. General Motors	Oldsmobile Cutlass Calais	494	417	88,229	74,045	5.6140
55. General Motors	Pontiac Sunbird	519	731	106,960	115,721	5.6134
56. Ford Motor Co	Ford Thunderbird	593	427	104,847	78,133	5.5744
57. BMW	5	126	101	23,871	17,016	5.5519
58. Chrysler Corp	New Yorker 5th Ave/Imperial	461	405	93,538	63,375	5.5190
59. Chrysler Corp	Plymouth Laser	257	141	45,141	30,720	5.2464
60. Nissan	240SX	301	190	60,582	34,534	5.1621
61. Mitsubishi	3000GT	0	51	0	9,903	5.1500
62. General Motors	Oldsmobile Cutlass Ciera	584	604	126,321	107,028	5.0911
63. Isuzu	Amigo	61	28	11,622	6,030	5.0419
64. General Motors	Pontiac Lemans	148	172	34,351	29,500	5.0117
65. Mazda	626/MX–6	530	448	96,966	100,436	4.9544
66. Nissan	Maxima	528	482	110,685	94,646	4.9189
67. General Motors	Buick Estate Wagon	37	0	7,524	0	4.9176
68. General Motors	Buick Century	497	649	123,893	110,767	4.8837
69. Chrysler Corp	Eagle Premier	55	71	14,277	11,630	4.8636
70. Ford Motor Co	Lincoln Town Car	602	666	142,648	119,046	4.8454
71. Alfa Romeo	Spider	2	8	915	1,154	4.8333
72. Chrysler Corp	Dodge Stealth	0	96	0	19,907	4.8224
73. Hyundai	Scoupe	0	165	0	34,305	4.8098
74. Mitsubishi	Eclipse	383	211	67,658	56,058	4.8013
75. Honda	Accord	1,833	2,151	410,915	425,360	4.7640
76. Ford Motor Co	Ford Escort	1,030	1,545	188,146	355,642	4.7353
77. General Motors	Chevrolet Cavalier	1,482	1,127	263,204	293,995	4.6823
78. Volkswagen	Corrado	49	12	11,041	2,072	4.6519
79. Nissan	Sentra	885	547	163,355	144,748	4.6478
80. Chrysler Corp	Dodge Daytona	186	69	37,884	17,286	4.6221
81. Honda/Acura	Legend	336	282	66,611	68,274	4.5817
82. Mercedes-Benz	129	19	50	5,413	9,797	4.5365
83. BMW	7	43	33	10,717	6,056	4.5311
84. Ford Motor Co	Mercury Cougar	335	280	76,580	60,669	4.4809
85. Hyundai	Excel	403	346	92,106	78,529	4.3895
86. General Motors	GEO Storm	370	343	73,376	89,996	4.3643
87. Mazda	B Series Pickup	323	269	70,866	65,585	4.3386
88. Toyota	Corolla/Corolla Sport	1,073	781	219,738	208,743	4.3269
89. Chrysler Corp	Jeep Wagoneer	53	10	10,928	3,702	4.3062
90. General Motors	Oldsmobile Delta 88 Royale	451	214	105,508	50,451	4.2639
91. Isuzu	Rodeo	0	123	0	28,953	4.2483
92. Ford Motor Co	Ford Tempo	999	734	218,976	189,747	4.2400
93. Chrysler Corp	Dodge Omni	69	0	16,481	0	4.1866
94. General Motors	Chevrolet Beretta	384	261	90,981	64,022	4.1612
95. General Motors	Buick LeSabre	593	387	152,967	83,677	4.1412
96. Nissan	Stanza	305	296	79,356	67,583	4.0901
97. Audi	Coupe Quattro	6	1	1,348	377	4.0580
98. Subaru	XT	0	7	12	1,725	4.0299
99. Chrysler Corp	Eagle Talon	117	125	28,064	32,096	4.0226
100. General Motors	Chevrolet Corsica	605	754	168,855	169,460	4.0170
101. Isuzu	Trooper/Trooper II	167	120	37,448	34,502	3.9889

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Manufacturer	Make/model (line)	Thefts 1990	Thefts 1991	Production (mfgr's) 1990	Production (mfgr's) 1991	Theft rate (1990/91 thefts per 1,000 cars produced)
102. Chrysler Corp	LeBaron Sedan	145	33	27,304	17,741	3.9516
103. General Motors	Cadillac Fleetwood/Deville	656	573	170,517	140,992	3.9453
104. Honda/Acura	Integra	479	267	109,321	80,333	3.9335
105. Toyota	Tercel	406	382	88,482	112,032	3.9299
106. Chrysler Corp	Plymouth Horizon	60	0	15,884	0	3.7774
107. General Motors	Chevrolet S–10 Pickup	349	1,271	72,784	358,397	3.7571
108. General Motors	GEO Metro	250	337	74,557	82,206	3.7445
109. Ford Motor Co	Mercury Tracer	0	260	0	70,172	3.7052
110. Toyota	Camry	1,052	909	270,029	259,414	3.7039
111. Ford Motor Co	E150 Van	37	28	10,102	7,516	3.6894
112. General Motors	GMC Sonoma	101	306	21,165	90,222	3.6539
113. General Motors	Chevrolet Caprice	361	413	55,528	156,822	3.6449
114. General Motors	Chevrolet Lumina APV	223	180	72,089	38,551	3.6424
115. Chrysler Corp	Jeep Comanche	45	19	10,681	7,063	3.6069
116. Ford Motor Co	Mercury Topaz	277	187	73,207	56,165	3.5866
117. General Motors	Oldsmobile 98/Touring	318	72	58,444	50,417	3.5826
118. Toyota	Celica	315	201	82,740	61,482	3.5778
119. Isuzu	Impulse	22	10	4,772	4,287	3.5324
120. Mitsubishi	Wagon	6	0	1,791	0	3.3501
121. Nissan	Pickup Truck	460	408	129,951	131,144	3.3245
122. BMW	8	0	8	0	2,411	3.3181
123. Rover Group	Range Rover MPV	14	11	4,862	2,681	3.3143
124. Mercedes-Benz	201	42	45	9,247	17,033	3.3105
125. Mazda	323/Protege	297	212	74,316	79,948	3.2995
126. Isuzu	Stylus	0	49	0	14,919	3.2844
127. General Motors	Cadillac Allante	11	7	3,076	2,485	3.2368
128. Rover Group	Sterling 827	6	5	1,200	2,216	3.2201
129. Mitsubishi	Van	3	0	934	0	3.2120
130. General Motors	Pontiac Grand Prix	363	277	110,549	91,646	3.1653
131. Mazda	Navajo	0	38	0	12,080	3.1457
132. General Motors	Chevrolet Astro	290	429	123,394	105,795	3.1371
133. Mercedes-Benz	124	81	59	21,870	22,771	3.1361
134. General Motors	Oldsmobile Cutlass Supreme	361	267	109,288	91,770	3.1235
135. Daihatsu	Rocky MPV	24	5	7,514	1,883	3.0861
136. Ford Motor Co	Bronco II	166	0	54,988	0	3.0188
137. General Motors	Oldsmobile Toronado/Trofeo	38	29	14,480	7,831	3.0030
138. Chrysler Corp	Eagle Summit	40	41	9,595	17,626	2.9756
139. Ford Motor Co	Mercury Sable	278	264	93,126	89,349	2.9703
140. Suzuki	Swift	19	22	7,671	6,227	2.9501
141. Ferrari	Testarossa	1	1	426	255	2.9369
142. Toyota	Cressida	33	36	12,456	11,039	2.9368
143. Chrysler Corp	Dodge Caravan/Grand	709	506	234,609	182,675	2.9117
144. Jaguar	XJS	13	9	5,213	2,371	2.9008
145. General Motors	Pontiac Trans Sport APV	88	60	33,424	18,418	2.8548
146. Porsche	944	6	2	1,990	850	2.8169
147. General Motors	Oldsmobile Silhouette APV	57	68	28,103	16,322	2.8137
148. Mazda	MX–5 Miata	157	97	52,247	38,868	2.7877
149. General Motors	Oldsmobile Custom Cruiser	18	13	3,573	7,660	2.7597
150. Nissan	Infiniti M30	20	19	7,466	6,718	2.7496
151. Mercedes-Benz	126	64	60	21,030	24,128	2.7459
152. Honda	Civic	737	759	277,631	269,947	2.7320
153. Mazda	929	36	47	18,090	12,449	2.7178
154. Chrysler Corp	Chrysler's TC	11	3	3,536	1,636	2.7069
155. General Motors	Chevrolet Celebrity	79	0	29,271	0	2.6989
156. Toyota	Pickup Truck	437	457	159,842	178,940	2.6389
157. Ford Motor Co	Ford Crown Victoria	148	133	57,680	49,213	2.6288
158. General Motors	Cadillac Eldorado	53	45	21,764	15,895	2.6023
159. Chrysler Corp	Dodge Ramcharger	30	13	12,311	4,483	2.5604
160. Ford Motor Co	Ford Festiva	140	95	47,449	44,544	2.5545
161. Volvo	740	147	58	54,036	29,343	2.4587
162. Nissan	Axxess	44	0	17,994	182	2.4208
163. Ford Motor Co	Mercury Grand Marquis	160	193	70,633	75,861	2.4097
164. General Motors	Chevrolet Lumina	763	422	296,720	196,473	2.4027
165. General Motors	Chevrolet Sprint	1	0	233	187	2.3810
166. Chrysler Corp	Plymouth Voyager/Grand	513	301	197,977	144,534	2.3766
167. Chrysler Corp	Dodge Ram Wagon/Van B150	24	18	13,706	3,969	2.3762
168. Isuzu	Pickup	106	94	50,214	34,635	2.3571

TABLE I.—MODEL YEARS 1990/1991 THEFT RATES FOR MOTOR VEHICLES PRODUCED IN CALENDAR YEARS 1990/1991—Continued

Manufacturer	Make/model (line)	Thefts 1990	Thefts 1991	Production (mfgr's) 1990	Production (mfgr's) 1991	Theft rate (1990/91 thefts per 1,000 cars produced)
169. General Motors	Buick Regal	148	274	53,561	126,701	2.3410
170. Chrysler Corp	Plymouth Colt/Colt Vista	26	50	12,183	20,681	2.3126
171. Ford Motor Co	Ford Taurus	716	635	309,211	278,485	2.2988
172. Volkswagen	Passat	42	36	17,426	16,567	2.2946
173. General Motors	GMC Safari	88	99	43,263	38,453	2.2884
174. Ford Motor Co	Ranger Pickup	566	599	271,160	243,697	2.2628
175. Ford Motor Co	Explorer	0	711	0	323,551	2.1975
176. Chrysler Corp	Dodge Colt/Colt Vista	23	58	13,743	23,813	2.1568
177. Nissan	Infiniti Q45	20	40	11,615	16,264	2.1522
178. General Motors	Buick Electra Park Avenue	184	131	46,360	100,702	2.1420
179. Volkswagen	Fox	58	15	24,714	10,425	2.0775
180. Volvo	240	80	45	35,580	25,561	2.0445
181. Volvo	940	0	29	0	14,249	2.0352
182. Ford Motor Co	F150 Pickup Truck	298	215	138,657	114,669	2.0251
183. Audi	80/90	24	1	9,168	3,224	2.0174
184. Toyota	Lexus ES250	32	43	19,561	17,643	2.0159
185. Ford Motor Co	Mercury Capri	0	70	0	35,407	1.9770
186. Jaguar	XJ6	24	23	15,172	8,995	1.9448
187. Chrysler Corp	Dodge Dakota Pickup	154	112	66,459	71,490	1.9282
188. Subaru	Legacy	154	141	88,873	64,200	1.9272
189. Honda/Acura	NSX	0	6	0	3,139	1.9114
190. Toyota	Lexus LS400	77	82	42,227	41,559	1.8977
191. Saab	900	32	23	14,574	15,437	1.8327
192. Ford Motor Co	Aerostar	303	279	169,574	150,579	1.8179
193. General Motors	Oldsmobile Cutlass Cruiser	16	13	8,891	7,163	1.8064
194. Volvo	760	17	0	9,515	0	1.7867
195. Mitsubishi	Precis	17	3	3,210	8,000	1.7841
196. Subaru	Loyale	68	36	32,994	25,904	1.7658
197. Nissan	Pulsar NX	2	0	1,168	0	1.7123
198. Daihatsu	Charade	23	4	12,447	3,732	1.6688
199. Toyota	Land Cruiser	3	0	1,921	0	1.5617
200. Nissan	Infiniti G20	0	25	0	16,132	1.5497
201. Toyota	Previa	0	126	0	81,426	1.5474
202. General Motors	Buick Riviera	29	25	21,982	12,956	1.5456
203. Mazda	MPV Wagon	57	82	47,852	47,107	1.4638
204. Audi	100/200	15	12	10,869	9,036	1.3564
205. Volkswagen	Vanagon	9	6	7,363	4,729	1.2405
206. General Motors	Saturn SL	0	49	0	39,867	1.2291
207. Peugeot	405	0	4	700	2,557	1.2281
208. Audi	V8 Quattro Sedan	4	0	2,911	542	1.1584
209. Subaru	Justy	10	10	9,552	8,999	1.0781
210. General Motors	Chevrolet Sportvan G–10	0	15	8,715	5,804	1.0331
211. General Motors	Buick Roadmaster	0	6	0	6,729	0.8917
212. Nissan	NX Coupe	0	7	0	8,705	0.8041
213. Chrysler Corp	Dodge Ram Pickup	24	19	42,251	21,763	0.6717
214. General Motors	Saturn SC	0	6	0	10,298	0.5826
215. Saab	9000	10	13	20,675	24,195	0.5126
216. General Motors	GMC Rally Sportvan	0	2	3,092	1,620	0.4244
217. Yugo	GV/GVL/GVX/GVS	1	1	1,323	8,250	0.2089
218. Peugeot	505	0	0	2	654	0.0000
219. Lotus	Esprit	0	0	102	28	0.0000
220. Ferrari	348	0	0	377	240	0.0000
221. Lotus	Elan	0	0	0	159	0.0000
222. Nissan	Van	0	0	292	0	0.0000
223. Ferrari	Mondial	0	0	98	49	0.0000
224. Aston Martin	Saloon/Vantage/Volante	0	0	2	40	0.0000
225. Lamborghini	Diablo	0	0	0	110	0.0000
226. Ferrari	F40	0	0	90	60	0.0000
227. Rolls-Royce	SIL Spirit/Spur/Mulsa/Eight	0	0	399	505	0.0000
228. Rolls-Royce	Corniche/Continental	0	0	162	141	0.0000
229. Rolls-Royce	Turbo R	0	0	340	207	0.0000
230. Maserati	Spyder	0	0	31	4	0.0000
231. Maserati	430/228	0	0	31	0	0.0000

TABLE II.—DESIGNATED HIGH THEFT CAR LINES WITH THEFT RATES BELOW THE MEDIAN THEFT RATE OF 3.5866

Manufacturer	Make/model
BMW	8.
Chrysler	Chrysler's TC.
Ferrari	Mondial.
Ford Mercury	Capri.
General Motors:	
Buick	Riveria, Electra, Park Avenue, Regal.
Cadillac	Eldorado, Allante.
Chevrolet	Lumina.
Oldsmobile	Cutlass Supreme, 98/Touring.
Pontiac	Grand Prix.
Saturn	Sports Coupe (SC).
Honda Acura	NSX.
Isuzu	Impulse, Stylus.
Jaguar	XJ6, XJS.
Lotus	Elan.
Mazda	MX-5 Miata, 929.
Mercedes-Benz	124, 126, 201.
Nissan Infiniti	M30, Q45.
Peugeot	405.
Rover Group	Sterling.
SAAB	900, 9000.
Toyota	Cressida, Celica.
Lexus	ES250, LS400.
Volkswagen, Audi	100/200/S4

TABLE III.—VEHICLES THAT FELL BELOW THE MEDIAN THEFT RATE AND ARE INTERCHANGEABLE WITH LINES THAT FELL ABOVE THE MEDIAN THEFT RATE

Manufacturer	Theft Rate
Chrysler:	
Chrysler Town and Country (MPV)	7.6614
Dodge Caravan/Grand	2.9117
Plymouth Voyager/Grand (Interchangeable with Chrysler Town and Country MPV)	2.3766
Ford:	
Ford Tempo	4.2400
Mercury Topaz (Interchangeable with Ford Tempo)	3.5866
General Motors:	
Chevrolet Caprice	3.6449
Buick Roadmaster (Interchangeable with Chevrolet Caprice)	0.8917
GEO Metro	3.7445
Suzuki Swift (Interchangeable with GEO Metro)	2.9501
Nissan:	
Pathfinder (MPV)	13.8175
Pickup Truck (LDT) (Interchangeable with Pathfinder MPV)	3.3245
Toyota:	
4-Runner (MPV)	7.2719
Pickup Truck (LDT) (Interchangeable with 4-Runner MPV)	2.6389

[FR Doc. 94-191 Filed 1-5-94; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review; Correction

December 29, 1993.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Correction

This is a correction to FR Doc. 93-31573 Filed 12-27-93; 8:45 a.m., for a Department of the Treasury, Office of Thrift Supervision information collection. The corrected information is as follows:

Estimated Number of Respondents: 1,500.

Estimated Burden Hours Per Respondent: 40 hours.

Estimated Total Reporting Burden: 60,000 hours.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 94-228 Filed 1-5-94; 8:45 am]

BILLING CODE: 4810-25-P

Public Information Collection Requirements Submitted to OMB for Review

December 30, 1993.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Bureau of Alcohol, Tobacco and Firearms

OMB Number: 1512-0052

Form Numbers: ATF F 5130.9

Type of Review: Extension

Title: Brewer's Monthly Report of Operations (formerly Brewer's Monthly Report of Operations)

Description: ATF F 5130.9 is a periodic report filed by brewers to account for taxable commodities. For this reason, ATF F 5130.9 is a method to protect tax revenue. The data collected on ATF F 5130.9 is also summarized by the Bureau of Alcohol, Tobacco and Firearms (ATF) in a statistical release which is used by industry and other government agencies.

Respondents: Businesses or other for-profit, Small businesses or organizations

Estimated Number of Respondents: 427

Estimated Burden Hours Per Respondent: 1 hour

Frequency of Response: Monthly, Quarterly

Estimated Total Reporting Burden: 2,388 hours

OMB Number: 1512-0059

Form Numbers: ATF F 5120.29

Type of Review: Extension

Title: Bonded Wineries—Formula and Process for Wine, Letterhead Applications and Notices Relating to Formula Wine

Description: ATF F 5120.29 is completed by proprietors of bonded wineries who intend to produce wine, to ensure that the formulas and processes used in the production of wine are in accordance with the regulations of the Federal Alcohol Administration Act and the Internal Revenue Code.

Respondents: Businesses or other for-profit

Estimated Number of Respondents: 600

Estimated Burden Hours Per Respondent: 2 hours

Frequency of Response: On occasion

Estimated Total Reporting Burden: 1,200 hours

OMB Number: 1512-0115

Form Numbers: ATF F 5220.4

Type of Review: Extension

Title: Monthly Report—Export Warehouse Proprietor

Description: Proprietors who are qualified to operate export warehouses that handle untaxpaid tobacco products are required to file a monthly report. This report summarizes all transactions by the proprietor handling receipts, dispositions and on-hand quantities. ATF F 5220.4 is used for product accountability and is examined by regional office personnel.

Respondents: Businesses or other for-profit
Estimated Number of Respondents: 272
Estimated Burden Hours Per Respondent: 48 minutes
Frequency of Response: Monthly
Estimated Total Reporting Burden: 2,644 hours
OMB Number: 1512–0216
Form Numbers: ATF F 5120.17
Type of Review: Extension
Title: Monthly Report of Wine Cellar Operations (formerly Monthly Report of Wine Cellar Operations)
Description: This report is used to monitor wine operations, insure collection of wine tax revenue and insure wine is produced in accordance with law and regulations. ATF F 5120.17 provides raw data for the Bureau of Alcohol, Tobacco and Firearm's (ATF's) Monthly Statistical Release on Wine, which is used by ATF and other federal agencies, along with industry itself, as a tool in trend analysis and planning.
Respondents: Businesses or other for-profit, Small businesses or organizations
Estimated Number of Respondents: 1,648
Estimated Burden Hours Per Respondent: 1 hour, 6 minutes
Frequency of Response: Monthly, Annually
Estimated Total Reporting Burden: 9,654 hours
OMB Number: 1512–0504
Form Numbers: ATF F 5000.28
Type of Review: Extension
Title: Floor Stocks Tax Return, Recordkeeping and Reporting Requirements
Description: ATF F 5000.28 is completed by persons who held alcohol, tobacco or imported perfume for sale on 1/1/91. This tax collection was imposed by Public Law 101–508 for collection of tax. ATF uses the form to identify the taxpayer, the liability, and the adjustments to the amount paid.
Respondents: Businesses or other for-profit, Small businesses or organizations
Estimated Number of Respondents: 100
Estimated Burden Hours Per Respondent: 30 minutes
Frequency of Response: Other (one-time floor stocks tax)
Estimated Total Reporting Burden: 530 hours
Clearance Officer: Robert N. Hogarth, (202) 927–8930, Bureau of Alcohol, Tobacco and Firearms, room 3200, 650 Massachusetts Avenue, NW., Washington, DC 20226
OMB Reviewer: Milo Sunderhauf, (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports Management Officer.
[FR Doc. 94–229 Filed 1–5–94; 8:45 am]
BILLING CODE: 4810–31–P

UNITED STATES INFORMATION AGENCY

U.S. Advisory Panel on Radio Marti and TV Marti; Meeting

AGENCY: United States Information Agency.

ACTION: Notice.

The United States Advisory Panel on Radio Marti and TV Marti will meet in room 840, 301 4th Street, SW., Washington, DC, on January 13, 1993, from 10 a.m. to 6 p.m.

The Panel will meet in open session with current and former U.S. government broadcasters, U.S. officials, technical experts, representatives of the Cuban community, representatives of the private sector and other interested parties to discuss the purposes, policies and practices of U.S. broadcasting to Cuba.

Please call Diane Augustine, (202) 475–2204, for further information.

Dated: December 30, 1993.

Robert S. Leiken,
Executive Director, U.S. Advisory Panel on Radio Marti and TV Marti.
[FR Doc. 94–258 Filed 1–5–94; 8:45 am]
BILLING CODE 8230–01–M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 4
Thursday, January 6, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Monday, January 10, 1994.

PLACE: 2033 K St., N.W., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–254–6341.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 94–410 Filed 1–4–94; 3:08 pm]

BILLING CODE 6351–01–M

U.S. CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 10:00 a.m., Wednesday, January 5, 1994.

LOCATION: Room 420, East West Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED: Fiscal Year 1995 Budget.*

The Commission will consider issues related to the CPSC Budget for Fiscal Year 1995.

For a recorded message containing the latest agenda information, call (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20207, (301) 504–0800.

Dated: January 3, 1994.

Sheldon D. Butts,
Deputy Secretary.

[FR Doc. 94–409 Filed 1–4–94; 3:07 pm]

BILLING CODE 6355–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:01 a.m. on Tuesday, January 4, 1994, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider the following:

Recommendations regarding the liquidation of depository institutions' assets acquired by the Corporation in its capacity as receiver, liquidator, or liquidating agent of those assets:

Memorandum re: The Howard Savings Bank, Newark, New Jersey (Case No. 505–8369–93–BOD)

Memorandum re: The Howard Savings Bank, Newark, New Jersey (Case No. 505–8553–93–BOD)

Recommendation regarding an administrative enforcement proceeding.

Matters relating to the Corporation's corporate activities.

In calling the meeting, the Board determined, on motion of Mr. Stephen R. Steinbrink, acting in the place and stead of Director Eugene A. Ludwig (Comptroller of the Currency), seconded by Director Jonathan L. Fiechter (Acting Director, Office of Thrift Supervision), concurred in by Acting Chairman Andrew C. Hove, Jr., that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550 17th Street, NW., Washington, DC.

Dated: January 4, 1994.

Federal Deposit Insurance Corporation.

Patti C. Fox,
Assistant Executive Secretary.

[FR Doc. 94–414 Filed 1–4–94; 3:31 am]

BILLING CODE 6714–01–M

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, January 11, 1994 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This Meeting Will Be Closed to the Public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.

Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Wednesday, January 12, 1994 at 10:00 a.m.

PLACE: 999 E Street, NW, Washington, DC (Ninth Floor.)

STATUS: This Oral Hearing Will Be Open to the Public.

MATTER BEFORE THE COMMISSION: Public Hearing on Personal Use of Campaign Funds.

DATE AND TIME: Thursday, January 13, 1994 at 10:00 a.m.

PLACE: 999 E Street, NW, Washington, DC (Ninth Floor.)

STATUS: This Meeting Will Be Open to the Public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Advisory Opinion 1993–23: Pacific Telesis Pactel.

Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Press Officer, Telephone: (202) 219–4155.

Majorie W. Emmons,
Secretary of the Commission.

[FR Doc. 94–413 Filed 1–4–94; 3:15 pm]

BILLING CODE 6715–01–M

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

TIME AND DATE: 4:00 p.m., January 18, 1994.

PLACE: 4th Floor, Conference Room, 1250 H Street, N.W., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of the December 20, 1993, Board meeting.
2. Thrift Savings Plan activity report by the Executive Director.
3. Review of legislative activity.

CONTACT PERSON FOR MORE INFORMATION: Tom Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: January 3, 1994.

Francis X. Cavanaugh,
Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 94–331 Filed 1–4–94; 9:57 am]

BILLING CODE 6760–01–M

* The Commission decided that agency business required scheduling this matter without the normal seven day advance notice.

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS

Presidential Search Committee Meeting; Changes

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 58 FR 68460.

PREVIOUSLY ANNOUNCED TIME AND DATE: A meeting of the Legal Services Corporation Board of Directors Presidential Search Committee will be held on January 7, 1994. The meeting will commence at 1:30 p.m.

PREVIOUSLY ANNOUNCED LOCATION OF MEETING: The Legal Services Corporation, 750 1st Street, N.E., 11th Floor, The Board Room, Washington, D.C. 20002, (202) 336–8800.

CHANGES IN THE MEETING:

STATUS OF MEETING: *Open*, except that a portion of the meeting will be closed pursuant to majority votes of the Board of Directors taken on January 4, 1994. In this regard, a majority of the Board of Directors voted to: (a) add what appears below as agenda item number 5, affirming by said vote that Corporation business required such a change and no earlier announcement of the change was possible; and, (b) close from public observation that portion of the meeting at which the above-referenced item will be discussed for the reasons enumerated below. Pursuant to the aforementioned votes, the Committee will, in closed session, consider and act on the hiring of a consultant to assist with administrative matters in connection with the presidential search being undertaken by the Committee, including discussion of the relative qualifications of candidates for the consulting position. The closing will be authorized by the relevant sections of the Government in the Sunshine Act [5 U.S.C. Sections 552b(c)(2)(2) and (6)], and the corresponding regulation of the Legal Services Corporation [45 C.F.R. Section 1622.5(a) and (e)]. The closing has been certified by the Corporation's General Counsel as authorized by the above-cited provisions of law. A copy of the General Counsel's certification is posted for public inspection at the Corporation's headquarters, located at 750 First Street, N.E., Washington, D.C., 20002, in its eleventh floor reception area, and is otherwise available upon request.

MATTERS OF BE CONSIDERED: Agenda items five through seven have been added as reflected below.

CLOSED SESSION:

5. Consider and Act on the Hiring of a Consultant to Assist With Administrative Matters in Connection With the Presidential Search Being Undertaken By the Committee, Including Discussion of the Relative Qualifications of Candidates for the Consulting Position.

OPEN SESSION: (Resumed)

6. Consider and Act on Other Business.
7. Consider and Act on Motion to Adjourn Meeting.

CONTACT PERSON FOR INFORMATION: Patricia D. Batie, Executive Office, (202) 336–8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Date Issued: January 4, 1994.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 94–411 Filed 1–4–94; 3:14 pm]

BILLING CODE 7050–01–M

Corrections

Federal Register
Vol. 59, No. 4
Thursday, January 6, 1994

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.

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-293]

Boston Edison Co., Pilgrim Nuclear Power Station; Issuance of Director's Decision Under 10 CFR 2.206

Correction

In notice document 93-29308 appearing on page 63192 in the issue of Tuesday, November 30, 1993, make the following correction:

In the second column, after the fourth full paragraph, insert the following text:

A copy of the Decision will be filled with the Office of the Secretary for the Commission's review in accordance with 10 CFR 2.206(c). As provided in this regulation, the Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes review of the Decision within that time period.

Dated at Rockville, Maryland, this 19th day of November, 1993.

For the Nuclear Regulatory Commission.

Thomas E. Murley,

Director, Office of Nuclear Reactor Regulation.

[93-29308 Filed 11-29-93; 8:45 am]

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

nternal Revenue Service

26 CFR Part 1

[FI-47-92]

RIN 1545-AR76

Reissuance of Mortgage Credit Certificates

Correction

In proposed rule document 93-31010 beginning on page 67744 in the issue of Wednesday, December 22, 1993, in the third column, under **DATES**, in the third line, "January 22, 1994" should read "February 22, 1994".

BILLING CODE 1505-01-D

federal register

Thursday
January 6, 1994

Part II

Environmental Protection Agency

40 CFR Part 131

Sacramento River, San Joaquin River, and San Francisco Bay and Delta, CA; Water Quality Standards for Surface Water; Proposed Rule

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants: Delta Smelt, Sacramento Splittail, and Longfin Smelt; Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[OW–FRL–4783–6]

Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta of the State of California

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: On September 3, 1991, the Regional Administrator for Region IX of the U.S. Environmental Protection Agency disapproved certain water quality criteria contained in the Water Quality Control Plan for Salinity for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, that was adopted by the California State Water Resources Control Board on May 1, 1991. These criteria were disapproved because they failed to protect the Estuarine Habitat and other designated fish and wildlife uses of the estuary. Under the authority of section 303 of the Clean Water Act, this document proposes a rule establishing three sets of federal criteria to protect the designated uses of the estuary: salinity criteria protecting the Estuarine Habitat and other designated fish and wildlife uses, a second set of salinity criteria (measured in electrical conductivity) to protect the Fish Spawning (Striped Bass) designated use in the lower San Joaquin River, and a set of salmon smolt survival index criteria to protect the Fish Migration and Cold Fresh-Water Habitat designated uses in the estuary.

DATES: All written comments received on or before March 11, 1994, will be considered in the preparation of the final rule. Public Hearings will be held during the week of February 21, 1994, in Fresno, Sacramento, and San Francisco, California.

ADDRESSES: Written comments should be addressed to Patrick Wright, Bay/Delta Program Manager, Water Quality Standards Branch, W–3, Water Management Division, Environmental Protection Agency, 75 Hawthorne Street, San Francisco, California 94105.

Both oral and written comments will be accepted at the hearings. EPA reserves the right to fix reasonable limits on the time allowed for oral presentations. Written comments are encouraged.

Contact Lois Grunwald, Public Affairs Office, Environmental Protection Agency, 75 Hawthorne Street, San Francisco, California 94105, 415/744–1588, for further information on hearings.

FOR FURTHER INFORMATION CONTACT: Patrick Wright, Bay/Delta Program Manager, Water Quality Standards Branch, W–3, Water Management Division, Environmental Protection Agency, 75 Hawthorne Street, San Francisco, California 94105, 415/744–1993.

SUPPLEMENTARY INFORMATION: Section 303 of the Clean Water Act, as amended (hereinafter CWA or the Act), requires each state to adopt water quality standards consisting of designated uses and instream water quality criteria to protect such uses for all waters of the United States located within that state. Section 303(c) of the Act provides that states shall review and, if appropriate, revise the water quality standards at least once every three years. Any new or revised standards adopted by the state are to be reviewed and approved or disapproved by the U.S. Environmental Protection Agency (EPA or the Agency). In the event that EPA disapproves a state's standards, and the state does not make EPA's requested changes within ninety (90) days of the disapproval, or if EPA determines at any time that revised or new standards are necessary to meet the requirements of the Act, section 303(c)(4) of the Act states that the Administrator shall promptly prepare and publish proposed regulations establishing water quality standards for the applicable waterbodies. The Administrator shall promulgate any new or revised standards not later than ninety (90) days after publication of the proposed standards. EPA's regulations for implementing section 303(c) of the Act are codified at 40 CFR part 131. Guidance for implementing these regulations is contained in the Water Quality Standards Handbook (December 1983) and Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analyses (Volumes I, II and III).

EPA's proposal is part of a coordinated federal interagency response to the water management issues in the San Francisco Bay and Delta. EPA has worked closely with the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and the U.S. Bureau of Reclamation (USBR) to develop a comprehensive, habitat-oriented approach to water and fish and wildlife resource management issues in California. Other components of this interagency initiative are being announced contemporaneously with EPA's proposal. These include USFWS actions on petitions to list the longfin smelt and Sacramento splittail as endangered fish species under the Federal Endangered Species Act, 16 U.S.C. §§ 1531 to 1540 (ESA), the USFWS proposal of critical habitat for the Delta smelt under the ESA, and the NMFS reclassification of the winter-run Chinook salmon as endangered under the ESA.

A. Background

The San Francisco Bay/Sacramento-San Joaquin River Delta estuary (hereinafter the Bay/Delta) is the West Coast's largest estuary. It encompasses roughly 1600 square miles, and drains over 40 percent of California. The Bay/Delta is the point of convergence of California's two major river systems—the Sacramento River system flowing southward and draining a large part of northern California, and the San Joaquin River system flowing northward and draining a large part of central California. These two rivers, together with a number of smaller rivers flowing directly westward from the mountains, come together in a network of channels and islands, roughly a triangle 90 miles on each side, known as the Sacramento-San Joaquin Delta. The rivers converge at the western tip of the Delta, forming an estuary as fresh water mixes with marine water through a series of bays, channels, shoals and marshes and ultimately flowing into San Francisco Bay and then to the Pacific Ocean.

The Bay/Delta constitutes one of the largest systems for fish production in the country, supplying habitat for over 120 fish species. It also comprises one of the largest areas of waterfowl habitat in the United States, providing a stopover for more than one-half of the waterfowl and shorebirds migrating on the Pacific Flyway. Within the boundaries of the Bay/Delta is the Suisun Marsh, the largest brackish marsh on the West Coast.

The Bay/Delta is also the hub of California's two major water distribution systems—the Central Valley Project (CVP) built and operated by the USBR and the State of California's State Water Project (SWP). Most of the State's developed water—75 to 85 percent—is used for irrigation purposes by agriculture, irrigating over 4.5 million acres throughout the State. The Bay/Delta watershed also provides part or all of the drinking water supply for over 18 million people.

Located solely within the State of California, the Bay/Delta is subject under state law to the water quality control jurisdiction of the California State Water Resources Control Board (State Board) and two regional boards,

the Central Valley and San Francisco Regional Water Quality Control Boards. Under the California regulatory scheme, the State Board's actions preempt regional board actions to the extent of any conflicts. Cal. Water Code § 13170.

In 1978, the State Board adopted and submitted to EPA a Water Quality Control Plan (hereinafter the 1978 Delta Plan) containing a comprehensive set of water quality standards to protect the designated uses of the Bay/Delta. The 1978 Delta Plan included water quality standards for three categories of designated uses: municipal and industrial, agriculture, and fish and wildlife.[1] The 1978 Delta Plan relied on a key set of criteria to protect fish and wildlife uses: the striped bass spawning and survival criteria. These criteria were established to provide minimum salinity and flow conditions to protect the fishery at levels that would have existed in the absence of the State and federal water projects (the so-called "without projects" level). The striped bass survival criteria were based on a statistical correlation between a Striped Bass Index (SBI) (a measure of the relative abundance of young striped bass in the estuary) and two hydrological variables: (1) Delta outflow (freshwater flowing through the Delta out to the ocean), and (2) Delta diversions (freshwater diverted out of the Delta channels for consumptive uses in agricultural irrigation, municipal and industrial uses). Based on this relationship, flow (measured in cubic feet per second (cfs) of Delta outflow) and salinity requirements at critical points in the Bay/Delta were adopted as criteria. The SBI, although not a formal criteria, was used to measure and predict the substantive environmental results of implementing these flow and salinity criteria. The 1978 Delta Plan emphasized striped bass protection because of the economic importance and availability of scientific information on this species in the Bay/Delta, but the Plan also indicated that it considered the striped bass standards to be a surrogate for protection of other species.

Pursuant to its obligations under section 303(c)(3) of the Act, EPA reviewed the 1978 Delta Plan in 1980. While EPA approved the Plan, it was concerned that the 1978 Delta Plan standards would not provide adequate protection of striped bass and the estuary's fishery resources. EPA therefore conditioned its approval upon a set of "interpretations" of the standards, including commitments by the State Board to review and revise the 1978 Delta Plan standards immediately if there were measurable adverse impacts on striped bass spawning, or if necessary to attain "without project" levels of protection for the striped bass (as defined by an SBI value of 79). EPA also conditioned its approval on the State Board's commitment to develop additional criteria to protect aquatic life and tidal wetlands in and surrounding the Suisun Marsh. The State Board concurred with these interpretations in its letter to EPA dated November 21, 1980.

In the years since the 1978 Delta Plan was adopted, these standards have not accomplished the intended goal of maintaining the SBI at a long term average of 79, the 1978 Delta Plan's estimate of "without project" levels. Indeed, during the 1980's, the SBI averaged approximately 7.5, and in 1983 and 1985 reached all-time lows of 1.2 and 2.2. Some of the decline in the SBI may be attributable to drought conditions in the late 1970's and again in the late 1980's. However, the highest SBI values actually attained since the 1978 Delta Plan was adopted were only in the teens and 20's, a substantial shortfall from the stated goal of 79.

The precipitous decline in striped bass is indicative of the poor health of other aquatic resources in the estuary. Several species have experienced similar declines, including chinook salmon (the winter-run of chinook salmon is listed as a threatened species under the ESA, and is currently proposed for reclassification as endangered), Delta smelt (recently listed as a threatened species under the ESA) and Sacramento splittail and longfin smelt (both the subject of a recent petition for listing as endangered species). The California Department of Fish and Game (California DFG) recently testified that virtually all of the estuary's major fish species are in clear decline. (CDFG 1992b, WRINT–DFG–8)[2]

As fishery resources continued to decline, EPA on several occasions expressed its concern to the State Board about the need for standards to adequately protect these resources. Throughout the first and second triennial reviews ending in 1981 and 1985, EPA urged the State Board to review and revise the 1978 Delta Plan in accordance with EPA's 1980 approval letter. At the conclusion of each triennial review, the State Board made no changes.

After its second triennial review, in a letter to EPA dated June 23, 1986, the State Board acknowledged that the 1978 Delta Plan standards were not adequate to protect the estuary's fishery resources. It then outlined the hearing process it was planning for revising the standards. In response, and as part of its consideration of the State Board's second triennial review, EPA, on June 29, 1987, sent a letter to the State Board stating that EPA could no longer approve the striped bass survival standards (or the related provision allowing relaxation of the spawning standard in drier years) because these standards did not adequately protect the designated uses. EPA recognized, however, that the State Board had initiated new hearings to revise the 1978 Delta Plan standards. EPA therefore indicated that it would await the results of the new hearings and approve or disapprove the revised standards after the State Board's submission to EPA of a complete set of revised standards.

In addition to EPA's review under the CWA, the 1978 Delta Plan also received intense scrutiny under state law in California state court. This review culminated in a state appellate decision, *United States, et. al.* v. *State Water Resources Control Board*, 182 Cal. App. 2d 82 (1st Dist., 1986) (known as the "Racanelli Decision" after its author, Judge John T. Racanelli). Among that decision's many holdings was the conclusion that the 1978 Delta Plan's water quality standards had been impermissibly limited to those standards that could be enforced against only the SWP and CVP (instead of against all water users). The court took notice that the State Board had proposed hearings to develop revisions to the 1978 Delta Plan, and asked the State Board to remedy the Plan's shortcomings in those hearings.

Following the first phase of the new hearings, the State Board in November 1988 issued a draft Plan that included revised salinity and flow standards to protect the fisheries and other designated uses. The State Board subsequently withdrew that draft Plan, however, and issued a revised workplan that served as the basis for the State Board's present Water Quality Control Plan for Salinity for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1991 Bay/Delta Plan).

[1] The CWA and implementing regulations describe the two components of water quality standards as "designated uses" and "water quality criteria" (40 CFR 131.3(i)), whereas California uses the terms "beneficial uses" and "objectives". It has been EPA's and California's longstanding practice to interpret these terms synonymously. To avoid confusion, this proposal will use the federal terms "designated uses" and "criteria".

[2] If a reference was presented to the State Board during one of its hearings, this preamble will present citations in both the standard scientific form and in the State Board hearing record form. Accordingly, the eighth exhibit submitted by California DFG at the Board's interim water rights hearings in the summer of 1992 is cited as indicated.

In accordance with the revised workplan, the State Board, on May 1, 1991, adopted State Board Resolution No. 91–34, formally approving the 1991 Bay/Delta Plan. The Plan restated the specific designated uses that had been included in the 1978 Delta Plan and related regional board basin plans. As restated, the designated uses included the following: Agricultural Supply, Cold and Warm Fresh-Water Habitat, Estuarine Habitat, Fish Migration, Fish Spawning, Groundwater Recharge, Industrial Process Supply, Industrial Service Supply, Municipal and Domestic Supply, Navigation, Contact and Non-Contact Water Recreation, Ocean Commercial and Sport Fishing, Preservation of Rare and Endangered Species, Shellfish Harvesting, and Wildlife Habitat.

The 1991 Bay/Delta Plan, which was submitted for EPA's review on May 29, 1991, amended certain salinity criteria and adopted new temperature and dissolved oxygen criteria for specified locations in the estuary. The changes to the criteria, however, were of minimal substance. The 1991 Bay/Delta Plan did not revise the earlier 1978 Delta Plan to address EPA's longstanding concerns about adequate protection for the designated fish and wildlife uses of the Bay/Delta.

On September 3, 1991, EPA approved in part and disapproved in part the provisions of the 1991 Bay/Delta Plan. EPA's letter found that "[t]he record * * * does not support the conclusion that the State has adopted criteria sufficient to protect the designated uses" of the estuary. The designated uses at risk, as defined by the State Board, include Estuarine Habitat, and also Cold and Warm Water Habitat, Fish Migration, Fish Spawning, Ocean Commercial and Sport Fishing, Preservation of Rare and Endangered Species, Shellfish Harvesting, and Wildlife Habitat. In addition to its general finding that the 1991 Bay/Delta Plan did not contain sufficient criteria to protect the designated uses, EPA also disapproved the absence of salinity standards to protect fish and wildlife uses in the Suisun, San Pablo, and San Francisco Bays and Suisun Marsh, the absence of scientifically supportable salinity standards (measured by electrical conductivity) to protect the Fish Spawning uses of the lower San Joaquin River, and the absence of scientifically supportable temperature standards on the San Joaquin and Sacramento Rivers to protect the fall-run and winter-run chinook salmon.

Pursuant to section 303(c)(3) of the Act, the State Board had 90 days to make changes to the criteria disapproved by EPA in its September 3, 1991 letter. The State Board made no such revisions during the 90 day period or at any subsequent time. However, in the summer of 1992, the State Board, at the request of the Governor of the State of California, held hearings for the purpose of establishing interim measures to protect the natural resources in the Bay/Delta estuary. In keeping with the CWA's recognition that the states have primary responsibility for setting water quality standards, EPA participated in these hearings—rather than proposing federal standards at that time—in the hope that the hearings would result in state adoption of approvable standards and preclude the need for a federal rulemaking. EPA submitted opening and closing statements to the State Board, and joined with NMFS and USFWS in submitting an Interagency Statement of Principles. These statements recommended that the State Board adopt a habitat and ecosystem-based approach to standards that would satisfy CWA requirements and meet the State Board's goal of reversing the decline of the estuary's fish and wildlife resources.

At the conclusion of these hearings, the State Board, on December 10, 1992, issued its recommended interim measures in Draft Water Rights Decision (hereinafter D–1630). The Draft contained new water export limits and pumping restrictions and ordered "pulse flows" to help transport young migratory fish through the Delta. It also imposed water conservation measures on agricultural and urban users, and established a restoration fund financed by user fees to pay for conservation efforts in the Bay/Delta. Although D–1630 proposed several changes in the operation of the water facilities affecting the estuary that would be beneficial to its natural resources, EPA informed the State Board in its comments dated January 13, 1993, that D–1630, if adopted, would not satisfy the requirements of the Act. EPA noted that D–1630, a proposed water rights decision, did not purport to revise the State's water quality standards at all, and therefore did not affect EPA's prior decision disapproving the 1991 Bay/Delta Plan. Moreover, EPA noted that the measures in D–1630 were not tied to specific designated uses in the estuary (including the Estuarine Habitat, Fish Spawning, and Preservation of Rare and Endangered Species uses), and that no attempt had been made to assure that the designated uses would be protected. Accordingly, EPA found that D–1630 "meets neither the procedural nor the substantive requirements of the Clean Water Act." After the close of the comment period for D–1630, the State Board, in response to a subsequent request by the Governor, declined to adopt D–1630.

In response to the State Board's failure to revise the criteria disapproved in EPA's September 3, 1991 letter, EPA, pursuant to section 303 (c)(3) and (c)(4) of the Act, is proposing regulations establishing revised water quality criteria which would in effect supersede and supplement the disapproved State criteria for purposes of the CWA.

B. Statutory Basis and Purpose

Section 303(c) of the Act requires that state water quality standards "* * * be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for propagation of fish and wildlife. * * *" Key concerns of this statutory provision are the enhancement of water quality and the protection of the propagation of fish. The ultimate purpose of water quality standards, as with the other sections of the Act, is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. CWA section 101(a).

Under section 303(c) of the Act, a water quality standard for a specific waterbody consists of two components: a designated use for which a waterbody is to be protected (such as recreation, fish and wildlife, or agriculture) and a numerical or qualitative water quality criterion which supports the designated use.

The Act gives primary responsibility for the adoption of water quality standards to the states. After adopting its initial water quality standards, a state is required, no less than every three years, to review those standards and, if necessary, modify them. Under section 303(c)(1) of the Act, the results of these triennial reviews are to be submitted to EPA for review and approval or disapproval.

EPA's Water Quality Standards regulations at 40 CFR part 131 specify the requirements for water quality criteria. States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use. (see 40 CFR 131.11(a).

In addition, a state's criteria must be consistent with the state's antidegradation policy. The federal

regulations provide that, at a minimum, the state must maintain "[e]xisting instream water uses [those existing in the waterbody at any time on or after November 28, 1975] and the level of water quality necessary to protect the existing uses. * * *" 40 CFR 131.12(a)(1). In order to approve a state's water quality criteria, EPA must determine whether the state has adopted "water quality criteria [that are] sufficient to protect the designated uses." 40 CFR 131.6(c).

Section 303(c)(4) of the Act provides that the Administrator shall promptly prepare and publish proposed regulations establishing a new or revised standard in either of two situations: First, when the Administrator has disapproved a state standard under section 303(c)(3) and the state has not taken corrective action within 90 days; and, second, in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. Once promulgated, the federal regulations are applicable to the state's waters, and, if they are more stringent, have the effect of supplanting and supplementing the state's standards. However, it is EPA's longstanding policy that the federal regulations will be withdrawn if a state adopts and submits standards that in the Agency's judgment meet the requirements of the Act.

In reviewing California's implementation of its water quality standards program, EPA has considered the provisions of section 101(g) of the Act, which restate the long-standing policy of Federal deference to state water allocation functions: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this [Act]." The General Counsel of EPA, in a Memorandum to Regional Administrators dated November 7, 1978, interpreted this statutory provision in the context of the water quality standards program and concluded that "EPA should therefore impose requirements which affect water usage only where they are clearly necessary to meet the Act's requirements." See also Memorandum from Robert M. Perry, General Counsel, to Frederic A. Eidsness, Jr., Assistant Administrator for Water, dated March 17, 1983 (considering interplay of section 101(g) and the guidelines under section 404(b)(1) of the Act). These positions of the General Counsel are consistent with the existing judicial precedent interpreting section 101(g). The leading case interpreting section 101(g) in light of the other mandates of the CWA, *Riverside Irrigation Dist.* v. *Andrews*, 758 F.2d 508, 513 (10th Cir. 1985), held that section 101(g) is only a general policy statement which "cannot nullify a clear and specific grant of jurisdiction." *Id.* at 513. The Court then examined the legislative history of the Act and concluded that "where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation." *Id. See also United States* v. *Akers*, 785 F.2d 814 (9th Cir. 1986) (adopting *Riverside* in the 9th Circuit on similar facts).

As the discussion above indicates, EPA has attempted to accommodate the State Board processes procedurally, generally deferring to the State Board schedules for review and revision of its water quality standards, even though this State process has continued for almost a decade and has frequently exceeded the Act's required triennial review requirements. Similarly, EPA is in this proposal attempting to accommodate the State's interest substantively. Although the State Board, in the 1978 Delta Plan, adopted explicit flow criteria, EPA is refraining from proposing direct revisions to the flow criteria. Instead, EPA is proposing criteria that describe the habitat conditions necessary to protect the designated uses of the Bay/Delta. The State Board still has full discretion to develop implementation measures attaining those habitat conditions, and still retains full discretion over the allocation of water necessary to achieve the criteria. Finally, EPA has fully considered the record developed in the State Board's 1992 hearings on D–1630 and, to the extent possible, has incorporated the scientific information presented in those hearings in the proposed criteria.

The State Board's adoption of the 1978 Delta Plan, and of the revised Bay/Delta Plan in 1991, were intended to meet the State's obligations to establish water quality standards under the CWA. Pursuant to its mandate under section 303(c)(3) of the Act, on September 3, 1991, EPA disapproved several of the criteria contained in the State Board's plan. For the reasons outlined herein and in EPA's letter of September 3, 1991, the Administrator finds that the water quality criteria adopted by the State fail to protect the designated uses and the criteria proposed below would meet the requirements of the Act. Accordingly, pursuant to sections 303(c)(3) and 303(c)(4) of the Act, the Administrator is proposing the following water quality criteria applicable to California waters.

C. Proposed Criteria

EPA is proposing three different sets of water quality criteria: Salinity criteria protecting estuarine habitat in the Suisun Bay area, salmon smolt survival indices protecting salmon migration, and an electrical conductivity criterion protecting striped bass spawning on the lower San Joaquin River. Each set of criteria is intended to protect a particular designated use or set of uses in the Bay/Delta estuary. As discussed above, these designated uses were originally established by the regional boards in the individual basin plans and by the State Board in its 1978 Delta Plan, and were reaffirmed and restated in the 1991 Bay/Delta Plan. The discussion below describes each set of proposed criteria in detail and outlines the scientific basis for the proposals.

In developing these proposed criteria, EPA has considered the scientific evidence and testimony presented during the State Board's 1992 hearing process, as well as scientific information from other sources. In particular, EPA has relied upon the recommendations of the USFWS, of Dr. Peter Moyle, Professor in the Department of Wildlife and Fisheries Biology at the University of California at Davis and author of more than 100 articles and books on the ecology of the inland fishes of California, and of a distinguished panel of scientists who participated in a series of workshops sponsored by the San Francisco Estuary Project (SFEP).

EPA's proposed criteria are consistent with the Interagency Statement of Principles dated June 15, 1992 and submitted to the State Board by EPA, USFWS, and NMFS during the Board's 1992 hearings. This Interagency Statement recommended that the State Board develop a comprehensive habitat protection approach to restore and maintain the ecological health of the estuary, and provided a framework for both interim and long-term standards. The Interagency Statement also emphasized that there is a consensus among the three federal agencies that the existing scientific information is sufficient to set criteria to protect the designated uses of the estuary.

The criteria proposed below are similar to those EPA has outlined in letters and statements to State and federal agencies, including in the following: its September 3, 1991 disapproval letter to the State Board; its June 11, 1992 policy statement and its August 24, 1992 closing statement submitted to the State Board's 1992 hearings; and its October 29, 1992 letter

to USFWS and NMFS. Throughout this process, EPA has carefully coordinated its actions and proposals with other State and Federal environmental agencies to achieve a consensus on the water quality criteria necessary to protect the estuary.

1. Estuarine Habitat Criteria

a. Designated Uses and EPA's Disapproval

The State's 1991 Bay/Delta Plan included "Estuarine Habitat" as a designated use for the Bay/Delta estuary. As described more fully in the Water Quality Control Plan, San Francisco Bay Basin [2], December 1986, at II–4, this Estuarine Habitat designated use is intended to provide "an essential and unique habitat that serves to acclimate anadromous fishes (salmon, striped bass) migrating into fresh or marine conditions. This habitat also provides for the propagation and sustenance of a variety of fish and shellfish, numerous waterfowl and shore birds, and marine mammals." Related fish and wildlife uses of the Bay/Delta estuary designated by the State Board include Ocean Commercial and Sport Fishing, Preservation of Rare and Endangered Species, Shellfish Harvesting, Fish Migration, and Wildlife Habitat. To protect these designated uses, the 1991 Bay/Delta Plan included dissolved oxygen and temperature criteria to protect chinook salmon, outflow and salinity criteria to protect striped bass, and salinity criteria to protect the managed (non-tidal) areas of Suisun Marsh.

Unfortunately, the specific criteria adopted by the State Board clearly do not protect the integrity of the Estuarine Habitat designated use. Although EPA had already many times noted the inadequacies of the 1978 Delta Plan, the 1991 Bay/Delta Plan made only minor adjustments to criteria protecting striped bass, salmon, and the managed portions of the Suisun Marsh, and provided no criteria specifically addressing the Estuarine Habitat designated use.

The shortcomings of the State Board's criteria are reflected by the continued deterioration of the estuary's resources. The SBI, used as a measure of the health of the 1978 Delta Plan's indicator species, has never attained its targeted value of 79, and instead has plummeted to unprecedented low values. Recent testimony by the California DFG indicates that virtually all of the estuary's major fish species are in clear decline (CDFG 1992b, WRINT–DFG–8). As noted above in the recitation of the history of the Bay/Delta, many species relying on the estuarine habitat are listed or are being considered for listing under the ESA. One recent report suggests that at least five of the estuary's fish species (longfin smelt, spring-run Chinook salmon, Sacramento splittail, green sturgeon, and Red Hills roach) qualify for immediate listing under the ESA (Moyle and Yoshiyama 1992), in addition to the already listed winter-run Chinook salmon and Delta smelt.

California's Gov. Wilson highlighted the seriousness of the problems in the Bay/Delta when he announced his new water policy on April 6, 1992.

> California has many species with populations in serious decline, and some faced with extinction. Both existing and proposed water projects often have an impact upon protected animal and plant species. * * *
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> * * * * *
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> [A]ny program must begin by recognizing a disturbing truth: The Delta is broken.

Gov. Wilson also outlined the kinds of measures necessary to protect the Bay/Delta: "If we are to be good stewards of our fish and wildlife, we must begin to mitigate these impacts by providing larger streamflows, greater Delta outflow, restoration of spawning gravel and provision of fish screens and temperature control measures." In response to Gov. Wilson's proposal, the State Board initiated the D–1630 process, the "immediate goal" of which was "to halt the decline and increase the protection of public trust resources where reasonable." (SWRCB 1992b). However, as explained above, California abandoned the D–1630 process, and the State Board has yet to develop criteria that adequately protect the Estuarine Habitat designated use.

In its disapproval letter of September 3, 1991, EPA formally found that the set of water quality criteria adopted by the State Board in the 1991 Bay/Delta Plan failed to protect the Estuarine Habitat and other designated fish and wildlife uses of the estuary.

> To be consistent with the Clean Water Act and the accompanying Regulations, the State's [criteria] must be sufficient to protect Estuarine Habitat and other designated fish and wildlife uses. The Estuarine Habitat use, which has been formally approved by the State and EPA as part of the State's water quality standards, was established to provide "an essential and unique habitat that serves to acclimate anadromous fishes (salmon, striped bass) migrating into fresh or marine conditions. This habitat also provides for the propagation and sustenance of a variety of fish and shellfish, numerous waterfowl and shore birds, and marine mammals. Water Quality Control Plan, San Francisco Bay Basin(2), December 1986, at II–4.
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> The record * * * does not support the conclusion that the State has adopted criteria sufficient to protect the designated uses. Accordingly * * * I hereby disapprove the current set of [criteria] contained in the State Board's Bay/Delta Plan because they fail to protect the Estuarine Habitat and the other designated fish and wildlife uses of the estuary.

Given the State Board's failure to address EPA's concerns either directly or in the D–1630 process, EPA is proposing to supplement the State's criteria with additional salinity criteria to protect the Estuarine Habitat designated use and related fish and wildlife uses of the estuary described above. EPA is emphasizing the Estuarine Habitat designated use because of its importance to the whole spectrum of fish and wildlife uses in the estuary. This emphasis is consistent with the Interagency Statement of Principles' recommendation that restoration efforts focus on habitat protection. The discussion below describes the scientific basis for salinity criteria and presents EPA's conclusions as to this proposal.

b. Developing Salinity Criteria

In developing proposed criteria protecting Estuarine Habitat, EPA has considered the complex hydrological and biological nature of the Bay/Delta estuarine system. Habitat conditions in the estuary change from month to month and year to year primarily in response to precipitation upstream, reservoir operations, agricultural patterns and export rates (Nichols et al. 1986). Many important environmental characteristics within the Delta and Bay respond to changes in water availability, storage and use. The environmental characteristics of particular biological importance include flow rates and volumes within river channels and the Bay, salinity and turbidity levels, water temperature, and the degree of stratification of the water column. Correlations among all these variables are high; thus, each is often a good indicator of the other. However, other factors such as wind, tidal stage, and antecedent conditions influence the day to day values of each variable.

When EPA disapproved the State's criteria on September 3, 1991, it suggested that the State could develop approvable replacement criteria using a number of alternative methodologies: it could adopt additional salinity and temperature criteria, adopt revised flow

criteria, adopt biological criteria, or develop a combination of these or other scientifically-defensible criteria protecting the designated Estuarine Habitat and fish and wildlife uses in the estuary. Upon the State's failure to revise its criteria during the statutory 90 day period (or during the D–1630 process), EPA began developing a federal proposal for criteria protecting the applicable designated uses.

(1) *Entrapment Zone.* The "entrapment zone" was the focus of EPA's initial consideration of water quality criteria due primarily to its perceived importance to the food chain. The entrapment zone, where ocean water flowing landward at depth mixes with freshwater flowing seaward at the surface (Kimmerer 1992), is widely acknowledged to be one of the most important habitats within the estuary. Salinities are usually between 2 and 10 ppt, turbidity and phytoplankton densities are high, and young fish of several species are most abundant in this zone. One of the most important aspects of the entrapment zone is the localized high density of prey. The closest association of predator and prey with the entrapment zone is shown by Delta smelt and its principal food item, the copepod *Eurytemora affinis* (Moyle et al. 1992). Similarly, young striped bass and their principal food item, the shrimp *Neomysis affinis*, are found in the greatest abundance in salinities between 2 and 10 ppt. (Heubach 1969, Siegfried et al. 1979, Orsi and Knutson 1979, Knutson and Orsi 1983, Orsi and Mecum 1986, Obrebski, et al. 1992). Many young fish require high food densities in order to obtain sufficient food for growth (Moyle and Cech 1988), and it has been suggested that the density of food in the entrapment zone may affect fish survival and abundance. However, no direct evidence of starvation has been demonstrated for the declining fish populations of the estuary (Bennett et al. 1990, Moyle et al. 1992). The location of the entrapment zone has also been shown to be important for organisms at lower trophic levels (that is, organisms that are lower on the food chain). Phytoplankton densities are higher when the entrapment zone is within the relatively-shallow Suisun Bay than when it is further upstream in deeper channels (Arthur and Ball 1980). Measurements of phytoplankton growth rates show that shallow areas are ten times as productive as channel areas (Cloern et al. 1983).

In large part because of the relationship between fishery productivity and the entrapment zone described above, EPA initially considered developing federal criteria designed to directly maintain and protect the entrapment zone. However, as described below, discussions among the participants in a workshop convened by the SFEP suggested that salinity criteria would be a more appropriate measure for protecting estuarine habitat.

(2) *San Francisco Estuary Project Workshop Findings.* The SFEP is a five-year cooperative effort by over 100 representatives of public and private entities concerned about the water quality and natural resources of the San Francisco Bay estuary. Funded primarily by EPA and the State of California, the SFEP has developed a Comprehensive Conservation and Management Plan to protect the natural and consumptive water uses of the Bay/Delta (SFEP 1993a). In 1991 and 1992, the SFEP convened a series of workshops to develop the scientific rationale for an estuarine index that would measure the responses of estuarine biota and habitats to various conditions of salinity and flow. The workshops involved approximately thirty scientists and policy makers with expertise in estuarine ecology and water resource management, and included several of the world's most distinguished estuarine scientists. The group focused its attention on the estuary between Carquinez Strait and the confluence of the Sacramento and San Joaquin Rivers. The specific operations of the water projects (water exports, gate closures, etc.) were not directly addressed by the group.

The findings of the workshops were assembled in a final report, Managing Freshwater Discharge to the San Francisco Bay/Sacramento-San Joaquin Delta Estuary: The Scientific Basis for an Estuarine Standard (SFEP 1993b) (SFEP Report). All of the conclusions and recommendations in this report were endorsed by a consensus of the estuarine scientists and managers who participated in the final workshop in August of 1992.[3]

Although the workshop group initially focused on the entrapment zone, they concluded that salinity would be a more appropriate index for the development of estuarine standards. Salinity was selected for several reasons: It is of direct ecological importance, it can be measured accurately and easily, and it integrates a number of important estuarine properties and processes. In particular, it is closely associated with the abundance and distribution of species at all trophic levels (SFEP 1993b). The workgroup further concluded that the placement of the 2 parts per thousand isohaline[4] should be used to develop estuarine standards.

Because of the broad spectrum of scientific expertise underlying the SFEP Report, its conclusions and recommendations are included in full as appendix I. For purposes of developing water quality criteria protecting Estuarine Habitat, the following conclusions and recommendations are especially relevant:

* * * * *

(2) Conclusion

Estuarine standards to be used in conjunction with flow standards should be based upon an index that is simple and inexpensive to measure accurately, that has ecological significance, that integrates a number of important estuarine properties and processes, and that is meaningful to a large number of constituencies.

Recommendation

Salinity should be used as an index for the development of some estuarine standards.

(3) Conclusion

Salinity measured at about 1m above the bottom[5] is an index upon which estuarine standards should be developed. The index is a practical way of tracking changes in habitat.

Recommendation

Standards should be developed using an index that establishes an upstream limit of the position of the 2‰ near-bottom isohaline, averaged over different periods of the year.

* * * * *

(7) Conclusion

The position of the near-bottom 2‰ salinity isohaline is an index of habitat

[3] The SFEP Report defined "consensus" as follows: "The term consensus is used to represent group solidarity on an issue; a judgement arrived at by most of the scientists and managers present. In all cases, the consensus was unanimous or nearly unanimous." SFEP Report, at p. 3. EPA recognizes that representatives from a number of the participating organizations (the State Water Contractors, the California Department of Water Resources (California DWR), the State Board, and the USBR) subsequently withdrew their names from the final SFEP Report. According to the Final Report, the conclusions are based on the consensus that was achieved by the participants at the workshops.

[4] An "isohaline" is defined as a theoretical or imaginary line in the estuary connecting all points of equal salinity. For example, the phrase "2‰ near-bottom isohaline" means a line stretching across the Delta marking the positions where the salinity of the near-bottom water is 2 parts per thousand. The position of an isohaline in an estuary changes dramatically during the day because of rising and falling tides, which sometimes move the isohaline as much as 5 miles up or downstream during a 24 hour period. By convention, a daily isohaline is measured at its daily mean position for the 24 hour period.

[5] Because the difference between surface and near-bottom salinities is small and because the relationship between them is reasonably well known, surface salinity could also be used. Near-bottom salinity is recommended, however, because it is a more stable indicator. [Footnote in the original.]

conditions for estuarine resources at all trophic levels, including the supply of organic matter to the food web of Suisun Bay, an important nursery area. In other words, well-behaved statistical relationships exist between the near-bottom 2‰ isohaline and many estuarine resources for which sufficient data exist to make appropriate analyses. Moreover, at least a rudimentary understanding exists for the causal mechanisms underlying many of these relationships. The location of the near-bottom 2‰ isohaline is important either because it is a direct causal factor or because it is highly correlated with a direct causal factor (e.g., diversions).

Preliminary analyses show that errors in prediction using models which incorporate only the position of the 2‰ isohaline are comparable to the errors using more complex models which incorporate additional flow-related variables. In other words, given the present data sets, predictive models using only the position of the near-bottom 2‰ isohaline perform as well as more complex models that incorporate other variables. However, some of these other variables may be very important in affecting habitat and the condition of biological resources of the estuary.

Recommendations

At this time, the most appropriate basis for setting salinity standards for the portion of the estuary on which this report concentrates is the position of the near-bottom 2‰ isohaline *alone*, unless it can be shown either that another variable is the controlling variable or that incorporation of additional variables improves the predictive capability.

* * * * *

(10) Conclusion

The actual setting of salinity standards—specifying the upstream locations of the near-bottom 2‰ isohaline for different periods of the year—should be keyed to environmental goals: to achieving and sustaining some desired biological response level specified in terms of habitat protection or abundance and survival rates of important and diagnostic estuarine and wetland species.

Recommendations

Goals should be expressed in terms of desired conditions for some future time. Progress toward those goals should be monitored and reported widely. Environmental goals for the estuary will be most effective if they are expressed in terms of restoring conditions to those that existed at specific historical times. . . .

In developing these conclusions, the workshop participants relied in part on a series of papers developed by Dr. Alan Jassby of the University of California at Davis and Dr. Wim Kimmerer of BioSystems Analysis, Inc. These papers concluded that the position of the 2 ppt isohaline is closely associated with the abundance of estuarine organisms at all trophic levels, as well as with the supply of organic matter from phytoplankton production and riverine loading (phytoplankton POC). The estuarine organisms include primary and secondary zooplankton consumers (*Neomysis* and *Crangon*), a major group of benthic consumers in Suisun Bay (mollusks), bottom-foraging fish (starry flounder), and both survival (striped bass) and abundance (striped bass and longfin smelt) of fish that feed in the water column. For each of these organisms, with the exception of mollusks, abundance levels increase as the position of the 2 ppt isohaline is located farther downstream (Jassby 1993).

The SFEP's final report cautioned that these correlations are not proof of cause and effect relationships. That is, the report did not attempt to identify the causal mechanism linking the salinity regime and the abundance of estuarine organisms. Further, the report did not address other factors unrelated to water quality, such as overfishing, that may also have an impact on abundance of certain aquatic resources. Nevertheless, salinity integrates a number of important estuarine properties, is easy to measure, and is readily understood by all interested parties. The particular value of 2 ppt near-bottom salinity was selected because it occurs near the upstream limit of marine salt penetration, is higher than salinities derived from agricultural runoff, is close to the entrapment zone and is associated with little stratification of the water column. The group concluded that the location of the 2 ppt isohaline, measured as kilometers upstream from the Golden Gate Bridge, is the most appropriate index of habitat conditions underlying the variability in biological resources (SFEP 1993b).

These findings in the SFEP workshop reports are entirely consistent with other scientific work in the Bay/Delta. For example, Dr. Peter Moyle testified to the State Board that nursery habitat (represented by areas of low salinity) in Suisun Bay is now more important than it was historically due to the high risks of entrainment[6] faced by fishes in the Delta. After discussing a variety of mechanisms that may be behind the declines of most aquatic populations of the upper estuary, Dr. Moyle concluded that "[w]hile the exact mechanisms that account for the importance of having the [entrapment] zone in Suisun Bay (increased food supplies, physical concentration of organisms, association with higher flows, etc.) are being debated, there seems little doubt that many fish species depend on this location for their long-term survival" (Moyle 1992, WRINT–NHI–9). Dr. Moyle recommended that in wetter years the zone of low salinity habitat should be located near Roe Island but that in drier years this requirement could be shifted upstream to Chipps Island. In addition, the USFWS cited the importance of low-salinity habitat in Suisun Bay in the January to June period in its 1991 proposal to designate critical habitat for Delta smelt under the ESA. 56 FR 50075 (October 3, 1991).

c. Ecological Significance of Salinity Levels

EPA is selecting the 2 ppt isohaline as the basis for its proposed criteria in part because that isohaline incorporates a whole range of factors relevant to the estuary's health, even though the operation of some of these factors is not fully understood. Some species that show high correlations with the location of the 2 ppt isohaline are not abundant in low salinity habitat and are probably responding to river flow or other correlated factors. However, salinity in the 2 ppt range is clearly and directly important to a broad range of estuarine species and the location of this salinity is strongly associated with the abundance and distribution of many of these species. The SFEP Report emphasized that it is well established scientifically that salinity has direct ecological importance to many estuarine species in this estuary and others throughout the world (SFEP 1993b). In fact, much of the distribution of estuarine species can be explained by their association with specific salinity ranges and their ability to survive and reproduce within certain salinity limits. The following sections summarize the best available evidence on the direct effects of the location of low salinity habitat on the distribution and abundance of key species and habitats within the Bay/Delta estuary. This scientific evidence provides substantial support for the need for the proposed salinity criteria protecting the water quality necessary to sustain the ecological health of the estuary.

—Delta smelt. Delta smelt (*Hypomesus transpacificus*) are found today only in the upper reaches of the Sacramento-San Joaquin estuary. Early studies by the California DFG of the two most abundant smelts, longfin smelt and Delta smelt, noted that changes in the historical location of the entrapment zone would threaten populations of both species (Broadway 1979). In its initial notice of petition findings for the listing of the Delta smelt as threatened under the ESA, the USFWS found that "the annual export of 6 million acre-feet of water by Federal, State and private agencies has allowed the intrusion of higher salinity seawater to the marshes. Because of higher salinities, the Delta smelt has lost spawning and nursery areas in Suisun Bay and Suisun Marsh." 55 FR 52852, 52853 (December 24, 1990). The final rule listing Delta smelt

[6] Strictly defined, "entrainment" is the displacement of fish or other aquatic organisms from their location in one waterbody to another as a result of the operation of a water diversion. In the Bay/Delta, however, the term "entrainment" is generally used to refer to the destruction of fish or larvae at the intake mechanisms of the many water diversion facilities in the Delta. Most entrainment occurs when fish or larvae are pulled into screens or pumps by the diversion apparatus.

as a threatened species found that embryonic, larval and post-larval mortality rates increase as salinities in the western Delta increase and the entrapment zone moves upstream. Delta smelt larvae survive and grow best when the entrapment zone occupies a broad geographic area with extensive shallow areas. Delta smelt reproduction has probably suffered in recent years because the entrapment zone has been located east of Suisun Bay. 58 FR 12854 (March 5, 1993).

In the proposal to list the Delta smelt as a threatened species, the USFWS identified critical habitat for the species as requiring salinities less than 2 ppt in Suisun Bay from January through June. 56 FR 50075, 50079 (October 3, 1991). When listing the Delta smelt as threatened, the USFWS deferred designation of critical habitat until October 1993. In summarizing the factors affecting Delta smelt, the USFWS concluded that the biological characteristics of the species made it very sensitive to perturbations in its reproductive habitat and larval nursery grounds. The final listing notice further determined that Suisun Bay is the primary nursery habitat for this species and that the habitat has been degraded because of higher salinities in the spring due to upstream freshwater diversions. 58 FR 12854, 12860 (March 5, 1993).

The USFWS's conclusions were also supported by an interagency Delta smelt working group convened by the USFWS after its proposal to list the species under the ESA. The working group included representatives of USFWS, EPA, USBR, California DFG, and the California DWR. The working group developed several recommendations to increase abundance levels of Delta smelt, including maintaining the 2 ppt zone in Suisun Bay during the Delta smelt's early months of life. The working group's recommendation was that low salinity habitat be kept in Suisun Bay in all years; no attempt was made to adjust the position of the zone to account for dry year conditions (USFWS 1992f, WRINT–USFWS–15).

The USFWS's proposed critical habitat designation has been supported by a recently published paper by biologists of the California DFG and the University of California at Davis. The authors concluded that Delta smelt are most abundant in low salinity water associated with the entrapment zone. During the years preceding their decline, Delta smelt were found most abundantly at sites where low salinity conditions coincided with shallow habitats. Since their decline, low salinity conditions have been found in areas where little shallow habitat is available. The principal conclusion of these authors was that "[r]estoration of the Delta smelt to a sustainable population size is likely to require maintenance of the [entrapment] zone in Suisun Bay and maintenance of net seaward flows in the lower San Joaquin River during the period when larvae are present" (Moyle et al. 1992).

The State Board's 1991 Bay/Delta Plan also acknowledged that the location of the 2 ppt isohaline is important for Delta smelt, finding that "existing knowledge suggests that salinities of 2 ppt or less are desired in Suisun Bay from March through June." However, rather than adopting protective salinity criteria, the State Board suggested that protection of low-salinity habitat would be dealt with as a "flow" issue in the subsequent scoping and water rights phases of its proceedings (1991 Bay/Delta Plan, p. 5–44). As explained in more detail above, to date the State Board has failed to adopt any additional standards since its 1991 Bay/Delta Plan.

—Striped Bass. Striped bass (*Morone saxatilis*) support one of the most economically important sportfisheries in the Bay/Delta estuary. The striped bass population (and consequently the number of anglers) has plummeted since the early 1970's, with populations declining by as much as 70 percent from historical levels (Stevens et al. 1985; White 1986; CDFG 1992b, WRINT–DFG–8). Although striped bass populations exist elsewhere in entirely freshwater habitats, the species thrives only in estuarine conditions (Talbot 1966), and in the Sacramento-San Joaquin estuary low salinity habitat appears to provide important nursery grounds (Wang 1986). Adult striped bass migrate upstream to spawn in fresh water. The planktonic larvae are carried downstream and concentrate in areas of low salinity (Moyle 1976). When this low salinity zone is located in Suisun Bay, survival of young bass is improved (Turner and Chadwick 1972). As a result, several parties have recommended that the entrapment zone be maintained in Suisun Bay to improve striped bass year class survival (Moyle 1992, WRINT–NHI–9; USBR 1991, WRINT–USBR–2; USFWS 1992d, WRINT–USFWS–19; USFWS 1992e, WRINT–USFWS–20; Moyle and Herbold 1989; Moyle, et al. 1989).

Other factors, including year-to-year variations in outflow and exports, have also contributed to the decline of the striped bass population. California DFG has developed a model suggesting that export limitations also are necessary to preserve the striped bass fishery. Accordingly, California DFG's recent recommendations to protect striped bass have focused on reducing entrainment of fish, eggs and larvae in water pumps operated by the SWP and the CVP, rather than on maintaining protective salinity conditions (CDFG 1992e, WRINT–DFG–3; D–1630). However, according to a series of papers developed for the SFEP-sponsored workshops, models that are based on the downstream extent of low salinity habitat are at least as accurate in predicting striped bass abundance as the California DFG model based on flows and exports (Jassby, in SFEP 1993b; CDFG 1992e, WRINT–DFG–3). The studies cited above suggest that, regardless of the effects of entrainment at the diversion pumps, low salinity nursery habitat in Suisun Bay is important and that this habitat has sharply declined in recent years. Based on these studies, EPA believes that salinity criteria in Suisun Bay are necessary to protect nursery habitat of the striped bass.

—Sacramento splittail. Sacramento splittail (*Pogonichthys macrolepidotus*) are now restricted to the lower reaches of the rivers flowing into the Sacramento-San Joaquin Delta and the upper regions of the San Francisco Bay complex, particularly Suisun Bay and Suisun Marsh (Moyle 1976; Moyle 1980). Historically, this species occurred throughout the lowlands of the Sacramento Valley, but diking and dredging have eliminated 96% of the wetland habitats this species appears to require (Meiorin et al. 1991). Currently, the population lives largely in the shallow, low salinity habitat of Suisun Bay and Marsh but in early spring adults migrate upstream through the Delta to spawn near the mouths of the rivers along the Delta's eastern edge (Daniels and Moyle 1983). Although this migration pattern predominates for most of the splittail, lower concentrations of the species can be found in most locations in the Delta throughout the year.

In recent years, fewer numbers of newly-spawned splittail have moved across the Delta, back to Suisun Bay. Recent severe declines in regions in which splittail were formerly abundant resulted in the filing of petitions to list the species as endangered under the ESA. 50 FR 36184 (July 6, 1993). The only other member of the genus, found in Clear Lake, California, became extinct in the early 1970's.

No physiological studies have been done to determine the specific salinity tolerances of the splittail, but it is likely that high salinities restrict their downstream range. The scarcity of shallow habitats upstream and the increase of salinity in Suisun Bay and

Suisun Marsh have greatly restricted the habitat required by this species.

Sacramento splittail recruitment displays a strong relationship to annual outflow (Daniels and Moyle 1983). The exact mechanism that results in this relationship is unclear; years of higher outflow provide better cues to direct successful migration upstream by adults, larger areas of flooded vegetation on which the adults can spawn (Caywood 1974), higher flows to transport the newly spawned young downstream, and larger areas of suitable habitat in Suisun Bay and Suisun Marsh. Protection of historical habitat conditions in the Bay/Delta through the implementation of the proposed salinity criteria should therefore provide indirect protection for all the needs of this species that depend on outflow.

—Estuary dependent species. In addition to Delta smelt and striped bass, several other fish species are dependent on brackish-water nursery habitat. The juveniles of these species, collectively referred to as "estuary dependent species" by the California DFG, live predominantly downstream of the Delta within a salinity range of approximately 0 to 22 ppt, although the range varies somewhat by species. This habitat is larger than the nursery habitat for Delta smelt and striped bass, but nevertheless has substantially diminished in size as water has been diverted and stored for upstream uses.

Three of these species, bay shrimp (*Crangon franciscorum*), starry flounder (*Platichthys stellatus*), and longfin smelt (*Spirinchus thaleichthys*), depend on brackish-water nursery habitat for a significant portion of their life cycles. Bay shrimp and starry flounder are important components of commercial and sport fisheries, and their protection is important to maintain the State's Ocean Commercial and Sport Fishing designated uses, as well as the Estuarine Habitat designated use.

The bay shrimp is the largest shrimp species in the estuary, and has been the most numerous, except during recent prolonged drought conditions, when abundance has been very low. It supports a commercial bait fishery in the Bay, and is an important food source for the larger fish of the estuary. Reproductive adults and larvae are found in the more marine habitats of Central San Francisco Bay and nearshore Gulf of the Farallones. Transforming larvae and early juveniles move into the Bay from the nearshore ocean, and maturing juveniles are mainly found in warm, shallow, brackish water areas (2 to 22 ppt) of the estuary (CDFG 1992; WRINT–DFG–6).

Starry flounder also use the brackish areas of San Francisco Bay as nursery habitat. After moving into the Bay as transforming larvae from the nearshore ocean during the spring, young-of-the-year juvenile flounder (smaller than 70 mm) are found primarily in warm shallows where salinities are less than 22 ppt (CDFG 1992, WRINT–DFG–6). By the second year of life (1+), the fish have moved out of fresh water completely and are concentrated in the brackish water areas of the Bay. By the third year of life (2+) they have spread throughout the higher salinity areas, and many have migrated out of the Bay.

Starry flounder supports both a commercial and recreational fishery in the San Francisco Bay area. Commercial catch has varied between 486 thousand pounds in 1980 to a minimum of 40 thousand pounds in 1990. Although starry flounder are a small component of the flatfish catch (2 percent by weight), they are second only to California halibut in price per pound at the dock (CDFG 1992, WRINT–DFG–6). Commercial passenger fishery total catch and catch per unit effort in San Pablo Bay have declined dramatically since the mid-1970's. Abundance of starry flounder young-of-the-year and one-year-olds (1+) has been consistently low since 1986, and older starry flounder (two years old and older) have also declined in the Bay since the mid-1970's, based on Commercial Passenger Fishing Vessel logs (CDFG 1992, WRINT–DFG–6).

Until recently, longfin smelt has been one of the most abundant fish species in the estuary. This species spawns in freshwater, and larvae and juveniles smaller than 50 mm are predominantly found in brackish water with bottom salinities less than 18 ppt. According to California DFG, water with less than 18 ppt salinity in the spring months of March through June constitutes important nursery habitat for longfin smelt (CDFG 1992, WRINT–DFG–6). Recent populations of longfin smelt have been very low, and in 1991 the population reached the lowest number ever recorded since monitoring was initiated in 1967. As a result, this species has been the subject of a petition for listing under the ESA. See Petition for Listing Under the Endangered Species Act—Longfin smelt and Sacramento splittail, National Heritage Institute (November 5, 1992).

There are close correlations between the location of the near-bottom 2 ppt isohaline during winter/spring and annual abundance indices of bay shrimp, starry flounder, and longfin smelt (Jassby 1992). Annual abundances are low when the position of the near-bottom 2 ppt isohaline is upstream and does not move to and remain at a position near Roe Island for any extended period of time. Under these circumstances, the brackish-water nursery habitat favored by these species is primarily limited to Suisun Bay. Salinity data from California DFG studies indicate that when near-bottom salinities are at or below 2 ppt near Roe Island in Suisun Bay, salinities downstream over the large shallow flats of San Pablo Bay are characteristically less than 18 to 22 ppt (CDFG 1993). In years when the position of the near-bottom 2 ppt isohaline moves downstream at least as far as Roe Island in the spring, the area of low-salinity habitat expands into the large shallows of San Pablo Bay and these species are more abundant. These areas of San Pablo Bay provide greatly increased habitat within the salinity ranges preferred by juveniles of these species.

As with striped bass, other factors are also likely to contribute to year-to-year variations in abundance of these species, including the strength of net landward bottom currents (shrimp and flounder), coastal distribution of reproductive adults and larvae (shrimp and flounder), and successful downstream transport and dispersal of larvae and juveniles (smelt) (CDFG 1992, WRINT–DFG–6). However, brackish-water nursery habitat is essential to the juveniles of these three species, and is a major factor in the strong correlation between the position of the near-bottom 2 ppt isohaline and abundance. According to studies by California DFG, an index of brackish water habitat is strongly correlated with abundance indices for these three species (CDFG 1992, figs 1–3, WRINT–DFG–6). EPA's proposed salinity criteria, by providing estuarine habitat conditions similar to the healthier reference period of the late 1960's to early 1970's, should restore and maintain the brackish-water nursery habitat required by these three species.

—Suisun Bay Tidal Wetland Species. The tidal wetlands bordering Suisun Bay are characterized as brackish marsh because of their unique combination of species typical of both freshwater wetlands and more saline wetlands.[7]

[7] There are currently no salinity criteria protecting the Estuarine Habitat, Wildlife Habitat, and other fish and wildlife uses of the brackish tidal marshes of Suisun Bay. These large tidal marshes are distinct from the "managed" marshes in the Suisun Bay. EPA's approval of the 1978 Delta Plan criteria was explicitly conditioned on the State Board's commitment to develop additional criteria for the tidal marshes and to protect aquatic life in the Suisun Marsh channels and open waters. Because these conditions have not been met, EPA, in its September 3, 1991 letter on the 1991 Bay/

Suisun Marsh itself, bordering Suisun Bay on the north, is the largest contiguous brackish water marsh in the United States. A large portion of the wetland habitat (approximately 44,000 acres) in this marsh is currently diked and managed for waterfowl use and hunting. Approximately 10,000 acres bordering Suisun Bay are still fully tidal (Meiorin 1991).

These tidal marshes provide habitat for a large, highly diverse, and increasingly rare ecological community. The recent "Status and Trends" reports published by the SFEP listed 154 wildlife species associated with the brackish marshes surrounding Suisun Bay (Harvey, et al. 1992), including a number of candidates for listing under the ESA. These include the Suisun song sparrow (*Melospiza melodia maxillaris*) and the Suisun ornate shrew (*Sorex ornatus sinuosus*), as well as the plants Suisun slough thistle (*Cirsium hydrophilum* var. *hydrophilum*), Suisun aster (*Aster chilensis* var. *lentus*), delta tule pea (*Lathyrus jepsonii*), Mason's lilaeopsis (*Lilaeopsis masonii*), and soft-haired bird's beak (*Cordylanthus mollis*). These rare species are all found exclusively in tidally inundated marsh.

As part of the SFEP-sponsored workshops, a comprehensive literature review and intensive field surveys of marsh vegetation were undertaken to document the responses of estuarine marsh communities to changes in the salinity regime (Collins and Foin 1993). The study concluded that salinity levels in the tidal marshes play a major role in the distribution and abundance of plant species. In addition, average tidal marsh salinity levels are related to the position of the 2 ppt isohaline, although local controls on salinity are important in some areas.

The study also found that recent increases in salinity caused by a combination of upstream diversions and drought have adversely affected the tidal marsh communities. As salinity has intruded, brackish marsh plants which depend on soils low in salt content (especially the tules *Scirpus californicus* and *S. acutus*) have died back in both the shoreline marshes and in some interior marsh channel margins of the western half of Suisun Bay. These plants have been replaced by plants typically growing in saline soils, especially cordgrass (*Spartina foliosa*). This has been associated with erosion of the marsh margins, significantly reducing the tidal marsh acreage in some areas. In addition, tules in the upper intertidal zone have been replaced by the smaller and more salt tolerant alkali bulrush (*Scirpus robustus*). These changes have significantly affected available habitat for a variety of wildlife that nest and feed in these areas, including the Suisun song sparrow, marsh wren, common yellowthroat, black-crowned night heron, and snowy egret (Collins and Foin 1993; Granholm 1987a; 1987b). The loss of habitat for the Suisun song sparrow is of particular concern, since individuals of this species are found only in the already fragmented marshes bordering Suisun Bay, occupy an established territory for their lifetime, and depend on tall tules for successful reproduction and cover from predators (Marshall 1948).

Although there have been no studies of the direct effects of salinity on rarer plant species, these species are likely to have the same salinity requirements as non-rare species residing in the same plant communities. Delta tule pea and Suisun aster are associated with tules along the banks of tidal sloughs (CDFG 1991). Mason's lilaeopsis is also found along tidal banks, associated with the more freshwater marsh species, including tules, and in the shade of riparian shrubs such as willows (CDFG 1991). Suisun thistle and soft-haired bird's beak are found in the few remaining higher elevation tidal marshes. All of these species are limited to marsh areas seasonally inundated with fresh to brackish water, and depend on such conditions to varying degrees.

For those brackish marsh plants depending on freshwater conditions, the most critical growth period is February through June. If suitable lowlands were present upstream, increases in the estuary's salinity gradient would allow brackish tidal marsh communities to migrate upstream. However, the floodplains and other lowlands suitable for the evolution of tidal marshes are absent upstream of Suisun Bay (SFEP 1993b). As a result, increases in tidal water salinity may significantly reduce the already severely limited freshwater and brackish marsh habitats, and will threaten the natural diversity of the estuary's wetland communities. Maintaining historical levels of low-salinity habitat in Suisun Marsh is therefore essential to protect Estuarine Habitat, Wildlife Habitat, Rare and Endangered Species, and other uses designated for protection by the State's water quality standards.

d. Proposed Criteria

(1) *Preliminary considerations.* This section discusses three issues that affect EPA's proposal: the proper level of protection for designated uses, the basis for choosing the locations for measuring the proposed criteria, and the proper time period for maintaining the proposed criteria.

—Level of Protection. One of the key recommendations of the SFEP-sponsored workshops was that environmental goals for the estuary would be most effective if expressed in terms of restoring conditions to those that existed at specific historical periods. If a certain level of ecosystem restoration is selected as a goal, then the relationship between abundance and the location of the 2 ppt isohaline (and the amount of water necessary to achieve that isohaline) can be used as a basis for setting standards that will achieve those goals. (SFEP 1993b).

This historically-based approach is consistent with EPA's National Program Guidance for Biological Criteria for Surface Waters (USEPA 1990). EPA's National Program Guidance recommends that aquatic communities in waterbodies subject to anthropogenic disturbance be assessed in comparison to similar, but unimpaired waterbodies (a reference condition). Although the Guidance discusses designation of a reference site to compare directly with an impaired waterbody, analysis of historical records is also recommended. In the case of the Bay/Delta, a reference waterbody is not available. Instead, reference conditions have been based on historical information.

The proposed salinity criteria reflect estuarine habitat conditions that existed prior to 1976. In the recent State Board hearings, EPA, NMFS, and USWFS recommended standards that would restore habitat conditions to levels that existed in the late 1960's and early 1970's (USFWS 1992g, WRINT–FWS–10).[8] This period generally reflects

Delta Plan, disapproved the standards for Suisun Marsh and stated that the State Board should immediately develop salinity objectives sufficient to protect aquatic life and the brackish tidal wetlands surrounding Suisun Marsh.

[8] This restoration goal is less protective than the "without project" goal targeted by the State Board as part of its water quality standards in 1978. In the 1978 Delta Plan, the State Board adopted standards intended to achieve levels that would have existed in the absence of the state and Federal water projects, and agreed to revise the standards if necessary to achieve this goal. This "without projects" goal was never formally incorporated into the State's water quality standards, and its continued validity as a stated goal is in question given the court's decision in *United States et. al. v. State Water Resources Control Board, supra*) (reviewing the 1978 Delta Plan and rejecting the "without projects" approach). EPA continues to believe that fully offsetting the impacts of water development should be the goal of long-term planning efforts by the State Board and other agencies. However, because of the precipitous

Continued

conditions that occurred in the estuary before fish habitat and populations began to experience the most recent significant declines, and therefore serves as a useful definition of a healthy fishery resource. Land use patterns and upstream water developments had largely stabilized by the end of this period so that increases in project impacts are the dominant change associated with the subsequent decline in fishery resources. The reclamation of wetlands was largely complete by the 1920's, and the largest of the upstream developments, Shasta Reservoir, was completed in the early 1940's.

Ideally, EPA would use the late 1960's to early 1970's habitat conditions as both the targeted level of protection and the historical reference period. However, to better reflect the natural variability of wet and dry years, EPA is proposing criteria that vary according to the "water year type". The water year type concept is already fully integrated into the operations of California water management, and the State Board's classification of years into one of five categories (wet, above normal, below normal, dry, and critically dry) is accepted as the standard water year type classification scheme.

The period of the late 1960's to early 1970's, however, contained no dry or critically dry years and only one above normal year. Thus, in order to provide an adequate representation of the different water year types, EPA is proposing the use of the period 1940 to 1975 as the historic reference period. An examination of the historical record reveals that this 35 year period was one of fairly consistent hydrological conditions. The period is bracketed by major hydrological changes—the construction of Shasta Dam immediately before this period, and the extended drought and increased water exports beginning immediately after this period in 1976.

Including the longer 1940–1975 period as the historical reference period allows better estimation of the salinity regime for different water year types than would use of only the late 1960's to early 1970's. Given that the hydrological conditions were fairly consistent throughout the longer 1940–1975 period, EPA believes this longer historical reference period serves as a better long term indicator through all water year types of the habitat conditions existing in the recommended target years of the late 1960's to early 1970's.

The development of the historical salinity regime is presented in appendix II. Salinity records extend back only to 1967, whereas daily flow estimates are available from October 1929. Using models created by California DWR relating flow and salinity allows reconstruction of the salinity regimes in the historical reference period.

—Basis for locations selected. Three locations for the proposed 2 ppt isohaline were selected to correspond to protection of three different types of estuarine habitat in different water years. Together, the use of these three locations will maintain the natural variability in salinity levels that characterize the historical data set at medium to lower flow levels (those substantially within the control of upstream diverters).

Roe Island. The 2 ppt isohaline occurs at or below Roe Island at times of high outflow accompanying storms with uncontrolled runoff, as well as at times of high water releases from upstream dams. These flows carry many young fish from the Delta downstream into Suisun Bay. Because the entrapment zone will consistently be near the broad shallows and large marsh areas of Suisun Bay, the young fish and other organisms associated with the zone will be distributed into these diverse and productive habitats, greatly increasing the extent and value of their available habitat. This location will also maximize the inputs of production from Suisun Marsh and the shallows of Suisun Bay into the entrapment zone, and will provide greatly increased areas of medium to low salinity nursery habitat for estuary dependent species in San Pablo Bay.

Chipps Island. The downstream end of Chipps Island marks the upstream end of Suisun Bay. As noted above, low salinity habitat in Suisun Bay has been well documented as an important nursery area for Delta smelt, striped bass, and other estuarine species. Suisun Bay also represents the farthest upstream extent of large areas of shallow habitat. These shallow habitats are more productive than deeper channels (Cloern et al. 1983), and horizontal flows across these shallows bring food sources into the entrapment zone. For some species, particularly Delta smelt, shallow areas near the entrapment zone are a preferred habitat (Moyle et al. 1992), perhaps as a refuge from predation. When the average salinity at Chipps Island is less than 2 ppt, organisms associated with this habitat will be in or near the shallow habitats of Suisun Bay for half of each tidal cycle.

Confluence of Sacramento and San Joaquin Rivers. The confluence of the Sacramento and San Joaquin Rivers marks the point where organisms associated with low salinity habitat are exposed to the detrimental conditions in the lower San Joaquin River. The higher mortalities and poorer habitat conditions associated with the lower San Joaquin River have been documented at length in testimony to the State Board (USBR 1992, WRINT–USBR–2; Moyle 1992, WRINT–NHI–9). This location, then, provides a suitable upstream limit for the 2 ppt isohaline. When average salinities at the confluence reach the 2 ppt level, the organisms associated with low salinity habitat will have access to the shallow habitats downstream in Suisun Bay only during the lower low tide point of the tidal cycle.

—Period of protection. Changes in water quality that have affected aquatic resources have been greatest during the period from February to June. Under naturally-occurring hydrological conditions, flows in these months were often very large while in summer flow rates declined and salinity in the delta increased. Upstream diversions have altered this natural pattern by reducing peak spring flows and, in some years, increasing flows during the late summer and fall months. The changes in summertime water quality (towards lower salinity) occur during a season when most of the fish species have already completed their spawning or migration (Monroe and Kelly 1992).

The abundance and reproductive success of almost all species that live in or migrate through the upper estuary depend strongly on conditions during the months from February through June (Stevens 1977; Daniels and Moyle 1983; Stevens and Miller 1983; Moyle and Herbold 1989; Herbold et al. 1992; SWC 1992, WRINT–SWC–1). These species survive and reproduce more successfully when Suisun Bay has large areas of low salinity habitat (less than 2 ppt), San Pablo Bay has large areas of medium to low salinities (less than 18 to 22 ppt), river outflows are high, bottom currents are strong, temperature is low, and the areas of greatest turbidity are downstream of the Delta. Because of the combination of drought conditions

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decline in the biological communities of the estuary in the last decade, this goal is no longer reasonably attainable in the short term, given the existing physical facilities and water project operations in the Delta. As a result, EPA, USFWS and NMFS have recommended that the State Board immediately set standards sufficient to restore estuarine habitat conditions to those that existed in the late 1960's and early 1970's, and to establish a long-term goal of fully offsetting the impacts of water development (USFWS 1992g, WRINT–FWS–10). This long-term goal is consistent with the goals of the recently-enacted Central Valley Project Improvement Act (Title 34 of P.L. 102–575, 106 Stat. 4600) (Central Valley Project Improvement Act), which include programs to mitigate the adverse effects incurred as a result of the construction of the CVP.

and high levels of water exports, these conditions have occurred very rarely in recent years. Therefore, EPA's proposed criteria center on these five months.

(2) *Proposed criteria.* EPA's specific proposed criteria are shown in Table 1. They include 2 ppt salinity criteria at Roe Island, Chipps Island, and at the Sacramento/San Joaquin River confluence from February through June. The criteria replicate the average number of days on which the 2 ppt isohaline occurred at or downstream from each of these locations during the historical period 1940–1975, inclusive, classified by water year type. Because no critically dry years occurred in the period from 1940 to 1975, the required number of days for critically dry years is based on an extrapolation of the data.

The proposed criteria are measured using a 14-day moving average. The use of a 14-day moving average allows the mean location to be achieved despite the varying strength of tidal currents during the lunar cycle because any 14 day period will include the full range of spring and neap tidal conditions.

TABLE 1.—PROPOSED 2 PPT SALINITY CRITERIA

Year type	Roe Island [km 64] (days)	Chipps Island [km 74] (days)	Confluence [km 81] (days)
Wet	133	148	150
Above normal	105	144	150
Below normal	78	119	150
Dry	33	116	150
Critically dry	0	90	150

Numbers indicate required number of days (based on a 14-day moving average) at or downstream from each location for the 5-month period from February through June. The water year classifications are identical to those included in the 1991 Bay/Delta Plan for the Sacramento River Basin. Roe Island salinity shall be measured at the salinity measuring station maintained by the USBR at Port Chicago (km 64). Chipps Island salinity shall be measured at the Collinsville station, and salinity at the Confluence shall be measured at the Mallard Slough station, both of which are maintained by the California Department of Water Resources. The Roe Island number represents the maximum number of days, based on the adjustment described below.

Example: In a wet year, the 2 ppt isohaline must be maintained at or downstream of the Confluence at least 150 days during February through June, at or downstream of Chipps Island for at least 148 days during that same period, and, ignoring for a moment the adjustment described below, at or downstream of Roe Island for at least 133 days.

Adjusting the Roe Island standard to reflect intra-year storm variability. As noted above, the proposed criteria at Roe Island are intended, in part, to replicate low salinity habitat conditions resulting from spring storm events. Storm events in the spring provide many benefits to aquatic resources of the estuary. Large areas of flooded vegetation provide ideal spawning for some species, high flows transport many planktonic larvae downstream, and translocation of low salinity habitat allows wide dispersion of many species which reduces predation (and perhaps competition) and replenishes otherwise isolated areas. In addition, the variability in salinity over a wide range is thought to be an important tool in preventing the buildup of molluscan species and, thus, ensures that more food will accumulate in the entrapment zone (Nichols 1985; Nichols and Pamatmat 1988).

The proposed criteria at Roe Island, unadjusted, would fully protect low salinity habitat, but would not accurately reflect the historical natural variability in runoff and precipitation. The distribution of storm systems within the October to April wet season varies greatly year-to-year. In some years, all storm events are concentrated in early winter, whereas in others the storm events are evenly distributed or concentrated in the spring. This natural historical variability is reflected in the proposed salinity criteria.

Without some form of adjustments, salinity criteria at a fixed downstream location would also result in more flows through the estuary than might be necessary to maintain water quality (that is, the "water costs" would be unnecessarily high). The flows necessary to hold the 2 ppt isohaline at a particular location in the estuary are substantially less than the flows needed to move that isohaline downstream to a different position. In the Bay/Delta, these higher flows used to move the isohaline could come either from natural storm events or from controlled reservoir releases. The proposed standard provides for an adjustment of the Roe Island standard to more closely replicate natural spring storm cycles. This adjustment will avoid adverse impacts on species (such as the winter-run salmon) dependent on upstream reservoir conditions.

Under the proposal, the criteria of number of days for a given year type at Roe Island would not apply unless and until the average daily salinity at Roe Island attains the 2 ppt level through natural uncontrolled flows. Following the occurrence of such an event, the 14 day average salinity at Roe Island must not exceed 2 ppt for the number of days specified in Table 1. Therefore, the number of days listed under Roe Island represents the maximum of the number of days that may be required. In effect, this adjustment provides that the additional water needed to move the isohaline downstream to Roe Island will come from natural storms rather than from reservoir releases or export restrictions. This approach better reflects the natural variability in timing and quantity of runoff and significantly reduces the water supply impacts of the proposed criteria relative to criteria that do not account for this variability.

e. Implementation Measures

Under the CWA, the states have a primary role in developing measures implementing water quality criteria. EPA expects that the State Board would implement these salinity criteria by making appropriate revisions to operational requirements included in water rights permits issued by the State Board. Consistent with the mandates of section 101(g) of the CWA, the State Board has full discretion in determining the source of water flows necessary to meet these criteria. EPA has intentionally drafted its proposed criteria to be measured at or downstream of the confluence of the Sacramento and San Joaquin Rivers. This allows the State Board maximum latitude in choosing a mix of flow conditions and export restrictions in both river basins.

Although the State Board has full discretion to develop an implementation plan for these criteria in

the manner it chooses, EPA and the other federal agencies involved in water resource management issues in the Bay/Delta (USFWS, NMFS, and USBR) urge the State Board to spread the burden across as broad a spectrum of water users as possible. The economic analysis prepared in conjunction with this proposal suggests that spreading the burden results in substantially lower costs than does imposing the burden on a particular geographical area or a narrowly defined group of water users. This is not just a matter of fairness. The federal agencies' preliminary discussions with water project managers indicated that increasing the pool of contributors substantially increases the operational flexibility of the water system, and thereby reduces the total impact of meeting the proposed criteria. For that reason, the federal agencies hope the State Board will continue the concept it adopted in its proposal for D-1630, and will allocate the burden of meeting these criteria across the broad range of the state's water users.

2. Fish Migration and Cold-Water Habitat Criteria

a. Background

The State's designated uses for the Bay/Delta include Cold Freshwater Habitat to sustain aquatic resources associated with a coldwater environment, and Fish Migration to protect those fish which migrate through the estuary. The migratory fish species associated with the cold-water environment in the Bay/Delta are chinook salmon (*Oncorhynchus tshawytscha*) and steelhead trout (*Oncorhynchus mykiss*).

Currently there are four distinct populations of salmon in the Sacramento/San Joaquin river systems, each named for the season of their migration upstream as adults. The fall-run population is now the most numerous; in recent years, typically 90 percent of all Central Valley spawners are fall-run fish. Increased hatchery production of fall-run fish has resulted in stable spawning returns of fall-run fish passing the Red Bluff Diversion Dam on the Sacramento River; however, wild fall-run chinook abundance is low and is decreasing. The Sacramento River system still supports small winter-run, spring-run and late fall-run populations, but these populations have all declined dramatically in recent years (USFWS 1992a, WRINT-USFWS-7). The winter-run population is now listed as threatened under the ESA. The spring-run population has recently reached low enough levels to be recognized as a species of special concern by the State of California.

Steelhead trout are also cold-water migratory fish within the Sacramento River System. They have suffered a 90 percent decline since the late 1960's, and are supported largely by hatchery production (CDFG 1992a, WRINT-DFG-14).

The San Joaquin River system supported both fall and spring runs until the 1940's when Friant Dam was built. The dam prevented the spring-run fish from reaching cool upstream areas suitable for summer rearing, so the spring-run disappeared and presently there is only a fall-run population. Recently, the San Joaquin population has been highly variable, reaching very low levels in times of drought, and responding quickly to higher wet year flows. Inadequate stream flows, water developments, poor water quality, water diversions, and habitat deterioration have had varying degrees of impact. Continuing high levels of water diversions from the San Joaquin River and tributaries, and high exports out of the South Delta, in concert with the recent extended drought have caused major impacts to all San Joaquin tributary runs. Population levels are extremely low, and the 1991 brood year may only produce a total of 100 to 300 returning adults in 1994 when these adults return to spawn at the end of their three year life cycle (CDFG 1992c, WRINT-DFG-25).

Salmon and steelhead populations are subject to increased mortality when exposed to high temperatures and when diverted out of the main channels of the Sacramento and San Joaquin Rivers into less suitable habitat. Those fish diverted from the main channels are also subject to increased mortality as water exports at the State and Federal pumping plants in the south Delta increase. USFWS tagged smolt[9] studies between 1984 and 1989 found that smolts migrating out of the Sacramento River system in the spring survived on average approximately 3.4 times better in the Sacramento main channel than in the interior (central) Delta. Results from studies carried out in the spring of 1985 to 1990 showed on average approximately 2 times better survival in the main channel of the San Joaquin River than in Old River, a secondary channel. Higher temperatures affect smolt mortality both in the main channel and in the central Delta. For example, the recent (1992) USFWS results from spring tagged smolt releases into the central Delta showed that mortality was approximately 2½ times greater at 67 °F than at temperatures of 63° and 64 °F (USFWS 1992a, WRINT-USFWS-7).

State and federal legislators have recognized the serious threat to the continued existence of migratory fishes in the Bay/Delta. In 1988, the California State legislature mandated a restoration goal of doubling natural salmon and steelhead production by the year 2000, and required development of a plan to meet this goal. Salmon, Steelhead Trout, and Anadromous Fisheries Program Act; codified at Cal. Fish & Game Code § 6900 et seq. (West 1991). In response to this mandate, California DFG published the Central Valley Salmon and Steelhead Restoration and Enhancement Plan in 1990 (CDFG 1990a). California DFG recommended that the State Board adopt an objective of maintaining the survival rate of salmon smolts passing through the estuary at the "without projects" historical level, and listed specific actions for the consideration of the State Board to implement this objective. Also, Congress recently enacted the Central Valley Project Improvement Act, which requires that a program be developed and implemented to ensure that natural production of anadromous fish in Central Valley rivers and streams will be "sustainable at levels at least twice the average levels attained during the period 1967-1991."

b. Protection of Bay/Delta Coldwater Habitat and Migration Under the Clean Water Act

In order to protect fall-run salmon, the 1978 Delta Plan included minimum flow objectives (below those set for striped bass) and mandated gate closures to help keep fry out of the central Delta when flows were above 12,000 cubic feet per second (cfs) during the period January 1 to April 15. In addition, gate closures through May, designed to protect striped bass, have also provided protection for out-migrating salmon smolts. These measures were considered inadequate by the fisheries agencies (USFWS, NMFS, and California DFG). At the 1987 Water Quality Control Plan hearings, these agencies recommended flow objectives based on 1940 historical flows (without project levels) that would have significantly increased protection for fall-run salmon. Similarly, in the 1988 Draft Water Quality Control Plan (SWRCB 1988), the State Board staff recommended objectives for Sacramento fall-run salmon based on average spring flow

[9] A "smolt" is a salmon in the process of acclimating to a change from a fresh water environment to a salt water environment. This occurs when young salmon migrate downstream through the Delta to the ocean.

conditions from 1930 to 1987, and for San Joaquin fall-run salmon based on flow conditions from 1953 to 1987. However, this Plan was not adopted.

The 1991 Bay/Delta Plan established additional criteria designed to protect salmon. The State Board set new temperature criteria of 68 °F at Freeport and Vernalis from April 1 through June 30 and September 1 through November 30 to protect Cold Fresh-Water Habitat for fall-run salmon. The 1991 Bay/Delta Plan also set a temperature criterion of 66°F at Freeport from January through March to protect winter-run salmon. EPA disapproved these criteria because the evidence in the State Board's submittal did not demonstrate that they would be sufficient to protect cold-water habitat for these species. Based on the supporting evidence in the State Board's submittal and the Central Valley Salmon and Steelhead Restoration and Enhancement Plan (CDFG 1990a), EPA recommended that the State Board adopt a 65 °F criterion, or an alternative that is scientifically defensible. EPA also disapproved the State's temperature criteria because they were subject to "controllable factors" (that is, temperature criteria were to be met only if they could be attained using a limited set of implementation measures). With this limitation such criteria are unlikely to be protective, especially since the State Board specifically prohibited the use of reservoir releases to reduce temperatures in the Delta (SWRCB, 1991).

EPA believes that the State should continue to work on developing scientifically-defensible long-term temperature criteria sufficient to protect cold-water habitat for salmon migrating through the estuary. Temperature has been consistently used nationwide as a basis for water quality criteria, and there is strong scientific evidence that temperature affects survival of salmon smolts as they move through the Delta (Kjelson, et al., 1989; USFWS 1992a, WRINT-USFWS–7, USFWS 1992b and USFWS 1992c, WRINT-USFWS–8). However, EPA acknowledges that specific temperature criteria are difficult to establish and implement presently in the Delta because historic temperature levels have been highly variable and respond quickly to ambient air temperatures, and because there is insufficient information on the effectiveness and feasibility of various methods of lowering temperature. It is likely that there are short time periods (on the order of days to a few weeks) during which efforts at temperature control could be successful and provide increased smolt survival. However, existing models predicting changes in temperature in response to water project operations use a monthly temporal structure and only provide results as monthly means. Thus, these models cannot be used to analyze measures that could provide improved conditions over shorter periods of time. In addition, management of reservoir releases to provide benefits to salmon both in the Delta and in the upstream reaches has not been thoroughly assessed (Kelley, et al. 1991; Mann and Abbott 1992).

Studies to develop improved reservoir and river temperature models with a shorter time-step and improved predictive capability for the entire Sacramento system are just beginning under the auspices of Trinity County, the University of California at Davis, and the California DFG. These studies will also include a direct analysis of the effect of temperature management alternatives on salmon populations. Additional work to develop effective temperature models has been mandated by section 3406(g) of the recently-enacted Central Valley Project Improvement Act. It should be possible to use information from these studies to set temperature criteria in the near future, and EPA will continue to work with the State to develop specific temperature criteria for the Delta. However, at this time, EPA is not proposing temperature criteria to replace those criteria disapproved in EPA's September 3, 1991 letter, and is instead proposing the salmon smolt survival criteria described below.

c. Proposed Smolt Survival Criteria

Because at this time EPA has not developed an adequate scientific basis for precise temperature criteria, EPA is proposing "smolt survival criteria" to protect the Fish Migration and Cold Fresh-Water Habitat designated uses in the Bay/Delta estuary. These criteria are based on a smolt survival index that quantifies and predicts the survival of salmon migrating through the Delta. The index can be used to determine whether the Fish Migration and Cold Fresh-Water Habitat uses are impaired in the Bay/Delta. When applied in criteria, the index measures and can control the condition of the resource at risk by directly assessing and limiting the loss of salmon smolts within the Delta due to a variety of impaired water quality conditions. The use of this index is consistent with the integrated approach envisioned by the National Program Guidance for Biological Criteria for Surface Waters (USEPA 1990).

(1) *Smolt Survival Models.* The smolt survival indices are based on USFWS models described in Kjelson et al. (1989), USFWS (1992a) (WRINT-USFWS–7) and USFWS (1992b). These models are summarized more fully in Appendix III. The models are empirical; that is, they are in large part based on the results of experiments measuring and comparing smolt survival under a number of different physical conditions of varying migration pathways, water temperatures, flow rates, and rates of exports from the Delta. The models underlying the salmon smolt survival criteria are complex; additional information about the methods used in constructing the Sacramento and San Joaquin indices is contained in Appendix III and the administrative record to the proposal. For the Sacramento River system, the proposed salmon smolt survival criteria are based on the most recent model (USFWS 1992b) for predicting migration success for the Sacramento River fall-run population, and rely on the relationship between smolt survival and three factors: temperature, diversion out of the mainstem Sacramento River, and export rates. The San Joaquin model is based on experimental data, and relies on the relationship between salmon smolt survival and river flows, diversion into Old River, and export rates. Consistent with the implementation recommendations of USFWS, NMFS, and California DFG, the San Joaquin model assumes that a barrier will be in place at the head of Old River during the peak migration season.

Verifying the models used to generate the salmon smolt criteria is a continuing process using code-wire tagged smolt studies conducted by the USFWS (USFWS 1992b, 1993). Although these models represent the present state-of-the-art in Bay/Delta salmon fisheries management, EPA anticipates that the models will continue to be verified, updated and refined each year by USFWS to reflect additional data collection results, and believes that continuing verification is necessary to assure that outmigrating smolts are protected. In the event that USFWS modifies its models, recommended index values, or recommended implementation measures, EPA intends that the criteria will be amended accordingly in the next triennial review.

(2) *Proposed Criteria.* In developing the goals or target index values for its proposal, EPA is relying primarily on the goal of restoring habitat conditions to those existing in the late 1960's and early 1970's, as recommended in the Interagency Statement of Principles. Strict adherence to this recommendation would suggest using the index values associated with that historical period as the target index values. These values are included in

Table 2, which provides estimated index values for different historical periods. As part of their recent expert testimony to the State Board, USFWS estimated these historical survival indices under different conditions (USFWS 1992c, WRINT-USFWS–8). The Sacramento River historical values are based on an early version of the Sacramento River model (Kjelson et al. 1989). There would be minor changes in the estimates using the most up-to-date model (USFWS 1992b). For example, recalculating the Sacramento River value for the 1956–1970 historical period yields a mean of the five-year types of .37, compared to the .36 indicated in Table 2.

TABLE 2.—HISTORICAL SALMON SMOLT SURVIVAL INDICES FOR THE SACRAMENTO AND SAN JOAQUIN RIVER PORTIONS OF THE DELTA

	WATER YEAR TYPE					Mean of year types
	W	AN	BN	D	C	
Sacramento River goal:						
1940 Level of Development	.76	.81	.77	.63	.44	.68
1956–70 Historical	.56	*.45	.35	.26	*.20	.36
1960–88 Historical	.44	.43	.31	.25	.19	.32
1978–90 Historical	.39	*.32	*.28	.22	.16	.27
San Joaquin River Goal:						
1940 Level of Development	.58	.50	.52	.47	.39	.49
1956–70 Historical	.61	*.25	.18	.17	*.15	.27
1960–88 Historical	.43	.12	.17	.13	.12	.19
1978–90 Historical	.48	*.15	*.09	*.06	.07	.17*

* Interpolated: there were no water years in these categories during the relevant historical period. Source: USFWS 1992a.

For a number of reasons, however, strict adherence to the late 1960's and early 1970's target is inappropriate. Salmon fisheries, especially on the San Joaquin River, were already somewhat degraded during that historical period, and the degradation has been more severe in drier years. This is demonstrated in Table 2, above, which provides estimated historical survival index values for the relevant period. This Table shows that the decline in the survival index was more pronounced in critical, dry, and below normal water years than in wetter years. Accordingly, to protect salmon from falling to dangerously low population levels, and more nearly mimic the natural historical response of smolts migrating through the Delta to year-to-year changes in hydrology, EPA is proposing more protective target values in drier years and less in wetter years.

On the Sacramento River system, EPA believes salmon smolt migration will be protected if the long-term average survival over all water year types replicates the target historical period values. Protection at the late 1960's to early 1970's level in the wetter years is not necessary if better protection is afforded migrating smolts in the drier years. On the San Joaquin River system, however, the drop in survival has been more severe in drier years, the runs are smaller and more at risk, and the overall survival index was less than in the Sacramento system during the target historical period. For that reason, in order to protect the Fish Migration designated use on the San Joaquin, EPA is proposing index values that afford both better protection in drier years and overall index values that are higher than in the historical late 1960's to early 1970's period.

To achieve this level of protection and to address this bias in the historical reference period index values, EPA is proposing the use of target values derived from the recommendations and analyses carried out by the Delta Team of the Five Agency Chinook Salmon Committee. This interagency group consists of representatives from the USFWS, California DFG, California DWR, NMFS, and USBR. Its reports (Five Agency Delta Salmon Team, 1991a, 1991b) represent a consensus on the most effective and feasible implementation measures to protect downstream migrant salmon smolts in the Delta. In preparing its recommendations for the 1992 State Board hearings, USFWS reviewed recommendations from the Five Agency Delta Salmon Team in its salmon smolt model, and presented a set of index values and corresponding operational recommendations to the State Board (USFWS 1992a, WRINT–USFWS–7; USFWS 1992c). These index values, which are intended to be consistent with the fisheries agencies recommended target index values that would restore habitat conditions and salmon populations to those characteristic of the late 1960's to early 1970's (USFWS 1992a, WRINT–USFWS–7; USFWS 1992c, WRINT–USFWS–8; CDFG 1992b, WRINT–DFG–8), are shown in Table 3. The values for the Sacramento River index differ slightly from those presented in the 1992 State Board hearings because these Table 3 values are based on the most recent version of the Sacramento River model.

TABLE 3.—SALMON SMOLT SURVIVAL INDICES BASED ON FIVE AGENCY CHINOOK SALMON COMMITTEE ANALYSIS AND RECOMMENDATIONS

Sacramento River		San Joaquin River	
Water year type	Index value	Water year type	Index value
Wet	.49	Wet	.46
Above Normal	.41	Above normal	.30
Below Normal	.40	Below normal	.26
Dry	.35	Dry	.23

TABLE 3.—SALMON SMOLT SURVIVAL INDICES BASED ON FIVE AGENCY CHINOOK SALMON COMMITTEE ANALYSIS AND RECOMMENDATIONS—Continued

Sacramento River		San Joaquin River	
Water year type	Index value	Water year type	Index value
Critical	.32	Critical	.20
Mean	.41	Mean	.31

Finally, in arriving at index values for its proposal contained in Table 4, EPA has adjusted the index values of Table 3 to meet concerns over potential closure of the Georgiana Slough. As discussed below, EPA has been engaged in consultations with USFWS and NMFS under the ESA about possible effects of EPA's water quality standards actions on threatened and endangered species. During the course of these consultations, it was suggested that one of the measures the Five Agency Chinook Salmon Committee had recommended as an effective protective measure for salmon smolts—putting a temporary barrier at the head of Georgiana Slough—may have deleterious effects on the Delta smelt and other native aquatic life in the central Delta, and possibly on adult salmon returning upstream. For that reason, EPA has recomputed the index values (see Table 4) to reflect model results if the Georgiana Slough were left open. Lower exports, particularly during times of peak San Joaquin salmon outmigration, were incorporated as an additional feasible and effective implementation measure benefiting salmon, in part to compensate for the additional mortality associated with keeping Georgiana Slough open. EPA believes that these adjustments still provide protection consistent with the goal of restoring habitat conditions to those existing in the late 1960's to early 1970's (mean Sacramento River survival index of .37), while also taking into account achievable implementation measures. The recomputed index values in Table 4 are included as EPA's proposal.

TABLE 4.—PROPOSED SALMON SMOLT CRITERIA

Sacramento River		San Joaquin River	
Water year type	Index value	Water year type	Index value
Wet	.45	Wet	.46
Above Normal	.38	Above normal	.30
Below Normal	.36	Below normal	.26
Dry	.32	Dry	.23
Critical	.29	Critical	.20

To protect both Fish Migration and Cold Fresh-Water Habitat designated, EPA proposes that the specific smolt survival criteria in Table 4, above, be adopted for the Bay/Delta. As explained above, the proposed Sacramento River criteria are modified from the USFWS indices in Table 3. The San Joaquin River criteria are the same as Table 3. The Sacramento River criteria provide overall protection at approximately the 1956–1970 historical level (.37 mean survival index). The San Joaquin River criteria provides better protection than the 1956–1970 historical level (.27 mean survival index). Both sets of criteria provide better protection than the 1956–1970 historical period in drier years, and less protection in wetter years. These criteria should provide more consistent smolt survival and help avoid situations where extraordinary measures are necessary to preserve runs, particularly in the San Joaquin River tributaries. Water year type designations are identical to State Board classifications (SWRCB 1992a).

d. Implementation Measures

Under the CWA, the States have a primary role in developing measures implementing water quality criteria. EPA expects that the State Board would implement these criteria by making appropriate revisions to operational requirements included in water rights permits issued by the State Board. EPA believes that the State Board would have a number of possible implementation approaches for achieving the salmon smolt survival criteria. In the recent State Board hearings, USFWS recommended a series of implementation measures (based on the Five Agency Chinook Salmon Committee proposals) designed to achieve the smolt survival indices recommended in the joint statement by USFWS, NMFS and EPA. For the Sacramento River, these included closure of the Delta Cross Channel from April through June, closure of Georgiana Slough from April 15 to June 15, and minimum Sacramento Flow at Rio Vista of 4000 cfs from April through June. For the San Joaquin River, these measures included requiring a range of flows from 2,000 to 10,000 cfs at Vernalis from April 15 to May 15; requiring minimum flows of 1000 cfs at Jersey Point from April through June, except from April 15 to May 15, when higher flows from 1000 to 3000 cfs would be required; and placing a full barrier in upper Old River from April through May. Total water exports would be curtailed to a range from 6000 cfs in wet years to 2000 cfs in critically dry years from April 15 to May 15.

Based on the USFWS models, these particular measures will achieve the proposed smolt survival indices in Table 3. However, as discussed earlier, EPA has incorporated into its proposed target index values changes to the recommended implementation measures based on concerns about the effect of these measures on other aquatic resources. Given the nature of the index itself, however, there is substantial flexibility in how the target values can be achieved. For example, if flows are increased above the recommended levels in the San Joaquin River, the

associated export limits could also be increased while achieving the same level of protection. Reductions in Sacramento River temperatures would also provide significant benefits. Although temperature controls were not included in the USFWS recommendations, they are an important variable in the USFWS model, and may be the most significant factor affecting smolt survival in the Sacramento River system. Implementation measures affecting temperature may therefore be an effective means of attaining the smolt survival criteria.

There is also evidence that short-term operational changes implemented at peak migration times coincident with critical periods of high ambient air and water temperature may provide significant benefits (Kelley, et al, 1991). Other possibilities listed in California DFG's *Central Valley Salmon and Steelhead Restoration and Enhancement Plan* (CDFG 1990) include screening Georgiana Slough and screening the Delta Cross Channel. A sound barrier (a device generating subsurface sound that discourages fish from entering the Slough) at Georgiana Slough is currently under study and may also be a useful implementation measure. As new methods are developed to increase smolt survival, their benefits can be assessed, and their contribution toward meeting and/or revising the criteria taken into account.

Given this potential flexibility, EPA believes that establishing smolt survival indices as Fish Migration and Cold Fresh-Water Habitat criteria would give the State Board maximum latitude in choosing a set of implementation methods that will attain protection of the designated migration and coldwater fisheries uses. As such, these proposed criteria are consistent with the mandates of section 101(g) of the CWA, as discussed above, and accommodate the State's interest in allocating its water supplies in a way that maximizes the many values important to the State. Furthermore, the proposal of these criteria is consistent with the authority in CWA section 303(c)(4), which authorizes EPA to propose revised or new standards to meet the requirements of the Act.

e. Protection of Other Salmon Runs and Life Stages

Because the smolt survival indices were developed using tagged fall-run fish during the time of their outmigration, EPA is proposing the use of these indices only for fall-run outmigrants. For winter-, late fall-, and spring-run salmon, as well as steelhead, there is no direct information about the factors that affect survival, although it is likely that many of the same factors, with the exception of temperatures during the colder months, are also affecting the juveniles of these populations as they migrate through the Delta.

Measures implemented by the USBR and SWP as a result of the Biological Opinion for winter-run salmon issued by NMFS under the ESA afford some protection for other runs, in addition to protection for the winter-run salmon population itself. NMFS, Biological Opinion on Central Valley Project, 1992 Operations (February 14, 1992). In addition, EPA has been consulting with NMFS to assure that the implementation of EPA's proposed standards will not jeopardize the winter-run Chinook salmon population.

Juvenile spring-run salmon and steelhead move through the Delta during the same period as winter-run and fall-run salmon, and should be protected in the Delta by measures taken for these other runs. Late fall-run salmon, however, outmigrate in fall and early winter, and are currently not fully protected during their passage through the Delta. Protective criteria for this run should be developed by the State Board in the near future to ensure that this run is protected.

Younger salmon, or fry, also enter the Delta, particularly when rainstorms stimulate the movement of fry out of the tributaries and into the lower Rivers and Delta. Some protection for these fry is afforded by the current State Board standards requiring closure of the Delta Cross Channel gates when flows are higher than 12,000 cfs. However, closure of the Cross Channel gates alone may not be protective enough, since fry can be swept into the central Delta through Georgiana Slough and upstream to the export pumps when there is reverse flow in the lower San Joaquin River, especially during times of high export. For that reason, Delta habitat conditions for fry may need to be addressed by the State Board in the future.

f. Protection of Other Migrating Species

Species other than salmonids seasonally migrate into and out of the Delta for spawning and as juveniles. These species include striped bass, Delta smelt, longfin smelt, white and green sturgeon, American shad and Sacramento splittail. With the exception of temperature, the factors that lead to successful migration of salmonid smolts are also important for successful migration of the juveniles of these species into the lower embayments. Therefore, EPA's proposed salmon smolt survival criteria, although specifically addressing fall-run Chinook salmon, will also help protect migration of these other migrating species.

3. Fish Spawning Criteria

a. Background

In California, striped bass spawn primarily in the warmer freshwater segments of the Sacramento and San Joaquin Rivers. Protection of spawning in both river systems is important to ensure the genetic diversity of the population as well as to increase the size of the overall striped bass population. Adults spawn by migrating upstream from the San Francisco Bay or from the Pacific Ocean (Stevens 1979; Wang 1986). The precise location and time of spawning appear to be controlled by temperature and salinity (Turner 1972a; Turner and Chadwick 1972). According to the California DFG, striped bass spawn successfully only in freshwater with electrical conductivities less than 0.44 millimhos [10] per centimeter electroconductivity (mmhos/cm EC), and prefer to spawn in waters with conductivities below 0.33 mmhos/cm. Conductivities greater than 0.55 mmhos/cm appear to block the upstream migration of adult spawners (Radtke and Turner 1967; SWRCB 1987; CDFG 1990b, WQCP–DFG–4).

In the Sacramento River, adults migrate to spawning sites upstream of Sacramento until they encounter the appropriate warmer temperatures for spawning. Because of the higher volume of water in the Sacramento River and the particular constituents and volume of nonpoint source discharges into the river, salinity does not appear to be a serious limitation on spawning at any location along the river. In years of higher spring river flows, with correspondingly lower water temperatures, bass can spawn further upstream and later in the April-June period because the warmer temperatures that induce spawning occur later (Chadwick 1958). Migration and spawning in the Sacramento River are therefore not adversely affected by salinity. In the smaller and shallower San Joaquin River, however, the earlier occurrence of warm temperatures causes the peak spawning period to occur

[10] The salinity problems addressed by the isohaline criteria outlined above are caused primarily by salt water intrusion and are traditionally measured by "parts per thousand". In contrast, salinity conditions upstream in freshwater are generally affected by dissolved salts from upstream water runoff. The salinity content of freshwater is traditionally measured by its electroconductivity or "EC" standardized to 25 C (specific conductance), and is expressed in terms of millimhos per centimeter electroconductivity or "mmhos/cm EC".

earlier than in the Sacramento River; the San Joaquin peak usually occurs in April or May rather than in May or June (Chadwick 1958). Migrating bass seeking the warmer waters encounter excessive upstream salinity caused primarily by runoff. This salinity can block migration up the San Joaquin River, thereby reducing spawning, and can also reduce survival of eggs (Farley 1966; Radtke 1966; Radtke and Turner 1967; Turner and Farley 1971; Turner 1972a, 1972b).

The State Board's 1991 Bay/Delta Plan established objectives of 1.5 mmhos/cm EC at Antioch and 0.44 mmhos/cm EC at Prisoners Point in April and May. EPA disapproved these objectives, in part, because they are not adequate to protect spawning habitat in the reach farther upstream between Prisoners Point and Vernalis.

In the 1987 State Board hearings, California DFG testified that striped bass formerly spawned farther up the San Joaquin River, but that this has occurred less frequently in recent years because of increased salinity levels (CDFG 1987). Salinity in the San Joaquin River increases upstream of Prisoners Point due to reduced freshwater inflow and agricultural return flows. Thus the absence of salinity criteria above Prisoners Point effectively establishes a barrier to adult migration and spawning farther upstream on the San Joaquin River (Turner 1972a,b). California DFG also suggested that there was a danger of losing the part of the population that spawned in this area if high salinities prevent spawning or decrease survival of newly spawned eggs (CDFG 1987; SWRCB. Phase I Hearing Transcript, LXXV, VII 111:3–14).

In the 1991 Bay/Delta Plan, the State Board described several alternative water quality standards that would have extended the protection of spawning conditions upstream of Prisoners Point, including one alternative very similar to the one EPA is proposing today. However, the State Board deferred adoption of revised standards, apparently because of concern that improved spawning conditions would lead to greater losses of young to entrainment at the State and Federal pumping plants. As indicated in its September 3, 1991 letter disapproving certain State criteria, EPA believes that the State Board can, in developing its implementation measures, address the impact of the pumps on this spawning habitat.

EPA also disapproved the 1991 Bay/Delta Plan spawning criteria because they were not based on sound science. The State Board explained that the 1.5 mmhos/cm EC criteria at Antioch was intended to protect spawning habitat upstream of Antioch (near Jersey Point), not at the Antioch location itself. The State Board acknowledged that "the use of 1.5 [mmhos/cm] EC at Antioch appears not to be generally appropriate, and proposed that a thorough review of this [criteria] be undertaken at the next triennial review" (1991 Bay/Delta Plan, p. 5–32). EPA found this indirect and unproven approach of setting criteria downstream in hopes of attaining different criteria upstream deficient, and disapproved it. EPA's proposed criteria would correct this deficiency by establishing the scientifically-defensible criteria at Jersey Point, the actual point of concern.

The State Board also acknowledged that the 1991 Bay/Delta Plan spawning criteria did not protect the spawning reach in the lower San Joaquin River, but instead only at two locations: Jersey Point and Prisoners Point (1991 Bay/Delta Plan, p. 5–30). As a result, the State Board directed California DFG to study how a specific habitat zone of 0.44 mmhos/cm EC could be established in the entire reach between Jersey Point and Prisoners Point "to make certain that the State Board develops water quality objectives that are based on sound scientific data" (1991 Bay/Delta Plan, p. 5–33). EPA agrees, and is proposing criteria to assure that the entire reach between Jersey Point and Prisoners Point should be protected.

b. Proposed Criteria

In its September 3, 1991 letter and subsequent correspondence with the Board, EPA recommended salinity criteria of 0.44 mmhos/cm EC in the lower San Joaquin River in the reach from Jersey Point and Vernalis. After further reviewing the scientific evidence, EPA is proposing the following criteria:

The 14-day running average of the mean daily EC shall not be more than 0.44 mmhos/cm for the period April 1 to May 31 in wet, above normal, and below normal years at the following stations: Jersey Point, San Andreas Landing, Prisoners Point, Buckley Cove, Rough and Ready Island, Brandt Bridge, Mossdale, and Vernalis. In dry and critical water years, the criteria are required only in the reach between Jersey Point and Prisoners Point, as measured at Jersey Point, San Andreas Landing, and Prisoners Point.

These criteria will fully protect the historic spawning range of striped bass on the lower San Joaquin River, while reflecting the natural variability in salinity levels in different water year types.

c. Implementation

Under the CWA, the states have a primary role in developing measures implementing water quality criteria. EPA expects that the State Board would implement these criteria by making appropriate revisions to operational requirements included in water rights permits issued by the State Board.

4. Compliance With Endangered Species Act

EPA has concluded that its promulgation of water quality criteria for the Bay/Delta may affect certain species protected by the federal ESA. These include the winter-run chinook salmon (listed as threatened and proposed for reclassification as endangered), the Delta smelt (listed as threatened), and the Sacramento splittail and longfin smelt (both the subject of petitions for listing). There are also a number of listed and proposed species resident in Suisun Marsh. Under section 7 of the ESA and accompanying regulations, EPA is required to consult with NMFS (on the winter-run chinook salmon) and USFWS (on the other listed and proposed species) to assure that the water quality criteria promulgated by EPA do not jeopardize the continued existence of these species or adversely affect their critical habitat. 50 CFR 402.14 and § 402.10.

EPA has worked closely with NMFS and USFWS over the past two years to meet its obligations under the ESA. The federal agencies have recognized the need to take an integrated ecosystem approach to the Bay/Delta rather than a fragmented, species-by-species approach. To that end, the EPA, NMFS, and USFWS issued a joint proposal to the State Board's 1992 hearings on interim measures recommending that the State Board adopt an immediate goal of restoration of habitat conditions to those characteristic of the late 1960's and early 1970's. By targeting this level of protection, the agencies intended to establish habitat conditions that would protect and preserve the entire range of fish and wildlife uses in the Bay/Delta.

The criteria proposed in this notice follow this approach to habitat protection within the Bay/Delta watershed. Pursuant to 50 CFR §§ 402.14, EPA has initiated formal consultations with USFWS and NMFS on the potential effects of its action on endangered and threatened species. The agencies have agreed to finalize these consultations before EPA promulgates water quality standards in the Bay/Delta.

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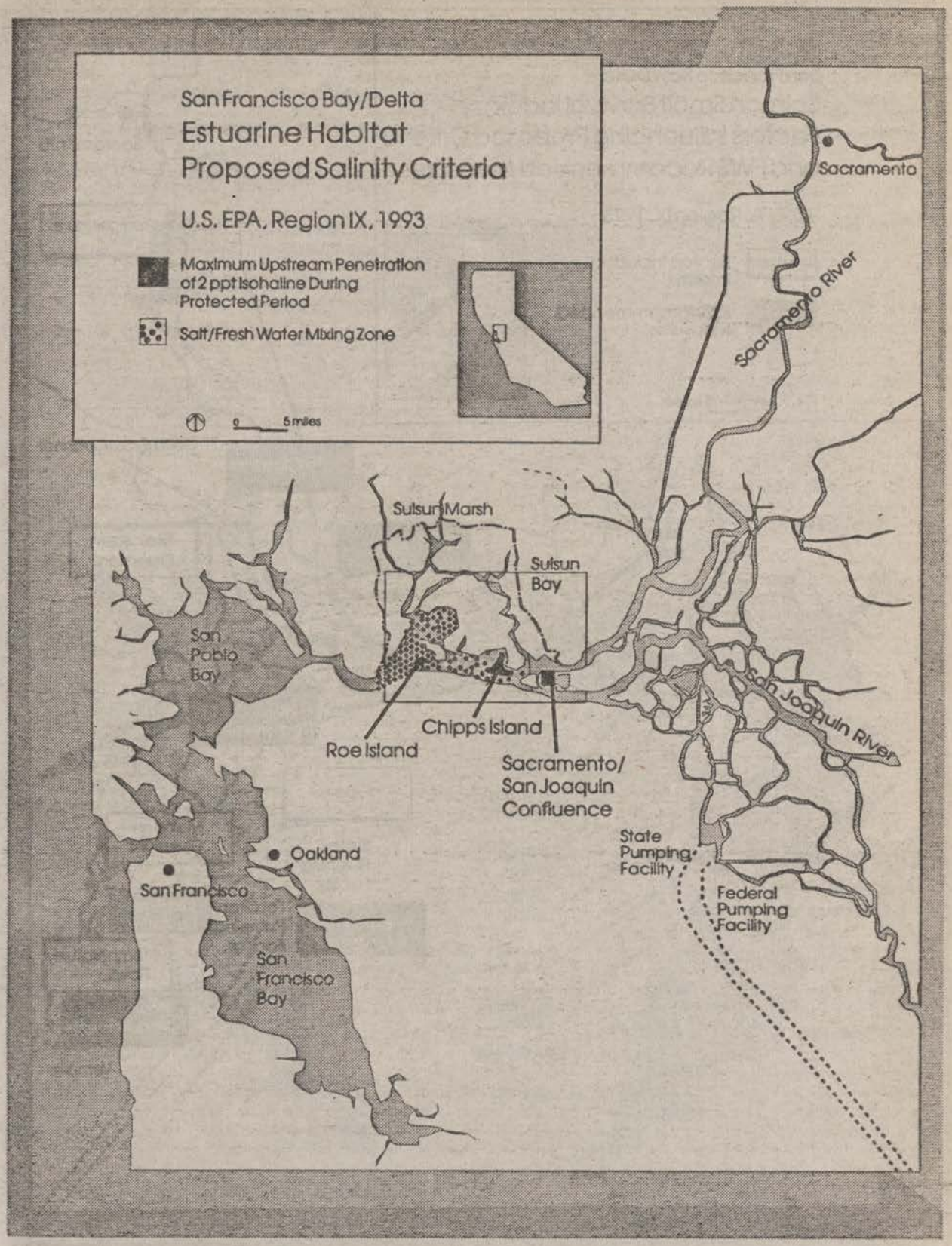
San Francisco Bay/Delta
Estuarine Habitat
Proposed Salinity Criteria
U.S. EPA, Region IX, 1993
Maximum Upstream Penetration of 2 ppt Isohaline During Protected Period
Salt/Fresh Water Mixing Zone
0 5 miles
Sacramento
Sacramento River
Suisun Marsh
Suisun Bay
San Pablo Bay
Chipps Island
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San Joaquin River
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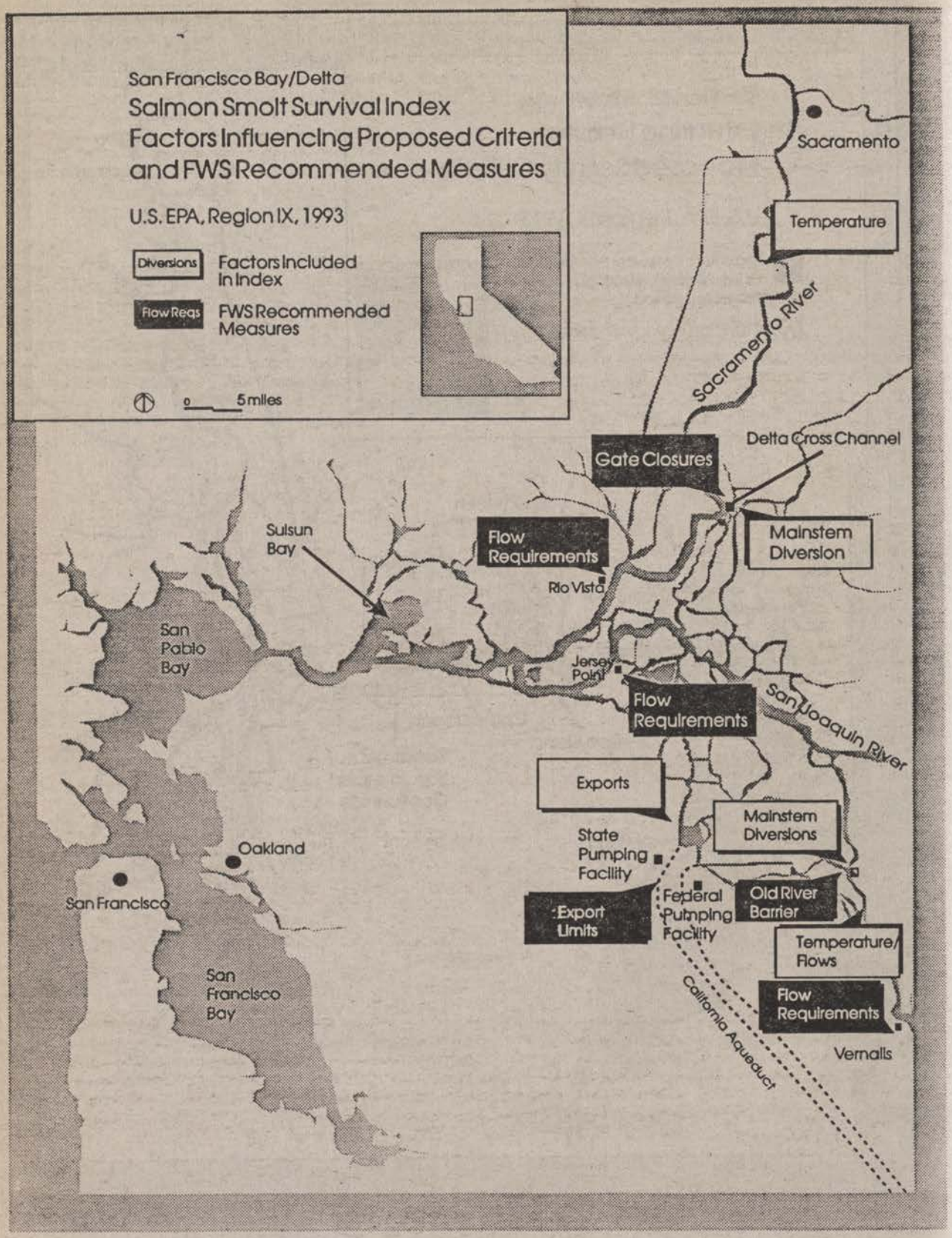
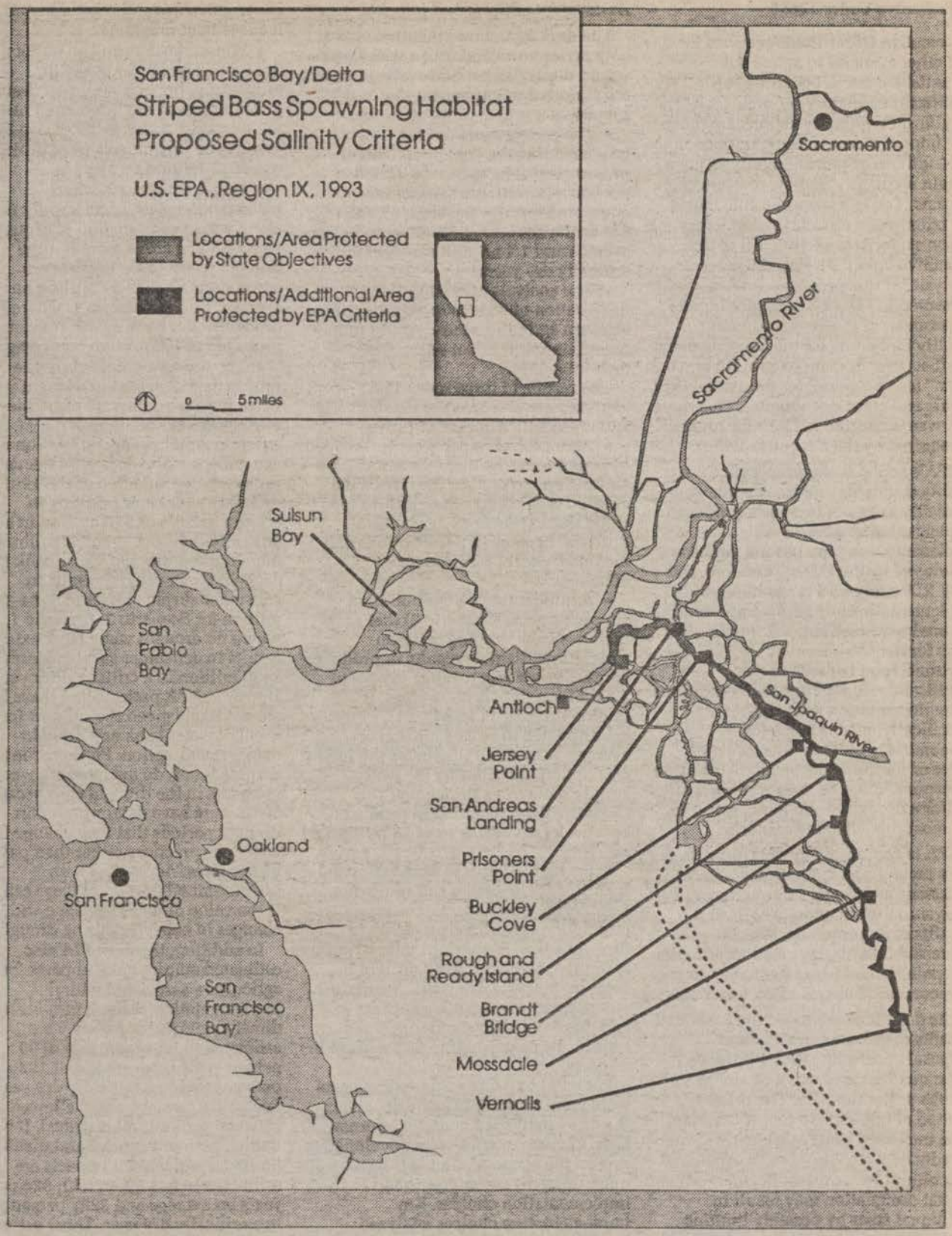
Federal Pumping Facility
Oakland
San Francisco
San Francisco Bay


San Francisco Bay/Delta
Salmon Smolt Survival Index
Factors Influencing Proposed Criteria
and FWS Recommended Measures
U.S. EPA, Region IX, 1993
Diversions
Factors Included in Index
Flow Reqs
FWS Recommended Measures
0
5 miles
Sacramento
Temperature
Sacramento River
Delta Cross Channel
Gate Closures
Mainstem Diversion
Suisun Bay
Flow Requirements
Rio Vista
San Pablo Bay
Jersey Point
Flow Requirements
San Joaquin River
Exports
Mainstem Diversions
State Pumping Facility
Oakland
San Francisco
Federal Pumping Facility
Old River Barrier
Export Limits
Temperature/ Flows
San Francisco Bay
Flow Requirements
California Aqueduct
Vernalis



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D. Executive Order 12866

Executive Order 12866 requires EPA and other agencies to assess the potential costs and benefits of all significant regulatory actions. Significant regulatory actions are those that impose a cost on the economy of $100 million or more annually or have certain regulatory, policy, or economic impacts. Today's proposed rule meets the criteria of a significant regulatory action set forth in section 3(f) of the Executive Order. The regulatory analysis for this proposed rule is presented in "Draft Regulatory Impact Assessment of the Proposed Water Quality Standards for the San Francisco Bay/Sacramento-San Joaquin River Delta" (see Section F for the availability of this and other documents). This draft RIA was submitted to OMB for review as required by the Executive Order.

EPA's action is the proposal of water quality standards and this action explicitly does not include a proposed implementation plan. The implementation plan has not yet been developed by the State. Therefore, this draft RIA analyses a range of possible implementation scenarios. Importantly, the analysis illustrates that the level of costs for the same level of environmental benefits varies significantly depending on assumptions in implementation scenarios. Specifically, mechanisms for economically-efficient allocation of water or for the widespread distribution of responsibility, such as water transfers and/or a drought water bank, result in the most cost-effective scenarios.

EPA is committed to working with the State on an implementation plan and welcomes additional information and analysis on the economic costs and benefits of its proposals. EPA is interested in both improved information and policies and programs to minimize the economic impacts upon water users.

The draft RIA evaluated the costs and benefits of the combined federal proposals, including EPA's proposed water quality standards and USFWS's actions under the ESA. The primary method of implementation is assumed to be increased Delta outflow resulting in reduced water supplies to urban and agricultural water users. Further, critical habitat designation may result in additional costs by possibly limiting sand and gravel operations and affecting marina operations. Benefits are to the Delta ecosystem as a whole, species diversity, and commercial and recreational fisheries.

Assessment of Costs and Impacts

The draft RIA shows that the costs to both agricultural and urban water users would depend upon how water supplies are allocated to implement the proposals.

- The primary method for implementing the combined federal proposals will be increases in Delta outflow. Current estimates of the additional outflow developed by the California DWR are 540,000 acre-feet on average and 1.1 million acre-feet in critically dry years.
- The analysis uses an initial distribution of water supply reductions between agricultural users (80% of the reductions) and urban users (the remaining 20%).

The results of three scenarios analyzed are presented in the draft RIA and are briefly summarized here.

- Agricultural impacts are influenced by improved irrigation efficiency, crop shifting opportunities, the size of the affected region and opportunities for water trading between agricultural districts. A range of these options was modeled, except for irrigation efficiency.
- A middle range distribution of supply impacts (Scenario 2) that includes water trading between agricultural districts results in producer surplus losses (net revenue losses) of $20 million dollars on average. If trading is limited (Scenario 1), impacts are estimated to be $44 million on average. Scenario 3 illustrates the lowest cost option, distributing the water supply reductions throughout the Central Valley, resulting in producer surplus losses estimates of $8 million on average.
- Economic impacts were estimated for critically dry years and indicate larger economic impacts, because lower cost options are already used up in drought years. Scenario 1, where trading is limited, estimates $147 million in costs in critically dry years. Scenario 2, where trading is facilitated among agricultural districts, reduces those impacts by nearly half to $87 million in impacts.

Potential impacts on the urban users were more difficult to estimate, given the less-established analytic information base. Three scenarios were developed to project the economic impacts based upon different assumptions and implementation choices. Key implementation choices analyzed include the availability of transfers, drought water pricing, a drought water bank and increased water reclamation. Additional water management choices include increased conservation, conjunctive use and other demand management programs.

- Water transfers and an efficient drought water bank are key to minimizing impacts on urban users, given increased environmental needs. In the least-cost scenario, (Scenario 3) impacts on urban users were projected to be $25 million on average.
- Under Scenario 2, where reclamation meets urban supply needs along with a combination of drought water pricing and a more limited drought water bank, impacts are approximately $50–54 million on average. Under Scenario 1, where no drought water bank exists, impacts are projected at $80 million on average.
- The economic impacts of the proposals are highest in drought years, when fewer supplies are available to meet increased urban and environmental needs. Estimation of consumer surplus losses for Scenario 3 projects a continuation of the 1991 drought water bank resulting in economic costs of $70 million in a critically dry year. A combination of a more limited drought water bank and drought water pricing results in consumer surplus losses of $184–223 million for Scenario 2. Scenario 1, where no drought water bank exists, results in consumer surplus losses of $450 million in a critically dry year. However, EPA projects that these losses are not likely given the support for a drought water bank as a drought management option. Further, consumer surplus losses do not measure water bill increases in the drought case because consumers have demonstrated in drought periods that they change their water use practices rather than pay higher rates. Accordingly, an undetermined portion of these estimates is the value of inconvenience and changes in behavior during drought.

In addition, the draft RIA also estimated employment impacts for agriculture associated with the implementation of these proposals. The direct employment effects were estimated to be a reduction of 99 person-years on average, but 1926 person-years in a critically dry year for Scenario 2 (water trading allowed between agricultural districts). If water trading between agricultural districts is limited, employment impacts are estimated to be higher, with 828 person years on average and 3282 person years in a critically dry year. These estimates are not predicted employment changes (e.g impacts that would effect the actual unemployment rate) because they do not account for a full labor market equilibrium analysis.

Assessment of Benefits

Background: The Bay/Delta estuary constitutes one of the largest habitats for fish and wildlife in the United States. The estuary supports more than 120 fish species and provides a stopover or home for more than half of the waterfowl and shorebirds migrating on the Pacific Flyway. Suisun Marsh, which is within the Bay/Delta estuary, supports many rare plant and animal species. Maintenance of freshwater, estuarine, and wildlife habitat would preserve rare and endangered species; permit fish migration; and provide opportunities for commercial ocean fishing and sport fishing.

Qualitative assessment: The combined proposed requirements will increase the protection of the estuarine habitat in the Delta and will benefit the ecosystem overall. In addition, the combined proposal is expected to increase biological productivity of such important resources as salmon, striped bass, and waterfowl; protect diversity of species, such as Delta smelt, longfin smelt and Sacramento splittail, that are unique to the Bay/Delta ecosystem; increase commercial and recreational fishing opportunities; and increase opportunities for wildlife observation resulting from restoration of riparian and tidal marsh habitat and ecosystem.

Benefits associated with the federal proposals are described qualitatively for most ecosystem benefits. Some fish population increases were estimated and a portion of the commercial and recreational fishery benefits were monetized.

- The benefits of the federal proposals are an increase in biological productivity and ecosystem health for the Bay/Delta ecosystem. This increase includes protecting unique species from extinction. Bay/Delta species that currently might qualify for listing under the ESA include the longfin smelt, spring-run Chinook salmon, Sacramento splittail, green sturgeon, and Red Hills Roach, in addition to the already listed winter-run Chinook salmon and Delta smelt. A potential benefit of the federal proposals is that the ecosystem health might improve to the point where unlisted species need not be listed, or presently listed species could be delisted under the ESA.
- Well-established relationships between estuarine conditions and populations exist for many estuarine species. The extent of the low salinity habitat in the estuary is closely associated with the abundance and distribution of estuarine species at all trophic levels. Increased populations were estimated for salmon (increasing by approximately 90,000 salmon), striped bass (increasing by approximately 10 percent), and starry flounder. In addition, populations of other game species of green and white sturgeon, bay shrimp, American shad and white catfish are expected to increase.
- A portion of these population increases will accrue to the recreational or commercial fisheries. Not less than $9–11 million annually were estimated, again with many benefits not estimated in dollar value. The majority of these gains are in the commercial salmon fishery. Employment gains in the salmon fishery were estimated to increase by 300–360 jobs annually.
- Many other recreation activities, including hunting, boating, and nature appreciation are expected to be enhanced by the proposed regulations; however, the estimated change in participation in these activities could not be quantified.
- Enhancing the natural environment of the Bay/Delta would have nonuse social benefits. Although these benefits could not be quantified, it is believed that they constitute the largest portion of the total value to society of implementing the proposed regulations.
- Enhancing water quality in the Bay/Delta could result in other benefits associated with the avoidance of listing additional species and associated increased flexibility in water management and the avoided costs of further collapse of the ecosystem and its associated fisheries and dependent communities.

Summary of Costs and Benefits

Monetized social costs and benefits of the federal proposals are not directly comparable in this analysis because some use benefits to fisheries and non-use benefits of ecological improvement and species diversity cannot be estimated. However, two conclusions can be drawn:

- The implementation plan for the federal proposals has not yet been developed, thereby making it difficult to project actual levels of economic impacts. However, it is reasonable to assume that cost-effective solutions will be pursued that include a flexible approach to meeting Delta requirements. Thus, economic costs in the agricultural sector are estimated to be $20 million on average and $25 million for the urban sector. However, the overall costs may be lower than the total, given that at least some of the increases in urban costs will be payments to agriculture for water transferred. The benefits are estimated to be $10 million from improved commercial fisheries, and unquantified but important ecological, scientific, educational and existence values.
- Costs and benefits are difficult to compare directly in this case because of the non-marginal nature of ecosystem protection and species protection. These benefits, including preventing the extinction of several candidate or listed species and preventing the collapse of the Bay/Delta ecosystem, account for the majority of benefits.
- Given both the monetary estimates of benefits and the qualitative information on benefits not expressed in dollar value, EPA believes that the proposal can be implemented in a cost-effective manner where a healthy estuary and fisheries can co-exist with a strong agricultural and urban sector. Given all the available information, the benefits are commensurate with the costs.
- Comprehensive analyses of the incremental response of costs and benefits to marginal changes in EPA's proposed rule have not been prepared. However, EPA has developed in the draft RIA a method for roughly estimating incremental changes in economic costs based on changes in the number of days of compliance with the proposed salinity criteria at particular locations in the estuary. These estimates are based on the estimates of the flows necessary to maintain the criteria at the target locations. For example, the difference in water supply impacts between a day of protection at Chipps Island and a day of protection at the Confluence is 12,276 AF/year. These estimates of the difference in water supply impact can be compared to the dollar value of that water, which the draft RIA estimates as being $90 per AF.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. § 601, et seq., requires EPA and other federal agencies to prepare an initial regulatory flexibility analysis (IFRA). EPA's internal guidelines require that an IFRA include a profile of the small entities and determine if the statutory authority allows consideration of alternative implementation actions.

EPA has determined that the action does not allow consideration of alternative implementation actions. First, under the Clean Water Act, water quality criteria must be based solely on science. Second, EPA is promulgating water quality criteria that in effect supplement state criteria that fail to meet the requirements of the CWA.

EPA has prepared an abbreviated regulatory flexibility analysis. It's findings include the following:

• Minimizing the impacts on small farms can be accomplished by developing the least costly implementation plan, which distributes water supply reductions widely and facilitates trading between water districts. Given that allocation of water at the farm level depends primarily on decisions at the irrigation district level, determining which size farm would experience water supply impacts will also be difficult at the State level.

F. Availability of the Record

The administrative record concerning the California Bay/Delta Water Quality Standards discussed in this preamble is available for public inspection and copying at the Environmental Protection Agency, Region IX Office, Water Quality Standards Branch, 75 Hawthorne Street, San Francisco, California 94105.

G. Specific Issues for Commenters to Address

Written public comments are invited on all issues raised in this notice. EPA is especially interested in soliciting public comments on the following issues:

1. EPA requests comments on the feasibility of setting water quality criteria based on a smooth function rather than on the mean value for each water year type categories.

Testimony at recent State Board hearings criticized the use of water year type categories. Because water year types can change as the year progresses, criteria based on the historical mean for each water year type can cause major changes in project operations and habitat conditions if a given year shifts from one water year type to another. For example, a later season storm could cause the water year type to be reclassified from the below normal category to the above normal category. This shift would increase the number of required days of compliance at Chipps Island from 119 to 144 days. Such large and sudden changes are inefficient for water resource management and can harm aquatic resources by dewatering or washing away newly spawned eggs. One formulation of the criteria that could provide for more gradual shifts is described below.

California DWR, USBR, and others have suggested that a smooth function should replace the use of means for each water year type category. Use of these smooth function equations would result in the same average number of days required for each year type but would involve higher numbers in wetter years within the category and lower numbers for the drier years within each category. Incorporation of a smooth function would likely ease the actual operational procedure to meet the criteria and would avoid the relatively large scale changes in operations that might come from a shift in the determination of year type as spring progresses.

EPA has discussed the use of a smooth function criteria with water project operators and the State Board, and has thus far received a very positive response. Because it is a new approach that has not received substantial scrutiny in California, EPA's proposal above relies on the traditional water year type classification. However, if public comments do not raise any significant issues preventing its use, EPA would be inclined to use the smooth function criteria as an alternative to the water year type classification.

The discussion below describes one possible approach to the construction of a smooth function criteria, and compares the potential effects of those functions with the traditional water year type criteria. Because no critically dry years occurred in the reference period it is necessary to extrapolate from the four year types for which there are data to the critical year type. Fortunately, there is a very high correlation among the four points (Figs. 1 and 2). These extrapolations allow the required number of days at Roe and Chipps Islands in each year type to be described as a pair of smooth functions.

Port Chicago Equation (see Figure 1).

$$\text{Days}=76 * \text{Index} - 3.3 * (\text{index})^2 - 299$$

This equation produces a wide range of required number of days within most year types and in all but wet years would involve a range of about thirty days. Use of the equation would result in little variance within wet years.

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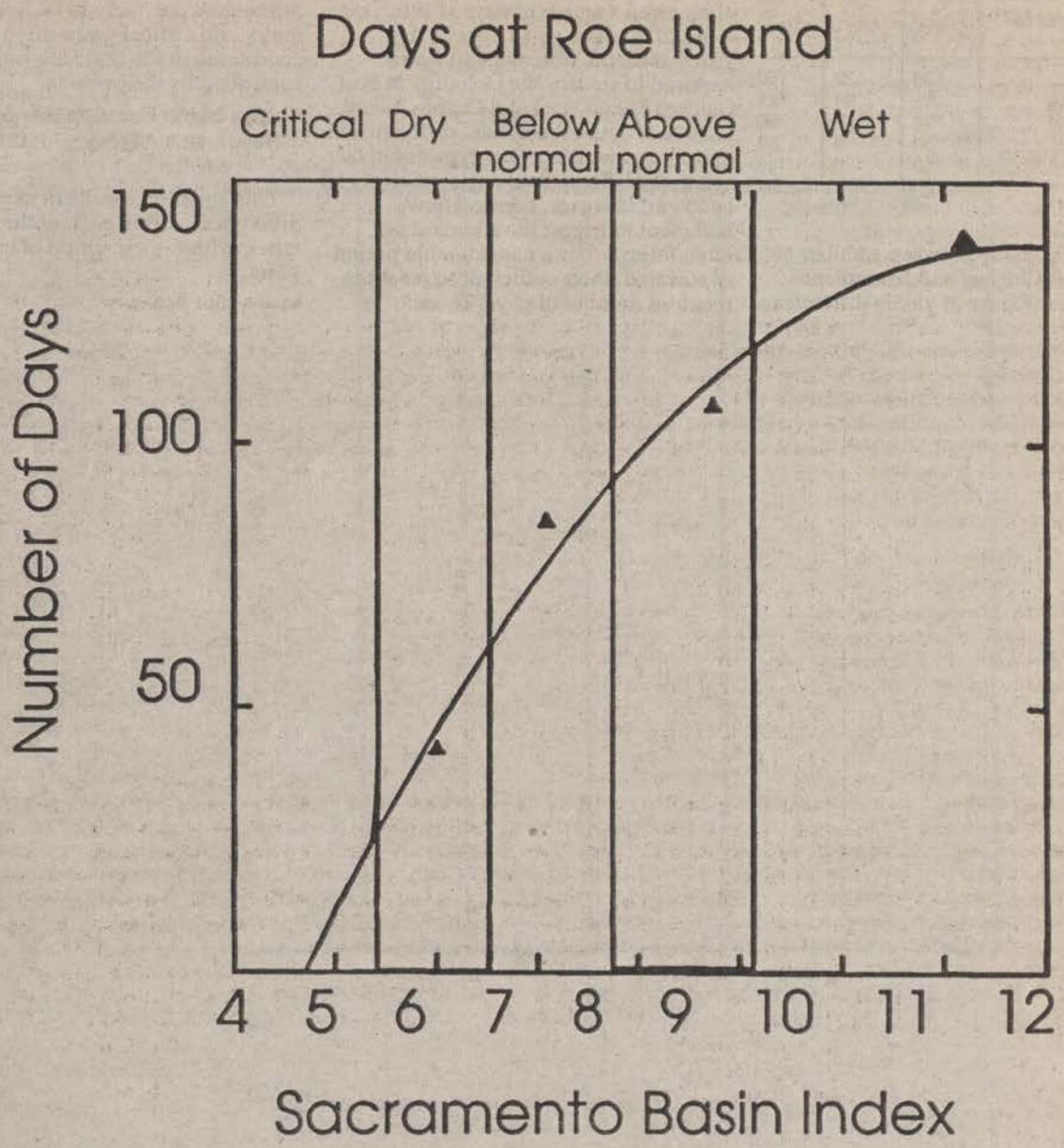

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Port Chicago (64 km)	Mean	Min	Max
Wet	133	122	150
Above normal	105	94	121
Below normal	78	57	93
Dry	33	16	56
Critical	0	0	15

Figure 3.

The relationship between number of days at Port Chicago and Sacramento Basin Index (Figure 3) yields differences of required number of days within year types of as much as 40 days in dry years. With the difference in flows required to sustain the isohaline at Port Chicago (29,000 cfs) and Chipps Island (12,000 cfs), the theoretical difference in water costs within a year type could be substantial. The actual costs are likely to be lower, however, because flows sufficient to trigger the standard are often followed by a considerable period of elevated flows sufficient to meet the required number of days. These differences are likely to be fully realized in dry and critical years when conditions in the Delta are fully controlled by the projects.

Chipps Island Equation (see figure 2)

Days = 26.3 * Index − 1.13 * (index) − 4.6

This equation results in small differences within each of the year types, with the exception of critical years.

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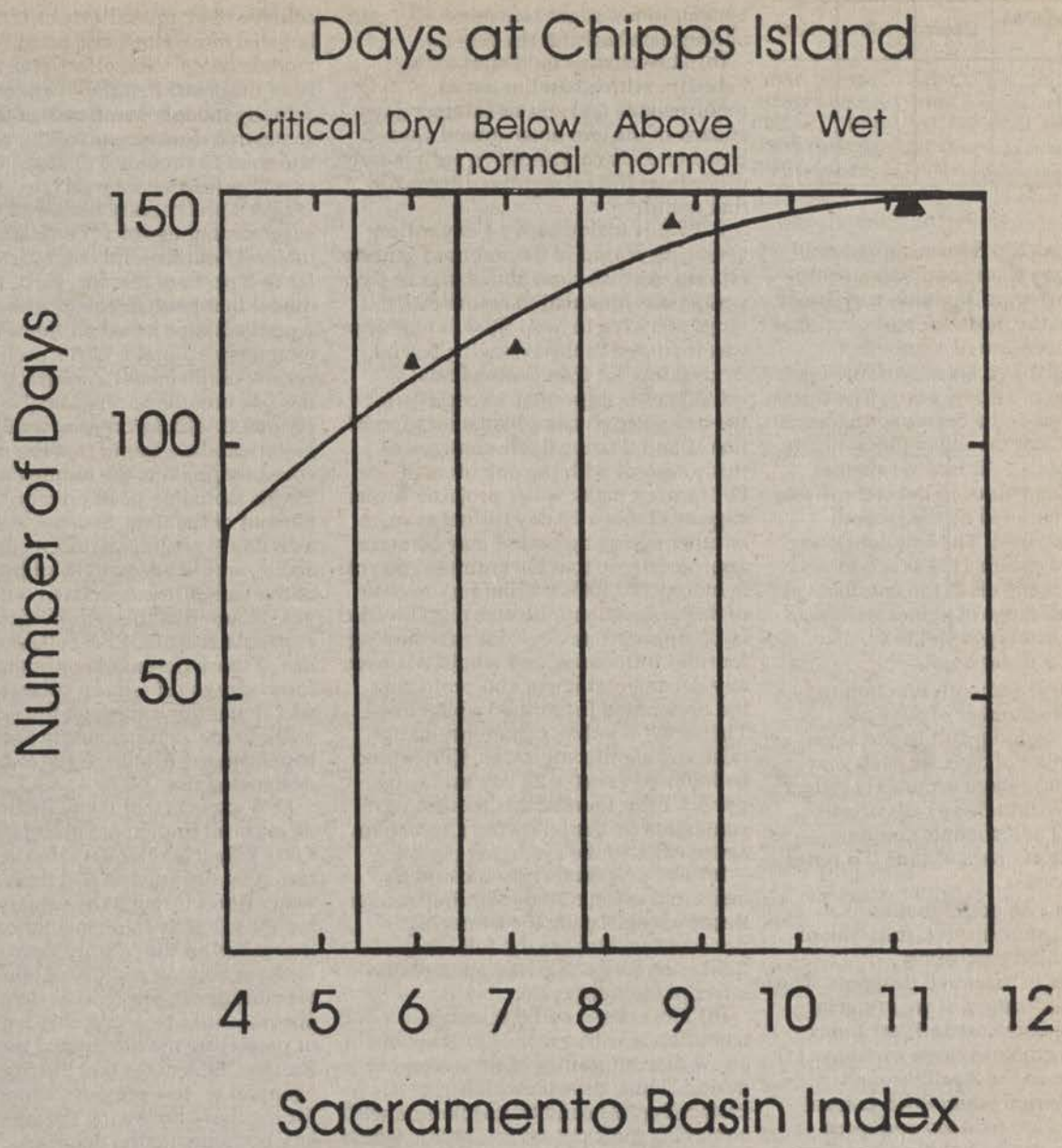

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Chipps Island (74 km)	Mean	Min	Max
Wet	148	142	150
Above normal	144	133	141
Below normal	119	118	132
Dry	116	105	118
Critical	90	66	104

Figure 4.

The relationship between number of days at Chipps Island and Sacramento Basin Index (Figure 4) yields very small ranges about the mean for all but critical years. However, use of a smooth function is justified because of the open-ended nature of critical years. The driest year on record had a Sacramento Basin Index of 3.1, but the index theoretically could approach 0. This wide span of possible index values in the critical year type is best handled by the smooth function described. The smaller flows this standard entails (12,000 cfs at Chipps and 5,800 cfs at the confluence) and the small range of values within all but critical year types yields smaller differences in water costs.

In summary, a smooth function to determine the number of days of compliance would result in the same average number of days for each year type, but would more accurately reflect differences within these categories. Hence, small adjustments could be made in project operations as the water year progresses.

The use of a smooth function addresses, to some extent, the issue of adjusting habitat protection requirements in extended droughts. The present identification of year type is based on the Sacramento River Index. That index combines three variables: (1) Precipitation in the April through September period when flood control requirements are reduced and more precipitation can be held in reservoirs, (2) the index of the previous year which partly reflects the amount of carry-over storage, and (3) precipitation in the October through March period. The index weights these three factors in a 40:30:30 ratio. For the purpose of protecting estuarine habitat, the precipitation in February to June and the amount of carry-over storage may be more important than precipitation in the rest of the year. EPA is requesting comments on the possibility of modifying the Sacramento River Index for purposes of developing the salinity criteria as follows:

(a) The criteria could calculate an index weighted more toward the previous year's Sacramento River Index and the February through June precipitation. A 40:40:20 ratio or even 50:50:0 index might be a more appropriate basis for the criteria.

(b) The criteria could start each February with a baseline set of requirements and add or subtract days at each of the two downstream sites based on how conditions in each month differ from the average conditions for that month.

2. EPA is including a 14 day rolling averaging period in its proposed salinity criteria. As discussed above, the 14 day period was included to assure that the range of spring to neap tidal conditions was included in the averaging period. Accounting for the effects of tidal influences is important, especially for the downstream compliance location at Roe Island. During its discussions of this proposal with the operators of California's major water projects, it was suggested that a 28 day rolling average or other averaging period may be more appropriate, so that the entire tidal cycle is included. EPA's preliminary review of this suggestion indicates that it would be an appropriate device for accounting for tidal influences, and would not have any detrimental impact on protecting the designated Estuarine Habitat use. Therefore, if public comments do not raise any significant issues, EPA would be inclined to use a 28 day averaging period. EPA, therefore, is requesting comments on the following alternative approaches to the averaging period:

(a) The proposed criteria could be measured using a 28 day rolling average, thereby lengthening the averaging period to encompass the full range of tidal strengths and giving an overall effect of the tidal cycle.

(b) The criteria could measure compliance with a rolling average but allow discontinuities in the averaging period. Thus, days on which meteorological conditions interfere with achieving the 2 ppt criteria at Roe Island would be counted instead as days of meeting the criteria upstream at Chipps Island. This approach could be applied only until all days that are required at the upstream site are met.

3. As a part of EPA's coordination process in developing this proposal, the Agency has discussed its proposed criteria at length with the operators of California's major water projects. These operators, who will have substantial responsibilities under any implementation plan developed by the State Board, raised a question about how compliance with the 2 ppt salinity criteria should be measured. Under existing operational models, these operators would translate the proposed criteria into a set of flow parameters, and would operate the system pursuant to those flow parameters so as to achieve the 2 ppt salinity criteria at the targeted sites. However, because all models contain imperfections, it has been proposed that the operators should actually model compliance at a site somewhat downstream of the targeted site so as to provide a "margin of error" or a "confidence interval".

EPA's preliminary review of this issue suggests that use of a "confidence interval" of this kind is unwarranted, for two primary reasons. First, the model that predicts the location of the 2 ppt isohaline based on flows is extremely accurate. EPA's preliminary review of the model's accuracy during the five months covered by the proposed salinity criteria, using historical data, found that the model correctly predicts the number of days for the isohaline position more than 95 percent of the time. Second, the use of a 28 day averaging period, as described above, would adequately address most of the variability associated with factors not included in the salinity-flow model. For these reasons, EPA believes that the use of these proposed confidence intervals would require substantial additional flows through the estuary without any corresponding ecological benefit to the Estuarine Habitat designated use.

EPA expects that the State Board will develop an implementation plan for these Estuarine Habitat criteria by changing the volume and timing of water flows through the estuary. EPA believes that an implementation plan that relies on the salinity-flow model, without making additional allowances for confidence intervals as described above, would be acceptable for purposes of protecting the designated use. Further, EPA notes that the State's triennial review provides a mechanism for regularly reviewing the adequacy of any implementation decisions concerning confidence intervals for the proposed salinity criteria.

EPA solicits comment from the public on this issue, and welcomes any evaluation on the merits of the use of this or other forms of confidence intervals with the proposed criteria. Specifically, EPA requests comment on whether the proposed criteria without the above confidence interval adjustment would be protective. Alternatively, would a confidence interval based on an extended number of days of compliance at the targeted sites yield the desired level of confidence without requiring the higher flows required by the confidence interval proposal outlined above?

4. Will these criteria be adequate to protect low-salinity habitat conditions in wetter years? The SFEP workshop

that developed the scientific rationale for an estuarine index based their conclusions on correlations between mean position of the 2 ppt isohaline during appropriate months and the abundance of estuarine organisms at all trophic levels. With the exception of mollusks, yearly measures of abundance increase either linearly or logarithmically as the mean location of the 2 ppt isohaline moves down the estuary.

EPA has developed its proposed Estuarine Habitat criteria based on the number of days at particular locations in the estuary, rather than a mean position over a series of months. These criteria have the advantage of being more easily implemented, and more directly tie certain salinity ranges to certain geographic locations (such as the extensive shallows of Grizzly Bay). However, basing the number of days on a certain historical period (such as 1940 to 1975) does not mean that the mean position of the 2 ppt isohaline for these reference years will be achieved. By using the historical period of 1940 to 1975 to define the number of days at each location, we are approximating the actual historical (late 1960's to early 1970's) mean position of the 2 ppt isohaline in drier years. However, EPA's criteria may not provide overall conditions equal to those during the late 1960's to early 1970's. This is because the mean position of the 2 ppt isohaline in wetter years has been substantially downstream of the wetter year positions in the proposed rule (see Table below).

MEAN POSITION, IN KM, OF THE FEBRUARY THROUGH JUNE 2 PPT ISOHALINE, BY YEAR TYPE, FOR 1940–1975 HISTORICAL PERIOD AND LATE 1960'S TO EARLY 1970'S HISTORICAL PERIOD (BASED ON DAYFLOW INFORMATION AND THE SALINITY/FLOW RELATIONSHIP DEVELOPED BY KIMMERER AND MONISMITH; SFEP 1993B), AND EPA CRITERIA

Year type	C	D	BN	AN	W
1940–1975	.....	70	67	59	56
1964–1975	.....	74	73	62	59
EPA criteria—with trigger [9]	77	73	70	67	65
EPA criteria—without trigger	77	76	75	74	74

[9] The EPA criteria include the Roe Island criteria with its "trigger", which in some years will not be triggered. These two sets of results indicate the mean position of the 2 ppt isohaline in the event that the Roe Island criteria is and is not triggered.

These wetter years are an important component of the natural hydrology; 40 percent of the last 50 years have been in the "wet" category. They are years of very high productivity for the estuary, and are likely to provide a buffer for times of low productivity, especially for those species living longer than one or two years. Such variability also encourages diversity, such as the plant diversity in brackish tidal marshes bordering Suisun Bay. While many of the winter/spring flows during these years are presently considered "uncontrollable," a number of new water projects have been proposed that would capture part of these flows.

One concern about the future development of these "uncontrolled" flows involves a possible decrease in the frequency with which triggering conditions will occur. The level of protection afforded by the Roe Island standard would be reduced if additional upstream water developments decrease uncontrolled wintertime flows, thus reducing the frequency with which the standard is triggered. EPA welcomes comments on how this standard should be modified to reflect future changes in upstream water development facilities.

An additional concern about the protection of conditions in wetter years is that some wet years are much more productive than others. By developing standards that can be met in all wet years some of the biological values associated with exceptional years is not included. Part of the difficulty of developing criteria to protect the biological value of these wetter years arises from the open-ended nature of the wet year category. Recent wet years include years as different as 1983 and 1986. In 1983, precipitation, both rain and snow, was heavy throughout the winter and spring. In 1986, on the other hand, a large tropical storm produced record-setting precipitation which lasted for a brief period and fell almost entirely as rain. Although both these were wet years, 1983 had about three times the amount of precipitation of 1986 and, because of the heavy snowfall, a much higher amount of water was available for use. Possible ways to protect the value of wet year habitats include the use of triggered standards downstream of Roe Island or by requiring more days at Roe Island in the wettest years.

EPA welcomes suggestions on the proper level of protection that should be provided during these wetter periods.

5. One of the critical elements of EPA's proposal is the determination of the proper historical reference period for developing target numbers of days when the 2 ppt isohaline is at a particular point in the estuary. As discussed above, EPA is recommending a level of protection for the Bay/Delta similar to that existing during the late 1960's to early 1970's. To estimate the hydrological conditions during the late 1960's to early 1970's across the five water year categories, EPA is proposing using the 1940 to 1975 period as the historical reference period.

The choice of years to include in the historical reference period can strongly affect the number of days when the 2 ppt isohaline is at a particular point. Incremental changes in the number of days have corresponding incremental effects on the water supply impacts of these proposals.

Prior to the building of Shasta Dam, uncontrolled spring runoffs resulted in as many as 150 days when the 2 ppt isohaline was located at or below Chipps Island, even in critical years, whereas in recent years there have been as few as 0 days. In developing the proposed rule, EPA has used the period between October 1939 and September 1975 to represent the period when the conditions in the estuary were sufficient to protect the designated fisheries uses. As explained above, this span of years provides the greatest number of examples of each year type during the period after the massive changes in hydrology due to the construction of the Shasta Dam on the Sacramento River and the Friant Dam on the San Joaquin but before the most dramatic recent declines in fishery abundance. Even so, the chosen historical reference period contains no examples of critical years and only three examples of above normal years.

One example of the variability of conditions within the chosen historical reference period involves the Chipps Island location. There is a great deal of variability in the number of days the 2 ppt isohaline was at Chipps Island within each of the drier year types in

the historical reference period. Although the years with fewest days occurs later in the period there are examples of later years with more days than earlier years. The following table gives the number of days that the 2 ppt isohaline was west of Chipps Island for each dry and below normal year in the historical period. The latest examples of dry years in the proposed reference period, 1964 and 1961, had the fewest days at Chipps Island. These two dry years, however, were immediately preceded by a dry year (1960) with a number of days at Chipps Island substantially greater than the historical mean, and the year with the third lowest number of days at Chipps actually occurred in 1947. The absence of a strong pattern of decreasing days at Chipps Island over time was the principal basis for EPA's use of as broad a historical period as possible, the full period from 1940 to 1975, as the historical reference period.

Year	Dry years	Below normal
Number of days between February and June when 2 ppt isohaline was west of Chipps Island;		
1930	146	
1932	151	
1935		150
1936		151
1937		150
1939	106	
1944	142	
1945		150
1946		150
1947	111	
1948		143
1949	141	
1950	150	
1955	129	
1957		147
1959		81
1960	123	
1961	89	
1962		136
1964	75	
1966		112
1968		83
1972		63
1979		117
1981	76	
1985	31	
1987	46	
1989	39	

During the development of EPA's proposal, it has been suggested that the years 1964 to 1976 could be used as an alternative historical reference period. This period almost literally replicates the intended late 1960's to early 1970's. EPA has not chosen that period for two reasons. First, it is an extremely limited sample of the variation of conditions within water year categories. Second, including the year 1976 is inappropriate, given that by 1976 the decline of certain aquatic resources was already apparent.

Another suggested possibility is that use of the 1955 to 1975 time period may be a better indicator of conditions in the late 1960's to early 1970's. The 1955–1975 period excludes water years before the CVP's pumping facilities were operational, but still provides a larger sample across certain water year types than would using the 1965 to 1974 period alone. As the table above indicates, using this 1955 to 1975 period would decrease the number of Chipps Island days from 116 to approximately 104 days during dry years, and from 119 to approximately 104 days during below normal years.

EPA did not use this 1955–1975 period as the historical reference period because, as explained above, it believes the 1940 to 1975 period provides a larger and more representative sample of hydrological conditions across all year types similar to those in the late 1960's to early 1970's.

Given the importance of this issue, EPA requests comments on the suitability of the above suggestions or of other historical reference periods for the salinity criteria. EPA is especially interested in how the use of alternative periods could provide a better estimate of the hydrological and ecological conditions in the estuary in the late 1960's to early 1970's. In addition, EPA is soliciting comment on alternative approaches to developing reference conditions for water year types for which there are limited historical examples.

6. During the spawning season, several species appear to be carried through the Delta to Suisun Bay during periods of elevated Delta flows caused by upstream storm events. The proposed Roe Island salinity criteria are partly intended to protect the normal dispersal of these young fish throughout Suisun Bay over a number of tidal cycles. As explained in more detail above, the proposed Roe Island criteria include a "trigger" that activates the criteria only after natural hydrological conditions push the 2 ppt isohaline to Roe Island. EPA is requesting comment on this trigger, including comment on the following specific questions:

(a) Would a trigger at some upstream site, such as Middle Ground, retain the desired link to storm events while ensuring a more frequent triggering of the standard?

(b) Should the criteria be triggered only by storm events actually occurring in the February through June period? This refinement would prevent the criteria from being triggered, for example, solely by a large storm occurring in January, the runoff from which may keep the 2 ppt isohaline below Roe Island into February.

(c) Should the trigger be stated as a single day when mean salinities are less than 2 ppt, or by a longer averaging period (14 days, 28 days, etc.)?

(d) It has been suggested that the need for a trigger might be eliminated by setting a criteria at a location further upstream. Both USFWS and USBR have suggested developing a criteria at Middle Ground (at roughly km 68). At this location the criteria would be triggered in all but critical years and would thereby provide an increased level of protection overall. Even though a Middle Ground criteria would require more days of protection than the Roe Island criteria, the upstream location means that the water supply impacts would be less than for the Roe Island criteria in years when the Roe Island criteria would have applied. It is likely that a shift of the downstream requirement from Roe Island to Middle Ground would have higher water supply impacts on average but lower impacts in particular years. At the same time, however, this shift in the downstream location would mean that the criteria would no longer be directly tied to salinities in San Pablo Bay that have been identified as biologically important for starry flounder, longfin smelt, and the shrimp, *Crangon franciscorum*.

7. Several participants in the State Board hearings stressed the importance of avoiding consecutive years of poor habitat conditions for short-lived species, such as Delta smelt and longfin smelt. For example, Dr. Moyle recommended that relaxations of the Roe Island standards to Chipps Island during dry and critical years be limited to two consecutive years. Similarly, during the course of the Agency's discussions with USFWS and NMFS about the potential effects of these proposed criteria on threatened and endangered species, a question was raised about whether the proposed criteria would adequately protect the listed Delta smelt in an extended drought. Recent extended droughts in the Bay/Delta watershed have lasted six or seven years, but there is scientific evidence that droughts as long as fifty years have occurred and could happen again. Although droughts of this magnitude are unlikely, such a drought would have serious adverse impacts on the estuary's fisheries resources, and especially on fishes with short life cycles such as the Delta smelt.

At the same time, water project operators have suggested that extended droughts impose special constraints on project operations and deliveries, and have recommended that EPA propose relaxations of the Estuarine Habitat criteria during extended droughts.

EPA is soliciting comments on whether it is necessary to promulgate special criteria to deal with the issue of consecutive dry or critical years or extended drought. EPA is particularly interested in comments on the biological requirements of threatened and endangered fishes during these periods, and on the operational impacts of special protection measures during these periods.

8. In this proposed rule, EPA is relying on the Estuarine Habitat criteria to protect the tidal wetlands bordering Suisun Bay. Tidal wetlands provide habitat for diverse marsh, aquatic and wildlife species, as well as special status species such as the Suisun song sparrow, Delta tule pea, black rail, clapper rail and soft-haired bird's beak. EPA's proposed criteria have been developed to protect aquatic species and to provide salinity conditions similar to those in the late 1960's to early 1970's. Therefore, many of the aquatic species that inhabit the marsh channels should be better protected under our proposed criteria. In addition, the proposed Estuarine Habitat criteria are designed to provide substantially better dry and critically dry year springtime conditions than the recent year conditions that have caused adverse effects on the tidal marsh communities bordering Suisun Bay. EPA therefore believes that these criteria will provide substantially better conditions in the marshes, but is soliciting comment as to whether additional criteria are necessary to fully protect the marsh resources.

Although EPA does not believe that there is a sufficient scientific record at this time to establish specific numerical salinity criteria for the tidal wetlands, it may be possible to set narrative criteria which could be developed into numerical criteria in the near future as additional information becomes available. To be consistent with EPA guidance, such narrative criteria should include specific language about conditions that must exist to protect a designated use, and must be quantifiable so that numeric standards can be developed (USEPA, 1990). Examples of possible narrative criteria for the Suisun Marsh are:

(1) "Water quality conditions sufficient to support high plant diversity and diverse wildlife habitat throughout all elevations of the tidal marshes bordering Suisun Bay"

(2) "Water quality conditions sufficient to assure survival and growth of brackish marsh plants dependent on soils low in salt content (especially *Scirpus californicus* and *Scirpus acutus*) in sufficient numbers to support Suisun song sparrow habitat in shoreline marshes and interior marsh channel margins bordering Suisun Bay."

EPA welcomes any information or recommendations on criteria to protect the Suisun Bay tidal marshes.

9. USFWS and NMFS have expressed concern that special measures may be necessary to protect Delta smelt in the event of a late spawn. In particular, these agencies have suggested that if real-time monitoring indicates that peak Delta smelt spawning occurs in late June or July, it might be appropriate to maintain the 2 ppt isohaline in Suisun Bay during those months to assure that juveniles remain in the suitable rearing habitat in eastern Suisun Bay.

EPA is soliciting comment as to whether and how these measures should be incorporated into water quality criteria, and on the operational impacts of such criteria. In addition, EPA requests comment on how implementation of these criteria would affect carryover storage requirements presently imposed on water projects for the benefit of the threatened winter-run Chinook salmon.

10. EPA is proposing salmon smolt survival criteria to protect the Cold Fresh-Water Habitat and Fish Migration designated uses. These criteria would address EPA's concerns with certain temperature criteria contained in the 1991 Bay/Delta Plan that were disapproved by EPA. As explained in more detail above, the Agency believes that it presently has an inadequate basis to propose temperature criteria. Further, the adoption of salmon smolt criteria provides the State with more flexibility in determining an implementation plan protecting the fisheries use.

EPA is soliciting comment as to whether an adequate scientific basis exists to propose a temperature criteria alone. The Agency is especially interested in receiving comment as to whether a temperature criteria would provide better protection for the designated uses than the proposed criteria, and whether a temperature criteria could be implemented given the present operational flexibility in the estuary.

11. EPA welcomes any additional information on the effectiveness and feasibility of installing a barrier to fish (including a sound barrier) at the head of Georgiana Slough. Results from USFWS coded-wire salmon smolt experiments clearly demonstrate that migrating smolts survive poorly in the central Delta, and salmon smolt survival would be higher if fish migrated down the main Sacramento River channel. Closure of Georgiana Slough is one of the implementation measures that the Delta Team of the Five Agency Chinook Salmon Committee evaluated and recommended as a measure to increase salmon smolt survival, and survival indices recommended by the fisheries agencies included this measure. The major concerns over Georgiana Slough closure are: exacerbation of the reverse flow situation in the lower San Joaquin River, degradation of water quality conditions in the Central Delta, and blocking of upstream migration of adult salmon. It is likely that reverse flows would become less of a problem with a barrier in place in Georgiana Slough if exports were balanced with San Joaquin River flows to continue to provide positive flows in the lower San Joaquin. EPA would like more information on whether a balance could be achieved to provide some periods of time when a Georgiana Slough barrier would be beneficial for salmon without causing detrimental effects on the other species and habitats in the Delta. Since EPA's proposed salmon smolt survival index is a criteria to protect the outmigration of smolts, and Georgiana Slough closure is a measure that would be beneficial for outmigrating salmon, EPA solicits comments on whether the target index values in its proposal should be changed.

12. As explained in more detail above, EPA has based its proposed index values for the salmon smolt survival criteria for the San Joaquin River on recommendations by the USFWS, NMFS and California DFG at the State Board's Interim Water Rights Hearings for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. These recommendations include placing a barrier at the head of Old River during migration of San Joaquin River system smolts through the Delta (April 1 until May 31). The Old River barrier was also recommended by the Delta Team of the Five Agency Chinook Salmon Committee, and is one of the projects called for in the CVP Improvement Act. However, discussions with USWFS and NMFS carried out during EPA's consultations under the ESA have raised questions about whether the barrier would adversely affect reverse flows in the central Delta under certain conditions. EPA is therefore requesting comment on the following issues:

(a) Would the proposed salmon smolt criteria index values on the San Joaquin need to be revised if the Old River barrier is not built? In what ways?

(b) Should EPA promulgate alternative or additional criteria that would be effective in the event that the Old River barrier is not constructed?

13. In addition to a barrier at the head of Old River, the USFWS implementation recommendations for the San Joaquin also included certain export limits and flow requirements during peak migration periods. Export limits are also an important measure for achieving protection for migrating smolts on the Sacramento River system, especially if there is no barrier in place at Georgiana Slough, and are an element of the models used to generate the salmon smolt survival indices on the Sacramento River. EPA is concerned that there may be implementation scenarios for the two rivers that could result in detrimental conditions for migrating smolts even if the proposed index values are achieved. One such possible scenario may occur if the State Board adopts USFWS implementation recommendations on the Sacramento River (adjusted, as described above, to account for Georgiana Slough remaining open), but then operates the San Joaquin River so as to just meet the proposed index values. In this case, our preliminary review indicates that the San Joaquin River index value theoretically might be attained with lower flows than are protective for the salmon resources. The USFWS has substantial evidence that San Joaquin River flows are a critical element for successful smolt migration. Protection of migration for these runs is particularly important considering the low abundances and poor conditions in the San Joaquin system.

The discussion above raises the possibility that the salmon smolt criteria for the San Joaquin River system may need to be refined. We are therefore requesting comment as to whether the proposed index values should be revised to reflect the interrelation between Sacramento River and San Joaquin River implementation measures recommended by USFWS. In particular, should the proposed index values be revised to account for the possible effects of low flow scenarios on the San Joaquin River?

14. The Central Valley Project Improvement Act requires that measures be taken to double the production of anadromous fish species throughout the Central Valley watershed. EPA intends that its proposed criteria should support this goal in the waters of the Bay/Delta estuary. EPA appreciates any information on whether the proposed criteria provide the necessary protection to reach this goal.

15. Dr. Wim Kimmerer has developed a salmon population model for the Sacramento River Basin, CPOP, which includes a regression model for the Delta based on the same USFWS data used to develop EPA's proposed criteria (BioSystems Analysis, 1989). This model is not divided into reaches, and uses all coded wire tag data from both ocean and trawl recoveries. Significant independent variables include: proportion of flow remaining in Sacramento River, flow in the Sacramento River, the interaction between these two, and temperature at Freeport. Dr. Kimmerer compares his analysis with the USFWS analysis, and reports that his analysis outperforms the USFWS analysis and, in addition, that it better models temperature effects on mortality. However, this model uses only pre-1989 data. EPA appreciates any comments on the usefulness of this model in predicting Sacramento River smolt survival and setting criteria to protect Fish Migration as a designated use.

16. A number of species in the Bay/Delta estuary appear to rely on estuarine conditions during the months of July to January. These species include herring (primarily a Bay species), late fall-run salmon, and juvenile striped bass. EPA welcomes any information on habitat conditions necessary for protection of these species, and on possible revisions to the proposed criteria that could address these species.

17. EPA is concerned that changes in water project operations in response to the proposed criteria may have unforeseen environmental impacts. EPA welcomes comments as to whether there are any operational scenarios for the CVP, SWP, and/or other water users that would increase or decrease the ecological benefits of the proposed criteria. In addition, EPA notes that, under the CWA, the state will conduct triennial reviews of these and other water quality criteria to determine whether they are adequate to protect the designated uses. At those times, the state has the opportunity to adjust criteria that are shown to be over or under protective of the uses. EPA welcomes comments as to the kinds of information, such as biological resource monitoring data, that are or will be available to measure the effectiveness of fish and wildlife criteria in the Bay/Delta.

List of Subjects in 40 CFR Part 131

Environmental protection, Water pollution control, Water quality standards, Water quality criteria.

Dated: December 13, 1993.

Carol M. Browner,

Administrator.

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Appendix I to the Preamble—Managing Freshwater Discharge to the San Francisco Bay/Sacramento-San Joaquin Delta Estuary: The Scientific Basis for an Estuarine Standard (San Francisco Estuary Project, 1993) (Excerpts)

Introduction

Aquatic resources of the Sacramento-San Joaquin Delta and upper portions of San Francisco Bay have undergone significant declines over the past several decades. Species characteristic of the Delta and rivers, such as striped bass and salmon, began to decline during the late 1970s. Prolonged drought, large diversions of fresh water, and dramatic increases in populations of introduced aquatic species during the 1980s and 1990s brought a number of indigenous aquatic species to extremely low levels. Species that spend more of their lives downstream of the Delta, including Delta smelt, longfin smelt, and many zooplankton, maintained large populations through the 1970s, but declined sharply after the mid-1980s. Declines in aquatic resources have led to curtailed fishing seasons, to petitions for endangered species status, and general concern about the health of the estuarine ecosystem.

Concern over the impacts of increased salinity produced from the combination of drought and high diversion rates is not limited to aquatic communities. The few remaining fragments of brackish and freshwater tidal marshlands are particularly vulnerable to increased salinity or to reduced variability in salinity. Under natural conditions, these tidal marsh communities would move upstream with the changing salinity. But the flood plains and other lowlands suitable for the evolution of tidal marshes are absent upstream. Tidal marshes provide important habitat for

numerous plants and animals of special concern.

Large demands for water by the agricultural community and by California's burgeoning urban areas make it difficult to allocate additional freshwater for the protection of dwindling aquatic and wetland resources of the estuary. Management of the State's water resources necessitates a delicate balancing of needs, given the intense and growing competition for water. If the freshwater needs of the estuary are to be considered seriously they must be based on sensitive, straightforward, and diagnostic indicators of the responses of the estuarine ecosystem to patterns of freshwater inflow.

An extensive body of scientific evidence indicates that flows into, within, and through the estuary are extremely important to organisms that depend on the estuary for at least a portion of their life cycles. However, the mechanisms by which flows affect different elements of the ecosystem are not well understood. In the Bay/Delta Estuary, many chemical and physical properties and processes are tightly linked to flow, including proportion of water diverted, salinity at a given point, the longitudinal position of a particular salinity range, and alteration of the effects of toxicants through dilutions. Any of these phenomena could be controlling a particular species, but each will also vary with the other variables that are closely correlated with flow.

At present, the complex configuration of the Delta and the estuary, combined with the complex withdrawal and diversion network, preclude any simple, directly monitored measure of freshwater discharge to the estuary. Effective protection and management of the estuary requires an index of the estuary's response to freshwater inflow that (1) Can be measured accurately, easily and inexpensively; (2) has ecological significance; and (3) has meaning for nonspecialists. Net Delta outflow, which is calculated from various measures and estimates of water inflow and use, has been a useful tool but it does not satisfy all of these requirements. Because of the high correlations among the flow-related variables, the choice of a suitable index does not need to be based on any presumed mechanism.

The San Francisco Estuary Project convened a series of technical workshops to evaluate the responses of estuarine biota and habitats to various conditions of salinity and flow. The workshops involved approximately 30 scientists and policy makers with expertise in estuarine oceanography and ecology, and in water and living resource management. The group focused its attention on the Suisun Bay area, the portion of the estuary downstream of the confluence of the Sacramento and San Joaquin rivers and upstream of Carquinez Strait. Internal Delta issues (such as gate closures, water exports, and internal flows) or problems of downstream portions of the San Francisco Bay (such as urban and industrial discharges) were not directly addressed by the group. No attempt was made to incorporate all management actions that might benefit biological communities, nor to identify what level of environmental restoration and protection should be set based on salinity and flow.

Identification of freshwater needs of aquatic resources has caused conflict for a variety of reasons. Debate of scientific issues is fundamentally different from other kinds of debate in that it should yield to scientific investigation. Participants developed issue papers that delineated areas of scientific agreement. Several issue papers showed that conditions in Suisun Bay largely reflected the abundance, recruitment, or survival not only of local species, but also of habitat conditions for species upstream and downstream. A primary result of the issue papers produced for this group was that almost all species studied increased in abundance as a simple function of increased outflow and decreased salinity. The absence of a plateau or peak in the relationship of species abundances and outflow conditions means that science alone cannot identify an optimal outflow. Furthermore, the similar response of species at all ecological (trophic) levels argues strongly that the estuary should be managed using an ecosystem approach rather than on a species by species basis.

The technical workshops concentrated on developing the scientific rationale for an estuarine index to measure the estuary's response to different levels and patterns of freshwater input. Participants recognized that economic and socio-political considerations should be accounted for at other points in the deliberations. The needs of society, as well as the needs of the environment, should be considered in determining appropriate allocations of freshwater. However, the premise of the workshops was that one should start with the best scientific and technical judgements possible.

Many large-scale changes in the structure of the Delta have been proposed to facilitate water use and to reduce impacts of water withdrawal on aquatic resources. There was general recognition by the group that the present Delta withdrawal and distribution system is a major contributor to the declines of important species. The conclusion and recommendations of the workshops are based upon the present water withdrawal and distribution system and would need to be re-evaluated if any significant alterations to that system are considered.

The conclusions and recommendations in this report were developed by the estuarine scientists and managers who participated in one or more of the workshops. The complete list of participants and their affiliations are listed in Appendix D. All conclusions and recommendations in this report were reviewed, voted on, and endorsed by a consensus of the estuarine scientists and managers who participated in the fourth and final workshop in the series (26 August 1992). The term consensus is used to represent group solidarity on an issue; a judgement arrived at by most of the scientists and managers present. In all cases, the consensus was unanimous or nearly unanimous. The conclusions and recommendations are arranged in a sequence that "tracks" the evolution of thinking of the participants. The conclusions and recommendations reached by the group reflect the participants' best scientific and technical judgements, not necessarily the positions of their affiliated agencies or organizations.

The following conclusions and recommendations are intended to provide guidance and information on how estuarine standards could be developed and how different levels of protection of estuarine resources could be selected.

The full justifications to these conclusions and recommendations are contained in technical papers that accompany this report and in other documents prepared for the San Francisco Estuary Project. (Appendix E).

Important Conclusions and Recommendations

(1) Conclusion

Because of the complex nature of the freshwater delivery and distribution system in the San Francisco Bay/Sacramento-San Joaquin Delta estuary, there is at present no single, simple, accurate measure of freshwater input to the estuary that conveys information important to resource managers and to the public, and that is meaningful to those with special concerns about how fluctuations in freshwater inflow to the

estuary affect habitat and the condition of the estuarine ecosystem.

Recommendation

Estuarine standards should be developed to be used in conjunction with flow standards. One set of standards should be based upon an index of the physical response of the estuary to fluctuations in the input of fresh water. These standards should have diagnostic value in providing, throughout the year, a level of protection to the estuary and to important ecosystem values and functions consistent with environmental goals and objectives for the Bay-Delta estuary.

(2) Conclusion

Estuarine standards to be used in conjunction with flow standards should be based upon an index that is simple and inexpensive to measure accurately, that has ecological significance, that integrates a number of important estuarine properties and processes, and that is meaningful to a large number of constituencies.

Recommendation

Salinity should be used as an index for the development of some estuarine standards.

Justification

In the first workshop (August 1991), participants identified and assessed a number of indices of the estuary's responses to flow to use in managing freshwater discharge to the estuary. The preliminary, preworkshop, choice was the position of the entrapment zone. This index was abandoned quickly, however. The entrapment zone is important to estuarine ecosystem processes and functions, but at present there is no single, straightforward "entrapment zone index" suitable for monitoring the position or strength of the entrapment zone as a function of freshwater input.

Salinity was selected as the most appropriate index because: (1) The salinity distribution is of direct ecological importance to many species; (2) the salinity distribution is a result of the interplay of freshwater input, geometry of the estuarine basin, diversion of fresh water in the Delta, and the tidal regime; and (3) salinity measurements can be made accurately, directly, easily, and economically. Moreover, since most of the major concerns about reductions in the freshwater input to the estuary are associated either directly or indirectly with the loss or alteration of low salinity habitat, salinity is an ideal index for keeping track of the extent—both area and volume—of low salinity habitat. The salinity distribution represents the response of the estuary to different combinations of river discharge, diversions and withdrawals, tidal regime, and basin geometry.

(3) Conclusion

Salinity measured at about 1m above the bottom [1] is an index upon which estuarine standards should be developed. The index is a practical way of tracking changes in habitat.

Recommendation

Standards should be developed using an index that establishes an upstream limit of the position of the 2‰ near-bottom isohaline, averaged over different periods of the year.

(4) Conclusion

Analysis of the available historical data indicates that, throughout the year, the farther downstream the 2‰ near-bottom isohaline is displaced, the greater the abundance or survival of most species examined.

Recommendation

The downstream position of the 2‰ isohaline should be unconstrained.

Justification

From the environmental perspective—an important perspective, but not the only one—scientific uncertainty dictates taking an environmentally conservative approach, i.e. providing enough Delta outflow to the estuary to push the 2‰ isohaline farther downstream than might be required with greater scientific certainty. It is anticipated, and preliminary analysis supports it, that the salinity standard—the upstream limit of the 2‰ near-bottom isohaline—will vary from season to season to provide the desired level of protection.

(5) Conclusion

Estuarine systems are characterized not only by short-term responses to the mean salinity at any given location, but also by responses to longer-term seasonal, annual and interannual variability in salinity and other properties.

Recent advances in scientific understanding indicate that this dynamic character of healthy estuarine ecosystems is particularly true for the distribution and abundance of wetland vegetation, but also holds for other aquatic organisms.

Recommendation

The potential importance of variations in salinity on different time scales to the structure and dynamics of estuarine ecosystems should be considered in developing salinity standards. Deviations from the patterns of salinity variability in the historical data set could increase the risk of not achieving environmental goals and objectives even if mean positions of the 2‰ near-bottom isohaline were matched with the historical data sets.

Justification

There is strong biological evidence from a number of estuaries throughout the world that variability in flow, in circulation and mixing, in the salinity distribution, and in the distribution of other important properties and processes is important in maintaining a healthy estuarine ecosystem. Therefore, variability in flow above the threshold needed to meet the seasonal salinity standard is encouraged.

(6) Conclusions

Empirical statistical relationships were developed between a variety of estuarine properties and resources, and the position of the near-bottom 2‰ isohaline and other flow-related variables. *The relationships developed are statistical relationships. They are not proof of cause-effect.* The relationships indicate clearly, however, that the position of the near-bottom 2‰ isohaline can serve as a powerful diagnostic indicator of the condition of biological "units" (communities, populations) across a range of different trophic levels.

With the information these relationships can provide, water managers will be in a far better position to regulate freshwater discharge to the estuarine system to produce, on the average,[2] predictable and desirable ecological responses of the estuary consistent with goals selected for the estuarine ecosystem. If this strategy is followed, the probability of the desired ecological response will be enhanced and the chances of undesirable ecological surprises in the estuary will be reduced.

Because the statistical relationship between net Delta outflow and the position of the near-bottom 2‰ isohaline is strong, the position of the near-bottom 2‰ isohaline is an excellent surrogate for net Delta outflow

[1] Because the difference between surface and near-bottom salinities is small and because the relationship between them is reasonably well known, surface salinity could also be used. Near-bottom salinity is recommended, however, because it is a more stable indicator.

[2] Over a period of several years.

in managing freshwater input to the estuary. The relationship may be improved further through routine direct monitoring of the position of the 2‰ isohaline and a suite of biological responses.

Recommendation

The salinity distribution should be monitored continuously at a series of at least six stations spaced approximately five kilometers apart and located along the channel between about Emmaton and Carquinez Bridge. Measurements should be made at least near the surface and near the bottom at each station. The data should be telemetered to a convenient location for timely analysis and interpretation. These continuous monitoring data should be supplemented with detailed surveys to map the distribution of salinity in three dimensions. The data should be readily available in a timely way to all interested parties.

An appropriate biological monitoring program should determine responses of a variety of organisms to changes in position of the 2‰ isohaline.

Justification

During the second and third workshops, and during intersessions between workshops, a systematic search was made to select the most powerful tools of analysis to describe how diagnostic biological indicators respond to changes in position of the near-bottom 2‰ isohaline. When data were rich enough, other variables were included in the analyses

The first task was to specify the most diagnostic resource variables—the responses of indicators that would convey the maximum amount of environmental/ecological information. In every case, the objective was to demonstrate how these diagnostic environmental/ecological indicators responded to changes in the position of the near-bottom 2‰ isohaline and to a variety of other flow measures. In every case, experts on the particular biological response were consulted in selecting the appropriate averaging time for the position of the 2‰ isohaline.

(7) Conclusion

The position of the near-bottom 2‰ salinity isohaline is an index of habitat conditions for estuarine resources at all trophic levels, including the supply of organic matter to the food web of Suisun Bay, an important nursery area. In other words, well-behaved statistical relationships exist between the near-bottom 2‰ isohaline and many estuarine resources for which sufficient data exist to make appropriate analyses. Moreover, at least a rudimentary understanding exists for the causal mechanisms underlying many of these relationships. The location of the near-bottom 2‰ isohaline is important either because it is a direct causal factor or because it is highly correlated with a direct causal factor (e.g., diversions).

Preliminary analyses show that errors in prediction using models which incorporate only the position of the 2‰ isohaline are comparable to the errors using more complex models which incorporate additional flow-related variables. In other words, given the present data sets, predictive models using only the position of the near-bottom 2‰ isohaline perform as well as more complex models that incorporate other variables. However, some of these other variables may be very important in affecting habitat and the condition of biological resources of the estuary.

Recommendations

At this time, the most appropriate basis for setting salinity standards for the portion of the estuary on which this report concentrates is the position of the near-bottom 2‰ isohaline alone, unless it can be shown either that another variable is the controlling variable or that incorporation of additional variables improves the predictive capability. Further research should be conducted to improve prediction of the responses of important estuarine resources to variations in the position of the near-bottom 2‰ isohaline. That research should incorporate other variables where they can be shown to contribute significantly.

(8) Conclusion

A number of key species are subject not only to the biological effects of the location of the near-bottom 2‰ isohaline, and therefore the effects of freshwater inflow to the estuary, but also to the physical effects of entrainment and diversion by the various water projects.

Recommendations

Salinity standards should be keyed to the existing city, county, regional, state, and federal water diversion and distribution system. Proposed changes to that system should trigger a re-evaluation of the salinity standards to ensure that they will continue to provide the desired level of environmental protection while retaining as much flexibility as possible in meeting the state's other needs for water.

Since a broad class of models can be constructed, including mechanistic and statistical models that incorporate both biological and physical parameters and other factors such as diversions, exports, and antecedent conditions, efforts should be enhanced to ensure a consistent, long-term accurate measurement program to enhance these models and to decrease the uncertainties in their application. The ultimate goal is to have a predictive model that incorporates the position of the 2‰ isohaline and other appropriate physical and biological variables.

(9) Conclusion

Salinity standards should be based upon the best scientific and technical knowledge. A method is needed to summarize and to advance the state of scientific and technical knowledge of the complex relationships between variations in the position of the near-bottom 2‰ isohaline during different periods of the year (and associated Delta outflow) and a variety of diagnostic ecosystem responses.

Recommendation

Salinity and flow-response matrices should be developed for different biologically important periods of the year. The matrices should summarize the existing state of knowledge of the responses of a rich variety of estuarine organisms and communities as well as estuarine properties and processes, to the location of the near-bottom 2‰ isohaline and associated freshwater discharge to the estuary. The estuarine properties and biological responses initially identified for inclusion in these matrices are summarized in Exhibit A.

A Matrix Manager should be appointed to oversee the development of the summary matrices and to ensure quality control. The Matrix Manager should orchestrate the analyses of relevant data and ensure that the results of the analyses are cast into forms appropriate for the intended uses.

Because estuarine habitat suitability and, therefore, estuarine ecosystem health are not simply a function of the instantaneous salinity distribution, the entry in each response cell of the matrix, whenever possible, should be based upon the development of functional relationships of estuarine properties to isohaline positions (and freshwater input to the estuary) that incorporate lagged terms, seasonal variability, and other water management variables. Ideally, the input to each matrix cell would include a directory of the appropriate model, or models, that could be used for prediction.

The proposed matrices are shorthand methods for keeping track of advances in the state of scientific knowledge and for ensuring that the most up-to-date

scientific knowledge is used in decision-making. They are not intended to be used as isolated regulatory tools. They are a summary of the state of development of those tools, a guide to which tools to use during different times of the year, and an index of where to find them. The responsibility for development of the matrices and for periodically updating them should be institutionalized. One appropriate agency might be the Interagency Ecological Studies Program.

Justification

The proposed matrices are an effective shorthand way of summarizing in a convenient format the status of a large amount of data and information relating the responses of the estuary to fluctuations in freshwater inflow and to other water management variables. The matrices are a useful vehicle for summarizing the biological benefits—using a broad array of response indicators—of positioning the near-bottom 2‰ salinity isohaline at various distances upstream (inland) from the Golden Gate Bridge during different periods of the year. The proposed matrices would provide the first quantitative and comprehensive summary of how the San Francisco Bay/Sacramento-San Joaquin Delta estuary ecosystem responds to fluctuations in freshwater inflow to the estuary (Delta outflow) and to the estuary's changing salinity regime. The matrices have further advantages. They will provide managers, policy-makers and the public with: (1) a clear statement by the scientific community of the current status of understanding of the effects of different freshwater discharge-diversion scenarios on the estuarine ecosystem; (2) an identification of critical gaps in scientific knowledge that can be used to guide future research and monitoring activities; and (3) a summary that is easily updated on a cell-by-cell basis as new knowledge is developed.

The models upon which the matrices are based can serve as tools for regulatory agencies to use in incorporating the environmental needs of the estuary into a set of management prescriptions for storing, releasing, and diverting water for consumptive uses. Section of the level or degree of biological response to be achieved—the level of environmental protection—is the responsibility of regulatory bodies acting in response to society's priorities.

(10) Conclusion

The actual setting of salinity standards—specifying the upstream locations of the near-bottom 2‰ isohaline for different periods of the year—should be keyed to environmental goals: to achieving and sustaining some desired biological response level specified in terms of habitat protection or abundance and survival rates of important and diagnostic estuarine and wetland species.

Recommendations

Goals should be expressed in terms of desired conditions for some future time. Progress toward those goals should be monitored and reported widely. Environmental goals for the estuary will be most effective if they are expressed in terms of restoring conditions to those that existed at specific historical times such as those summarized in Exhibit B.

(11) Conclusion

At prevailing patterns of the position of the near-bottom 2‰ isohaline, the biological resources of the low salinity portion of the estuary, including the Delta, have been seriously depleted. Data from the Interagency Ecological Studies Program and the University of California at Davis indicate clearly that species at every trophic level are now at, or near, record low levels in the Delta and in Suisun Bay. This is not surprising considering the recent drought, the introduction of exotic species, and the increased diversion of water.

Analyses of the data indicate that the abundance or survival of a number of important species at a variety of life history states and from a variety of trophic levels is related to the position of the near-bottom 2‰ isohaline. Of the organisms whose response to salinity has been analyzed, the farther downstream the 2‰ isohaline is, the higher their abundance or survival.

Almost all of the components of the estuarine community analyzed during the workshops (e.g., organisms, habitats, and processes) show a strong, coherent, and negative monotonic response to increased penetration (upstream movement) of the near-bottom 2‰ isohaline. There is no well-defined break point that can be reliably identified statistically in the composite relationship between the abundance or survival of these components and the position of the 2‰ isohaline. In other words, the biological benefits of downstream displacement of the 2‰ continue to increase over the range of positions of the 2‰ near-bottom isohaline reflected in the historical data set.

If one selects a certain level of restoration and biological response as a goal, then one can develop statistical relationships to prescribe the appropriate range of the position of the near-bottom 2‰ isohaline and the amounts of water necessary to achieve these salinity distributions during different periods of the year. *While such action will not guarantee achieving a desired level of resource recovery or protection, it would increase the probability of attaining these goals.*

Recommendations

A range of environmental/ecosystem restoration goals should be selected, and analyses should be made, to determine the distribution of the 2‰ near-bottom isohaline throughout the year consistent with those goals. Historical flow and salinity data should be examined to determine how frequently these conditions would have been met before construction of the Central Valley Project; the State Water Project; a variety of city, county, and regional projects that divert water; and before the large-scale reclamation of historical tidal marshlands. The results of these analyses would provide a valuable context within which to evaluate the amounts of water needs to achieve a range of ecological goals.

Appendix II to the Preamble—Determination of Historical Conditions

Appendix II summarizes the methodology used in developing the historical conditions data presented in Table 1, above.

1. Calculating Delta Outflow Over Historical Period

Net Delta outflow at Chipps Island is estimated by performing a water balance at the boundary of the Delta. The water balance involves adding the total Delta inflow and Delta precipitation runoff, then subtracting Delta channel depletions and exports. *See* Equation 1, below. DWR has estimated net Delta outflow for water years 1956–present with their flow accounting model, DAYFLOW. A similar model, using a smaller number of measured flows, was used to estimate Delta outflow from 1929–1962. In the years of overlap the two models yield very similar results.

Equation 1: Delta outflow = river inflows + precipitation − channel depletions—exports

The four components used to calculate net Delta outflow are based on a variety of measurements. Most of the river inflows are gaged or directly measured at some point before they enter the Delta. Local precipitation is derived by multiplying the surface area of the Delta by the rainfall recorded at Stockton. Local precipitation is usually a trivial amount of flow but within-Delta uses (called channel depletions) can be substantial. Prior to construction of

Shasta Dam and its regulation of Sacramento River flow, net Delta outflow was often negative during summer months because channel depletions exceeded Delta outflow. The level of channel depletions in DAYFLOW are based on average monthly crop demands for the acreage of each crop grown on Delta islands. Exports are directly measured at the point of diversion.

Because of the arithmetic nature of these estimates of Delta outflow, the estimated flows cannot reflect the impacts of such factors as the spring/neap tidal cycles, wind, etc. that would affect the actual mean daily flow velocities in the western Delta.

2. Calculation of Historical Occurrence of 2 ppt Isohaline Position

The daily estimates of net Delta outflow from October 1, 1939 to September 30, 1975 were used to calculate the frequency with which the 2 ppt isohaline was downstream of each of the specified positions in each year. Isohaline position is a function of net Delta outflow on a particular day and the isohaline position on the previous day, as specified in Eq. 2. (Kimmerer and Monismith 1993).

Equation 2: Mean daily position of 2 ppt near-bottom isohaline (X2) on day t:

$$X2_{(t)} = 10.16 + (0.945 \text{ times } X2_{(t-1)}) - (1.487 \text{ times } \log_{10}(\text{Delta outflow}))$$

3. Adjustment for Water Year Type

The proposed criteria were developed to reflect the average position of the 2 ppt isohaline in different water year types, according to the classification adopted by the State Board (SWRCB 1991). First, for each year from 1940 to 1975, the number of days on which the 2 ppt level was attained at each target location was tabulated. These totals were then averaged across each water year type. Because no critical years were available for comparison during this historical period, the average position of the 2 ppt isohaline in critical years was extrapolated from the other year types. The extrapolation was performed by fitting a curvilinear model to the averages for the other year types. These extrapolations are shown in Figures 1 and 2, above. The results of average number of days for each year type, along with the extrapolated values for critical years, are presented in Table 1, above.

4. Sensitivity to Starting Assumptions

No estimate of the location of the 2 ppt isohaline on October 1, 1939 was available, so the starting position in October 1939 was assumed to be 75 km. However, sensitivity analysis showed that the calculated isohaline position on February 1 was largely independent of the assumed isohaline position on the preceding October 1. This sensitivity analysis was performed as follows: for each of the ten years from 1940 to 1949, the February 1 isohaline position was calculated under two assumptions: (1) that the October 1 starting position was at the Golden Gate (km 0), and (2) that the October 1 starting position was 100 km upstream of the Golden Gate. The historical delta outflow patterns and volumes differed greatly among these years and the calculated February 1 isohaline positions ranged from 49 km above the Golden Gate after wet winters to as much as 72 km above the Golden Gate during dry winters. However, by February 1 the difference in calculated positions based on the two different starting positions varied by no more than 0.1 km in any year.

Appendix III to the Preamble

Appendix III describes the models used to create and measure the salmon smolt survival indices for the Sacramento and San Joaquin Rivers. These indices and the underlying models represent the state-of-the-art analyses of the factors critical to maintaining habitat conditions necessary to protect cold water fish migration. Nevertheless, as further scientific work is completed and the new data is analyzed in the models, EPA anticipates that the models and indices will be further refined. EPA intends that these refinements be incorporated into the State's criteria during the triennial review process.

Derivation of the Sacramento River Index

The smolt survival index for fall-run outmigrating smolts in the Sacramento River Delta has been developed by the US Fish and Wildlife Service, using coded-wire tagged hatchery-raised smolts released at various locations and under different conditions within the Bay/Delta, and recovered by trawl downstream. The methods are described in USFWS, 1987. Since estimates of total tagged fish in the river cross-section (based on trawl mouth size and time fished) yielded a maximum survival index of nearly 1.8, and the frequency distribution plot of survival indices indicated an approximately normal distribution with a median near 1.0, the indices were divided by 1.8 to provide biologically meaningful survival rates.

In order to estimate the benefits of various measures to achieve these indices, a multiple regression smolt survival model was developed for the Sacramento River portion of the Delta. The model, based on tagged smolt releases between 1978 and 1989, is described in Kjelson et al, 1989; a more recent verification and analysis is described in USFWS, 1992a and 1992b. The Sacramento River portion of the Delta was divided into three reaches for survival analysis: (1) The Sacramento River from Sacramento to Walnut Grove, where the Cross-Delta Channel and Georgiana Slough divert water from the main-stem Sacramento River into the central Delta; (2) Walnut Grove to Chipps Island (at the confluence of the Delta river systems) via the central Delta; and (3) Walnut Grove to Chipps Island via the Sacramento River system. Survival indices were converted to mortalities by subtracting from 1.0, and were correlated with ecologically meaningful factors for each reach. Multiple regression analysis was then used to develop equations for each reach which included the significant ($p<.05$) factors affecting mortality. The equations used to calculate mortality for each reach (as identified above) are:

$M_1 = -2.45925 + (0.0420748 * \text{Avg Water Temp, °F, at Freeport, CA})$, $r^2 = .39$

$M_2 = -0.5916024 + (0.017968 * \text{Avg Water Temp, °F, at Freeport, CA}) + (0.0000434 * \text{SWP} + \text{CVP Exports})$, $r^2 = .69$

$M_3 = -1.613493 + (0.0319584 * \text{Avg Water Temp, °F, at Freeport, CA})$, $r^2 = .32$

Using these equations, USFWS calculated total mortality for the Sacramento River Delta using an adaptation of an approach developed by Ricker (1975) describing the combined effect of two independent sources of mortality occurring sequentially over two distinct time periods:

$$M_T = M_1 + M_2*P_1 + M_3*P_2 - M_1*M_2*P_1 - M_1*M_3*P_2$$

where P_1 = proportion of Sacramento River flow diverted into the central Delta at Walnut Grove through the Cross-Delta Channel and Georgiana Slough, and P_2 = proportion of Sacramento River flow remaining in the Sacramento River. If, as happens when temperatures are low, the term "M_1" is negative, it will be reset to zero before the computation above is made. Total survival is then calculated as:

$$S_T = (1-M_T)$$

The USFWS is also estimating survival from recovery of tagged fish in the ocean salmon fishery. The results correlate with the (unadjusted) trawl recovery survival indices ($p<0.01$; $r=0.89$; USFWS 1992b), and further increase confidence in the survival indices as a good measure of migration success and habitat conditions.

Sacramento River Delta survival index values reflecting historical habitat conditions in different types of water years (Table 2) were calculated by the USFWS using the 1989 version of the above models, together with historical data on temperatures, water exports, and the percentage of Sacramento River flows diverted at Walnut Grove, as described in USFWS 1992a. All total survival values are calculated as monthly averages, and assume, based on past sampling results, that 17% migrate through the Delta from the Sacramento River in April, 65% in May, and 18% in June. At low temperatures, the Sacramento River regression gives mortality values (m_i) of less than zero, indicating that the regression does not give biologically meaningful results at these lower temperatures. The USFWS transforms these negative values to zeros before calculating total survival.

Derivation of San Joaquin River Index

The smolt survival indices for the San Joaquin River Delta were developed from coded-wire tagged smolt study results (USFWS 1992b). The CWT experiments were specifically designed to evaluate the benefit of constructing a barrier at the head of the Old River Channel to keep smolts in the main channel of the San Joaquin River. Smolts diverted into the Old River Channel are on a direct path to the State and Federal pumping plants, and are also likely subject to high temperatures and increased predation. The smolt survival relationship for smolts kept in the San Joaquin River is:

$y = 0.191271 + .000067x$

Where y = smolt survival and x = San Joaquin flow at Stockton in cfs ($r=0.68$, $n=8$, $p<0.10$).

There was evidence from the individual CWT studies that water exports had a substantial effect on survival for those smolts migrating down the San Joaquin to Suisun Bay. For instance, separate releases in 1989 under high export conditions and low export conditions indicate approximately double the survival under low export conditions. Although adding exports to the regression equation did not improve it, probably because there are not enough experimental releases under enough variety of conditions to provide a significant relationship, the USFWS developed an additional equation to model this factor, and used both this equation and the above flow equation to estimate smolt survival indices for the San Joaquin River. A discussion of the methodology is provided in USFWS 1992a and 1992b. This additional relationship is:

$y = (.341271 - 0.00025x_1 + 0.00067x_2)/1.8$

Where x_1 = CVP+SWP exports in cfs and x_2 = flow at Stockton in cfs.

Past adult escapement data was used to estimate smolt survival for historical conditions because there is still not enough CWT information under a broad enough variety of flow and export conditions to rely solely on CWT study results. Escapement values on the Y axis were replaced with survival values from 0 to 1.0. This assumes that adult production is an indicator of smolt survival. This assumption is generally valid, because less of the overall natural mortality occurs after the smolts enter the ocean. The relationship is as follows:

$y = (4.90106 + .000286x_1 - .000774x_2)/12$

where y = smolt survival, x_1 = mean daily flow at Vernalis from March 15 to June 15, and x_2 = mean daily CVP+SWP exports from March 15 to June 15.

The USFWS used this relationship to estimate historical smolt survival indices for various periods of time (see Table 2). Further support for the importance of flows to salmon smolt survival comes from CWT study results showing a significant relationship between flow at Stockton and survival through the lower San Joaquin River (USFWS 1992a).

40 CFR part 131 is proposed to be amended as follows:

PART 131—[AMENDED]

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 131.37 is proposed to be added to read as follows:

§ 131.37 California.

(a) *Additional Criteria.* The following criteria are applicable to waters specified in the Water Quality Control Plan for Salinity for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, adopted by the California State Water Resources Control Board in State Board Resolution No. 91-34 on May 1, 1991 which is available from the Water Resources Control Board, State of California, PO Box 100, Sacramento, CA 95812:

(1) *Suisun Bay Salinity Criteria.* (i) *General rule.* Salinity (measured 1 meter above bottom) shall not exceed 2 ppt (measured on a 14-day moving average) at the stations listed in Table 1 for at least the number of days listed in Table 1, during the months of February through June.

TABLE 1. TWO PARTS PER THOUSAND (2 PPT) SALINITY CRITERIA

Water year type	Roe Island (km 64)	Chipps Island (km 74)	Confluence (km 81)
Wet	133 days	148 days	150 days.
Above normal	105 days	144 days	150 days.
Below normal	78 days	119 days	150 days.
Dry	33 days	116 days	150 days.
Critically dry	0 days	90 days	150 days.

The Roe Island measurements shall be made at the salinity measuring station maintained by the U.S. Bureau of Reclamation at Port Chicago (km 64). The Chipps Island measurements shall be taken at the Mallard Slough Monitoring Site, Station D-10 (RKI RSAC-075) maintained by the California Department of Water Resources. The Confluence measurements shall be taken at the Collinsville Continuous Monitoring Station C-2 (RKI RSAC-081) maintained by the California Department of Water Resources. Water year types shall be determined by reference to the Sacramento Basin Water Year Type classifications, defined in paragraph (c)(1)(i) of this section.

(ii) *Exception.* The 2 ppt salinity criteria need not be met at the Roe Island station unless and until the 2 ppt salinity isohaline occurs at the Roe Island station due to uncontrolled hydrologic conditions. After such occurrence, the 2 ppt salinity criteria (measured on a 14-day moving average) must be attained at the Roe Island station for the lesser of the number of days indicated in Table 1 or the number of days remaining in the period February 1 through June 30 after such occurrence. (2) *Salmon Smolt Survival Criteria.*—(i) *General rule.* Salmon smolt survival index values shall attain at least the values indicated in Table 2.

TABLE 2. SALMON SMOLT SURVIVAL CRITERIA

Sacramento River		San Joaquin River	
Water year type	Index value	Water year type	Index value
Wet	.45	Wet	.46
Above normal	.38	Above normal	.30
Below normal	.36	Below normal	.26
Dry	.32	Dry	.23
Critical	.29	Critical	.20

(ii) *Computing salmon smolt survival index values for Sacramento River.* Index values on the Sacramento River shall be computed according to the following formula:

$$SRSI = 1 - (-2.45925+.0420748T) +(-0.5916024+.017968T+.0000434E)(P_1) +(-1.613493+.0420748T)(P_2) -(-2.45925+.0420748T)* (-.5916024+.017968T+.0000434E) * P_1 -(-2.45925+.0420748T) * (-1.613493+.0420748T) * P_2$$

where

SRSI = Sacramento River Salmon Index value

T = Average Water Temperature in Fahrenheit at Freeport

E = Average State Water Project plus Central Valley Project Exports in cubic feet/second (cfs) (from DAYFLOW)

P_1 = proportion water diverted into Delta Cross-Channel at Walnut Grove

P_2 = proportion water remaining in Sacramento River at Walnut Grove

The index shall be computed at least monthly, weighted by the proportion migrating during each month (or shorter time period) and summed to estimate survival for the water year. Total survival for the entire fall-run migration period shall either use monitoring information collected during each water year's outmigration to determine the specific pattern of migration for the water year, or shall assume monthly migration to be 17% in April, 65% in May, and 18% in June. For purposes of this computation, mortality for the Sacramento River Reach between Sacramento and Walnut Grove (which is reflected in the computation above by the term "(−2.45925+.0420748T)") shall be reset to zero before the index is calculated if this term is negative, as happens at low temperatures.

(iii) *Computing salmon smolt survival index values for San Joaquin River.* Index values on the San Joaquin River shall be computed according to the following formula:

$$SJSI = (0.341271 - 0.000025E + 0.000067F)/1.8$$

where

SJSI = San Joaquin River Salmon Index value

E = Average Central Valley Project plus State Water Project exports measured in cfs

F = Mean daily flow in cfs in San Joaquin River at Stockton, calculated as Old River flow subtracted from San Joaquin River flow at Mossdale. Old River flow is calculated from ratio of Brandt Bridge flow to exports.

The index shall be computed at least monthly, weighted by the proportion migrating during each month (or shorter time period) and summed to estimate survival for the water year. Total survival for the entire fall-run migration period shall either use monitoring information collected during each water year's outmigration to determine the specific pattern of migration for the water year, or shall assume monthly migration to be 45% in April and 55% in May.

(b) *Revised Criteria.* The following criteria are applicable to state waters specified in Table 1–1, at Section (C)(3) ("Striped Bass—Salinity : 3. Prisoners Point—Spawning") of the Water Quality Control Plan for Salinity for the San Francisco Bay—Sacramento/San Joaquin Delta Estuary, adopted by the California State Water Resources Control Board in State Board Resolution No. 91–34 on May 1, 1991:

Location	Sampling site Nos. (I–A/RKI)	Parameter	Description	Index type	Year type	Dates	Values
San Joaquin River at Jersey Point, San Andreas Landing, Prisoners Point, Buckley Cove, Rough and Ready Island, Brandt Bridge, Mossdale, and Vernalis.	D15/ RSAN018, C4/ RSAN032, D29/ RSAN038, P8/ RSAN056, -/RSAN062, C6/ RSAN073, C7/ RSAN087, C10/ RSAN112	Electrical Conductivity (EC)	14-day running average of mean daily for the period not more than value shown, in mmhos.	Not Applicable	Wet, Above normal, and below normal years	April 1 to May 31	0.44
San Joaquin River at Jersey Point, San Andreas Landing and Prisoners Point.	D15/ RSAN018, C4/ RSAN032, D29/ RSAN038	Electrical Conductivity (EC)	14-day running average of mean daily for the period not more than value shown, in mmhos.	Not Applicable	Dry and critical dry years	April 1 to May 31	0.44

(c) *Definitions.* Terms used in paragraphs (a) and (b) of this section, shall be defined as follows:

(1) *Water year type.*

(i) *Sacramento Basin Water Year Type.* Water year types in the Sacramento River basin are computed as follows:

(A) The Sacramento Basin Index is computed according to the following formula:

$I_{SAC}=0.4X+0.3Y+0.3Z$

where I_{SAC}=Sacramento Basin Index

X = April through July Four River Unimpaired Flow in Million Acre Feet (MAF)

Y = October through March Four River Unimpaired Flow in MAF

Z = Previous Year's Sacramento Basin Index in MAF, not to exceed 10 maf

(B) *Measuring Four River Unimpaired Flow.* The Four River Unimpaired Flow for a current water year (October 1 to September 30) is a forecast of the sum of the following locations: Sacramento River above Bend Bridge, near Red Bluff; total inflow to Oroville Reservoir; Yuba River at Smartville; American River, total inflow to Folsom Reservoir. The flow determinations are made and are published by the California Department of Water Resources in Bulletin 120 which is available from the California Department of Water Resources, 3251 S Street, Sacramento, CA 95816. Preliminary determinations of year classification shall be made in February, March, and April with final determination in May. These preliminary determinations shall be based on hydrological conditions to date plus forecasts of future runoff assuming normal precipitation for the remainder of the water year.

(C) Sacramento River Basin Water Year Type shall be categorized according to the following table:

Sacramento basin water year type	Sacramento basin index value
Wet (W)	≥ 9.2 MAF.
Above normal (AN)	< 9.2 MAF, > 7.8 MAF.
Below normal (BN)	≤ 7.8 MAF, > 6.5 MAF.
Dry (D)	≤ 6.5 MAF, > 5.4 MAF.
Critical (C)	≤ 5.4 MAF.

(ii) *San Joaquin Basin Water Year Type.*

Water year types in the San Joaquin River Basin are computed as follows:

(A) The San Joaquin Valley Index is computed according to the following formula:

$I_{SJ}=0.6X+0.2Y$ and $0.2Z$

where I_{SJ}=San Joaquin Valley Index

X = Current year's April-July San Joaquin Valley unimpaired runoff

Y = Current year's October-March San Joaquin Valley unimpaired runoff

Z = Previous year's index in MAF, not to exceed 0.9 MAF

(B) *Measuring San Joaquin Valley unimpaired runoff.* San Joaquin Valley unimpaired runoff for the current water year from the preceding year's October 1 to September 30 of the current calendar year) is a forecast of the sum of the following locations: Stanislaus River, total flow to New Melones Reservoir; Tuolumne River, total inflow to Don Pedro Reservoir; Merced River, total flow to Exchequer Reservoir; San Joaquin River, total inflow to Millerton Lake. Preliminary determinations of year classification shall be made in February, March and April with final determination in May. These preliminary determinations shall be based on hydrologic conditions to date plus forecasts of future runoff assuming normal precipitation for the remainder of the water year.

(C) San Joaquin Valley Water Year Type shall be categorized according to the following table:

San Joaquin valley water year type	San Joaquin valley index value
Wet (W)	≥ 3.8 MAF.
Above normal (AN)	< 3.8 MAF, > 3.1 MAF.
Below normal (BN)	≤ 3.1 MAF, > 2.5 MAF.
Dry (D)	≤ 2.5 MAF, > 2.1 MAF.
Critical (C)	≤ 2.1 MAF.

(2) *Water year.* A water year is the twelve calendar months beginning October 1.

[FR Doc. 94–120 Filed 1–5–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB66

Endangered and Threatened Wildlife and Plants; Revised Proposed Critical Habitat Determination for the Delta Smelt

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service (Service) revises its proposed designation of critical habitat for the delta smelt (*Hypomesus transpacificus*) originally published on October 3, 1991, concurrently with the proposal to list the species, pursuant to the Endangered Species Act of 1973, as amended (Act). The final rule listing the delta smelt as a threatened species was published on March 5, 1993. In the final rule, the Service postponed the decision on critical habitat determination for up to 1 year beyond the date that the final rule was due (October 3, 1993) in accordance with section 4(b)(6)(C)(ii) of the Act. The Service has refined the primary constituent elements described in the original critical habitat proposal. This revised proposed rule supersedes all aspects of the Service's previous proposal. Critical habitat designation for the delta smelt would provide additional protection under section 7 of the Act with regard to activities that require Federal agency action. As required by section 4 of the Act, the Service will consider economic and other relevant impacts prior to making a final decision on the size and configuration of critical habitat. The Service solicits data and comments from the public on all aspects of this revised proposal.

DATES: Comments from all interested parties must be received by March 7, 1994. Public hearing requests must be received by February 22, 1994.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Acting Field Supervisor, Fish and Wildlife Service, Sacramento Field Office, 2800 Cottage Way, room E–1803, Sacramento, California 95825–1846. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Dale Pierce, Sacramento Field Office (see ADDRESSES section) at (916) 978–4866.

SUPPLEMENTARY INFORMATION:

Background

Previous Service Action

In the January 6, 1989 (50 FR 554), Animal Notice of Review, the Service included the delta smelt as a category 1 candidate species. Category 1 includes species for which data in the Service's possession are sufficient to support proposals for listing. On June 29, 1990, the Service received a petition dated June 26, 1990, from Dr. Don C. Erman, President-Elect of the California-Nevada Chapter of the American Fisheries Society, to list the delta smelt as an endangered species with critical habitat. The Service made a 90-day finding that substantial information had been presented indicating that the petitioned

action may be warranted and announced this decision in the Federal Register on December 24, 1990 (55 FR 52852). On October 3, 1991 (56 FR 50075), the Service published a proposal to list the delta smelt as a threatened species and to designate critical habitat. This proposed rule constituted the 12-month petition finding in accordance with section 4(b)(3)(B) of the Act.

Critical habitat was proposed for areas of all water and all submerged lands below ordinary high water and the entire water column bounded by and contained within Suisun Bay (including the contiguous Grizzly and Honker Bays), the length of Montezuma Slough, portions of the Sacramento River, portions of the Sacramento-San Joaquin Delta, portions of the San Joaquin River, and the contiguous water bodies in between (a complex of bays, dead-end sloughs, channels typically less than four meters deep, marshlands, etc.), California. The public comment period opened on the date of publication of the proposed rule (October 3, 1991) and closed on January 31, 1992.

The Service published a notice of public hearing on the proposed rule on December 19, 1991 (56 FR 65877). Public hearings were conducted in California on January 9, 1992, in Sacramento; on January 14, 1992, in Santa Monica; and on January 16, 1992, in Visalia. At each meeting, testimony was taken from 1 p.m. to 4 p.m. and from 6 p.m. to 9 p.m.

The final rule listing the delta smelt as a threatened species was published on March 5, 1993 (58 FR 12854). In the final rule, the Service postponed the decision on critical habitat designation for up to 1 year beyond the date that the final rule was due (October 3, 1993) in accordance with section 4(b)(6)(C)(ii) of the Act. The economic analysis necessary to determine critical habitat was still in progress at that time. On March 16, 1993 (58 FR 14199), the Service published a notice that the public comment period on the proposed designation of critical habitat for the delta smelt was reopened until April 30, 1993, to allow the Service to consider any information that previously had not been submitted.

Revisions to the October 3, 1991, Critical Habitat Proposal

The Service is required to base critical habitat designations on the best scientific and commercial data available (50 CFR 424.12). Subsequent to publication of the October 3, 1991, proposed rule, the Service received new information on the current distribution of the delta smelt, primarily from other State and Federal agencies.

Based primarily on information gathered by the California Department of Fish and Game (Dale Sweetnam, California Department of Fish and Game, pers. comm., 1993) and University of California, Davis (Lesa Meng, University of California, pers. comm., 1993), the Service proposes to expand the geographic extent of critical habitat to include additional areas now known to constitute important spawning habitat. In 1993, delta smelt spawned in the Sacramento River, at least as far upstream as Sacramento and Barker, Lindsey, Cache, Georgiana, Prospect, Beaver, Hog, and Sycamore Sloughs (Dale Sweetnam, pers. comm., 1993). In 1991, when delta smelt had all but disappeared from Suisun Marsh, relatively large numbers of delta smelt were caught in Suisun Slough, as far upstream as Suisun City (Lesa Meng, pers. comm., 1993). For these reasons, the proposed critical habitat has been revised to encompass these upstream habitats. Protection of these upstream spawning habitats is essential to ensure recovery of the species. Hence, this rule proposes critical habitat for the following geographic area: Areas of all water and all submerged lands below ordinary high water and the entire water column bounded by and contained in Suisun Bay (including the contiguous Grizzly and Honker Bays); the length of Goodyear, Suisun, Cutoff, First Mallard (Spring Branch), and Montezuma Sloughs; and the existing contiguous waters contained within the Delta. As used in this rule, the term "Delta" refers to all tidal waters contained within the legal definition of the Sacramento-San Joaquin Delta, as delineated by section 12220 of the State of California's Water Code of 1969.

In an April 23, 1993, letter, received during the public comment period, the Environmental Protection Agency (EPA) requested that new scientific information presented in its draft proposed Bay/Delta water quality standards be considered in the Service's designation of critical habitat. The Service has used this information to refine the primary constituent elements described in the original critical habitat proposal. (The term "primary constituent element" is defined in the "Primary Constituent Elements" section of this rule.) The Service's original proposal listed the following constituent elements: Space for population growth, cover or shelter, maintenance of appropriate littoral zone reproduction habitat to sustain embryos and to rear larvae and juveniles, and 0–2 parts per thousand (ppt) salinities during the January to June delta smelt reproductive season. As part of the background for formulation of its proposed water quality standards, EPA analyzed the number of days that low salinity (2 ppt) water historically was located at three positions in Suisun Bay. The revised primary constituent elements incorporate this new information. As described in the "Primary Constituent Elements" section of this rule, the Service has revised the primary constituent elements to include those features that provide temporal and spatial variability of low salinity waters that will deter further invasion of exotic species, produce high zooplankton densities for food, and simulate natural processes and historical conditions. The primary constituent elements also describe in detail the months that each delta smelt life stage requires protective habitat conditions.

After considering the information presented by EPA, the Service has determined that, if implemented, EPA's proposed water quality standards would likely significantly affect critical habitat as proposed in the October 3, 1991, rule. Consequently, the Service is proposing this revised rule to reduce the potential for inconsistencies between EPA's standards and the Service's proposed critical habitat. Resolving the inconsistencies will afford the smelt the same or better protection as would have been achieved through the earlier proposal.

Relationship Between Fish and Wildlife Service and EPA Actions

The Clean Water Act and Endangered Species Act as written do not specify how government actions should be coordinated or agency conflicts should be resolved. However, because the Service and EPA recognize that their proposed regulatory actions overlap both biologically and economically, both agencies are working closely to provide a comprehensive, ecosystem-based approach to the protection of the fish and wildlife resources of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. This coordination should also provide a set of regulatory actions that are integrated in both substance and timing.

Section 7 of the Endangered Species Act requires that all Federal agencies ensure that their actions do not jeopardize the continued existence of listed species or adversely modify listed species' critical habitat. EPA's proposed action to designate water quality standards must comply with the section 7 requirement. EPA has initiated a formal consultation process under section 7. Additionally, the Clean Water

Act requires protection of the most sensitive use within each category of designated uses. Protection of endangered and threatened species is considered a designated use within the meaning of the Clean Water Act; therefore, a species listing under the Endangered Species Act provides one method to identify the most sensitive use within the designated uses of a water body.

Biologically, the proposed critical habitat for the delta smelt and the salinity criteria that constitute EPA's proposed water quality standards are directly related. Specifically, the occurrence of salinities of 2 parts per thousand (ppt) in Suisun Bay was identified as a critical habitat primary constituent element in the October 3, 1991, critical habitat proposal. Subsequent scientific publications indicate that salinities associated with the distribution of delta smelt may provide the best basis for setting standards for many species that are affected by freshwater discharge from the Bay/Delta Estuary. Favorable conditions from February through June are extremely important to the abundance and reproductive success of almost all species that live in or migrate through the upper Bay/Delta Estuary. EPA's proposed water quality standards address the location of 2 ppt salinities from February to June and, therefore, address both critical habitat requirements for delta smelt and a range of interrelated parameters that affect other species that rely on estuarine habitat.

Habitat Requirements

Historically, the delta smelt is thought to have occurred from Suisun Bay upstream to the city of Sacramento on the Sacramento River and Mossdale on the San Joaquin River (Moyle *et al.* 1992). Recently, however, Wang (1991) recorded larval delta smelt from the Sacramento River as far north as its confluence with the Feather River. The delta smelt is an euryhaline species (tolerant of a wide salinity range) that spawns in fresh water and has been collected from estuarine waters up to 14 grams per liter (ppt) salinity (Moyle *et al.* 1992). For a large part of its annual life span, this species is associated with the freshwater edge of the entrapment zone (mixing zone at the saltwater-freshwater interface), where the salinity is approximately 2 ppt (Ganssle 1966, Moyle *et al.* 1992, Sweetnam and Stevens 1993).

The delta smelt is adapted to living in the highly productive Sacramento-San Joaquin River Estuary (Estuary) where salinity varies spatially and temporally according to tidal cycles and the amount of freshwater inflow. (The term estuary refers to a partially enclosed water body of variable salinity with freshwater and seawater inflow.) Despite this tremendously variable environment, the historical Estuary probably offered relatively constant suitable habitat conditions to delta smelt, which could move upstream or downstream with the entrapment zone (Peter Moyle, University of California, pers. comm., 1993). Since the 1850s, however, the amount and extent of suitable habitat for the delta smelt has declined dramatically. The advent in 1853 of hydraulic mining in the Sacramento and San Joaquin Rivers led to increased siltation and alteration of the circulation patterns of the Estuary (Nichols *et al.* 1986, Monroe and Kelly 1992). The reclamation of Merritt Island for agricultural purposes in the same year marked the beginning of the present-day cumulative loss of 94 percent of the Estuary's tidal marshes (Nichols *et al.* 1986, Monroe and Kelly 1992).

In addition to this degradation and loss of estuarine habitat, the delta smelt has been increasingly subject to entrainment, upstream or reverse flows of waters in the Delta and San Joaquin River, and constriction of habitat in the less productive, deep-water river channels of the Delta (Moyle *et al.* 1992). These adverse conditions are primarily a result of the steadily increasing proportion of water diverted from the Delta by the Federal and State water projects (Monroe and Kelly 1992). Water delivery through the Federal Central Valley Project began in water year 1940. The State Water Project began delivering water in 1968. However, the proportion of fresh water being diverted has increased since 1983 and has remained at high levels (Moyle et al. 1992). The high proportion of fresh water exported has exacerbated the already harsh environmental conditions experienced by the delta smelt during the recent 6-year drought. The March 5, 1993 (58 FR 12854), final rule listing the delta smelt as a threatened species describes in detail the factors that have led to this species' decline.

This revised proposed rule to designate critical habitat for the delta smelt focuses on habitat conditions required during specific life stages (spawning, larval and juvenile transport, rearing, and adult migration) of this annual species to ensure its eventual recovery. Shortly before spawning, adult delta smelt migrate upstream from the highly productive brackish-water habitat associated with the entrapment zone to disperse widely into river channels and tidally-influenced backwater sloughs (Radtke 1966, Moyle 1976, Wang 1991). Migrating adults with nearly mature eggs have been taken at the Central Valley Project's Tracy Pumping Plant from late December 1990 to April 1991 (Wang 1991).

Delta smelt spawn in shallow, fresh or slightly brackish water upstream of the entrapment zone (Wang 1991). Most spawning occurs in tidally-influenced backwater sloughs and channel edgewaters (Moyle 1976; Wang 1986, 1991; Moyle et al. 1992). Although delta smelt spawning behavior has not been observed (Moyle *et al.* 1992), the adhesive, demersal eggs are thought to attach to substrates such as cattails and tules, tree roots, and submerged branches (Moyle 1976, Wang 1991). In the Delta, spawning is known to occur in the Sacramento River and in Barker, Lindsey, Cache, Georgiana, Prospect, Beaver, Hog, and Sycamore Sloughs (Wang 1991; Dale Sweetnam, pers. comm., 1993). Delta smelt also spawn north of Suisun Bay in Montezuma and Suisun Sloughs and their tributaries (Dale Sweetnam, pers. comm., 1993; Lesa Meng, pers. comm., 1993).

The spawning season varies from year to year and may occur from late winter (December) to early summer (July). Moyle (1976) collected gravid adults from December to April, although ripe delta smelt were most common in February and March. In 1989 and 1990, Wang (1991) estimated that spawning had taken place from mid-February to late June or early July, with the peak spawning period occurring in late April and early May.

Based on data for a closely related species, delta smelt eggs probably hatch in 12 to 14 days (Moyle *et al.* 1992). After hatching, larvae are transported downstream toward the entrapment zone where they are retained by the vertical circulation of fresh and salt waters (Stevens *et al.* 1990). The pelagic larvae and juveniles feed on zooplankton. When the entrapment zone is located in a broad geographic area with extensive shallow-water habitat within the euphotic zone (depths less than 4 meters), high densities of phytoplankton and zooplankton are produced (Arthur and Ball 1978, 1979, 1980), and larval and juvenile fish, including delta smelt, grow rapidly (Moyle *et al.* 1992, Sweetnam and Stevens 1993). In general, estuaries are among the most productive ecosystems in the world (Goldman and Horne 1983). Estuarine environments produce an abundance of fish as a result of plentiful food and shallow, protective habitat for young.

When the entrapment zone is contained within Suisun Bay, young

delta smelt are dispersed widely throughout a large expanse of shallow-water and marsh habitat. Dispersion in areas downstream from the State and Federal water pumps and in-Delta agricultural diversions protects young smelt from entrainment and distributes them among the extensive, protective, and highly productive shoal regions of Suisun Bay. In contrast, when located upstream, the entrapment zone becomes confined in the deep river channels, which are smaller in total surface area, contain fewer shoal areas, have swifter, more turbulent water currents, and lack high zooplankton productivity.

Erkkila *et al.* (1950) collected young delta smelt near Sherman Island, at the confluence of the Sacramento and San Joaquin Rivers, in July and August of 1948. In studies by the California Department of Fish and Game, California Department of Water Resources, and Bureau of Reclamation, larval and juvenile delta smelt were collected from Roe Island in Suisun Bay north to the confluence of the Sacramento and Feather Rivers and east to Medford Island on the San Joaquin River (Wang 1991). These studies were conducted during the months of April through mid-July in 1989 and 1990. Through these distribution surveys, Wang (1991) was able to document the movement of juvenile delta smelt from the Delta to Suisun Bay in late June and early July. In 1990, young delta smelt were taken at the Tracy Pumping Plant at the end of February (Wang 1991).

Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as "(i) the specific areas within the geographic area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination * * * that such areas are essential for the conservation of the species." The term "conservation," as defined in section 3(3) of the Act, means "* * * to use and the use of all methods and procedures which are necessary to bring an endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." Therefore, areas designated as critical habitat must contain those physical or biological features essential to recover a species to the point that it no longer requires protection under the Act. Hence, critical habitat designation affords species additional protection above and beyond those of listing in that it preserves options for the species' eventual recovery. Section 3 further states that in most cases the entire range of a species should not be encompassed within critical habitat.

Critical habitat designations alert Federal and State agencies, other organizations, and the public about the importance of an area in the conservation of a listed species. Critical habitat also identifies areas that may require special management or protection. Critical habitat receives protection under section 7 of the Act with regard to actions carried out, funded, or authorized by Federal agencies. Section 7 requires that Federal agencies consult on actions that may affect critical habitat to ensure that their actions are not likely to destroy or adversely modify critical habitat. Section 7 also requires Federal agencies to confer on Federal actions that are likely to result in adverse modification or destruction of proposed critical habitat. Aside from the added protection provided under section 7, the Act does not provide other direct forms of protection to lands designated as critical habitat.

In addition to considering biological information in designating critical habitat, the Service also considers economic and other relevant impacts of designating critical habitat. The Secretary may exclude areas from critical habitat when the benefits of such exclusion outweigh the benefits of including the areas within critical habitat, provided that the exclusion will not result in the extinction of a species.

Primary Constituent Elements

In determining which areas to designate as critical habitat, the Service considers those physical and biological features that are essential to a species' conservation (50 CFR 424.12). The Service is required to list the known primary constituent elements together with a description of any critical habitat that is proposed. Such physical and biological features (i.e., primary constituent elements) include, but are not limited to, the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and

(5) Generally, habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

Following are the primary constituent elements necessary to conserve the delta smelt. These elements were determined in coordination with EPA in preparation of its proposed water quality standards. EPA's proposed rule to promulgate Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta of the State of California is published in this same Federal Register separate part. In its proposed rule, EPA has requested specific comments on several issues, including the possibility of modifying the Sacramento River Index for the purposes of developing the salinity criteria, alternative approaches to the averaging period used in its proposed salinity criteria, and evaluation of the merits of the use of difference forms of confidence intervals with the proposed criteria. The Fish and Wildlife Service will consider these comments also in developing its final rule.

The primary constituent elements are organized by habitat conditions required for each life stage. The specific geographic areas and seasons identified for each habitat condition specified below represent the maximum possible range of each of these variables.

Each of the habitat conditions specified below requires as its basis placement of the 2 ppt isohaline at or downstream of the Sacramento-San Joaquin River confluence from February through June. (An isohaline is a line that can be drawn to connect all points of equal salinity.) Furthermore, the location of the 2 ppt isohaline must vary according to water years because:

(1) Temporal and spatial variability of the 2 ppt isohaline will be the most effective deterrent to further invasion of new introduced species and continued competition by those that are already established,

(2) Placement of the 2 ppt isohaline in an area will also produce the high phytoplankton and zooplankton densities that characterize most healthy estuarine ecosystems, and

(3) Variability is needed to simulate natural processes and historical conditions.

Table 1 lists the number of days (based on a 14-day running average) that the 2 ppt isohaline must be located at Roe Island, Chipps Island, or the Sacramento-San Joaquin River confluence during wet, above normal, below normal, dry, and critically dry years to achieve the life-stage habitat conditions described below. These required salinity criteria are based on

historical records of the water years between October 1939 (subsequent to the operation of the Federal and State water projects) and September 1975 (prior to the decline of the delta smelt) (Harry Seraydarian, EPA, *in litt.*, 1993; Bruce Herbold, EPA, pers. comm., 1993). However, because no critically dry years occurred during this period, the salinity criteria (required number of days) for these years are based on an extrapolation of the data.

TABLE 1.—REQUIRED SALINITY CRITERIA FOR SUISUN BAY TO REFLECT HISTORICAL HABITAT CONDITIONS

[Values represent the number of days that the 2 ppt isohaline must be placed at three locations within the Sacramento-San Joaquin River Estuary]

Year type	Roe Island [km 64]	Chipps Island [km 74]	Confluence [km 81]
Wet	133	148	150
Above normal	105	144	150
Below normal	78	119	150
Dry	33	116	150
Critically dry	0	90	150

The Roe Island salinity criteria are meant to replicate natural spring storm cycles and are invoked only after uncontrolled runoff has placed the 2 ppt isohaline seaward of Roe Island. Therefore, the criteria for Roe Island represent the maximum number of days that the 2 ppt isohaline must be located there.

Spawning Habitat—Delta smelt adults seek shallow, tidally-influenced, freshwater (i.e., less than 2 ppt salinity) backwater sloughs and edgewaters for spawning. To ensure egg hatching and larval viability, spawning areas also must provide suitable water quality (i.e., low concentrations of pollutants) and substrates for egg attachment (e.g., submerged tree roots and branches and emergent vegetation). Specific areas that have been identified as important delta smelt spawning habitat include Barker, Lindsey, Cache, Prospect, Georgiana, Beaver, Hog, and Sycamore Sloughs and the Sacramento River in the Delta, and tributaries of northern Suisun Bay. The spawning season varies from year to year and may start as early as December and extend until July.

Larval and Juvenile Transport—To ensure that delta smelt larvae are transported from the area where they are hatched to shallow, productive rearing or nursery habitat, the Sacramento and San Joaquin Rivers and their tributary channels must be protected from physical disturbance (e.g., sand and gravel mining, diking, dredging, and levee or bank protection and maintenance) and flow disruption (e.g., water diversions that result in entrainment and in-channel barriers or tidal gates). Adequate river flow is necessary to transport larvae to rearing habitat in Suisun Bay. To ensure that suitable rearing habitat is available in Suisun Bay, the salinity criteria described above in Table 1 are required. Reverse flows that maintain larvae upstream in deep-channel regions of low productivity and expose them to entrainment interfere with these transport requirements. Suitable water quality must be provided so that maturation is not impaired by pollutant concentrations. The specific geographic area important for larval transport is confined to waters contained within the legal boundary of the Delta, Suisun Bay, and Montezuma Slough and its tributaries. The specific season when habitat conditions identified above are important for successful larval transport varies from year to year depending on when peak spawning occurs. Therefore, habitat conditions suitable for transport of larvae and juveniles may be required as early as February 1 and as late as August 31.

Rearing Habitat—Maintenance of the 2 ppt isohaline (according to the salinity criteria described in Table 1) and suitable water quality (low concentrations of pollutants) within the Estuary is necessary to provide delta smelt larvae and juveniles a shallow, protective, food-rich environment in which to mature to adulthood. This placement of the 2 ppt isohaline also serves to protect larval, juvenile, and adult delta smelt from entrainment in the State and Federal water projects. However, additional flows above those required to implement the February through June salinity criteria listed in Table 1 may be required occasionally to protect larval and juvenile delta smelt from being entrained in the State and Federal water projects during the months of July and August. These additional flows will be required when the previous year's abundance indices show that the adult population already is at low levels and late spawning conditions have led to distribution of larval and juvenile delta smelt upstream of the confluence of the Sacramento and San Joaquin Rivers in July and August. An area extending eastward from Carquinez Straits, including Suisun Bay, Grizzly Bay, Honker Bay, Montezuma Slough and its tributary sloughs, up the Sacramento River to its confluence with Three Mile Slough, and south along the San Joaquin River including Big Break, defines the specific geographic area critical to the maintenance of suitable rearing habitat. Three Mile Slough represents the approximate location of the most upstream extent of tidal excursion when the salinity criteria described in Table 1 are implemented. Protection of rearing habitat conditions may be required from the beginning of February to the end of August.

Adult Migration—Adult delta smelt must be provided unrestrained access to suitable spawning habitat in a period that may extend from December to July. Therefore, adequate flow and suitable water quality must be maintained to attract migrating adults in the Sacramento and San Joaquin River channels and their associated tributaries, including Cache and Montezuma Sloughs and their tributaries. These areas also must be protected from physical disturbance and flow disruption during migratory periods.

To conserve the delta smelt, critical habitat is proposed for an area encompassing the specific habitat conditions required by each life stage identified above. Accordingly, critical habitat is proposed for the following geographic area: Areas of all water and all submerged lands below ordinary high water and the entire water column bounded by and contained in Suisun Bay (including the contiguous Grizzly and Honker Bays); the length of Goodyear, Suisun, Cutoff, First Mallard (Spring Branch), and Montezuma Sloughs; and the existing contiguous waters contained within the Delta. The proposed critical habitat is contained within Contra Costa, Sacramento, San Joaquin, Solano, and Yolo Counties, California. The "Proposed Regulations

Promulgation" section provides a precise metes and bounds description of the revised proposed critical habitat.

Effects of Critical Habitat Designation

Section 7(a)(2) of the Act requires Federal agencies to ensure that the activities they authorize, fund, or carry out are not likely to destroy or adversely modify critical habitat. This Federal responsibility is in addition to the requirement in the same section of the Act that Federal agencies ensure their actions do not jeopardize the continued existence of any listed species.

Jeopardy is defined at 50 CFR 402.02 as any action that would be expected to reduce appreciably the likelihood of both the survival and recovery of a listed species. Destruction or adverse modification of critical habitat is defined at 50 CFR 404.02 as a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. The regulations also clearly state that such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. The requirement to consider potential adverse modification of critical habitat is an incremental consideration above and beyond the review necessary to evaluate the likelihood of jeopardy and incidental take in section 7 consultations. In section 7 consultations, the Service considers the potential for adverse modification of the primary constituent elements identified in the critical habitat designation.

Section 4(b)(8) of the Act requires for any proposed or final regulation that designates critical habitat a brief description and evaluation of those activities (public or private) that may adversely modify such habitat or may be affected by such designation. The Service has identified the following list of activities that, depending on the season of construction and scale of the project, may result in the destruction or adverse modification of critical habitat without necessarily jeopardizing the continued existence of the delta smelt:

(1) Sand and gravel extraction in river channels or marshes;

(2) Diking wetlands for conversion to farmland and dredging to maintain these dikes;

(3) Levee maintenance and bank-protection activities, such as riprapping, removal of vegetation, and placement of dredged materials on levees of banks;

(4) Operation of the Montezuma Slough Control Structure; and

(5) Bridge and marina construction.

Construction and implementation of each of these actions requires authorization by the Army Corps of Engineers pursuant to section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act. Based on the Service's review of all existing or proposed projects that may affect the delta smelt, the great majority that would likely result in destruction or adverse modification of critical habitat also would be likely to jeopardize the continued existence of the species. The Service has not identified any proposed actions that might jeopardize the delta smelt without adversely affecting its critical habitat.

Considerations of Economic and Other Factors

Section 4(b)(2) of the Act requires the Service to consider economic and other relevant impacts of specifying any particular area to be included within the critical habitat boundary. The Secretary may exclude any area from critical habitat should it be determined that the benefits of such exclusion outweigh the benefits of specifying such an area as part of the critical habitat unless it is determined, based on the best scientific and commercial data available, that the failure to designate such an area as critical habitat will result in the extinction of the species concerned.

The impacts of designating critical habitat are in addition to the economic and other impacts attributable to listing of the species. Impacts attributable to listing include those resulting from the taking prohibitions under section 9 of the Act and associated regulations. "Take," as defined in section 3(18) of the Act, includes harm to a listed species. "Harm" means an act that actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including feeding, breeding, or sheltering (50 CFR 17.3).

Impacts attributable to listing also include those resulting from the responsibility of Federal agencies under section 7 to ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species. An action could be likely to jeopardize the continued existence of a listed species through the destruction or modification of its habitat regardless of whether that habitat has been formally designated as critical. The Act provides significant protection to species, including protection to their habitats, as a result of listing. Therefore, the direct economic and other impacts resulting from additional habitat protection through critical habitat designation may be incrementally small. In general, the designation of critical habitat supplements the substantive protection resulting from listing.

EPA has prepared a draft Regulatory Impact Analysis on its proposed water quality standards. EPA's draft Regulatory Impact Analysis includes an economic analysis of the effects of the designation of critical habitat for the delta smelt. This economic analysis concludes that economic costs attributable to the designation of critical habitat for the delta smelt are relatively small and due primarily to the effects designation of critical habitat would have upon the five types of actions listed above under the section entitled "Effects of Critical Habitat Designation." An underlying assumption of the draft economic analysis is that the costs associated with implementing EPA's proposed water quality standards for the Bay/Delta are due primarily to listing the delta smelt as threatened. As the Service refines its economic analysis, it may determine that this assumption is to some degree inappropriate and that some of the costs associated with implementing the water quality standards may be attributable to the designation of critical habitat.

The costs associated with sand and gravel operations (approximately two aggregate operators are located in the Delta), diking or dredging for agricultural activities, and marina or bridge construction are expected to be similar. Project proponents or operators would incur costs associated with wetlands restoration, using a replacement ratio of 3 acres restored for 1 acre destroyed. The cost to restore 1 acre of wetlands ranges between $10,000 and $50,000. However, for some tracts of land, the costs associated with restoring wetlands may exceed the value derived from the agricultural activity, in which case the cost attributable to critical habitat would be the loss in agricultural income. The costs attributable to a designation of critical habitat are not expected to substantially affect levee maintenance operations because Federal regulatory agencies currently have restrictions that generally avoid adverse effects to the delta smelt. However, the designation of critical habitat may result in leaving the Montezuma Slough Control Structure's gates open from December to August rather than November to March.

The Service will prepare a final economic analysis prior to making its final determination on critical habitat. If that analysis substantially differs from the draft summarized here, the Service will make a revised economic analysis

available to the public for comment prior to a final determination on critical habitat.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed and its critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Survival and recovery, mentioned in both the definition of adverse modification and jeopardy (see "Effects of Critical Habitat Designation" section), are directly related. Survival may be viewed as a linear continuum between recovery and extinction of the species. The closer a species is to recovery, the greater the certainty of the species' continued survival. Thus, the terms survival and recovery are related by the degree of certainty that the species will persist over a given period of time. Survival relates to viability. Factors that influence a species' viability include population numbers, distribution throughout the range, stochasticity, expected duration, and reproductive success. A species may be considered recovered when there is a high degree of certainty for the species' continued viability.

The Act's definition of critical habitat indicates that the purpose of critical habitat is to contribute to a species' conservation, which, by definition, means recovery. Section 7 prohibitions against the destruction or adverse modification of critical habitat apply to actions that would impair survival and recovery of the listed species, thus providing a regulatory means of ensuring that Federal actions within critical habitat are considered in relation to the goals and recommendations of a recovery plan. As a result of the link between critical habitat and recovery, the prohibition against destruction or adverse modification of critical habitat should protect the critical habitat's ability to contribute fully to a species' recovery. Thus, the adverse modification standard may be reached closer to the recovery end of the survival continuum, whereas the jeopardy standard traditionally has been applied nearer to the extinction end of the continuum.

Federal actions that may affect the delta smelt or its critical habitat, should any be designated, include those authorized, carried out, or funded by the Army Corps of Engineers, Bureau of Reclamation, National Marine Fisheries Service, and EPA. The Army Corps of Engineers funds projects and issues permits for water pumping and diversion facilities, levee construction or repair, bank protection activities, deep-water navigation channel dredging and dredge spoil disposal projects, sand and gravel extraction, marina and bridge construction, diking of wetlands for conversion to farmland, and tidal gate or barrier installation. The Bureau of Reclamation and California Department of Water Resources construct, operate, and/or manage water export facilities. EPA reviews State water quality standards and promulgates replacement standards, pursuant to the Clean Water Act, if the State standards are found to be inadequate. In 1991, EPA disapproved portions of the California State Water Resources Control Board's Water Quality Control Plan for Salinity for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Accordingly, EPA has prepared proposed replacement standards for those portions of the State's salinity standards that were disapproved. Measures to protect the federally listed winter-run chinook salmon, for which the National Marine Fisheries Service has jurisdiction under the Act, also may affect the delta smelt and may require consultation with the Service.

Under section 4 of the Act, listing of the delta smelt provided a requirement for the development of a recovery plan. The Service convened the Delta Native Fishes Recovery Team to prepare a recovery plan for declining native fishes in the Sacramento-San Joaquin Estuary. The recovery plan will develop a framework for Federal, State, and private entities to coordinate activities and cooperate with each other in conservation efforts. The plan will set recovery priorities and estimate the costs of various tasks necessary to accomplish recovery goals. Site-specific management actions necessary to achieve survival and recovery of the delta smelt and other fishes native to the Estuary ecosystem also will be described in this plan.

Summary of Comments and Recommendations

During the 4-month comment period following publication of the October 3, 1991 (56 FR 50075), proposed rule to list the delta smelt as threatened and designate its critical habitat, the Service received 360 comments (i.e., letters and oral testimony) from 348 individuals. The Service received several letters supporting designation of delta smelt critical habitat as proposed. Many local government agencies, water districts, business and trade associations, and other private interests submitted comments regarding the presumed economic effects of the proposed critical habitat designation on industries, planned activities, and development in specific municipalities or geographic regions of California.

On March 16, 1993 (58 FR 14199), the Service published a notice that the public comment period on the proposed designation of critical habitat for the delta smelt was reopened until April 30, 1993, to allow the Service to consider any information that previously had not been submitted. In response, the Service received seven letters: two in support of critical habitat designation as proposed, four in opposition, and a letter from EPA requesting that the Service consider the biological and hydrological information described in EPA's draft proposed rule to promulgate Bay/Delta water quality standards.

The proposed rule to designate critical habitat for the delta smelt has been revised to reflect the best scientific information currently available and to ensure that the Service coordinates its final actions with other interested Federal agencies. For this reason, the Service will address all comments

previously received on the economic impacts, legal requirements, and interpretation of various provisions of the Act during preparation of a final rule. Additionally, comments received during the 60-day comment period following publication of this revised proposed rule will be used in preparing a final rule. Only comments addressing the issue of available scientific information used to revise this proposed rule are responded to in this document. In its final determination on the designation of critical habitat, the Service will provide a thorough discussion of all comments received in response to the original proposed rule and to this revised proposed rule.

Comment: EPA requested that in its designation of critical habitat the Service consider the scientific information described in EPA's draft proposed rule to promulgate water quality standards for the Bay/Delta.

Service Response: The Service has substantially revised the primary constituent elements in this proposed rule to reflect more closely the historical placement of low salinity estuarine habitat in Suisun Bay. As part of the background for formulation of its proposed water quality standards, EPA analyzed the number of days that low salinity (2 ppt) water historically was located at the confluence of the Sacramento and San Joaquin Rivers, Chipps Island, and Roe Island in Suisun Bay. The Service has revised the primary constituent elements to include those features that provide temporal and spatial variability of low salinity waters that will deter further invasion of exotic species, produce high zooplankton densities for food, and simulate natural processes and historical conditions. The "Primary Constituent Elements" section of this revised proposed rule describes in detail the months that each delta smelt life stage requires protective habitat conditions. This revised proposal refines the primary constituent elements to more accurately replicate historical conditions that are needed to recover the delta smelt.

Comment: One commenter stated that the Service does not have enough scientific data to substantiate the conclusions that the location of low salinity habitat in Suisun Bay is important to the recovery of the delta smelt, that delta smelt are associated with the saltwater-freshwater mixing zone, or that water exports could adversely affect delta smelt critical habitat as currently proposed.

Service Response: Section 4(b)(B)(2) of the Act requires that critical habitat designations be based on the best scientific data available. As discussed in the "Habitat Requirements" and "Primary Constituent Elements" sections of this rule, the best available scientific evidence shows that when the entrapment zone is located in a broad geographic area with extensive shallow-water habitat within the euphotic zone, high densities of phytoplankton and zooplankton are produced (Arthur and Ball 1978, 1979, 1980) and larval and juvenile fish, including delta smelt, grow rapidly (Moyle *et al.* 1992, Sweetnam and Stevens 1993). When the entrapment zone is contained within Suisun Bay, young delta smelt are dispersed widely throughout a large expanse of shallow-water and marsh habitat (Harry Seraydarian, EPA, *in litt.*, 1993). Dispersion in areas downstream from the State and Federal water pumps and in-Delta agricultural diversions protects young smelt from entrainment (diverted into man-made structures or impinged on screens) and distributes them among the extensive, protective, and highly productive shoal regions of Suisun Bay. In contrast, high exports cause the entrapment zone to be pulled upstream into the deep river channels (Moyle *et al.* 1992). The large river channels are smaller in total surface area, contain fewer shoal areas, have swifter, more turbulent water currents, and lack high zooplankton densities.

Because the Service seeks to coordinate its final actions with other interested Federal agencies and because the Service also has received new distributional information since the October 3, 1991, proposal to designate critical habitat for the delta smelt, the Service hereby revises the proposal to designate critical habitat. This proposed rule revision is based on materials received during the public comment period and information received during numerous meetings and discussions with State and Federal agency biologists, ichthyologists, engineers, and hydrologists. This new proposal supersedes the October 3, 1991, proposal.

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments are particularly sought concerning:

(1) The reasons why any habitat (either existing or additional areas) should or should not be determined to be critical habitat as provided by section 4 of the Act;

(2) Current or planned activities and their possible impacts on proposed critical habitat areas;

(3) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat;

(4) Economic values associated with benefits of designating critical habitat for the delta smelt; and

(5) The methodology the Service might use, under section 4(b)(2) of the Act, in determining whether the benefits of excluding an area from critical habitat outweigh the benefits of specifying the area as critical habitat. Because the primary constituent elements used in determining which areas to propose as critical habitat for the delta smelt were determined in coordination with EPA in preparation of its proposed water quality standards, the Service also encourages the public, other concerned governmental agencies, the scientific community, industry, or any other interested party to provide comments or suggestions to EPA on its proposed rule to promulgate Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta of the State of California. The Fish and Wildlife Service will consider these comments also in developing its final rule. EPA's proposed rule is published in this same **Federal Register** separate part.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days of the date of publication of this revised proposal in the **Federal Register**. Such requests must be made in writing and should be sent to the Acting Field Supervisor, Sacramento Field Office (see **ADDRESSES** section).

As stated previously, all comments that have been received during the preceding public comment periods on the economic impacts, legal requirements, and biological or ecological requirements or effects of critical habitat designation will be considered during preparation of a final rule. Additionally, comments received during the 60-day comment period following publication of this revised proposed rule will be used in preparing a final rule. The final decision on the designation of critical habitat will take into consideration the comments and any additional information received by the Service and will include any exclusion determinations.

National Environmental Policy Act

The Service has determined that an Environmental Assessment and/or an Environmental Impact Statement, as

defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

Regulatory Flexibility Act and Executive Order 12866

This proposed rule has been reviewed under Executive Order 12866. The Department of the Interior has determined that the proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Based on the information discussed in this rule concerning public projects and private activities within critical habitat areas, significant economic impacts will not result from the critical habitat designation. Also, no direct costs, enforcement costs, information collection, or recordkeeping requirements are imposed on small entities by this designation. Further, the rule contains no recordkeeping requirements as defined by the Paperwork Reduction Act of 1980.

Takings Implications Assessment

The Service has analyzed the potential takings implications of designating critical habitat for the delta smelt in a Takings Implications Assessment prepared pursuant to requirements of Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights." The Takings Implications Assessment concludes that the designation does not pose significant takings implications.

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Author

The primary author of this proposed rule is Nadine R. Kanim, Sacramento Field Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulations Promulgation

Accordingly, the Service hereby proposes to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

§ 17.11 [Amended]

2. Amend § 17.11(h), in the entry in the table under FISHES for "Smelt, delta," in the column under "Critical habitat" by revising "NA" to read "17.95(e)."

3. Amend § 17.95(e) by adding critical habitat of the delta smelt in the same alphabetical order as the species occurs in § 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.

(e) * * *

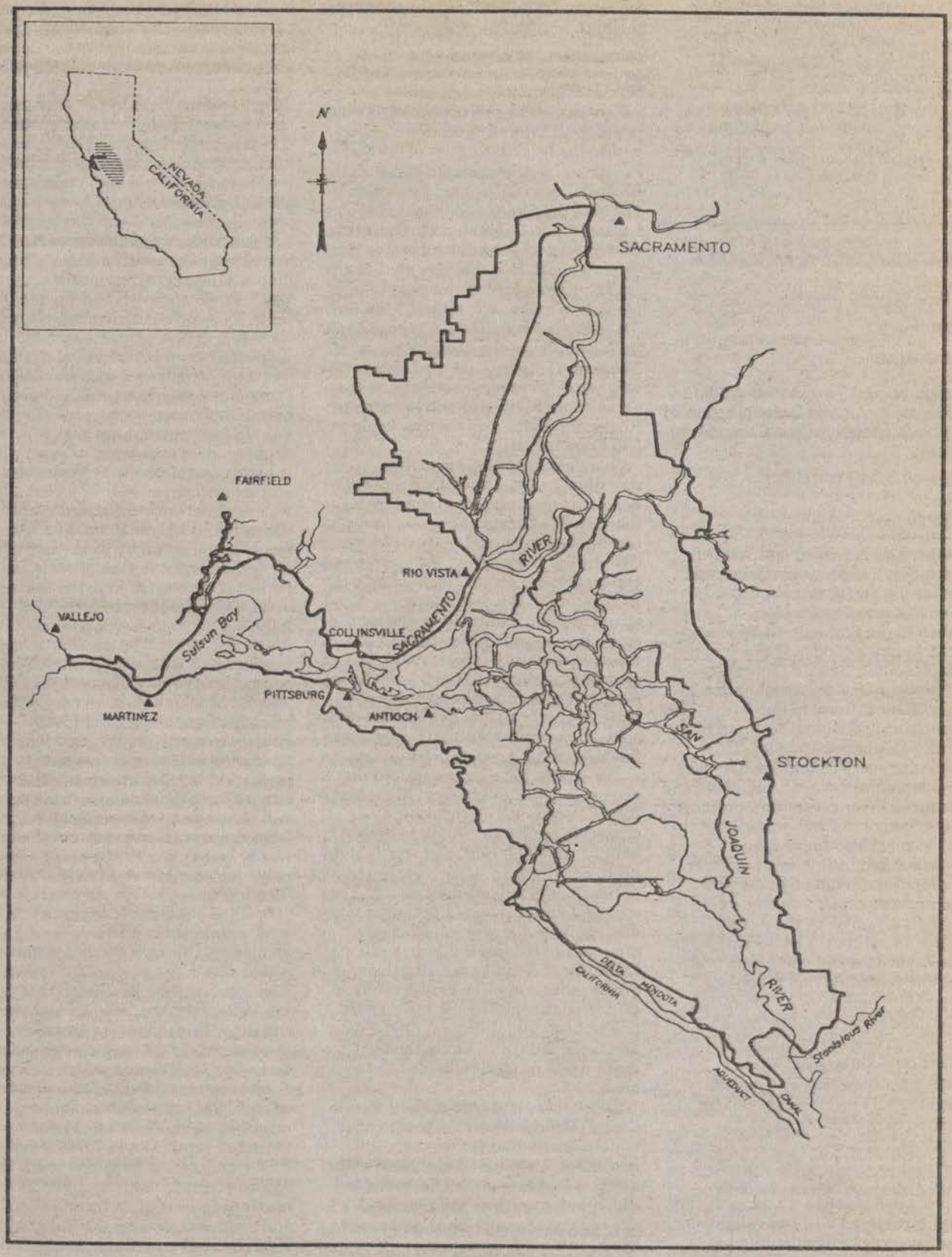
* * * * *

Delta Smelt (*Hypomesus transpacificus*)

California: Areas of all water and all submerged lands below ordinary high water and the entire water column bounded by and contained in Suisun Bay (including the contiguous Grizzly and Honker Bays); the length of Montezuma Slough; and the existing contiguous waters contained within the Delta, as defined by section 12220, of the State of California's Water Code of 1969 (a complex of bays, dead-end sloughs, channels typically less than 4 meters deep, marshlands, etc.) as follows:

Bounded by a line beginning at the Carquinez Bridge which crosses the Carquinez Strait, thence northeasterly along the western and northern shoreline of Suisun Bay, including Goodyear, Suisun, Cutoff, First Mallard (Spring Branch), and Montezuma Sloughs; thence upstream to the intersection of Montezuma Slough with the western boundary of the Delta as delineated in section 12220 of the State of California's Water Code of 1969; thence following the boundary and including all contiguous water bodies contained within the statutory definition of the Delta, to its intersection with the San Joaquin River at its confluence with Suisun Bay; thence westerly along the south shore of Suisun Bay to the Carquinez Bridge.

BILLING CODE 4310–55–P



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Primary Constituent Elements: Physical habitat, water, river flow, and salinity concentrations required to maintain delta smelt habitat for spawning, larval and juvenile transport, rearing, and adult migration.

Dated: December 10, 1993.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 94-90 Filed 1-5-94; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AC26

Endangered and Threatened Wildlife and Plants; Proposed Determination of Threatened Status for the Sacramento Splittail

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) proposes threatened status for the Sacramento splittail (*Pogonichthys macrolepidotus*) pursuant to the Endangered Species Act of 1973, as amended (Act). Sacramento splittail occur in Suisun Bay and the San Francisco Bay-Sacramento-San Joaquin River Estuary in California. The Sacramento splittail has declined by 62 percent over the last 15 years. This species is primarily threatened by large freshwater exports from Sacramento and San Joaquin River diversions, prolonged drought, loss of shallow-water habitat, introduced aquatic species, and agricultural and industrial chemicals. This proposal, if made final, would implement the protection and recovery provisions afforded by the Act for Sacramento splittail. The Service seeks all available data and comments from the public regarding this proposal.

DATES: Comments from all interested parties must be received by March 7, 1994. Public hearing requests must be received by February 22, 1994.

ADDRESSES: Comments and materials concerning this proposal should be submitted to the Acting Field Supervisor, Sacramento Field Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, E-1803, Sacramento, California 95825-1846. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Dale Pierce, Acting Field Supervisor, Sacramento Field Office (see **ADDRESSES** section) at 916/978-4866.

SUPPLEMENTARY INFORMATION:

Background

As used in this rule, the term "Delta" refers to all tidal waters contained within the legal definition of the San Francisco Bay-Sacramento-San Joaquin River Delta, as delineated by section 12220 of the State of California's Water Code of 1969. Generally, the Delta is contained within a triangular area that extends south from the city of Sacramento to the confluence of the Stanislaus and San Joaquin Rivers on the southeast corner and Chipps Island in Suisun Bay at the southwest corner. The term "Estuary," as used in this rule, refers to tidal waters contained in the Sacramento River and San Joaquin Rivers, the Delta, and the San Pablo and San Francisco Bays.

Sacramento splittail were first described in 1854 by W.O. Ayres as *Leuciscus macrolepidotus* and by S.F. Baird and C. Girard as *Pogonichthys inaequilobus*. Although Ayres' species description is accepted, the species was assigned to the genus *Pogonichthys* in recognition of the distinctive characteristics exhibited by the two splittail species *P. ciscoides* and *P. macrolepidotus* (Hopkirk 1973). *P. ciscoides*, endemic to Clear Lake, Lake County, California, has been extinct since the early 1970s. The Sacramento splittail (hereafter splittail) represents the only extant species in its genus.

The splittail is a large cyprinid that can exceed 40 centimeters (16 inches) in length (Moyle 1976). Adults are characterized by an elongated body, distinct nuchal hump, and small, blunt head, usually with barbels at the corners of the slightly subterminal mouth. The enlarged dorsal lobe of the caudal fin distinguishes the splittail from other minnows in the Central Valley of California. Splittail are dull, silvery-gold on the sides and olive-gray dorsally. During spawning season, the pectoral, pelvic, and caudal fins are tinged with an orange-red color. Males develop small white nuptial tubercles on the head.

Splittail are endemic to California's Central Valley, where they were once widely distributed (Moyle 1976). Historically, splittail were found as far north as Redding on the Sacramento River, as far south as the present-day site of Friant Dam on the San Joaquin River, and as far upstream as the current Oroville Dam site on the Feather River and Folsom Dam site on the American River (Rutter 1908). Recreational anglers in Sacramento reported catches of 50 or more splittail per day prior to damming of these rivers (Caywood 1974). The species was used as part of the Central Valley Native American diet (Caywood 1974).

In recent times, dams and diversions have increasingly prevented upstream access to large rivers, and the species is now restricted to a small portion of its former range (Moyle and Yoshiyama 1992). Splittail enter the lower reaches of the Feather (Jones and Stokes 1993) and American Rivers (Charles Hanson, State Water Contractors Association, *in litt.*, 1993) on occasion; however, the species now largely is confined to the Delta, Suisun Bay, Suisun Marsh, and Napa Marsh.

Splittail are relatively long-lived, frequently reaching 5 to 7 years of age. Females are highly fecund and produce over 100,000 eggs each year. Populations fluctuate annually depending on spawning success, which is highly correlated with freshwater outflow and the availability of shallow-water habitat with submerged vegetation (Daniels and Moyle 1983). Fish usually reach sexual maturity by the end of their second year. Some variability in the period of reproduction exists because older individuals reproduce first, followed by younger individuals (Caywood 1974). The onset of spawning is associated with rising temperature, and peak spawning occurs from the months of March through May, although records of spawning exist for late January to early July (Wang 1986). Spawning occurs over flooded vegetation in tidal freshwater and euryhaline habitats of estuarine marshes and sloughs and slow-moving reaches of large rivers. Larvae remain in shallow, weedy areas close to spawning sites and move into deeper water as they mature (Wang 1986).

Splittail are benthic foragers that feed on opossum shrimp (*Neomysis mercedis*), although detrital material makes up a large percentage of their stomach content (Daniels and Moyle 1983). Earthworms, clams, insect larvae, and other invertebrates also are found in the diet. Predators include striped bass and other piscivores.

Although primarily a freshwater species, the splittail can tolerate salinities as high as 10 to 18 parts per thousand (ppt) (Moyle 1976, Moyle and Yoshiyama 1992). In recent years, this fish has been found most often in slow-moving sections of rivers and sloughs and dead-end sloughs (Moyle *et al.* 1982, Daniels and Moyle 1983). Reports from the 1950s, however, mention Sacramento River spawning migrations and catches of splittail during fast tides in Suisun Bay (Caywood 1974). Because

they require flooded vegetation for spawning and rearing, splittail are frequently found in areas subject to flooding, such as the major flood basins distributed throughout the Sacramento and San Joaquin Valleys. California Department of Fish and Game (CDFG) survey data from the last 15 years indicate that the highest catches occurred in shallow areas of Suisun and Grizzly Bays.

The decline in splittail abundance has taken place during increased human-induced changes to seasonal estuary hydrology and freshwater exports and the accompanying changes in the temporal, spatial, and relative ratios of water diversions. These deleterious hydrological effects, coupled with severe drought years, introduced aquatic species, and loss of shallow-water habitat to reclamation, seem to have reduced the species' capacity to recover from natural seasonal fluctuations in hydrology for which it was adapted.

Analyses of survey data collected since 1967 (Meng 1993) by Service, CDFG, and University of California, Davis, biologists from several different studies indicate the following:

(1) On average, splittail have declined in abundance by 62 percent since 1984. Percent decline varied among studies, dependent upon location of sampling effort. The greatest declines (over 80 percent) were found from studies that sampled the shallow Suisun Bay area, the center of the species' range. A study that began in 1980 at the lower Estuary, the outermost edge of splittail range, found the lowest percent decline (34 percent). The number of splittail young taken at State and Federal pumping facilities (per acre-foot of water pumped) has declined 64 percent since 1984;

(2) Successful reproduction in splittail is highly correlated with wet years, but within these wet years, young-of-the-year taken per unit effort has declined steadily from a high of 12.3 in 1978 to 0.3 in 1993;

(3) A strong relationship exists between young-of-the-year abundance and outflow (i.e., river outflow into San Francisco Bay after water exports are removed). As outflow increases, annual abundance of splittail young increases. Changes in outflow explain 73 percent of the changes seen in splittail young abundance;

(4) When young-of-the-year abundance is predicted using unimpaired outflow (i.e., river outflow without water exports removed), abundance is higher than expected in dry years, indicating that water exports affect young-of-the-year abundance in dry years. In dry years when river outflow is reduced, high proportions of outflow are diverted, resulting in lower than expected splittail young numbers;

(5) Lower than expected numbers of splittail young persisted throughout the recent 6-year drought in California. This prolonged period of poor reproductive success may affect the stock's ability to recover;

(6) Splittail are most abundant in shallow areas of Suisun and Grizzly Bays and are vulnerable to increased salinities. Salinities increase when, as a result of water exports and drought conditions, the entrapment zone (mixing zone at the freshwater-saltwater interface) is moved upstream. Concentration of splittail in shallow areas suggests that they are particularly vulnerable to reclamation activities, such as dredging and the diking and filling of wetlands; and

(7) Splittail distribution has shifted upstream into the lower Sacramento River and South Delta since 1983. Ninety-one percent of the splittail captured in San Pablo and lower Suisun Bays from 1967 to 1993 were taken before 1983, and 77 percent of the splittail captured in the lower Sacramento River and South Delta were taken after 1983. Because State and Federal water project pumps are located near the lower Sacramento River and South Delta, this upstream shift in splittail distribution increases splittail mortality at the pumps. In 1993, the number of splittail young taken at the Federal pumping facility was four times higher than in previous years.

A variety of factors affects the estuarine ecosystems and has led to the decline of Sacramento splittail. Principal among these factors specific to the Estuary are the altered hydraulics and reduced outflow of the Delta caused by export of freshwater from the Sacramento and San Joaquin Rivers through State and Federal water diversion projects. Additional threats to this species include:

(1) Loss at pumping plants and in-Delta diversion sites,

(2) Loss of spawning and nursery habitat as a consequence of draining and diking for agriculture,

(3) Reduction in the availability of highly productive brackish-water habitat,

(4) Urban and agricultural pollution,

(5) Introduction of exotic species, and

(6) Exacerbation of the effects of these factors as a result of 6 years of drought.

The causes of splittail decline in the Estuary are multiple and synergistically threaten this species. The individual threats include:

(1) Reduced river outflows, primarily in the Sacramento and San Joaquin Rivers and their tributaries;

(2) Loss of shallow-water habitat;

(3) Mortality caused by diversion into State and Federal water projects and privately-operated agricultural in-Delta water diversions;

(4) Human and natural perturbations of the food web;

(5) Presence of toxic substances in the aquatic habitat (e.g., agricultural and industrial chemicals and heavy metals); and

(6) Introduction of non-native species.

Previous Service Action

The Service included the Sacramento splittail as a category 2 candidate species for possible future listing as endangered or threatened in the January 6, 1989 (54 FR 554), Animal Notice of Review. Category 2 includes species for which information contained in Service files indicates that proposing to list is possibly appropriate but additional data is needed to support a listing proposal.

On November 5, 1992, the Service received a petition from Mr. Gregory A. Thomas of the Natural Heritage Institute to add the splittail to the List of Endangered and Threatened Wildlife and to designate critical habitat for this species in the Sacramento and San Joaquin Rivers and those estuaries. In his letter, Mr. Thomas identified the following eight organizations as co-petitioners: American Fisheries Society, Bay Institute of San Francisco, Natural Heritage Institute, Planning and Conservation League, Save San Francisco Bay Association, Friends of the River, San Francisco Baykeeper, and the Sierra Club. On June 24, 1993, the Service issued a 90-day finding, notice of which was published in the Federal Register on July 6, 1993 (58 FR 36184), that the petition presented substantial information indicating that the requested action may be warranted. The Service initiated a status review and analyzed available data on this species (Meng 1993). Additional sources of information describing the human factors and projects that may affect this species include expert testimonies presented to the California State Water Resources Control Board's 1987 Water Quality/Water Rights Proceeding on the San Francisco Bay and Sacramento-San Joaquin River Delta and 1992 Water Rights Phase of the Bay-Delta Estuary Proceedings. This proposal constitutes the final finding on the petition to list the Sacramento splittail.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be endangered or threatened because of one or more of the five factors described in section 4(a)(1). These factors and their application to the Sacramento splittail (*Pogonichthys macrolepidotus*) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The Sacramento splittail was once widely distributed in the Central Valley of California from Redding to the modern-day site of Friant Dam near the City of Fresno. It is now restricted to western, northern, and southern portions of the Delta due to dams, diversions, dredging, and the diking and filling of historic flood basins. Within the species' constricted range, splittail have declined by 62 percent since 1984. However, the overall percentage decline over its historical range is much greater. Populations have fluctuated somewhat in the past, with most recruitment taking place in wet years. In wet years since 1976, however, splittail recruitment has declined consistently with catches per unit effort of 12.3, 8.1, 2.0, 1.3, and 0.3 for 1978, 1982, 1983, 1986, and 1993, respectively. Splittail declines are highest (82 percent) in the shallow-water Suisun Bay area, which is the center of its distribution. This may reflect the loss of productive brackish-water habitat in Suisun and Grizzly Bays due to increased salinities caused by low outflows.

Currently, Delta water diversions and exports total to about 9 million acre-feet per year. Federal and State projects presently export about 6 million acre-feet per year when sufficient water is available, and in-Delta agricultural uses result in diversion of about 3 million additional acre-feet per year. Plans currently being prepared could potentially induce increased exports and diversions in the future. The Service knows of 22 major Central Valley Project, State Water Project, or private organization proposals that would result in increased water exports from the Delta, reduced water inflow to the Delta, changes in the timing and volume of Delta inflow, or increases in heavy metal contamination of the Delta. These proposed projects or actions include but are not limited to Central Valley Project Operations Criteria and Plan (including Friant Contract Renewals), Los Banos Grandes Reservoir, Los Vaqueros Reservoir, South Delta Water Management Program, South Delta Water Barriers Project, North Delta Water Management Project, West Delta Water Management Project, Coastal Aqueduct proposal, Delta Wetlands Corporation Water Storage Project, Folsom Dam Reoperation, Oroville Dam Reoperation, Auburn Dam, Central Valley Project contract renewals, the Central Valley Project and State Water Project wheeling purchase agreement, reactivation of the San Luis Drain, Stanislaus-Calaveras River Basin Water Use Program, Suisun Marsh Project Phase Three and Four, Kern Water Bank, Arvin Edison water storage and exchange proposal, Federal Water Project change in diversion point, and State Water Project Pump additions. These projects would modify or destroy the habitat of this species.

Because the Federal pumping plant has been operated at capacity for many years except for a few drought years, increased exports at this plant appear unlikely. However, the State Water Project pumping plant and the capacity of the State Aqueduct have considerable unused capacity. The California Department of Water Resources (1992) reported the past and projected State Water Project deliveries from Delta sources during the years of 1962 to 2035. In the 1980s, deliveries ranged from 1.5 million acre-feet to 2.8 million acre-feet. By 2010, deliveries of up to 4.2 million acre-feet are planned.

Since 1983, the proportion of water exported from the Delta during October through March has been higher than in earlier years (Moyle *et al.* 1992). The timing of these proportionally higher exports have coincided with the spawning season of the splittail. Federal and State water diversion projects in the southern Delta export, by absolute volume, mostly Sacramento River water with some San Joaquin River water. Moreover, during periods of high export pumping and low to moderate river outflows, reaches of the San Joaquin River reverse direction and flow upstream to the pumping plants located in the southern Delta. The State-operated pumping plant presently exports water at rates up to 6,400 cubic feet per second (cfs). The State is considering proposals to export an additional 3,900 cfs. The Federal pumping plant can export water at rates up to 4,600 cfs. In addition, local private diverters export up to 5,000 cfs from about 1,800 diversions scattered throughout the Delta.

When total diversion rates are high relative to Delta outflow, and the lower San Joaquin River and other channels have a net upstream (i.e., reverse or negative) flow, out-migrating larval and juvenile fish of many species become disoriented. Large mortalities occur as a result of loss to pumps and predation by striped bass at the various water facilities and other diversion sites. Because data from State and Federal pumping facilities indicate that splittail migrate upstream to spawn, positive outflows are also important to transport splittail young downstream (Meng 1993).

In recent years, the number of days of reversed San Joaquin River flow have increased (Moyle *et al.* 1992), particularly during the February-June spawning months for splittail. All size classes of splittail young suffer near total loss when they are entrained by the pumping plants and diversions in the south Delta. Few young are effectively salvaged at the Federal and State pumping plant screens. This species' embryonic, larval, and postlarval mortality rates also are higher when reduced outflows cause increases in salinity and relocation of the entrapment zone (Moyle and Yoshiyama 1992).

Splittail are adapted for life in the entrapment zone. Estuaries are ecosystems where the entrapment zone and salinity levels are determined by the interaction of river outflow and tidal action. Splittail are most abundant in the shallow waters of Suisun Bay, which is historically associated with the entrapment zone. The young of this species require high zooplankton densities produced by the entrapment zone environment. The best survival and growth of splittail occurs when the entrapment zone occupies a large geographic area with extensive shoal regions within the euphotic zone (depths less than 4 meters). Fall mid-water trawl survey data collected by CDFG indicate that 76 percent of the splittail captured from 1967 to 1992 in the Delta were taken in the shallow areas of Suisun and Grizzly Bays (Meng 1993).

During periods of drought and increased water diversions, the entrapment zone and associated fish populations are shifted farther upstream in the Estuary. During years prior to 1984, the entrapment zone was located in Suisun Bay from October through March (except in months with exceptionally high outflows or during years of extreme drought). From April through September, the entrapment zone usually was found upstream in the river channels. Since 1984, with the

exception of the record 1986 flood outflows, the entrapment zone has been located primarily in the river channels during the entire year because of drought and increased water exports and diversions. When located upstream, the entrapment zone is confined to deep river channels where the total surface area is smaller, fewer shoal areas of suitable spawning substrate exist, water currents are swifter and more turbulent, and zooplankton productivity is low. In all respects, the upstream river channels are much less favorable for spawning and rearing of splittail. Splittail declines since 1984 have been concurrent with an increasing amount and proportion of freshwater diversions that confine the entrapment zone to the narrow, deep, and less productive channels in the lower rivers.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

This factor is not known to be applicable. Some scientific collecting is conducted for splittail, but these activities do not adversely affect this species. Little or no recreational harvest of splittail is likely occurring because the population has dramatically declined, and it is not a desirable game species. No recent records of splittail harvest exist, probably because little or no harvest occurs, and the identification of this species is often confused with other nongame species. No other recreational or educational uses of this species exist that may affect its abundance.

C. Disease or Predation

This factor is not known to be applicable. However, if the non-native striped bass populations increase, all size classes of splittail could be under greater threat of predation. An effort by CDFG is under way to compensate for striped bass population mortalities caused by water export projects. The 1991 striped bass stock was low relative to the population in the 1960s. Previously, the striped bass compensation program annually released 1 to 2 million juvenile, hatchery-reared striped bass in the Estuary in an effort to rebuild the population. However, for the last 2 years, the Director of CDFG has foregone release of striped bass because of the potential harm they would cause to the federally-threatened Sacramento River winter-run chinook salmon and delta smelt.

D. The Inadequacy of Existing Regulatory Mechanisms

Regulatory mechanisms currently in effect do not provide adequate protection for the splittail or its habitat. This species is not listed by the State of California.

Suisun Bay is the best known nursery habitat for reproduction and larval survival of splittail, but the habitat has been deleteriously altered by higher salinities in the spring. These higher salinities are caused by a large number of freshwater diversions that allow seawater to intrude farther upstream. At present, there are relatively few periods when freshwater outflow volumes through the Delta and Suisun Bay of any significance are mandated for wildlife or fisheries. State and Federal agencies had planned to increase 1991 and 1992 water supplies for out-of-stream uses at the expense of environmental protection of estuarine fish and wildlife resources in the fifth and potentially sixth years of drought (Morat 1991). Because of significantly higher than normal precipitation and subsequent higher instream flows after March 1991, a State agency request for relaxation of Delta water quality standards was withdrawn. Should a California drought return, water quality relaxation action likely will be requested again to favor out-of-stream water use over the need to protect aquatic habitats for fish and wildlife.

Present regulatory processes do not ensure that water inflows to Suisun Bay and the western Estuary will be adequate to maintain the entrapment zone near or in Suisun Bay to benefit splittail. The California State Water Resources Control Board (Board) has the authority to condition or require changes in the amount of water inflow and the amount of water exported or diverted from the Delta. In testimony given before the Board's Water Quality/Water Rights Hearings in 1987, a Service biologist expressed concern for several Delta species including splittail (Lorentzen 1987). The Board did not take regulatory or legal action to protect this fish or its habitat during the four following years. On May 1, 1991, the Board adopted the Water Quality Control Plan for Salinity for the San Francisco Bay-Sacramento-San Joaquin Delta Estuary (1991 Bay/Delta Plan). On September 3, 1991, under provisions of the Clean Water Act, the Environmental Protection Agency (EPA) disapproved certain water quality standards for the Board's failure to adopt criteria to protect estuarine habitat. In 1993, EPA began the process of formulating replacement standards for those portions of the 1991 Bay/Delta Plan that were disapproved. In January 1992, the Governor of California announced a new water policy that included a directive to the Board to establish "interim measures" to reverse the decline of fishes in the Bay and Delta. Accordingly, the Board released an interim water quality plan (Draft Decision 1630) in December 1992 that immediately was suspended by the Governor.

EPA's proposed rule to promulgate Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta is published in this same **Federal Register** separate part; however, enforcement of these standards may be difficult. The Service is aware that the salinity standards currently in effect (Water Right Decision 1485) are inconsistently implemented and frequently violated. Institutional guarantees of compliance have been lacking in the past and are needed in the future before existing mechanisms can contribute to the protection of this species.

The Service currently is analyzing the potential effects on the splittail and other fish and wildlife resources in California as a result of recent enactment of the Central Valley Project Improvement Act (Pub. L. 102–575). Two of the stated purposes of this act are to: "Protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California" and "to contribute to the State of California's interim and long-term efforts to protect the San Francisco Bay-Sacramento-San Joaquin Delta Estuary." Section 3406(b)(2) dedicates 800,000 acre-feet of Central Valley Project water annually for various purposes, including the benefit of federally listed species. Although the Service is reasonably certain that the splittail will realize some benefit from implementation of the Central Valley Project Improvement Act, the magnitude and timeliness of these protections may be inadequate to prevent further decline of splittail.

Protective measures currently being implemented to benefit the delta smelt will beneficially affect the splittail by restricting pumping under certain conditions. However, the ecological requirements of each species differ, especially with respect to timing of important developmental stages and habitat use. Splittail need flooded lowland habitat for spawning and are particularly vulnerable to disturbance or destruction of marshy habitat. Therefore, the protections afforded the delta smelt, listed as threatened in 1993

under the Endangered Species Act, will not be sufficient to prevent further decline of the splittail. For the reasons stated above, the Service considers the existing regulatory mechanisms inadequate to ensure the long-term existence of the Sacramento splittail.

E. Other natural or manmade factors affecting its continued existence

Splittail are vulnerable to extinction from stochastic events because of the consistent decline in population indices and severely constricted ranges and distribution.

Poor water quality also may adversely affect splittail, either through direct exposure to toxins or depletion of zooplankton or invertebrate food sources. All major rivers that are tributary to the Estuary are exposed to large volumes of agricultural and industrial chemicals that are applied in the Central Valley watershed (Nichols *et al.* 1986). Agricultural chemicals and their residues, as well as chemicals originating in urban runoff, find their way into the rivers and Estuary. Approximately 10 percent of the total pesticide use in the United States occurs in the Sacramento and San Joaquin River watersheds, primarily on orchards, alfalfa, and rice during the months of January to June of each year (Jewel Bennett, U.S. Fish and Wildlife Service, *in litt.*, 1993). Recently, high concentrations of organophosphate and carbamate pesticides from agricultural uses have been documented entering the Estuary. These pesticides are acutely toxic to zooplankton and fishes as far west as Martinez in Suisun Bay and as far south as Vernalis on the San Joaquin River (Bennett, *in litt.*, 1993). The periods of pesticide use coincide with the timing of migration, spawning, and early development of splittail. During rainfall runoff events, acutely toxic pulses of pesticides move down the rivers and through the Estuary with remarkable persistence and relatively little dilution.

Toxicology studies of rice field irrigation drain water of the Colusa Basin Drainage Canal have documented significant toxicity of drain water to striped bass embryos and larvae, *Oryzias latipes* larvae (in the Cyprinodontidae family), and the opossum shrimp, which is the major food organism of striped bass larvae and juveniles (Bailey *et al.* 1991). This drainage canal flows into the Sacramento River just north of the City of Sacramento. The majority of drain water samples collected during April and May 1990 were acutely toxic to striped bass larvae (96 hour exposures); this was the third consecutive year that the Colusa Basin rice irrigation drain water was acutely toxic (Bailey *et al.* 1991). Splittail may be similarly affected by agricultural and industrial chemical run-off.

Some heavy metal contaminants have been released into the Estuary from industrial and mining enterprises. While the effects of these contaminating compounds on splittail larvae and their zooplankton food resources are not well known, the compounds could adversely affect survival. In addition, increases in urban development in the Sacramento Valley will continue to result in concurrent increases in urban runoff. Selenium has been found in aquatic organisms (Saiki and Lowe 1987) and fish species in the San Joaquin River watershed (Nakamoto and Hassler 1992). Selenium has been shown to cause developmental defects in and mortality of fish species (Hermanutz 1992).

In recent years, untreated discharges of ship ballast water has introduced exotic aquatic species to the Estuary ecosystem (Carlton *et al.* 1990). Several exotic species may adversely affect the splittail. An asian clam (*Potamocorbula amurensis*), introduced as veliger larvae in 1986, was first discovered in Suisun Bay during October 1986. By June 1987, the Asian clam was widespread in Suisun, San Pablo, and San Francisco Bays irrespective of salinity, water depth, and sediment type at densities greater than 10,000 individuals per square meter. Asian clam densities declined to 4,000 individuals per square meter as the population aged during the year (Carlton *et al.* 1990). Persistently low river outflow and concomitant elevated salinity levels may have contributed to this species' population explosion (Carlton *et al.* 1990). The Asian clam could potentially play an important role in affecting the phytoplankton dynamics in the Estuary. The clam may have an effect on higher trophic levels by decreasing phytoplankton biomass.

Historically, *Eurytemora affinis*, the native euryhaline copepod, has been the most important food for larval fishes in the Estuary. Three non-native species of euryhaline copepods (*Sinocalanus doerrii*, *Pseudodiaptomus forbesi*, and *Pseudodiaptomus marinus*) became established in the Delta between 1978 and 1987 (Carlton *et al.* 1990), while *E. affinis* populations have declined since 1980. It is not known if the exotic species have displaced *E. affinis* or whether changes in the estuarine ecosystem now favor *S. doerrii* and the two *Pseudodiaptomus* species (Moyle *et al.* 1989). *S. doerrii* is difficult for larval fishes to catch because of its fast swimming and effective escape response (Meng and Orsi 1991). Reduced feeding efficiency and ingestion rates weaken and slow the growth of splittail young and make them more vulnerable to starvation or predation.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to propose this rule. Sacramento splittail have declined by 62 percent over the last 15 years. This species has been extirpated from portions of its range. In the Estuary during the past 2 decades, the entrapment zone, associated with the important nurseries for splittail, has been more frequently shifted upstream to a confined area of greater depth as a result of drought conditions, water management schedules, and the continual and increasing demand for water exports and diversions. These factors will continue to adversely affect all life stages of splittail.

Threatened status is proposed for the Sacramento splittail because of several factors. The population has declined by 62 percent within 15 years. The historical and current range of the species is constricted. Changes in water salinity and the reverse flow of water has shifted the distribution of individuals upstream and has caused the fish to be vulnerable to State and Federal pumping plants. The death of these fish due to pumping continues at present and is likely to continue in the future. Water exports also threaten the quality and quantity of habitat at present and for the future. Because Sacramento splittail are long-lived, their decline has been gradual, and extinction is not imminent, listing the splittail as endangered would not be appropriate. Although this species is not in imminent danger of extinction at this time, it is likely to become endangered in the foreseeable future.

Therefore, based on the evaluation of all available information on abundance, present distribution, and threats to this species, the Service has determined that proposing to list the Sacramento splittail as threatened is appropriate at this time. Critical habitat is not determinable for reasons discussed in the "Critical Habitat" section of this rule.

Critical Habitat

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, the Secretary propose critical habitat concurrently with proposing a species to be endangered or threatened. The Service finds that designation of critical habitat for the

Sacramento splittail is not determinable at this time. Regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable if information sufficient to perform required analyses of the impacts of the designation is lacking or if the biological needs of the species are not sufficiently known to permit identification of an area of critical habitat. The Service's efforts to gather information on the potential benefits of designating critical habitat for splittail may lead to the conclusion that designation of critical habitat is not prudent. Regulations at 50 CFR 424.12(a)(1) state that a designation of critical habitat is not prudent when the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or when such designation would not be beneficial to the species.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed and its critical habitat is designated, section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal actions that may affect the splittail or its critical habitat, should any be designated, include those authorized, carried out, or funded by the Army Corps of Engineers, Bureau of Reclamation, National Marine Fisheries Service, and EPA. The Army Corps of Engineers funds projects and issues permits for water pumping and diversion facilities, levee construction or repair, bank protection activities, deep-water navigation channel dredging and dredge spoil disposal projects, sand and gravel extraction, marina and bridge construction, diking of wetlands for conversion to farmland, and tidal gate or barrier installation. The Bureau of Reclamation and California Department of Water Resources construct, operate, and/or manage water export facilities. EPA reviews State water quality standards and promulgates replacement standards, pursuant to the Clean Water Act, if State standards are found to be inadequate. In 1991, EPA disapproved portions of the California State Water Resources Control Board's Water Quality Control Plan for Salinity for the San Francisco Bay-Sacramento-San Joaquin Delta Estuary. Accordingly, EPA has published in this same **Federal Register** separate part proposed replacement standards for those portions of the State's salinity standards that were disapproved.

Under section 4 of the Act, listing the splittail will provide additional impetus for the development of a recovery plan to bring together Federal, State, and private efforts to develop conservation strategies for this species. The Service has convened the Delta Native Fishes Recovery Team to prepare a recovery plan for declining native fishes in the Estuary. The recovery plan will develop a framework for agencies to coordinate activities and cooperate with each other in conservation efforts. The plan will set recovery priorities and estimate the costs of various tasks necessary to accomplish recovery goals. Site-specific management actions necessary to achieve survival and recovery of the splittail and other fishes native to the Estuary ecosystem also will be described in this plan.

The Act and its implementing regulations found at 50 CFR 17.31 set forth a series of general prohibitions and exceptions that apply to all threatened wildlife not covered by a special rule. These prohibitions, in part, would make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt any such conduct), import or export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any such species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered or threatened wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Permits for threatened species are available for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available. For threatened species, permits are lawful for zoological exhibition, educational purposes, or special functions consistent with the purposes of the Act. Further information regarding regulations and requirements for permits may be obtained from the U.S. Fish and Wildlife Service, Ecological Services, Permits Branch, 911 NE. 11th Avenue, Portland, Oregon 97232–4181 (503/231–6241; FAX 503/231–6243).

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to this species;

(2) The location and status of any additional populations of this species and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act. Biological information that would be useful in determining whether to designate critical habitat includes descriptions and locations of spawning habitat and life history information on behavior and ecological needs;

(3) Additional information concerning the range, distribution, and population size of this species; and

(4) Current or planned activities in the subject area and their possible impacts on this species.

Any final decision on this proposal will take into consideration the comments and any additional information received by the Service, and such communications may lead to final regulations that differ from this proposal.

The Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal. Such requests must be made in writing and addressed to the Acting Field Supervisor, Sacramento Field Office (see **ADDRESSES** section).

National Environmental Policy Act

The Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

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Authors

The authors of this rule are Dr. Lesa Meng and Nadine R. Kanim, Sacramento Field Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulations Promulgation

Accordingly, the Service hereby proposes to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Section 17.11(h) is amended by adding the following, in alphabetical order under FISHES, to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
Fishes:							

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*		*	*	*
Splittail, Sacramento.	*Pogonichthys macrolepidotus.*	U.S.A. (CA)	Entire	T		NA	NA
*	*	*	*		*	*	*

Dated: December 21, 1993.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 94-91 Filed 1-5-94; 8:45 am]

BILLING CODE 4310-55-P

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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Notice of 1-Year Finding on a Petition to List the Longfin Smelt

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a 1-year finding on a petition to list the longfin smelt (*Spirinchus thaleichthys*) under the Endangered Species Act of 1973, as amended (Act). The Service determines that the petitioned action is not warranted at this time. The longfin smelt occurs from the San Francisco Bay-Sacramento-San Joaquin River Estuary in California to Prince William Sound in Alaska. Although the southernmost populations are declining, little or no population trend data are available for estuaries in Oregon and Washington. The species may be surviving and reproducing in Puget Sound, Skagit Bay, Grays Harbor, Willapa Bay, the Columbia River, Yaquina Bay, and Coos Bay. Large numbers are found in the Gulf of Alaska 5 to 6 miles off shore. The listing of a Sacramento-San Joaquin River estuary vertebrate population segment is also not warranted at this time because that population does not seem to be biologically significant to the species as a whole, and may not be sufficiently reproductively isolated.

DATES: Comments from all interested parties will be accepted until further notice.

ADDRESSES: Comments and materials concerning this document should be submitted to the Acting Field Supervisor, Sacramento Field Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, E-1803, Sacramento, California 95825-1846.

FOR FURTHER INFORMATION CONTACT: H. Dale Hall, Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife Service, 911 NE. 11th Avenue, Portland, Oregon 97232-4181 (503/231-6150).

SUPPLEMENTARY INFORMATION: On November 5, 1992, the Service received a petition from Mr. Gregory A. Thomas of the Natural Heritage Institute to add the longfin smelt to the List of Endangered and Threatened Wildlife and to designate critical habitat in the Sacramento and San Joaquin Rivers and estuary. In his letter, Mr. Thomas identified the following eight organizations as co-petitioners: American Fisheries Society, Bay Institute of San Francisco, Natural Heritage Institute, Planning and Conservation League, Save San Francisco Bay Association, Friends of the River, San Francisco Baykeeper, and the Sierra Club. On June 24, 1993, the Service issued a 90-day finding, a notice of which was published in the **Federal Register** on July 6, 1993 (58 FR 36184), that the petition presented substantial information indicating that the requested action may be warranted. The Service initiated a status review and analyzed available data on this species (Meng 1993). Additional sources of information describing the human factors and projects that may affect this species include expert testimonies presented to the California State Water Resources Control Board's 1987 Water Quality/Water Rights Proceeding on the San Francisco Bay and Sacramento-San Joaquin River Delta and 1992 Water Rights Phase of the Bay-Delta Estuary Proceedings.

Section 4(b)(3)(B) of the Act requires that the Service issue a finding within 1 year of the receipt of the petition on whether the petitioned action is (a) not warranted, (b) warranted, or (c) warranted but precluded from immediate proposal by other pending proposals of higher priority.

In casual conversations, the petitioner indicated that he intended the petition to be a request to list the Sacramento-San Joaquin River estuary population. However, the Service did not receive this request in writing and, in any case, was required to review the status of the species on a rangewide basis prior to considering the appropriateness of listing individual population segments. The Service determines that listing of the Sacramento-San Joaquin estuary population segment of the longfin smelt is not warranted.

Longfin smelt is an euryhaline species with a 2-year life cycle (Moyle 1976, Moyle and Yoshiyama 1992). Spawning occurs in fresh water over sandy-gravel substrates, rocks, or aquatic plants. Spawning may take place as early as November and extend into June, although the peak spawning period is from February to April (Wang 1986). After hatching, larvae move up into surface waters and are transported downstream into brackish-water nursery areas. Sacramento-San Joaquin River outflow into Suisun and San Pablo Bays has been positively correlated with longfin smelt recruitment (Stevens and Miller 1983) because higher outflow increases larval dispersal and the area available for rearing (Wang 1986). The main food of longfin smelt is opossum shrimp, although copepods and other crustaceans also are eaten (Moyle 1976). Longfin smelt are preyed upon by fishes, birds, and marine mammals (Monaco et al. 1991). Longfin smelt play a role in maintaining the structure and function of estuarine ecosystems because they are important as food for birds and piscivorous fishes.

As presently described, longfin smelt range from the San Joaquin-Sacramento River estuary and South San Francisco Bay, California, to Prince William Sound, Alaska (Miller and Lea 1972). The present-day distribution of longfin smelt is probably due to lower sea levels in the Pleistocene, which would have enlarged estuaries up and down the Pacific coast and shortened the distances between estuaries, as well as provide more habitat (Peter Moyle, University of California, Davis, pers. comm., 1993). Unverified reports of offshore collection of longfin smelt exist, approximately 5 to 6 miles off shore in Alaska (Bruce Wing, National Marine Fisheries Service, Auke Bay, Alaska, pers. comm., 1993) and 3 to 4 miles off shore in northern California (Larry

Quirollo, California Department of Fish and Game, pers. comm., 1993).

Based on inferred abundance, longfin smelt may be common in Willapa Bay, Skagit Bay, and Puget Sound in Washington and Coos Bay and Yaquina Bay in Oregon (Monaco *et al.* 1990). Largely using sampling data, Monaco *et al.* (1990) also reported that longfin smelt were common to highly abundant in the Columbia River and Grays Harbor, Washington. Few data exist on the recent status of the Oregon and Washington longfin smelt; however, indications are that this species may be reproducing and surviving in the Oregon and Washington estuaries (Bob Emmett, National Marine Fisheries Service, Hammond, Oregon, pers. comm., 1993). A land-locked population exists in Harrison Lake in British Columbia. British Columbia longfin smelt have also been recorded at the Fraser River estuary and near Prince Rupert and Vancouver (Hart 1973). Alaska longfin smelt are found at the Dixon Entrance, Yakutat Bay, Prince William Sound, and Cook Inlet (Wing, pers. comm., 1993). In California, the longfin smelt occurs (or did occur) in the Klamath River mouth, Humboldt Bay, Eel River mouth, Van Duzen River mouth, and the San Francisco Bay-Sacramento-San Joaquin Estuary (Moyle 1976; Moyle and Yoshiyama 1992; Ron Fritzsche, Humboldt State University, pers. comm., 1993). The Estuary supports the largest and most southerly longfin smelt population in California (Lee *et al.* 1980).

The strongest information on the decline of longfin smelt comes from the Sacramento-San Joaquin River Estuary of California. Longfin smelt were once one of the most abundant fish caught by trawl surveys in the Sacramento-San Joaquin (Herbold *et al.* 1992) and Humboldt Bay estuaries (Barnhart, pers. comm., 1993). Longfin smelt numbers in the Estuary fluctuated widely in the past, but since 1983 abundance has dropped dramatically and remained at record lows. In Humboldt Bay, longfin smelt were the fourth most abundant fish captured in trawls in the late 1960s and early 1970s (Roger Barnhart, National Biological Survey, pers. comm., 1993). However, since 1988, no longfin smelt have been captured in Humboldt Bay using similar sampling methods (Tim Mulligan, Humboldt State University, pers. comm., 1993). Historical records of longfin smelt from the mouth of the Van Duzen River exist; however, in recent years, no evidence of the fish exists for this location (Fritzsche, pers. comm., 1993). The Eel River, which is about 3.2 kilometers (2 miles) from Humboldt Bay, is relatively small and probably contains little habitat appropriate for longfin smelt. Longfin smelt likely occurred in the Eel River only when high river outflows introduced fish from Humboldt Bay. Longfin smelt numbers probably declined in the Eel River at the same time declines occurred in Humboldt Bay. Recent surveys have not found the longfin in the Eel estuary (Moyle, pers. comm., 1993). In Oregon and Washington, no population trend data exist for any of the estuaries, although the indications are that the species is surviving and reproducing in several estuaries (Emmett, pers. comm., 1993). In Alaska, large numbers of longfin smelt are found in the Gulf of Alaska (Bruce Wing, National Marine Fisheries Service, pers. comm., 1993).

In the Sacramento-San Joaquin River Estuary the decline in longfin smelt abundance is associated with fresh water diversions from the Delta to support California's agricultural industry in the Central Valley and the vast urban areas of southern California. Strong relationships between outflow and longfin smelt abundance indicate that outflows less than 3,400 cubic feet per second (cfs) result in reproductive failure for longfin smelt (Moyle and Yoshiyama 1992). Because of its 2-year life span, such flows for more than 2 or 3 consecutive years could push this species toward extinction. From 1986 to 1991, outflows hovered close to that number, partly due to high proportions of inflow diverted. Movement of the entrapment zone (mixing zone at the freshwater-saltwater interface) up-river due to low outflows has constricted the range of the longfin smelt and made it increasingly vulnerable to diversion into man-made structures. Low outflows have failed to disperse larvae downstream to the productive nursery areas in Suisun Bay away from the pumps. The water exports from the Delta by far exceed those from any other estuary on the west coast of North America.

Sediment production as a result of human activities and developments in the Humboldt, Eel, Van Duzen, and Klamath watersheds may be a cause of the decline of longfin smelt in those estuaries. Soil washed into the streams can deposit in estuaries downstream. Sedimentation in the spawning habitat could have reduced the spawning success of this species due to physical scouring or suffocation of eggs (Barnhart, pers. comm., 1993). Although human activities upstream of estuaries in Oregon, Washington, Canada, and Alaska would likely result in similar impacts, the Service does not have population trend data for these portions of the species' range.

Longfin smelt disappeared from the Humboldt Bay estuary in the 1980s (Barnhart, pers. comm., 1993), perhaps as a result of a dramatic loss of intertidal marsh habitat, which may have reduced productivity levels to a point at which they could no longer support the species. In addition, the loss of freshwater flows from the Mad River, as a result of water diversions and land reclamation, may have contributed to the loss of this species from the Humboldt Bay.

Longfin smelt may be particularly sensitive to adverse habitat alterations or to stochastic events because their 2-year life cycle increases the likelihood of extinction after consecutive periods of reproductive failure due to drought or other factors. Relatively brief periods of reproductive failure could lead to extirpations.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in this determination. This species does not appear to be threatened throughout all or a significant portion of its range or likely to become so in the foreseeable future. However, given the declines in the southern portion of the species' range and the general lack of population trend data for the remainder of its range, the Service will include the longfin smelt in category 2 of the next notice of review for animals.

Though the petition was not limited to a portion of the species' range, the petitioner focused on the resident longfin smelt in the Sacramento-San Joaquin River estuary population. In telephone conversations, the petitioner indicated that he was most interested in a population listing. Longfin smelt numbers in this estuary have declined by 90 percent since 1984 and by 50 percent annually since 1987.

The Service has listed vertebrate population segments where the entity being listed represented the entire coterminous United States population (e.g., marbled murrelet, grizzly bear). Some reproductively isolated (or nearly so) vertebrate population segments that are clearly important to the conservation of an entire species have also been listed under the Act (e.g., Mojave population of the desert tortoise, coastal population of the western snowy plover).

Although the longfin smelt reportedly is unable to swim between estuaries (Moyle, pers. comm., 1993), unverified reports of offshore collections exist (Quirollo, pers. comm., 1993; Wing, pers. comm., 1993). Furthermore, the current distribution is thought to be the

result of movements between estuaries that took place during the Pleistocene when lower sea levels reportedly would have enlarged estuaries along the Pacific coast and shortened the inter-estuarian distances (Moyle, pers. comm., 1993). Though geographically removed from the closest known extirpated or declining population (300 miles from the Eel River in California), this isolation does not necessarily indicate that the Sacramento-San Joaquin River estuary population is significant to a species that has a range of more than 1,900 miles. In addition, electrophoretic analysis revealed that the accumulated number of codon substitutions per locus (i.e., Nei's genetic distance) since the time of separation of the Sacramento-San Joaquin River estuary population and the longfin population in Lake Washington, Washington, connected to Puget Sound via a system of locks, has been small (0.005 according to Stanley *et al.*, submitted to *Copeia*). Thus, these populations, separated by approximately 1,000 miles, have genetically diverged only slightly since their separation.

The Sacramento-San Joaquin River estuary is clearly an important and significant wetland ecosystem. The longfin smelt formerly was the fourth most abundant fish in the Sacramento-San Joaquin River estuary; however, the role of this declining species in the estuary today is unknown.

Based on this evaluation the Service has determined that the listing of the longfin smelt under the Act is not warranted at this time. The listing of the Sacramento-San Joaquin River estuary population of the longfin smelt is also not warranted at this time.

References

A complete list of references used in the preparation of this finding is available from the Associate Manager—Endangered Species, U.S. Fish and Wildlife Service, Portland, Oregon (see ADDRESSES section).

Authority

The authority for this action is the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Dated: December 22, 1993.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 94–92 Filed 1–5–94; 8:45 am]

BILLING CODE 4310–55–P

federal register

Thursday
January 6, 1994

Part III

Department of Labor

Employment and Training Administration
20 CFR Parts 621 and 655

Wage and Hour Division

29 CFR Part 504
Attestations by Facilities Using Nonimmigrant Aliens as Registered Nurses; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 621 and 655

RIN 1205–AA84

Wage and Hour Division

29 CFR Part 504

RIN 1215–AA55

Attestations by Facilities Using Nonimmigrant Aliens as Registered Nurses

AGENCIES: Employment and Training Administration and Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) and the Wage and Hour Division of the Employment Standards Administration (ESA) of the Department of Labor (DOL or Department) are publishing final regulations governing the filing and enforcement of attestations by facilities seeking to use nonimmigrant aliens as registered nurses under H–1A visas.

The attestations, required under the Immigration and Nationality Act, pertain to substantial disruption in the delivery of health care services, absence of adverse effect on wages and working conditions of similarly employed registered nurses, payment of wages to nonimmigrant alien nurses employed by the facility at wage rates paid to other registered nurses similarly employed by the facility, taking timely and significant steps designed to recruit and retain U.S. nurses in order to reduce dependence on nonimmigrant alien nurses, absence of a strike or lockout, and giving appropriate notice of filing.

Facilities are required to submit these attestations to DOL as a condition for being able to petition the Immigration and Naturalization Service (INS) for H–1A nurses. The attestation process is administered by ETA, while complaints and investigations regarding the attestations are handled by ESA.

EFFECTIVE DATE: February 7, 1993, except 20 CFR 655.310 and 655.350 and 29 CFR 504.310 and 504.350 which contain information collection requirements which are under review at OMB. When approval is received, the agencies will publish a document announcing the effective date.

FOR FURTHER INFORMATION CONTACT: On 20 CFR part 655, subpart D, and 29 CFR part 504, subpart D, contact Mr. Denis M. Gruskin, Senior Specialist, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room N–4456, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: 202–219–4369 (this is not a toll-free number).

On 20 CFR part 655, subpart E, and 29 CFR part 504, subpart E, contact Mr. Solomon Sugarman, Chief, Farm Labor Programs, Wage and Hour Division, Employment Standards Administration, Department of Labor, room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: 202–219–7605 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

The Immigration Nursing Relief Act of 1989 (INRA), Public Law 101–238, 103 Stat. 2099 (December 18, 1989), amended the Immigration and Nationality Act (INA) to add new sections 101(a)(15)(H)(i)(a) and 212(m) governing the admission to the United States of nonimmigrant aliens for employment as registered nurses (RN's) during a 5-year "pilot" period. 8 U.S.C. 1101(a)(15)(H)(i)(a) and 1182(m). The provisions which INRA added to the INA were further amended by section 162(f) of the Immigration Act of 1990 (IMMACT), Public Law 101–649, 104 Stat. 4978 (November 29, 1990), and by section 302(e) (9) and (10) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Public Law 102–232, 105 Stat. 1733 (December 12, 1991).[1]

Congress enacted this legislation based on its finding of a shortage of RN's in the United States. See, *e.g.*, H.R. Rep. No. 101–288, 101st Cong., 1st Sess. 1–4 (October 16, 1989). Some health care facilities had been relying on nonimmigrant RN's admitted under H–1 visas to meet this need. However, the numbers of visas available for such aliens to adjust their immigration status to permanent residency had been limited. *Id.* at 2 and 3.

At the time of INRA's enactment, many such RN's were approaching the end of their periods of admission to the United States and faced return to their home countries. Many H–1 RN's potentially affected by the INRA were thought to be employed in critical care and emergency service units. *Id.* at 2. The House Judiciary Committee found that departure of these H–1 RN's would have a detrimental impact on the care provided to critically ill patients. *Id.* The INRA addressed this situation by permitting certain RN's who had H–1 status to become permanent residents. Public Law 101–238, sec. 2, 8 U.S.C. 1255 note.

At the same time, Congress was concerned about the perceived increased dependence of health care providers on foreign RN's. As a result, the INA, as amended, links future access to nonimmigrant RN's to the taking of significant steps by the facility to develop, recruit and retain U.S. workers in the registered nursing profession while ensuring that the temporary foreign nurses admitted are protected in their employment and that their employment does not adversely affect the employment of U.S. nurses. 8 U.S.C. 1182(m).

Facilities are required to file attestations with DOL attesting to certain conditions and to steps taken to recruit and retain U.S. nurses in order to reduce dependence on nonimmigrant alien nurses. Facilities are required to submit these attestations to DOL as a condition to being able to petition INS for admission of H–1A nurses. The attestation process is administered by ETA, while complaints and

[1] The provisions of INRA do not apply to nurses admitted under the free trade agreement with Canada, whose admission is authorized under section 214(e) of the INA. Under the provisions of Appendix 1603.D.4 of Annex 1603 of the North Atlantic Free Trade Agreement (NAFTA), the number of Mexican professionals (including registered nurses) entering the United States pursuant to NAFTA is limited to 5,500 annually. This limit may be increased by agreement between Mexico and the United States and will expire 10 years after NAFTA enters into effect, unless the two countries decide to remove the limit earlier. Entry into the United States under these provisions of NAFTA neither forecloses nor establishes their eligibility for entry under other similar provisions of the INA.

As authorized by Paragraph 5(b) of Section D of Annex 1603 of NAFTA, during the period that the transition provisions of Appendix 1603.D.4 of Annex 1603 of the NAFTA are in effect, Mexican nurses are subject to the labor attestation requirements of section 212(m) of the INA. See 8 U.S.C. 1182(m); Section 341(b) of the NAFTA Implementation Act.

In order to implement its responsibilities with respect to the admission of Mexican nurses during the transition period provided under the NAFTA, the Department will require health care facilities seeking to use the services of Mexican registered nurses to file H–1A labor attestations under and pursuant to existing regulations implementing section 212(m) of the INA, at 20 CFR part 655, subpart D; and 29 CFR part 504, subpart D. Complaints regarding such attestations will be processed under and pursuant to existing regulations at 20 CFR part 655, subpart E; and 29 CFR part 504, subpart E. This document amends the applicability section of the regulations promulgated pursuant to section 212(m) of the INA pertaining to facilities using nonimmigrants as registered nurses under H–1A visas, to implement the provisions of NAFTA.

investigations regarding the attestations are handled by ESA.

The INRA-amended portions of the INA were amended by IMMACT to make clear that where nursing contractors are involved, both the contractor and the worksite facility (other than private households) must file attestations, but granted the Secretary of Labor (Secretary) some discretion in determining the requirements of the worksite facility attestation. MTINA further amended the INA to clarify Congressional intent concerning the "no lay off" provision, to specify that a facility that has laid off a nurse other than a staff nurse still meets the "no lay off" requirement, if it attests that it will not replace the nurse with an H–1A nurse for 1 year after the lay off.

B. Attestation Process

The INA requires a health care facility seeking access to temporary foreign RN's (under the H–1A visa category) to file an "attestation" with the Department of Labor (DOL or Department) on an annual basis. 8 U.S.C. 1101(a)(15)(H)(i)(a) and 1182(m)(2)(A) and (C). This includes worksites (except private households) seeking to use the services of an H–1A nurse through a nursing contractor. See IMMACT section 162(f). The attestation must assure that the following six statutory criteria are met:

(1) There would be a substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such alien(s). A facility is not considered to meet this clause if, within the previous year, it laid off RN's, unless such RN's were other than staff nurses and the facility has attested that it will not replace them with H–1A visa nurses.

(2) The employment of the alien(s) will not adversely affect the wages and working conditions of RN's similarly employed.

(3) The alien(s) employed by the facility will be paid the wage rate for RN's similarly employed by the facility.

(4) Either:

(a) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient RN's who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant RN's or

(b) The facility is subject to an approved State plan for the recruitment and retention of nurses (see 8 U.S.C. 1182(m)(3)).

(5) There is not a strike or lockout in the course of a labor dispute, and the employment of such alien(s) is not intended or designed to influence an election for a bargaining representative for RN's of the facility.

(6) At the time of the filing of the petition for RN's, notice of the filing has been provided by the facility to the bargaining representative of the RN's at the facility or, where there is none, notice of the filing has been provided to RN's employed at the facility through posting in conspicuous locations.

8 U.S.C. 1182(m)(2)(A)(i) through (vi).

Each of the following is a "significant step" reasonably designed to recruit and retain RN's (see Item (4)(a) above):

(i) Operating of training program for RN's at the facility or financing (or providing participation in) a training program for RN's elsewhere;

(ii) Providing career development programs and other methods of facilitating health care workers to become RN's;

(iii) Paying RN's wages at a rate higher than currently being paid to RN's similarly employed in the geographic area;

(iv) Providing adequate support services to free RN's from administrative and other non-nursing duties;

(v) Providing reasonable opportunities for meaningful salary advancement by RN's.

8 U.S.C. 1182(m)(2)(B) (i) through (v); see 8 U.S.C. 1182(m)(2)(A)(iv)(I).

Items (i) through (v) above are not an exclusive list of the significant steps that may be taken to meet the requirements of the fourth attestations element, and a facility is not required to take more than one step if the facility can demonstrate than taking a second step is not reasonable. 8 U.S.C. 1182(m)(2)(B).

Special rules apply to cases where an alien nurse, for whom an employer has filed an attestation, is performing services at a worksite other than the employer's worksite or other than a worksite controlled by the employer. In cases of temporary, emergency circumstances, with respect to information not within the knowledge of the attestor, or for other good cause, the Secretary may waive such requirements for the attestation for the worksite as the Secretary may determine are appropriate, in order to avoid duplicative attestations. 8 U.S.C. 1182(m)(2)(A) (as amended by section 162(f)(2)(B)(iii) of IMMACT).

These attestations (and visa petitions supported by them) are available for public examination in the Employment and Training Administration (ETA) National Office in Washington, D.C. 8 U.S.C. 1182(m)(2)(E)(i). The Department also informs the Immigration and Naturalization Service (INS) which attestations have been accepted. The employer must furnish evidence to INS that the Department has accepted its attestation for filing as a prerequisite for INS approving a petition to bring in foreign RN's under H–1A visas (which visas are issued by the U.S. Department of State (DOS)). 8 U.S.C. 1101(a)(15)(H)(i)(a).

In summary, DOL's administrative functions under the INRA include, with certain limited exceptions, receiving and accepting attestations for filing, *i.e.*, checking that the attestation form is properly completed and that the required explanatory statements are provided. DOL reviews elements of attestations in only four instances: (1) the facility attests to a "non-standards" indicator of substantial disruption (Element I); (2) the facility takes as one of its two steps a "non-standard" timely and significant step (Element IV); (3) the facility attests that taking a second timely and significant step under Element IV would not be reasonable; and (4) the facility is not an employer of H–1A nurses and is claiming a bona fide medical emergency as the basis for requesting a waiver of one or more of the attestation elements. The Department also makes the accepted attestations available for public inspection, and notifies INS of those attestations that DOL has on file. These administration functions are delegated, by regulation, to ETA.

C. Complaints, Investigations and Enforcement

The Department is also authorized to investigate allegations that a facility has failed to meet the conditions attested to or that a facility has misrepresented a material fact in an attestation. 8 U.S.C. 1182(m)(2)(E) (ii) through (v). If violations are found, DOL may impose administrative remedies, including civil money penalties (CMP's); shall notify the Attorney General, who shall not approve H–1A petitions for a period of at least 1 year for the facility; shall obtain back wages; and may impose other remedies. These activities constitute the Department's enforcement functions under the INRA. Under the regulations, the enforcement functions are delegated to the Department's Employment Standards Administration (ESA), Wage and Hour Division.

D. Advisory Group

Finally, pursuant to the INRA, the Secretary appointed an advisory group which includes representatives of DOL, the Department of Health and Human Services, the Attorney General, hospitals, and labor organizations

representing RN's. Pub. L. 101–238 section 3(c)(2), 103 Stat. at 2103.

Under the INRA, the advisory group advises the Secretary on:

(1) The impact of this legislation on the nursing shortage,

(2) Programs that health care facilities may implement to recruit and retain U.S. RN's,

(3) State recruitment and retention plans, and

(4) The advisability of extending the law beyond the current 5-year duration of this pilot program.

The advisory group operates under the auspices of the DOL Office of the Assistant Secretary for Policy.

E. Operating Experience

On December 6, 1990, an interim final rule was published in the **Federal Register** to implement the Department's responsibilities relating to attestations by facilities seeking to use nonimmigrant aliens as registered nurses. 55 FR 50500. This interim final rule incorporated many of the comments the Department received on the Notice of Proposed Rulemaking (NPRM) which was published in the July 6, 1990, **Federal Register**. 55 FR 27992; see also 55 FR 30720 (July 27, 1990). The interim final rule went into effect on the date it was published and established a comment period that ended February 4, 1991.

The rulemaking was the Department's first experience with defining and implementing an attestation process. The interim final rule required attestations to be filed in the ETA National Office to allow it to gain operating experience in this new process. The final rule published below decentralizes the processing of H–1A attestations to four ETA regional offices.

The attestation includes a completed Form ETA 9029 and accompanying statements that explain briefly how the facility complies with the various attestation elements and describe the documentation available at the facility that demonstrates compliance. In the case of facilities attesting to "other" indicators of substantial disruption, "other" timely and significant steps, the unreasonableness of taking more than one timely and significant step, and/or a bona fide medical emergency, the attestation must also include more detailed information describing how the prescribed standards are being met.

Attesting facilities are required to maintain sufficient documentation to demonstrate compliance with the statutory and regulatory standards for each of the attestation elements. The attestation, along with supporting documentation, must be maintained by the facility on site in a separate file. The file shall also contain visa petitions supported by the attestation. Any interested party may request to see this file. The facility is required to make all of the information in the file available within 72 hours of receiving a request.

ETA has provided for a 30-day time period to determine whether an attestation can be accepted for filing. All attestations are examined to ensure that the Form ETA 9029 is properly completed and that the explanatory statements contain the required information. In the case of facilities attesting to "other" indicators of substantial disruption, "other" timely and significant steps, the unreasonableness of taking more than one timely and significant step, or a bona fide medical emergency, the explanatory information is reviewed to ensure that the prescribed standards are being met. Attestations which meet the established criteria are accepted for filing.

At the time the interim final rule was promulgated, ETA estimated that approximately 1,000 facilities per year would be submitting attestations. Experience has proven this estimate to be too low. Approximately 1,500 facilities submitted attestations the first year the H–1A attestation process was in effect. Approximately 1,400 facilities submitted attestations during the 1992 fiscal year. It should be noted, however, that the number of attestations received was substantially larger than the number of facilities submitting attestations, because many facilities submitted attestations that were returned as unacceptable.

As employers' experience with the H–1A program has increased, the proportion of attestations that ETA returns because they are unacceptable for filing has decreased from 43 percent to the current level of 23 percent. The two most common reasons why ETA is not able to accept attestations for filing are that the Form ETA 9029 is not properly completed and the required explanatory statements are not included with the submission. ETA returns unacceptable attestations to the facility with a letter explaining why the attestation cannot be accepted for filing. The facility may file a new attestation which corrects the deficiencies. There are no restrictions on how frequently they may be refiled. Most facilities which have submitted attestations not accepted for filing continue to refile their attestations until they are accepted for filing.

Over 70 percent of the attestations have been submitted by health care facilities located in six States—California, New York, New Jersey, Texas, Illinois, and Florida. Approximately 90 percent of the attestations received have been submitted by three types of facilities: about 62 percent by acute care facilities; 22 percent by long-term care facilities; and 6 percent by nursing contractors.

It was estimated in the interim final rule that 10 notices of strikes or lockouts and 10 annual State plans would be submitted per year. However, ETA has received notice from an attesting facility of a strike that lasted 1 day. ETA has not received any annual State plans.

F. Comments on Interim Final Rule

The interim final rule, which was published in the **Federal Register** on December 6, 1990, invited comments through February 4, 1991. 55 FR 50500 comments were received from 21 organizations and individuals, including employers and employer associations, labor organizations, a nurse association, a commission, an attorney association, two individual attorneys, one Member of Congress, and one State employment security agency (SESA). The 41 comments received on the NPRM were discussed at 55 FR 50501–50504 and are further discussed in pertinent part below.

The labor organizations and other organizations representing the interests of registered nurses asserted that the interim final rule did not offer U.S. nurses the protection offered in the proposed rule, while the attorneys and commenters representing the interests of employers asserted that the interim final rule did not go far enough in "streamlining" the attestation process. See 55 FR 27992 (July 6, 1990); and 55 FR 30720 (July 27, 1990). Some commenters stated that the Department had been successful in addressing concerns that the proposed definition of "nurse" did not take into consideration the differences among State governments in defining nursing duties and practices and did not clearly state that foreign nurses who have not been licensed by State nursing boards must have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination.

The major concerns expressed by commenters on the interim final rule included: the type of and location for retention of supporting documentation; the waiver provisions; DOL's role in reviewing attestations; the definition of "facility"; and the indicators of substantial disruption.

All of the comments received on the interim final rule, as well as those comments received on the proposed rule that may not have been fully

addressed in the interim final rule, have been reviewed and considered in preparing this final rule.

1. Location for Retention of Supporting Documentation

Three labor organizations and one Member of Congress commented that supporting documentation should be available at DOL, as well as at the facility. The attorneys commented that only the Form ETA 9029 should be submitted to DOL and that the requirement concerning the accompanying explanatory statements should be removed in the final rule. Two employer associations commented in support of the interim final rule provisions which require the attestor to maintain the supporting documentation at the facility, but these commenters wanted the rule to be more specific about the explanatory statements to be submitted with the Form ETA 9029.

As indicated in the preamble to the interim final rule, ETA found the comments offered by Former Representative Bruce Morrison, then Chairman of the House Judiciary Committee's Subcommittee on Immigration, Refugees, and International Law when INRA was passed, and one of the principal authors of the legislation, to be very persuasive. In commenting on the proposed rule, Representative Morrison voiced his support for the kinds of supporting documentation required, and indicated that the intent of a streamlined attestation process would best be served by keeping the amount of documentation filed with the attestation to a minimum, and requiring the bulk of it to be retained at the facility. (The preamble to the interim final rule also pointed out that the Office of Management and Budget in its official comments to the Department on the paperwork burden stated that there should be a streamlined attestation process.) See 55 FR at 50502.

After reviewing the comments received during this rulemaking concerning the location for retention of supporting documentation, and considering the fact that the comments received from Representative Morrison and OMB are consistent with a "complaint driven process" for investigating and resolving complaints, the Department has decided to retain the interim final rule's provisions concerning the location of the supporting documentation. The facility must submit to DOL only a brief statement of what documentation is available at the facility to demonstrate compliance with the various attestation elements. The full documentation must be retained at the facility for the duration of the attestation period, and for as long thereafter as the facility continues to employ an H–1A nurse hired under the attestation. Further, the facility must attest that the documentation will be available for public examination within 72 hours of receiving a request. Failure to provide access may be the basis for a complaint as a "failure to perform."

2. DOL Authority To Review Attestations

An attorney commenting on the interim final rule questioned whether DOL has the authority to review any H–1A attestations, and an employer and an attorney association commented that the DOL role in reviewing attestations should be reduced. However, two of the labor organizations submitting comments voiced concern that the interim final rule weakened DOL's role in reviewing attestations.

The proposed rule prescribed a substantial review function by DOL. As indicated in the preamble to the interim final rule, ETA found the comments of Representative Morrison and Senator Edward M. Kennedy, Chairman of the Senate Judiciary Committee's Subcommittee on Immigration and Refugee Affairs, highly persuasive. Both Representative Morrison and Senator Kennedy expressed the view that the proposed DOL review function was greater than that intended by the legislation. This was also the view expressed by many health care facility commenters. See 55 FR at 50502. In response to these comments, the interim final rule substantially restricted the DOL review function. As indicated above, DOL reviews elements of attestations in only four instances. For all other attestations, the DOL function is limited to checking that the attestation Form ETA 9029 is properly completed, the required explanatory statements are included, and the facility is attesting to compliance with the regulatory standards.

The Department has concluded that the provisions governing DOL's review function, set forth in the interim final rule should be retained. After a careful review of the comments received both on the proposed rule and on the interim final rule, considering that only minimal documentation is submitted, and, in view of the fact that the H–1A program relies on a "complaint driven process" for investigating and resolving complaints, DOL has determined that no further change in this provision is warranted.

3. Indicators of Substantial Disruption

The Department received 10 comments concerning the indicators of substantial disruption under Attestation Element One. One attorney commented that the rule should not be more specific than the legislation in addressing "substantial disruption"; and an employer commented that a simple description of the steps taken to fill vacant nursing positions should suffice as evidence that there would be a substantial disruption without the services of nonimmigrant alien nurses. In contrast, one employer commented that the requirement that a facility document its recruiting efforts does not belong in the section of the regulations dealing with substantial disruption. The employer also commented that the documentation requirements under § ____.310(d)(3) should be limited to the total number of nursing vacancies and the total number of H–1A nurses employed at the time the attestation is submitted. Other commenters recommended adding more specific requirements to § ____.310(d)(2) and allowing facilities to count as vacant all positions encumbered by H–1A nurses.

INRA was enacted to allow facilities to use nonimmigrant alien nurses temporarily to help alleviate substantial disruptions in health care services, while requiring that facilities take steps designed to develop, recruit and retain a trained U.S. workforce as the long-term solution to the current nursing shortage. One of the legislatively-mandated elements that a facility must attest to in order to have its attestation accepted by DOL is a substantial disruption in health care services due to a shortage of nurses (absent the services of the nonimmigrant alien nurses on whose behalf they are petitioning).

The interim final rule listed four possible indicators of substantial disruption. These indicators were identified by organizations representing both employers and nurses as being those most commonly experienced throughout the health care industry. However, this provision was not intended to be an exhaustive list. When a facility finds that the indicators of substantial disruption listed in the regulations cannot be demonstrated or that such indicators are inappropriate to that facility, the facility may propose an alternative indicator of substantial disruption under the "other" category. A facility attesting to an "other" indicator of substantial disruption is required to provide an explanation which clearly shows a substantial disruption in the delivery of specific health care services due to a shortage of

nurses. For example, a facility that has a large number of H–1A nurses with visas that will be expiring within the next 12 months may be able to demonstrate that it will experience a substantial disruption if it cannot petition INS for extensions of stay and/or new H–1A nurses. Such a facility may choose to attest to an "other" indicator substantial disruption. The facility would then be required to demonstrate that it has made conscientious efforts to recruit and retain U.S. nurses but has a history of being able to fill only a small percentage of its vacancies with U.S. nurses, and that it projects a vacancy rate of at least 7 percent, if it cannot continue to petition INS for H–1A nurses.

DOL has determined that the four indicators of substantial disruption listed in the interim final rule, coupled with the "other" indicator of substantial disruption, strike the proper balance in addressing the concerns raised in the comments. These indicators satisfy the need for standardized criteria that can be used by facilities in determining whether they qualify to file an attestation and by DOL in carrying out its enforcement responsibilities. Therefore, they have been retained in this final rule.

However, based on its operating experience, the Department has determined that a brief explanatory statement is not necessary if the employer attests to a vacancy rate of 7 percent or more, or to an unutilized bed rate of 7 percent or more. The employer is still required to maintain supporting documentation and to make it available for review at the facility in accordance with § ____.350(b).

4. No Adverse Effect

A nurses' association, a labor organization, and one Member of Congress submitted comments endorsing the Department's approach to determining no adverse effect on wages. The labor organization and the Member of Congress advocated using the same approach to determining whether there would be no adverse effect on working conditions. A nationwide employer organization and a statewide employer association both commented that the rule should state that the wage need only be the lowest point on the prevailing wage range since most H–1A nurses start out in entry-level positions. One attorney commented that facilities should not be required to get prevailing wage determinations prior to filing their attestations, and another attorney and an attorney association commented that the prevailing wage requirement should be deleted entirely.

After careful consideration of the comments received, the Department has determined that there will be no substantive changes made to the interim final rule's requirements concerning no adverse effect on wages and working conditions.

The requirement concerning no adverse effect on wages is statutory and, as such, cannot be removed from the regulations. As pointed out in the preamble to the interim final rule:

> The phrase "not adversely affect the wages" is a well established legal term of art that has been used for decades in alien labor certification programs, with a very specific meaning of at least the area prevailing wage for the occupation * * *. Presumably Congress was aware of this meaning in incorporating this language in the INRA. [55 FR at 50506.]

The prevailing wage rate is derived by averaging the wages paid by a sample of facilities in the geographic area. If the prevailing wage determination was not obtained prior to submitting the attestation, the facility would not have the knowledge needed to determine whether it could truthfully attest to paying each nurse it employs at least the prevailing wage for the geographic area, nor would it be able to attest to having the supporting documentation available at the facility for examination by interested parties.

Operating experience has indicated that clarification is desirable as to how far in advance a health care facility can obtain the prevailing wage from the SESA. Some facilities have allowed an inordinate amount of time to elapse between obtaining a prevailing wage determination from the SESA and filing an appropriate attestation. Since prevailing wage surveys and determinations are frequently updated by SESA's, to minimize the possibility of adverse effect on the wages of U.S. registered nurses the prevailing wage determination should be reasonably contemporaneous with the filing of the attestation. To assure that the prevailing wage determination supporting the attestation is current the regulation at 20 CFR 655.310(e)(1)(i) has been amended to require filing of the attestation within 90 days of the date the prevailing wage request was submitted to the SESA by the facility.

Section § ____.310(e)(1)(i) of the interim final rule requires that a facility obtain a prevailing wage determination from the SESA. Although the SESA and ETA administrative system provide an avenue for a facility to challenge a SESA determination through the Employment Service (ES) complaint process (see 20 CFR part 658, subpart E), the interim final rule did not specifically identify that process. The final rule provides needed clarification by directing the facility to the ES complaint process and alerting the facility that a challenge of a SESA determination may be made only prior to filing an attestation in which that SESA determination is used. Implicit and essential in this process is the requirement that once a facility obtains a prevailing wage determination from the SESA and files the attestation without challenging the SESA's determination through the ES complaint system, the facility has in effect accepted the determination and waived its right to challenge the determination. Permitting a facility to operate under a determination and later contest it in the course of an investigation or enforcement action is contrary to sound public policy; such a delayed, disruptive challenge would have a harmful effect on U.S. and H–1B nurses, competing hospitals, and other parties who may have relied on the wage provided by the facility on the attestation. Section § ____.310(3)(1)(i) of the final rule explicitly states the Department's clarification of the use and consequence of the ES complaint process.

Regarding working conditions, the final rule, as did the interim final rule, applies an adverse effect standard on a facility basis, due to the administrative infeasibility of making prevailing practice determinations on an area-wide basis.

Concerning the documentation requirements for pay and compensation, a Member of Congress commented that the interim final rule did not require specific enough documentation. He suggested that the rule should require specific wage and job data for individual nurses and positions, not summaries. However, a statewide employer association expressed concern that the interim final rule made confidential information available to the public. This commenter suggested that such information should be available only to the Department of Labor and/or others as hospital policy allows. Former Representative Morrison, in commenting on the NPRM, which contained documentation requirements much like the interim final rule, voiced his support for the kinds of supporting documentation required.

After careful consideration of the comments received, the Department has determined that there will be no changes made to the interim final rule's requirements concerning documentation of no adverse effect on wages and working conditions. Employers should note that if a complaint is filed, an investigation conducted, and a hearing

held, any employer information submitted as evidence for the hearing will become a matter of public record. Such information may well be more extensive than that which the employer must make available for public examination. See 8 U.S.C. 1182(m)(2)(E).

5. Notification of Strike or Lockout

One employer commented that the requirement that the facility notify ETA within 3 days of the occurrence of a strike or lockout at the facility involving registered nurses should be changed to allow the facility 10 days to notify ETA.

The Department has determined that the current requirement that ETA be notified within 3 days of the occurrence of a strike or lockout provides the facility with adequate time for making the required notification, since the facility will be aware of any such occurrence immediately. The current protections offered to U.S. nurses would be weakened if the 3-day notification period were lengthened. Therefore, no change is being made in the requirements governing notification of strike or lockout.

6. Notification of Filing

An attorney commented that the requirement that facilities notify their employees when they file an attestation is burdensome to employers and goes beyond what is in the statute. The attorney recommended that facilities be required to provide notice only of the filing of H–1A visa petitions with INS and only from the time of filing until the alien begins work. The attorney also commented that the current requirement concerning the availability for public examination of the supporting documentation goes beyond what should be required.

While INRA amendments to the INA call for notice of filing when the visa petition is filed, the accompanying House Judiciary Committee report on INRA (then called H.R. 3259) recommending that the bill pass without amendment, stated on page 5 that:

> [T]he facility is required to provide notice of filing of an attestation to various labor representatives or to post a notice in a conspicuous location. The Committee believes that notice of filing is an important element of the new procedure, particularly in view of the fact that this is one of two mechanisms available for U.S. nurses to monitor the admission of foreign nurses and its possible effect on their employment situation. [H.R. Rep. No. 101–288, 101st Cong., 1st Sess. 5 (1989).]

The Department believes that the notice requirements are consistent with the intent of Congress that all aspects of the process should be open to public review. Additionally, this approach is necessary to facilitate the complaint and investigative process that is called for in the INA.

7. Waiver Provisions

The Department received numerous comments critical of the interim final rule's provisions concerning waivers of certain attestation elements. Such waivers may be requested by facilities which are not themselves employers of H–1A nurses, but which use H–1A nurses employed by contractors. Three labor organizations opposed the interim final rule's waiver provisions. One of these organizations expressed opposition to allowing any waivers, while another commented that the provisions go beyond the statute and allow for circumvention of legislative intent. One Member of Congress commented that waivers for temporary emergency situations should be very narrow and for a short period of time.

One attorney commented that the waiver provisions should be expanded so that facilities only using H–1A nurses employed by contractors would not be required to file an attestation. Such a broad waiver would go beyond the scope of the statute. The Secretary only has the discretion to waive attestations for worksites using nonimmigrant nurses employed by contractors "to avoid duplicate attestations in cases of temporary circumstances, with respect to information not within the knowledge of the attestor, or for other good cause." Section 212(m)(2)(A) of the INA as amended by section 162(f)(2)(B)(iii) of IMMACT.

The Department has carefully considered the comments concerning the waiver provisions set forth in the interim final rule. With the above one exception, none of the commenters made any specific recommendations for revisions to these provisions which would address the concerns raised. No need or basis for revisions are indicated by the Department's operational experience, the Department has received very few requests for waivers during the 2 years the program has been in operation. Therefore, for the above reasons, no changes have been made to this section in the final rule.

8. Nursing Contractors

An attorney organization commented that contractors should not be required to comply with each attestation element. The commenter suggested that, at most, they should be required to attest that their employees will be paid at a rate equal to the rate for nurses similarly employed by the facility where they are placed. The Department does not have the authority to make such a change. Amendments to the INA by IMMACT require that *both* the contractor *and* the worksite facility (other than private households) file attestations. These amendments grant the Secretary discretion to determine the requirements of the attestation filed by the worksite facility, but they do not grant the Department the authority to waive any attestation elements for contractors. To the contrary, IMMACT amended the INA to make clear that, where nursing contractors are involved, both the contractor and the worksite facility (other than private households) must file attestations.

9. Definition of "Facility"

One labor organization commented in support of the definition of "facility" set forth in the interim final rule, which requires an employer with multiple sites to file an individual attestation for each site unless the sites are in reasonable geographic proximity, used for the same purpose, and share the same nursing staff and equipment. On the other hand, one employer and an attorney recommended that a multi-site employer should be allowed to file a single attestation so long as the same employer controls each worksite.

DOL carefully considered this multi-site issue during the development of both the NPRM and the interim final rule and determined that any advantages of a "single attestation" would be offset by the problems it would cause. Area prevailing wage rates would be different for sites in different geographic areas. Entities would be significantly increasing the vulnerability of their entire system to suspension from the program, should one of their sites incur a violation or should a lay off of nurses occur at only one of their sites. It should be noted, however, that multi-site entities may develop materials that could be used by all of their sites, with perhaps some minor modifications. See 55 FR at 50504.

10. State Plans

Three commenters stated that the section dealing with State plans for the recruitment and retention of nurses should be expanded. One labor organization commented that the regulations need to specify that a State may use a State plan to impose obligations on a facility that go beyond those that would be applicable in the absence of a State plan. One Member of Congress commented that the regulations should specify that the list of eight components of a State plan is not an exhaustive list and that States

should be encouraged to develop additional components. An employer association commented that the regulations should include the criteria that will be used for determining whether to approve State plans.

To date, the Department has received no State plans. All of the changes suggested by the commenters would make the section dealing with State plans more restrictive. The Department believes that any additional restrictions would further discourage States from developing and implementing State plans. Therefore, no revision has been made to this section.

11. Definitions of "U.S. Nurse" and "U.S. Worker"

The definitions of "United States (U.S.) nurse" and "United States (U.S.) worker" in the interim final rule include U.S. citizens, U.S. nationals, permanent resident aliens, and temporary resident aliens. A Member of Congress commented that refugees and asylees should be included in both of these definitions, since refugees and asylees are lawfully in the U.S., are allowed to work for an indefinite period of time, and there is nothing in the statute that excludes them.

In response to comments received from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) of the Department of Justice during the rulemaking process implementing the IMMACT amendments to the permanent labor certification program, the definition of "U.S. worker" for the purposes of that program was amended to include within that definition "protected individuals" under the INA's unfair immigration-related employment practices provision. 8 U.S.C. 1324b(a)(3); see 56 FR 54920, 54926 (October 23, 1991); see also 8 U.S.C. 1182(a)(5)(A); and 20 CFR part 656. To meet the definition of a "protected individual", one must be a U.S. citizen, a U.S. national, or an alien in one of four citizenship status categories: (1) permanent resident; (2) temporary resident (including seasonal and replenishment agricultural workers); (3) refugee; or (4) asylee. To remain a "protected individual", these aliens must complete the naturalization process within a specified period of time. Protected individuals can work indefinitely in the United States.

The H–1A interim final rule's definitions of "U.S. nurse" and "U.S. worker" included all "protected individuals" except refugees and asylees. To have consistent definitions of the term "U.S. worker" in the certification and attestation programs administered by DOL, the definitions of "U.S. nurse" and "U.S. worker" have been clarified and amended in §____.302 to be consistent with the definition of "U.S. worker" for the permanent alien labor certification program.

12. Layoff Provision

INRA amended the INA to provide that a facility cannot meet the first attestation element, relating to a substantial disruption in the delivery of health care services, if, within the past 12 months it has laid off any registered nurses. In the interim final rule the Department interpreted this statutory provision to cover lay offs of all individuals who are licensed registered nurses, regardless of the positions they held within the health care facility.

MTINA amended the INA to clarify Congressional intent regarding lay offs, by specifying that a facility which has laid off a registered nurse other than a staff nurse still meets the "no layoff" requirement, if, in its attestation, the facility attests that it will not replace the nurse with an H–1A nurse (either through promotion or otherwise) for a period of 1 year after the date of the layoff. In the final rule, section §_____.310(d)(1) has been revised to incorporate this statutory amendment. The definition of "layoff" in §_____.302 has been revised to specify that if staff nurses are separated from one specialized activity, the retraining and retention they are offered must be in another activity involving direct patient care at the same facility in order for their separation not to be considered a "layoff", and a sentence has been expanded to indicate that a "staff nurse" means a nurse who provides nursing care directly to patients Item 8.a(i) on the Form ETA 9029 has also been modified to reflect the amendment to the "no layoff" provision.

G. Technical and Clarifying Amendments in Final Rule

1. Decentralization to the Regional Offices

The interim final rule required that attestations be submitted to the ETA National Office. This was done as a temporary measure, in order to allow the National Office, which is responsible for establishing the policies and procedures for administering the program, an opportunity to gain first-hand experience in administering an attestation program. It was believed that this experience would assist the National Office in developing regulations and in providing policy guidance for regional offices once they were assigned responsibility for administering the program.

The final rule decentralizes the processing of attestations for four ETA regional offices—Boston, Chicago, Dallas, and Seattle—by revising §_____.310(b) and by making the modifications required elsewhere, so that the entire body of the rule reflects this decentralization. Information on the addresses of the four regional offices and the States served by each has been added to the instructions for completing the Form ETA 9029.

2. Claims of Business Exigency

Under §_____.310(c)(1)(iii) of the interim final rule, a facility submitting an attestation prior to April 1, 1991, was allowed to claim business exigency as a basis for delaying the compilation of documentation supporting its attestation for up to 90 days after submission of its attestation. This provision, now obsolete, which was intended to ease the transition from the H–1 to the H–1A program, has been deleted from the final rule since the applicable date has passed.

3. Indicators of Substantial Disruption

The third indicator of substantial disruption was described in §_____.310(d)(2)(C) of the interim final rule as the elimination or curtailment of "essential health care services that are otherwise not available in the community. * * *" This indicator should have been described, in accordance with section 212(m)(2)(A)(i) of the INA, as the elimination or curtailment of essential health care services not otherwise available "at the facility." Section 212(m)(2)(A)(i) of the INA requires the facility to attest that "there would be a substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of [the] alien". The final rule makes this change, so that the third indicator of substantial disruption, as described in _____.310(d)(2)(C) of the final rule reads so that it applies to the elimination or curtailment of health services at the facility.

4. Timely and Significant Steps

Section 212(m)(2)(E)(iv) of the INA provides that a violation will be found if a facility "fail[s] to meet a condition attested to". The regulation, §_____.310(g)(1), has been modified, in accordance with this statutory directive, to specify that employers will be held responsible for all timely and significant steps to which they attest. If, for example, the employer attests it is taking four timely and significant steps,

but is found in an investigation to be complying with only two, a violation will be cited. It should be noted that the INA requires a minimum of two steps, unless taking a second step would be unreasonable.

The interim final rule required a facility taking the third timely and significant step specified in section 212(m)(2)(B)(iii) of the INA—the facility is paying nurses at a higher rate than nurses similarly employed in the—area to maintain documentation showing that its entire schedule of wages for nurses is at least 5 percent higher than the prevailing wages, as determined pursuant to 22 § _____.310(e)(1). The question arose whether, in the case of a facility where wages for nurses are the result of arms-length collective bargaining, this regulation required the facility to pay at least 5 percent higher than the collectively-bargained rate in order to attest to the third statutory step. The Department has concluded that it is not reasonable to require that facilities pay 5 percent higher than a collectively-bargained rate, if such a wage is at least five percent higher than the prevailing wage for the geographic area as determined by the SESA. Therefore, in the final rule § _____.310(g)(1)(i)(A)(*3*) has been amended to allow a facility the option of attesting to the third timely and significant step if its entire schedule of collectively-bargained wage rates is 5 percent above the prevailing wage as determined by the SESA.

One commenter, an employer organization, suggested a new waiver provision. This commenter proposed that any facility which can demonstrate that it is unable to meet the requirements for nursing services under title XVIII or title XIX of the Social Security Act, or that can demonstrate that it fails to meet minimum federal or state statutory requirements for nursing staff, should be exempt from the fourth attestation element—timely and significant steps. The Department has concluded that it does not have the authority to promulgate such a waiver, since timely and significant steps are required by the statute.

5. Review of Attestations Accepted and Not Accepted for Filing

The interim final rule's provision for administrative-judicial review of a determination by DOL whether or not to accept an attestation for filing has been clarified. Under § _____.301(e), an appeal may be taken to the Board of Alien Labor Certification Appeals only on an ETA determination where ETA has performed a review function. The four instances in which ETA performs a review function involve determinations on the following issues only: (1) The facility attests to a "non-standard" indicator of substantial disruption (Element I); (2) the facility takes as one of its two steps a "non-standard" timely and significant step (Element IV); (3) the facility attests that taking a second timely and significant step under Element IV would not be reasonable; and (4) the facility is not an employer of H–1A nurses and is claiming a bona fide medical emergency as the basis for requesting a waiver of one or more of the attestation elements.

6. Technical Amendments to Enforcement Subpart

Based on ESA's operational experience with the H–1A program, three technical changes have been made in subpart E on enforcement. First, to regularize the hearing process, while remaining consistent with Congressional intent regarding timely hearings for interested parties, the final rule specifies that, once the deadline for requesting a hearing has expired, an interested party may participate in an administrative law judge proceeding only with the approval of the judge. Further, to make the hearing and notification process more easily understood, the final rule has a separate section setting out the stages at which the enforcement determination becomes final agency action and notification (if any) is sent to ETA and INS. In the interim final rule, these provisions appeared in the same section with the provisions regarding the ESA determination notification, and this regulatory structure was somewhat confusing. In addition, the final rule contains an express statement of the opportunity to direct inquiries and requests for technical assistance to the Wage and Hour Division of ESA. The final rule also expressly authorizes the filing of hearing requests by facsimile transmission (FAX) and requires that the Solicitor of Labor will be appropriately served with hearing requests. Finally, the rule has been modified to make corrections regarding cross references and citations.

II. Paperwork Reduction Act

The information collection requirements contained in the final rule have been submitted to the Office of Management and Budget (OMB) for clearance under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control No. 1205–0305.

Based on operating experience, technical changes were made to the Form ETA 9029 to clarify the attestation requirements and reduce the need for separate explanatory statements. The Department believes that the changes to the form will result in a decrease in the proportion of attestations returned to employers because they are unacceptable for filing.

Included among the changes made to the form are the following:

a. The phrase "no explanatory statement required" has been added as a parenthetical after the first two indicators of substantial disruption under item 8.a.(ii), to make it clear that explanatory statements are no longer required for these two attestation elements.

b. The word "past" has been added before "elimination/curtailment" in the third indicator of substantial disruption under item 8.a.(ii), to make it clear that the elimination or curtailment must already have occurred.

c. Language has been added under item 8.b. clarifying that in order to be in compliance with the no adverse effect wage requirement the facility must be paying each nurse it employs at least the prevailing wage as determined by the SESA unless wages for nurses at the facility are the result of a collective bargaining agreement.

d. The words "developed under the provisions of the Immigration and Nationality Act" have been added to item 8.d.(i) to clarify that the State plan has to be one developed pursuant to the requirements of the INA.

e. The words "steps of comparable timeliness and significance" have been added to the sixth box under item 8.d.(ii) to clarify the "other" timely and significant step category.

ETA estimates that 1,400 facilities per year will be submitting attestations. The public reporting burden for this collection of information is estimated to average 8–10 hours for searching existing information/data sources and gathering and compiling the data at the facility the first year that a facility submits an attestation. In the second, and subsequent years, the reporting burden, based on operating experience, will average 2–3 hours.

Regulatory Impact and Administrative Procedure

E.O. 12866

In accordance with Executive Order 12866, the Department of Labor has determined that this is not a significant regulatory action as defined in section 3(f) of the Order.

Regulatory Flexibility Act

At the time the proposed rule was published, the Department of Labor notified the Chief Counsel for

Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities.

Catalog of Federal Domestic Assistance Number

This program is not yet listed in the Catalog of Federal Domestic Assistance.

List of Subjects

20 CFR Part 621

Administrative practice and procedure, Aliens, Employment, Guam, Labor, Wages.

20 CFR Part 655

Administrative and practice procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Forest and forest products, Guam, Health professions, Immigration, Labor, Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and recordkeeping requirements, Specialty occupation, Students, Wages.

29 CFR Part 504

Administrative practice and procedures, Aliens, Employment, Enforcement, Health professions, Immigration, Labor, Nurse, Penalties, Registered nurse, Reporting and recordkeeping requirements, Wages.

Text of the Joint Final Rule

The text of the joint final rule as adopted by ETA and the Wage and Hour Division, ESA, in this document appears below.

Subpart D—Attestations by Facilities Using Nonimmigrant Aliens as Registered Nurses

Sec.

_____.300 Purpose and scope of subparts D and E.
_____.301 Overview of process.
_____.302 Definitions.
_____.310 Attestations.
_____.315 State plans.
_____.320 Appeals of acceptance and rejection of attestations submitted for filing and of State plans.
_____.350 Public access.

Subpart E—Enforcement of H–1A Attestations

_____.400 Enforcement authority of Administrator, Wage and Hour Division.
_____.405 Complaints and investigative procedures.
_____.410 Civil money penalties and other remedies.
_____.415 Written notice and service of Administrator's determination.
_____.420 Request for hearing.
_____.425 Rules of practice for administrative law judge proceedings.
_____.430 Service and computation of time.
_____.435 Administrative law judge proceedings.
_____.440 Decision and order of administrative law judge.
_____.445 Secretary's review of administrative law judge's decision.
_____.450 Administrative record.
_____.455 Notice to the Attorney General and the Employment and Training Administration.
_____.460 Non-applicability of the Equal Access to Justice Act.

Subpart D—Attestations by Facilities Using Nonimmigrant Aliens as Registered Nurses

§ _____.300 Purpose and scope of subparts D and E.

(a) *Purpose.* The Immigration and Nationality Act (INA) establishes the H–1A program to provide relief for the nursing shortage crisis. Subpart D of this part sets forth the procedure by which health care facilities seeking to use nonimmigrant registered nurses may submit attestations to the Department of Labor relating to the effects of the nursing shortage on their operations, their efforts to recruit and retain United States workers as registered nurses and certain information on wages and working conditions for nurses at the facility. Subpart E of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* The INA establishes a procedure for health care facilities to follow in seeking admission to the United States for, or use of, nonimmigrant nurses under H–1A visas. The procedure is designed to reduce reliance on nonimmigrant nurses in the future, and calls of the health care facility to attest, and be able to demonstrate, that, *e.g.*, there would be substantial disruption to health services without the nonimmigrant nurses and that it is taking timely and significant steps to develop, recruit, and retain U.S. nurses. Subparts D and E of this part set forth the specific requirements for those procedures.

(c) *Applicability.* (1) Subparts D and E of this part apply to all facilities that seek the temporary admission or use of nonimmigrants as registered nurses.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts D and E of this part shall apply to the entry of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D of Annex 1603 of NAFTA.

§ _____.301 Overview of process.

This section provides a context for the attestation process, to facilitate understanding by health care facilities that may seek nonimmigrant nurses under H–1A visas.

(a) *Federal agencies' responsibilities.* The United States Department of Labor (DOL), Department of Justice, and Department of State are involved in the H–1A visa process. Within DOL, the Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) have responsibility for different aspects of the process.

(b) *Health care facility's attestation responsibilities.* Each health care facility seeking one or more H–1A nurses shall, as the first step, submit an attestation on *Form ETA 9029*, as described in § _____.310 of this part, to the designated regional office of the Employment and Training Administration (ETA) of DOL. If the attestation is found to meet the requirements set at § _____.310 (a) through (k) of this part, ETA shall accept the attestation for filing, shall return the cover form of the accepted attestation to the health care facility, and shall notify the Immigration and Naturalization Service (INS) of the Department of Justice of the filing. As discussed in § _____.310 of this part, if the facility proposes to utilize alternative methods to comply with Attestation Elements I and/or IV, or asserts that taking a second timely and significant step under Element IV would be unreasonable, or claims a bona fide medical emergency exemption from Element IV as a worksite using one or more H–1A nurses through a nursing contractor only, additional supporting information and ETA review shall be required.

(c) *Visa petitions.* Upon ETA's acceptance of the filing, the health care facility may then file with INS H–1A visa petitions for the admission of H–1A nurses, or to extend the stay of alien nurses currently working at the facility. the facility shall attach a copy of the accepted attestation form (Form ETA 9029) to the visa petition filed with INS. At the same time that the facility files a visa petition with INS, it shall also send a copy of the visa petition with INS, it shall also send a copy of the visa petition to the Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., room N-4456, Washington, DC 20210.

(d) *Visa issuance.* INS assures that the nonimmigrants possess the required qualifications and credentials to be

employed as nurses. See 8 U.S.C. 1182(m)(1)). The Department of State is responsible for issuing the visa.

(e) *Board of Alien Labor Certification Appeals (BALCA) review of attestations accepted and not accepted for filing.* The decision whether or not to accept for filing an attestation which ETA has reviewed, that is: an attestation where the facility is attesting to alternative methods of compliance with Element I and/or Element IV; an attestation where the facility is claiming that taking a second timely and significant step would not be reasonable; and/or an attestation where a facility that is not an employer of H–1A nurses is claiming a bond fide medical emergency as the basis for requesting a waiver of Element IV; may be appealed by any interested party to the BALCA.

(f) *Complaints.* Complaints concerning misrepresentation in the attestation or failure of the health care facility to carry out the terms of the attestation may be filed with the Wage and Hour Division (Division), Employment Standards Administration (ESA) of DOL, according to the procedures set forth in subpart E of this part. Complaints of "misrepresentation" may include assertions that a facility's attestations of compliance failed to meet the regulatory standards for attestation elements under which the attestation was accepted by ETA for filing without ETA review. The Division shall then investigate, and, where appropriate, after an opportunity for a hearing, assess sanctions and penalties. Subpart E of this part also provides that interested parties may obtain an administrative law judge hearing and may seek the Secretary's review of the administrative law judge's decision.

§ _____.302 Definitions.

For the purposes of subparts D and E of this part:

Accepted for filing means that the attestation and supporting documentation submitted by the health care facility have been received by the Employment and Training Administration of the Department of Labor (DOL) and have been found to be in compliance with the attestation requirements in § ____.310 of this part.

Act and *INA* mean the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Administrative law judge means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts D and E of this part.

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Board of Alien Labor Certification Appeals (BALCA) means a panel of one or more administrative law judges who serve on the permanent Board of Alien Labor Certification Appeals established by 20 CFR Part 656. BALCA consists of administrative law judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals.

Bona fide medical emergency means a situation in which the services of one or more H–1A contract nurses are necessary at a worksite facility (which itself does not employ an H–1A nurse) to prevent death or serious impairment of health, and, because of the danger to life or health, nursing services for such situation are not elsewhere available in the geographic area.

Certifying Officer means a Department of Labor official, or such official's designee, who makes determinations about whether or not H–1A attestations are acceptable for filing.

Chief Administrative Law Judge means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Chief, Division of Foreign Labor Certifications, USES means the chief official of the Division of Foreign Labor Certifications within the United States Employment Service, Employment and Training Administration, Department of Labor, or the designee of the Chief, Division of Foreign Labor Certifications, USES.

Date of filing means the date an attestation is "accepted for filing" by ETA.

Department and *DOL* mean the United States Department of Labor.

Director means the chief official of the United States Employment Service (USES), Employment and Training Administration, Department of Labor, or the Director's designee.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employer means a person, firm, corporation, or other association or organization involved in the direct provision of health care services, which:

(1) Suffers or permits a person to work;

(2) Has a location within the United States to which U.S. workers may be referred for employment;

(3) Proposes to employ workers at a place within the United States; and

(4) Has an employer-employee relationship with respect to employees under subpart D and E of this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of such employee.

Employment means full-time work by an employee for an employer/health care facility other than oneself. "Full-time work" means work where the nurse is regularly scheduled to work 40 hours or more per week, unless the facility documents as part of its attestation that it is common practice for the occupation at the facility or for the occupation in the geographic area for nurses to work fewer hours per week.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

Employment Standards Administration (ESA) means the agency within the Department of Labor (DOL) which includes the Wage and Hour Division.

Facility means a user of nursing services with either a single site or a group of contiguous locations at which it provides health care services. "Facility" includes an employer of registered nurses which provides health care services in a home or other setting, such as a hospital, nursing home, or other site of employment, not owned or operated by the employer (*e.g.*, a visiting nurse association or a nursing contractor). "Facility" also includes a private household which employs or seeks to employ one or more H–1A nurses, but does not include a private household which uses H–1A nurses only through a nursing contractor. Groups of structures which form a campus or separate buildings across the street from one another are a single facility. However, separate buildings or areas which are not physically connected or in immediate proximity are a single health care facility if they are in reasonable geographic proximity, used for the same purpose, and share the same nursing staff and equipment. An example is an entity which manages a nursing home and a hospital in the same area and which regularly shifts or rotates the nurses between the two. Non-contiguous sites, even within the same geographic area, which do not share the same nursing staff and operational purposes are not a single facility. For example, hospitals which are located on opposite sides of a municipality, but which are managed or owned by a single entity, are separate

facilities if they do not regularly share nursing staff and operational purpose.

Geographic area means the area within normal commuting distance of the place (address) of the intended worksite. If the geographic area does not include a sufficient number of facilities to make a prevailing wage determination, the term "geographic area" shall be expanded (by the State employment service, unless directed not to do so by the Director) with respect to the attesting facility to include a sufficient number of facilities to permit a prevailing wage determination to be made. If the place of the intended worksite is within a Metropolitan Statistical Area (MSA), any place within the MSA may be deemed to be within normal commuting distance of the place of intended employment.

Governor means the chief elected official of a State or the Governor's designee.

H–1A nurse means any nonimmigrant alien admitted to the United States to perform services as a nurse under section 101(a)(15)(H)(i)(a) of the Act (8 U.S.C. 1101(a)(15)(H)(i)(a)).

Immigration and Naturalization Service (INS) means the component of the Department of Justice which makes the determination under the Act on whether to grant visa petitions to petitioners seeking the admission of nonimmigrant nurses under H–1A visas.

Layoff means any involuntary separation of one or more staff nurses without cause/prejudice. If a staff nurse is separated from one specialized activity and is offered retraining and retention at the same facility in another activity involving direct patient care at the same wage and status, but refuses such training and retention, such separation shall not constitute a layoff. The layoff provision applies to staff nurses only, not to other health occupations. If the position occupied by the staff nurse is covered by a collective bargaining agreement, the collective bargaining agreement definition of "layoff" (if any) shall apply to that position.

Lockout means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

Nurse means a person who is or will be authorized by a State Board of Nursing to engage in registered nursing practice in a State or U.S. territory or possession at a facility which provides health care services. A staff nurse means a nurse who provides nursing care directly to patients. In order to qualify under this definition of "nurse" the alien shall:

(1) Have obtained a full and unrestricted license to practice nursing in the country where the alien obtained nursing education, or have received nursing education in the United States or Canada;

(2) Have passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS), or have obtained a full and unrestricted (permanent) license to practice as a registered nurse in the state of intended employment, or have obtained a full and unrestricted (permanent) license in any state or territory of the United States and received temporary authorization to practice as a registered nurse in the state of intended employment; and,

(3) Be fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States, and be authorized under such laws to be employed by the employer. For purposes of this paragraph, the temporary or interim licensing may be obtained immediately after the alien enters the United States and registers to take the first available examination for permanent licensure.

Nursing contractor means an entity that employs registered nurses and supplies these nurses, on a temporary basis and for a fee, to health care facilities or private homes.

Prevailing wage means the average wage paid to similarly employed registered nurses within the geographic area.

Secretary means the Secretary of Labor or the Secretary's designee.

Similarly employed means employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area.

State means one of the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

State employment security agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with USES in the operation of the national system of public employment offices.

Strike means a labor dispute wherein employees engage in a concerted stoppage or work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

United States Employment Service (USES) means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

United States (U.S.) nurse means any nurse who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

United States (U.S.) worker means any worker who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

United States is defined at 8 U.S.C. 1101(a)(38).

Worksite means the health care facility or home where the nurse is involved in the practice of nursing. It is possible, in the case of nursing contractors, that the employer's physical location and the worksite facility's physical location will differ.

§ _____.310 Attestations.

(a) *Who may submit attestations?* Any entity meeting the definition of "facility" in § _____.302, may submit an attestation. The attestation shall include: a completed Form ETA 9029, which shall be signed by the chief executive officer of the facility (or the chief executive officer's designee); and explanatory statements prescribed in paragraphs (c) through (k) of this section. A nursing contractor that seeks to employ nonimmigrant nurses shall file its own attestation (including *Form ETA 9029* and explanatory statements) as prescribed by this section, and, as part of its own attestation, shall attest that it shall refer H–1A nurses only to facilities that, with the exception of private households which themselves do not employ H–1A nurses, have current and valid attestations on file with ETA. Subparts D and E of this part shall apply both to the nursing contractor and to the worksite facility.

(b) *Where should attestations be submitted?* Attestations shall be submitted, by U.S. mail or private carrier, to the U.S. Department of Labor ETA Regional Office which has jurisdiction over the geographic area where the H–1A nurse will be employed, as designated by the Chief, Division of Foreign Labor Certifications, USES. The addresses of the Certifying

Officers are set forth in the instructions to *Form ETA 9029*.

(c) *What should be submitted?*—(1) *Form ETA 9029 and* explanatory statements.

(i) A completed and dated original *Form ETA 9029*, containing the required attestation elements and the original signature of the chief executive officer of the facility, shall be submitted, along with two copies of the completed, (signed, and dated) *Form ETA 9029*. (Copies of *Form ETA 9029* are available at the address listed in paragraph (b) of this section.) In addition, explanations, where required, for the required attestation elements as to what documentation is available at the facility and how such documentation indicates compliance with the regulatory standards as prescribed in paragraphs (d) through (i) of this section. In addition,

(A) If the facility is a nursing contractor, the special attestation element in paragraph (j) of this section; or

(B) If the facility is a worksite (other than a private household which itself does not employ, seek to employ, or file a visa petition on behalf of an H–1A nurse), which will use H–1A nurses only through a nursing contractor, the special attestation element in paragraph (k) of this section, shall be submitted in triplicate with the *Form ETA 9029*.

(ii) If the facility is proposing to meet alternative standards for substantial disruption (Element I) and/or the taking of timely and significant steps (Element IV), an explanation of the standards being proposed and an explanation of how these proposed standards are of comparable significance to those set forth in the statute shall be submitted in triplicate. If the facility is attesting that it can only take one timely and significant step (Element IV), it shall submit an explanation, in triplicate, demonstrating that taking a second step is unreasonable. If the facility uses H–1A nurses only through a nursing contractor, but claims a bona fide medical emergency exemption from Element IV, it shall submit a written explanation, in triplicate, demonstrating the existence of such an emergency. DOL may request additional explanation and/or documentation from a facility in the process of determining acceptability in cases described in this paragraph (c)(1)(ii).

(2) *Attestation elements*. The attestation elements referenced in paragraph (c)(1) of this section are mandated by section 212(m)(2)(A) of the Act (8 U.S.C. 1182(m)(2)(A)). Section 212(m)(2)(A) of the Act requires covered facilities to attest as follows:

(i) The attestation referred to in section 101(a)(15)(H)(i)(a) of the Act, with respect to a facility for which an alien will perform services, is an attestation as to the following:

(A) There would be a substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens.

(B) The employment of the aliens will not adversely affect the wages and working conditions of registered nurses similarly employed.

(C) The aliens employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.

(D) Either—(*1*) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses, or

(*2*) The facility is subject to an approved State plan for the recruitment and retention of nurses (described in section 212(m)(3) of the Act; 8 U.S.C. 1182(m)(3)).

(E) There is not a strike or lockout in the course of a labor dispute, and the employment of such an alien is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility.

(F) At the time of the filing of the petition for registered nurses under section 101(a)(15)(H)(i)(a) of the Act, notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations.

(ii) A facility is considered not to meet paragraph (c)(2)(i)(A) of this section (relating to an attestation of a substantial disruption in delivery of health care services) if the facility, within the previous year, has laid off registered nurses. A facility which lays off a registered nurse *other than a staff nurse* still meets the "no layoff" requirement if, in its attestation, it attests that it will not replace the nurse with an H–1A nurse (either through promotion or otherwise) for a period of 1 year after the date of the layoff. Nothing in paragraph (c)(2)(i)(D) of this section shall be construed as requiring a facility to have taken significant steps described in such paragraph before December 18, 1989 (*i.e.*, the date of enactment of the Immigration Nursing Relief Act of 1989).

(d) *The first attestation element: substantial disruption*. The facility shall attest that "there would be substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens." This element shall be met if the facility provides the following information:

(1) *Layoffs*. The facility shall attest that it has not laid off nurses during the 12-month period prior to submitting the attestation. A facility which lays off a registered nurse *other than a staff nurse* still meets the "no layoff" requirement if, in its attestation it attests that it will not replace the nurse with an H–1A nurse (either through promotion or otherwise) for a period of 1 year after the date of the layoff.

(2) *Nursing shortage*. (i) The facility shall attest to one of the following:

(A) It has a current nurse vacancy rate of 7 percent or more. An explanatory statement does not have to be submitted for this attestation element, but documentation to support this attestation shall be maintained at the facility and shall be available for review in accordance with § _____.350(b).

(B) It is unable to utilize 7 percent or more of its total beds due to a shortage of nurses. An explanatory statement does not have to be submitted for this attestation element, but supporting documentation for this attestation shall be maintained at the facility and shall be available for review in accordance with § _____.350(b).

(C) It has had to eliminate or curtail the delivery of essential health care services due to a shortage of nurses, and provide brief explanatory information about the essential services eliminated or curtailed by the facility due to a nursing shortage, what documentation is available at the facility to substantiate this attestation, where this documentation is located and can be reviewed, and the applicable time period of the documentation.

(D) It has been unable to effect established plans to provide needed new health care services in the community due to a shortage of nurses, and provide brief explanatory information about needed new services that have not been implemented by the facility due to a nursing shortage and which will be implemented with the availability of H–1A nurses, what documentation is available at the facility to substantiate this attestation, where this documentation is located and can be reviewed, and the applicable time period of the documentation.

(ii) *Other substantial disruption.* When an attesting facility finds that the indicators in paragraphs (d)(2)(i) (A) through (D) of this section cannot be demonstrated, or that such indicators are inappropriate to that facility, but that without the services of H–1A nurses, substantial disruption in the delivery of health care services of the facility still would occur due to a shortage or nurses, the facility shall provide an explanation of how a shortage of nurses has caused a "substantial disruption" in the delivery of its health care services. Such explanation shall be sufficient to provide a clear showing of "substantial disruption" in the delivery of specific health care services due to a shortage of nurses, and shall clearly explain why the indicators in paragraphs (d)(2)(i) (A) through (D) of this section cannot be met by or are inappropriate to that facility. In addition to the documentation required to be maintained by attesting facilities described in paragraph (d)(3) of this section, facilities attesting under this paragraph also shall maintain and make available for inspection (as described elsewhere in this section) such additional documentation as is necessary to substantiate such claim of substantial disruption.

(3) *Documentation of facility's nursing positions.* The attesting facility shall maintain and make available for inspection (as described in § _____.350(b)) documentation substantiating:

(i) The total number of nursing positions at the facility;

(ii) The number of nursing vacancies at the facility during a 12-month period ending no later than 3 months prior to submittal of the attestation;

(iii) The number of nurses who left the facility during the same 12-month period;

(iv) The number of nurses hired by the facility during the same 12-month period;

(v) The overall staffing pattern for nursing positions at the facility; and

(vi) A description of the facility's efforts to recruit U.S. nurses during the same 12-month period. The documentation on numbers of nurses, maintained for the purposes of this paragraph (d)(3), shall be broken out by numbers of U.S. nurses, nurses admitted under H–1 visas, nurses admitted under H–1A visas, nurses admitted under other nonimmigrant visas, and other nurses.

(e) *The second attestation element: no adverse effect.* The facility shall attest that "the employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed."

(1) *Wages.* To meet the requirement of no adverse effect on wages, the facility shall attest that it shall pay each nurse of the facility at least the prevailing wage for the occupation in the geographic area. The facility shall pay the higher of the wage required pursuant to this paragraph (e) or the wage required pursuant to paragraph (f) of this section (*i.e.*, the third attestation element: facility wage).

(i) *State employment security determination.* The facility does not independently determine the prevailing wage. The State employment security agency (SESA) shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines or regulations issued by ETA. The facility shall request the appropriate prevailing wage from the SESA not more than 90 days prior to the date the attestation is submitted to ETA. Once a facility obtains a prevailing wage determination from the SESA and files an attestation supported by that prevailing wage determination, the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (both to the occupational classification and wage) and thereafter shall not contest the legitimacy of the prevailing wage determination in an investigation or enforcement action. A facility may challenge a SESA prevailing wage determination through the Employment Service complaint system. See 20 CFR part 658, Subpart E. A facility which challenges a SESA prevailing wage determination shall obtain in final ruling from the Employment Service prior to filing an attestation. Any such challenge shall not require the SESA to divulge any employer wage data which was collected under the promise of confidentiality.

(ii) *Collectively bargained wage rates.* Where wage rates for nurses at a facility are the result of arms-length collective bargaining, those rates shall be considered "prevailing" for that facility for the purposes of this subpart.

(iii) *Total compensation package.* The prevailing wage finding under this paragraph (e)(1) relates to wages only. However, each item in the total compensation package for U.S., H–1A, and other nurses employed by the facility shall be the same within a given facility, including such items as housing assistance and other perquisites.

(iv) *Documentation of pay and total compensation.* The facility shall maintain documentation summarizing its pay schedule and compensation package for nurses. See § _____.350(b). The summary shall cover each category of nursing position in which H–1A nurses are or will be hired or promoted into and each category of nursing position in which H–1A nurses (or nurses admitted on H–1 visas) have been hired or promoted into. Categories of nursing positions not covered by the documentation shall not be covered by the attestation, and, therefore, such positions shall not be filled or held by H–1A nurses.

(2) *Working conditions.* To meet the requirement of no adverse effect on working conditions, the facility shall attest that it shall afford equal treatment to U.S. and H–1A nurses with the same seniority, with respect to such working conditions as the number and scheduling of hours worked (including shifts, straight days, weekends); vacations; wards and clinical rotations; and overall staffing-patient patterns.

(f) *The third attestation element: facility/employer wage.* The facility employing or seeking to employ the alien shall attest that "the alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility." The facility shall maintain documentation substantiating compliance with this attestation which shall include a description of the factors taken into consideration by the facility in making compensation decisions for nurses and the facility pay schedule for nurses maintained pursuant to paragraph (e)(1) of this section. See § _____.350(b). The facility shall pay the higher of the wage required pursuant to this paragraph (f) or the wage required pursuant to paragraph (e) of this section (*i.e.*, the second attestation element: no adverse effect).

(g) *The fourth attestation element: timely and significant steps; or State plan.* The facility may satisfy the fourth attestation element by satisfying Alternative I in paragraph (g)(1) of this section or by satisfying Alternative II in paragraph (g)(2) of this section.

(1) *Alternative I: Timely and significant steps.* The facility shall attest that it "has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses." The facility shall take at least two such steps, unless it demonstrates that taking a second step is not reasonable. The steps described in this paragraph (g)(1)

shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of this paragraph (g)(1). Nothing in this subpart or subpart E of this part shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. The facility is not required to have taken any of these steps prior to December 18, 1989. A facility choosing to take timely and significant steps other than those specifically described in paragraph (g)(1)(i)(A) of this section shall submit with its attestation a description of the steps it is proposing to take and an explanation of how the proposed steps are of comparable timeliness and significance to those described in paragraph (g)(1)(i)(A) of this section. A facility claiming that a second step is unreasonable shall submit an explanation of why such second step would be unreasonable.

(i) *Descriptions of steps— (A) Statutory steps.* Each of the actions described in this paragraph (g)(1)(i)(A) shall be considered a significant step reasonably designed to recruit and retain U.S. nurses. A facility choosing any one of the following steps shall attest that its program(s) meets the regulatory requirements set forth for each and provide an explanation of how the requirements are satisfied by the program(s). In addition, the attesting facility shall maintain and make available for inspection (as described in § _____.350(b) of this part) documentation specified in the particular step selected and/or documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its attestation and full compliance with the requirements for the particular step selected. Section 212(m)(2)(E) of the INA provides that a violation shall be found if a facility fails to meet a condition attested to. Thus, a facility shall be held responsible for all timely and significant steps to which it attests.

(*1*) *Step One: "Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere."* Training programs may include either courses leading to a higher degree (*i.e.*, beyond an associate or a baccalaureate degree), or continuing education courses. If the program includes courses leading to a higher degree, they shall be courses which are part of a program accepted for degree credit by a college or university and accredited by a State Board of Nursing or a State Board of Higher Education (or its equivalent), as appropriate. If the program includes continuing education courses, they shall be courses which meet criteria established to qualify the nurses taking the courses to earn continuing education units accepted by a State Board of Nursing (or its equivalent). In either type of program, financing by the facility, either directly or arranged through a third party, shall cover the total tuition costs of such training. The number of U.S. nurses for whom such training actually is provided shall be no less than half of the number of nurses who left the facility during the 12-month period prior to submission of the attestation. (U.S. nurses to whom such training was offered, but who rejected such training, may be counted towards those provided training, but the facility, in such case, shall maintain documentation of such offer and rejection). See § _____.350(b).

(*2*) *Step Two: "Providing career development programs and other methods of facilitating health care workers to become registered nurses."* This may include programs leading directly to a degree in nursing, or career ladder/career path programs which could ultimately lead to a degree in nursing. A facility choosing this step shall maintain as documentation a description of the content and eligibility requirements for both types of programs and an explanation of how the requirements of this paragraph (g)(1)(i)(A)(*2*) are satisfied by each program. Any such degree program shall be, at a minimum, either through an accredited community college (leading to an associate's degree), 4-year college (a bachelor's degree), or diploma school, and the course of study shall be one accredited by a State Board of Nursing (or its equivalent). For career ladder or career path programs, the facility shall maintain documentation that the programs are normally part of a course of study or training which prepares a U.S. worker for enrolling in formal direct training leading to a degree in nursing, either through an accredited community college, a 4-year college, or a diploma school. See § _____.350(b) of this part. Financing by the facility, either directly or arranged through a third party, shall cover the total costs of such programs. U.S. workers participating in such programs shall be working or have worked in health care occupations or health care facilities. The number of U.S. workers for whom such training is provided shall be equal to no less than half the average number of vacancies for nurses during the 12-month period prior to the submission of the attestation.

(*3*) *Step Three: "Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area."* A facility choosing this step shall maintain documentation showing that its entire schedule of wages for nurses is at least 5 percent higher than the prevailing wages as determined by the SESA pursuant to paragraph (e)(1)(i) of this section, and it shall attest that such differentials shall be maintained throughout the period of the attestation's effectiveness.

(*4*) *Step Four: "Providing adequate support services to free registered nurses from administrative and other non-nursing duties."* Non-nursing duties include such activities as housekeeping duties; food preparation and delivery; transporting patients; providing occupational and respiratory therapy; answering telephones; running errands for patients; and clerical tasks. A facility choosing this step shall not require nurses at the facility to perform non-nursing duties. However, it is understood that on an infrequent non-recurring basis, nurses at the facility may perform one or more of the tasks encompassed by the duties listed above in this paragraph (g)(1)(i)(A)(*4*) or other non-nursing duties. Facilities choosing this step shall maintain documentation showing what steps they have taken to ensure that nursing jobs do not include any of these duties and that such activity by nurses at the facility occurs without regularity and infrequently. Such a facility also shall maintain documentation with respect to any other steps being taken to relieve nurses from non-nursing duties, or to enhance the nursing function, such as computerizing certain writing and routine functions performed by nurses.

(*5*) *Step Five: "Providing reasonable opportunities for meaningful salary advancement by registered nurses."* Documentation for this step shall include documentation of systems for salary advancement based on factors such as merit, education, and specialty, and/or salary advancement based on length of service with other bases for wage differentials remaining constant.

(*i*) *Merit, education, and specialty.* For salary advancement based on factors such as merit, education, and specialty, the facility shall maintain and make available for inspection documentation that it provides opportunities for professional development of its nurses which lead to salary advancement, *e.g.*, opportunities for continuing education; in-house educational instruction; special committees, task forces, or projects considered of a professional development nature; participation in

professional organizations; and writing for professional publications. Such opportunities shall be available to all the facility's nurses.

(*ii*) *Length of service.* For salary advancement based on length of service, the facility shall maintain and make available for inspection documentation that it has clinical ladders in place which provide, annually, salary increases of 3 percent or more for a period of no less than 10 years, over and above the costs of living and merit, education, and specialty increases and differentials.

(B) *Other possible steps.* The Act indicates that the five steps described in paragraphs (g)(1)(i)(A) (*1*) through (*5*) of this section are not an exclusive list of timely and significant steps which might qualify. Facilities are encouraged to be innovative in devising other timely and significant steps, but these shall be of timeliness and significance comparable to those in paragraphs (g)(1)(i)(A) (*1*) through (*5*) of this section to qualify. A facility may attest that it has taken and is taking other such steps and explain in its attestation what these steps are, their nature and scope, how they are effected and how they meet the statutory test of timeliness and significance comparable to those Steps One through Five described above. A facility choosing alternative steps shall attest that its program(s) meet(s) the statutory requirements of timeliness and significance in promoting the development, recruitment and retention of U.S. nurses, explaining how these requirements are satisfied by such program(s). In addition, the attesting facility shall maintain and make available for inspection (as described in § _____.350(b)) documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its attestation and full compliance with the requirements of this paragraph (g)(1)(i)(B). Examples of such steps which—depending on the circumstances, the size and nature of the attesting facility, the nature and scope of the step(s) described, the number of persons affected, and other such factors—may meet these requirements are:

(*1*) *Monetary incentives*—providing monetary incentives to nurses, through bonuses and merit pay plans not included in the base compensation package, for additional education, and for efforts leading to increased recruitment and retention of U.S. nurses. Such monetary incentives can be based on actions by nurses such as: Innovations to achieve better patient care, increased productivity, reduced waste, better safety; obtaining additional certification in a nursing specialty; unused sick leave; recruiting other U.S. nurses; staying with the facility for a given number of years; taking less desirable assignments (other than shift differential); participating in professional organizations, on task forces and on special committees; or contributing to professional publications. Facilities attesting to this step shall have a documented system for providing significant financial rewards in the form of bonuses or salary advancement to nurses participating in the activities described in this paragraph.

(*2*) *Special perquisites*—providing nurses with special perquisites for dependent care or housing assistance of a nature and/or extent that constitute a "significant" factor in inducing employment and retention of U.S. nurses.

(*3*) *Work schedule options*—providng nurses with non-mandatory work schedule options for part-time work, job-sharing, compressed work week or non-rotating shifts (provided, however, that H–1A nurses are employed only in full-time work) of a nature and/or extent that constitute a "significant" factor in inducing employment and retention of U.S. nurses.

(*4*) *Other training options*—providing training opportunities to become registered nurses to U.S. workers not currently in health care occupations by means of financial assistance (*e.g.*, scholarship, loan or pay-back programs) to such persons.

(ii) *Unreasonableness of second step.* The steps described in this paragraph (g)(1) shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of this paragraph (g)(1). Nothing in this subpart or subpart E of this part shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. However, a facility shall make every effort to take at least two steps. A facility taking only one step shall provide an explanation with its attestation, and maintain documentation at the facility, relating to why taking a second step is not reasonable. The taking of a second step may be considered unreasonable if it would result in the facility's financial inability to continue providing the same quality and quantity of health care or if the provision of nursing services would otherwise be jeopardized by the taking of such a step. If the single step which is taken is one of the statutorily defined steps described in paragraphs (g)(1)(i)(A)(*1*) through (g)(1)(i)(A)(*5*) of this section, the facility shall explain with its attestation, and maintain documentation at the facility, with respect to each of the four statutory steps (described in paragraphs (g)(1)(i)(A)(*1*) through (g)(1)(i)(A)(*5*) of this section) not taken, relating to why it would be unreasonable for the facility to take such step and also shall explain with its attestation, and shall maintain and make available for inspection (as described in § _____.350(b)) documentation demonstrating why it would be unreasonable for the facility to take any other steps designed to recruit, develop and retain sufficient U.S. nurses to meet its staffing needs. If the single step which is taken is not one of the five statutory steps described in paragraphs (g)(1)(i)(A)(*1*) through (g)(1)(i)(A)(*5*) of this section, the facility shall, with respect to each of the five statutory steps not taken, explain with its attestation, and maintain documentation and make available for inspection (as described in § _____.350(b)) documentation, demonstrating why it would be unreasonable for the facility to take such step; the facility also shall explain with its attestation, and make available for inspection (as described in § _____.350(b)) documentation demonstrating why it would be unreasonable for the facility to take any other steps designed to recruit and retain sufficient U.S. nurses to meet its staffing needs. On the basis of the explanation submitted by the facility, the Certifying Officer shall determine whether the requirements of this paragraph (g)(1)(ii) have been met. See paragraph (m) of this section regarding such determinations and administrative appeals therefrom.

(iii) *Alternative to criteria for each specific step.* Instead of complying with the specific criteria for each of the steps in the second and succeeding years, a facility may include in its prior year's attestation, in addition to the actions taken under Steps One through Five, that it shall reduce the number of alien (H–1 and H–1A visaholders) nurses it utilizes within 1 year from the date of attestation by at least 10 percent, without reducing the quality or quantity of services provided. If this goal is achieved (as demonstrated by documentation maintained by the facility and made available for inspection, and indicated in its subsequent year's attestation), the facility's subsequent year's attestation may simply include the *Form ETA 9029*, an explanation demonstrating that this goal has been achieved and an attestation that it shall again reduce the

number of alien nurses it utilizes within 1 year from the date of attestation by at least 10 percent. This alternative is designed to permit a facility to achieve the objectives of the Act, without subjecting the facility to detailed requirements and criteria as to the specific means of achieving that objective. The first, second, and succeeding years shall be consecutive.

(2) *Alternative II: subject to approved annual State plan.* As an alternative to attesting to the timely and significant steps set forth in paragraph (g)(1) of this section, the facility may attest that it "is subject to an approved State plan for the recruitment and retention of nurses." The contents of the annual State plan are described in more detail in §_____.315. For an individual facility to meet the requirements of this paragraph (g)(2), the annual State plan shall provide for the taking of timely and significant steps by that facility, and the facility shall maintain appropriate documentation with respect to those steps. See §_____.350(b). To qualify for this Alternative II, the annual State plan shall have been approved prior to the date the facility submits its attestation to ETA for filing.

(h) *The fifth attestation element: No strike or lockout; no intention or design to influence bargaining representative election.* The facility shall attest that "there is not a strike or lockout in the course of a labor dispute, and the employment of such an alien is not intended or designated to influence an election for a bargaining representative for registered nurses of the facility." Labor disputes for purposes for this attestation element relate only to those involving nurses providing nursing services; other health service occupations are not included. This attestation element applies to strikes and lockouts and elections of bargaining representatives at both the facility employing the nurse and, in the case of nursing contractors, at the worksite facility.

(1) *Notice of strike or lockout.* In order to remain in compliance with the no strike or lockout portion of this attestation element, if a strike or lockout of nurses at the facility occurs during the 1 year's validity of the attestation, the facility, within 3 days of the occurrence of the strike or lockout, shall submit to the ETA National Office, by U.S. mail or private carrier, written notice of the strike or lockout.

(2) *ETA notice to INS.* Upon receiving from a facility a notice described in paragraph (h)(1) of this section, ETA shall examine the documentation, and may consult with the union at the facility or other appropriate entities. If ETA determines that the strike or lockout is covered under 8 CFR 214.2(h)(17), INS's *Effect of strike* regulation for "H" visaholders, ETA shall certify to INS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of nurses is in progress at the facility.

(i) *The sixth attestation element: notice of filing.* The facility shall attest that at the time of filing of the petition for registered nurses under section 101(a)(15)(H)(i)(a) of the Act, notice of filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations. The requirement applies to providing notice of filing both for attestations submitted to ETA and for visa petitions filed with INS.

(1) *Notification of bargaining representative.* No later than the date the attestation is mailed to DOL to be considered for filing, the facility shall notify the bargaining representative (if any) for nurses at the facility that the attestation is being submitted to DOL, and shall state in that notice that the attestation is available at the facility (explaining how it can be inspected or obtained) and at the national office of ETA for review by interested parties. No later than the date the facility transmits a visa petition for H–1A nurses to INS, the facility shall notify the bargaining representative (if any) for nurses at the facility that the visa petition is being submitted to INS, and shall state in that notice that the attestation and visa petition are available at the facility (explaining how they can be inspected or obtained) and at the national office of ETA for review by interested parties. Notices under this paragraph (i)(1) shall include the following statement: "Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

(2) *Posting notice.* If there is no bargaining representative for nurses at the facility, when the facility submits and attestation to ETA, and each time the facility files an H–1A visa petition with INS, the facility shall post a written notice at the facility (and, in addition, at the worksite facility, if at a different location, such as in the case of nursing contractors), stating that the attestation and/or visa petition(s) have been filed and are available at the facility (explaining how these documents can be inspected or obtained) and at the national office of ETA for review by interested parties. In order for the facility to remain in compliance with this paragraph (i)(2), all such notices shall remain posted during the validity period of the attestation and the attestations and petitions shall be available for examination at the facility throughout this period of time. The notice of posting shall provide information concerning the availability of these documents for examination at the facility and at the national office of ETA, and shall include the following statement: "Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office the Wage and Hour Division of the United States Department of Labor." Such posted notices shall be clearly visible and unobstructed while posted, shall be posted in conspicuous places, where the facility's U.S. nurses readily can read the posted notice on the way to or from their duties. Appropriate locations for posting such notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational Safety and Health Act occupational safety and health notices.

(j) *Special provisions for nursing contractors.* A nursing contractor submitting an attestation for filing as a facility shall attest, in addition to the first through sixth attestation elements, that it will refer H–1A nurses only to facilities that (with the exception of private households which themselves do not employ H–1A nurses) have valid attestations on file with ETA. The nursing contractor shall obtain from each such worksite facility a copy of that facility's *Form ETA 9029,* accepted for filing by ETA and then currently on file with ETA. The nursing contractor shall maintain a copy of such worksite facility's accepted attestation on file at the nursing contractor's principal office during the validity period of the nursing contractor's attestation or the period of time that any H–1A nurse in its employ is providing nursing services at the worksite facility, whichever is longer.

(k) *Special provisions for worksite facilities which are not employers of H–1A nurses and are not controlled by employers of H–1A nurses.* A facility (other than a private household) which obtains the services of an H–1A nurse by contracting with a nursing contractor, but which is itself neither the employer of any H–1A nurse nor controlled by the employer of any H–1A nurse (see paragraph (k)(1) of this

section), shall file an attestation with ETA pursuant to this subpart. Such a worksite facility may request from ETA a waiver of specific elements of the attestation to avoid duplicative attestations, in cases of temporary, emergency circumstances, with respect to information not within the knowledge of the attestor, or for other good cause. The attesting worksite facility shall be to ably demonstrate the existence of the circumstances or good cause which are asserted as the basis(es) for the request for a waiver of a particular element of the attestation, but need not submit such evidence with its request for waiver, except evidence with respect to a bona fide medical emergency (see paragraph (k)(3)(iii) of this section).

(1) *Worksites employing, seeking to employ, or filing visa petitions on behalf of H-1A nurses.* An attestation with respect to which waiver is requested or granted pursuant to this paragraph (k) is not valid (*i.e.*, is not "on file and in effect") for a worksite facility employing, seeking to employ, or filing a visa petition on behalf of H-1A nurses. Only an attestation meeting the requirements of paragraphs (a) through (i) of this section (and paragraph (j) of this section, in the case of a nursing contractor) can serve as the basis for a petition for an H-1A visa. A worksite facility which uses H-1A nurses only through a nursing contractor and, as part of its attestation, requests waiver of one or more attestation elements nevertheless shall file a complete attestation in order to be able to use such attestation as a basis for itself filing a visa petition for an H-1A nurse. Thus, a worksite facility should consider its future needs for H-1A nurses in filing attestations and requests for waiver pursuant to this paragraph (k).

(2) *Inapplicability of third attestation element: facility/employer wage.* If a worksite facility uses H-1A nurses only through a nursing contractor, the third attestation element (facility/employer wage; see paragraph (f) of this section) is not applicable to that facility, since the worksite facility is not the employer of the H-1A nurse and does not guarantee the H-1A nurse's wage. The third attestation element is required only for the employer of the H-1A nurse(s), *i.e.*, the third attestation element shall be included in the attestation of and met by the H-1A nurse's employer (*i.e.*, the nursing contractor).

(3) *Waiver of attestation elements.* ETA may consider, pursuant to this paragraph (k)(3) requests for waiver of certain attestation elements by a worksite facility which uses or will use an H-1A nurse provided by a nursing contractor (*i.e.*, an "H-1A contract nurse"), but which worksite facility itself does not employ, seek to employ, or file a visa petition on behalf of an H-1A nurse. Paragraphs (k)(3) (i) through (iii) of this section set forth different conditions for waiver depending on the number of workdays of H-1A contract nurse services the worksite facility will use. For the purposes of this paragraph (k)(3), a "workday" shall consist of one H-1A contract nurse working for one normal shift in a day. Thus, for example, three normal shifts worked by each of a group of five H-1A contract nurses totals 15 workdays.

(i) *Minimal use of H-1A contract nurses by a worksite.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use no more than a total of 15 workdays of H-1A contract nurse services in any 3-month period of the attestation's 1-year period of validity to meet emergency needs on a temporary basis, ETA may waive the first (substantial disruption), second (adverse effect), and fourth (timely and significant steps or State plan) elements of the attesting worksite facility's attestation. See paragraphs (d), (e), and (g) of this section; see also paragraphs (f) and (k)(2) of this section, with respect to the inapplicability of third attestation element (facility/employer wage). ETA shall not waive pursuant to this paragraph (k)(3)(i) the fifth attestation element (strike, lockout, or intent or design to influence bargaining representative election) or the sixth attestation element (notice). See paragraphs (h) and (i) of this section.

(ii) *Short-term use of H-1A contract nurses.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use no more than a total of 60 workdays of H-1A contract nurse services in any 3-month period of the attestation's 1-year period of validity to meet temporary needs, ETA may waive the nursing shortage component of the first element (substantial disruption; see paragraphs (d)(2) and (d)(3) of this section) and may waive the fourth (timely and significant steps or State plan; see paragraph (g) of this section) element of the attesting worksite facility's attestation. See also paragraphs (f) and (k)(2) of this section, with respect to the inapplicability of third attestation element (facility/employer wage). ETA shall not waive pursuant to this paragraph (k)(3)(ii) the no-layoff component of the first attestation element (substantial disruption; see paragraph (d)(1) of this section); the second attestation element (adverse effect); the fifth attestation element (strike, lockout, or intent to influence a bargaining representative election); or the sixth attestation element (notice). See paragraphs (d), (e), (h), and (i) of this section.

(iii) *Long-term use of H-1A contract nurse services.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use more than 60 workdays of H-1A contract nurse services in any 3-month period of the attestation's 1-year period of validity, ETA shall not waive any attestation element, except that, if the attestor documents a bona fide medical emergency warranting a waiver of the fourth attestation element (timely and significant steps or State plan) ETA may waive such element. See paragraph (g) of this section.

(l) *Agents of worksite facilities.* A worksite facility (including a worksite facility which itself employs or seeks to employ an H-1A nurse) may authorize a nursing contractor to act as its agent in preparing and filing the worksite facility's attestation; however, a worksite facility using an agent for preparation and filing of the attestation is responsible for the contents of such attestation and remains liable for any violations which may be disclosed in any investigation under Subpart E of this Part, and the chief executive officer of the worksite facility shall sign the original attestation, as required by paragraph (c)(1)(i) of this section.

(m) *Actions on attestations submitted for filing.* An attestation which meets the established criteria set forth in this § ____.310 shall be accepted for filing by ETA on the date it is signed by the Certifying Officer. ETA shall then follow the procedures set forth in paragraph (m)(1) of this section. An attestation submitted by a facility proposing alternative criteria or steps for the first and/or the fourth attestation elements, and/or proposing to take only one timely and significant step, and/or claiming a bona fide medical emergency exemption from the fourth attestation element shall be reviewed by ETA, and a determination shall be made by the Certifying Officer whether to accept or reject the attestation for filing. See paragraphs (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), and (k)(3)(iii) of this section. The Certifying Officer may request additional explanation and/or documentation from the facility in making this determination. If the Certifying Officer does not contact the facility for such information or make any determination within 30 days of receiving the attestation, the attestation shall become accepted for filing. Upon the facility's submitting the attestation

to ETA and providing the notice required by the sixth attestation element (see § ____.310(i)), the attestation shall be available for public examination at the health care facility itself. When ETA accepts the attestation for filing, the Certifying Officer shall forward the attestation to the ETA National Office, where it shall be available for public examination. Information contesting an attestation received by ETA prior to the determination to accept or reject the attestation for filing shall not be made part of ETA's administrative record on the attestation, but shall be referred to ESA to be processed as a complaint pursuant to Subpart E of this part, and, if such attestation nevertheless is accepted by ETA for filing, the complaint will be handled by ESA under that subpart.

(1) *Acceptance.* (i) If the attestation (and any explanatory statements that may be required) meet the requirements of this subpart, ETA shall accept the attestation for filing, shall, in the case of a facility intending to file a visa petition as the employer of an H–1A nurse, notify INS in writing of the filing, shall return to the facility one copy of the attestation form submitted by the facility, with ETA's acceptance indicated thereon, and shall forward one copy of the attestation with ETA's acceptance indicated thereon to the ETA National Office. The facility may then file a visa petition with INS for alien nurses in accordance with INS regulations.

(ii) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(2) *Appeals of acceptances.* If an attestation which is subject to a determination under paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), or (k)(3)(iii) of this section is accepted for filing, any interested party may appeal ETA's determination(s) on the element(s) that have been reviewed. Appeals of acceptances shall be filed with the BALCA, no later than 30 days after the date of acceptance, and will be considered under the procedures set forth at § ____.320.

(3) *Appeals of rejections.* If the attestation is not accepted for filing, which may occur as a result of a determination under paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), or (k)(3)(iii) of this section, ETA shall notify the facility in writing, specifying the reasons for rejection and quoting the language of § ____.320(a)(1). Any interested party may appeal such rejection to the BALCA, no later than 30 days after the date of rejection. Appeals of rejections shall be filed and considered under the procedures set forth at § ____.320.

(n) *Effective date and validity of filed attestations.* An attestation becomes filed and effective as of the date it is accepted and signed by the Certifying Officer and accepted thereby for filing. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to § ____.320 or subpart E. The filed attestation expires at the end of the 12-month period of validity.

(o) *Suspension or invalidation of filed attestation.* Suspension or invalidation of an attestation may result from a BALCA decision reversing an ETA acceptance for filing; from investigations by the Administrator, Wage and Hour Division, of the facility's misrepresentation in or failure to carry out its attestation; or from a discovery by ETA that it made an error in its review of the attestation (in those cases where ETA performs such review pursuant to paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), (k)(3)(iii) of this section) and that the explanation and documentation provided and maintained by the facility does not or did not meet the criteria set forth at § ____.310 (a) through (k). If an attestation is suspended or invalidated, DOL shall notify INS.

(1) *Result of BALCA or Wage and Hour Division action.* If an attestation is suspended or invalidated as a result of a BALCA decision overruling an acceptance of the attestation for filing, or is suspended or invalidated as a result of a Wage and Hour Division action pursuant to subpart E, such suspension or invalidation may not be separately appealed, but shall be merged with appeals of BALCA's or the Wage and Hour Division's determination on the underlying violation.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA discovers that it erroneously accepted that attestation for filing, and, as a result, ETA suspends or invalidates that acceptance, the facility may appeal such suspension or invalidation pursuant to § ____.320 as if that suspension or invalidation were a decision to reject the attestation for filing.

(p) *Facility's responsibilities during suspension and after invalidation or expiration of filed attestation.* A facility shall comply with the terms of its attestation, even if such attestation is suspended, invalidated, or expired, as long as any H–1A nurse is at the facility, unless the attestation is superseded by a subsequent attestation accepted for filing by ETA.

(q) *Facilities subject to penalties.* No attestation shall be accepted for filing from a nursing contractor or other facility which has failed to comply with any penalty, sanction, or other remedy assessed in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart E.

§ _____.315 State plans.

A State may submit an annual plan for the recruitment and retention of U.S. citizens and permanent resident aliens who are authorized to perform nursing services in the State.

(a) *Who should prepare and file the annual plan?* The Governor of each State that chooses to submit an annual State plan shall be responsible for the preparation and filing of the annual plan. The Governor may designate any public and/or private organization(s) to assist the Governor in the development of the annual plan.

(b) *When and where should the annual plan be filed?* If a State determines to file an annual State plan, the Governor shall submit the original plan, signed by the Governor, by U.S. mail or private carrier, to ETA at the following address: Director, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., room N–4456, Washington, DC 20210. An annual State plan may be filed with ETA at any time. However, for an individual facility legitimately to attest to being subject to an annual State plan for the purposes of the fourth attestation element, Alternative II (see § _____.310(g)(2)), such annual State plan shall have been approved prior to the date the attestation was submitted to ETA for filing and be in current effect. Therefore, if the Governor is aware that a facility within the State plans to submit an attestation for filing with ETA, the annual State plan should be mailed to ETA at least 35 days prior to the facility's submission of its attestation to ETA.

(c) *What overall issues shall the annual State plan address?* The annual State plan shall address the overall issue of supply of and demand for nurses within the State, with particular emphasis on measures to develop a sufficient supply of U.S. nurses to meet projected demand. The State, as opposed to individual facilities, is in a position to—and may be expected to—address broad issues and perform such functions as conducting a Statewide needs assessment; overall management, facilitation and coordination among various interested entities within the State; and undertaking more regionally

based approaches. The State is also in a position to devote resources which individual facilities may be lacking.

(d) *How should the annual State plan address the timely and significant steps?* The annual State plan shall address all of the timely and significant steps in § _____.310(g)(1)(i)(A)(*1*) through (g)(1)(i)(A)(*5*) generically, without regard to the specific criteria therein, on a Statewide basis. However, for the annual State plan to satisfy Alternative II of the fourth attestation requirement for an individual facility (see § _____.310(g)(2)), the annual State plan shall indicate which of those timely and significant steps relate to individual facilities, and that each individual facility shall take such a step (either one step or more, as appropriate) to meet the appropriate specific criteria as set forth in § _____.310(g)(1).

(e) *What other components may the annual State plan include?* An annual State plan may include the following components:

(1) The cooperation of high schools and colleges may be enlisted in counseling health workers and other individuals to enter the nursing profession.

(2) Geographic and salary data may be made available to assist in linking nurses to facilities.

(3) Publications of vacancies and programs may be made in industry and State newsletters.

(4) Training films and videotapes, as well as information on housing and relocation services, may be developed and distributed.

(5) Measures may be taken to encourage other health professionals to become nurses, such as: setting up home study programs with State licensing boards to allow work credits for purposes of meeting educational or State clinical requirements; entering into cooperative agreements for providing health care insurance and other job-related elements which would allow greater flexibility for those attempting to combine careers and school; providing monetary grants or long-term loans to persons preparing to become nurses.

(6) Steps may be taken to encourage nurses who have left the nursing field to return to nursing, by providing such inducements as child care, holiday schedule adjustments, and substantial salary increases.

(7) The State may profile and publicize those facilities with special model programs.

(8) The annual State plan may place demands on facilities for comprehensive plans to reduce reliance on foreign nurses.

(f) *Approval and disapproval of annual State plans.* Determinations of approval and disapproval of annual State plans shall be made by the Director, USES. The annual State plan shall be reviewed by ETA, in consultation with the Department of Health and Human Services, and a determination to approve or disapprove the annual State plan made within 30 calendar days of ETA's receipt of the plan.

(1) If the annual State plan is approved, the Director shall notify the Governor in writing.

(2) If the annual State plan is disapproved, the Director shall notify the Governor in writing, specifying the reason(s) for disapproval. The notice shall state that within 30 calendar days of the date of the notice of disapproval, the Governor may correct the deficiencies noted in the disapproval and resubmit the annual State plan to ETA; and shall inform the state of its right to an appeal, by quoting the language of § _____.320(a).

(g) An approved annual State plan shall be valid for 12-month period beginning on the date of its approval by DOL.

(Approved by the Office of Management and Budget under control number 1205–0305)

§ _____.320 Appeals of acceptance and rejection of attestations submitted for filing and of State plans.

(a) *Appeal right*—(1) *Attestations; when to file appeals from acceptances and rejections.* On the basis that the explanation and documentation provided and maintained by the facility does not or did not meet the criteria set forth at § _____.310(d)(2)(ii), (g)(1)(i)(B)(*5*), (g)(1)(ii), or (k)(3)(iii), an interested party may appeal an acceptance or rejection by ETA of an attestation submitted by a facility for filing in those cases where DOL performed an attestation review function under those provisions. The appeal shall be limited to ETA's determinations on the element(s) reviewed and shall not be an appeal as to any other element(s) in the attestation. An interested party may also appeal ETA's invalidation or suspension of a filed attestation due to a discovery by ETA that it made an error in its reviewing of the attestation (see § _____.310(o). In the case of an appeal of an acceptance, the facility shall be a party to the appeal; in the case of the appeal of a rejection, invalidation, or suspension, the collective bargaining representative (if any) representing nurses at the facility shall be a party to the appeal. Appeals shall be in writing; shall set forth the grounds for the appeal; shall state if *de novo* consideration by BALCA is requested; and shall be mailed by certified mail within 30 calendar days of the date of the action from which the appeal is taken (*i.e.*, the acceptance, rejection, suspension or invalidation of the attestation).

(2) *Annual State plans; when to file appeals from disapprovals.* A Governor of a State may appeal ETA's disapproval of an annual State plan. Individual facilities in the State may file briefs as *amici curiae*. Appeals shall be in writing and shall be mailed by certified mail within 30 calendar days of the disapproval of the annual State plan.

(3) *Where to file appeals.* Appeals made pursuant to this section shall be in writing and shall be mailed by certified mail to: Director, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., Room N–4456, Washington, DC 20210.

(4) *Complaints.* Appeals under this paragraph (a) shall not encompass questions of misrepresentation by a health care facility or nonperformance by such a facility of its attestation. Such complaints shall be filed with an office of the Wage and Hour Division, United States Department of Labor.

(b) *Transmittal to BALCA; case file.* Upon receipt of an appeal pursuant to this section, the Certifying Officer (or, in the case of State plans, the Director, USES), shall send to BALCA a certified copy of the ETA case file, containing the attestation and supporting documentation and any other information or data considered by ETA in taking the action being appealed. The administrative law judge chairing BALCA shall assign a panel of one or more administrative law judges who serve on BALCA to review the record for legal sufficiency and to consider and rule on the appeal.

(c) *Consideration on the record; de novo hearings.*—(1) *General.* BALCA shall not remand, dismiss, or stay the case, except as provided in paragraph (c)(2) of this section, but may otherwise consider the appeal on the record or in a *de novo* hearing (on its own motion or on a party's request). Interested parties and *amici curiae* may submit briefs in accordance with a schedule set by BALCA. The ETA official making the determination from which the appeal was taken shall be represented by the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, Department of Labor, or the Associate Solicitor's designee. If BALCA determines to hear the appeal on the record without a *de novo* hearing, BALCA shall render a decision within

30 calendar days after BALCA's receipt of the case file. If BALCA determines to hear the appeal through a *de novo* hearing, the procedures contained in 29 CFR part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an answer is required;

(ii) BALCA shall ensure that, at the request of the appellant, the hearing is scheduled to take place within a reasonable period after BALCA's receipt of the case file (see also the time period described in paragraph (c)(1)(iv) of this section);

(iii) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B), shall not apply to any hearing conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by BALCA in conducting the hearing; BALCA may exclude irrelevant, immaterial, or unduly repetitious evidence; the certified copy of the case file transmitted to BALCA by the Certifying Officer (or, in the case of State plans, the Director, USES), shall be part of the evidentiary record of the case and need not be removed into evidence; and

(iv) BALCA's decision shall be rendered within 120 calendar days after BALCA's receipt of the case file.

(2) *Dismissals and stays.* If the BALCA determines that the appeal is solely a question of misrepresentation by the facility or is solely a complaint of the facility's nonperformance of the attestation, BALCA shall dismiss the case and refer the matter to the Administrator, Wage and Hour Division, for action under subpart E. If the BALCA determines that the appeal is partially a question of misrepresentation by the facility or is partially a complaint of the facility's nonperformance of the attestation, BALCA shall refer the matter to the Administrator, Wage and Hour Division, for action under Subpart E of this part and shall stay BALCA consideration of the case pending final agency action on such referral. During such stay, the 120-day period described in paragraph (c)(1)(iv) of this section shall be suspended.

(d) *BALCA's decision.* After consideration on the record or a *de novo* hearing, BALCA shall either affirm or reverse ETA's decision, and shall so notify the appellant; the Director, if the affirmation or denial involves a State plan; Certifying Officer; Chief, Division of Foreign Labor Certifications; and any other parties. See § _____.450 custody of the record of the appeal.

(e) *Decisions on attestations.* With respect to an appeal of the acceptance, rejection, suspension or invalidation of an attestation, the decision of BALCA shall be the final decision of the Secretary, and no further review shall be given to the matter by any DOL official.

(f) *Decisions on annual State plans.* With respect to an appeal of the disapproval of an annual State plan, the decision of BALCA shall be the final decision by the Secretary, unless a petition for review of the BALCA decision is filed with the Secretary and the Secretary determines to review the decision.

(1) *Filing of petition for review.* The Director or the State desiring review of the decision and order of BALCA may petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 days of the date of the decision and order. Copies of the petition shall be served on all parties and on BALCA.

(2) *Form of petition for review.* No particular form is prescribed for any petition for Secretary's review permitted by this paragraph (f). However, any such petition shall:

(i) Be dated;

(ii) Be typewritten or legibly written;

(iii) Specify the issue or issues stated in the BALCA decision and order giving rise to such petition;

(iv) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(v) Be signed by the party filing the petition or by an authorized representative of such party;

(vi) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(vii) Attach copies of BALCA's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(3) *Notice of determination to review.* Whenever the Secretary determines to review the decision and order of BALCA on an annual State plan, a notice of the Secretary's determination to do so shall be served upon BALCA and upon all parties to the proceeding within 30 days after the Secretary's receipt of the petition for review.

(4) *Hearing record.* Upon receipt of the Secretary's notice, BALCA shall within 15 days forward the complete hearing record to the Secretary.

(5) *Contents of Secretary's notice.* The Secretary's notice shall specify:

(i) The issue or issues to be reviewed;

(ii) The form in which submissions shall be made by the parties; and

(iii) The time within which such submissions shall be made.

(6) *Filing of documents.* All documents submitted to the Secretary pursuant to this paragraph (f) shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, Room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(7) *Service of documents.* Copies of all documents filed with the Secretary pursuant to this paragraph (f) shall be served simultaneously upon all other parties involved in the proceeding. Service upon the Director shall be in accordance with paragraph (a)(3) of this section.

(8) *Secretary's decision.* The Secretary's final decision pursuant to this paragraph (f) shall be issued within 180 days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and BALCA.

(9) *Transmittal of record.* Upon issuance of the Secretary's decision under this paragraph (f), the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § _____.450.

§ _____.350 Public access.

(a) *Public examination at ETA.* ETA shall make available for public examination in Washington, DC, a list of facilities which have filed attestations, and such facilities' visa petitions (if any) for H–1A nurses, and for each such facility, a copy of the facility's attestation and any explanatory statements it has received; the annual State plan (if any) which relates to the facility's attestation; and a copy of each of the facility's H–1A visa petitions (if any) to INS. A copy of the latter shall be transmitted to ETA by the facility at the same time it is submitted to INS. The facility shall also forward to ETA a copy of the INS visa petition approval notice within 5 days after it is received from INS.

(b) *Public examination at facility.* For the duration of the attestation's validity and thereafter for so long as the facility

uses any H–1 or H–1A nurse under the attestation, the facility shall maintain a separate file containing the attestation and required documentation, and shall make this file available to any interested parties within 72 hours upon written or oral request. If a party requests a copy of the file, the facility shall provide it and any charge for such copy shall not exceed the cost of reproduction.

(c) *Notice to public.* ETA periodically shall publish a notice in the **Federal Register** announcing the names and addresses of facilities which have submitted attestations; facilities which have attestations on file; facilities which have submitted attestations which have been rejected for filing; facilities which have had attestations suspended; States which have submitted annual State plans; States which have approved annual State plans; and States which have submitted annual State plans which were disapproved.

Subpart E—Enforcement of H–1A Attestations

§ _____.400 Enforcement authority of Administrator, Wage and Hour Division.

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under 8 U.S.C. 1182(m) and subparts D and E of this part.

(b) The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters to which a health care facility has attested under section 212(m) of the INA (8 U.S.C. 1182(m)) and subparts D and E of this part.

(c) A facility being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No facility shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(m) or subparts D or E of this part. In the event of such interference, the Administrator may deem the interference to be a violation and take such further actions as the Administrator considers appropriate. (*Note:* Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 1114.)

(d) A facility subject to subparts D and E of this part shall at all times cooperate in administrative and enforcement proceedings. No facility shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

(1) Filed a complaint or appeal under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part;

(2) Testified or is about to testify in any proceeding under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part;

(3) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part.

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to the Act or to subparts D or E of this part or any other DOL regulation promulgated pursuant to 8 U.S.C. 1182(m).

In the event of such intimidation or restraint as are described in paragraph (d)(1), (2), (3), or (4) of this section, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(e) A facility subject to subpart D and E of this part shall maintain a separate file containing its attestation and required documentation, and shall make that file or copies thereof available to interested parties, as required by § _____.350(b). In the event of a facility's failure to maintain the file, to provide access, or to provide copies, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(f) No health care facility shall seek to have an H–1A nurse, or any other nurse similarly employed by the employer, or any other employee waive rights conferred under the Act or under subpart D or E of this part. In the event of such waiver, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or subpart D or E of this part may be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or subpart D and E of this part. This prohibition of waivers does not prevent agreements to settle litigation among private parties.

(g) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any complainant or other person who provides information to the Department.

§ _____.405 Complaints and investigative procedures.

(a) The Administrator, through investigation, shall determine whether a facility has failed to perform any attested conditions, misrepresented any material facts in an attestation (including misrepresentation as to compliance with regulatory standards), or otherwise violated the Act or subpart D or E of this part.

(**Note:** Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546).

(b) Any aggrieved person or organization may file a complaint of a violation of the provisions of section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part. No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint shall set forth sufficient facts for the Administrator to determine what part or parts of the attestation or regulations have allegedly been violated. Upon the request of the complainant, the Administrator shall, to the extent possible under existing law, maintain confidentiality regarding the complainant's identity; if the complainant wishes to be a party to the administrative hearing proceedings under this subpart, the complainant shall then waive confidentiality. The complaint may be submitted to any local Wage and Hour Division office; the addresses of such offices are found in local telephone directories. Inquiries concerning the enforcement program and requests for technical assistance regarding compliance may also be submitted to the local Wage and Hour Division office.

(c) The Administrator shall determine whether there is reasonable cause to believe that the complaint warrants investigation and, if so, shall conduct an investigation, within 180 days of the receipt of a complaint. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new

complaint, with such additional information as may be necessary.

(d) When an investigation has been conducted, the Administrator shall, within 180 days of the receipt of a complaint, issue a written determination, stating whether a basis exists to make a finding that the facility failed to meet a condition of its attestation, or made a misrepresentation of a material fact therein, or otherwise violated the Act or subpart D or E. The determination shall specify any sanctions imposed due to violations. The Administrator shall provide a notice of such determination to the interested parties and shall inform them of the opportunity for a hearing pursuant to § _____.420.

§ _____.410 Civil money penalties and other remedies.

(a) The Administrator may assess a civil money penalty not to exceed $1,000 for each affected person with respect to whom there has been a violation of the attestation or subpart D or E of this part of and with respect to each instance in which such violation occurred. The Administrator also shall impose appropriate remedies, including the payment of back wages and the performance of attested obligations such as providing training.

(b) In determining the amount of civil money penalty to be assessed for any violation, the Administrator shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the facility under the Act and subpart D or E of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the attestation or the State plan as provided in the Act and Subparts D and E of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance, taking into account the public health, interest or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury or adverse effect upon the workers.

(c) The civil money penalty, back wages, and any other remedy determined by the Administrator to be appropriate, are immediately due for payment or performance upon the assessment by the Administrator, or the decision by an administrative law judge where a hearing is requested, or the decision by the Secretary where review is granted. The facility shall remit the amount of the civil money penalty, by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred. The payment of back wages, monetary relief, and/or the performance or any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. The facility's failure to pay the civil money penalty, back wages, or other monetary relief, or to perform any other assessed remedy, shall result in the rejection by ETA of any future attestation submitted by the facility, until such payment or performance is accomplished.

§ _____.415 Written notice and service of Administrator's determination.

(a) The Administrator's determination, issued pursuant to § _____.405(d), shall be served on the complainant, the facility, and other interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail. Where the complainant has requested confidentiality, the Administrator shall serve the determination in a manner which will not breach that confidentiality.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(c) The Administrator's written determination required by § _____.405(c) shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor; prescribe any remedies or penalties including the amount of any unpaid wages due, the actions required for compliance with the facility attestation and/or State plan, and the amount of any civil money penalty assessment and the reason or reasons therefor.

(2) Inform the interested parties that they may request a hearing pursuant to § _____.420.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 10 days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the address of the Chief Administrative Law Judge.

(5) Inform the parties that, pursuant to § _____.455, the Administrator shall notify the Attorney General and ETA of the occurrence of a violation by the employer.

§ _____.420 Request for hearing.

(a) Any interested party desiring to request an administrative hearing on a determination issued pursuant to § _____.405(d) shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination.

(b) An interested party may request a hearing in the following circumstances:

(1) Where the Administrator determines that there is no basis for a finding of violation, the complainant or other interested party may request a hearing. In such a proceeding, the party requesting the hearing shall be the prosecuting party and the facility shall be the respondent; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) Where the Administrator determines that there is a basis for a finding of violation, the facility or other interested party may request a hearing. In such a proceeding, the Administrator shall be the prosecuting party and the facility shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination given rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 10 days after the date of the determination. An interested party which fails to meet this 10-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party

pursuant to 29 CFR 18.10 (b) through (d) or through participation as an *amicus curiae* pursuant to 29 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is filed by mail, it should be certified mail. If the request is filed by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within 10 days of the date of the Administrator's notice of determination.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

§ _____.425 Rules of practice for administrative law judge proceedings.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges* (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is inmaterial, irrelevant, or unduly repetitive.

§ _____.430 Service and computation of time.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ _____.435 Administrative law judge proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § _____.420, the Chief Administrative Law Judge shall appoint an administrative law judge to hear the case.

(b) Within 7 days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least 5 days notice of such hearing.

(c) The date of the hearing shall be not more than 60 days from the date of the Administrator's determination. Because of the time constraints imposed by the Act, no requests for postponement shall be granted except for compelling reasons and by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § _____.430. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § _____.430.

§ _____.440 Decision and order of administrative law judge.

(a) Within 90 days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision. The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision shall be served on all parties in person or by certified or regular mail.

§ _____.445. Secretary's review of administrative law judge's decision.

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for Secretary's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and upon all parties to the proceeding within 30 days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within 15 days forward the complete hearing record to the Secretary.

(e) The Secretary's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.*, briefs, oral argument);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § _____.430(b).

(h) The Secretary's final decision shall be issued within 180 days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § _____.450.

§ _____.450 Administrative record.

The official record of every completed administrative hearing procedure provided by subparts D and E of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

§ _____.455 Notice to the Attorney General and the Employment and Training Administration.

(a) The Administrator shall promptly notify the Attorney General and ETA of the final determination of a violation by an employer upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to § _____.420; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer; or

(3) Where the administrative law judge finds that there was no violation, and the Secretary, upon review, issues a decision pursuant to § _____.445, holding that a violation was committed by an employer.

(b) The Attorney General, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under section 212(m) of the INA (8 U.S.C. 1182(m)) during a period of at least 12 months from the date of receipt of the Administrator's notification.

(c) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall suspend the employer's attestation under subparts D and E of this part, and shall not accept for filing any attestation submitted by the employer under subparts D and E of this part, for a period of 12 months from the date of receipt of the Administrator's notification or for a longer period if such is specified by the Attorney General for visa petitions filed by that employer under section 212(m) of the INA.

§ _____.460 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart D or E of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

Adoption of the Joint Final Rule

The agency specific adoption of the joint final rule which appears at the end of the common preamble, appears below:

TITLE 20—EMPLOYEES' BENEFITS

CHAPTER V—EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

Accordingly, the interim final rule published on December 6, 1990 (55 FR 50500) amending Chapter V of Title 20 of the Code of Federal Regulations by redesignating §§ 621.1, 621.2 and 621.3 to subpart A of part 655, removing the remainder of part 621 and amending part 655 is adopted as final, and part 655 is further amended as follows:

PART 655—[AMENDED]

1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978 5027 (8 U.S.C. 1184 note); and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); and sec. 341(a) and (b), Pub. L. 103–182, 107 Stat. 2057.

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

2. Part 655 is amended by revising subparts D and E to read as set forth in the joint final rule above in this document.

Subpart D—Attestations by Facilities Using Nonimmigrant Aliens as Registered Nurses

Sec.
655.300 Purpose and scope of subparts D and E.
655.301 Overview of process.
655.302 Definitions.
655.310 Attestations.
655.315 State plans.
655.320 Appeals of acceptance and rejection of attestations submitted for filing and of State plans.
655.350 Public access.

Subpart E—Enforcement of H–1A Attestations

655.400 Enforcement authority of Administrator, Wage and Hour Division.
655.405 Complaints and investigative procedures.
655.410 Civil money penalties and other remedies.
655.415 Written notice and service of Administrator's determination.
655.420 Request for hearing.
655.425 Rules of practice for administrative law judge proceedings.
655.430 Service and computation of time.
655.435 Administrative law judge proceedings.
655.440 Decision and order of administrative law judge.
655.445 Secretary's review of administrative law judge's decision.
655.450 Administrative record.
655.455 Notice to the Attorney General and the Employment and Training Administration.
655.460 Non-applicability of the Equal Access to Justice Act.

Signed at Washington, DC, this 28th day of December, 1993.

Robert B. Reich,

Secretary of Labor.

TITLE 29—LABOR

CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

Accordingly, part 504 of Title 29, Code of Federal Regulations, is revised to read as follows:

PART 504—ATTESTATIONS BY FACILITIES USING NONIMMIGRANT ALIENS AS REGISTERED NURSES

Subparts A, B, and C—[Reserved]

Subpart D—Attestations by Facilities Using Nonimmigrant Aliens as Registered Nurses

Sec.
504.300 Purpose and scope of subparts D and E.
504.301 Overview of process.
504.302 Definitions.
504.310 Attestations.
504.315 State plans.
504.320 Appeals of acceptance and rejection of attestations submitted for filing and of State plans.
504.350 Public access.

Subpart E—Enforcement of H–1A Attestations

504.400 Enforcement authority of Administrator, Wage and Hour Division.
504.405 Complaints and investigative procedures.
504.410 Civil money penalties and other remedies.
504.415 Written notice and service of Administrator's determination.
504.420 Request for hearing.
504.425 Rules of practice for administrative law judge proceedings.
504.430 Service and computation of time.
504.435 Administrative law judge proceedings.
504.440 Decision and order of administrative law judge.
504.445 Secretary's review of administrative law judge's decision.
504.450 Administrative record.
504.455 Notice to the Attorney General and the Employment and Training Administration.
504.460 Non-applicability of the Equal Access to Justice Act.

Authority: 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m) and Pub. L. 101–238, sec. 3(c)(1), 103 Stat. 2099, 2103; and sec. 341(a) and (b), Pub. L. 103–182, 107 Stat. 2057

Signed at Washington, DC, this 28th day of December, 1993.

Robert B. Reich,

Secretary of Labor.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix—Form ETA 9029

Billing Code 4510–10–M and 4510–27–M

Health Care Facility Attestation (H-1A)

U.S. Department of Labor
Employment and Training Administration
U.S. Employment Service

1. Name of Facility (Full Legal Name of Organization)	3. Telephone (Area Code and Number)	OMB Approval No.: 1205-0305
2. Address (Number, Street, City, State and ZIP Code)	4. Facility's Federal Employer I.D. Number	
	5. Nature of Facility's Business Activity (Hospital, Nursing Home, etc)	
	6. Name of Chief Executive Officer	
	6a. Contact Person & Telephone Number	

7. KIND OF FACILITY: (check appropriate item)

☐ a. Facility (hospital, nursing home, clinic, household, etc.) intending to petition for H-1A nurses.
☐ b. Nurse contractor intending to petition for H-1A nurses.
☐ c. Facility intending to use H-1A nurses through a contractor only (check appropriate item; item 8.c. not applicable if item 7.c. is checked):
- ☐ (i) For no more than 15 workdays in any 3-month period to meet temporary emergency needs or other good cause on a temporary basis. (Waivers may be requested in writing for items 8.a., 8.b., and 8.d.)
- ☐ (ii) For more than 15 but no more than 60 workdays in any 3-month period to meet temporary emergency needs or for other good cause on a temporary basis. (Waivers may be requested in writing for items 8.a.(ii), and 8.d.)
- ☐ (iii) For more than 60 workdays in any 3-month period due to a bona fide medical emergency. (Explanatory statement required; waiver may be requested in writing for item 8.d.)
- ☐ (iv) None of the above.

8. FACILITY ATTESTATION: (Applicable in its entirety if item 7.a. or item 7.b. is checked. Item 8.g. required if item 7.b. is checked.)

☐ a. Lay offs and Substantial Disruption
- ☐ (i) This facility has not laid off any registered staff nurses within the past year; and this facility will not replace laid off nonstaff nurses with H-1A nurses either through promotion or otherwise for a period of 1 year from the lay off. (No explanatory statement required.)
- ☐ (ii) Through no fault of this facility, there would be a substantial disruption in the delivery of health care services of the facility without the services of H-1A nurses, as demonstrated by (check at least one item):
  - ☐ Current nurse vacancy rate of 7% or more. Vacancy rate is ____ %. (No explanatory statement required.)
  - ☐ Current unutilized bed rate of 7% or more. Unutilized bed rate is ____ %. (No explanatory statement required.)
  - ☐ Past elimination/curtailment of essential health care services. (Explanatory statement required.)
  - ☐ Inability to implement established plans for needed new health care services. (Explanatory statement required.)
  - ☐ Other. (Explanatory statement required.)

☐ b. The employment of H-1A nurses will not adversely affect the wages and working conditions of registered nurses similarly employed. This facility has obtained a prevailing wage determination from the State Employment Security Agency (SESA) and is paying both U.S. and H-1A nurses at least the prevailing wage for the geographic area unless wages for registered nurses at this facility are the result of a collective bargaining agreement. (No explanatory statement required.)

(NOTE: 8. FACILITY ATTESTATION CONTINUES ON THE BACK OF THIS FORM.)

FOR U.S. GOVERNMENT AGENCY USE ONLY: By virtue of my signature below, I acknowledge that this attestation is accepted for filing

on _____ (date) and will be valid through _____ (date 12 months from the date it is accepted for filing).

Signature of Authorized DOL Official _____ ETA Case No. _____

The Department of Labor is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

Public reporting burden for this collection of information is estimated to average 1 hrs 5 min per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of IRM Policy, Department of Labor, Room N-1301, 200 Constitution Avenue, N.W., Washington, DC 20210; and to the Office of Management and Budget, Paperwork Reduction Project (1205-0305), Washington, DC 20503.

DO NOT SEND THE COMPLETED FORM TO EITHER OF THESE OFFICES

ETA 9029
Rev. Mar. 1993

(8. FACILITY ATTESTATION CONTINUATION)

☐ c. H-1A nurses employed by the facility will be paid the same wage rate as other registered nurses similarly employed by this facility. (No explanatory statement required; this item not applicable if item 7.c. is checked.)

☐ d. Recruitment and Retention of Registered Nurses (Check either 8.d.(I) or 8.d.(II).)

☐ (I) This facility is subject to an approved State plan for the recruitment and retention of nurses developed under the provisions of the Immigration Nursing Relief Act of 1989. (If checked, skip item 8.d.(ii), explanatory statement required.)

☐ (II) This facility has taken and is taking timely and significant steps designed to recruit and retain registered nurses who are United States citizens or immigrants who are authorized to perform nursing services in order to remove as quickly as reasonably possible our dependence on nonimmigrant nurses. Timely and significant steps being taken by this facility include (check at least two items and include explanatory statement for each):

- ☐ Operating a training program at no cost for registered nurses at the facility or providing for 100% tuition in a training program for registered nurses elsewhere.
- ☐ Paying 100% of the cost of career development programs and other methods of facilitating health care workers to become registered nurses.
- ☐ Paying registered nurses at a rate at least 5% higher than the prevailing wage as determined by the SESA.
- ☐ Providing adequate support services to free registered nurses from administrative and other nonnursing duties.
- ☐ Providing reasonable opportunities for meaningful salary advancement by registered nurses based on merit, education, and specialty or based on length of service.
- ☐ Other Step of comparable timeliness and significance.
- ☐ Only one timely and significant step has been and is being taken by this facility because taking a second step is unreasonable.

☐ (III) Alternative criteria for each step for second and succeeding years. (Check appropriate items and attach explanatory statement; see instructions.)

- ☐ This facility does not have a valid attestation on file with the Department of Labor. This facility will, within the next year, reduce the number of nonimmigrant nurses it utilizes by at least 10% without reducing the quality or quantity of services provided.
- ☐ This facility has a valid attestation on file with the Department of Labor. This facility will, within the next year, reduce the number of nonimmigrant nurses it utilizes by at least 10% without reducing the quality or quantity of services provided.
- ☐ Pursuant to its prior attestation, this facility has reduced the number of nonimmigrants it utilizes by 10% within one year of the date of such prior attestation, without reducing the quantity of services provided.

☐ e. No Strike or Lay Off

There is not a strike or lockout in the course of a labor dispute, and the employment of H-1A nurses is not intended or designed to influence an election for a bargaining representative for registered nurses of this facility. (No explanatory statement required.)

☐ f. Notice and Pubic Examination

A copy of this attestation and supporting documentation are available at this facility for examination by interested parties. Copies of all visa petitions filed by the facility with INS for H-1A nurses will also be available for examination at this facility and will also be sent to the ETA National Office. (Check only one item; no explanatory statement required.)

☐ (I) As of this date, notice of this filing has been provided to the bargaining representative of the registered nurses at this facility; or

☐ (II) Where there is no such bargaining representative, notice of this filing has been provided as of this date to registered nurses at this facility through posting in conspicuous locations.

☐ g. **FOR NURSE CONTRACTORS ONLY:** H-1A nurses shall be referred only to facilities which themselves have valid and current attestations; this employer maintains copies of the valid attestation (Form ETA 9029) from each facility where its H-1A nurses are working. (No explanatory statement required.).

9. DECLARATION OF FACILITY:

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the information provided on this form is true and accompanying documentation is true and correct. In addition, I declare that I will comply with the Department of Labor regulations governing this program and, in particular, that I will make this attestation, supporting documentation, and other records, files and documents available to officials of the Department of Labor, upon such officials request, during any investigation under this attestation or the Immigration and Nationality Act.

Signature of Chief Executive Officer (or such officer's agent or designee and title) _____ Date _____

INSTRUCTIONS FOR COMPLETING FORM ETA 9029

HEALTH CARE FACILITY ATTESTATION (H-1A)

IMPORTANT: READ CAREFULLY BEFORE COMPLETING FORM

Submit an original and two copies of Form ETA 9029 and explanatory statements attached to all copies to the appropriate ETA regional office listed at the end of these instructions.

To knowingly furnish any false information in the preparation of this form and any explanatory statements thereto, or to aid, abet or counsel another to do so is a felony, punishable by $10,000 fine or five years in the penitentiary, or both (18 U.S.C. 1001). Other penalties apply as well to fraud and misuse of this immigration document (18 U.S.C. 1546 and 1621).

Print legibly in ink or use a typewriter. Sign and date one form in original signature. Citations below to "regulations" are citations to the identical provisions of 20 CFR Part 655, Subparts D and E, and 29 CFR Part 504, Subparts D and E.

Item 1. Name of Facility. Enter full legal name of business, firm or organization, or, if an individual, enter name used for legal purposes on documents.

Item 2. Address of Facility. Self explanatory.

Item 3. Telephone Number. For private households, enter a business and home telephone number when all adults are employed.

Item 4. Facility's Federal Employer I.D. Number. Enter the facility's federal employer identification number assigned by the Internal Revenue Service.

Item 5. Nature of Facility's Business Activity. Enter a brief, non-technical description, e.g., acute care, long-term care, nursing contractor, clinic and private physician.

Item 6. Name of Chief Executive Officer. Self explanatory.

Item 6.a. Contact Person and Telephone Number. Enter the name and telephone number of the person who has direct knowledge of, and can be contacted about, this attestation.

Item 7. Kind of Facility. A facility intending to use H-1A nurses through a contractor only must check the applicable box under Item 7.c. and may request, in writing on an attached sheet, a waiver of certain attestation elements (see § ___ .310(k) of the regulations). See instructions to Item 8. Waiver requests must include an estimate of the maximum number of workdays of H-1A contract nurses services the facility intends to use in any 3-month period. A workday consists of one H-1A contract nurse working for one normal shift in a day. Facilities may waive certain attestation elements when using H-1A nurses through a contractor.

A facility intending to use H-1A nurses through a contractor for no more than 15 workdays in any 3-month period to meet emergency needs on a temporary basis may request, in writing, a waiver of Item 8.a. (substantial disruption; lay offs), Item 8.b. (adverse effect), and Item 8.d. (timely and significant steps; or State plan).

A facility intending to use H-1A nurses through a contractor for no more than 60 workdays in any 3-month period to meet temporary needs may request, in writing, a waiver of Item 8.a.(ii) (substantial disruption, but not pay offs under Item 8.a.(i)) and Item 8.d. (timely and significant steps; or State plan).

A facility intending to use H-1A nurses through a contractor for more than 60 workdays in any 3-month period may request, in writing, a waiver of Item 8.d. (timely and significant steps; or State plan) due to a bona fide medical emergency. As part of the request for waiver, the facility must attach an explanation documenting the bona fide medical emergency. "Bona fide medical emergency" means a situation in which the services of one or more H-1A contract nurses are necessary at a facility (which itself does not employ an H-1A nurse) to prevent death or serious impairment of health, and, because of the danger to life or death, nursing services for such situations are not elsewhere available in the geographic area.

Note: A facility requesting a waiver, in writing, of any attestation element (see § ___ .310(k) of the regulations) may obtain the services of an H-1A nurse by contracting with a nurse contractor but will not be eligible to itself employ any H-1A nurses under this attestation.

Item 8. Facility Attestation. In order to be eligible to hire nonimmigrant alien (H-1A) nurses, a facility must attest to the conditions listed in elements (a) through (f). The attestation cannot be accepted for filing if the required explanations or information supporting these elements are not attached to the Form ETA 9029. See § ___ .310(c) through (k) of the regulations for guidance on the supporting information that must be attached to the Form ETA 9029, and the specific requirements for each attested element and the documentation required to be maintained in one location at the facility.

Item 8.a.(i). No Lay Offs. Lay off means any involuntary separation of staff nurses without cause or prejudice. If nurses involved in direct patient care are separated from one specialized activity and offered retraining and retention at the same facility in another activity involving direct patient care at the same wage and status, but refuse, it is not a lay off. If the position is covered by a collective bargaining agreement, the agreement's definition of "Lay off" (if any) shall apply to that position. An explanatory statement is not required for this item.

Item 8.a.(II). Substantial Disruption. A facility may attest that substantial disruption in the delivery of its health care services without nonimmigrant nurses is demonstrated by one or more of the specific circumstances listed. To make such an attestation, a facility must check the appropriate item(s) and attach brief explanatory statements (unless otherwise indicated on the Form ETA 9029) as to the circumstances and the nature and location of supporting documentation (see §§ ___ .310(d)(2)(i) and ___ .310(d)(3) of the regulations). If a facility finds that the listed circumstances are inapplicable or cannot be demonstrated, the facility may make an attestation of substantial disruption in the delivery of the facility's health care services by checking the "Other" item and attaching a clear explanation of the substantial disruption in specific health care services due to a shortage of nurses and why none of the four indicators listed can be met (see §§ ___ .310(d)(2)(ii) and ___ .310(d)(3) of the regulations).

Item 8.b. No Adverse Effect. A facility must attest that the employment of H-1A nurses will not adversely affect the wages and working conditions of registered nurses similarly employed. To make such an attestation, a facility must check Item 8.b. By checking this item the facility is also attesting that, unless wages for registered nurses are covered by a collective bargaining agreement, it has obtained a prevailing wage determination from the State Employment Security Agency (SESA) and is paying both U.S. and H-1A nurses at least the prevailing wage for the geographic area. An explanatory statement is not required for this item. The facility must update the prevailing wage every year in which it employs H-1A nurses.

Item 8.c. Facility/Employer Wage. A facility may attest that H-1A nurses employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility. In other words, H-1A nurses cannot be paid less than similarly employed U.S. nurses, even if the wages paid U.S. nurses are higher than the prevailing wage level. To make such an attestation, a facility must check item 8.c. An explanatory statement is not required for this item.

Item 8.d. Recruitment and Retention of Registered Nurses. Check either item 8.d.(i) or 8.d.(ii).

Item 8.d.(I). State Plan. A facility may attest that it is subject to an approved State plan for the recruitment and retention of nurses developed under the provisions of the Immigration Nursing Relief Act of 1989. To make such an attestation, a facility must check item 8.d.(i). Facilities are cautioned to contact the ETA National Office before checking this box since such plans must be approved by the ETA National Office.

Item 8.d.(II). Timely and Significant Steps. A facility may attest that it has taken and is taking one or more of the listed timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses. To make such an attestation, a facility must check the appropriate items and for each attach an explanatory statement of how the facility's programs meet the requirements of the steps (see § ___ .310(g)(1)(i)(A) of the regulations). The five steps listed on the form are not an exclusive list of timely and significant steps which might qualify. Facilities are encouraged to be innovative in devising other steps, that are of comparable timeliness and significance. A facility choosing to take steps other than the listed steps must make its attestation by checking the "Other" item and attaching an explanation of the nature and scope of the steps taken, how the steps are implemented, and how the steps meet the statutory test of timeliness and significance comparable to the listed steps. Examples of such other steps which may be considered to be of comparable timeliness and significance, depending upon all of the circumstances, are monetary incentives, special perquisites, work schedule options, and other training options. See § ___ .310(g)(1)(i)(B) of the regulations.

Nothing shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. However, a facility shall make every effort to take at least two steps. To make an attestation that taking a second step would be unreasonable, a facility must check the last item under 8.d.(ii) and attach an explanatory statement of why such a step would be unreasonable. The taking of a second step may be considered unreasonable, if it would result in the facility's financial inability to continue providing the same quality and quantity of health care, or the provision of nursing services would otherwise by jeopardized by the taking of such a step. For any of the five listed steps not taken, the facility's explanation shall demonstrate, with respect to each of the listed steps not taken, why it would be unreasonable for the facility to take such step. Such facility also shall explain why it would be unreasonable for the facility to take any other steps designed to recruit and retain sufficient U.S. nurses to meet its staffing needs. See § ___ .310(g)(1)(ii).

Item 8.d.(II). Alternative to criteria for each specific step after the first year of attestation. In order to avoid the necessity of complying with the specific criteria for each of the steps in the second and succeeding years, a facility may include with its Form ETA 9029, in addition to the actions taken under items 8.d.(ii), an attestation that it shall reduce the number of nonimmigrant alien (H-1 and H-1A) nurses it uses one year from the date of attestation by at least 10%. This shall be achieved without reducing the quality or quantity of services provided. If this goal is achieved (as demonstrated by documentation maintained by the facility and indicated in its subsequent year's Form ETA 9029), the facility's subsequent year's Form ETA 9029 may simply include an explanation demonstrating that this goal has been achieved and an attestation that it shall again reduce the number of nonimmigrant alien (H-1A) nurses it uses one year from the date of attestation by at least 10%.

Item 8.e. No Strike or Lockout. A facility must attest that there is not a strike or lockout in the course of a labor dispute, and that the employment of H-1A nurses is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility. To make such an attestation, a facility must check item 8.e. An explanatory statement is not required for this item.

Item 8.f. Notice and Public Examination. A facility must attest that, as of the date it files the attestation with the Department, it has provided notice of filing to the bargaining representative of registered nurses at the facility, or, if there is none, it has posted notice of filing in conspicuous locations. To make such an attestation, a facility must check either item 8.f.(i) or 8.f.(ii). An explanatory statement is not required for this item.

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Item 8.g. Nurse Contractor Only. This item is only applicable if item 7.b. is checked. Nurse contractors must check item 8.g. to attest that they will refer H-1A nurses only to facilities which themselves have valid and current attestations on file. An explanatory statement is not required to this item.

DRAFT

Item 9. Declaration of Facility. One copy of this form must bear the original signature of the chief executive officer of the facility (or the chief executive officer's designee). By signing this form the chief executive officer is attesting to item 7. and item 8. on the Form ETA 9029 and to the accuracy of the information provided in the explanatory statements. False statements are subject to Federal criminal penalties, as stated above.

If the attestation bears the necessary entries of information and attached explanations for all items except item 7.c.(ii) "Bona Fide Medical Emergency", Item 8.a.(ii) "Other," and item 8.d.(ii) "Other," and if for those three items the Department of Labor determines after review that the attached explanations are sufficient to demonstrate compliance with the regulatory standards, the Department of Labor shall accept the attestation for filing and shall document such acceptance on the original and two copies of Form ETA 9029's submitted. The original of the attestation form indicating the Department's acceptance will be returned to the health care facility. The facility may then make a copy of the accepted attestation and file visa petitions with INS for H-1A nonimmigrant nurses in accordance with INS regulations. The facility shall include a copy of the accepted Form ETA 9029 with each visa petition filed with the Immigration and Naturalization Service.

Regional Office to which H-1A Attestations should be submitted:

The States of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, New York, New Jersey, Puerto Rico, and Virgin Islands, should submit Attestations to:

Regional Certifying Officer
U.S. Department of Labor/ETA
One Congress Street
10th Floor
Boston, Massachusetts 02114-2021

The States of: Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia, Illinois, Indiana, Michigan, Minnesota Ohio, Wisconsin, Iowa, Kansas, Missouri, Nebraska, Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, should submit Attestations to:

Regional Certifying Officer
U.S. Department of Labor/ETA
230 South Dearborn Street
Room 628
Chicago, Illinois 60604

The States of: Arkansas, Louisiana, New Mexico, Oklahoma, Texas, Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, should submit Attestations to:

Regional Certifying Officer
U.S. Department of Labor/ETA
Federal Building
Room 317
525 Griffin Street
Dallas, Texas 75202

The States of: Arizona, California, Guam, Hawaii, Nevada, Alaska, Idaho, Oregon, Washington, should submit Attestations to:

Regional Certifying Officer
U.S. Department of Labor/ETA
1111 Third Avenue
Suite 900
Seattle, Washington 98101-3212

A copy of this attestation, along with any explanatory statements and visa petitions, will be available for public inspection at the ETA National Office in Room N-4456, 200 Constitution Avenue, NW, Washington, D.C. 20210. The facility must submit a copy of an H-1A visa petition to the ETA national office at the same time that it is submitted to INS. The facility must also forward to the ETA national office a copy of the INS visa petition approval notice within 5 days after it is received. The address is:

Chief, Division of Foreign Labor Certifications
U.S. Employment Service
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-4456
Washington, D.C. 20210

[FR Doc. 94-17 Filed 1-5-94; 8:45 am]
BILLING CODE 4510-10-C and 4510-27-C

federal register

Thursday
January 6, 1994

Part IV

Department of Labor

Employment and Training Administration

20 CFR Part 617

Trade Adjustment Assistance for Workers; Amendment of Regulations; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 617

RIN: 1205–AA72

Trade Adjustment Assistance for Workers; Amendment of Regulations

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule; request for comments.

SUMMARY: This document contains a final rule amending the regulations on trade adjustment assistance for workers which implement the 1988 Amendments to the Trade Act of 1974 as contained in the Omnibus Trade and Competitiveness Act of 1988. This action will update the regulations and will provide uniform instructions to State agencies in carrying-out their responsibilities under the Trade Act. These State agencies act as agents of the United States for the purpose of providing adjustment assistance benefits and services to adversely affected workers. Comments are requested on the several material changes being made in this final rule, which differ from the September 1988 proposed rule, and on a number of other changes which were not included in the proposed rule.

DATES: Effective date: February 7, 1994.

Comment date: Comments on the material changes, from the proposed rule to this final regulation, are invited and must be received in the Department on or before February 22, 1994.

ADDRESSES: Written comments on the changes in the regulations, on which comments are invited, may be mailed or delivered to the Office of Trade Adjustment Assistance, Employment and Training Administration, 200 Constitution Avenue NW., room C–4318, Washington, DC 20210.

All comments received will be available for public inspection during normal business hours in Room C–4318 at the above address.

FOR FURTHER INFORMATION CONTACT: Marvin M. Fooks, Director, Office of Trade Adjustment Assistance, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 219–5555 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

In General

The Trade Act of 1974 made major changes to the trade adjustment assistance program (hereafter "TAA program") for workers displaced because of increased imports of articles like or directly competitive with articles produced by the workers' firm. On receiving a petition for trade adjustment assistance (hereafter "TAA") from a group of workers or its authorized representative, the Department conducts a factfinding investigation in response to the petition. If the findings substantiate that the workers of a firm or subdivision of a firm have been adversely affected by import competition, a certification is issued stating that the workers are eligible to apply at a local office of a State employment security agency for TAA benefits.

The 1981 Amendments to the Trade Act of 1974 (Title XXV of Pub. L. 97–35) made extensive changes in the TAA program. Further changes were made in the 1984 Amendments (Sections 2671 and 2672, of Pub. L. 98–369) and in the 1986 Amendments (Part 1 of Subtitle A of Title XIII of Pub. L. 99–272). Final regulations implementing the 1986 Amendments were published in the **Federal Register** on August 24, 1988, at 53 FR 32344, and on May 23, 1989, at 54 FR 22277.

The 1988 Amendments to the TAA program are contained in Part 3, Trade Adjustment Assistance, of subtitle D of title I of the "Omnibus Trade and Competitiveness Act of 1988" (Pub. L. 100–418) (hereafter the "OTCA"). The 1988 Amendments expand eligibility for TAA to workers in the oil and natural gas industry engaged in exploration and drilling; require detailed information about TAA program benefits to be given to every individual who files an initial claim for unemployment benefits, and further require an individualized notice to every worker believed to be covered by a certification issued by the Department; require publication of a notice of the certification in a newspaper of general circulation; require a worker to participate in training as a condition for receiving basic trade readjustment allowances (hereafter "TRA"); authorize the waiver of the training requirement for a worker when training is not feasible or appropriate; authorize the payment of basic and additional TRA to a worker during breaks in training that do not exceed 14 days; reinstate the movable eligibility period for basic TRA, based on the worker's most recent qualifying (total) separation rather than the first qualifying separation as was previously required; extend the expiration date of the TAA program to September 30, 1993; emphasize coordination with programs and services to dislocated workers provided under title III of the Job Training Partnership Act; and make other changes.

While most of the provisions of Part 3 affecting the TAA program are in the form of amendments to Chapter 2 of Title II of the Trade Act of 1974, some provisions of Part 3 affecting workers do not amend existing law. Examples are the provision which permits workers in the oil and natural gas industry engaged in exploration or drilling, separated after September 30, 1985, to file petitions under new eligibility rules, and the provision concerning the eligibility of workers totally separated from adversely affected employment during the period beginning August 13, 1981, and ending April 7, 1986. The provisions of the 1988 Amendments became effective, in general, on August 23, 1988, except that the amendments to sections 231(a)(5), (b) and (c) took effect on November 21, 1988, and the amendment to Section 225 took effect on September 22, 1988.

Because many of the 1988 Amendments were effective on the date of their enactment into law, August 23, 1988, most notably the new "movable" eligibility period for basic TRA, the Department issued interim Operating Instructions in General Administration Letter (hereafter "GAL") No. 7–88, dated September 12, 1988, which was published in the **Federal Register** on September 16, 1988, at 53 FR 36180–36213, together with Training and Employment Information Notice (hereafter "TEIN") 6–88. GAL 7–88 and the two changes thereto were subsequently rescinded and replaced by GAL 15–90, dated August 21, 1990. These GALs disseminated controlling guidance to the States on the administration of the TAA program as amended by the OTCA, pending the issuance of final amendments to the regulations. GAL 15–90 was published in the **Federal Register** on November 21, 1990, at 55 FR 48774–48800, together with TEIN 13–90.

Following the issuance of GAL 7–88, amendments to the regulations at 20 CFR part 617, implementing the 1988 Amendments, were proposed in a document published in the **Federal Register** on November 30, 1988, at 53 FR 48474, with a comment period ending on December 30, 1988. Preparation of a final rule document, addressing the comments received, began after the end of the comment period. The need for other changes in the regulations was identified in light of the comments received, further reflection on the 1988 Amendments, and experience with the interim Operating Instructions. The most significant changes, resulting in the

issuance of GAL 15–90 and in delaying the publication of this final rule document, were the changes in the interpretations of subsections (a) and (g) of Section 1430 of the OTCA, relating to the new "movable" eligibility period for basic TRA. This significant change, and other related changes, were announced in GAL 15–90.

This final rule therefore includes substantive changes in the amendments to part 617 that were included in the proposed rule published on November 30, 1988. The most significant of these changes are the new interpretations of the effective dates of the 1988 Amendments relating to the "movable" eligibility period for basic trade readjustment allowances (§§ 617.3 and 617.11(a) (1) and (2)). This document also includes substantive changes to Part 617 that were not included in the published proposed rule, including substantive changes that were announced in Changes 2 and 3 to GAL 15–90, relating to a complete revision of § 617.26 and a change in § 617.22(a). Many of these substantive changes resulted from a consideration of comments received on the proposed rule. Nonetheless, in the interests of keeping its rulemaking processes as open as possible, the Department is inviting public comments on these changes. Further changes are made in §§ 617.3, 617.11(a), 617.15(b) and (d), 617.16, 617.19(b), 617.21, 617.22(f), 617.33, 617.44, 617.50(d), 617.55, 617.60 and 617.64, which are related to the revision of § 617.26 or for other reasons as explained below. Conforming changes are also made in § 617.67.

The effective date of all of the substantive changes in the statute and the regulations that are announced in any GAL (or change thereto) is the same as the effective date of the amendment(s) to which the GAL pertains, but any substantive change in GAL operating instructions applies, unless stated otherwise, in the case of all decisions made after the date of issuance of the GAL (or change thereto) by the Department. However, all of the substantive changes noted below in items A through R are subject to an opportunity for comment after publication of this final rule. After the end of the comment period, and consideration of any comments received, another final rule document will be published relating to these substantive changes.

Substantive changes in the interpretations of the 1988 Amendments which are addressed below relate primarily to the effective date and application of the new eligibility period for basic TRA, but also relate to other provisions of the OTCA, the Trade Act of 1974 and section 106(a) of Public Law 102–318 which amends section 231(a)(2) of the Trade Act, as discussed below.

The Department's new interpretations center on the effective date provisions of subsections (a) and (g) of Section 1430 of the OTCA. These new interpretations are discussed in detail in paragraph A, below.

Good Cause Exception

The Department has determined, pursuant to 5 U.S.C. 553 (b)(B), that good cause exists for publication in final of the substantive changes in this document, because all of such changes are essential to the proper administration of the TAA program by the States, and such changes either relieve a restriction, and have been previously announced in controlling operating instructions issued to the States, or relate primarily to procedural relationships between and among the States. In addition, because of the delays encountered in issuing this final rule, any further delay in putting these substantive changes into effect would be impractical and contrary to the public interest. As explained above, comments are invited and will be considered, after which a final rule will be published. In the meantime, public implementation of these substantive changes as final regulations will not be delayed further.

In the following text, therefore, substantive changes, on which comments are requested, are addressed first. These changes are followed by a discussion of the comments received on the proposed rule published on November 30, 1988.

Substantive Changes from November 30, 1988 Proposed Rule

The substantive changes noted under this heading are either changes in the amendments to part 617, as published on November 30, 1988, or changes in other sections of Part 617 that were not included in the proposed rule. These substantive changes also include conforming changes in the transition provisions of § 617.67.

Comments are requested on all of these substantive changes, after which a final rule document on such changes will be published.

A. New Eligibility Period for Basic TRA

Section 1425 (a) of the OTCA amended section 233(a)(2) of the Trade Act of 1974 to reinstate the "movable" eligibility period for basic TRA. Section 1430(a) of the OTCA made this amendment effective on the date of enactment, August 23, 1988, and section 1430(g) of the OTCA provided that amended section 233(a)(2) would not be applied in certain circumstances if it would result in an earlier expiration date of a worker's eligibility period established on the basis of the prior law.

In the proposed rule published on November 30, 1988 (53 FR 48474) (as well as in Section 4.F.1. of GAL 7–88), Section 1430(a) was interpreted as making this amendment applicable to any total qualifying separation which occurred on or after August 23, 1988. The limitation in section 1430 (g) was interpreted as applying with respect to any such total qualifying separation if it would result in an earlier expiration date of the eligibility period of a worker based on the prior law and a first qualifying separation which occurred before August 23, 1988.

In GAL 15–90, issued on August 21, 1990, the Department announced that, in conjunction with the development of final regulations implementing the 1988 Amendments, the Department determined that the previously published interpretations of the effective date provisions in the proposed rule published on November 30, 1988, were in error. The same erroneous interpretations were contained in GAL 7–88, and this fact necessitated the issuance of revised operating instructions in GAL 15–90, which was published in the **Federal Register** on November 21, 1990, at 55 FR 48774.

Subsection (a) of section 1430 of the OTCA provides that: "Except as otherwise provided by this section, the amendments made by this part shall take effect on the date of enactment of this Act." Subsection (a) thus applied to, among others, the amendment to section 233(a)(2) of the Trade Act of 1974, which prescribes the eligibility period for basic TRA. In the proposed rule and in GAL 7–88, the amendment to section 233(a)(2) was interpreted as being applicable to separations which occurred on or after the date of enactment of the OTCA, August 23, 1988.

In the new interpretations announced in GAL 15–90, section 1430(a) was interpreted as applying to all decisions (i.e., all determinations, redeterminations, and decisions on appeals) made on and after August 23, 1988.

The Department concluded, and announced in GAL 15–90, that amended section 233(a)(2) should be applied to all decisions rendered on or after August 23, 1988, regardless of whether they involved initial determinations of TRA eligibility, redeterminations, or decisions on appeal.

The Department also stated in GAL 15–90 that the new interpretation of section 1430(a) is supported by the analysis and construction placed on subsection (g) of section 1430, and by the general principle of law known as the law-in-effect rule. Under the law-in-effect rule, the law to be applied in making any decision is the law in effect at the time the decision is made. In GAL 15–90, this law-in-effect rule was determined to be applicable to the new interpretations and the 1988 Amendments.

Subsection (g) of section 1430 provides that the amendment to section 233(a)(2) "shall not apply with respect to any total separation of a worker * * * that occurs before the date of enactment of this Act if the application of such amendment with respect to such total separation would reduce the period for which such worker would (but for such amendment) be allowed to receive" basic TRA. In the proposed rule and in GAL 7–88, section 1430(g) was interpreted as limiting the application of amended section 233(a)(2) to total separations which occurred on or after August 23, 1988, where the result otherwise achieved would be an earlier expiration date of the eligibility period of a worker established on the basis of the prior law and a first qualifying separation which occurred before August 23, 1988.

In the new interpretations announced in GAL 15–90, section 1430(g) was interpreted literally as applying only to total separations that occurred before August 23, 1988, and the limitation in section 1430(g) thus applies only to such prior separations.

A consequence of this new interpretation of section 1430(g) is that, if the application of amended section 233(a)(2) to a total separation prior to August 23, 1988, would result in extending the worker's eligibility period, the amended section 233(a)(2) shall be applied. Conversely, amended section 233(a)(2) shall be applied to total separations which occur on and after August 23, 1988, regardless of whether it would result in an earlier expiration date of the worker's eligibility period based upon a first qualifying separation which occurred before August 23, 1988.

Section 1430(g) is not applicable, however, to a "first qualifying separation" which occurs before August 23, 1988. It is on the basis of such a first qualifying separation that a worker would have a longer eligibility period "but for" the amendment to section 233(a)(2). To preserve a longer eligibility period, and thereby give effect to the limitation in section 1430(g), therefore, such limitation could not logically be made applicable to such a first qualifying separation.

A more extensive explanation and justification for the new interpretations affecting amended section 233(a)(2) was set forth in GAL 15–90, and in Attachment A and Section F.1. of GAL 15–90. That explanation and justification was published in the Federal Register, at 55 FR 48774, 48778, 48782, and 48789 (November 21, 1990).

The new interpretations require substantive changes in the final rule, particularly in the definitions of "eligibility period" and the various types of "separation" defined in §§617.3(m) and 617.3(t), as well as in the transition provisions in §617.67. Other conforming changes are made throughout the document, including the deletion of clause (D) in §617.11(a)(2)(iii).

B. Other Applications of New Interpretations

The new interpretation of section 1430(a) and the law-in-effect rule also affect other amendments to which section 1430(a) applies. These include—

- OTCA Section 1421(a)(1)(B)—§617.11(a)(4) *Special rules for oil and gas workers—retroactive.* (Section A.2. of Attachment A to GAL 15–90);
- Trade Act Section 233(b)—§617.15 (Section E.4. of Attachment A to GAL 15–90);
- OTCA Section 1425(b)—§617.11(a)(3) *Special rules for workers separated in 1981 to 1986 period.* (Section F.2. of Attachment A to GAL 15–90).

A more extensive explanation and justification for the application of the new interpretations to these provisions was set forth in GAL 15–90 and Attachment A thereto.

The Department also has decided that the 1988 Amendments relating to sections 231(a)(5), 231(b), and 231(c) of the Trade Act, which, under section 1430(f) of the OTCA, took effect 90 days after the date of enactment (i.e., on November 21, 1988), are not affected by the new interpretation of section 1430(a). Although the effective date language of section 1430(f) is the same as the effective date language of section 1430(a), the Department has determined that the application of the new interpretation to these provisions would cause manifest injustice to affected workers and also would appear to be contrary to the intent of the Congress and the logic of the 90-day delay in the effective date of these amendments. This is more fully explained in GAL 15–90 and Attachment A.

C. Changes to §617.11(a)(2)(iii)(B) (1) and (2)

Section 106(a) of Public Law 102–318 amended section 231(a)(2) of the Trade Act of 1974 by adding a new paragraph (D) to the categories which are considered a week of adversely affected employment at wages of $30 or more a week in order to qualify for TRA. The new subparagraph (D) provides that any week a worker is on call-up for active duty in a reserve status in the armed forces, provided such active duty is "Federal service" as defined in 5 U.S.C. 8521(a)(1), shall constitute a week in meeting the TRA qualifying requirements of section 231(a)(2) of the Trade Act of 1974. Section 106(a) also clarifies that not more than 26 weeks described in subparagraphs (B) or (D) of section 231(a)(2) of the Trade Act may be used for TRA qualifying purposes.

This means that all of the required employment and wages necessary to qualify for TRA may be attained during a reservist's call-up to active duty. This amendment only affects the TRA qualifying requirement in section 231(a)(2); all other TRA qualifying requirements in section 231 are unchanged. Therefore, State agencies must also determine if a reservist meets the remaining TRA qualifying requirements contained in section 231 of the Trade Act before awarding TRA entitlement to the reservist.

In determining the worker's qualifying weeks at wages of $30 or more a week for TRA qualifying purposes, the amendment to section 231(a)(2) of the Trade Act applies to weeks beginning after August 1, 1990. The effective date of this amendment results in a retroactive application to TRA claims filed (or which would have been filed) by reservists who took part in Operations Desert Storm and Desert Shield. This means that State agencies must redetermine the TRA initial claims of all reservists called-up for active duty whose claims were denied solely because they did not meet the requirements of section 231(a)(2) of the Trade Act as in effect prior to the enactment of this amendment. State agencies must also take TRA initial claims of reservists who did not previously file a TRA initial claim because they did not meet the requirements of section 231(a)(2) as in effect prior to the enactment of this amendment.

Operating instructions issued to State agencies in GAL No. 10–92, *Operating Instructions to section 231(a)(2) of the Trade Act of 1974 Contained in H.R. 5260*, dated July 6, 1992, explained the changes to section 231(a)(2) of the Trade

Act and instructed State agencies and cooperating agencies to take the appropriate actions to identify and inform reservists of their rights to redetermination or the opportunity to file TRA initial claims. Actions by State agencies include a search of claimant files and publication of information on this new provision in newspapers of general circulation and other appropriate media.

Accordingly, a new clause (*iv*) is added to § 617.11(a)(2)(iii)(B)(*1*) and clause (*ii*) in § 617.11(a)(2)(iii)(B)(*2*) is changed to implement these amendments to section 231 (a)(2) of the Trade Act.

D. Change to § 617.11(a)(3)(i)(E)

Section 1425(b) of OTCA provides eligibility for TRA to certain workers who were continuously unemployed since separation from adversely affected employment during the period from August 13, 1981 to April 7, 1986, not taking into account seasonal employment, odd jobs, or part-time, temporary employment. This provision opened up eligibility to workers who could not qualify for additional weeks of TRA because they did not meet the 210-day time limit for filing for training and to workers who did not receive all of their TRA entitlement because their eligibility period was based on their first rather than their most recent separation. In the proposed rule, general guidance was provided to State agencies on "continuously unemployed" but State agencies were allowed to apply the provisions using their expertise in determining eligibility relating to employment. However, the Department decided that it was essential to provide State agencies with guiding instructions for implementing section 1425(b)(2)(A)(ii) of the OTCA so that the Department, rather than States, defines the limits of the Federal liability. Accordingly, definitions to be used in applying the terms "seasonal employment", "odd jobs" and "part-time, temporary employment" are added in a new clause (*2*) in § 617.11(a)(3)(i)(E). Because precise definitions were not available for each of these terms, definitions were developed for purposes of this final rule from various sources and other program applications. The seasonal provision of applicable State law is used in applying the "seasonal employment" provision. A definition for "odd jobs" was developed in which the established period of employment occurs within 5 days or less. The definition for "part-time" is taken from the ETA Glossary of Program Terms and Definitions (ETA Handbook No. 373), which provides for less than 30 hours per week of regularly scheduled work. However, that definition has to be applied along with "temporary employment." The definition for "temporary employment" is based on ETA reporting requirements for the public employment service in which an established employment period of 150 days or less is used.

E. Change to § 617.15(b)

Amendments to § 617.15 were included in the proposed rule published for comment on November 30, 1988. A further change in § 617.15 was considered as a result of the reinstatement of the movable eligibility period for basic TRA. This change was to base the 210-day period for filing an application for training, in order to qualify for up to 26 weeks of additional TRA, on the worker's most recent partial or total separation from employment under the certification, rather than within 210 days after the date of the first qualifying separation. This change reinstates the rule that was applicable prior to the 1981 Amendments, when the eligibility period was movable, and was adopted with the issuance of Change 2 to GAL 7–88, dated May 22, 1989. In view of the new interpretation of section 1430(a), and the law-in-effect rule, a further change was made in the interpretation and application of the 210-day rule, which was announced in GAL 15–90. The new interpretation applies to all decisions (i.e., determinations, redeterminations, and decisions on appeals) which are made after the date of issuance of GAL 15–90, on August 21, 1990. (See GAL 15–90 and section E.4 of Attachment A). These changes are incorporated in § 617.15(b) of this final rule.

F. Change to § 617.15(d)

The proposed rule was published for comment on November 30, 1988. At that time, the Department had concluded that days "in which training would not normally be scheduled" should not be counted as part of a scheduled break in training. Initially, the Department limited the exclusion to Saturdays and Sundays, if training in the applicable training program would not normally be conducted on those days. In GAL 7–88, and Change 1 to GAL 7–88, the Department interpreted section 233(f) of the Trade Act as excluding certain weekend days and holidays in counting the days of a break in training. GAL 7–88 and Change 1 were unclear, however, whether the exclusion of holidays included both National and State holidays. On further consideration, the Department agreed that all officially recognized National and State holidays should be excluded in counting the days of a break in training, to the extent that training in the applicable training program would not normally be scheduled on those days if they did not occur during the break. This change was adopted with the issuance of GAL 15–90 and is applicable to all decisions (i.e., all determinations, redeterminations, and decisions on appeals) which are made on or after August 23, 1988, regardless of when the training was approved under section 236 of the Trade Act, or whether the training was approved or is approvable under section 236 as amended by the 1988 Amendments, or when the break in training began or ended. In making decisions under § 617.15(d), the law to be applied is the law as in effect on the date the decision is made, and this rule has applied since the issuance of GAL 15–90 on August 21, 1990. Decisions previously made under prior operating instructions are subject to redetermination in accordance with State law, as set forth in section 4.b. of GAL 15–90.

In order to clarify what constitutes a "break in training" for purposes of section 233(f), a new clause (2) is added to § 617.15(d) defining a break in training as including all periods within or between courses, terms, quarters, semesters and academic years, whether or not such breaks are scheduled by the training provider.

Clauses (2) through (5) of § 617.15(d) are renumbered (3) through (6).

G. Revision of § 617.16

Section 234 of the Trade Act of 1974 specifies the State law provisions that shall be applicable to claimants for TRA purposes, and § 617.16 distills the provisions of section 234 in a definition of "applicable State law." Section 617.16 is now being revised for two essential reasons. The first reason is to include in the definition the situation of the worker who is not entitled to UI after separation from adversely affected employment, as is provided for in Section 234. This had not seemed relevant after the 1981 Amendments, because of the addition in section 231(a)(3) of the eligibility requirement that the worker must be entitled to and have exhausted all UI. The 1988 Amendments, however, have prompted rethinking of the roles and responsibilities of the States in the administration of the TAA program, and particularly of the role of the "applicable State" (i.e., the State whose law is the applicable State law) in the case of TAA program benefits other than TRA. Accordingly, the definition of "applicable State law" is broadened so that it is a useful reference point for all

TAA program benefits. While providing a useful reference point, there is no intent in revising § 617.16 to suggest that an individual who is not entitled to UI after a qualifying separation from adversely affected employment may be entitled to TRA.

The second reason for revising § 617.16 is to conform § 617.16 to the revision of § 617.26, relating to the roles and responsibilities of the States as liable States and agent States in the administration of the TAA program. As discussed below, § 617.26 is revised to incorporate the Department's thinking as set out in Change 2 to GAL 15–90. In this connection, consideration was given to including in § 617.16 the definition of "applicable State" which is set forth in Change 2. Upon further consideration, however, it was decided that the definition of "applicable State law" furnished the most useful reference point for all purposes of the TAA program, and that a special definition of "applicable State" is neither necessary nor useful.

Accordingly, § 617.16 is revised to track more closely Section 234, and to serve as a useful reference point for all of the purposes of the TAA program. The section also is modified to make it clear that the UI entitlement referred to is that which immediately follows a qualifying separation from adversely affected employment, and not UI entitlement in some past period, however recent or remote it may have been.

H. Revision of § 617.19(b)(1)(i)(B) and (b)(2)(ii)(A)

Clause (A) of § 617.19(b)(2)(ii) explains that training is not appropriate when the firm from which the individual was separated plans to recall the individual within the "reasonably foreseeable future". Also, § 617.19(b)(1)(i)(B) defines "appropriate" as including whether there is a reasonable prospect which is reasonably foreseeable that the individual will be reemployed by the separating firm. These provisions are consistent with § 617.22(a)(1)(ii) on conditions for approval of training when there is reasonable prospect of suitable work within the foreseeable future. (See item 43 below.)

While it is reasonable to deny training under § 617.22 (a) to a worker who is scheduled for recall, there is an identified need to provide additional guidance in the regulations on the application of the term "recall that will occur in the reasonably foreseeable future", for purposes of administering §§ 617.19(b)(1)(i)(B) and (b)(2)(ii)(A). These regulations are consistent with the Administration's position to tighten waivers. Publication of these regulations will improve efficiency in utilizing waivers. This moves the current TAA program in to closer alignment with the Transitional Adjustment Assistance provisions of NAFTA. Therefore, this section is being amended by adding a new clause (2) to §§ 617.19(b)(2)(ii)(A), for use in approving training and granting waivers. Clause (2) provides guidance on two types of planned recalls. The first type is a specific recall where an individual or group of individuals who was separated from employment is identified and notified by the employer to return to work within a specified time period. In this situation an individual would not be approved for training and a waiver of the training requirement would be granted for purposes of receiving basic TRA.

The second type is a general recall where the employer announces an intention to recall an individual or group of individuals, or by other action reasonably signals an intent to recall, but does not specify a certain time period in which the recall will occur. In this situation, if the recall in each individual case is reasonably expected to occur after the individual would exhaust his or her eligibility for regular UI associated with the most recent total separation that is within the TAA certification period, the individual would be treated as any other individual who was separated from adversely affected employment and the participation in training requirement would be applied.

I. Revision of § 617.21

Section 617.21 describes the activities that are included as reemployment services and allowances. Paragraph (e) of this section is revised to add child care as a support service. This revision is made to eliminate any uncertainty that child care is a support service and that the costs for such service may not be charged as a related cost of training and paid with TAA program funds. See also the Department's response to item 47 below.

Paragraph (g) of this section is also revised to reflect the 1988 Amendment to section 236 of the Act which added remedial education as being approvable as classroom training. Training designed to enhance the employability of individuals by upgrading basic skills, through remedial education or English-as-second-language courses, are considered as remedial education approvable under § 617.22(a) if all the approval criteria in that section are met. A training program of remedial education only may now be approved for an individual if he or she possesses occupational skills and needs only remedial education to obtain employment. Ordinarily, remedial education is made part of a broader skills training program as defined in § 617.22(f) (3).

J. Revision of § 617.22(a)(5)

Section 617.22(a) lists six criteria that must be met for approval of training. These are intended to assure that training will lead to a specific occupational goal. Clause (5) of § 617.22(a) deals with a worker's personal qualifications to undertake and complete such training. The Department's interpretation of this clause has been changed to add "financial resources" to those personal qualifications, and this change is included in amended § 617.22(a)(5).

Change 3 to GAL 15–90, dated July 17, 1991, (56 FR 46331, 46333), announced a change in the definition of the criterion for approval of training in Section 236(a)(1) (E) of the Act, by adding "financial resources" to the existing physical and mental qualifications which must be reviewed in making a determination that a worker is able to undertake and complete training, as set out for criterion (E) in Section G.1. of Attachment A to GAL 15–90 and incorporated in this final rule. This change was made to enhance the worker's ability to complete training by stressing that the duration of approved training should be commensurate with the worker's financial resources.

Training may be approved for a duration not to exceed 104 weeks under a single certification, as limited in amended § 617.22(f)(2). However, combined UI and TRA entitlement is available to workers for a maximum of 78 weeks. When the duration of training exceeds the remaining weeks of UI and TRA payments, a worker's income support may end or be substantially reduced before completing the approved training program. This situation often results in workers dropping out of training.

The amended § 617.22(a)(5) will require State agency staff to explain to workers seeking approval of training in which the duration of training exceeds their remaining weeks of UI and TRA payments, that in the absence of other financial resources such training may not be appropriate. When the worker's financial resources are not commensurate with a training program suitable to the worker, the training requirement may be waived under § 617.19(b)(2)(ii)(B).

K. Revision of § 617.22(f)

An individual who satisfies the six criteria for approval of training in § 617.22(a) may be enrolled in a training program that does not exceed 104 weeks in length. (See § 617.22(f)(2).) Inquiries were received on whether an individual may pursue more than one training program under a single certification or whether training under a certification is limited by the 104-weeks time provision. To eliminate any uncertainty on this matter, clause (2) on length of training has been revised to state more clearly that the maximum duration for any approvable training program is 104 weeks and no individual shall be entitled to more than one training program under a single certification.

For purposes of part 617, a new clause (3) is added to § 617.22(f), which provides a definition for a "training program". Subclause (i) of clause (3) provides that a training program may consist of a single course or a group of courses designed and approved by the State agency for an individual to meet a specific occupational goal. Subclause (ii) of clause (3) authorizes State agencies to amend an individual's approved training program, when the duration of training is less than 104 weeks, to add a course or courses designed to satisfy unforeseen needs, such as the need for remedial education or specific occupational skills. However, the amended training program may not exceed the 104-week time limitation in clause (2).

Clause (4), previously clause (3), is amended to clarify that the hours in a day and the days in a week an individual attends an approved training program must be full time commensurate with the standards of the training facility. The purpose of this amendment is to ensure that hours of training per week and length of the training program are scheduled in a manner that the individual will develop the skills needed to achieve a specific occupational goal in a reasonable time period and at a reasonable cost. Any week in which training is less than full time will still count as a full week for the purposes of the 104-week limitation.

L. Revision of § 617.26

Section 617.26, entitled "Approval of other training including interstate," was not among the sections of regulations proposed to be amended in the proposed rule published on November 30, 1988. However, rethinking occasioned by the 1988 Amendments led to the conclusion that there is a need to clarify, and in some respects alter, the roles and responsibilities of liable States and agent States in the administration of the TAA program. Among the OTCA amendments that caused such rethinking were those making training an entitlement and an eligibility requirement for basic TRA, and the provisions of amended section 231(c) on training waivers. In addition, comments received on related sections of the proposed regulations were considered in reaching this conclusion. The redescription of liable State and agent State roles and responsibilities was announced in Change 2 to GAL 15–90, which was published at 56 FR 46331, 46332.

The present § 617.26, written in 1975, provides that the agent State shall be responsible for the selection and approval of training, and will pay any training related costs, and that the liable State is responsible for determining eligibility for TRA, job search and relocation allowances, and may approve and purchase training provided that certain conditions are met. Although the respective roles of the liable and agent States were spelled out, the section was silent on the legal relationships and the appellate authority in the case of determinations made by the agent State. In addition, there were some overlapping responsibilities relative to training approval and payment of training costs. The regulations as revised in this document address these issues and, in general, deal more comprehensively with the roles and responsibilities of liable and agent States in administering the TAA program. Accordingly, § 617.26 is retitled "Liable and agent State responsibilities" and the roles of liable and agent States are delineated.

After examining State practices, as affected by the OTCA amendments, the Department has concluded that, as a general rule, the agent State should continue to be responsible for procuring and paying for TAA approved training and related costs, including subsistence and transportation, as appropriate. In addition, the agent State shall assist the liable State in fulfilling its responsibilities for making determinations of entitlement to all TAA program benefits. These changes are reflected in revised § 617.26.

Another significant change in § 617.26 is in making the liable State responsible for all determinations, redeterminations, and decisions on appeals pertaining to any worker's eligibility for or entitlement to any TAA program benefit under Part 617. This includes determinations relating to training approval, disapproval, waivers and revocation of waivers for training, and training related costs including subsistence and transportation. This requirement will preclude due process objections which could be raised if workers were required to appeal some issues under the agent State law and other issues under the liable State law. Responsibility for selection and approval of training no longer resides in the agent State, as is provided in the present rule.

However, a liable State and an agent State may jointly agree to modify this rule with respect to their TAA administrative functions, but any such change must comply with the legal requirement that all determinations will be under the authority of the liable State, and all appeals by individuals will be under the law of the liable State. Further, prior approval for any such modification must be obtained under § 617.54. (See also §§ 617.33 and 617.44, below.)

Additionally, in those situations where two or more States share a common labor market area and workers commute across State lines for work, those States may wish to develop cooperative arrangements, consistent with revised § 617.26, and approved under § 617.54, to provide TAA services to adversely affected workers in the area.

The definition of "liable State" at § 617.3(aa) is also revised to conform with changes in §§ 617.16, 617.26, 617.33 and 617.44, and a definition is added for "agent State". (The term "applicable State," which is defined and used in Change 2 to GAL 15–90, is not used in this final rule. It was decided that the terms "liable State" and "agent State," and the definition of "applicable State law" in § 617.16 were adequate to cover the rules associated with interstate responsibilities without adding a further definition of "applicable State.")

As revised in this final rule, § 617.26 comprehensively addresses the roles and responsibilities of liable States and agent States in interstate cases, clarifies the legal and appellate relationships among the States, and assures due process for workers and conformance with section 239(d) of the Act. With this revision, and other changes in the rules, there is consistency among the regulations in addressing State responsibilities: § 617.16 covers applicable State law; § 617.20 addresses State responsibilities for the delivery of reemployment services, in general; § 617.33 addresses findings required before final payment of a job search allowance is made by the liable State; § 617.44 addresses findings required before final payment of a relocation allowance is made by the liable State;

and §§ 617.50 and 617.51 speak to determinations of entitlement, and appeals and hearings under the applicable State law, respectively.

A conforming change is made in § 617.50(a) by striking the clause ", or the State agency as provided in § 617.26(d),".

M. Revision of § 617.33

Section 617.33 prescribes the findings required before final payment of a job search allowance is made to an eligible worker by the liable State. It describes the responsibilities of liable and agent States in regard to those findings. This section is revised to delineate more clearly the responsibilities of liable and agent States for determinations (and appeal rights) regarding job search allowances.

N. Revision of § 617.44

Section 617.44 prescribes the findings required before final payment of a relocation allowance is made to an eligible worker by the liable State. It describes the responsibilities of liable and agent States in regard to those findings. This section is revised to delineate more clearly the responsibilities of liable and agent States for determinations (and appeal rights) regarding relocation allowances.

O. Revision of § 617.50(d)

Section 617.50(d) contains the rules on the use of State law and regulations in making and reviewing determinations and redeterminations under part 617. Questions have arisen in at least two States whether the 210-day time limit in § 617.15(b) (and section 233(b) of the Act) may be waived for good cause, or whether State law provisions on good cause for late filing of UI claims may be applied. The Department has consistently taken the position that such good cause provisions may not be applied, in view of the lack of authority for doing so in any provision of the Act or the regulations. Nevertheless, State authorities in one State have ruled a number of times that there can be good cause for late filing. And more recently, in a matter arising in another State, the Sixth Circuit Court of Appeals issued a decision adverse to the position of the Department. Because the Department believes that conclusions inconsistent with its longstanding position do not comport with the Act, it has decided to address the issue in a broad manner and state as clearly as possible in the regulations the precise situations in which State laws may be applicable in addressing issues arising under the regulations.

The Sixth Circuit's decision started with the proposition that the Trade Act of 1974 was passed by the Congress "during a mood of congressional largesse," and that the 210-day rule in section 233(b) of the Act "was not intended to act as a jurisdictional prerequisite to additional TRA benefits." From this premise it reasoned that "the purpose of the rule is to discourage dilatory" conduct by applicants, and that absent a finding of dilatory conduct "the application of the 210-day rule does nothing to further the Act's remedial purpose and everything to frustrate it". Citing another holding in the District of Columbia Circuit, the Sixth Circuit held that the Department's "interpretation makes sense only if there was a congressional policy in favor of limiting TRA benefits." The Sixth Circuit concluded that: "That court found no evidence of such a policy. Nor do we." From this line of reasoning the Sixth Circuit held that the State's "waiver for good cause rule [is applicable] in this context".

The Department believes the Sixth Circuit erred in relying upon the "mood of congressional largesse" in passing the 1974 Act, without taking into account the critical redirection in the 1981 amendments away from TRA and towards greater emphasis upon training (including changing the 233(b) rule from 180 days to 210 days), and the direct linkage in the 1988 Amendments of training and eligibility for basic TRA (as well as additional TRA). In this context, there is a sound reason for upholding the "jurisdictional" nature of the 210-day rule, and less reason for reaching out to State law for a good cause exception, as distinguished from fashioning an exception from the language of Section 233(b). For these reasons, the Department believes the Sixth Circuit's decision was incorrect. The Department is therefore moving to clarify the regulations to make its interpretation of the Act clearer.

In considering where in the regulations the clarification of the Department's position should be made, the Department took into account the fact that there are other time limits expressed in the regulations, such as in §§ 617.10(b), 617.31(c), 617.41(c), and 617.43(b). Since all such time limits may be vulnerable to the same deviations that occurred with respect to the 210-day time limit, it was decided that a general rule was needed that is applicable to all of part 617. The placement of this general rule thus fell logically in paragraph (d) of § 617.50.

Accordingly, paragraph (d) of § 617.50 is amended to add the general rule that no provision of State law or regulations as to good cause for waiver of any time limit or for late filing of any claim shall apply in the case of any time limitation stated in part 617, unless such State law or regulation is made applicable by a specific provision of part 617. This change eliminates any uncertainty about the Department's position, and places a clear obligation on the States to adhere to the time limitations in all of part 617.

P. Revision of § 617.55

Section 243 of the Act, on Fraud and Recovery of Overpayments, is interpreted as being drawn in broad terms so as to impose liability for repayment of all improper payments under the Act, and to impose penalties for all false statements or representations resulting in improper payments. Subsection (a) imposes repayment liability upon any "person" receiving an improper payment, whereas subsections (b) and (c) use the term "individual" in the fraud and recovery provisions. In § 617.55, in contrast, the term "individual" is used throughout the liability, fraud, and waiver provisions of the regulations.

Recent experience in the administration of the TAA program has highlighted the difference between "person" and "individual" as such terms are commonly understood in other areas of law. The term "person" is more comprehensive, and may include an employer or other entity or organization as well as an individual, whereas the term "individual" as used throughout part 617 typically means the individual workers who are the beneficiaries of the program. The question that arose was whether § 617.55(a) was sufficiently broad in wording to impose repayment liability upon an employer who had received improper payments for the on-the-job training. In examining this issue it became apparent that the same issue existed with respect to payments for training of individuals that are made directly to training providers. Although the payments in both cases may be said to be made on behalf of the individual workers, it is evident that, in many cases (particularly in the case of on-the-job training), liability for repayment as well as responsibility for fraud is more properly assignable primarily to the employer and possibly the training provider.

To clarify the regulations, and to reflect the broad interpretation given to section 243 of the Act, § 617.55 is revised throughout to make it specifically applicable to any person or individual, and paragraph (i) is added to define person as any employer or other entity or organization as well as the

officers and officials thereof who may bear individual responsibility.

Q. Revision of § 617.60

A new § 617.60, on Administrative requirements, was included in the proposed rule published on November 30, 1988, for comment. Although no comments were received, the substance of several of the provisions are affected by other administrative regulations. Since further work is required to bring the TAA administrative requirements into full conformity with those other regulations, the decision was made to reserve § 617.60 for use when the revised TAA administrative requirements are completed and published.

R. Revision of § 617.64

In the 1986 Amendments to the Trade Act, section 285 was amended by, among other things, adding a subsection (b), to provide that "no assistance, allowance, or other payments may be provided under chapter 2 * * * after September 30, 1991." This new subsection (b) superseded the current provisions in § 617.64, which were consistent with the amendments made by section 2512 of the Omnibus Budget Reconciliation Act of 1981. Section 1426(a) of the OTCA extended the termination of the program to September 30, 1993. While the 1986 and 1988 amendments to the TAA program changed the termination dates to September 30, 1991 and 1993, respectively, appropriate changes were not made to § 617.64 concerning the payment of TAA program benefits after the termination date in the Act. Therefore, § 617.64 is amended to bring it into accord with the amended language in section 285 of the Act.

A strict construction of the law, prohibiting the actual payment of TAA program benefits to individuals after the termination date in the Act, would have a profound effect on those persons who completed approved TAA program services, but, because of State processing requirements, payment for such services cannot be made by the State agency until after the termination date in the Act. This strict construction would unnecessarily make the orderly termination of the program impossible. It would deny payment of benefits to individuals for the period prior to the termination date of the program simply because it was administratively infeasible to make the payment before the termination date. Therefore, in order to avoid these untoward results stemming from a strict construction, a more liberal construction of section 285(b) is necessary to effectuate the Congressional intent. A "payment," within the meaning of section 285(b), will be deemed to have been made before the termination date of the program, if a final determination on the amount payable to, or on behalf of, the individual for TAA program services was made on or before the termination date of the program, for which payment was due.

This means that State agency approved job search and relocation, and training related transportation and subsistence, must be completed on or before the termination date in the Act and that the State make a final determination on the amount of TAA program funds payable to the individual on or before such termination date. This places the requirement on the State agency to inform all individuals presently approved for such benefits of the statutory time provision that the service must be completed and a final determination on the amount payable made on or before the termination date of the program. It also places a requirement on individuals to complete the approved services and to submit all claims for such activities to the State agency in time to receive a final determination on the amount payable on or before the termination date.

Individuals approved for training who began approved training on or before the termination date in the Act must have a final determination by the State agency on or before the termination date on the amount due and payable for the training costs to cover previously incurred tuition and related expenses. Determinations on tuition shall be limited to the current training term, quarter, semester, or other scheduled period, and be in accord with normal billing practices of the training provider and payment practices of the State agency. In order to conform with the intent of the law, the State agency may make a final determination on the amount payable only for the training term, quarter, semester or other time period for which payment is due and payable on or before the termination date of the program.

Individuals entering training, and those currently in training programs which extend beyond the termination date of the program, should be informed that no payments will be authorized or made for any costs or expenses which become due and payable after the termination date of the program, nor will any such costs or expenses be paid prior to the expiration date of the program.

Moreover, only the last full TRA benefit week, for which a final determination has been made according to normal State UI processing procedures on or before the termination date of the program, will be paid to any individual.

When a claim for TRA is submitted to the State agency subsequent to the termination date in the Act, or for which a final determination on the amount payable has not been made on or prior to the termination date of the program, the State agency is required to issue a "no-payment" determination on the claim because the State may not refuse to take and process the claim even though it is prohibited by statute from paying the claim. These provisions apply also to claims for job search allowances under § 617.33 and for relocation allowances under § 617.44.

Discussion of Comments and Changes

In response to the proposed rule, the Department received written comments from two State Governors, fourteen State employment security agencies, three labor unions, and one public interest group.

1. *Eligibility period.* The Pennsylvania Department of Labor and Industry (PDLI) recommended that clause (i) of § 617.3(m)(1) (defining "eligibility period" for basic TRA) be amended by removing the word "first" after the word "individual" in the seventh line, and by removing all language after the parenthetical clause "(as defined in paragraph (oo)(1) of this section)." The PDLI stated that these deletions are necessary for the regulation to conform to the eligibility requirement of Section 233(a)(2) prior to its amendment by the OTCA. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) commented that the proposed rule incorrectly ties the eligibility period for basic TRA to the date on which the first qualifying separation occurs, and the reference to eligibility period, therefore, should be omitted.

Department's response. The Department believes that these comments reflect an incorrect view of the 1981 Amendments and the effect of the 1988 Amendments in the OTCA. The Department construes the 1981 Amendments as setting the beginning of the eligibility period as the week immediately following the week in which regular benefits are exhausted following the worker's first qualifying separation. This is explicitly provided for in section 233(a)(2), as amended in 1981, and is set forth in the Department's regulations implementing the 1981 Amendments. The only change in this provision of the law was the extension of the eligibility period from 52 weeks to 104 weeks in the 1986

Amendments. No change was made in the fixed eligibility period until the 1988 Amendments, which restored the movable eligibility period based on the most recent qualifying total separation. Therefore, in § 617.3(m)(1), the fixed eligibility period is retained for first qualifying separations that occurred before August 23, 1988. The new movable eligibility period is also implemented, in accordance with the 1988 Amendments, for decisions made on or after August 23, 1988, for other qualifying total separations which occurred before, on, or after August 23, 1988.

Section 1430(g) of the OTCA provides for the retention of the pre-OTCA eligibility period which was established by the first qualifying separation occurring before August 23, 1988, even if the decision is made on or after August 23, 1988. Amended section 233(a)(2) may not be applied in a decision made on or after August 23, 1988, in the case of a more recent total separation occurring before August 23, 1988, if the effect of applying such amended section would result in an earlier expiration date of the eligibility period established on the basis of an earlier first qualifying separation.

It is essential to retain the definition of eligibility period for the application of prior law with respect to first qualifying separations which occurred before August 23, 1988, while adding a definition of the new eligibility period for qualifying separations to which amended section 233(a)(2) is applicable. If, however, the adversely affected worker is totally separated on or after August 23, 1988, following a first qualifying separation which occurred prior to August 23, 1988, amended section 233(a)(2) must be applied even though it results in an earlier expiration date of the eligibility period established under pre-OTCA law.

Therefore, no substantive change is made in paragraph (m)(1)(i) of § 617.3, but as noted below substantive changes are made in paragraphs (m) and (t) as a result of the new interpretations of sections 1430 (a) and (g) of the OTCA, and to correct technical errors.

2. *Application of new eligibility period.* The UAW commented that in § 617.3(m)(1) the Department set up two standards for the 104-week eligibility period during which TRA is payable. The UAW argues that the proposed two standards differ according to whether the date of separation occurred before or after August 23, 1988. The UAW commented that Congress explicitly provided in section 1430(g) of the OTCA that the revised definition of the 104-week eligibility period in section 1425(a) (amending section 233(a)(2)) was effective upon enactment unless the application of the amended eligibility period would reduce the period for which a worker would have been eligible for TRA. Therefore, the two standards should not turn on the date of the worker's separation, but on whether or not the worker's period of eligibility is reduced through the application of the amended eligibility period. The UAW commented further that Congress intended the amendment to be fully effective upon enactment, permitting the amendment to increase the eligibility period for basic TRA or establish a TRA eligibility period for some workers, and noted that the Conference agreement statements in House Conference Report 100–576 on sections 1425 and 1430 of the OTCA strongly support this application of the amendments. The UAW also commented that under OTCA sections 1425(a) and 1430(g) the most recent total separation which is qualifying must be used to determine the eligibility period, unless the eligibility period would be shortened through the application of the amendment to workers separated prior to enactment.

The PDLI, commenting on the transition guidelines in § 617.67(e)(3), noted that section 1430(g), in specifically referring to total separations prior to the enactment of the OTCA, raised the unavoidable implication that amended section 233(a)(2) shall be applied to total separations prior to August 23, 1988, if such application would provide the worker with a longer or later eligibility period than the worker would have had under the pre-OTCA law. The Unemployment Council of Southwestern Pennsylvania made the same point in its comments.

Department's response. The Department agrees with the commenters' understanding that the amendment to the basic TRA eligibility period is not to operate to the disadvantage of workers whose eligibility period would expire at a later date with respect to a qualifying separation which occurred before the date of enactment of the amendment to section 233(a)(2). These comments were also a factor in the Department's reconsideration of GAL 7–88 and the resulting new interpretations of sections 1430(a) and 1430(g) announced in GAL 15–90 (see discussion in item A. above).

If workers are to retain the advantage of a later expiration date for the eligibility period based on the prior law, then the prior law must continue to be applied to first qualifying separations which occur before the date of enactment of the OTCA (August 23, 1988).

Accordingly, in general the comments have merit, and substantial changes are made in the final regulations regarding the definition of "eligibility period" in § 617.3(m)(1) and the definitions of "separations" in § 617.3(t). Furthermore, the transition provisions at § 617.67(e) also have been revised to reflect the Department's new interpretations of sections 1430(a) and 1430(g). For further clarification, a proviso directly implementing section 1430(g) of the OTCA is added to § 617.3(m)(1).

3. *Retroactive approval.* The PDLI stated that § 617.3(m)(2)(iii) does not clearly point out why weeks of training prior to approval cannot be paid. The PDLI asked "What if the trainee, for example, was in JTPA funded training that would be, after approval, either paid for by TAA or continued under JTPA?"

Department's response. This comment suggests a misunderstanding of the TAA program and the effects of the 1988 Amendments and earlier changes. Since the addition of section 236(a)(3) (now 236(a)(4)) in the 1986 Amendments, the switching of training costs from other funds to TAA funds has to be subject to the controls set out in that section. In the 1988 Amendments those controls were retained, and authority was added to mix TAA funding with funding from other public and private sources and to use funding solely from other sources for TAA training. That is why, in GAL 15–90 (and earlier in GAL 7–88) and in amended § 617.25, greater emphasis is given to entering into prearrangements for sharing the costs of training with other funding sources. With training becoming an eligibility requirement for basic TRA in the 1988 Amendments, the same emphasis upon prospective treatment must now be given to basic TRA as has been given to additional TRA and, to a somewhat lesser extent, TAA funds for training. Additional TRA has not been paid for retroactive weeks, nor, under § 617.22(c), have previously incurred training costs been payable from TAA funds. This same rule must now be applied to basic TRA, as well as additional TRA and TAA training funds, and it is this rule that is reflected in amended § 617.3(m)(2)(iii) as well as in amended § 617.22(c). Under the 1988 Amendments, therefore, TAA funding will not follow automatically from approval of training under § 617.22(a), nor will approval of training that commenced before approval under § 617.22(a) imply or justify payment of previously incurred training costs from TAA funds, or payment of any TRA for

any week that ended before such approval was documented.

For the foregoing reasons, no substantive change is made in the final regulations to accord with PDLI's comment. Changes are made in § 617.3(m)(2)(iii), as well as in § 617.22(c), however, for purposes of stating the prospective rule as clearly as possible and to furnish a regulatory response to the PDLI's multi-faceted question.

4. *Retroactive payments.* The Ohio Bureau of Employment Services (OBES) commented that § 617.3(m)(2)(iii) specifies that the eligibility period, during which additional weeks of TRA are payable to a worker in approved training, if such training is approved after the training commences, begins with the first week such training is approved. Approval of such training after the training has commenced shall not be deemed to authorize the payment of TRA for any week which ended before such approval was documented. The OBES explained that, at the present time, many individuals are enrolled in training programs which were not TAA approvable prior to the 1988 Amendments because the costs of training were paid with non-appropriated funds. While these individuals are being made aware of the change in the law that now authorizes the use of non-appropriated funds to pay the costs of training, there are unavoidable delays in documenting sources of training funds and approving the training under part 617. These delays result in lost worker eligibility for weeks of additional TRA. OBES recommends that the final rule provide for retroactive payment of the additional weeks of TRA in such cases, at least to the date of application for approval of such training. Sections 617.22(c) and 617.67(f) would also need to be modified for this purpose.

Department's response. The OBES presented the problem as one that existed at the time the letter was written; that is, when the OBES's comments were made in December 1988. Although the Department understands that such a problem may have existed in late August and in September 1988, the operating instructions in GAL 7–88 were issued to State agencies some three months before the OBES comments were made. Accordingly, the Department has decided not to relax its long-standing rule against retroactive payments expressed in § 617.22(c). See discussion under the preceding item. It was not expected that the new authorization for sharing costs of training would furnish a viable solution to all existing cases. One of the safeguards built into the new system was to require that sharing of costs be under conditions arranged before the training was approved under § 617.22 and undertaken by the worker. There is no intent to approve the payment of additional TRA for weeks a worker is not actually participating in training nor to approve retroactive payments that are not allowable under § 617.22 (c). The expectation is that cooperating agencies will enter into shared cost prearrangements for training not funded wholly from TAA funds.

Therefore, the Department has decided to make no change in the regulations in response to this comment, but notes under item 3 that clarifying technical changes are being made in §§ 617.3(m)(2)(iii) and 617.22(c).

5. *Qualifying separations.* The Missouri Department of Labor and Industrial Relations (MDLIR) commented on paragraphs (t)(1), (t)(2)(ii) and (t)(3)(ii) of § 617.3 in the proposed rule, which define "first separation", "qualifying separation", and "first qualifying separation". Since a worker must have a total separation on or after August 23, 1988 to qualify for TRA, the MDLIR asked why the definition of "partial separation" should not be eliminated if it takes a total separation to establish eligibility for TRA?

Department's response. The Department retained the definition of "partial separation" because the qualifying requirements in section 231(a)(1) and (2) continue to permit workers to have a total or partial separation from employment to qualify for TRA prior to August 23, 1988, and for TAA services other than TRA whether a separation occurs before or after August 23, 1988. The amended law does not require that a worker have a total qualifying separation on or after August 23, 1988, in order to qualify for basic or additional TRA for weeks beginning after August 23, 1988. Workers will continue to be eligible for basic and additional TRA after August 23, 1988, based on a partial or total qualifying separation that occurred before August 23 under the prior law. Although the amended law requires that a qualifying separation must be a total separation to qualify initially for basic TRA (or to move the eligibility period based on a prior qualifying separation under the same certification), a partial qualifying separation will be used for purposes other than the basic TRA eligibility period. For example, under § 617.15(b) an application for training must be filed within 210 days after the date of the worker's total or partial separation referred to in Section 231(a)(1). (See item E. above, and item 25, below, concerning changes to § 617.15(b) on the application of the 210-day rule.) Further, the weekly and maximum amounts of TRA payable to an individual are based on the first total or partial separation. However, with respect to qualifying separations to which amended section 233(a)(2) applies, a worker's eligibility period for basic TRA is based on total separations only.

In considering this comment, however, an error was discovered in paragraph (t)(3) of § 617.3, which did not give proper effect to a partial separation on or after August 23, 1988. Therefore, in addition to other changes as discussed above, paragraph (t)(3) is amended in this final rule to accord with the above response to this comment. For the same reason a parallel change is made in § 617.67(e)(4).

6. *TRA weekly and maximum.* In commenting on the application of amended section 233(a)(2) to the most recent total qualifying separation, in determining the eligibility period of a worker, the UAW argued that this contrasts with the determination of weekly and maximum amounts of TRA, which does require the use of "first qualifying separation." The proper use of "first qualifying separation" is restricted to the determination of the weekly and maximum amounts of TRA.

Department's response. The Department agrees that determinations of TRA weekly benefit amounts and maximum benefit amounts, under sections 232(a) and 233(a)(1), will continue to be based on the first total or partial separation, and that this was not changed by the 1988 Amendments. What this means is that monetary determinations of TRA entitlement may have to be based upon two separations which occurred in different years. For example, for a period of up to three years or more after August 23, 1988 (the impact date to termination date of a certification plus the time between petition and certification dates can be a period of up to or in excess of three years), it is possible that a worker will have had a first qualifying separation before August 23, 1988, and computations under sections 232(a) and 233(a)(1) will be based upon UI entitlement in the first benefit period following such first separation, whereas the worker's most recent total qualifying separation will be used to determine the basic TRA eligibility period. This is simply illustrative, however, because in all cases decided on or after August 23, 1988, the eligibility period under amended section 233(a)(2) will be based upon the most recent "total qualifying

separation," whereas computations of weekly and maximum TRA amounts under sections 232(a) and 233(a)(1) will continue to be based on the first separation with respect to which the worker is entitled to UI, whether such separation occurred before or after August 23, 1988. This is an additional reason why, for any worker who is determined to have had a "total qualifying separation," it will be necessary to establish whether the worker had an earlier first separation under the same certification.

The definition of "first qualifying separation" in paragraph (t)(3) of § 617.3 incorrectly relates determinations of weekly and maximum TRA amounts only to first qualifying separations with respect to which the worker also qualifies for TRA. This is corrected in the final regulations, and other technical corrections are made to distinguish between "first separation" and the meaning of "first qualifying separation" for its two purposes; that is, (a) eligibility period for TRA, and (b) computation of weekly and maximum TRA amounts.

7. *Partial separations.* The Indiana Department of Employment and Training Services (IDETS) commented that, based on its understanding of § 617.3(t)(3)(ii) of the proposed rule, and sections 233(a)(1) and 231(a)(3)(A) of the Act, there appears to be a conflict over whether a partial separation after August 23, 1988, may be used to determine benefit amounts.

Department's response. The IDETS is correct in noting this error in paragraph (t)(3) of § 617.3. See the discussion under the preceding two items. The first separation under a single certification, with respect to which the worker is entitled to UI, must be used to determine the worker's weekly and maximum amounts of basic TRA, whether such first separation occurs before or after August 23, 1988. As noted in the preceding two items, § 617.3(t) is modified to clarify this and other points.

8. *Advice to workers.* The Vermont Department of Employment and Training (VDET) commented on § 617.4 concerning what constitutes proper advice and assistance to workers. The VDET stated that the requirement to inform each worker applying for unemployment insurance "of the procedures and deadlines for applying for such benefits" taken literally includes a large number of applicants who are applying for short term UI benefits and who in no way are likely to be eligible for benefits under the TAA program. The VDET argues that while it is important that the State agency take the initiative to inform workers who may be eligible for the benefits, the current language is too rigid, and will only cause confusion among short term unemployed. The Vermont agency recommended that the requirement be rephrased to require States to develop the means to identify trade eligible workers who apply for UI and then provide the necessary information to those workers.

Department's response. The Department agrees that State agencies should identify potential trade eligible workers as early as possible in their benefit period. However, section 239(f) of the Act provides, among other things, that each worker who applies for unemployment insurance shall be advised of the benefits under the TAA provisions of the Trade Act and the procedures and deadlines to apply for such benefits. There is no language which would support the limitation suggested by the VDET. Often temporary layoffs by a firm adversely affected by import competition or other economic conditions become permanent. The intent of Congress is to ensure that such workers are made aware early in their unemployment experience of the TAA program, how to apply for benefits, and the services available to them. Many State UI agencies furnish an information bulletin or brochure to every worker who files a claim for UI. These bulletins or brochures should include full and correct information on the amended TAA program, and on the benefits and services available to unemployed workers. The Department is encouraging all State agencies to publish a brochure for handout to workers filing initial claims for UI. State agencies should revise their previously used brochures to accurately reflect all the changes made in this final rule, and furnish a copy to each worker who files an initial claim for UI as required by section 239(f) since August 23, 1988.

While no change is made in the final regulations regarding the requirement of advising all UI claimants of the TAA program, § 617.4(e) is modified by eliminating the unnumbered paragraph at the end of this section and by adding the provisions of that paragraph in clause (2).

9. *Notice to workers.* The Michigan Employment Security Commission (MESC) explained that § 617.4(d)(1)(ii)(A) states that notices to workers must include information as to the article(s) produced. The MESC commented that unless the article(s) produced is part of the certification statement, e.g. "all workers producing shock absorbers," referring to it will often confuse rather than clarify worker coverage. For example, if the certification covers "all workers of XYZ Company," to state in the worker notice that the company "produces shock absorbers," will confuse workers of the XYZ Company who may have produced brakes. Unless a specific article is identified in the published certification document, it should not be required information in the notice to workers.

Department's response. The Department concurs with the comment. The articles produced are to be specified in a notice to the workers only when there is a specific reference in the published certification document to an article or articles. When all workers in the firm are covered by the certification it is not necessary to identify the article(s) produced. The regulation is modified at § 617.4(d)(1)(ii)(A) to reflect this change, and the same change is made in § 617.4(d)(2)(ii)(A) regarding newspaper notices.

10. *Identifying workers.* The New York Department of Labor (NYDL) commented that § 617.4(d)(1) expands the intent of the Trade Act by specifying the sources that the State agency should utilize in identifying adversely affected workers. The NYDL stated that it is inappropriate to specify such sources in a regulation and suggested that the Department adhere to the language of the Act. It also suggested the following substitute language: "The state agency shall provide written notice, through the mail, of benefits available under this chapter to each worker whom the State agency has reason to believe is covered by a certification made under subchapter A of this chapter. The notice must include the following information: * * *."

Department's response. The proposed rule merely refers to any other reliable sources of information other than the workers' firm. When a firm closes, information from the firm's records may be difficult to obtain. In this case, as well as others, the State agency should obtain the best information available to it. This level of specificity seems appropriate for the regulations. Similarly, in implementing the provision on the scope of the notice to be given, the Department has concluded that amended Section 225 requires that all workers who can be identified shall receive such notice. Therefore, no change is made in the final regulations.

11. *Newspaper notices.* The OBES commented that § 617.4(d)(2) requires State agencies to publish a notice of each certification issued in its State in a newspaper of general circulation in the areas in which the affected workers reside. OBES further commented that it is not uncommon that prior to the State

agency being informed of a certification by the Department of Labor all affected workers have already learned of the certification and have reported to the State agency to file for TAA benefits. Therefore, OBES recommended that the final rule provide for a waiver of the public notice requirement when it can be verified by the State agency that all the affected workers have filed for TAA benefits. The OBES also recommended that the funding source for such newspaper notices be identified formally. The California Employment Development Department (CEDD) provided similar comments on § 617.4(d)(2). CEDD pointed out that there is no useful purpose in placing an expensive newspaper ad when all affected workers are notified by letter, or when the ad will very likely not be seen by any of the former workers.

Department's response. The Department agrees that a newspaper notice is not needed in some situations because all the workers are identified by the State agency and notified by mail. This situation occurs frequently when the certified worker group is small. Therefore, the Department is amending the final rule at § 617.4(d)(2) to authorize State agencies to dispense with the newspaper notice when it can be *substantiated* and is *documented* in the agency's records that all adversely affected workers covered by a certification have been identified and have been sent written notice by mail as required by § 617.4(d)(1)(i).

12. *Notices of waivers.* The UAW, commenting on § 617.4(e), stated that workers should be provided with a notice of their right to seek a waiver of the training requirement and the procedure for doing so.

Department's response. The Department believes that the regulations as proposed establish the right of workers to waivers of the training requirement in appropriate cases, and provide for appeal and review of determinations on such waivers. State agencies will initiate waivers where training is not feasible or appropriate. Information that waivers will be issued to workers when training is not appropriate or feasible must be furnished to the workers or be included in the bulletin or brochure furnished to each worker under paragraph (e)(1) of § 617.4. The Department does not believe that more specificity is required in paragraph (e)(1). Therefore, no change is made in the final regulations.

13. *Information to workers.* The CEDD, commenting on § 617.4(e), stated that there is some confusion between this section and § 617.67(c)(2). The CEDD commented that it is not clear whether TAA information must be provided to every individual who applies for unemployment insurance, as stated in § 617.67(c)(2), or just to those certified as adversely affected as implied by use of the word "worker" in § 617.4(e). The CEDD recommended, if States are to provide TAA information to all individuals filing for UI, this requirement should be clearly identified in the final rule.

Department's response. The Department does not believe that the regulations are ambiguous on this issue. The 1988 Amendments to section 239(f) state that every worker filing for UI is to be informed of the TAA program and the benefits available, even though the worker may not qualify for TAA. The regulations at §§ 617.4(e)(1) and 617.67(c)(2) clearly state that each worker who applies for UI shall be advised of the benefits available under the TAA program and does not confine such advice to workers who have been identified as adversely affected by imports. Therefore, no change is made in the regulations.

14. *Advice to UI claimants.* The OBES commented that § 617.4(e)(1) requires State agencies to advise each worker who files for unemployment insurance of TAA benefits available and the deadlines for applying for such benefits. The OBES requested that the final rule replace the term "deadlines" with "time limits". The final rule should also establish the administrative funding mechanism for the substantial costs associated with implementing this requirement. CEDD also commented on a funding issue.

Department's response. The regulations at § 617.4(e)(1) track the language of section 239(f)(1) of the Trade Act, which provides that workers shall be informed of the "deadlines" for applying for TAA benefits. Matters of administrative funding are addressed in program letters and other issuances of the Department and will be addressed further in § 617.60 when it is published. (See explanation on the publication of § 617.60 in item Q. above.) No special funding category is contemplated for furnishing information and assistance to applicants and potential applicants. Therefore, no change is made in the final regulations.

15. *All UI claimants.* The CEDD, commenting on § 617.10(d), stated that this section contains a statement about providing "workers" with TAA information at the time the UI claim is filed. The CEDD argues that, if the rule means every individual who files a UI claim, States will have problems meeting this requirement because often a TAA certification has not been issued when the worker files an initial UI claim.

Department's response. The 1988 Amendments require the State agency to inform every worker filing an initial UI claim about the TAA program and the benefits available under it. There are no exceptions to this rule. One of the purposes of the amendment is to ensure that workers are informed of the program at that time so they can file a petition for TAA if they wish, whether or not a petition has been filed or a certification issued covering that worker or others. See § 617.4(e). The Department believes this requirement can be met easily by furnishing an information bulletin or brochure on the TAA program to every worker who files an initial UI claim. See discussion in item 8, above. Therefore, no change is made in the final regulations.

16. *Legal work requirement.* The UAW commented that the proposed rules at § 617.11(a)(1)(iii)(C) and (a)(2)(iii)(C) are not reflected in any provision of the Trade Act of 1974, as amended, nor in the 1988 Amendments. The UAW stated that the Department is trying to enforce the Immigration Reform and Control Act (IRCA) with this provision. The UAW argued that if Congress wished to enact such a provision it could have, but it did not do so. IRCA did not implicitly amend other federal laws. The Department should not amend the TAA program to enforce IRCA in the absence of statutory authority and therefore the referenced subparagraphs should be deleted entirely.

Department's response. The content of §§ 617.11(a)(1)(iii)(C) and (a)(2)(iii)(C) is not changed by reason of the 1988 Amendments. These sections of the regulations merely restate a requirement which has been in the TAA regulations since they were issued in 1975 in a different place within the regulations. No substantive change has been made in this regulatory requirement. These provisions do not implement the IRCA. Therefore, no change is made to the regulations.

17. *Certification period.* The NYDL recommended that paragraphs (B) and (C) of § 617.11(a)(1)(ii) and (a)(2)(ii) be combined to read as follows: "(B) Before the expiration of the two-year period beginning on the date of such certification, or, if earlier, before the termination date, if any, of such certification."

Department's response. The Department agrees that this change would clarify an ambiguity in the statutory language. Therefore, the regulations are changed along the lines suggested by the NYDL.

18. *Job search program.* The NYDL recommended that § 617.11(a)(1)(vii) on the job search program (JSP) be deleted from the regulations since retroactive TRA claims approved for weeks prior to November 21, 1988, will no longer require participation in a JSP. After November 21, 1988, individuals involved will not know about the requirement. The UAW made a similar comment on the JSP requirement. However, the UAW commented further that this proposed rule creates a likelihood that workers will not be informed by State agencies of the deletion of this requirement in the 1988 Amendments since the Department is "encouraging" States to continue the program.

Department's response. Various provisions of the 1988 Amendments became effective on different dates. The proposed rule was structured to address those statutory requirements that applied prior to, and apply on and after November 21, 1988. The JSP requirement was applicable through November 20, 1988. The training requirement became applicable on November 21, 1988. Therefore, it is essential to delineate the statutory requirements for each time period, and set them forth clearly in these regulations. Also, appeal actions may be pending on workers who were denied TRA eligibility because they failed to begin participation in or failed to complete a JSP. Some of these cases could eventually be resolved in the courts. The retention of the regulations on the JSP will continue to provide the basis for supporting determinations made by State agencies during the period the JSP requirement was applicable. In the proposed rule, a new paragraph was added to § 617.49, specifically providing that JSP is not a requirement for any week which begins after November 20, 1988, and this provision is included in the final regulations. In addition, the Department believes that a JSP is a very useful employability service for adversely affected workers and should be encouraged. Therefore, no change is made in the final regulations.

19. *Temporary work.* The OBES commented that § 617.11(a)(3)(iii) specifies that State agencies are to take into account local labor market characteristics in giving effect to the terms seasonal employment and part-time, temporary work. The OBES recommended that the final rule should provide a definition of temporary work to ensure uniformity among and between States.

Department's response. As noted in item D. above, the Department decided to add to the regulations definitions of the terms "seasonal employment", "odd jobs", and "part-time, temporary employment", to provide State agencies with guiding instructions for implementing section 1426(b)(2)(A)(ii) of the OTCA, so that the Department, rather than the States, defines the limits of Federal liability under § 617.11(a)(3) as under other aspects of the TAA program. The explanation for each of these definitions is noted in item D. In more specific response to the commenter, notice that the definitions go beyond simply defining temporary work separate and apart from "part-time, temporary employment" as used in the statute. To fit into this category, as is made clear in the amended regulation, such work must be both part-time and temporary.

20. *Enrolled in training.* The Governor of North Dakota and the Job Service of North Dakota, commenting on § 617.11(a)(2)(vii), point out that the definition for "enrolled into training" is when the worker has been accepted to an approved training program that will begin within 30 calendar days. Both recommended that the definition provide that a worker be considered as enrolled in training upon acceptance into an approved training program and scheduled to commence training on the next regularly scheduled program starting date. Rural States have a limited number of training facilities offering open entry and open exit options. Virtually all training programs offered by both public and private facilities have designated enrollment dates. The 30-day limitation would cause States to invoke the waiver provision unnecessarily.

Department's response. The Department included the 30-day provision in the definition for "Enrolled in training" to help reduce the number of waivers of the training requirement that would have to be issued by State administering agencies because approved training would not begin immediately. The Department recognizes that schedules for some training institutions may involve periods longer than 30 days for training to begin. In such situations, a waiver may and should be granted. States must search for training programs for individuals which will begin within 30 days, or as soon as possible thereafter. To allow fewer days in the definition for "Enrolled in training" would generate more waivers of the training requirement and increase administrative costs. The Department believes that extending this period in regulations would be difficult to justify. Under the statute, the objective of the training requirement is to get workers actively engaged in training as soon as possible, as a condition of entitlement to TRA. The 30-day requirement eliminates the need for a waiver where the training program is to begin within 30 days, but does not subject the worker to the EB work test while awaiting the start of training. Accordingly, no change is made in the final regulations.

21. *Apparent contradiction with EB work test.* The MDLIR commented that § 617.11(a)(2)(vi)(B) and (vii)(B) and (C), which refer to the EB work test and the training requirement, appear to be contradictory. The regulations state that the EB work test and the training requirement shall not apply to an individual with respect to a claim for TRA for weeks of unemployment prior to the filing of an initial claim for TRA, nor for any week which begins before the certification is issued and the individual is fully informed of the requirement. The MDLIR points out that the language of these paragraphs appears to permit retroactive payments of TRA.

Department's response. The Department does not agree with the commenter. The cited paragraphs of the regulations do not authorize retroactive payments of TRA. These paragraphs specifically provide that the requirements for eligibility in clauses (vi) and (vii) may not be applied retroactively, to workers otherwise eligible for basic TRA, because workers cannot comply retroactively with those requirements. This is a "due process" issue only. Therefore, no change is made in the regulations.

22. *Completed training.* The Unemployed Council of Southwestern Pennsylvania (UCSP), commenting on § 617.11(a)(2)(vii)(D)(*2*), stated that the requirement "the training occurred subsequent to the individual's total or partial separation" goes beyond Congressional intent. The UCSP argues that in amended Section 231(a)(5)(B) Congress allowed TRA payments to workers who have "* * * after the date on which the worker became totally separated, or partially separated, from adversely affected employment, completed a training program approved by the Secretary. * * *" The UAW also commented along the same lines.

Department's response. The Department agrees with the comments, and the regulations have been changed accordingly to delete the word "occurred" and insert in place thereof "was completed" in § 617.11(a)(2)(vii)(D)(*2*).

23. *Enrolled in training.* The Washington Employment Security Department (WESD), commenting on

§ 617.11(a)(2)(vii)(D)(*1*), recommended that the definition for "enrolled in training" be amended by adding after "within 30 calendar days" the words "or the next available time the training could begin at the training institution." The WESD explained that in the cases where training is not available within 30 days of approval that to subject the worker to the EB work test, which means a worker must accept any work the worker is physically capable of performing, would be to the detriment of the worker when training is approved and planned for in the foreseeable future.

Department's response. During the period the EB work test is applied under § 617.19(b)(3), when the training requirement is waived, the worker may find suitable employment which would eliminate the need for additional training. If the State agency determines the job is not suitable (as defined in § 617.22(a)(1)(ii)), and it is reasonable and necessary for the worker to quit work in order to enter training, as provided in § 617.18(b)(1)(iii), the individual may enter training when the training program begins. Also, see the Department's response in item 20, above. Therefore, no change is made in the final regulations.

24. *Certain waivers.* The PDLI commented that § 617.11(a)(3)(i)(C) appears to require that a worker must meet all the requirements applicable to eligibility for basic TRA in the preceding sections, including the wage and employment qualifying requirements, with respect to the total separation in § 617.11(a)(3)(i)(B), to qualify for the waiver of the basic TRA eligibility period and the 210-day filing requirement under Section 1425(b) of the OTCA. The PDLI commented further that the reference in Section 1425(b) is to total separations from adversely affected employment within the meaning of Section 247 of the Act. Section 247 defines both separation and adversely affected employment. The definitions do not include references to wage and employment qualifying requirements. Requiring workers to meet these additional conditions with respect to the total separation noted in section 1425(b) seems to be beyond the intent of the law. Further, to the extent previous Federal operating instructions (GAL 7–88) direct the wage requirements, including equivalent qualifying weeks, be met as provided under the law prior to the 1986 Amendments, the PDLI believes those instructions are incorrect and should be revised.

Department's response. The Department does not concur in these comments. Section 1425(b) does not remove the wage and employment qualifying requirements of the Trade Act. This section, by specific reference to sections 233(a)(2) and 233(b), only eliminates the time limit on the eligibility period for receiving basic TRA and the 210-day time limit for filing for training to qualify for additional weeks of TRA. No waiver of any of the other basic eligibility requirements is implied in removing these two time constraints. Therefore, no change is made in the regulations.

25. *210-day period.* The WESD, commenting on § 617.15(b)(2), argues that it would be a contradiction for the Department to retain the present 210-day requirement for requesting training in order to qualify for additional weeks of TRA rather than applying a movable eligibility period as used for TRA payments. The NJDL and the MESC also commented that the 210-day period should begin with the individual's most recent qualifying separation.

Department's response. The Department agrees with these comments, and § 617.15(b) is revised accordingly in the final rule. This change has already been implemented through Change 2 to GAL 7–88 and reiterated in GAL 15–90, both of which were also previously published as notices in the **Federal Register**. This change is effective for decisions made on or after August 23, 1988, when the movable eligibility period took effect. However, as this change was not included in the proposed rule, a 30-day comment period is provided in this final rule. (See the explanation above in item C.)

26. *Scheduled breaks in training.* The UAW, commenting on § 617.15(d)(1), pointed out that amended section 233(f) provides that a worker shall be treated as participating in training during a week which falls in a break of 14 days or less, if the worker was participating in training before the break and "the break is provided under such training program."

The UAW points out that the proposed rule adds the requirement that the break be "provided in the published schedule of the training program." While "publication" might ease administration, there are some individualized training programs which do not have published schedules. Therefore, the UAW recommended that "previously established" schedule as an alternative formulation which would permit workers in less academic settings to continue to receive TRA as Congress intended, but prevent nonparticipating workers from arguing they were merely "on break."

Department's response. The Department does not believe such a narrow reading need be given to the word "published," but has clarified the regulations by modifying § 617.15(d)(1) to add after the "published schedule" the words "or previously established schedule" and by adding that the break may be indicated in the training program approved for the individual. The intent is to ensure that "breaks" in training during which TRA payments may continue are not limited to regularly scheduled breaks established by the training provider before the program begins but also include all other periods of time elapsing between courses or phases of the approved training program. Therefore, the changes made in this final rule with respect to this matter go beyond the comments received, and, as explained in item F. above, a new clause (2) is added to § 617.15(d) to define a scheduled break in training as including scheduled breaks within or between courses, terms, quarters, semesters, and academic years, whether or not such breaks are scheduled by the training provider.

27. *Before and after break.* The PDLI commented that § 617.15(d)(1)(i) requires, in addition to other requirements, that the worker be participating in training immediately prior to the break and resume participation immediately after the break ends. The PDLI recommends that this provision might be stated better by changing the final regulation to participating in training for the week claimed prior to the beginning of the break and resuming participation for the week claimed at the end of the break.

Department's response. The Department believes the commenter's suggestion would introduce some ambiguity in the wording of the regulations. However, § 617.15(d)(1) is revised to reflect the change announced in GAL 15–90, and set forth in Section E.3., *Payments of TRA During Breaks in Training*, in Attachment A to GAL 15–90. Section 233(f) provides for the payment of basic and additional TRA "during any week which is part of a break in training" provided certain conditions are met. The conditions are spelled out in § 617.15(d)(1), clauses (i) through (iii). In addition, as a condition of TRA eligibility during the break, § 617.15(d)(1) is amended to restate the requirement that the worker shall be required to participate in training after the break ends. This will assure that the purpose of Section 233(f) is carried out. Section 617.15(d)(1) accordingly is modified by removing the "resume participation" condition from clause (i)

and restating it in clause (iii), with emphasis upon "immediate" resumption of participation.

28. *Break delay.* The ODHR, commenting on § 617.15(d)(1)(i), explains that by including the phrase "and resumes participation" as a condition for payment means that no payment for the break can be paid until the break is over and this is verified. The ODHR states that this contradicts the intent of the rule that "An individual will continue to receive basic and additional weeks of TRA during scheduled breaks in training" and would create problems if the break fell within the individual's scheduled reporting period. The NYDL provided similar comments on § 617.15(d)(1)(i).

Department's response. The Department agrees that it is not the intent of this regulation to delay TRA payments during scheduled breaks in training that do not exceed 14 days. However, if a worker fails to resume participation in the training immediately after the break ends, any payments made during the scheduled break shall be established as overpayments, subject to repayment under the provisions of § 617.55. Therefore, no change in the regulations is necessary to reflect this intent.

29. *Inconsistency.* The MESC, commenting on § 617.15(d)(2), stated that no basic TRA may be paid if the individual is on a scheduled training break of 15 days or more. The MESC stated that denial of TRA to a claimant during a break which exceeds 14 days, but less than 30 days, is inconsistent with the definition of "enrolled in training" in § 617.11(a)(2)(vii)(D)(*1*), which allows payment of TRA to a claimant who will enter training within 30 days. A claimant during a break in training of less than 30 days should be considered enrolled in training and eligible for basic TRA.

Department's response. The purpose of these two provisions is not similar, nor is there a basis in the statute for altering the specific 14-day provision of section 233(f). The 14-day break in training provision is a statutory requirement and not subject to change in regulations. On the 30-day provision, see the discussion in item 20 above. Therefore, no change is made in the final regulations.

30. *Holidays during breaks.* The West Virginia Department of Employment Security (WVDES) commented that, in counting days of breaks under § 617.15(d)(3), Saturdays and Sundays are not counted but holidays are counted. The WVDES recommends that for purposes of counting the days in a break, holidays not be counted along with Saturdays and Sundays. The MESC, NYDL and the Oregon Department of Human Resources (ODHR) provided similar comments.

Department's response. The Department agrees that recognized legal holidays should not be counted, and has already acknowledged this change in section E.3. of Attachment A to GAL 15–90 (also see page 3 of the GAL). Ordinarily, breaks in training are oriented to National and State holidays, and to periods within terms or semesters of the training institution. The one long holiday oriented break each year is the holiday beginning around the second or third week in December and ending after New Year's Day. Since these holidays are the reason for the break, the Department agrees that such holidays should not be included in counting the number of days of the break. The critical point is whether a particular day would ordinarily be a scheduled training day in the particular training program. Therefore, official State and National holidays are added to the days not counted in counting the days of a break, if training in the program concerned would not normally be scheduled on such days. (See the explanation in item F. above.)

31. *EB work test.* The MESC, commenting on § 617.17(b)(2), stated that this section indicates that on or after November 21, 1988, claimants in training which is State approved (but not TAA approved) must satisfy the EB work test. The MESC further states that before November 21, 1988, the EB work test was not applied to claimants in State approved training. The MESC argues that there should be no change in the exception to the EB work test on or after November 21, 1988. Section 231(a)(4) of the Trade Act, unchanged by the 1988 Amendments, requires that to be eligible for TRA, a worker would not be disqualified for EB due to the work test. An EB claimant in State approved training would not be disqualified.

Department's response. The commenter incorrectly reads section 231(a)(4) and the effect of the substantive amendment to section 231(a)(5), which was effective on November 21, 1988. Prior to November 21, 1988, for the purposes of basic TRA, participation in training approved under the State law or under § 617.22(a) was sufficient to make the able and available requirement, including the EB work test, inapplicable. The amendment to section 231(a)(5) makes training approved under section 236 an eligibility requirement for basic TRA, effective on November 21, 1988. After November 20, therefore, claimants for basic TRA may not satisfy the requirement of section 231(a)(5), or avoid the EB work test, by participating in training which is not approved under section 236. The Department's position was clearly set forth in section 4.C. of GAL 7–88, and was reiterated without change in section C. of Attachment A to GAL 15–90; it also is correctly stated in §§ 617.11(a)(2), (3), and (4) and 617.17(b) of the proposed rule and is retained in this final rule.

To give full effect to the 1988 Amendments, moreover, the EB work test must apply even after the TRA claimant has satisfied the requirement of Section 231(a)(5) by completing a training program approved under amended § 617.22(a), (see Section C. of Attachment A to GAL 15–90). Having completed such training, the individual should be job ready, and should be actively seeking work so as to return to employment as soon as possible. It is particularly appropriate in these circumstances, therefore, that the EB work test of section 231(a)(4) should apply in regard to any further claims for basic TRA. It would not accord with these purposes to permit the claimant to avoid the EB work test by engaging in any other training that is not approved under amended § 617.22(a). The Department has concluded, and the final regulations provide, therefore, that the EB work test must be met by every claimant for basic TRA, unless the claimant actually is enrolled in or participating in TAA approved training as specified in the Trade Act and in these final regulations. This requirement applies as well to claimants who have completed TAA approved training, with respect to any claim for basic TRA for any week beginning after completing the training program. For the foregoing reasons, no change is made in the final regulations.

(**Note:** section 202(b) of the Unemployment Compensation Amendments of 1992 added paragraph (7) to section 202(a) of the Federal-State Extended Unemployment Compensation Act of 1970, which suspends the eligibility and requalification requirements of paragraphs (3) and (4) of section 202(a) for the weeks beginning after March 6, 1993, until January 1, 1995. GAL No. 7–93, 58 F.R. 21477, makes this change applicable to the TAA Program and should be used for guidance with respect to this issue. This change is not incorporated into the final regulations because it is a temporary suspension.)

32. *Justifiable cause.* The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), commented on § 617.18(b)(2)(i), regarding an individual who "* * * fails to make satisfactory progress in

training," and on § 617.18(b)(2)(ii)(C), *Justifiable cause*, including reasons related to the individual's capability to participate in or complete approved training. The AFL-CIO recommends that, since educational limitations are a common reason for failure to profit from job training, such individuals should be promptly evaluated as to the need for remedial education, as authorized under the 1988 Amendments.

Department's response. The Department agrees that training must be suitable for the worker. The fifth criterion in section 236(a)(1) requires a supported determination that a worker is qualified to undertake and complete the training being approved. See section G.1. of Attachment A to GAL 15–90 and section 4.G.1. of GAL 7–88, and § 617.22(a)(5). This provision emphasizes the worker's personal qualifications; that is, that the worker's own physical and mental capabilities and background and experience are appropriate to the training. It states further that the worker must be evaluated before approving training as being qualified to undertake the specific training program being considered and to complete that training program successfully. If the worker needs remedial education, this should be identified and included as a part of the approved training program. If, during the training program, the need for remedial education becomes apparent, appropriate arrangements should be made to accommodate those needs as part of the same training program. Therefore, while the Department agrees with the comment, no change is needed in the regulations to accomplish this intent. However, the worker's personal qualifications in § 617.22(a)(5) are amended by adding financial resources to the existing qualifications to undertake and complete the training being approved. Item J., above, explains the change and the Department's reasons for the change.

33. *Satisfactory progress in training.* The PDLI commented that several paragraphs in the proposed rule refer to "making satisfactory progress" in training. This language was amended in section 233(a) of the Trade Act effective on November 21, 1988, to "participating" in training, and section 236(c) was repealed. The PDLI recommends that unless these sections refer to the law prior to November 21, 1988, this language only serves to confuse and should be revised or deleted. The UCSP and UAW made similar comments on the requirement in the proposed rule that the worker must have "successfully" completed an approved training program to meet the training completion requirement of amended Section 231(a)(5).

Department's response. The Department has reconsidered these matters and agrees that the comments on "satisfactory progress" have merit. References to "satisfactory progress" have therefore been removed from §§ 617.11(a)(3)(i)(D), 617.15(b)(3), 617.18(b)(1)(ii) and (iii), and 617.18(b)(2)(i). The references to "successfully" completed and "satisfactory" completion of training are also removed from §§ 617.11(a)(2)(vii)(A)(*2*) and (D)(*2*). However, the conditions for "completed training" in § 617.11(a)(2)(vii)(D)(*2*) are retained. To meet the requirements of section 231(a)(5) of the Act, it is reasonable to expect an individual who completed a training program to have satisfied the standards or conditions for the training program and, therefore, to have "successfully" completed such training in order to be job ready. Further, in connection with making this correction in § 617.11(a)(3)(i)(D), the language is modified to make it clearer that an individual must actually be enrolled in or participating in approved training in each week that TRA is claimed, and that, while the break in training provisions of § 617.15(d) apply, the waiver of participation provisions of § 617.19 shall not be applicable under paragraph (a)(3).

34. *Waiver appeals.* The PDLI commented that § 617.19(a)(2) provides the minimum information that shall be contained on the waiver of training participation. (§ 617.19(c)(3) provides for equivalent information on the waiver revocation form.) These minimum information items do not include an appeal date, or instructions for appeal. However, § 617.19(c)(4) appears to state that waivers and waiver revocations shall be appealable. The PDLI suggests that the issuance of waivers and waiver revocations should not be appealable determinations; rather, these documents are prerequisites to determinations of entitlement to TRA payments, and these latter determinations should be appealable. The PDLI recommends further evaluation of this regulation.

Department's response. The 1975 regulations required that all determinations relating to TAA program benefits shall be subject to appeal and review, as specifically required by section 239(d) of the Trade Act of 1974. That requirement continues in effect and is correctly implemented in the regulations in providing that §§ 617.50 and 617.51 shall apply to all determinations regarding waivers, as well as any determination pertaining to any other TAA program benefit. Waivers have a direct relationship to basic TRA entitlement. The Department does not believe it would be appropriate to provide that an individual should be denied the right to appeal a determination issued by the State agency that training is not feasible or appropriate, or that written notice of such determinations (granting, denying, or revoking a waiver) should not include notice of appeal rights.

Consideration of the comments, however, reveals that there appears to be some lingering uncertainty about the scope of the waiver provision and the appeal rights of individual workers, and the reexamination of the language proposed for § 617.19 underscores the need for some clarification of the regulatory language so as to express the scope of the waiver provision more accurately and to declare unmistakably the appeal and review rights of individuals in regard to all determinations relating to waivers.

Paragraph (a)(1) of § 617.19 thus is revised to state more accurately the scope of the waiver provision, and to state explicitly that a waiver pertains solely to basic TRA and may never be made applicable to additional TRA. Paragraph (a)(2) is revised so as to be more explicit about the application of the waiver provision, and to provide that waiver determinations shall include all of the information required by § 617.50(e), which thereby requires inclusion of notice of appeal rights in any such determination. This is in addition to other information specified in paragraph (a)(2) that is required to be furnished in the determination.

Other important changes in paragraph (a) of § 617.19 are the addition of clauses (3) and (4). Clause (3) is added to make certain that denial of a waiver also is a determination to which all of the requirements for determinations apply. Clause (4) is a restatement of the provision proposed in paragraph (c)(4), and is moved in paragraph (a) and revised to make more explicit the application of §§ 617.50 and 617.51 to all determinations under paragraph (a) and to provide expressly that this means and includes notice of appeal rights.

Conforming changes are made in other paragraphs of § 617.19, most significantly including a combining of the provisions of clauses (3) and (4) of paragraph (c) into a revised clause (3), and deleting the proposed clause (4). This revision makes clear that waiver revocations are determinations to which §§ 617.50 and 617.51 apply, and that such determinations shall include all of the information required for determinations under paragraph (a), including notice of appeal rights.

35. *Waiver revocation.* The NYDL commented on § 617.19(a)(2)(iv), which mandates inclusion of the statement that the "waiver will be revoked at any time suitable training becomes available." This statement would be appropriate only for waivers issued because suitable training is not currently available; however, there are numerous situations in which training may become available and yet a revocation of waiver would not be appropriate. Accordingly, the NYDL recommended the following statement as more appropriate: "This waiver is subject to review at 30 day intervals." This would afford the states the needed latitude to assess the continuing validity of a waiver should training become available but remain inappropriate.

Department's response. The Department agrees that the qualifying wording is too narrowly focused, but does not agree on affording States the broad latitude suggested by the NYDL. Accordingly, § 617.19(a)(2)(iv) is revised by deleting the term "suitable training" and inserting in place thereof "appropriate and feasible training" as provided in amended section 231(c)(2) of the Act.

36. *Waiver reasons.* The UAW commented that § 617.19(b)(2)(i) as drafted should be of substantial assistance to State agencies in administering this provision. The UAW suggested that, for clarity, the Department repeat the criteria that "the worker is so situated as to be able to take full advantage of the training" at this point in the rule.

Department's response. The Department believes that § 617.19(b)(2) adequately covers the reasons for issuing a waiver when training is not feasible or appropriate. The UAW's point is covered under the criteria for approval of training. Therefore, no change is made in the regulations.

37. *Training limitation.* The Nebraska Department of Labor (NDL) commented that § 617.19(b)(2)(ii)(B) indicates that a course of training is not appropriate if the duration of training exceeds the individual's maximum entitlement to TRA payments. This would seem to limit appropriate training to a duration of 52 weeks when initial UI eligibility is 26 weeks. If this is the actual effect, it ignores the fact that an individual may enter training during the initial UI benefit period. When the individual enters training during the UI eligibility period, a training program of up to 78 weeks might be completed before exhausting TRA benefits. It seems further to preclude the possibility for an individual who enters training during the first 13 weeks of UI to be eligible for needs based payments under EDWAA during the portion of a training period which might extend beyond the end of TRA eligibility. If this section in fact has these effects, they may be unintended, and should perhaps be reconsidered.

Department's response. The TAA provisions of the Trade Act authorize the State to approve training for a worker for up to 104 weeks; however, the maximum combined duration of UI and TRA payments generally is 78 weeks. If a training program longer than the worker's remaining eligibility for UI and TRA payments is being considered, the State administering agency should ensure that the individual has the financial resources to complete the training program after TRA payments expire. If such an assurance cannot be made, a training program of shorter duration should be considered for approval. The Department therefore agrees that the regulation is too strictly worded, and § 617.19(b)(2)(ii)(B) is clarified in these final regulations. (See discussion in item J. above, on Revision of § 617.22(a)(5).)

38. *Reasons for waiver.* The VDET, commenting on § 617.19(b)(2)(ii)(C), concerning reasons for issuing a waiver, asked why, after 26 weeks of UI, a person with skills for suitable employment has not become reemployed already. Simply allowing a waiver to be granted at this point in a person's unemployment seems to be at odds with the intent of all of the recently enacted Federal retraining legislation, and may actually exacerbate a situation where the worker has not been receiving the proper services which would result in new employment. The VDET recognized that there may be some circumstances where it would be unfair to the worker not to receive a waiver based on this condition. However, the VDET recommended making this condition an extreme one, by not specifically identifying it as a reason to grant a waiver.

Department's response. The Department agrees that waivers should only be issued on a limited basis. As reflected in the VDET comment, however, there may be situations where such waivers are properly warranted. For example, when a firm agrees to employ a worker in the foreseeable future, no purpose would be served by having the worker enter training to learn other occupational skills. Therefore, the Department sees no need to make any change in the regulations.

39. *Every 30 days.* The PDLI recommended that the parenthetical phrase "(i.e., every 30 days or less)" in § 617.19(c)(1) be deleted as an unnecessary guideline with which compliance could be impossible. The OBES presented similar comments that the final rule should reflect administrative and logistical realities by specifying such period for waiver review to be 60 days. Basic TRA payments should be made once a waiver has been issued until such time as the waiver is revoked, and not require documentation of such waiver reviews on an ongoing or routine basis. The CEDD also recommended that the frequency of waiver reviews be changed to 60 days. The MESC recommended that waivers be reviewed every 90 days, while the ODHR recommended that the State have more flexibility in the frequency for reviewing waivers. The NJDL recommended that States be given authority to establish procedures for reviewing appropriate waivers.

Department's response. A major objective of the 1988 Amendments is to enroll adversely affected workers in training programs to help facilitate their return to employment as quickly as possible. The Department believes that, when the training requirement is waived for an individual, proper program administration necessitates regular reviews of waivers issued by the State agencies. The frequency of such reviews at 30-day intervals is reasonable to carry out the provision requiring adversely affected workers to be enrolled in training for purposes of receiving TRA, particularly in light of the fact that TRA is a weekly benefit program and the 30-day rule only requires review approximately every four weeks. Section 231(c)(2)(B) provides that "If, after submitting to a worker a written statement * * * a State or State agency finds that it is feasible or appropriate to approve a training program for such worker pursuant to the requirements of section 236(a), the State or State agency shall submit to such worker * * * a written statement that revokes the certification * * *." To review waivers less frequently than every 30 days would not give the sense of urgency reflected in the law on placing adversely affected workers into training programs as soon as possible.

However, the comments highlight an omission in the regulations, in that, in individual cases, when circumstances change, the need to revoke a waiver may arise earlier than the next periodic review, and, accordingly, necessitate action to revoke the certification before the next review date. Therefore, § 617.19(c)(2) is amended to require revocation in individual cases at any time a change in circumstances occurs.

40. *Waiver determinations appealable.* The MESC, commenting on § 617.19(c)(4), stated that waiver actions should not be appealable determinations. If training is being denied, the denial and any appeal should come on the training determination, not on the waiver. Otherwise, duplicative appeals and confusion of issues will result. The waiver form should contain an explanatory statement, such as: "If you disagree with this waiver action, you have the right to appeal any denial of training or trade readjustment allowances (TRA) that results from this action."

Department's response. See discussion under item 34, above. A determination on the feasibility and appropriateness of training, and the reason(s) therefor, constitutes the critical determination on whether a worker is subject to the EB work test regarding claims for basic TRA. Equally important is the relevance of a waiver in some cases. For example, a waiver is not appropriate concerning entitlement to additional TRA, because additional TRA is payable only while the worker is actually participating in training, and, in that case, the EB work test is not applicable. Similarly, a waiver is not appropriate during breaks in training. It is not needed if the break is not more than 14 days. A waiver is not appropriate if the break is more than 14 days, since payment of basic or additional TRA in this case would be inconsistent with sections 231(a)(5), 233(a)(3), and 233(f). It is clear, therefore, that the determination resulting in the issuance, denial or revocation of a waiver presents justiciable issues, and, accordingly, determinations relating to waivers must be subject to the right of appeal and review. To deny the right of appeal and review on justiciable issues cannot be justified. Paragraph (c)(4) of § 617.19, therefore, has a sound basis in law, and is unchanged in the final rule.

41. *Recording waivers.* The NYDL, commenting on § 617.19(d)(1), stated that recordkeeping and reporting of waivers issued and revoked by reason constitutes a very real problem in that the agency relies on time consuming manual systems. Any requirement in this regard must be accompanied by appropriate levels of administrative funding, specifically for this purpose, in order to yield reliable data.

Department's response. The regulations at § 617.19(d) (1) track the language of section 231(c)(3) of the Trade Act, which provides that the Secretary shall submit an annual report to Congress on the number of waivers issued and the number revoked. As explained in item 14 above, matters concerning the administrative funding for all TAA activities are addressed in program letters and other issuances of the Department and will be addressed further in § 617.60 when it is published. No special funding category is contemplated for this item. Therefore, no change is made in the final regulations.

42. *Reemployment plans.* The NYDL commented that to require monthly reviews of individual reemployment plans, as implied in § 617.20(b)(13), would not serve the worker in a constructive way, and to interview every adversely affected worker needlessly would place an unreasonable burden on the agency when there is a minimum amount of funds available for staff costs. The PDLI and the NJDL provided similar comments.

Department's response. The Department concurs in the comments. It is not the Department's intent to have State agency staffs review individual reemployment plans every 30 days, as is required for waivers of the training requirement. Therefore, the rule is modified to provide for periodic review and updating of reemployment plans, as may be appropriate, in individual cases. The review of waivers, which is required no less frequently than every 30 days under § 617.19(c)(1), is addressed in a new clause (14) in § 617.20(b).

43. *Work in the "foreseeable future".* The UAW, commenting on § 617.22(a)(1)(ii), stated the proposed rule provides that training can be denied if there is a reasonable prospect of suitable work within the "foreseeable future." The statute does not include this element, providing instead that there must be "no suitable employment available" to the adversely affected worker. The UAW argues that under the proposed rule, a worker could be denied TRA because training was not approved due to foreseeable work, even though the worker had no job to enter. The UCSP provided similar comments and recommended that the last part of the rule be eliminated.

Department's response. This provision was incorporated in the regulations to preclude the approval of training when the worker is clearly scheduled to be employed or recalled. For that worker, suitable employment is "available" if the employment may occur in the foreseeable future. The purpose of including the provision in the rule is to give meaning to the first criterion of section 236(a)(1) and help preserve limited training funds for use by workers who need such assistance to return to employment. Labor-management agreements frequently provide for worker recall on a seniority basis. When recalls are scheduled in the foreseeable future, workers clearly do not need training in order to return to employment. In such situations, a waiver of the training requirement is appropriate and shall be issued by the State administering agency. Therefore, no change is made in § 617.22(a)(1)(ii) of the regulations. However, as explained in item H. above, guidance is added in §§ 617.19 (b)(1)(i)(B) and (b)(2)(ii)(A) for use by State agencies on the application of recall that will occur in the "reasonably foreseeable future."

44. *Suitable employment.* The AFL-CIO, commenting on § 617.22(a)(1)(ii), pointed out that the term "suitable employment" means work at no less than 80 percent of the worker's average weekly wage in such adversely affected employment. Since job benefits such as health insurance and pension entitlement must be coupled with wages to determine the total compensation of a position, this definition should be expanded to include "and benefits valued at not less than 80 percent of those provided in the worker's adversely affected employment."

Department's response. The regulation uses the definition in section 236(e), and any change such as that suggested would require a change in the law. Therefore, no change is made in the regulations.

45. *Adversely affected wage.* The MDLIR, commenting on § 617.22(a)(1)(ii), explained that suitable employment is defined in the proposed rule as work of a substantially equal or higher skill level than the worker's past adversely affected employment and wages for such work at not less than 80 percent of the worker's average weekly wage in such adversely affected employment. The MDLIR asks why, since there does not appear to be a change in the law, the regulation was changed from average weekly wage to average weekly wage in adversely affected employment? In addition, the definition of average weekly wage in adversely affected employment makes reference to partial separation which, for separations on August 23, 1988 or later, will no longer establish TRA eligibility.

Department's response. The Department agrees that the definition of "average weekly wage in adversely affected employment" is used appropriately only in the definition of "partial separation," and the definition of "suitable work" in section 236(e) does not include the reference to adversely affected employment.

Therefore, to fully accord with the statute, the phrase "in such adversely affected employment" is removed from § 617.22(a)(1)(ii).

46. *Training cost limit.* The UAW, commenting on § 617.22(b), pointed out that the Conference Committee rejected a proposed $4000 per worker limit on training costs, stating that "it is inappropriate to establish a ceiling on training and related costs for individual workers since such costs may vary significantly from one region of the country to another and from one worker dislocation to another." The Department cannot give the States the authority to do indirectly what the Congress decided it would not let the Department do directly. The UAW recommended that this proposal should be dropped. The UCSP provided similar comments. The MESC also commented that it is contradictory to require States to establish a single maximum amount and then indicate that States should take into consideration the type of occupational training, duration of training, etc. The different types of training and varying durations render a single maximum cost meaningless. By applying § 617.22(a)(6)(iv)(B), there will be sufficient cost control. Section 617.22(a)(6)(iv)(B) requires comparison of training similar in quality, content and results at different training facilities, and approval of the lowest cost training. Also, the ODHR recommended that more guidelines are needed in order to define the "maximum amount allowable for the total costs of training." Specifically, ODHR is concerned with overcoming inequities in setting an amount both for individuals in a rural area without training facilities and for individuals in an urban area with training facilities. The ODHR asked if it is the intent for the maximum amount allowable, because the cost of subsistence or mileage is part of the cost of training, to limit the kinds or duration of training for individuals in rural areas.

Department's response. The Department agrees with the comments and is amending this section by eliminating the requirement that States establish, annually, a maximum amount allowable for the total cost of training for each worker. While the Congress did not establish a national ceiling for the costs of training for individual workers, the Conferees did state in the Conference Report that they expected the Secretary of Labor to set forth guidelines for State administering agencies to provide approved training at the lowest reasonable cost for the particular type of training in that region consistent with the objective of assisting import impacted workers to obtain suitable skills to return to work as quickly as possible. The 1988 Amendments clearly provide that State administering agencies shall approve training for individual workers at the lowest reasonable cost which will lead to employment and will result in training opportunities for the largest number of adversely affected workers. This means that State administering agencies should avoid approving training for occupations that require an extraordinarily high skill level relative to the worker's current skills level and for which total costs of training, including transportation and subsistence, are excessively high. While the final regulations eliminate the requirement for States to establish a maximum amount allowable for the total costs of training, they continue to provide that States approve training at the lowest reasonable cost for the particular type of training in that region that will lead to employment and will enable the worker to obtain employment within a reasonable period of time.

47. *Child care.* The WESD, commenting on § 617.22, stated it believed that child care is equally important as transportation and subsistence to include as a cost of training. The WESD recommended that child care be included under the definition for supportive services, as is transportation and subsistence. The WESD states that the 1981 Amendments do not permit self-financed training and require TAA or other Federal, State, or private sources to "pay the full costs of the training." Washington contends that the lack of child care would, in fact, require self payment of training costs and it should be included as part of the reasonable costs of training.

Department's response. Section 236(b) authorizes transportation and subsistence expenses applicable to training. Child care is a supportive service to be obtained for individuals under section 235 of the Act (and § 617.21(e)), and is not a training cost in the TAA program. Funds for the administration of sections 225, 231 through 235, 243 and 244 of the Trade Act are appropriated in the State Unemployment Insurance and Employment Service Operations (SUIESO) account. The SUIESO account includes funds for the administration of section 235 activities but not for the direct payment of supportive services for certified individuals. Since child care is a supportive service authorized by section 235 to be provided if available under "any other Federal law", no TAA funds are appropriated for such services.

The Department's position is that the State administering agency, in carrying out its responsibilities under section 235 and § 617.21(e), should make every reasonable effort to secure for adversely affected workers covered by a certification any supportive services, including child care, which are obtainable under any other Federal law, to help individuals in training and to obtain employment. No change is made in the regulations, but § 617.21 is amended to make clear that supportive services are to be provided under other Federal law and may include child care.

48. *Other source funds.* The MESC, commenting on § 617.24(e), stated that this rule allows approval of training for which all, or any portion, of the cost of training is paid "from any other source". The MESC points out that the rule does not sufficiently define acceptable funding sources. Some limits are necessary. Acceptable funding sources should be limited to recognized employment and training programs, including employer training funds. Such funding sources as friends, relatives, and fraternal organizations should not be acceptable, but § 617.24(e) does not preclude them.

Department's response. The Department concurs in this comment and has modified §§ 617.24(e)(2) and 617.25(b)(1) to clarify that other funding sources may not include sources personal to the individual, such as self, relatives, or friends. This is consistent with the Department's prior position on this matter.

49. *Equal monthly installments.* The MESC questioned the application of the requirement in § 617.25(a) that employers be paid in equal monthly installments for on-the-job training (OJT) programs. The MESC stated that problems are associated with trainees entering OJT programs in the middle of the month, trainees receiving raises in wages during the month, and trainees working different hours. The MESC explained that it has attempted to satisfy the intent of the equal monthly payment requirement by having the employer bill for the trainee's hours in training during the month, which results in approximately equal monthly payments. The Governor of Idaho and the WESD presented similar comments on § 617.25. The Governor stated that the proposed rule will require Idaho and possibly many other States to incur additional administrative costs to pay for tracking OJT reimbursements. The WESD suggested that reimbursement to employers for actual hours worked by the trainee, on a monthly basis, would eliminate overpayments.

Department's response. The Department recognizes that the statutory provision requiring payments for OJT to be made to employers in equal monthly installments is presenting problems in negotiating and reimbursing employers for OJT contracts. In negotiating OJT contracts with employers, reasonable costs should be based on the achievement of a prescribed level of job skills, rather than being based solely on the hourly wages of the worker. The hourly wages should serve only as a guide for establishing OJT contract costs. A raise in the worker's wages implies increased proficiency of the worker and higher productivity, and may not form the basis for increasing training costs. Once the cost of OJT for a worker is established, payments can be made in equal monthly installments, with any required adjustment made in the final payment to the employer.

What appears to be troubling to States in administering this provision is thinking of equal monthly installments in terms of equal "dollar" amounts. Instead, it appears most reasonable to base the "equal monthly installments" on the number of hours of paid work during the month, multiplied by the agreed upon rate of payment. Although this would not assure the same dollar figure for each month, it is nonetheless "equal" in the sense that the payment for each month is computed at the same rate. This method would appear to address the concerns expressed in the comments received, and may be accomplished under the present reading of § 617.25(a). For these reasons, no change is made in the regulations.

50. *Pell and similar grants.* The ODHR, commenting on § 617.25(b)(4)(i)(A)(2), stated the rule is clear that when the direct payment of the costs of training has been made under any other Federal law, or the costs are reimbursable under any other Federal law and a portion of the direct costs has already been paid under such other Federal law, payment of such training costs may not be made from TAA funds. The ODHR points out, however, that grants, such as Pell Grants, are often paid directly to the institution to be applied toward tuition. The ODHR feels this contingency should be addressed here and that these funds should be allowed in these cases in determining costs payable from TAA funds for training.

Department's response. The Department agrees that complications are presented in considering appropriate TAA funding in the case of Pell Grants and similar Federal educational assistance. Section 617.25(b)(4)(ii)(C) provides, in implementing section 236(a)(4)(C), that such federal educational assistance paid to the individual may not be taken into account in determining payment of the costs of training from TAA or other funds, but such payments to the individual shall be deducted from TRA under § 617.13(c)(2). Conversely, when such Federal educational assistance is paid to the training institution, to the extent it is used for training costs otherwise payable from TAA funds, it must be taken into account in determining the training costs payable from TAA funds, either alone or in combination with other funds. To clarify this matter, the regulations at § 617.25(b)(4)(ii)(C) are modified; combination funding is otherwise addressed in more detail in the completely revised § 617.25.

51. *OJT approval.* The AFL–CIO recommended that additional standards be added in § 617.25(a) concerning the approval of on-the-job training agreements. Further, the AFL–CIO recommended that since employers available to provide OJT under TAA have offered such training under JTPA, those who failed to meet JTPA requirements should be barred from receiving TAA funds for such training. Such a requirement is clearly in keeping with the emphasis on coordination of TAA program activities with the JTPA Title III program.

Department's response. The requirements in § 617.25(a) are based on existing statutory language, and provide adequate protection to workers from adverse effects under OJT training contracts. The Department agrees that contracts under the TAA program for OJT should not be entered into with employers who failed to meet JTPA requirements. While § 617.25 (a)(9) and (a)(10) are intended to avoid such situations, the final rule is clarified to help ensure that employers who violated a JTPA training contract will be denied TAA training contracts. The words "or under any other Federal law" is added after "this Subpart C" in paragraph (a)(9) of § 617.25, with another addition at the end of paragraph (a)(9) to make this point clear.

52. *Information on waivers.* The UCSP, commenting on § 617.67(c), argues that workers should be furnished information on applying for a waiver of the training requirement in order to receive TRA payments.

Department's response. The Department does not believe a specific provision is needed for the reasons explained in the response to item 12, above.

53. *Homework.* The Amalgamated Clothing and Textile Workers Union (ACTWU) commented that a major problem has recently arisen which affects workers, when the Department lifted the restrictions prohibiting homework in five of the six industries, and announced it will shortly lift the restraints on homework in the women's and children's apparel industry. While this matter is not finally resolved due to court challenges, the TAA regulations have to anticipate the situation of potentially extensive homework in these industries.

Department's response. This issue is beyond the scope of the 1988 Amendments to the TAA program, and the final rule in this document.

Other changes. In addition to the changes discussed above in responses to comments received, other changes are made in the final rule in this document to correct printing errors, and to make technical and conforming changes that either do not affect the substance of the regulations, or, in the case of other provisions (including the transition provisions of § 617.67), are necessary to conform to other changes in the final regulations. Further, references to compliance with "the Act and this Part" are changed to eliminate references to the Act so that it is clear that the regulations are controlling and express the Department's interpretations of the Act.

Drafting Information

This document was prepared under the direction and control of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210: telephone: (202) 219–5555 (this is not a toll free number).

Classification Executive Order 12866

The final rule in this document is not classified as a "major rule" under Executive Order 12866 on Federal Regulations, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1980, 44 U.S.C. Ch. 35, approval of the recordkeeping requirement contained at

§§ 617.19(d) and 617.57 has been obtained from the Office of Management and Budget (control number 12050016, for reporting forms ETA 563 and ETA 9027). OMB control number 12050222 applies to forms used by States to convey reports to the Department as required in §§ 617.52(c) and 617.54.

Regulatory Flexibility Act

No regulatory flexibility analysis is required where the rule "will not . . . have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The definition of the term "small entity" under 5 U.S.C. 601 (6) does not include States. Since these regulations involve an entitlement program administered by the States, and are directed to the States, no regulatory flexibility analysis is required. The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory flexibility analysis is required.

Catalog of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at No. 17.245, "Trade Adjustment Assistance—Workers."

List of Subjects in 20 CFR Part 617

Job search assistance, labor, reemployment services, relocation assistance, trade readjustment allowances, unemployment compensation, vocational education.

Words of Issuance

For the reasons set out in the preamble, part 617 of title 20, Code of Federal Regulations, is amended as set forth below.

Signed at Washington, DC on December 21, 1993.

Doug Ross,

Assistant Secretary of Labor.

PART 617—TRADE ADJUSTMENT ASSISTANCE FOR WORKERS

1. The authority for part 617 continues to read as follows:

Authority: 19 U.S.C. 2320; Secretary's Order No. 3–81, 46 FR 31117.

2. Paragraphs (j), (m), (t), (aa), (ff), and (oo)(4) of § 617.3 are revised to read as follows:

§ 617.3 Definitions.

* * * * *

(j)(1) *Certification* means a certification of eligibility to apply for TAA issued under section 223 of the Act with respect to a specified group of workers of a firm or appropriate subdivision of a firm.

(2) *Certification period* means the period of time during which total and partial separations from adversely affected employment within a firm or appropriate subdivision of a firm are covered by the certification.

* * * * *

(m) *Eligibility period* means the period of consecutive calendar weeks during which basic or additional TRA is payable to an otherwise eligible individual, and for an individual such eligibility period is—

(1) *Basic TRA.* (i) With respect to a first qualifying separation (as defined in paragraph (t)(3)(i)(A) of this section) that occurs on a day that precedes August 23, 1988, the 104-week period beginning with the first week following the week with respect to which the individual first exhausts all rights to regular compensation (as defined in paragraph (oo)(1) of this section) in such individual's first benefit period (as described in § 617.11(a)(1)(iv)) or § 617.11(a)(2)(iv), whichever is applicable), and

(ii) With respect to a total qualifying separation (as defined in paragraph (t)(3)(i)(B) of this section) that occurs on or after August 23, 1988—or before August 23, 1988, if the individual also had a prior first qualifying separation under the same certification—the 104-week period beginning with the first week following the week in which such total qualifying separation occurred;

Provided, that, an individual who has a second or subsequent total qualifying separation within the certification period of the same certification shall be determined to have a new 104-week eligibility period based upon the most recent such total qualifying separation; but the rule of this proviso shall not be applicable in the case of an individual who had a total qualifying separation before August 23, 1988, and also had a prior first qualifying separation (as referred to in paragraph (m)(1)(i) of this section) within the certification period of the same certification, if the individual's 104-week eligibility period based upon the total qualifying separation (as referred to in paragraph (m)(1)(i) of this section) would end on a date earlier than the ending date of the individual's eligibility period which is based upon the prior first qualifying separation; and

(2) *Additional TRA.* With respect to additional weeks of TRA, and any individual determined under this part 617 to be entitled to additional TRA, the consecutive calendar weeks that occur in the 26-week period that—

(i) Immediately follows the last week of entitlement to basic TRA otherwise payable to the individual, or

(ii) Begins with the first week of training approved under this part 617, if such training begins after the last week described in paragraph (m)(2)(i) of this section, or

(iii) Begins with the first week in which such training is approved under this part 617, if such training is so approved after the training has commenced; but approval of training under this part 617 after the training has commenced shall not imply or justify approval of a payment of basic or additional TRA with respect to any week which ended before the week in which such training was approved, nor approval of payment of any costs of training or any costs or expenses associated with such training (such as travel or subsistence) which were incurred prior to the date of the approval of such training under this part 617.

* * * * *

(t)(1) *First separation* means, for an individual to qualify as an adversely affected worker for the purposes of TAA program benefits (without regard to whether the individual also qualifies for TRA), the individual's first total or partial separation within the certification period of a certification, irrespective of whether such first separation also is a qualifying separation as defined in paragraph (t)(2) of this section;

(2) *Qualifying separation* means, for an individual to qualify as an adversely affected worker and for basic TRA—

(i) Prior to August 23, 1988, the individual's first (total or partial) separation within the certification period of a certification, with respect to which the individual meets all of the requirements of § 617.11(a)(1) (i) through (iv), and which qualifies as a first qualifying separation as defined in paragraph (t)(3)(i)(A) of this section, and

(ii) At any time before, on, or after August 23, 1988, any total separation of the individual within the certification period of a certification (other than a first qualifying separation as defined in paragraph (t)(3)(i)(A) of this section), with respect to which the individual meets all of the requirements in § 617.11(a)(2) (i) through (iv), and which qualifies as a total qualifying separation as defined in paragraph (B) of (t)(3)(i)(B) of this section;

(3) "First qualifying separation" means—

(i) For the purposes of determining an individual's eligibility period for basic TRA—

(A) with respect to a separation that occurs before August 23, 1988, the individual's first (total or partial) separation within the certification period of a certification, with respect to which the individual meets all of the requirements of § 617.11(a)(1) (i) through (iv), and

(B) with respect to a separation that occurs before, on, or after August 23, 1988 (other than a first qualifying separation as defined in paragraph (t)(3)(i)(A) of this section), the first total separation of the individual within the certification period of a certification, with respect to which the individual meets all of the requirements in § 617.11(a)(2) (i) through (iv); and

(ii) For the purposes of determining the weekly and maximum amounts of basic TRA payable to an individual, with respect to a separation that occurs before, on, or after August 23, 1988, the individual's first (total or partial) separation within the certification period of a certification if, with respect to such separation, the individual meets the requirements of § 617.11(a)(1) (i), (ii) and (iv) or § 617.11(a)(2) (i), (ii) and (iv).

* * * * *

(aa) *Liable State* and *Agent State* are defined as follows:

(1) *Liable State* means, with respect to any individual, the State whose State law is the applicable State law as determined under § 617.16 for all purposes of this Part 617.

(2) *Agent State* means, with respect to any individual, any State other than the State which is the liable State for such individual.

* * * * *

(ff)(1) *Secretary* means the Secretary of Labor of the United States of America.

(2) *Department of Labor* or *Department* means the United States Department of Labor or the Employment and Training Administration within the Department.

* * * * *

(oo) * * *

(4) *Federal supplemental compensation* means the supplemental unemployment compensation payable to individuals who have exhausted their rights to regular and extended compensation, and which is payable under the Federal Supplemental Compensation Act of 1982 or any similar Federal law enacted before or after the 1982 Act.

* * * * *

4. Sections 617.3(h)(1) and 617.3(kk) (1) and (2) are revised to read as follows.

§ 617.3 Definitions.

* * * * *

(h) *Benefit period* * * *

(1) The benefit year and any ensuing period, as determined under the applicable State law, during which the individual is eligible for regular compensation, additional compensation, extended compensation, or federal supplemental compensation, as these terms are defined by paragraph (oo) of this section; or

* * * * *

(kk) *Suitable work* * * *

(1) Suitable work as defined in the applicable State law for claimants for regular compensation (as defined in paragraph (oo)(1) of this section); or

(2) Suitable work as defined in applicable State law provisions consistent with section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970;

whichever is applicable, but does not in any case include self-employment or employment as an independent contractor.

* * * * *

5. Section 617.4 is amended by revising the heading of paragraph (c) and adding new paragraphs (d) and (e) to read as follows:

§ 617.4 Benefit information to workers.

* * * * *

(c) *Providing information to State vocational education agencies and others.* * * *

(d) *Written and newspaper notices.* (1) *Written notices to workers.* (i) Upon receipt of a certification issued by the Department of Labor, the State agency shall provide a written notice through the mail of the benefits available under subparts B through E of this part 617 to each worker covered by a certification issued under section 223 of the Act when the worker is partially or totally separated or as soon as possible after the certification is issued if such workers are already partially or totally separated from adversely affected employment.

(ii) The State agency will satisfy this requirement by obtaining from the firm, or other reliable source, the names and addresses of all workers who were partially or totally separated from adversely affected employment before the certification was received by the agency, and workers who are thereafter partially or totally separated within the certification period. The State agency shall mail a written notice to each such worker of the benefits available under the TAA Program. The notice must include the following information:

(A) Worker group(s) covered by the certification, and the article(s) produced as specified in the copy of the certification furnished to the State agency.

(B) Name and the address or location of workers' firm.

(C) Impact, certification, and expiration dates in the certification document.

(D) Benefits and reemployment services available to eligible workers.

(E) Explanation of how workers apply for TAA benefits and services.

(F) Whom to call to get additional information on the certification.

(G) When and where the workers should come to apply for benefits and services.

(2) *Newspaper notices.* (i) Upon receipt of a copy of a certification issued by the Department affecting workers in a State, the State agency shall publish a notice of such certification in a newspaper of general circulation in areas in which such workers reside. Such a newspaper notice shall not be required to be published, however, in the case of a certification with respect to which the State agency can substantiate, and enters in its records evidence substantiating, that all workers covered by the certification have received written notice required by paragraph (d)(1) of this section.

(ii) A published notice must include the following kinds of information:

(A) Worker group(s) covered by the certification, and the article(s) produced as specified in the copy of the certification furnished to the State agency.

(B) Name and the address or location of workers' firm.

(C) Impact, certification, and expiration dates in the certification document.

(D) Benefits and reemployment services available to eligible workers.

(E) Explanation of how and where workers should apply for TAA benefits and services.

(e) *Advice and assistance to workers.* In addition to the information and assistance to workers as required under paragraphs (a) and (b) of this section, State agencies shall—

(1) Advise each worker who applies for unemployment insurance under the State law of the benefits available under subparts B through E of this part and the procedures and deadlines for applying for such benefits.

(2) Facilitate the early filing of petitions under section 221 of the Act and § 617.4(b) for any workers that the agency considers are likely to be eligible for benefits. State agencies shall utilize information received by the State's dislocated worker unit to facilitate the early filing of petitions under section 221 of the Act by workers potentially adversely affected by imports.

(3) Advise each adversely affected worker to apply for training under

§ 617.22(a) before, or at the same time as, the worker applies for trade readjustment allowances under subpart B of this part.

(4) Interview each adversely affected worker, as soon as practicable, regarding suitable training opportunities available to the worker under § 617.22(a) and review such opportunities with the worker.

6. Section 617.10 is amended by adding a new paragraph (d) to read as follows:

§ 617.10 Applications for TRA.

* * * * *

(d) *Advising workers to apply for training.* State agencies shall advise each worker of the qualifying requirements for entitlement to TRA and other TAA benefits at the time the worker files an initial claim for State UI, and shall advise each adversely affected worker to apply for training under subpart C of this part before, or at the same time, the worker applies for TRA, as required by § 617.4(e)(1) and (3).

7. Section 617.11 is revised to read as follows:

§ 617.11 Qualifying requirements for TRA.

(a) *Basic qualifying requirements for entitlement*—(1) *Prior to November 21, 1988.* To qualify for TRA for any week of unemployment that begins prior to November 21, 1988, an individual must meet each of the following requirements of paragraphs (a)(1) (i) through (vii) of this section:

(i) *Certification.* The individual must be an adversely affected worker covered under a certification.

(ii) *Separation.* The individual's first qualifying separation (as defined in paragraph (t)(3)(i) of § 617.3) before application for TRA must occur:

(A) On or after the impact date of such certification; and

(B) Before the expiration of the two-year period beginning on the date of such certification, or, if earlier, before the termination date, if any, of such certification.

(iii) *Wages and employment.* (A) In the 52-week period (i.e., 52 consecutive calendar weeks) ending with the week of the individual's first qualifying separation, the individual must have had at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm. Evidence that an individual meets this requirement shall be obtained as provided in § 617.12. Employment and wages covered under more than one certification may not be combined to qualify for TRA.

(B)(*1*) For the purposes of paragraph (a)(1)(iii) of this section, any week in which such individual—

(*i*) is on employer-authorized leave from such adversely affected employment for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training, or

(*ii*) does not work in such adversely affected employment because of a disability compensable under a workers' compensation law or plan of a State or the United States, or

(*iii*) had adversely affected employment interrupted to serve as a full-time representative of a labor organization in such firm or subdivision,

shall be treated as a week of employment at wages of $30 or more:

(*2*) *Provided*, that—

(*i*) not more than 7 weeks in the case of weeks described in paragraph (a)(1)(iii)(B)(*1*)(*i*) or paragraph (a)(1)(*iii*)(B)(*1*)(*iii*) of this section, or both, and (*ii*) not more than 26 weeks described in paragraph (a)(1)(iii)(B)(*1*)(*ii*) of this section,

may be treated as weeks of employment for purposes of paragraph (a)(1)(iii) of this section.

(C) Wages and employment creditable under paragraph (a)(1)(iii) of this section shall not include employment or wages earned or paid for employment which is contrary to or prohibited by any Federal law.

(iv) *Entitlement to UI.* The individual must have been entitled to (or would have been entitled to if the individual had applied therefor) UI for a week within the benefit period—

(A) in which the individual's first qualifying separation occurred, or

(B) which began (or would have begun) by reason of the filing of a claim for UI by the individual after such first qualifying separation.

(v) *Exhaustion of UI.* The individual must:

(A) Have exhausted all rights to any UI to which the individual was entitled (or would have been entitled to if the individual had applied therefor); and

(B) Not have an unexpired waiting period applicable to the individual for any such UI.

(vi) *Extended Benefit work test.* (A) The individual must—

(*1*) Accept any offer of suitable work, as defined in § 617.3(kk), and actually apply for any suitable work the individual is referred to by the State agency, and

(*2*) Actively engage in seeking work and furnish the State agency tangible evidence of such efforts each week, and

(*3*) Register for work and be referred by the State agency to suitable work,

in accordance with those provisions of the applicable State law which apply to claimants for Extended Benefits and which are consistent with Part 615 of this Chapter.

(B) The Extended Benefit work test shall not apply to an individual with respect to claims for TRA for weeks of unemployment beginning prior to the filing of an initial claim for TRA, nor for any week which begins before the individual is notified that the individual is covered by a certification issued under the Act and is fully informed of the Extended Benefit work test requirements of paragraph (a)(1)(vi) of this section and § 617.17. Prior to such notification and advice, the individual shall not be subject to the Extended Benefit work test requirements, nor to any State timely filing requirement, but shall be required to be unemployed and able to work and available for work with respect to any such week except as provided for workers in approved training in § 617.17(b)(1).

(vii) *Job search program participation* (A) The individual is enrolled in, participating in, or has successfully completed a job search program which meets the requirements of § 617.49(a); or the State agency has determined that no acceptable job search program is reasonably available under the criteria set forth in § 617.49(c).

(B) The job search program requirement shall not apply to an individual with respect to claims for TRA for weeks of unemployment beginning prior to the filing of an initial claim for TRA, nor for any week which begins before the individual is notified that the individual is covered by a certification issued under the Act and is fully informed of the job search program requirement of paragraph (a)(1)(vii) of this section and § 617.49.

(C) The job search program requirement shall not apply to an individual, as a qualifying requirement for TRA, with respect to any week ending after November 20, 1988, but cooperating State agencies are encouraged to continue to utilize job search programs after November 20, 1988, as an effective tool to assist adversely affected workers in finding suitable employment, particularly unemployed workers who have completed training or for whom the training requirement has been waived under § 617.19.

(2) *On and after November 21, 1988* To qualify for TRA for any week of unemployment that begins on or after November 21, 1988, an individual must

meet each of the following requirements of paragraphs (a)(2) (i) through (vii) of this section:

(i) *Certification.* The individual must be an adversely affected worker covered under a certification.

(ii) *Separation.* The individual's first qualifying separation (as defined in paragraph (t)(3)(i) of § 617.3) before application for TRA must occur:

(A) On or after the impact date of such certification; and

(B) Before the expiration of the two-year period beginning on the date of such certification, or, if earlier, before the termination date, if any, of such certification.

(iii) *Wages and employment.* (A) In the 52-week period (i.e., 52 consecutive calendar weeks) ending with the week of the individual's first qualifying separation, or any subsequent total qualifying separation under the same certification, the individual must have had at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm. Evidence that an individual meets this requirement shall be obtained as provided in § 617.12. Employment and wages covered under more than one certification may not be combined to qualify for TRA.

(B)(*1*) For the purposes of paragraph (a)(2)(iii) of this section, any week in which such individual—

(*i*) Is on employer-authorized leave from such adversely affected employment for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training, or

(*ii*) Does not work in such adversely affected employment because of a disability compensable under a workers' compensation law or plan of a State or the United States, or

(*iii*) Had adversely affected employment interrupted to serve as a full-time representative of a labor organization in such firm or subdivision, or

(*iv*) Is on call-up for the purpose of active duty in a reserve status in the Armed Forces of the United States (if such week began after August 1, 1990), provided such active duty is "Federal service" as defined in part 614 of this chapter,

shall be treated as a week of employment at wages of $30 or more;

(*2*) *Provided,* that—

(*i*) Not more than 7 weeks in the case of weeks described in paragraph (a)(2)(iii)(B)(*1*) (*i*) or (*iii*) of this section, or both, and

(*ii*) Not more than 26 weeks described in paragraph (a)(2)(iii)(B)(*1*) (*ii*) or (*iv*) of this section,

may be treated as weeks of employment for purposes of paragraph (a)(2)(iii) of this section.

(C) Wages and employment creditable under paragraph (a)(2)(iii) of this section shall not include employment or wages earned or paid for employment which is contrary to or prohibited by any Federal law.

(iv) *Entitlement to UI.* The individual must have been entitled to (or would have been entitled to if the individual had applied therefor) UI for a week within the benefit period—

(A) in which the individual's first qualifying separation occurred, or

(B) which began (or would have begun) by reason of the filing of a claim for UI by the individual after such first qualifying separation.

(v) *Exhaustion of UI.* The individual must:

(A) Have exhausted all rights to any UI to which the individual was entitled (or would have been entitled if the individual had applied therefor); and

(B) Not have an unexpired waiting period applicable to the individual for any such UI.

(vi) *Extended Benefit work test.* (A) The individual must—

(*1*) Accept any offer of suitable work, as defined in § 617.3(kk), and actually apply for any suitable work the individual is referred to by the State agency, and

(*2*) Actively engage in seeking work and furnish the State agency tangible evidence of such efforts each week, and

(*3*) Register for work and be referred by the State agency to suitable work,

in accordance with those provisions of the applicable State law which apply to claimants for Extended Benefits and which are consistent with part 615 of this chapter.

(B) The Extended Benefit work test shall not apply to an individual with respect to claims for TRA for weeks of unemployment beginning prior to the filing of an initial claim for TRA, nor for any week which begins before the individual is notified that the individual is covered by a certification issued under the Act and is fully informed of the Extended Benefit work test requirements of paragraph (a)(2)(vi) of this section and § 617.17. Prior to such notification and advice, the individual shall not be subject to the Extended Benefit work test requirements, nor to any State timely filing requirement, but shall be required to be unemployed and able to work and available for work with respect to any such week except as provided in § 617.17(b)(2) for workers enrolled in, or participating in, a training program approved under § 617.22(a).

(vii) *Participation in training.* (A) The individual must—

(*1*) Be enrolled in or participating in a training program approved pursuant to § 617.22(a), or

(*2*) Have completed a training program approved under § 617.22(a), after a total or partial separation from adversely affected employment within the certification period of a certification issued under the Act, or

(*3*) Have received from the State agency a written statement under § 617.19 waiving the participation in training requirement for the individual.

(B) The participation in training requirement of paragraph (a)(2)(vii) of this section shall not apply to an individual with respect to claims for TRA for weeks of unemployment beginning prior to the filing of an initial claim for TRA, nor for any week which begins before the individual is notified that the individual is covered by a certification issued under the Act and is fully informed of the participation in training requirement of paragraph (a)(2)(vii) of this section and § 617.19.

(C) The participation in training requirement of paragraph (a)(2)(vii) of this section shall apply, as a qualifying requirement for TRA, to an individual with respect to claims for TRA for weeks of unemployment commencing on or after November 21, 1988, and beginning with the first week following the week in which a certification covering the individual is issued under the Act, unless the State agency has issued a written statement to the individual under § 617.19 waiving the participation in training requirement for the individual.

(D) For purposes of paragraph (a)(2)(vii) of this section, the following definitions shall apply:

(*1*) *Enrolled in Training.* A worker shall be considered to be enrolled in training when the worker's application for training is approved by the State agency and the training institution has furnished written notice to the State agency that the worker has been accepted in the approved training program which is to begin within 30 calendar days of the date of such approval. (A waiver under § 617.19 shall not be required for an individual who is enrolled in training as defined herein.)

(*2*) *Completed Training.* A worker shall be considered to have completed a training program if the training program was approved, or was approvable and is approved, pursuant to § 617.22, and the training was

completed subsequent to the individual's total or partial separation from adversely affected employment within the certification period of a certification issued under the Act, and the training provider has certified that all the conditions for completion of the training program have been satisfied.

(3) *Special rules for workers separated in 1981 to 1986 period.* (i) *Basic conditions.* Under section 1425(b) of the Omnibus Trade and Competitiveness Act of 1988 (the "OTCA") (Pub. L. 100–418) the time limit on the eligibility period for basic TRA in section 233(a)(2) of the Act (before and after the amendment by Public Law 100–418), and the 210-day time limit in section 233(b) of the Act on the filing of a bona fide application for training in order to qualify for additional TRA, are set aside and shall be disregarded for any individual separated from adversely affected employment in the period which began on August 13, 1981, and ended on April 7, 1986: *Provided,* That, any such individual must meet all of the following requirements of paragraphs (a)(3)(i)(A) through (E) of this section to qualify for TRA for any week.

(A) *Period of separation.* The separation of the individual must have occurred on a date within the period which began on August 13, 1981 and ended on April 7, 1986.

(B) *Total separation required.* Such separation must be a "total separation" as defined in § 617.3(ll), and a "total qualifying separation" as defined in § 617.3(t)(3)(i)(B); and, for the purposes of determining whether an individual has been continuously unemployed, as defined in § 617.3(t)(3)(i)(E), only the last such total separation within the August 13, 1981 to April 7, 1986 period shall be taken into account.

(C) *Other standard requirements.* The individual must, with respect to such total separation, meet all of the requirements of paragraphs (a)(2)(i) through (v) of this section.

(D) *Participation in training.* (1) The individual must meet the requirements of paragraph (a)(2)(vii) of this section, with respect to being enrolled in or participating in a training program approved pursuant to § 617.22(a), as to each week TRA is claimed, and not be ineligible under § 617.18(b)(2) for failure to begin participation in such training or for ceasing to participate in such training.

(2) With respect to participation in training, as required under paragraph (a)(3) of this section, the break in training provisions of § 617.15(d) shall be applicable, and the waiver of participation provisions in § 617.19 shall not be applicable.

(E) *Continuously unemployed.* (1) The individual must have been continuously unemployed since the date of the individual's total separation referred to in paragraph (a)(2)(vii)(B) of this section, not taking into account for the purposes of this determination any work in which the individual was employed in seasonal employment, odd jobs, or part-time, temporary employment.

(2) For purposes of § 617.11(a)(3)(i)(E)(1), continuously unemployed shall mean the individual has not been engaged in any employment, except for seasonal employment, odd-jobs, or part-time, temporary employment. Employment shall be considered:

(*i*) *Seasonal employment* when seasonality provisions of the applicable State law are applicable to such employment; or

(*ii*) An *odd job* when the established period of employment occurs within five (5) consecutive days or less; or

(*iii*) *Part-time, temporary employment* when a termination date of one hundred fifty (150) days or less was established at the time of employment, and the average weekly hours for the job, over the period of employment, was less than 30 hours per week.

(ii) *TRA payments prospective only.* The provisions of paragraph (a)(3) of this section apply to payments of TRA only for weeks which begin after August 23, 1988, and with respect to training in which the individual becomes enrolled and begins participation before or after such date, and which is approved under § 617.22(a) before or after such date. No payment of TRA may be authorized under paragraph (a)(3) of this section for any week which ends before such training is approved under § 617.22(a).

(iii) *Other special rules.* (1) Although the last total qualifying separation of an individual will be used for the purposes of the determination under paragraph (a)(3)(i)(B) of this section, the individual's first qualifying separation (as defined in paragraph (t)(3)(ii) of § 617.3) must be used to determine the weekly and maximum amounts payable to the individual in accordance with §§ 617.13 and 617.14.

(2) No individual shall be determined to be eligible for TRA under paragraph (a)(3) of this section if the individual has previously received all of the basic and additional TRA to which the individual was entitled.

(3) The 26-week eligibility period for additional TRA is applicable under paragraph (a)(3) of this section, as such term is defined in paragraph (m)(2) of § 617.3.

(4) *Special rules for oil and gas workers—retroactive.* (i) *Basic conditions.* Under section 1421(a)(1)(B) of the OTCA, individuals employed by independent firms engaged in exploration or drilling for oil and natural gas who were separated after September 30, 1985, may be entitled, retroactively, to TAA program benefits, but only if, as to any such individual, all of the conditions in the following provisions of paragraph (a)(4) of this section are met.

(ii) *Prior certification.* Individuals covered by this paragraph (a)(4) do not include any individual covered under a certification (made with respect to the same firm or subdivision of a firm) that was issued under section 223 of the Act without regard to the amendments to section 222 of the Act (relating to oil and gas workers) made by section 1421 (a)(1)(A) of the OTCA.

(iii) *Petition.* (A) To apply for a certification under section 223 covering workers referred to in section 1421 (a)(1)(B) of the OTCA, a petition must have been filed in the Office of Trade Adjustment Assistance after August 23, 1988, and on or before November 18, 1988, by or on behalf of a group of workers of such a firm or subdivision of a firm.

(B) A petition, to be valid, may not be signed by or on behalf of an individual referred to in paragraph (a)(4)(ii) of this section.

(iv) *Certification.* (A) As provided in section 1421(a) (1)(B) of the OTCA, a certification issued pursuant to section 223 of the Act will not be subject to the one-year limitation on the impact date which is specified in section 223(b) of the Act, but the impact date of any such certification may not be a date earlier than October 1, 1985.

(B) A certification shall not be issued under the authority of section 1421(a)(1)(B) of the OTCA if a certification could have been issued under section 223 of the Act before or after the amendment made by section 1421(a)(1)(A) of the OTCA.

(v) *Coverage of certification.* Individuals covered by a certification issued under the authority of section 1421(a)(1)(B) of the OTCA will be eligible to apply for TAA program benefits as follows:

(A) Basic and additional TRA, retroactively and prospectively, subject to the conditions stated in paragraph (a)(4) of this section;

(B) Training, prospectively, subject to the conditions stated in subpart C of this part;

(C) Job search allowances, prospectively, subject to the conditions stated in subpart D of this part; and

(D) Relocation allowances, prospectively, subject to the conditions stated in subpart E of this part.

(vi) *TRA entitlement.* To qualify for TRA for any week, an individual must meet all of the following requirements of paragraphs (a)(4)(vi)(A) through (D) of this section;

(A) *Certification.* The individual must be an adversely affected worker covered under a certification issued pursuant to section 223 of the Act and under the authority of section 1421(a)(1)(B) of the OTCA.

(B) *Date of separation.* The date of the individual's most recent total separation (as defined in § 617.3) must be a date after September 30, 1985, and within the certification period of the certification under which the worker is covered. Separations occurring prior to October 1, 1985, shall be disregarded for the purposes of determining whether an individual experienced a total separation after September 30, 1985.

(C) *Other standard requirements.* (*1*) With respect to weeks of unemployment that begin after September 30, 1985, but prior to November 21, 1988, the individual must, with respect to the separation referred to in paragraph (a)(4)(vi)(B) of this section, meet all of the requirements of paragraph (a)(1)(i) through (vii) of this section, and

(*2*) With respect to weeks of unemployment that begin on or after November 21, 1988, the individual must meet all of the requirements of paragraphs (a)(2)(i) through (vii) of this section.

(D) *Other special rules.* (*1*) Although an individual's most recent total or partial separation after September 30, 1985 must be used for the purposes of this paragraph (a)(4)(vi)(B) of this section, the individual's first qualifying separation (as defined in paragraph (t)(3)(ii) of § 617.3) must be used to determine the weekly and maximum amounts payable to the individual in accordance with §§ 617.13 and 617.14.

(*2*) The 60-day preclusion rule in paragraph (b)(1) of this section shall not be applicable to an individual covered by a certification referred to in paragraph (a)(4)(vi)(A) of this section, and who is eligible for TRA under the provisions of paragraph (a)(4) of this section.

(*3*) The 26-week eligibility period for additional TRA (as defined in paragraph (m)(2) of § 617.3) is applicable under paragraph (a)(4) of this section.

(b) *First week of entitlement.* The first week any individual may be entitled to a payment of basic TRA shall be the later of:

(1) The first week beginning more than 60 days after the date of the filing of the petition which resulted in the certification under which the individual is covered (except in the case of oil and gas workers to whom paragraph (a)(4) of this section applies); or

(2) The first week beginning after the individual's exhaustion of all rights to UI including waiting period credit, as determined under § 617.11(a)(1)(v) or § 617.11(a)(2), as appropriate.

8. Section 617.14(a)(2) is revised to read as follows:

§ 617.14 Maximum amount of TRA.

(a) *General rule.* * * *

(2) Subtracting from the product derived under paragraph (a)(1) of this section, the total sum of UI to which the individual was entitled (or would have been entitled if the individual had applied therefor) in the individual's first benefit period described in § 617.11(a)(1)(iv) or, as appropriate, § 617.11(a)(2)(iv). The individual's full entitlement shall be subtracted under this paragraph, without regard to the amount, if any, that was actually paid to the individual with respect to such benefit period.

9. Section 617.15 is revised to read as follows:

§ 617.15 Duration of TRA.

(a) *Basic weeks.* An individual shall not be paid basic TRA for any week beginning after the close of the 104-week eligibility period (as defined in § 617.3(m)(1)), which is applicable to the individual as determined under §§ 617.3 (m)(1), 617.3(t), and 617.67(e).

(b) *Additional weeks.* (1) To assist an individual to complete training approved under subpart C of this part, payments may be made as TRA for up to 26 additional weeks in the 26-week eligibility period (as defined in § 617.3(m)(2)) which is applicable to the individual as determined under §§ 617.3(m)(2) and 617.67(f).

(2) To be eligible for TRA for additional weeks, an individual must make a bona fide application for such training—

(i) within 210 days after the date of the first certification under which the individual is covered, or

(ii) if later, within 210 days after the date of the individual's most recent partial or total separation (as defined in §§ 617.3(cc) and 617.3(ll)) under such certification.

(3) Except as provided in paragraph (d) of this section, payments of TRA for additional weeks may be made only for those weeks in the 26-week eligibility period during which the individual is actually participating fully in training approved under § 617.22(a).

(c) *Limit.* The maximum TRA payable to any individual on the basis of a single certification is limited to the maximum amount of basic TRA as determined under § 617.14 plus additional TRA for up to 26 weeks as provided in paragraph (b) of this section.

(d) *Scheduled breaks in training.* (1) An individual who is otherwise eligible will continue to be eligible for basic and additional weeks of TRA during scheduled breaks in training, but only if a scheduled break is not longer than 14 days, and the following additional conditions are met:

(i) The individual was participating in the training approved under § 617.22(a) immediately before the beginning of the break; and

(ii) The break is provided for in the published schedule or the previously established schedule of training issued by the training provider or is indicated in the training program approved for the worker; and, further

(iii) The individual resumes participation in the training immediately after the break ends.

(2) A scheduled break in training shall include all periods within or between courses, terms, quarters, semesters and academic years of the approved training program.

(3) No basic or additional TRA will be paid to an individual for any week which begins and ends within a scheduled break that is 15 days or more.

(4) The days within a break in a training program that shall be counted in determining the number of days of the break for the purposes of paragraph (d) of this section shall include all calendar days beginning with the first day of the break and ending with the last day of the break, as provided for in the schedule of the training provider, except that any Saturday, Sunday, or official State or National holiday occurring during the scheduled break in training, on which training would not normally be scheduled in the training program if there were no break in training, shall not be counted in determining the number of days of the break for the purposes of paragraph (d) of this section.

(5) When the worker is drawing basic TRA, the maximum amount of TRA payable is not affected by the weeks the worker does not receive TRA while in a break period, but the weeks will count against the 104-week eligibility period.

(6) When the worker is drawing additional weeks of TRA to complete training, any weeks for which TRA is not paid will count against the continuous 26-week eligibility period and the number of weeks payable.

10. Section 617.16 is revised to read as follows:

§ 617.16 Applicable State law.

(a) *What law governs.* The applicable State law for any individual, for all of the purposes of this part 617, is the State law of the State—

(1) In which the individual is entitled to UI (whether or not the individual has filed a claim therefor) immediately following the individual's first separation (as defined in paragraph (t)(1) of § 617.3), or

(2) If the individual is not so entitled to UI under the State law of any State immediately following such first separation, or is entitled to UI under the Railroad Unemployment Insurance Act (RRUI), the State law of the State in which such first separation occurred.

(b) *Change of law.* The State law determined under paragraph (a) of this section to be the applicable State law for an individual shall remain the applicable State law for the individual until the individual becomes entitled to UI under the State law of another State (whether or not the individual files a claim therefor).

(c) *UI entitlement.* (1) An individual shall be deemed to be entitled to UI under a State law if the individual satisfies the base period employment and wage qualifying requirements of such State law.

(2) In the case of a combined-wage claim (Part 616 of this chapter), UI entitlement shall be determined under the law of the paying State.

(3) In case of a Federal UI claim, or a joint State and Federal UI claim (Parts 609 and 614 of this Chapter), UI entitlement shall be determined under the law of the State which is the applicable State for such claims.

(d) *RRUI claimants.* If an individual is entitled to UI under the Railroad Unemployment Insurance Act, the applicable State law for purposes of paragraphs (a) and (b) of this section is the law of the State in which the individual's first qualifying separation occurs.

(e) *Liable State.* The State whose State law is determined under this section to be the applicable State law for any individual shall be the liable State for the individual for all purposes of this part 617. Any State other than the liable State shall be an agent State.

11. Section 617.17 is revised to read as follows:

§ 617.17 Availability and active search for work.

(a) *Extended Benefit work test applicable.* Except as provided in paragraph (b) of this section, an individual shall, as a basic condition of entitlement to basic TRA for a week of unemployment—

(1) be unemployed, as defined in the applicable State law for UI claimants, and

(2) be able to work and available for work, as defined in the applicable State law for UI claimants, and

(3) satisfy the Extended Benefit work test in each week for which TRA is claimed, as set forth in §§ 617.11(a)(1)(vi) and 617.11(a)(2)(vi).

(b) *Exceptions*—(1) *Prior to November 21, 1988.* The conditions stated in paragraphs (a) and (b) of this section shall not be applicable to an individual actually participating in training approved under the applicable State law or under § 617.22(a), or during a scheduled break in the training program if (as determined for the purposes of § 617.15 (d)) the individual participated in the training immediately before the beginning of the break and resumes participation in the training immediately after the break ends, unless the individual is ineligible or subject to disqualification under the applicable State law or § 617.18 (b)(2).

(2) *On and after November 21, 1988.* The conditions stated in paragraphs (a)(2) and (a)(3) of this section shall not be applicable to an individual who is enrolled in or participating in a training program approved under § 617.22 (a), or during a break in the training program if (as determined for the purposes of § 617.15(d)) the individual participated in the training immediately before the beginning of the break and resumes participation in the training immediately after the break ends.

12. Paragraph (b) of § 617.18 is revised to read as follows:

§ 617.18 Disqualifications.

* * * * *

(b) *Disqualification of trainees*—(1) *State law inapplicable.* A State law shall not be applied to disqualify an individual from receiving either UI or TRA because the individual:

(i) Is enrolled in or is participating in a training program approved under § 617.22(a); or

(ii) Refuses work to which the individual has been referred by the State agency, if such work would require the individual to discontinue training, or if added to hours of training would occupy the individual more than 8 hours a day or 40 hours a week, except that paragraph (b)(1)(ii) of this section shall not apply to an individual who is ineligible under paragraph (b)(2) of this section; or

(iii) Quits work, if the individual was employed in work which was not suitable (as defined in § 617.22(a)(1)), and it was reasonable and necessary for the individual to quit work to begin or continue training approved for the individual under § 617.22(a).

(2) *Trainees ineligible.* (i) An individual who, without justifiable cause, fails to begin participation in a training program which is approved under § 617.22(a), or ceases to participate in such training, or for whom a waiver is revoked pursuant to § 617.19(c), shall not be eligible for basic TRA, or any other payment under this part 617, for the week in which such failure, cessation, or revocation occurred, or any succeeding week thereafter until the week in which the individual begins or resumes participation in a training program that is approved under § 617.22(a).

(ii) For purposes of this section and other provisions of this Part 617, the following definitions shall be used:

(A) *Failed to begin participation.* A worker shall be determined to have failed to begin participation in a training program when the worker fails to attend all scheduled training classes and other training activities in the first week of the training program, without justifiable cause.

(B) *Ceased participation.* A worker shall be determined to have ceased participation in a training program when the worker fails to attend all scheduled training classes and other training activities scheduled by the training institution in any week of the training program, without justifiable cause.

(C) *Justifiable cause.* For the purposes of paragraph (b)(2) of this section, the term "justifiable cause" means such reasons as would justify an individual's conduct when measured by conduct expected of a reasonable individual in like circumstances, including but not limited to reasons beyond the individual's control and reasons related to the individual's capability to participate in or complete an approved training program.

* * * * *

13. A new § 617.19 is added to read as follows:

§ 617.19 Requirement for participation in training.

(a) *In general*—(1) *Basic requirement.* (i) All individuals otherwise entitled to basic TRA, for all weeks beginning on and after November 21, 1988, must either be enrolled in or participating in a training program approved under § 617.22(a), or have completed a training program approved under § 617.22(a), as provided in § 617.11(a)(2)(vii), in order to be entitled to basic TRA payments for any such week (except for continuation of payments during scheduled breaks in training of 14 days or less under the

conditions stated in § 617.15(d)). The training requirement of paragraph (a)(1)(i) of this section shall be waived in writing on an individual basis, solely in regard to entitlement to basic TRA, if approval of training for the individual is not feasible or is not appropriate, as determined in accordance with paragraph (a)(2) of this section.

(ii) As a principal condition of entitlement to additional TRA payments, all individuals must actually be participating in a training program approved under § 617.22(a), for all weeks beginning before November 21, 1988, and for all weeks beginning on and after November 21, 1988 (except for continuation of payments during breaks in training under the conditions stated in § 617.15(d)). Paragraph (a)(2) of this section is not applicable in regard to additional TRA, and the participation in training requirement of paragraph (a)(1)(ii) of this section may not be waived under any circumstances.

(2) *Waiver of participation requirement.* When it is determined, in accordance with paragraph (a)(2) of this section, that it is not feasible or is not appropriate (as such terms are defined in paragraph (b) of this section) to approve a training program for an individual otherwise entitled to basic TRA, the individual shall be furnished a formal written notice of waiver, with an explanation of the reason(s) for the waiver and a statement of why training is not feasible or is not appropriate in the case of such individual. At a minimum, the written statement furnished to the individual shall contain information required by § 617.50(e) as well as the following information:

(i) Name and social security number of the individual;

(ii) Petition number under which the worker was certified;

(iii) A statement why the agency has determined that it is not feasible or is not appropriate to approve training for the individual at that time, and the reason(s) for the finding;

(iv) A statement that the waiver will be revoked at any time that feasible and appropriate training becomes available;

(v) Any other advice or information the State agency deems appropriate in informing the individual;

(vi) Signature block (with signature) for the appropriate State official; and

(vii) Signature block (with signature) for the worker's acknowledgement of receipt.

(3) *Denial of a waiver.* In any case in which a determination is made to deny to any individual a waiver of the participation requirement, the individual shall be furnished a formal written notice of denial of waiver, which shall contain all of the information required of formal written notices under paragraph (a)(2) of this section.

(4) *Procedure.* Any determination under paragraph (a)(2) or paragraph (a)(3) of this section shall be a determination to which §§ 617.50 and 617.51 apply, including the requirement that any written notice furnished to an individual shall include notice of the individual's appeal rights as is provided in § 617.50(e).

(b) *Reasons for issuing a waiver.* (1) For the purposes of paragraphs (a)(2) and (a)(3) of this section, a waiver of the participation in training requirement shall be issued to an individual only upon a supported finding that approval of a § 617.22(a) training program for that individual is not feasible or is not appropriate at that time.

(i) *Feasible and appropriate.* For the purposes of this section:

(A) *Feasible.* The term *feasible* means:

(*1*) training is available at that time which meets all the criteria of § 617.22(a);

(*2*) the individual is so situated as to be able to take full advantage of the training opportunity and complete the training; and

(*3*) funding is available to pay the full costs of the training and any transportation and subsistence expenses which are compensable.

The funding referred to in paragraph (b)(1)(i)(A)(*3*) of this section includes not only TAA program funds but also all other funds available under any of the provisions of the Job Training Partnership Act (including Title III) or any other Federal, State or private source that may be utilized for training approvable under § 617.22(a). Further, the individual's situation in respect to undertaking training (as referred to in paragraph (b)(1)(i)(A)(*2*) of this section) shall include taking into account personal circumstances that preclude the individual from being able to participate in and complete the training program, such as the availability of transportation, the ability to make arrangements for necessary child care, and adequate financial resources if the weeks of training exceeds the duration of UI and TRA payments.

(B) *Appropriate.* The term *appropriate* means being suitable or compatible, fitting, or proper. Appropriate, therefore, refers to suitability of the training for the worker (including whether there is a reasonable prospect which is reasonably foreseeable that the individual will be reemployed by the firm from which separated), and compatibility of the training for the purposes of the TAA Program. In these respects, suitability of training for the individual is encompassed within the several criteria in § 617.22 (a), and compatibility with the program is covered by the various provisions of subpart C of this part which describe the types of training approvable under § 617.22(a) and the limitations thereon.

(ii) *Basis for application.* Whether training is feasible or appropriate at any given time is determined by finding whether, at that time, training suitable for the worker is available, the training is approvable under subpart C of this part including the criteria in § 617.22(a), the worker is so situated as to be able to take full advantage of the training and satisfactorily complete the training, full funding for the training is available from one or more sources in accordance with §§ 617.24 and 617.25, the worker has the financial resources to complete the training when the duration of the training program exceeds the worker's eligibility for TRA, and the training will commence within 30 days of approval.

(2) *Particular applications.* The reasons for any determination that training is not feasible or is not appropriate shall be in accord with the following:

(i) *Not feasible* because—

(A) The beginning date of approved training is beyond 30 days, as required by the definition for "Enrolled in training" in § 617.11(a)(2)(vii)(D).

(B) Training is not reasonably available to the individual,

(C) Training is not available at a reasonable cost,

(D) Funds are not available to pay the total costs of training, or

(E) Personal circumstances such as health or financial resources, preclude participation in training or satisfactory completion of training,

(F) Other (explain).

(ii) *Not appropriate* because—

(A)(*1*) The firm from which the individual was separated plans to recall the individual within the reasonably foreseeable future (State agencies must verify planned recalls with the employer),

(*2*) *Planned recall.* For the purpose of determining whether the recall or reemployment of an individual is reasonably foreseeable (for the purposes of this section and § 617.22), either a specific or general type of recall (as set out) shall be deemed to be sufficient.

(*i*) *Specific recall.* A specific recall is where an individual or group of individuals who was separated from employment is identified and notified by the employer to return to work within a specified time period.

(*ii*) *General recall.* A general recall is where the employer announces an intention to recall an individual or group of individuals, or by other action reasonably signals an intent to recall, without specifying any certain date or specific time period.

(*iii*) *Reasonably foreseeable.* For purposes of determining whether training should be denied and a training waiver granted, because of a planned recall that is reasonably foreseeable, such a planned recall includes a specific recall and also includes a general recall (as defined in paragraph (b)(2)(ii)(A)(*2*) of this section) if the general recall in each individual's case is reasonably expected to occur before the individual exhausts eligibility for any regular UI payments for which the individual is or may become entitled. A general recall, in which the timing of the recall is reasonably expected to occur after the individual's exhaustion of any regular UI to which the individual is or may become entitled, shall not be treated as precluding approval of training, but shall be treated as any other worker separation for these purposes.

(B) The duration of training suitable for the individual exceeds the individual's maximum entitlement to basic and additional TRA payments and the individual cannot assure financial responsibility for completing the training program,

(C) The individual possesses skills for "suitable employment" and there is a reasonable expectation of employment in the foreseeable future, or

(D) Other (explain).

(3) *Waivers and able and available.* An individual who has been furnished a written notice of waiver under paragraph (a)(2) of this section (or denial of waiver under paragraph (a)(3) of this section) shall be subject to all of the requirements of § 617.17(a), which shall continue until the individual is enrolled in a training program as required by paragraph (a)(2)(vii) of § 617.11.

(c) *Waiver review and revocations.* (1) State agencies must have a procedure for reviewing regularly (i.e., every 30 days or less) all waivers issued under this section to individuals, to ascertain that the conditions upon which the waivers were granted continue to exist. In any case in which the conditions have changed—i.e., training has become feasible and appropriate—then the waiver must be revoked, and a written notice of revocation shall be furnished to the individual involved.

(2) In addition to the periodic reviews required by paragraph (c)(1) of this section, State agencies must have a procedure for revoking waivers in individual cases promptly whenever a change in circumstances occurs. For example, a written notice of revocation shall be issued to the individual concurrent with the approval of the training in which the individual has enrolled (if such training is scheduled to commence within 30 days), and shall not be issued prior to such approval.

(3) State agencies may incorporate a revocation section in the waiver form or on a separate revocation form. Any determination under paragraph (c) of this section shall be a determination to which §§ 617.50 and 617.51 apply. The information included in a written notice of revocation issued under this paragraph (c) shall include all of the information required for written notices issued under paragraph (a)(2) of this section.

(d) *Recordkeeping and reporting.* (1) State agencies must develop procedures for compiling and reporting on the number of waivers issued and revoked, by reason, as specified in paragraphs (b) and (c) of this section, and report such data to the Department of Labor as requested by the Department.

(2) State agencies are not required to forward copies of individual waiver and revocation notices to the Department of Labor, unless specifically requested by the Department. However, each State agency shall retain a copy of every individual waiver and revocation notice issued by the State, for such period of time as the Department requires. (Approved by the Office of Management and Budget under control number 1205–0016).

14. Section 617.20 is revised to read as follows:

§ 617.20 Responsibilities for the delivery of reemployment services.

(a) *State agency referral.* Cooperating State agencies shall be responsible for:

(1) Advising each adversely affected worker to apply for training with the State agency responsible for reemployment services, while the worker is receiving UI payments, and at the time the individual files an initial claim for TRA; and

(2) Referring each adversely affected worker to the State agency responsible for training and other reemployment services in a timely manner.

(b) *State agency responsibilities.* The responsibilities of cooperating State agencies under subpart C of this part include, but are not limited to:

(1) Interviewing each adversely affected worker regarding suitable training opportunities reasonably available to each individual under subpart C of this part, reviewing such opportunities with each individual, informing each individual of the requirement for participation in training as a condition for receiving TRA, and accepting each individual's application for training. Such training may be approved for any adversely affected worker at any time after a certification is issued and the worker is determined to be covered without regard to whether the worker has exhausted all rights to unemployment insurance;

(2) Registering adversely affected workers for work;

(3) Informing adversely affected workers of the reemployment services and allowances available under the Act and this Part 617, the application procedures, the filing date requirements for such reemployment services and the training requirement for receiving TRA;

(4) Determining whether suitable employment, as defined in § 617.22(a)(1), is available;

(5) Providing counseling, testing, placement, and supportive services;

(6) Providing or procuring self-directed job search training, when necessary;

(7) Providing training, job search and relocation assistance;

(8) Developing a training plan with the individual;

(9) Determining which training institutions offer training programs at a reasonable cost and with a reasonable expectation of employment following the completion of such training, and procuring such training;

(10) Documenting the standards and procedures used to select occupations and training institutions in which training is approved;

(11) Making referrals and approving training programs;

(12) Monitoring the progress of workers in approved training programs;

(13) Developing, and periodically reviewing and updating reemployment plans for adversely affected workers;

(14) Developing and implementing a procedure for reviewing training waivers and revocations at least every 30 days to determine whether the conditions under which they are issued have changed; and

(15) Coordinating the administration and delivery of employment services, benefits, training, and supplemental assistance for adversely affected workers with programs under the Act and under Title III of the Job Training Partnership Act.

15. The introductory text and paragraphs (e) and (g) of § 617.21 are revised to read as follows:

§ 617.21 Reemployment services and allowances.

Reemployment services and allowances shall include, as

appropriate, the services and allowances as set forth in this section, provided that those services included within the scope of paragraphs (a) through (e) of this section shall be provided for under any other Federal law other than the Act.

* * * * *

(e) *Supportive services.* Supportive services shall be provided so individuals can obtain or retain employment or participate in employment and training programs leading to eventual placement in permanent employment. Such services may include work orientation, basic education, communication skills, child care, and any other services necessary to prepare an individual for full employment in accordance with the individual's capabilities and employment opportunities.

* * * * *

(g) *Classroom training.* This training activity is any training of the type normally conducted in a classroom setting, including vocational education, and may be provided to individuals when the conditions for approval of training are met, as provided in § 617.22(a), to impart technical skills and information required to perform a specific job or group of jobs. Training designed to enhance the employability of individuals by upgrading basic skills, through the provision of courses such as remedial education or English-as-a-second-language, shall be considered as remedial education approvable under § 617.22(a) if the criteria for approval of training under § 617.22(a) are met.

* * * * *

16. Paragraphs (a), (b), (c), and (f) (2), (3), and (4) of § 617.22 are amended to read as follows:

§ 617.22 Approval of training.

(a) *Conditions for approval.* Training shall be approved for an adversely affected worker if the State agency determines that:

(1) *There is no suitable employment (which may include technical and professional employment) available for an adversely affected worker.*

(i) This means that for the worker for whom approval of training is being considered under this section, no suitable employment is available at that time for that worker, either in the commuting area, as defined in § 617.3(k), or outside the commuting area in an area in which the worker desires to relocate with the assistance of a relocation allowance under subpart E of this part, and there is no reasonable prospect of such suitable employment becoming available for the worker in the foreseeable future. For the purposes of paragraph (a)(1) of this section only, the term "suitable employment" means, with respect to a worker, work of a substantially equal or higher skill level than the worker's past adversely affected employment, and wages for such work at not less that 80 percent of the worker's average weekly wage.

(2) *The worker would benefit from appropriate training.* (i) This means that there is a direct relationship between the needs of the worker for skills training or remedial education and what would be provided by the training program under consideration for the worker, and that the worker has the mental and physical capabilities to undertake, make satisfactory progress in, and complete the training. This includes the further criterion that the individual will be job ready on completion of the training program.

(3) *There is a reasonable expectation of employment following completion of such training.* (i) This means that, for that worker, given the job market conditions expected to exist at the time of the completion of the training program, there is, fairly and objectively considered, a reasonable expectation that the worker will find a job, using the skills and education acquired while in training, after completion of the training. Any determination under this criterion must take into account that "a reasonable expectation of employment" does not require that employment opportunities for the worker be available, or offered, immediately upon the completion of the approved training. This emphasizes, rather than negates, the point that there must be a fair and objective projection of job market conditions expected to exist at the time of completion of the training.

(4) *Training approved by the Secretary is reasonably available to the worker from either governmental agencies or private sources (which may include area vocational education schools, as defined in section 195(2) of the Vocational Education Act of 1963, and employers).* (i) This means that training is reasonably accessible to the worker within the worker's commuting area at any governmental or private training (or education) provider, particularly including on-the-job training with an employer, and it means training that is suitable for the worker and meets the other criteria in paragraph (a) of this section. It also means that emphasis must be given to finding accessible training for the worker, although not precluding training outside the commuting area if none is available at the time within the worker's commuting area. Whether the training is within or outside the commuting area, the training must be available at a reasonable cost as prescribed in paragraph (a)(6) of this section.

(ii) In determining whether or not training is reasonably available, first consideration shall be given to training opportunities available within the worker's normal commuting area. Training at facilities outside the worker's normal commuting area should be approved only if such training is not available in the area or the training to be provided outside the normal commuting area will involve less charges to TAA funds.

(5) *The worker is qualified to undertake and complete such training.* (i) This emphasizes the worker's personal qualifications to undertake and complete approved training. Evaluation of the worker's personal qualifications must include the worker's physical and mental capabilities, educational background, work experience and financial resources, as adequate to undertake and complete the specific training program being considered.

(ii) Evaluation of the worker's financial ability shall include an analysis of the worker's remaining weeks of UI and TRA payments in relation to the duration of the training program. If the worker's UI and TRA payments will be exhausted before the end of the training program, it shall be ascertained whether personal or family resources will be available to the worker to complete the training. It must be noted on the worker's record that financial resources were discussed with the worker before the training was approved.

(iii) When adequate financial resources will not be available to the worker to complete a training program which exceeds the duration of UI and TRA payments, the training shall not be approved and consideration shall be given to other training opportunities available to the worker.

(6) *Such training is suitable for the worker and available at a reasonable cost.* (i) Such training means the training being considered for the worker. Suitable for the worker means that paragraph (a)(5) of this section is met and that the training is appropriate for the worker given the worker's capabilities, background and experience.

(ii) Available at a reasonable cost means that training may not be approved at one provider when, all costs being considered, training substantially similar in quality, content and results can be obtained from another provider at a lower total cost

within a similar time frame. It also means that training may not be approved when the costs of the training are unreasonably high in comparison with the average costs of training other workers in similar occupations at other providers. This criterion also requires taking into consideration the funding of training costs from sources other than TAA funds, and the least cost to TAA funding of providing suitable training opportunities to the worker. Greater emphasis will need to be given to these elements in determining the reasonable costs of training, particularly in view of the requirements in § 617.11(a) (2) and (3) that TRA claimants be enrolled in and participate in training.

(iii) For the purpose of determining reasonable costs of training, the following elements shall be considered:

(A) Costs of a training program shall include tuition and related expenses (books, tools, and academic fees), travel or transportation expenses, and subsistence expenses;

(B) In determining whether the costs of a particular training program are reasonable, first consideration must be given to the lowest cost training which is available within the commuting area. When training, substantially similar in quality, content and results, is offered at more than one training provider, the lowest cost training shall be approved; and

(C) Training at facilities outside the worker's normal commuting area that involves transportation or subsistence costs which add substantially to the total costs shall not be approved if other appropriate training is available.

(b) *Allowable amounts for training.* In approving a worker's application for training, the conditions for approval in paragraph (a) of this section must be found to be satisfied, including assurance that the training is suitable for the worker, is at the lowest reasonable cost, and will enable the worker to obtain employment within a reasonable period of time. An application for training shall be denied if it is for training in an occupational area which requires an extraordinarily high skill level and for which the total costs of the training are substantially higher than the costs of other training which is suitable for the worker.

(c) *Previous approval of training under State law.* Training previously approved for a worker under State law or other authority is not training approved under paragraph (a) of this section. Any such training may be approved under paragraph (a) of this section, if all of the requirements and limitations of paragraph (a) of this section and other provisions of Subpart C of this part are met, but such approval shall not be retroactive for any of the purposes of this Part 617, including payment of the costs of the training and payment of TRA to the worker participating in the training. However, in the case of a redetermination or decision reversing a determination denying approval of training, for the purposes of this Part 617 such redetermination or decision shall be given effect retroactive to the issuance of the determination that was reversed by such redetermination or decision; but no costs of training may be paid unless such costs actually were incurred for training in which the individual participated, and no additional TRA may be paid with respect to any week the individual was not actually participating in the training.

* * * * *

(f) *Length of training and hours of attendance.* * * *

(2) *Length of training.* The maximum duration for any approvable training program is 104 weeks (during which training is conducted) and no individual shall be entitled to more than one training program under a single certification.

(3) *Training program.* (i) For purposes of this Part 617, a training program may consist of a single course or group of courses which is designed and approved by the State agency for an individual to meet a specific occupational goal.

(ii) When an approved training program involves more than one course and involves breaks in training (within or between courses, or within or between terms, quarters, semesters and academic years), all such breaks in training are subject to the "14-day break in training" provision in § 617.15(d), for purposes of receiving TRA payments. An individual's approved training program may be amended by the State agency to add a course designed to satisfy unforeseen needs of the individual, such as remedial education or specific occupational skills, as long as the length of the amended training program does not exceed the 104-week training limitation in paragraph (f)(2) of this section.

(4) *Full-time training.* Individuals in TAA approved training shall attend training full time, and when other training is combined with OJT attendance at both shall be not less than full-time. The hours in a day and days in a week of attendance in training shall be full-time in accordance with established hours and days of training of the training provider.

* * * * *

17. Section 617.24 is revised to read as follows:

§ 617.24 Preferred training.

Training programs that may be approved under § 617.22(a) include, but are not limited to—

(a) On-the-job training,

(b) Any training program provided by a State pursuant to Title III of the Job Training Partnership Act,

(c) Any training program approved by a private industry council established under the Job Training Partnership Act,

(d) Any program of remedial education,

(e) Any training program (other than a training program described in paragraph (c) of § 617.25) for which all, or any portion, of the costs of training the worker are paid—

(1) Under any other Federal or State program other than this Subpart C, or

(2) From any other source other than this section, but not including sources personal to the individual, such as self, relatives, or friends, and

(f) Any other training program approved by the Department.

18. Section 617.25 is revised to read as follows:

§ 617.25 Limitations on training under Subpart C of this part.

The second sentence of amended section 236(a)(1) of the Act provides that an adversely affected worker shall be entitled to have payment of the costs of training approved under the Act paid on the worker's behalf, subject, however, "to the limitations imposed by" section 236. The limitations in section 236 which are implemented in this section concern the restrictions on approval of training which are related directly or indirectly to the conditions on training which are approvable or on the funding of training costs.

(a) *On-the-job training.* The costs of on-the-job training approved Subpart C of this part for a worker, which are paid from TAA funds, shall be paid in equal monthly installments. Such costs may be paid from TAA funds, and such training may be approved under subpart C of this part, however, only if the State agency determines that:

(1) No currently employed individual is displaced by such eligible worker, including partial displacement such as a reduction in the hours of non-overtime work, wages, or employment benefits;

(2) Such training does not impair existing contracts for services or collective bargaining agreements;

(3) In the case of training which would be inconsistent with the terms of a collective bargaining agreement, written concurrence has been obtained from the concerned labor organization;

(4) No other individual is on layoff from the same or any substantially equivalent job for which such eligible worker is being trained;

(5) The employer has not terminated the employment of any regular employee or otherwise reduced the work force with the intention of filling the vacancy so created by hiring the eligible worker;

(6) The job for which the eligible worker is being trained is not being created in a promotional line that will infringe in any way upon the promotional opportunities of currently employed individuals;

(7) Such training is not for the same occupation from which the worker was separated and with respect to which such worker's group was certified pursuant to section 222 of the Act;

(8) The employer certifies to the State agency that the employer will continue to employ the eligible worker for at least 26 weeks after completing the training if the worker desires to continue such employment and the employer does not have due cause to terminate such employment;

(9) The employer has not received payment under this Subpart C or under any other Federal law for any other on-the-job training provided by such employer which failed to meet the requirements of paragraphs (a)(1) through (a)(6) of this section or such other Federal law; and

(10) The employer has not taken, at any time, any action which violated the terms of any certification described in paragraph (a)(8) of this section made by the employer with respect to any other on-the-job training provided by the employer for which the employer has received a payment under Subpart C of this part (or the prior provisions of Subpart C of this part).

(b) *Other authority and restrictions on funding*—

(1) *In general.* Section 236(a) contains several provisions which allow the costs of a training program approved under the Act to be paid—

(i) Solely from TAA funds,

(ii) Solely from other public or private funds, or

(iii) Partly from TAA funds and partly from other public or private funds,

but also precludes the use of TAA funds or funds under another Federal law where such use of funds would result in duplication of payment of training costs. Those authorities and restrictions are spelled out in paragraph (b) of this section: *Provided*, that, private funds may not include funds from sources personal to the individual, such as self, relatives, or friends.

(2) *Section 236(a)(5)(E) of the Act.* (i) *In general.* Paragraph (5)(E) of section 236(a) of the Act specifies one of the types of training programs approvable under the Act, as including a program (other than a training program described in section 236(a)(7) (paragraph (b)(5) of this section)) for which all, or any portion, of the costs of the training program are paid—

(A) Under any Federal or State program other than the Act, or

(B) From any source other than TAA funds.

(ii) *Application.* Paragraph (E) of section 236(a)(5) of the Act thus authorizes prearrangements between cooperating State agencies administering the TAA program and the authorities administering any other Federal, State, or private funding source, to agree upon any mix of TAA funds and other funds for paying the costs of a training program approved under Subpart C of this part. Any such prearrangement must contain specific commitments from the other authorities to pay the costs they agree to assume.

(3) *Section 236(a)(6) of the Act.* (i) *In general.* Paragraph (6) of section 236(a) of the Act is related to section 236(a)(5)(E) in providing that the costs of a training program approved under the Act are not required to be paid from TAA funds to the extent that such costs are paid under any Federal or State program other than the Act or from any source other than the Act.

(ii) *Application.* (A) Although paragraph (6) of section 236(a) of the Act is expressed in terms of the costs not being *required* to be paid from TAA funds, it authorizes the mixing of TAA funds and funds from any other Federal, State or private source. Therefore, sharing the future costs of training is authorized where prior costs were paid from another Federal, State or private source, but this does not authorize reimbursement from TAA funds of any training costs which were incurred and for which payment became due prior to the approval of the training program under Subpart C of this part. In utilizing the authority under paragraph (b)(3) of this section for sharing training costs, prearrangements shall be entered into as required under paragraph (b)(2) of this section before any TAA funds are obligated.

(B) Paragraph (6) of section 236(a) contains a special restriction on the authority derived thereunder to use TAA funds in sharing training costs. Therefore, before approving any training program under Subpart C of this part, which may involve sharing of the training costs under the authority of paragraph (b)(3) of this section, the cooperating State agencies for the TAA program shall require the worker to enter into a written agreement with the State under which TAA funds will not be applied for or used to pay any portion of the costs of the training the worker has reason to believe will be paid by any other governmental or private source.

(4) *Section 236(a)(4) of the Act.* (i) *In general.* (A) Paragraph (4) of section 236(a) of the Act (paragraph (3) of section 236(a) before August 23, 1988) continues to provide, as it did before the addition of paragraphs (5)(E), (6), and (7) to section 236(a), that:

(*1*) When the costs of training are paid from TAA funds under subpart C of this part, no other payment for such costs of training may be made under any other Federal law; and

(*2*) When the payment of the costs of training has already been made under any other Federal law, or the costs are reimbursable under any other Federal law and a portion of the costs has already been paid under such other Federal law, payment of such training costs may not be made from TAA funds.

(B) Paragraph (4) of section 236(a) also requires that: The provisions of paragraphs (b)(4)(i) (A)(*1*) and (A)(*2*) of this section shall not apply to, or take into account, any funds provided under any other provision of Federal law which are used for any purpose other than the direct payment of the identical costs incurred in training the adversely affected worker under the TAA Program, even if such other use has the effect of indirectly paying or reducing any portion of the costs involved in training the adversely affected worker.

(ii) *Application.* (A) Although the prohibition on duplicate payments in the first part of section 236(a)(4) remains fully implemented in this section, the second part of section 236(a)(4) on the sharing of costs from TAA funds and other Federal fund sources is modified by the explicit provisions of paragraphs (5)(E) and (6) of section 236(a), as set forth in paragraphs (b)(2) and (b)(3) of this section.

(B) When the direct costs of a training program approvable under subpart C of this part are payable from TAA funds and are also wholly or partially payable under another Federal law, or under any State law or from private, nongovernmental sources, the TAA Program agencies shall establish procedures which ensure that TAA funds shall not be utilized to duplicate funds available from another source, but this preclusion of duplication does not prohibit and shall not discourage sharing of costs under prearrangements

authorized under paragraphs (b)(2) and (b)(3) of this section.

(C)(*1*) Therefore, pursuant to paragraph (4) of section 236(a), paragraph (b)(4) of this section continues to prohibit duplicate payment of training costs, which is consistent with the general prohibition expressed in subpart C of this part, against any use of TAA funds to duplicate payment of training costs in any circumstances. Paragraph (b)(4) of this section also continues to prohibit taking into account, in determining whether training costs are payable from TAA funds, any payments to the worker under any other Federal law which may have the effect of indirectly paying all or a portion of the training costs. Such indirect payments include Veterans Educational Assistance, Pell Grants, and Supplemental Educational Opportunity Grants, which are paid to the individual. However, any payments to the individual under these programs are deductible from TRA payable to the individual under § 617.13(c)(2).

(*2*) When payments of Veterans Educational Assistance, Pell Grants, and Supplemental Educational Opportunity Grants are made to the training provider, instead of the individual, and are used for training costs, such payments shall be taken into account as direct payment of the training costs under other Federal law for the purposes of this section.

(5) *Section 236(a)(7) of the Act.* (i) *In general.* Paragraph (7) of section 236(a) of the Act provides that a training program shall not be approved under the Act if—

(A) all or a portion of the costs of such training program are paid under any nongovernmental plan or program,

(B) the adversely affected worker has a right to obtain training or funds for training under such plan or program, and

(C) such plan or program requires the worker to reimburse the plan or program from funds provided under the Act, or from wages paid under such training program, for any portion of the costs of such training program paid under the plan or program.

(ii) *Application.* Paragraph (7) of section 236(a), which is implemented in paragraph (b)(5) of this section, reinforces the prohibition in § 617.22(h) against approval of a training program under subpart C of this part if the worker is required to pay a fee or tuition. The provisions of paragraph (b) and paragraph (h) of this section shall be given effect as prohibiting the approval under subpart C of this part of any training program if the worker would be requested or required, at any time or under any circumstances, to pay any of the costs of a training program, however small, from any TAA funds given to the worker or from any other funds belonging to the worker from any source whatever. Aside from this stringent limitation, however, paragraph (7) of section 236(a) of the Act implicitly authorizes training approved under this subpart C to be wholly or partly funded from nongovernmental (i.e., employer, union or other private) sources.

19. Section 617.26 is revised to read as follows:

§ 617.26 Liable and agent State responsibilities.

(a) *Liable State.* The liable State means, for any individual, the State which administers the applicable State law (as determined under § 617.16). The liable State is responsible for making all determinations, redeterminations, and decisions on appeals on all claims for program benefits under this part 617, including waivers and revocations of waivers pursuant to § 617.19, subsistence payments pursuant to § 617.27, and transportation payments pursuant to § 617.28. Upon receiving a copy of a certification issued by the Department, with respect to an affected firm in the State, the liable State also is responsible for publishing newspaper notices as provided in § 617.4(d), furnishing information and assistance to workers as provided in § 617.4, furnishing reemployment services under subparts C, D, and E of this part to all eligible workers covered by such certification, and carrying out other activities and functions required by the State's Agreement with the Secretary entered into pursuant to § 617.59. All determinations pertaining to any individual's eligibility for or entitlement to any program benefit under this part 617 shall be subject to the provisions of §§ 617.50 and 617.51.

(b) *Agent State.* Agent State means, for any individual, any State other than the liable State for the individual. Agent States shall be responsible for cooperating fully with the liable State and assisting the liable State in carrying out its activities and functions. These agent State responsibilities shall be part of the activities and functions undertaken by the agent States under their Agreements entered into pursuant to § 617.59. Agent State responsibilities include cooperating with liable States in taking applications and claims for TAA, providing reemployment services to certified workers in accordance with subparts B, C, D and E of this part, providing interstate claimants with TAA program information and assistance, assisting applicants or claimants to file claims for TAA program benefits and services, cooperating with the liable State by providing information needed to issue determinations, redeterminations, and decisions on appeals, and procuring and paying the cost of any approved training, including subsistence and transportation costs, according to determinations issued by the liable State.

20. Section 617.32(a)(4) is revised to read as follows:

§ 617.32 Eligibility.

(a) *Conditions.* * * * *

(4) A determination by the State agency that the individual has no reasonable expectation of securing suitable employment in the commuting area, and has a reasonable expectation of obtaining suitable employment of long-term duration outside the commuting area and in the area where the job search will be conducted. For the purposes of this section, the term "suitable employment" means suitable work as defined in § 617.3(kk) (1) or (2), whichever is applicable to the individual; and

* * * * *

21. Section 617.33 is revised to read as follows:

§ 617.33 Findings required.

(a) *Findings by liable State.* Before final payment of a job search allowance may be approved, the following findings shall be made by the liable State:

(1) The individual meets the eligibility requirements for a job search allowance specified in § 617.32(a) (1) through (4);

(2) The application for a job search allowance was submitted by the individual within the time limits specified in § 617.31(c); and

(3) The individual completed the job search within the time limits stated in § 617.32(a)(5), and the requirements of paragraphs (b) and (c) of § 617.32 have been met.

(b) *Agent State.* (1) When an individual files an application for a job search allowance with respect to a job search conducted in a State other than the liable State, the State agency of the State in which the individual conducts the job search shall serve as the agent State and be responsible for assisting the individual in conducting the job search and in filing an application for a job search allowance with the liable State, and for assisting the liable State by furnishing to it any information required for the liable State's determination of the claim.

(2) The agent State shall cooperate fully with the liable State in carrying

out its activities and functions with regard to such applications.

22. Paragraph (b) of § 617.34 is revised to read as follows:

§ 617.34 Amount.

* * * * *

(b) *Limit.* The total job search allowances paid to an individual under a certification may not exceed $800, regardless of the number of job searches undertaken by the individual. The amounts otherwise payable under paragraph (a) of this section shall be reduced by any amounts the individual is entitled to be paid or reimbursed for such expenses from any other source.

23. Section 617.42(a)(6) is revised to read as follows:

§ 617.42 Eligibility.

(a) *Conditions.* * * *

(6) A determination by the State agency that the individual has no reasonable expectation of securing suitable employment in the commuting area, and has obtained suitable employment affording a reasonable expectation of employment of long-term duration, or a bona fide offer of such suitable employment, outside the commuting area and in the area of intended relocation. For the purposes of this section, the term "suitable employment" means suitable work as defined in § 617.3(kk) (1) and (2), whichever is applicable to the individual; and

* * * * *

24. Section 617.44 is revised to read as follows:

§ 617.44 Findings required.

(a) *Findings by liable State.* Before final payment of a relocation allowance may be approved, the following findings shall be made by the liable State:

(1) The individual meets the eligibility requirements for a relocation allowance specified in § 617.42(a) (1) to (6) and § 617.42(b).

(2) The application for a relocation allowance was submitted by the individual within the time limits specified in § 617.41(c);

(3) The individual began and completed the relocation within the limitations specified in § 617.42(a)(7) and § 617.43; and

(4) The liable State has verified (directly or through the agent State) with the employer, and finds, that the individual has obtained suitable employment affording a reasonable expectation of employment of long-term duration, or a bona fide offer of such suitable employment, in the area of intended relocation, in accordance with § 617.42(a)(6).

(b) *Agent State.* (1) When an individual relocates in a State other than the liable State, the State agency of the State in which the individual relocates shall serve as the agent State and be responsible for:

(i) Assisting the individual in relocating to the State, and in filing an application for a relocation allowance with the liable State, and

(ii) Assisting the liable State by furnishing to it any information required for the liable State's determination on the claim.

(2) The agent State shall cooperate with the liable State in carrying out its activities and functions with regard to such applications. When requested by the liable State, the agent State shall verify with the employer and report to the liable State whether the individual has obtained suitable employment affording a reasonable expectation of employment of long-term duration, or a bona fide offer of such suitable employment.

25. Section 617.49 is amended by adding a new paragraph (e) to read as follows:

§ 617.49 Job search program.

* * * * *

(e) *Termination of requirement.* The job search program requirement set out in this section shall not be a condition of entitlement to TRA for any week which begins after November 20, 1988.

26. Paragraphs (a) and (d) of § 617.50 are revised to read as follows:

§ 617.50 Determinations of entitlement; notices to individuals.

(a) *Determinations of initial applications for TRA or other TAA.* The State Agency whose State law is the applicable State law under § 617.16 shall upon the filing of an initial application for TRA or other TAA promptly determine the individual's entitlement to such TRA or other TAA under this part 617, and may accept for such purposes information and findings supplied by another State agency under this part 617.

* * * * *

(d) *Use of State law.* In making determinations or redeterminations under this section, or in reviewing such determinations or redeterminations under § 617.51, a State agency shall apply the regulations in this part 617. As to matters committed by this part 617 to the applicable State law, a State agency, a hearing officer, or a State court shall apply the applicable State law and regulations thereunder, including procedural requirements of such State law or regulations, except so far as such State law or regulations are inconsistent with this part 617 or the purpose of this part 617: *Provided*, that, no provision of State law or regulations on good cause for waiver of any time limit, or for late filing of any claim, shall apply to any time limitation referred to or specified in this part 617, unless such State law or regulation is made applicable by a specific provision of this part 617.

27. Section 617.55 is revised to read as follows:

§ 617.55 Overpayments; penalties for fraud.

(a) *Determination and repayment.* (1) If a State agency or a court of competent jurisdiction determines that any person or individual has received any payment under this part 617 to which the person or individual was not entitled, including a payment referred to in paragraph (b) or paragraph (c) of this section, such person or individual shall be liable to repay such amount to the State agency, and the State agency shall recover any such overpayment in accordance with the provisions of this part 617; except that the State agency may waive the recovery of any such overpayment if the State agency determines, in accordance with the guidelines prescribed in paragraph (a)(2) of this section, that:

(i) The payment was made without fault on the part of such person or individual; and

(ii) Requiring such repayment would be contrary to equity and good conscience.

(2)(i)(A) In determining whether fault exists for purposes of paragraph (a)(1)(i) of this section, the following factors shall be considered:

(*1*) Whether a material statement or representation was made by the person or individual in connection with the application for TAA that resulted in the overpayment, and whether the person or individual knew or should have known that the statement or representation was inaccurate.

(*2*) Whether the person or individual failed or caused another to fail to disclose a material fact, in connection with an application for TAA that resulted in the overpayment, and whether the person or individual knew or should have known that the fact was material.

(*3*) Whether the person or individual knew or could have been expected to know, that the person or individual was not entitled to the TAA payment.

(*4*) Whether, for any other reason, the overpayment resulted directly or indirectly, and partially or totally, from any act or omission of the person or individual or of which the person or individual had knowledge, and which

was erroneous or inaccurate or otherwise wrong.

(5) Whether there has been a determination of fraud under paragraph (b) of this section or section 243 of the Act.

(B) An affirmative finding on any one of the factors in paragraphs (a)(2)(i)(A) of this section precludes waiver of overpayment recovery.

(ii)(A) In determining whether equity and good conscience exists for purposes of paragraph (a)(1)(ii) of this section, the following factors shall be considered:

(1) Whether the overpayment was the result of a decision on appeal, whether the State agency had given notice to the person or individual that the case has been appealed and that the person or individual may be required to repay the overpayment in the event of a reversal on appeal, and whether recovery of the overpayment will not cause extraordinary and lasting financial hardship to the person or individual.

(2) Whether recovery of the overpayment will not cause extraordinary financial hardship to the person or individual, and there has been no affirmative finding under paragraph (a)(2)(ii)(A) of this section with respect to such person or individual and such overpayment.

(B) An affirmative finding on either of the foregoing factors in paragraphs (a)(2)(ii)(A) of this section precludes waiver of overpayment recovery.

(C)(1) For the purpose of paragraph (a)(2)(ii) of this section, an extraordinary financial hardship shall exist if recovery of the overpayment would result directly in the person's or individual's loss of or inability to obtain minimal necessities of food, medicine, and shelter for a substantial period of time; and an extraordinary and lasting financial hardship shall be extraordinary as described above and may be expected to endure for the foreseeable future.

(2) In applying this test in the case of attempted recovery by repayment, a substantial period of time shall be 30 days, and the foreseeable future shall be at least three months. In applying this test in the case of proposed recoupment from other benefits, a substantial period of time and the foreseeable future shall be the longest potential period of benefit entitlement as seen at the time of the request for a waiver determination. In making these determinations, the State agency shall take into account all potential income of the person or individual and the person's or individual's firm, organization, or family and all cash resources available or potentially available to the person or individual and the person's or individual's firm, organization, or family in the time period being considered.

(3) Determinations granting or denying waivers of overpayments shall be made only on request for a waiver determination. Such request shall be made on a form which shall be furnished to the person or individual by the State agency. Notices of determination of overpayments shall include an accurate description of the waiver provisions of paragraph (a) of this section, if the State agency has elected to allow waivers of TAA overpayments.

(4) Each State shall have the option to establish a policy as to whether the waiver provisions of this section shall be applied to TAA overpayments. A State's decision on its policy shall not be controlled by whether it waives UI overpayments, but the State's decision shall be published for the information of the public and the Department.

(5)(i) Unless an overpayment is otherwise recovered, or is waived under paragraph (a) of this section, the State agency shall recover the overpayment by deduction from any sums payable to such person or individual under:

(A) This part 617;

(B) Any Federal unemployment compensation law administered by the State agency; or

(C) Any other Federal law administered by the State agency which provides for the payment of unemployment assistance or an allowance with respect to unemployment.

(ii) In addition, a State agency may recover the overpayment from unemployment insurance payable to such person or individual under the State law.

(b) *Fraud.* If a State agency or a court of competent jurisdiction finds that any person or individual:

(1) Knowingly has made, or caused another to make, a false statement or representation of a material fact; or

(2) Knowingly has failed, or caused another to fail, to disclose a material fact; and as a result of such false statement or representation, or of such nondisclosure, such individual has received any payment under this part 617 to which the person or individual was not entitled, such person or individual shall, in addition to any other penalty provided by law, be ineligible for any further payments under this part 617.

(c) *Training, job search and relocation allowances.* (1) If an individual fails, with good cause, to complete training, a job search, or a relocation, any payment or portion of a payment made under this part 617 to such individual or any person that is not properly and necessarily expended in attempting to complete such training, job search, or relocation, shall constitute an overpayment.

(2) If an individual fails, without good cause, to complete training, a job search, or a relocation, any payment made under this part 617 to such individual or any person shall constitute an overpayment.

(3) Such overpayment shall be recovered or waived as provided in paragraph (a) of this section.

(d) *Final determination.* Except for overpayments determined by a court of competent jurisdiction, no repayment may be required, and no deduction may be made, under this section until a determination under paragraph (a) of this section by the State agency has been made, notice of the determination and an opportunity for a fair hearing thereon has been given to the person or individual concerned, and the determination has become final.

(e) *Deposit.* Any amount recovered by a State agency under this section shall be deposited into the Federal fund or account from which payment was made.

(f) *Procedural requirements.* (1) The provisions of paragraphs (c), (e), and (g) of § 617.50 shall apply to determinations and redeterminations made pursuant to this section.

(2) The provisions of § 617.51 shall apply to determinations and redeterminations made pursuant to this section.

(g) *Fraud detection and prevention.* State procedures for the detection and prevention of fraudulent overpayments of TAA shall be, as a minimum, commensurate with the procedures adopted by the State with respect to State unemployment compensation and consistent with the Secretary's "Standard for Fraud and Overpayment Detection," Employment Security Manual, Part V, sections 7510–7515 (Appendix B of this Part).

(h) *Debts due the United States or Others.* (1) Notwithstanding any provision of this part 617, TAA payable to a person or an individual under this part 617 shall be applied by the State agency for the recovery by offset of any debt due the United States from the person or individual.

(2) TAA shall not be applied or used by the State agency in any manner for the payment of any debt of any person or individual to any State or any other entity or person, except that TRA payable to an individual shall be payable to someone other than the individual if required by State law and

Federal law to satisfy the individual's obligation for child support or alimony.

(i) *Definition of person.* For purposes of this section, a person includes any employer or other entity or organization as well as the officers and officials thereof who may bear individual responsibility.

28. Section 617.59 is amended by adding a new paragraph (h) and a new paragraph (i) to read as follows:

§ 617.59 Agreements with State agencies.

* * * * *

(h) *Program coordination.* State agencies providing employment services, training and supplemental assistance under Subpart C of this part shall, in accordance with their Agreements under this section, coordinate such services and payments with programs and services provided by State Service Delivery Areas, Private Industry Councils, and substate grantees under the Job Training Partnership Act and with the State agency administering the State law.

(i) *Administration absent State Agreement.* In any State in which no Agreement under this section is in force, the Secretary shall administer the Act and this part 617 and pay TAA hereunder through appropriate arrangements made by the Department, and for this purpose the Secretary or the Department shall be substituted for the State or cooperating State agency wherever appropriate in this part 617. Such arrangements shall include the requirement that TAA be administered in accordance with this part 617, and the provisions of the applicable State law except to the extent that such State law is inconsistent with any provision of this part 617 or section 303 of the Social Security Act (42 U.S.C. 503) or section 3304(a) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)), and shall also include provision for a fair hearing for any individual whose application for TAA is denied. A final determination under paragraph (i) of this section as to entitlement to TAA shall be subject to review by the courts in the same manner and to the same extent as is provided by section 205(g) of the Social Security Act (42 U.S.C. 405(g)).

29. Section 617.60 is added and reserved to read as follows:

§ 617.60 Administrative requirements. [Reserved]

30. Section 617.64 is revised to read as follows:

§ 617.64 Termination of TAA program benefits.

The following rules are applicable to the termination of TAA benefits under the Act:

(a) No application for TRA, or transportation or subsistence payment while in training approved under subpart C of this part 617, shall be approved, and no payment of TRA or payment for transportation or subsistence occurring on or before the termination date shall be made after the termination date specified in the Act, unless the claim for TRA or an invoice for transportation and subsistence is presented to the State agency and a final determination is made on the amount payable on or before the termination date in the Act.

(b) No payment of job search or relocation allowances shall be made after the termination date specified in the Act, unless an application for such allowances was approved, such job search or relocation was completed, and a final determination made on the amount payable for such benefits by the State agency on or before the termination date in the Act.

(c) No training under subpart C of this part shall be approved unless a determination regarding the approval of such training was made on or before the termination date in the Act, and such training commenced on or before such termination date. Consistent with the requirements of section 236(a)(1) of the Act, and the termination provisions of paragraph (c) of this section, a final determination must be made on the invoice for the training costs by the State agency on or before the termination date specified in the Act to cover tuition related expenses. Determinations on tuition bills shall be limited to the training term, quarter, semester or other period beginning on or before the termination date in the Act. The training period should be in accord with normal billing practices of the training provider and/or State agency approval practices.

31. Section 617.67 is added to read as follows:

§ 617.67 Transition guidelines for the 1988 Amendments.

The provisions of part 3 of subtitle D of title I of the Omnibus Trade and Competitiveness Act of 1988 (the "OTCA"), Public Law 100–418, approved on August 23, 1988, made material changes in the TAA Program for workers that are reflected in the amended regulations published with this new section on transition guidelines for the 1988 Amendments. States and cooperating State agencies shall be guided by the following paragraphs of this section in the transition to the TAA Program as modified by the 1988 Amendments and reflected in the preceding provisions of this part 617, as well as in the interim operating instructions issued by the Department which are superseded by these regulations. The operating instructions in GAL 15–90, and the Changes thereto, shall continue in effect as guidance on the proper application of the 1988 Amendments except as modified in these final regulations. (GAL 15–90 is available from the Office of Trade Adjustment Assistance, U.S. Department of Labor, 200 Constitution Ave., NW., room C–4318, Washington, DC 20210.)

(a) *Oil and gas workers—prospective.* Workers in firms or appropriate subdivisions of firms engaged in exploration or drilling for oil or natural gas are newly covered under the TAA Program by an amendment to section 222 of the Trade Act of 1974. This is a permanent change in the Act having prospective effect, and became effective on August 23, 1988. Oil and gas workers covered by a certification issued pursuant to section 223 of the Act and the regulations at 29 CFR part 90 shall be entitled to basic and additional TRA and other TAA Program benefits on precisely the same terms and conditions as apply to other workers covered by other certifications and which are specifically set forth in this part 617.

(b) *Oil and gas workers—retroactive.* Oil and gas workers referred to in paragraph (a) of this section, who were separated from adversely affected employment after September 30, 1985, are covered retroactively under section 1421(a)(1)(B) of the OTCA, if they are covered by a certification issued pursuant to section 223 of the Act which is in response to a petition filed in the Office of Trade Adjustment Assistance on or before November 18, 1988. Administration of TAA Program benefits to these workers shall be on precisely the same terms and conditions as apply to other workers covered by other certifications, except that the limitations of the impact date provision of section 223(b) and the 60-day preclusion in section 231(a) may not be applied to these workers.

(c) *Benefit information to workers.* (1) An amendment to section 225 of the Act requires individualized and published notices to workers covered by certifications issued pursuant to section 223 of the Act. This amendment became effective as a requirement on September 22, 1988, and is applicable to all certifications issued on and after that date. Individualized notices and

published notices shall contain the information specifically set forth in this part 617.

(2) Section 239(f) of the Act requires cooperating State agencies to furnish four discrete items of information and advice to individuals about TAA Program benefits, commencing with such advice and information to every individual who applies for unemployment insurance under each State's unemployment compensation law. See § 617.4(e). This amendment became effective on August 23, 1988. Information and advice required by section 239(f) shall be provided in accordance with this part 617.

(d) *Training and eligibility requirements for TRA.* Effective on November 21, 1988, in general, enrollment and participation in, or completion of, a training program approved under subpart C is required as a condition of entitlement to basic TRA. Amendments to sections 231(a)(5), 231(b), and 231(c) of the Act incorporate this new requirement, replacing the job search program requirement which remains in effect through November 20, 1988. Continuation of the job search program requirement through November 20, 1988, and installation of the training program requirement on and after November 21, 1988, is required of all applicants for basic TRA.

(e) *Eligibility period for basic TRA.* (1) Effective on August 23, 1988, and with respect to all decisions (i.e., all determinations, redeterminations, and decisions on appeals) issued on or after that date, the eligibility period for basic TRA is changed from the prior law. Prior to the OTCA amendments, section 233(a)(2) provided that the eligibility period for an individual was a fixed 104-week period that immediately followed the week with respect to which the individual first exhausted all rights to regular benefits after the individual's first qualifying separation. Under section 233(a)(2) the new eligibility period is movable, and is the 104-week period that immediately follows the week in which the worker's most recent total qualifying separation occurs under the same, single certification. Under the effective date provisions of the OTCA, section 233(a)(2) applies to all decisions (i.e., determinations, redeterminations, and decisions on appeals) issued on and after August 23, 1988. Further, the law to be applied in making any such decision is the law as in effect on the date such a decision is made. These interpretative rules apply in all cases, regardless of whether the total qualifying separation occurred before, on, or after August 23, 1988, except as noted in paragraph (e)(3) of this section.

(2) The major significance of the change in section 233(a)(2) is that, effective for all decisions (i.e., determinations, redeterminations, and decisions on appeals) issued on or after August 23, 1988, it applies to the "most recent" total qualifying separation. This means that, after the first qualifying separation before August 23, 1988, or the first total qualifying separation on and after August 23, 1988, with each subsequent total qualifying separation of an individual under the same certification the individual's eligibility period must be redetermined as the 104-week period that immediately follows the week in which such subsequent separation occurred.

(3) Section 1430(g) of the OTCA requires that the new eligibility period not be applied with respect to any total qualifying separation occurring before August 23, 1988, if as a result of applying section 233(a)(2) the individual would have an eligibility period with an earlier expiration date than the expiration date of the eligibility period established under the prior law and based on a first qualifying separation which occurred under the same certification before August 23, 1988. Therefore, for decisions (i.e., determinations, redeterminations, and decisions on appeals) issued on or after August 23, 1988, for a worker who had a first qualifying separation under the same certification before August 23, 1988, it must be determined what the individual's eligibility period is based upon the prior law, and, if the individual also had a subsequent total qualifying separation, what the individual's eligibility period is based on the amended law. Only if the subsequent total qualifying separation occurred before August 23, 1988, and the expiration date of the new eligibility period ends on the same date or a later date than the expiration date of the old eligibility period may the new eligibility period be applied to the individual, and in that event it must be applied; if the new eligibility period would end on a date earlier than the ending date of the eligibility period based on the worker's first qualifying separation, section 1430(g) operates to preclude the application of amended section 233(a)(2).

(4) Computation of the weekly and maximum amounts of basic TRA do not change under the 1988 Amendments in the OTCA. They must continue to be based upon the first benefit period which is related to the worker's first total or partial separation under the same certification regardless of whether such first separation occurs before, on, or after August 23, 1988. Upon the occurrence of a second or subsequent separation under the same certification which is a total qualifying separation under this part 617, the individual's eligibility period will be 104 weeks after the week of such second or subsequent (total qualifying) separation, but no change will be made in the weekly or maximum amounts of basic TRA as computed in relation to the first separation. Therefore, for any decision (i.e., determination, redetermination, or decision on appeal) issued on or after August 23, 1988, whenever an individual files a new TRA claim it will be necessary to determine whether the individual's most recent separation was a total qualifying separation, and, if so, whether the individual had a prior partial or total separation within the certification period of the same certification which was a first qualifying separation. If such most recent (total qualifying) separation occurred before August 23, 1988, and was not the individual's first qualifying separation, then:

(i) The eligibility period will be the 104 weeks beginning with the week following the week in which the most recent total qualifying separation occurred *or* 104 weeks after the first exhaustion of regular UI following the first qualifying separation, whichever is longer, and

(ii) The individual's weekly amount of basic TRA, as computed under § 617.13, and the individual's maximum amount of basic TRA, as computed under § 617.14, are established or remain fixed as determined with respect to the individual's first benefit period following the first separation which is within the certification period of the certification covering the individual.

(f) *Eligibility period for additional TRA.* One technical and one conforming change are made by the OTCA in section 233(a)(3) of the Act, but have no effect on the 26-week eligibility period for additional TRA as the statute has been interpreted and applied in the past. Therefore, the 26-week eligibility period begins with the first week of training if the training begins after exhaustion of basic TRA. Further, if the training begins before approval is obtained under this part 617, the 26-week eligibility period begins with the week in which the determination of approval is issued, if there is any scheduled training session in that week after the date of the determination.

(g) *Eligibility for TRA during breaks in training.* (1) Paragraph (f) of section 233 of the Act, added by the OTCA, provides for the payment, under

specified conditions, of both basic and additional TRA during scheduled breaks in a training program, provided the conditions for such payments are met as expressed in this part 617. By making this provision applicable to basic TRA as well as additional TRA, paragraph (f) of section 233 of the Act changes the prior law for both. Previously, basic TRA was payable during training breaks, but additional TRA was payable solely with respect to weeks of training. Under new section 233(f), both basic and additional TRA are payable during training breaks, but only if the break does not exceed 14 days. Now, as under the prior law, weeks when TRA is not payable will still count against the eligibility periods for both basic and additional TRA, and in the case of additional TRA it will also count against the number of weeks payable.

(2) Paragraph (f) of section 233 of the Act is effective with regard to all decisions (i.e., all determinations, redeterminations, and decisions on appeals) made on or after August 23, 1988, regardless of when the training was approved under section 236 of the Trade Act, or whether the training was approved or is approvable under section 236 as amended by the 1988 Amendments, or when the break in training began or ended. In making any decision involving paragraph (f) of section 233 of the Act, the law to be applied is the law as in effect on the date the decision is made.

(h) *Retroactive eligibility for TRA.* (1) Effective on August 23, 1988, section 1425(b) of the OTCA provides for an open-ended waiver of the time limit in section 233(a)(2) on the eligibility period for basic TRA, and the 210-day time limit in section 233(b) on filing a bona fide application for training in order to qualify for additional TRA. This waiver provision applies solely to workers who experienced a total qualifying separation in the period which began on August 13, 1981 and ended on April 7, 1986. Other conditions must be met that are specified in section 1425(b) and in this part 617.

(2) Altogether, nine conditions must be met for workers to obtain TRA payments under this special provision. (See § 617.11(a)(3).) Further, this special provision applies solely to weeks which begin after August 23, 1988; no retroactive payments may be made under this special provision. Finally, only the two specific time limitations are waived, and all other requirements of the prior and amended law apply, including the first separation rule (relating to computation of the weekly and maximum amounts of basic TRA payable), the 26-week eligibility period for additional TRA, and the break provision of section 233(f).

(i) *Training for adversely affected workers.* Extensive amendments to section 236 are made in the OTCA which, except for some technical and conforming changes that take effect on November 21, 1988, all became effective on August 23, 1988. These changes must be effectuated in accordance with this part 617.

(j) *Agreements with States.* Section 239 also was amended by the OTCA, to require new terms and conditions in the section 239 agreements. This requires new agreements to be executed between the States and the Secretary of Labor, and gives new emphasis to the contractual nature of the obligations entered into by the States to administer the TAA Program in strict accordance with the Act and the regulations and operating instructions issued by the Department.

(k) *Other.* Other matters covered by the OTCA amendments, as well as the matters discussed in the preceding paragraphs of this section, shall, to the extent that the States may be involved in their implementation, be effectuated in strict accordance with the Act and the regulations and operating instructions issued by the Department, and as of the respective effective dates of the various provisions of the OTCA.

32. By redesignating Appendixes A and B as Appendixes B and C.

§ 617.50 [Amended]

33. By amending § 617.50(g) by removing "(Appendix A of this part)" and adding in place "(Appendix B of this Part)".

§ 617.55 [Amended]

34. By amending § 617.55(g) by removing "(Appendix B of this part)" and adding in place "(Appendix C of this Part)".

§ 617.10 [Amended]

35. By amending § 617.10(c) by removing all words after "sections 5000 *et seq.*" and adding in place "(Appendix A of this Part)".

36. By adding a new appendix A to read as follows:

Appendix A to Part 617—Standard for Claim Filing, Claimant Reporting, Job Finding, and Employment Services

EMPLOYMENT SECURITY MANUAL (Part V, Sections 5000–5004)

5000–5099 Claims Filing

5000 *Standard for Claim Filing, Claimant Reporting, Job Finding, and Employment Services*

A. *Federal law requirements.* Section 3304(a)(1) of the Federal Unemployment Tax Act and section 303(a)(2) of the Social Security Act require that a State law provide for:

"Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary may approve."

Section 3304(a)(4) of the Federal Unemployment Tax and section 303(a)(5) of the Social Security Act require that a State law provide for:

"Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation * * *"

Section 303(a)(1) of the Social Security Act requires that the State law provide for:

"Such methods of administration * * * as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation when due."

B. *Secretary's interpretation of federal law requirements.*

1. The Secretary interprets section 3304(a)(1) of the Federal Unemployment Tax Act and section 303(a)(2) of the Social Security Act to require that a State law provide for payment of unemployment compensation solely through public employment offices or claims offices administered by the State employment security agency if such agency provides for such coordination in the operations of its public employment offices and claims offices as will insure (a) the payment of benefits only to individuals who are unemployed and who are able to work and available for work, and (b) that individuals claiming unemployment compensation (claimants) are afforded such placement and other employment services as are necessary and appropriate to return them to suitable work as soon as possible.

2. The Secretary interprets all the above sections to require that a State law provide for:

a. Such contact by claimants with public employment offices or claims offices or both, (1) as will reasonably insure the payment of unemployment compensation only to individuals who are unemployed and who are able to work and available for work, and (2) that claimants are afforded such placement and other employment services as are necessary and appropriate to facilitate their return to suitable work as soon as possible; and

b. Methods of administration which do not unreasonably limit the opportunity of individuals to establish their right to unemployment compensation due under such States law.

5001 *Claim Filing and Claimant Reporting Requirements Designed to Satisfy Secretary's Interpretation*

A. *Claim filing—total or part-total unemployment*

1. Individuals claiming unemployment compensation for total or part-total unemployment are required to file a claim weekly or biweekly, in person or by mail, at a public employment office or a claims office (these terms include offices at itinerant points) as set forth below.

2. Except as provided in paragraph 3, a claimant is required to file in person.

a. His new claim with respect to a benefit year, or his continued claim for a waiting week or for his first compensable week of unemployment in such year; and

b. Any other claim, when requested to do so by the claims personnel at the office at which he files his claim(s) because questions about his right to benefits are raised by circumstances such as the following:

(1) The conditions or circumstances of his separation from employment;

(2) The claimant's answers to questions on mail claim(s) indicate that he may be unable to work or that there may be undue restrictions on his availability for work or that his search for work may be inadequate or that he may be disqualified;

(3) The claimant's answers to questions on mail claims create uncertainty about his credibility or indicate a lack of understanding of the applicable requirements; or

(4) The claimant's record shows that he has previously filed a fraudulent claim.

In such circumstances, the claimant is required to continue to file claims in person each week (or biweekly) until the State agency determines that filing claims in person is no longer required for the resolution of such questions.

3. A claimant must be permitted to file a claim by mail in any of the following circumstances:

a. He is located in an area requiring the expenditure of an unreasonable amount of time or money in traveling to the nearest facility established by the State agency for filing claims in person;

b. Conditions make it impracticable for the agency to take claims in person;

c. He has returned to full-time work on or before the scheduled date for his filing a claim, unless the agency makes provision for in-person filing at a time and place that does not interfere with his employment;

d. The agency finds that he has good cause for failing to file a claim in person.

4. A claimant who has been receiving benefits for partial unemployment may continue to file claims as if he were a partially unemployed worker for the first four consecutive weeks of total or part-total unemployment immediately following his period of partial unemployment so long as he remains attached to his regular employer.

B. *Claim filing—partial unemployment.* Each individual claiming unemployment compensation for a week (or other claim period) during which, because of lack of work, he is working less than his normal customary full-time hours for his regular employer and is earning less than the earnings limit provided in the State law, shall not be required to file a claim for such week or other claim period earlier than 2 weeks from the date that wages are paid for such claim period or, if a low earnings report is required by the State law, from the date the employer furnished such report to the individual. State agencies may permit claims for partial unemployment to be filed either in person or by mail, except that in the circumstances set forth in section A 3, filing by mail must be permitted, and in the circumstances set forth in section A 2 b, filing in person may be required.

5002 *Requirement for Job Finding, Placement, and Other Employment Services Designed to Satisfy Secretary's Interpretation*

A. Claims personnel are required to assure that each claimant is doing what a reasonable individual in his circumstances would do to obtain suitable work.

B. In the discretion of the State agency:

1. The claims personnel are required to give each claimant such necessary and appropriate assistance as they reasonably can in finding suitable work and at their discretion determine when more complete placement and employment services are necessary and appropriate for a claimant; and if they determine more complete services are necessary and appropriate, the claims personnel are to refer him to employment service personnel in the public employment office in which he has been filing claim(s), or, if he has been filing in a claims office, in the public employment office most accessible to him; *or*

2. All placement and employment services are required to be afforded to each claimant by employment service personnel in the public employment office most accessible to him in which case the claims personnel in the office in which the claimant files his claim are to refer him to the employment service personnel when placement or other employment services are necessary and appropriate for him.

C. The personnel to whom the State agency assigns the responsibilities outlined in paragraph B above are required to give claimants such job-finding assistance, placement, and other employment services as are necessary and appropriate to facilitate their return to suitable work as soon as possible.

In some circumstances, no such services or only limited services may be required. For example, if a claimant is on a short-term temporary layoff with a fixed return date, the only service necessary and appropriate to be given to him during the period of the layoff is a referral to suitable temporary work if such work is being performed in the labor market area.

Similarly, claimants whose unemployment is caused by a labor dispute presumably will return to work with their employer as soon as the labor dispute is settled. They generally do not need services, nor do individuals in occupations where placement customarily is made by other nonfee charging placement facilities such as unions and professional associations.

Claimants who fall within the classes which ordinarily would require limited services or no services shall, if they request placement and employment services, be afforded such services as are necessary and appropriate for them to obtain suitable work or to achieve their reasonable employment goals.

On the other hand, a claimant who is permanently separated from his job is likely to require some services. He may need only some direction in how to get a job; he may need placement services if he is in an occupation for which there is some demand in the labor market area; if his occupation is outdated, he may require counseling and referral to a suitable training course. The extent and character of the services to be given any particular claimant may change with the length of his unemployment and depend not only on his own circumstances and conditions, but also on the condition of the labor market in the area.

D. Claimants are required to report to employment service personnel, as directed, but such personnel and the claims personnel required to so arrange and coordinate the contacts required of a claimant as not to place an unreasonable burden on him or unreasonably limit his opportunity to establish his rights to compensation. As a general rule, a claimant is not required to contact in person claims personnel or employment service personnel more frequently than once a week, unless he is directed to report more frequently for a specific service such as referral to a job or a training course or counseling which cannot be completed in one visit.

E. Employment service personnel are required to report promptly to claims personnel in the office in which the claimant files his claim(s): (1) his failure to apply for or accept work to which he was referred by such personnel or when known, by any other nonfee-charging placement facility such as a union or a professional association; and (2) any information which becomes available to it that may have a bearing on the claimant's ability to work or availability for work, or on the suitability of work to which he was referred or which was offered to him.

5004 *Evaluation of Alternative State Provisions*

If the State law provisions do not conform to the "suggested State law requirements" set forth in sections 5001 and 5002, but the State law contains alternative provisions, the Manpower Administrator, in collaboration with the State agency, will study the actual or anticipated affect of the alternative provisions. If the Manpower Administrator concludes that the alternative provisions satisfy the requirements of the Federal law as construed by the Secretary (see section 5000 B) he will so notify the State agency. If he does not so conclude, he will submit the matter to the Secretary. If the Secretary concludes that the alternative provisions satisfy such requirements, the State agency will be so notified. If the Secretary concludes that there is a question as to whether the alternative provisions satisfy such requirements, the State agency will be advised that unless the State law provisions are appropriately revised, a notice of hearing will be issued as required by the Code of Federal Regulations, title 20, section 601.3.

[FR Doc. 94-16 Filed 1-5-94; 8:45 am]

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